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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<tr>
<td>ADA</td>
<td>Anti Discrimination Act</td>
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<td>AVO</td>
<td>Apprehended Violence Order</td>
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<tr>
<td>CLCs</td>
<td>Community Legal Centres</td>
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<tr>
<td>Cwlth</td>
<td>Commonwealth</td>
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<tr>
<td>DDA</td>
<td>Disability Discrimination Act</td>
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<tr>
<td>DPP</td>
<td>Department of Public Prosecutions</td>
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<tr>
<td>HREOC</td>
<td>Human Rights and Equal Opportunity Commission</td>
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<tr>
<td>NADRAC</td>
<td>National Alternative Dispute Resolution Advisory Council</td>
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<tr>
<td>NSW</td>
<td>New South Wales</td>
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<tr>
<td>TTY</td>
<td>Telephone typewriter used by people who are deaf or hearing impaired</td>
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<td>WHO</td>
<td>World Health Organization</td>
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Foreword

A Question of Justice was a research project jointly funded by the Disability Council of NSW and the Law and Justice Foundation of NSW, conducted over the period 1998-99 and intended to inform the process of reform within the justice system.

The Disability Council of NSW is the official advisory body to the NSW Government on disability issues and policy. The Council, appointed by the Governor and reporting to the Minister for Disability Services, operates under the Community Welfare Act 1987 and is made up of a majority of members who have a disability. In addition, there are members who have experience in the provision of services for people with disabilities, their families and carers. The role of the Disability Council is to

- research, evaluate and implement all government policy relating to disability issues and assess its impact on people with disabilities;
- advise government on the priorities and initiatives to be given to services and advocate on behalf of people with disabilities;
- promote the integration of people with disabilities into the community through community awareness and education; and
- encourage diversity, flexibility and innovation in services through constant consultation with people with disabilities, their families and carers.

The justice system is composed of a broad range of specialist and generic services. These include private and public agencies that provide legal and para-legal services to the community. It is the responsibility of all entities within the justice system to address the issues of access and participation for people with disabilities. With this in mind, the recommendations of A Question of Justice identify key areas for change that must be addressed by all facets of the justice system.

Council believes that the recommendations form an ongoing part of the discourse for a more inclusive justice system. That is, when a recommendation is made that a process, or policy, for example, 'be developed' or 'be provided', the implication is that this is a systemic responsibility. This report also emphasises a whole of government approach, such that the justice system’s responsibility to its clientele includes the identification of, and the maintenance of relationships with,
other Departments and agencies that can advise or facilitate the realisation of particular recommendations.

The Disability Council welcomes the initiatives that have been developed, or progressed, since this report’s inception. These have included:

- the continued development and implementation of the Disability Strategic Plan strategies by the NSW Attorney General’s Department (see section 5.7.2), particularly the Flexible Service Delivery project;
- the release of the Framework Report, commissioned by the Intellectual Disability Rights Service and the NSW Council for Intellectual Disability, which discusses issues relating to appropriate community service for offenders with intellectual disability, or those at risk of offending;
- the Court Support Program for people with intellectual disability, funded by the Department of Ageing, Disability and Home Care and conducted by the Intellectual Disability Rights Service; and
- the review of the Jury Act 1977 being undertaken by the NSW Law Reform Commission as part of its inquiry into whether people who are blind or deaf are eligible for jury service.

While initiatives such as these address some of the issues raised in the report, to varying degrees, the reality is that a significant amount of work remains to be done. The information received during the research for A Question of Justice was extremely complex and the analysis has taken some time. Nonetheless, the recommendations of this report are just as important as ever.

Andrew Buchanan
Chairman, Disability Council of NSW
Chapter 1

Executive Summary and Recommendations

1.1. Executive summary

The justice system is founded on the rule of law as the cornerstone of civil democratic society. Access to, and participation in, the justice system are considered to be central to the notion of citizenship. However, a growing body of evidence suggests that people with disabilities are being denied access to and participation in the justice system, through a range of barriers.

This report presents the findings of an extensive study, looking at the experiences of people with disabilities in contact with the NSW justice system. It was based on interviews conducted from 1998 to 1999. The project was funded by the Law and Justice Foundation of NSW and the Disability Council of NSW. The aim was to gather information about barriers to access and participation for and the effects for people with disabilities when they became involved with the justice system.

This research documents the experiences of sixty-one people with disabilities in contact with the NSW justice system. It must be emphasised that the findings should not be generalised as applicable to all people with disabilities – this report does not speak for all. Rather, it illuminates the experiences some people with disabilities have had in their contact with the NSW justice system. It tries to identify barriers to access and participation, based on those perspectives. The research does so in a way that acknowledges positive practice and policy changes, while identifying further opportunities for change. Most importantly of all, it argues that people with disabilities are powerfully placed to inform the process of change.

The Disability Council of NSW had three aims in undertaking this project:

- to gather empirical data about people with disabilities and their access to the justice system;
- to identify critical areas of access prevention and/or difficulty; and
- to use this information to inform the reform process.
Accordingly, this report
• documents the experiences of people with disabilities in contact with
  the justice system;
• presents the views of other key stakeholders about disability-related
  issues; and
• identifies access issues and opportunities for reform.

Findings: Barriers to access and participation

The justice system views people with disabilities in a negative way. People with disabilities encounter responses of fear, confusion, hostility and dismissal. The system places the onus on individuals to assert their rights and demonstrate their capacity to access and participate within the justice system in a way that is not experienced by people who do not have a disability.

Who else is involved?

People with disabilities are supported in a variety of ways through a combination of personal and professional networks. The critical role of these support networks is often ignored by the justice system.

The identity of ‘the other party’ presents significant barriers for people with disabilities in their decision to take action. These barriers include:
• the comparative power, status and resources of the other party;
• the role of the other party in providing essential services, care and assistance;
• personal relationships with the other party; and
• the fear of reprisal, harassment, threats and intimidation.

The complex nature of these relationships is compounded by the inherent adversarial nature of the justice system, characterised by advantage and disadvantage, gains and losses, winners and losers.

Advocacy & support

The justice system fails to understand the role of advocates, which leads to a perception of them as a hindrance and interference to ‘normal’ process.

People with disabilities – especially those living in regional and remote areas – have limited access to advocacy, largely because of limited
funded services. The quality of advocacy is limited by the quality of recruitment and training.

**Impact of the adversarial system**

The inherently adversarial nature of the justice system disadvantages people with disabilities. People’s disabilities are used against them to undermine their credibility and participation in formal proceedings. Even the less-formal alternative dispute resolution processes are implicitly adversarial – yet the system fails to acknowledge this or address underlying power imbalances.

**Accessibility**

The justice system presents many barriers for people with disabilities trying to access information, advice or support, including:
- inaccessible physical environments;
- inaccessible information formats;
- inappropriate consultation;
- staff attitudes and awareness;
- gate-keeping mechanisms; and
- lack of service continuity.

The search for legal information and assistance is time-consuming, discouraging and frustrating for people who have little assistance and few resources.

**Physical access**

Organisations, buildings and services throughout the justice system are generally physically inaccessible. The lack of physical access reflects essential systemic assumptions about who is entitled to participate and how. Resource and budget allocations reflect underlying attitudinal norms and priorities that overlook disability-related requirements. Physical access is generally interpreted in its narrowest sense; the physical access requirements of many people with disabilities are subsequently overlooked or misunderstood.

**Perception of roles**

The roles of those involved in legal proceedings are rarely explained clearly to people with disabilities.
Consistency and continuity

People with disabilities experience inconsistent, interrupted and uncoordinated service provision when attempting to access the justice system. Their experience includes a high level of staff turnover, difficulties in accessing the designated representative, little communication, and inconsistent practice.

Communication

The ability of people with disabilities to participate is severely limited by communication barriers. The justice system is unable to communicate effectively, relying on complex language and verbal forms of communication.

Consultation

People with disabilities are excluded from consultation with those representing their interests, due to time and resource issues – which is compounded by a lack of awareness about disability-related requirements and rights to effective consultation.

Flexibility

The justice system is rigid and inflexible, shaped by ‘norms’ that fail to acknowledge community diversity. It operates according to strict time-limits that do not recognise disability-related requirements, or the comparative disadvantage in access to essential resources and support. There is also considerable confusion about the respective, appropriate roles for interpreters, advocates and support persons – and these are often not available when most required, or available inconsistently throughout proceedings.

Procedures in the justice system are applied narrowly and inflexibly. Flexibility is interpreted by the system as procedural unfairness: anything outside the ‘norm’ is considered to be ‘special’ or ‘extra’.

Cost

The financial, physical and emotional costs of legal action are major barriers. People with disabilities are less likely to be in a position to afford private legal advice and more likely to rely on the diminishing resources
of community legal services, pro bono schemes, and Legal Aid. The risk of incurring costs for the other side – high profile, highly resourced legal teams employed by large government and private corporations – dissuades many people with disabilities from pursuing legal action.

Significant physical and emotional costs are directly attributed to the effects of inappropriate processes and practices within the justice system, to the point where people with disabilities do not pursue action, or decide against reporting subsequent incidents.

**Time**

Time issues created significant additional pressures and stress for people with disabilities when taking legal action. On the one hand, they are confronted with a system that seeks to process cases quickly, without making allowances for disability-related requirements. On the other hand, they face the frustrations associated with long delays in resolving matters.

**Multiplicity of issues**

People with disabilities are usually juggling a number of different issues at any one time – frequently involving essential service-providers, large government and private corporations. As a result, there is a tendency to label people with disabilities as vexatious or unreasonable litigants, which has an influence on the process and outcomes of legal action. These labels ignore the complexity and difficulties experienced by people with disabilities when they try to exercise basic rights.

**Accountability**

As citizens, people with disabilities have a right to an accountable justice system, yet they perceive little accountability in the justice system. At an individual level, people with disabilities are unaware of their rights to redress, unclear about how to pursue them, or frustrated in their efforts to do so. At the systemic level, people with disabilities’ rights are routinely overlooked.

A widespread lack of disability-awareness and narrowly-defined assumptions regarding ‘access’ and ‘participation’ are the results of inadequate and ineffective accountability mechanisms. Because accountability in the justice system is generally self-regulated it is, therefore, considered to be ineffective and biased.
Access and participation: the implications for citizenship

People with disabilities are citizens. Citizenship involves a broad range of social, political and economic rights. Society is obliged to assist and support citizens to exercise their rights, by recognising and resourcing disability-related requirements. However, the justice system does not recognise such requirements as valid and therefore fails, firstly, to provide adequate assistance and support and, secondly, to challenge systemic ‘norms’.

Participation in juries is one way of expressing citizenship status: people with disabilities are effectively excluded from jury duty. The disclosure of disability is generally interpreted as grounds for exemption, irrespective of ability and willingness to participate in duty.

Training issues

There is a clear need for more community education for people with disabilities – particularly those in isolated, vulnerable and dependent situations – to learn about their legal rights and responsibilities.

With regard to people working in the justice system, basic disability awareness training is required at all levels, to address a general lack of understanding of disability issues. Such training needs to be compulsory, ongoing and related to real experiences of people with disabilities. People with disabilities must be involved as trainers, facilitators, experts and consultants.

Issues identified by people working in the justice system

Identification and disclosure

Basic disability awareness training must explore the complex issues involved in disclosure and identification of disability to stop people from second-guessing – and to stop people with disabilities, who are accessing the justice system, from being required to provide disability-awareness education.

Policies, procedures and guidelines

At all levels of the justice system, there needs to be formal policies that relate to disability access and participation. Such policies need to be
presented in a way that makes them readily accessible and easy to implement, through timed action plans.

**The language of disability**

The justice system views disability in terms of impairment, illness, medical treatment, misfortune, tragedy and suffering. People with disabilities are objectified as ‘other’ and ‘different’ from the ‘norm’.

The justice system perceives the ability to communicate as directly reflecting a person’s capacity and credibility. A person’s ability to communicate presents significant issues for legal practitioners:

- Difficulties in communication often lead to reliance on a third party as a point of reference, rather than directly communicating with the person with a disability.

- The need to communicate clearly and directly with people with disabilities is recognised, but legal jargon and terminology may be used to disguise discomfort, inexperience and/or lack of knowledge, or as a shortcut to minimise costs.

- The justice system maintains that everyone who participates experiences difficulties and concludes that people with disabilities do not experience any particular barriers. Thus, barriers to access and participation are the results of an individual’s incapacity, actions and choices. Disability may be regarded as just another issue used to disadvantage, unsettle and undermine an opponent, in an adversarial system.

**Whole of government approach**

A whole of government approach is sought by the justice system to coordinate responses to people with disabilities. Key agents of change identified were:

- legal representatives;
- senior police management;
- local court managers;
- senior departmental managers;
- members of the judiciary; and
- people with disabilities and peak disability organisations.
The justice system relates the barriers experienced by people with disabilities to inadequate resources. Resources are seen as inevitably limited and reflect an economic reality.

The justice system identifies the need for people with disabilities to be involved, as potential service-users:
- in assessing existing services;
- as educators and trainers; and
- as advisers and consultants.

The system recognises that agencies should provide opportunities for people with disabilities to comment on their services.

1.2 Recommendations

Community education

- That education and training programs about the justice system, aimed at people with disabilities, be developed.
- That education and training about the justice system, aimed at people who informally assist people with disabilities, be developed.
- That advertising of existing services and resources for people with disabilities be increased.
- That accurate information to people with disabilities about legal rights, procedural criteria, limits to the law and alternative options be provided.
- That information on the above be provided in accessible formats including community languages for people with disabilities.

Training

- That there be universal disability awareness education and training for all personnel in the justice system.
- That mandatory and ongoing training requirements for all personnel in the justice system on the awareness of disability be provided.
- That all disability awareness training be informed by people with disabilities;
- That skills-based training on working with support persons, advocates and interpreters be provided to all personnel in the justice system.
• That skills-based training in the use of alternative formats, communications and assistive technology be provided to all personnel in the justice system.

• That training about the justice system for professional support persons, advocates, interpreters, and staff in disability services be provided.

**Increased access to legal advice and representation**

• That funding and resources for community legal centres and legal aid services be increased.

• That the structured provision of pro bono representation be increased.

• That new disability-specialist advocacy and legal centres be established.

• That there be an emphasis on front-end engagement, with professional supervision and support.

**Physical access and the built environment**

• That physical access that recognises the range of disability-related access requirements be provided.

• That the provision of physical access recognises the external as well as internal access requirements to the justice system facilities.

• That there be agreed and coordinated minimum standards between people with disabilities and the justice system of physical access, design and signage, across the entire justice system.

• That there be an agreed and coordinated minimum provision between people with disabilities and the justice system of communications and assistive technology across the entire justice system.

• That the audit of access provisions and a review of implementation be a requirement of resource and funding allocations.

**Procedural issues**

• That specialist disability policies and procedures be developed, coordinated and incorporated within mainstream service provision across the justice system.
• That realistic practice guidelines, informed by local contexts, resources and expertise, be developed, coordinated and incorporated within the justice system.

• That clear professional boundaries and negotiated client agreements be developed and produced in accessible formats.

• That attitudinal bias, camouflaged as procedural requirement, be challenged as a matter of urgency.

• That the integral recognition of the role, status and use of support persons, advocates and interpreters be adopted within the justice system.

• That the need for greater flexibility in predetermined processes and timeframes be addressed.

• That designated personnel, trained and skilled in disability issues and resources, and supported by justice organisations, be made available to people with disabilities.

Flexible service delivery

• That flexible work practices be introduced and associated resources be proactively offered and advertised.

• That appropriately trained and skilled staff to respond on-site and as required by people with disabilities, be provided.

• That a procedure for identifying disability-related requirements be developed and implemented.

• That alternative ways of giving evidence, making statements, lodging and making complaints, that will assist the person with a disability, be developed and implemented.

• That clear and agreed definitions and role of support persons, advocates and interpreters be developed.

• That the availability of support persons, advocates and interpreters at all stages of contact be increased.

• That flexible timeframes be built into procedures.

• That flexible approaches to address physical access issues be adopted.

• That the use of plain English, symbols and alternative formats be adopted in the provision of information.
• That the provision and use of TTYs (telephone typewriters for the deaf), communications and assistive technology be increased.

• That resources to facilitate flexible service delivery at all stages of contact, and particularly in rural and regional areas, be increased.

• That community and support resources be increased.

Monitoring and evaluation

• That a systematic procedure of monitoring and evaluation of disability issues across the justice system, to identify barriers to access and participation for people with disabilities, be developed and implemented.

• That the procedure for monitoring and evaluation should involve ongoing surveys of service users for feedback.

• That services and organisations across the justice system should seek informal and formal feedback from people with disabilities.

• That the procedure for monitoring and evaluation of service provision and delivery should be introduced as an ongoing process.

• That the procedure for monitoring and evaluation should be based on an established and accountable framework of review and implementation.

Accountability

• That perceptions of self-regulation and lack of accountability should be recognised and addressed.

• That a positive response mechanism should be developed and implemented;

• That accountability mechanisms should be accessible, transparent, responsive, independent and external.

• That accountability mechanisms should be advertised widely, routinely and in accessible formats.

• That accountability mechanisms should be supported by appropriate resource levels.
Legislative issues

- That agreed definitions of disability, reflecting the impact of social and cultural contexts and avoiding the medical model view of individual impairment, be included in legislation.
- That clear, simple and relevant information about the application and limits of legislation be provided in alternative formats and community languages.
- That legislation involving alternative dispute resolution processes needs to include clear guidelines that relate to access and participation issues for people with disabilities.
- That guidelines defining the use of accessible formats, support persons, advocates and interpreters, as integral parts of the process be included within legislation.

Involving people with disabilities

- That the personal and professional skills and expertise of people with disabilities be recognised.
- That people with disabilities be included in needs assessments, service design, monitoring and evaluation.
- That experienced or professional educators, trainers, advisers and consultants with disabilities be engaged.
- That people with disabilities be included as members of management committees, advisory forums, and review bodies.
- That the input and contributions of people with disabilities should be supported by appropriate resources, assistance and access provisions.

Whole of government approach

- That the processes, protocols, referral arrangements be streamlined.
- That information and skills-sharing within the justice system be formalised.
- That the service provision and delivery to people with disabilities, across departments and jurisdictions, be coordinated.
- That a process of flagging from one jurisdiction to the next be implemented.
• That a system of networking of specialist services be developed and implemented.
Chapter 2

Introduction

Access to, and participation in, the justice system are considered central to the notion of citizenship. However, a growing body of evidence suggests that people with disabilities are being denied equal access to and participation in the justice system. People with disabilities have also long argued that they are excluded and dismissed by a society that in theory enshrines principles of inclusion, access and participation\(^1\).

A Question of Justice presents the findings of an extensive study looking at the experiences of people with disabilities in contact with the NSW justice system. It was based on interviews conducted in 1998-99 and was funded by the Law Foundation of NSW and Disability Council of NSW. The project was overseen by the Research Sub-Committee at the Disability Council of NSW and was informed and directed by a Reference Group made up of people with a range of specialist professional and personal expertise (see Appendix G).

The objectives of the research were to:

1. **gather empirical data about people with disabilities and their access to the justice system**;
2. **identify critical areas of access prevention and/or difficulty**; and
3. **use this information to inform the reform process**.

It draws on the social model of disability to examine barriers to access and participation for people with disabilities in contact with the justice system and, in doing so, shifts the focus from issues of individual impairment to issues of systemic disablement (see also 2.2 Defining disability - medical and social models).

This report is aimed at people working in the justice system. It examines citizenship and the way this is understood and applied in relation to people with disabilities and it:

- documents the experiences of people with disabilities in contact with the justice system;
- presents the views of other key stakeholders about disability-related issues; and
- identifies access issues and opportunities for reform.
As with the general population, people with disabilities are a diverse group that includes individuals of different backgrounds - socioeconomic, age, gender, language, ethnicity, culture, religion, lifestyle, and political and social commitment. They may also understand, describe and identify with disability in different ways.

Therefore, while this report may illuminate the experiences and barriers to access and participation of people with disabilities as individuals and as a group in the NSW justice system, its findings cannot be generalised to apply to all people with disabilities.

The research acknowledges positive practice and policy changes where they are implemented, while identifying further opportunities for change. Most importantly, it argues that people with disabilities are powerfully placed to inform any process of change.

2.1 About the findings

Sixty-one people with disabilities were interviewed as well as a diversity of stakeholders from across the justice system. What they said about barriers for people with disabilities in accessing and participating in the justice system is grouped under seven sections in Chapter 5:

1. Attitudes and expectations.
2. Communication, flexibility and resources.
3. The other party, advocacy and support.
4. Physical access.
5. Citizenship and jury duty.
6. Education and training.
7. Roles, policies and procedures.

Chapter 6 provides a summary of the key issues identified by those interviewed and a list of recommendations.

2.2 Defining disability - medical and social models

The two main theories that have been developed to describe, understand, and analyse experiences of disability are known as the medical model and the social model.
1. Medical model

Definitions of disability that reflect the medical model are based on a core notion or myth ‘of bodily and intellectual perfection or the able-bodied ideal’ (Barnes 1996). They define disability as a medical and individual problem, an impairment that affects one or more functions such as intellect, speech, mobility, sight or hearing.

The medical model focuses on ‘capacity’ rather than abilities or potential. It has been described as the ‘personal tragedy theory’ (Barnes 1996). If people with disabilities are ‘incapacitated’, ‘limited’ and ‘damaged’, they are also essentially ‘tragic’, albeit inspirational ‘victims’.

According to the medical model, a person with a physical impairment is disabled because they have limited mobility. A person with a psychiatric impairment is disabled because they ‘suffer’ a mental illness. A person with a sensory impairment is disabled because they cannot hear, see or speak ‘normally’. These notions of disability have been reflected in legislative and policy frameworks.

2. Social model

According to the social model of disability, the source of disability is not impairment, but socially and economically constructed discrimination and exclusion, that is, the responses of society towards impairment. Therefore, a person has a disability because the society in which they live does not recognise disability-related requirements, and does not assist people with disabilities to access and participate in society.

The social model considers:

.... the failure of a structured social environment to adjust to the needs and aspirations of citizens with disabilities rather than from the inability of a disabled individual to adapt to the demands of society. (Hahn 1986:128)

Thus, a person with a physical impairment is disabled by barriers in the built environment. A person with a psychiatric impairment is disabled by attitudes that categorise them as dangerous and delusional. A person with a sensory impairment is disabled by modes of communication that exclude them.
A social model of disability values the abilities and skills of people with disabilities, and reflects their experiences of disability without dismissing them.

....the locus of interest is not the disabled individual, but the oppressive aspects of the social, political and economic environment in which disabled people conduct their lives. (Drake 1996)

It understands disability as:

a social relationship (Finkelstein 1980), created by a disabling environment and disabling attitudes (UPIAS 1976), socially constructed and culturally produced (Oliver 1990), and [as] a form of structural oppression (Abberley 1987). (Stone and Priestly 1996)

A growing body of work, however, critiques the social model for failing to acknowledge the realities of impairment, pain and illness in the lives of some people with disabilities (Shakespeare 1993). Others point out its inadequacy in addressing issues for people with cognitive or psychiatric disabilities. All argue for a more inclusive social model.

**Minority rights and universalist approaches**

Since the social model locates disability within disabling social and economic environments, the focus for change becomes attitudes, policies and law. There are two approaches to this: one advocating minority rights and, the other, universal participation (Bickenbach 1999).

Those advocating the minority rights approach call for: extensive community education to change attitudes, policies to guarantee equal rights, and the use of legal remedies such as anti-discrimination legislation to eliminate prejudice, segregation and discrimination (Bickenbach 1999). They assume all people with disabilities are united by shared experiences of disability, disadvantage and discrimination and suggest that social institutions can effectively implement anti-discrimination initiatives, even though they are themselves intrinsically associated with the very conditions that anti-discrimination legislation seeks to address.
This approach also maintains that once the barriers created by the discriminatory acts of other people are removed, all that is required to overcome poverty and disadvantage is to remain motivated, ambitious, and disciplined. Critics of the minority rights approach have suggested an alternative, long-term, strategy of universalism.

Universalist approaches demystify the ‘specialness’ of disability by arguing that disability:

....is an infinitely various but universal feature of the human condition. No human has a complete repertoire of abilities, suitable for all permutations of the physical and social environment’. (Bickenbach 1999)

A universalist strategy accepts human variation as an inherent characteristic of society and turns around the label usually attached to disability programming.

Why should those whose repertoires of ability happen to fall within the restricted range of human variation be accorded the ‘special’ privilege of having their 'special' needs catered to? (Bickenbach 1999)

Universalism focuses on ensuring that legislation, social policies, environments and tools reflect the full range of ‘repertoires’ that exist in society. This has been described as looking at ‘the fit of [one’s mental and physical] impairments with the social, attitudinal, architectural, medical, economic, and political environment’ (Zola 1993).

This report is informed by the social model of disability.

2.3 About the Disability Council

The Disability Council of NSW is the official adviser to the NSW Government on issues facing people with disabilities, their families and carers. Of its 18 members, two thirds are people with disabilities or family members or carers of people with disabilities. The remainder are individuals selected on the basis of their expertise in the disability sector. The Disability Council has strong links to the community and provides leadership and information on issues facing people with disabilities.
2.4 Some key terms

The Justice System - includes NSW courts, tribunals and review bodies, police, the Office of the Director of Public Prosecutions (DPP), defence bodies, the Legal Aid Commission, the private legal profession, Public Defenders, community legal centres (CLCs), civil litigants and their legal representatives.

Access - full and equal participation in the physical, conceptual and linguistic spheres of the justice system.

Participation - to be actively involved in processes, discussions, choices and decisions about one’s life. It relies on being able to express one’s views and decisions in a forum where others will listen and respect your right to do so, and in a way that acknowledges and provides for disability-related requirements.

Participants in the justice system include workers, members of the judiciary, litigants, the accused, offenders, jury members, victims, witnesses, complainants, plaintiffs, respondents, legal representatives, advocates, support persons, and members of the public.

People with disabilities - any person who has an impairment where the impairment significantly affects one or more aspects of their life. The effect of an impairment is disabling when society designates impairment as ‘abnormal’, fails to recognise disability-related requirements, and does not permit people with impairments to access and participate in social, political and economic structures.

Stakeholders - ‘interested parties’ or key players in an issue. For the purposes of this report, this term is used to refer only to those working in a paid capacity within the justice system. This is to distinguish between the perspectives of people with disabilities and those of people who work in the justice system.

Disability-related requirements - essential mechanisms that facilitate access and participation for people with disabilities. For example:
- a deaf person who signs will require a Sign Language interpreter in order to communicate and participate;
- a person who uses a wheelchair requires ramps and lifts in order to enter and use a building; or
• a person with an intellectual disability requires information in Plain English and/or graphics in order to understand and make informed choices.

This term is used in preference to the more conventional ‘disability-related needs’, ‘adjustments’ or ‘accommodations’ to emphasise systemic responsibilities towards the rights of people with disabilities to access and participate in the justice system.
Chapter 3

Background and Literature Review

3.1 People with disabilities and society

According to the Australian Bureau of Statistics (1998), 47% of people with disabilities were in the lowest two income groups, compared with 30% of people with no disability. A 1998 ABS survey commented on the levels of assistance required by people with disabilities experiencing restrictions or difficulties in core activities and high levels of unmet need. Core activities included self-care, mobility, communication, schooling and employment.

In NSW, it is estimated that one person in five has a disability (ABS 1998) and that people with a disability have the highest rate of poverty in Australia, particularly after paying for housing, travel and other costs associated with their disability (Graham 1990: 6). People with a disability share many of the experiences and needs of other people on similar types of income supports but with the added disadvantage of having unavoidable additional costs associated with their disability. For many people with a disability and their families the reality is one of entrenched poverty, lack of training and employment opportunities, and exclusion from mainstream support and community networks:

....upon leaving school, people with a disability are often unemployed, underemployed, do not participate in community activities, and frequently do not receive appropriate post-school training or support services. (McElwaine & Ford, 1994: 17)

Furthermore, when people with a disability do participate in the workforce they typically make insignificant earnings, work relatively few hours, rarely move to less restrictive, more favourable work settings, and are more likely to encounter discrimination uncertainty about productivity. (Commonwealth of Australia, 1992: 309)

In 1991, the Disability Task Force found that people with disabilities faced additional costs in earning an income, ‘and more generally, in
simply living’, compared with those who did not have a disability. Additional or extra costs have been defined as those incurred by a person with a disability that would not have been incurred if not for the disability (Graham 1990).

These result from barriers to access to generalist services and the need for specialist provision of accommodation (including specialised construction or modifications, maintenance and running costs); personal aids, equipment, medical and hygiene needs; transport; recreation and leisure; education; and employment. Indirect costs included ‘restriction on choice, the social and psychological effects of disability and strain on relationships, as well as income foregone through lack of access to employment opportunities’ (Graham 1990: 5).

### 3.2 People with disabilities and the criminal justice system

People with disabilities are disproportionately represented as offenders in the criminal justice system. In 1996, it was estimated that people with an intellectual disability, who represent 2-3 per cent of the NSW population, comprised 12-13 per cent of its prison population. That is, four times that of the wider population. More recently it’s been estimated that this figure has risen to one in five prisoners with an intellectual disability (Murphy 2000). This disproportionate representation of people with an intellectual disability in prison is also thought to extend across other parts of the criminal justice system (NSW Law Reform Commission 1996: 25).

People with a psychiatric disability and people with an acquired brain injury are also said to be over-represented in the prison population (Disability Council of NSW 2000: 2). In a recent submission to a parliamentary inquiry into the increase in the prisoner population, the Disability Council also reported:

> It is a fact....that people with a disability experience abusive situations, discrimination, lack of education, isolation and exclusion from society, poverty, unemployment, and inadequate support services. To the extent that there exists a relationship between these factors and the incidence of crime, people with a disability are more likely to be drawn into the criminal justice system. (Disability Council of NSW 2000: 3-4)
Due to the lack of systematic monitoring of disability issues across the justice system and the fact that crimes against people with disabilities may not be recognised or reported it is difficult to assess the proportion of victims who may be people with disabilities. Nonetheless, it is widely reported that people with disabilities are over-represented as victims of crime, especially as victims of violence, fraud and sexual assault, and this is particularly reported in relation to people with disabilities living in group homes and institutions.

A survey of crime prevention research found that people with disabilities in residential care were at greater risk of crime than people in the general community, particularly crimes involving physical and sexual assault, theft, fraud, property damage and wrongful imprisonment (White & Smeaton, 1999: 3-4). The survey also found that such crimes were likely to be unrecognised, unreported and unpunished, and that organisational and community responses to crimes against people with disabilities could increase their vulnerability.

A number of other studies have looked at violence and sexual assault against women with disabilities. Cattalini (1993) has suggested that women with disabilities were more likely to be subjected to violence than any other group of women. In addition, women with disabilities were more commonly in positions of powerlessness and dependence, increasing the likelihood of abuse (Cattalini 1993: 2).

### 3.3 People with disabilities and the civil justice system

There has been little systematic monitoring of people with disabilities and their involvement in the civil justice system. However, informal discussions during the development phase of this research suggest there may be a significant degree of contact, given the predominance of people with disabilities as litigants in personal injury compensation matters and as complainants in disability discrimination matters.

It has also been suggested that people with disabilities may be more likely to engage in civil processes where they can instigate proceedings on their own behalf. This is attributed to the barriers experienced during a criminal process, where it has been reported that victims with disabilities are not believed, assumed to lack credibility, and where the criminal process is experienced as further trauma and victimisation (Mulder 1995; Donaldson 1997). For example, anecdotal reports suggest that women
who have been sexually assaulted may pursue compensation through the Victims Compensation Tribunal, rather than through criminal proceedings.

A discussion of disability and the law stated:

....the legal system has regarded disability as largely invisible....lack of exposure to issues around disability means that many of the social myths about people with disabilities and value judgements about their worth and their appropriate place in society, which are part of the general community, are imported, without contestation, into the legal system. When this basic ignorance is combined with the reductionist nature of legal thinking which individualises legal dilemmas, rather than socialising and contextualising them, the position of the person with disability within the legal system is one of extreme vulnerability and the legal system can actually be used, in a similar way to medicine, to legitimise abuses against people with disability (Fitzgerald 1999: 277).

The Human Rights and Equal Opportunity Commission’s (HREOC) complaints statistics for 1997-98 show that the largest percentage of complaints received, 39 per cent, were lodged under the Disability Discrimination Act 1992 (DDA). Statistics also showed that complaints relating to the DDA were disproportionately less likely to be finalised in 1997-98 than were those relating to other Acts administered by the Commission7. The largest area of complaint involved employment, followed by the provision of goods, services and facilities, access to premises and education.

Changes to the role of HREOC and the Federal Court have led to recognition that people with disabilities face additional barriers in upholding their rights not to be discriminated against on the basis of disability8. Uniform complaints handling processes apply, irrespective of the Act under which the complaint is made, and the complaints handling process is overseen by the President of HREOC rather than the specific Commissioner for each Act. Hearings are no longer conducted by HREOC but are heard in the Federal Court. If a complaint goes to the Federal Court complainants pay a $50 filing fee and the Court can award costs against parties.
Although the changes mean that orders are now enforceable (in contrast to previous arrangements), it is acknowledged that an emphasis on uniform processes may overlook disability-related requirements; that the change in role for Commissioners may result in the loss of specialist insight into the law, disability and discrimination issues; and that hearings may be conducted by members of the Federal judiciary who may not possess insight and expertise in disability issues. It has also been suggested that the power of the Federal Court to award costs against parties may discourage people with disabilities from proceeding, given they are disproportionately represented among financially disadvantaged groups.

The role of the Federal Court also raises issues regarding access to legal representation for people with disabilities. Disability discrimination matters do not traditionally attract large financial settlements, and yet costs may be significant due to the length and complexity of matters. It has been suggested that moving hearings to the Federal Court may encourage lawyers to take matters on a contingency or speculative basis. Others are doubtful about judging these issues on the same basis as in other areas of law, such as personal injury actions (Banks 1999: 9-11).

Given the nature of personal injury matters, it might be assumed that people with disabilities will predominate as litigants. Again, there are no systematic figures on this. However, it is interesting to note that personal injury matters feature significantly in written complaints, telephone inquiries, and reviews conducted for the Office of the Legal Services Commissioner, the main legal complaints body in NSW.

### 3.4 Research about people with disabilities and the justice system

An extensive investigation into issues for people with intellectual disabilities in contact with the criminal justice system was completed in 1996 by the NSW Law Reform Commission. As a result, the Commission made 60 recommendations concerning: definitions of intellectual disability; police procedures and a Code of Practice; the presence of lawyers and support persons during police interviews and other meetings; fitness to be tried; diversionary options; the defence of mental illness; giving evidence; legislative amendments; information, education and training; a coordinated strategy between agencies and government
departments; and custodial and non-custodial specialist service provision (NSW Law Reform Commission 1996).

An interdepartmental committee, coordinated by the Attorney-General’s Department, has been working to advance the recommendations, many of which could apply more generally to people with other types of disabilities, in particular (but not only) to people with acquired brain injuries and people with psychiatric disabilities.

Socioeconomic disadvantage, limited knowledge of rights within the criminal justice system, the attitudes of key personnel, perceptions of credibility and ‘capacity’, the use of support persons, information, education and training needs, legislative amendments and the need for a coordinated strategy between departments, were all areas where parallels may be drawn.

This is not to suggest that all of the issues are the same. Rather, it has been argued that people with different disabilities and disability-related requirements also experienced difficulties in these areas. The Commission’s report was considered a signpost for further research into barriers to access and participation for people with disabilities more generally.

Research conducted by the Justice Research Centre in 1997 looked at how litigants in personal injury matters evaluated their experiences of civil process in disputes resolved by trial, arbitration, pre-trial conference and mediation. It also sought to identify the factors influencing plaintiffs’ perceptions of fairness regarding the litigation procedure, satisfaction with the outcome, and satisfaction with the legal system more generally (Delaney & Wright 1997). While information was not recorded about disability or injury, it could be expected that most of the 255 research participants, if not all, had a disability.

A sense of control over outcome, involvement and participation in the process, understanding of the procedure, the perceived dignity of the procedure and higher levels of trust in one’s lawyer all contributed to perceptions of a fair process, a satisfactory outcome, and a satisfactory legal system more generally. Attitudinal issues were identified by litigants from non-English speaking backgrounds and the systemic issues identified included communication difficulties, inadequate communication skills among lawyers, the complexity and terminology of the system, and procedural bias in informal processes.
Various reports have looked specifically at barriers to access and participation for people with disabilities in contact with the justice system. They have tended to focus on a particular type of disability\textsuperscript{10} or a particular setting\textsuperscript{11}. A number have commented on research involving women with disabilities as victims of violence and/or sexual assault\textsuperscript{12}.

Some have been based on the views of service providers, key personnel or family members\textsuperscript{13}, while others have focussed on a legislative or policy perspective\textsuperscript{14}. All have identified barriers relating to socioeconomic disadvantage, lack of knowledge and support, lack of access to legal assistance, lack of disability awareness, attitudes, myths and perceptions about people with disabilities, communication issues, physical access issues, procedural and legislative requirements, and failure to identify and address disability-related requirements.

Recurring themes throughout these reports are:
- the absence of policies and procedures relating to people with disabilities;
- the lack of systematic monitoring and evaluation of services for people with disabilities;
- the absence of consistent interagency coordination of services;
- the need for legislative and procedural amendments to reflect disability-related requirements for equitable access and participation; and
- the need for extensive community education and professional ability awareness training.

While there is a wealth of information documenting different barriers to access and participation, the different foci and general failure to consistently act on recommendations and coordinate their implementation, has resulted in little change for people with disabilities. Because few reports have involved people with disabilities in roles other than as research subjects, there remains a need for qualitative research that:
- represents the experiences of people with disabilities in contact with the justice system;
- highlights the barriers to access and participation across jurisdictions, from a cross-disability perspective;
- identifies areas for systemic reform; and
- involves people with disabilities throughout.
3.5 Citizenship and participation

People with disabilities have long argued that their experience of citizenship rights and status is very different to that of people who do not have disabilities. Being a citizen is not based on employability, financial status, or labour market competitiveness (Abberley 1996; Davis 1999; Oliver 1996).

Citizenship relies on access and participation in the community. Society is therefore obligated to assist and enable people with disabilities to achieve citizenship. The Senate Legal and Constitutional References Committee has summarised citizenship as consisting of the following four linked elements:
1. the quality of full membership and active participation;
2. in a just, democratic and mutually supportive political community;
3. including the individual and collective rights and responsibilities - legal, social, economic, cultural and environmental - that go with such membership; and
4. the public and private policies and resources needed to sustain it (Scales 1997).

This broad notion of citizenship is developed from the work of T. H. Marshall who based his concept of citizenship on three sets of rights, expressed through corresponding social institutions. They are:

1. Civil rights - the right to freedom of expression and association, and equal treatment before the law. Civil rights are expressed through the courts of law and the judicial system.

2. Political rights - the right to participate in a political party, to membership of a political party, to vote and to stand for election. These are expressed through government institutions at various levels.

3. Social rights - the right to a minimum level of economic comfort and social well-being, consistent with prevailing standards. Associated institutions include the welfare state and social infrastructure (Davis 1999).

Each set of rights emerges in sequence, with 'each being a necessary condition for the emergence of the next' (Davis 1999). Moreover, such rights are socially constructed in response to 'particular actions by particular groups in specific historical circumstances' (Davis 1999).

According to Marshall, it is the relationship between identified rights and the associated institutions that determine the quality of citizenship. Associated institutions must provide the necessary frameworks and
practical supports to assist citizens to exercise their rights. If they do not, then citizenship rights remain theoretical.

Davis suggests citizenship should focus on the ways in which corresponding social institutions can practically assist and enable citizens to realise each set of rights. This requires ‘a recognition of the diversity of the citizenry, rather than an effective denial of some people’s citizenship’ (Davis 1999: 71). It also requires an examination of underlying assumptions about access and equity.

3.6 Three approaches to access and equity

Rioux (1994) has examined underlying assumptions about equity that are used to legitimise barriers to access and participation for people with intellectual disabilities (Rioux 1994: 67-108). Such assumptions are also used more widely to justify the social, political and economic exclusion experienced by those designated outside the ‘norm’.

1. The assumption of formal equality

Formal equality might also be called the equal or same-treatment approach. It suggests that social, economic and legal processes are inherently impartial. It is based on ‘norms’ that assume everyone is equal, or alike, and therefore they must be treated in the same manner. Different treatment is understood as unequal (unfair) treatment.

The formal theory of equality is evident in the legal interpretation of ‘procedural fairness’ as ‘procedural sameness’. Disadvantage is an unintended consequence of impersonal social, economic and political forces (Bickenbach 1999: 101-15), and this applies more particularly to people with disabilities because they do not conform to the ‘norm’. This failure to conform to the ‘norm’ therefore justifies the lack of formal equality. This is most often seen in relation to people with cognitive or psychiatric disabilities, where they are excluded from exercising their rights because they are judged to lack intelligence, ‘capacity’ and the ability to participate.

2. Liberal assumptions about equality

The liberal theory of equality incorporates the principles of equality of opportunity and special treatment. It is reflected in equality of opportunity
employment legislation, disability discrimination legislation, and in disability-specialist policies, procedures and services.

It recognises the experiences and barriers faced by people with disabilities when they try to engage with the justice system as well as historical disadvantages in access to education, employment, resources, opportunities, and status. Thus it is argued that people with disabilities may need specialist assistance and support to enable them to assert their rights to access and participation. This understanding of equality also highlights what has been called 'the dilemma of difference', which is expressed in the question:

When does treating people differently emphasise their differences and stigmatise or hinder them on that basis? And when does treating people the same become insensitive to their difference and likely to stigmatise or hinder them on that basis? (Minow 1990: 20)

The liberal notion of equality has been criticised for not taking into account the disability-related requirements of those who communicate non-verbally or those with intellectual disabilities, psychiatric disabilities, acquired brain injuries, sensory disabilities and neurological disabilities. Nor does it consider what participation actually means for them, and how best to facilitate that.

3. Equality of outcomes

The equality of well-being, or outcomes model argues that all people, irrespective of their differences, are entitled to be regarded and respected as equals, with the right to participate in the social and economic life of society. It recognises that all can participate in a meaningful way, and that the nature and method of participation may vary for each individual. It also recognises that meaningful participation relies on social institutions and structures identifying and ensuring individual requirements are met.

This model understands well-being in terms of 'self-determination, participation and inclusion in social life, and the exercise of fundamental citizenship rights'. (Rioux 1994: 86) Equality of well-being requires social institutions and structures to support, facilitate, and enable participation, with integral accommodations and services that target disability-related requirements.
This approach assumes for example, that a person with an intellectual
disability and who may communicate non-verbally has a right to
express their potential and participate fully in processes affecting their
life.

A society that exercises equality of well-being is one that embraces
people with disabilities as citizens with civil, political and social rights. It
ensures the necessary associated structures and support is in place, to
facilitate the exercise of those rights.

3.7 Legislative frameworks

The rights of people with disabilities are protected in a number of
national and international instruments. The NSW Law Reform
Commission listed seven international instruments that relate to the
rights of people with disabilities (NSW Law Reform Commission 1996)\(^{15}\). These instruments emphasise the principles that people with disabilities:
• share the same fundamental rights as all other people;
• have the right to protection from exploitation, abuse and degrading
treatment;
• are entitled to equal protection before the law; and
• have the right to a fair trial.

They state that procedures must include legal safeguards against abuse
and that governments should ensure the development of legislation,
policies, training and support services to assist people with disabilities to
exercise their rights (NSW Law Reform Commission 1996).

While not all are ratified or incorporated into Australian law, they do offer
a framework of rights for people with disabilities. In addition to legislation
that applies generally across the justice system in NSW, there is a range
of federal and State legislation that applies specifically to people with
disabilities:
• Human Rights and Equal Opportunity Commission Act 1986 (Cwlth)
• Disability Discrimination Act 1992 (Cwlth)
• Disability Services Act 1986 (Cwlth)
• Disability Services Act 1993 (NSW)
• Community Services (Complaints, Appeals and Monitoring) Act 1993
  (NSW)
• Mental Health Act 1990 (NSW)
• Mental Health (Criminal Procedure) Act 1990
• Anti-Discrimination Act 1977 (NSW).

**The Human Rights and Equal Opportunity Commission (HREOC)** has responsibility for monitoring implementation of seven international instruments adopted by Australia. These include the International Covenant on Civil and Political Rights, the Declaration on the Rights of Disabled Persons and the Declaration on the Rights of Mentally Retarded Persons. In addition, the Commission oversees the administration of the Disability Discrimination Act 1992 (Cwlth).

**The Disability Discrimination Act 1992 (DDA)** aims to eliminate discrimination against people with disabilities, promote community acceptance of the principle that people with disabilities have the same fundamental rights as all members of the community, and ensure as far as practicable that people with disabilities have the same rights to equality before the law as other people in the community. It makes it unlawful in certain circumstances to discriminate, harass or vilify a person on the basis of disability.

**The Anti-Discrimination Act 1977 (ADA)** is administered by the Anti-Discrimination Board of NSW and complements the DDA at State level. It concerns discrimination against a person on the basis of race, sex, marital status, homosexuality, disability, age and transgender status. It also makes it unlawful to harass or vilify another on those grounds.

**Disability Services Acts** support this legislation at both Commonwealth and State levels. They require government-funded services to meet certain standards of access, equity and participation for people with disabilities using their services. The NSW Disability Services Act 1993 requires most State government agencies to develop Disability Action Plans. Local councils and State-funded services not covered by the Act are also encouraged to submit Disability Action Plans.

**Other State legislation** involving the rights of people with disabilities include:

• Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW) - a complaints, appeals and monitoring mechanism for people with disabilities and clients in contact with community services

• Mental Health Act 1990 (NSW) - concerns the care, treatment and control of ‘mentally ill’ and ‘mentally disordered’ persons, through community care facilities and hospital facilities.
• Mental Health (Criminal Procedure) Act 1990 (NSW) - used in criminal proceedings involving defendants with a mental illness or 'other mental conditions'. Also considers questions of fitness to plea, fitness to be tried, and verdicts and sentencing options.
• Guardianship Act 1987 (NSW) - exists to address situations where a person is judged ‘totally or partially incapable of managing his or her person' because of a disability.

3.8 Policy frameworks

These support the above legislation.

1. Fair Go, Fair Share, Fair Say: NSW Social Justice Directions Statement (The Cabinet Office, 1996) - outlines programs and policies designed to achieve ‘greater equity, better access, wider participation and stronger rights’.

2. NSW Government Disability Policy Framework (NSW Government, 1998) - requires that all State Government agencies identify gaps and barriers in the provision and delivery of services to people with disabilities in the following priority areas:
- Physical access.
- Promoting positive community attitudes.
- Staff training.
- Information about services.
- Employment.
- Complaints procedures.
- Other areas identified by the agency.

The Framework’s goal is ‘a society in which individuals with disabilities and their carers live as full citizens with optimum quality of life, independence and participation'. Its three objectives are:
- the achievement of a planned, coordinated and flexible approach to policy and service provision in NSW for people with disabilities and their carers;
- the creation and promotion of opportunities, services and facilities which enable people with disabilities and their carers to participate in the wider community and to attain a better quality of life; and

• providing ways for State Government service providers to measure and report on their progress in increasing access for people with disabilities.

The principles regarding an inclusive society that underpin the Framework are:
• People with disabilities are full and valued members of the community.
• People with disabilities will have access to services provided to the general community.
• In the provision of services to people with disabilities the focus will be on the whole of life needs of individuals in their own communities.
• Better outcomes for people with disabilities will result from cooperation among service providers, with the active participation of people with disabilities.
• Services will support and be sensitive to the diversity of people with disabilities.
• The unique needs of people with disabilities of Aboriginal and Torres Strait Islander background will be recognised.
• The legal rights of people with disabilities will be recognised and protected.

Under the Framework, the Attorney General’s Department is the coordinating agency for joint planning across justice agencies.

3.9 Definitions of disability

In 1996, the NSW Law Reform Commission recommended that different pieces of legislation adopt agreed definitions of disability, particularly in regard to intellectual disability. It felt that consistency and clarity of terminology and definitions were vital ‘to avoid injustices, particularly if special procedures flow from a person’s diagnosis’ (NSW Law Reform Commission 1996).

The Commission noted that such a definition would have a limited purpose. It may assist awareness of a person’s disability and inform responses and management of the person within a criminal justice context. However, it would not be as relevant for the purpose of identifying ‘special measures’ or disability-related requirements to access and participation in legal processes. It would also have a ‘limited operational effect’ in relation to lawyers, police, prison staff and justice professionals working in the field. These personnel would require additional education and training.
Similar issues have been raised by the Australian Institute of Health and Welfare:

The use of common terms and definitions provides individuals with a basis for a common understanding. In this way, communication is assisted, transparency in social programs is improved, and needs are better met through accurate definition and understanding what people require....If words are to be used in legislation and service definitions, it is important that their definitions clearly capture the essence of what is wanted or required from that legislation or those services. (Madden & Hogan 1997: 1)

Legislative and service definitions of disability predominantly tend to reflect the medical model, that is, disability is generally defined in terms of impairment, located within the individual, and cognitive and psychiatric disabilities are often expressed in medical terminology. (See also ‘Defining disability - medical and social models’).

Disability Discrimination Act 1992 (DDA)

The DDA defines a disability as:
- a total or partial loss of the person’s bodily or mental functions; or
- total or partial loss of a part of the body; or
- the presence in the body of organisms causing disease or illness; or
- the presence in the body of organisms capable of causing disease or illness; or
- the malfunction, malformation, or disfigurement of a part of the person’s body; or
- disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour;

and includes a disability that
- presently exists; or
- previously existed but no longer exists; or
- may exist in the future; or
- is imputed to a person.
NSW Disability Services Act 1993

The NSW Disability Services Act does not define disability, but refers to a target group. A person is in the target group if:

1. the person has a disability (however arising and whether or not of a chronic episodic nature):
   a. that is attributable to an intellectual, psychiatric, sensory, physical or like impairment or to a combination of such impairments, and
   b. that is permanent or is likely to be permanent, and
   c. that results in:
      i. a significantly reduced capacity in one or more major life activities, such as communication, learning, mobility, decision-making or self-care, and
      ii. the need for support, whether or not of an ongoing nature.

2. For the purposes of this Act, the following persons (within the meaning of the Mental Health Act 1990) are in the target group, but only if the services provided for them are not inconsistent with the objects and relevant requirements of that Act:
   a. a temporary patient, continued treatment patient or forensic patient, or
   b. a person subject to a community treatment order, or
   c. a person under detention in a hospital.

National Alternative Dispute Resolution Advisory Council (NADRAC)

NADRAC has observed that the term disability may be applied across a range of ‘conditions’ (NADRAC, 1997). For example, a disability can be:

- Physical.
- Intellectual.
- Neurological.
• Psychological/emotional.
• Obvious.
• Hidden.
• Temporary and/or episodic.
• Permanent.
• Improving, stable or worsening over time.
• Minor, moderate or severe.
• Multiple.
• Of genetic origin.
• Resulting from trauma, disease, illness, substance abuse.
• Accompanied by physical or emotional pain.
• Experienced as stigmatising or shameful.

NADRAC goes on to state that disability may affect a person’s capacity, either partially or completely, to do any or a combination of the following:

• hear, see, or speak;
• understand others;
• be understood by others;
• acquire knowledge and skills/access information about what is happening in the world or what others are doing or saying;
• understand the likely effects of their actions or those of others;
• walk, travel, sit, stand;
• concentrate, read, or remember;
• look after themselves;
• effectively express their needs and interests;
• make decisions for themselves or on behalf of others; or
• socialise effectively.

World Health Organization (WHO)

The WHO’s original framework for disability was outlined in the International Classification of Impairments, Disabilities and Handicaps (ICIDH 1980) and described disability in three dimensions:

• impairment – ie mental or physical limitation;
• disability – ie activity limitation; and
• handicap – ie social disadvantage, resulting from impairment or disability (Madden & Hogan 1997: 14-15).
It has been criticised for conceptual overlap, an emphasis on the ‘health experience’, and a failure to fully reflect the social and cultural contexts of disability (Madden & Hogan 1997: 15-16).

An alternative framework has now been adopted by the WHO that includes impairments, activities and participation, and a supplementary annexe called Contextual Factors. It draws on a social model approach to expand the original concepts and reflect a different emphasis on the social and contextual as disabling factors.
Chapter 4

Methodology

4.1 A looped methodology

The primary aim of the research was to explore the experiences of people with disabilities who have been involved with the NSW justice system as victims, witnesses, defendants, plaintiffs and complainants. Experiences of jury duty were also explored.

The perspectives of 61 people with disabilities were supplemented by interviews with key stakeholders. They were asked to comment on narrative accounts, scenarios and quotes from people with disabilities (see Appendix E).

Draft sections of this report were circulated to participants with disabilities for feedback on the sections presenting their views and experiences.

4.2 Research method

A grounded theory approach was used in order to uncover and understand the experiences of people with disabilities in the justice system. It sought to include, involve and empower the ‘subjects’ of the research (emancipatory research approach) and included people with disabilities as experts, researchers, advisers, research participants and evaluators.

The four stages in the research were:

1. Initial scope and funding. A feasibility study was carried out between June and July 1996. A small number of stakeholders were contacted and agreed to provide information (including case summaries) relating to their experience of the access issues facing people with disabilities in the justice system. The Law Foundation of NSW and the Disability Council of NSW jointly funded this study.
2. Setting parameters for the project. The Project Officer was employed in 1998 and re-contacted two disability advocacy organisations, two specialist community legal centres and a sexual assault service. Case summaries were collected from these services, and meetings were held with key personnel in the disability sector. The case studies highlighted a broad range of issues that were used to inform the scope and focus of the project.

3. Contacting people with disabilities. This was achieved by:
   • an information flyer which outlined the project and invited people to participate in interviews. It was made available in print, Braille, audio tape and disk formats (see Appendix A);
   • advertising on the Disability Council website and through a range of networks including advocacy and disability organisations and specialist legal centres (see Appendix B);
   • advocates, friends and colleagues directly facilitating contact with people with disabilities; and
   • newsletters, websites, mailouts and on Radio for the Print Handicapped.

Few people with an intellectual disability made contact, so a separate information flyer, using fewer words and ComPic graphics, was circulated via advocacy organisations.

The Disability Council advertised a $25 interview payment for participants, to cover any costs incurred and acknowledge contribution of their time, knowledge and experience to the project.

4. Interviews with people with disabilities. These were conducted in an approachable, accessible and flexible manner. People living or working within a two-hour drive around Sydney were offered face to face or telephone interviews and, with the exception of two areas, interviews in regional and rural areas were by telephone. In central western NSW, an Indigenous peer researcher carried out some face to face interviews on the Disability Council’s behalf. In a second town in southern NSW, the Project Officer carried out face to face interviews with people with intellectual disabilities over two days.
Table 1: Interviews with people with disabilities by type of interview

<table>
<thead>
<tr>
<th>Type of interview:</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Face to face</td>
<td>42</td>
</tr>
<tr>
<td>Telephone</td>
<td>19</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Where interviewed:</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Home</td>
<td>25</td>
</tr>
<tr>
<td>Café</td>
<td>6</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
</tr>
<tr>
<td>Not applicable</td>
<td>20</td>
</tr>
</tbody>
</table>

n = 61 interviews and 1 submission

With face to face interviews, all participants chose where and when these would occur; the majority were held during business hours. People also had the option of having a friend, family member, support person or interpreter present during the interview. Where a paid support person or interpreter was requested, the Council offered to pay the cost. While several people chose to have a carer or support person present, only one requested an interpreter.

Those who participated signed a consent form (see Appendix C), copies of which were available on disk, audio tape and in Braille. Where another person was to speak on behalf of a person with a disability, the person with a disability was asked to sign their consent. The Project Officer also met or spoke directly with the person with a disability to ensure they had provided an informed consent for the interview to take place with another person on their behalf.

Interviews were generally in-depth, loosely structured, and took 1½ - 2 hours. Once an interview had gone over one hour, people were asked if they would like to finish, have a break or arrange another meeting. They chose to continue in all cases. Notes were taken during interviews and all interviewees were invited to review them. Nine people accepted and the notes were supplied on audio-tape (2), electronically (1), and in print (the remainder). All but two requested amendments and clarifications.

The three main questions asked in interviews were:
1. What would you like to tell me about your contact or experience of the justice system?
2. What were the main barriers or problems that you experienced?
3. What do you think needs to change/be done differently?
A mental checklist of keywords and areas to cover were used to inform listening and suggest possible directions to pursue during the discussion.

4.3 **Development and use of notes and scenarios**

Notes from the interviews with people with disabilities were written up as case studies. Scenarios based on these were developed in such a way as to protect the identity of individuals (see Appendix E). These were used alongside excerpts from interviews to raise pertinent issues for comment by stakeholders. For example, a number of people raised issues relating to advocacy and support services, legal aid, Barristers, solicitors and community legal centres. A collection of relevant excerpts was developed for each group that were designed to illustrate the themes and types of barriers that had emerged across the analysis of all interviews with people with disabilities (see Appendix E).

Specific questions raised by many people with disabilities were also used to inform the questions asked in the stakeholder interviews.

4.4 **Interviews with stakeholders**

A semi-structured schedule of interview questions was developed (see Appendix F) and a list of stakeholder groups drawn up. Individual stakeholders were identified and approached directly. In some cases, interviews were facilitated by a stakeholder organisation.

Stakeholder interviews were by telephone with two exceptions where they were conducted face to face. Prior to the interview, participants were faxed a copy of the questions and scenarios and/or excerpts to be discussed. All were with individuals except for one that was jointly conducted with two stakeholders over the telephone. On average they took a maximum of one hour.

4.5 **Profile of people with disabilities interviewed**

People with disabilities participated in 59 interviews, plus there were two interviews concerning a person with a disability, and one submission from a person with a disability. 17
The majority of people with disabilities lived with family members or friends (42). One quarter lived alone (15), two lived in a group home, and one lived in temporary hostel accommodation.

Table 2: Demographic characteristics of people with disabilities interviewed

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sex:</strong></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>32</td>
</tr>
<tr>
<td>Female</td>
<td>29</td>
</tr>
<tr>
<td><strong>Age:</strong></td>
<td></td>
</tr>
<tr>
<td>Under 10 yrs</td>
<td>1</td>
</tr>
<tr>
<td>10 – 20 yrs</td>
<td>2</td>
</tr>
<tr>
<td>21 – 30 yrs</td>
<td>10</td>
</tr>
<tr>
<td>31 – 40 yrs</td>
<td>19</td>
</tr>
<tr>
<td>41 – 50 yrs</td>
<td>12</td>
</tr>
<tr>
<td>51 – 60 yrs</td>
<td>8</td>
</tr>
<tr>
<td>Over 60 yrs</td>
<td>6</td>
</tr>
<tr>
<td>Not known</td>
<td>3</td>
</tr>
<tr>
<td><strong>NESB:</strong></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>14</td>
</tr>
<tr>
<td>No</td>
<td>43</td>
</tr>
<tr>
<td>Not known</td>
<td>4</td>
</tr>
<tr>
<td><strong>ATSI:</strong></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>3</td>
</tr>
<tr>
<td>No</td>
<td>58</td>
</tr>
<tr>
<td><strong>Home area:</strong></td>
<td></td>
</tr>
<tr>
<td>Sydney</td>
<td>30</td>
</tr>
<tr>
<td>Outer western Sydney</td>
<td>10</td>
</tr>
<tr>
<td>Central coast</td>
<td>1</td>
</tr>
<tr>
<td>North coast</td>
<td>2</td>
</tr>
<tr>
<td>South coast</td>
<td>1</td>
</tr>
<tr>
<td>Central west NSW</td>
<td>7</td>
</tr>
<tr>
<td>Southern NSW</td>
<td>7</td>
</tr>
<tr>
<td>Canberra</td>
<td>1</td>
</tr>
<tr>
<td>Out of State</td>
<td>2</td>
</tr>
</tbody>
</table>

As Figure 1 shows, a quarter of participants were employed in paid work and over half received the Disability Support Pension. The majority of those interviewed were involved in disability networks and organisations as members, on mailing lists, and as participants in social, political and support groups. They commonly described themselves as ‘activists’ and ‘campaigners’, and referred to ‘the disability movement’ and the ‘disability community’.
Generally speaking, these were people with disabilities who lived in the community and were actively engaged with that community, whether through paid employment, volunteer work or education. They accessed a range of disability services and resources and were active in social and political networks for people with disabilities.
Table 3: People with disabilities by types of disabilities (some individuals identified more than one disability)

<table>
<thead>
<tr>
<th>Type of disability</th>
<th>Totals:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Intellectual</strong></td>
<td></td>
</tr>
<tr>
<td>Learning difficulties</td>
<td>3</td>
</tr>
<tr>
<td>Autism</td>
<td>2</td>
</tr>
<tr>
<td>Downs syndrome</td>
<td>-</td>
</tr>
<tr>
<td>Downs syndrome</td>
<td>8</td>
</tr>
<tr>
<td>Unspecified</td>
<td></td>
</tr>
<tr>
<td><strong>Sub-total</strong></td>
<td><strong>13</strong></td>
</tr>
<tr>
<td><strong>Psychiatric</strong></td>
<td></td>
</tr>
<tr>
<td>Depression</td>
<td>4</td>
</tr>
<tr>
<td>Agoraphobia</td>
<td>1</td>
</tr>
<tr>
<td>Schizophrenia</td>
<td>5†</td>
</tr>
<tr>
<td>Personality disorder</td>
<td>1</td>
</tr>
<tr>
<td>Dissociative identity disorder</td>
<td>1</td>
</tr>
<tr>
<td>Unspecified</td>
<td>2‡</td>
</tr>
<tr>
<td><strong>Sub-total</strong></td>
<td><strong>14</strong></td>
</tr>
<tr>
<td><strong>Sensory</strong></td>
<td></td>
</tr>
<tr>
<td>Vision impaired</td>
<td>4</td>
</tr>
<tr>
<td>Blind</td>
<td>5</td>
</tr>
<tr>
<td>Hearing impaired</td>
<td>3</td>
</tr>
<tr>
<td>Deaf</td>
<td>2</td>
</tr>
<tr>
<td>Speech</td>
<td>6</td>
</tr>
<tr>
<td><strong>Sub-total</strong></td>
<td><strong>20</strong></td>
</tr>
<tr>
<td><strong>Physical</strong></td>
<td></td>
</tr>
<tr>
<td>Mobility</td>
<td>22</td>
</tr>
<tr>
<td>- Ambulatory</td>
<td>12</td>
</tr>
<tr>
<td>- Non-ambulatory</td>
<td>10</td>
</tr>
<tr>
<td>Cerebral palsy</td>
<td>3</td>
</tr>
<tr>
<td><strong>Sub-total</strong></td>
<td><strong>25</strong></td>
</tr>
<tr>
<td><strong>Neurological</strong></td>
<td></td>
</tr>
<tr>
<td>Epilepsy</td>
<td>3</td>
</tr>
<tr>
<td>Brain injury</td>
<td>8</td>
</tr>
<tr>
<td>Stroke</td>
<td>1</td>
</tr>
<tr>
<td><strong>Sub-total</strong></td>
<td><strong>12</strong></td>
</tr>
<tr>
<td><strong>Total number:</strong></td>
<td><strong>84</strong></td>
</tr>
</tbody>
</table>

† one person who identifies schizophrenia as a life enhancing condition, not a disability; and
‡ one person who disputes the diagnosis.

Almost a quarter of those interviewed identified multiple disabilities. In some cases, these involved distinctly different disabilities (for example, a person with cerebral palsy reported a vision impairment and an acquired brain injury). Some described impairments that are often associated with particular disabilities. For example, a person with cerebral palsy who walked and spoke differently.
4.6 Types of legal issues covered in interviews

There was no particular focus on an area of law or justice setting. The information flyer offered a range of possible points of contact with the justice system, several of which applied across jurisdictions.

Where people cited experience of different types of justice issues each was counted separately. Hence, there are 91 identified separate issues across 61 interviews. Of these, 24 interviews involved two types of justice issues, seven reported three, and one referred to four. Overall, more than a third (37) concerned criminal law and half (45) involved civil law. Eight involved complaints processes and one mental health proceedings (see Figure 2).

4.7 Relationship with the ‘other party’

The other party is the opposing side in a complaints process or formal legal proceeding where people with disabilities are involved as witnesses, victims, offenders, plaintiffs or complainants (irrespective of whether formal proceedings have been initiated).

People with disabilities who were interviewed identified 102 other parties. As Table 4 shows, just less than one quarter involved government departments, legal and justice bodies, and insurance companies. Employers were also a significant group. Over a third involved formal

![Fig. 2 Types of justice issues referred to in interviews with people with disabilities](image-url)
service providers - most notably providers of health and treatment services, education services, accommodation and transport.

### Table 4: Nature of relationship with other party

<table>
<thead>
<tr>
<th>Identity of the other party</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insurance company</td>
<td>9</td>
</tr>
<tr>
<td>Government department</td>
<td>8</td>
</tr>
<tr>
<td>Legal/justice bodies</td>
<td>7</td>
</tr>
<tr>
<td>Employer</td>
<td>10</td>
</tr>
<tr>
<td>Service providers</td>
<td>40</td>
</tr>
<tr>
<td>- Education</td>
<td>(6)</td>
</tr>
<tr>
<td>- Recreation &amp; respite</td>
<td>(2)</td>
</tr>
<tr>
<td>- Employment</td>
<td>(1)</td>
</tr>
<tr>
<td>- Transport</td>
<td>(4)</td>
</tr>
<tr>
<td>- Health &amp; treatment</td>
<td>(12)</td>
</tr>
<tr>
<td>- Accommodation</td>
<td>(5)</td>
</tr>
<tr>
<td>- Welfare</td>
<td>(2)</td>
</tr>
<tr>
<td>- Telecommunications</td>
<td>(2)</td>
</tr>
<tr>
<td>- Internet access</td>
<td>(1)</td>
</tr>
<tr>
<td>- Building</td>
<td>(1)</td>
</tr>
<tr>
<td>- Advocacy</td>
<td>(2)</td>
</tr>
<tr>
<td>- Personal assistance</td>
<td>(1)</td>
</tr>
<tr>
<td>- Public utility</td>
<td>(1)</td>
</tr>
<tr>
<td>Fellow service users</td>
<td>1</td>
</tr>
<tr>
<td>Fellow residents</td>
<td>2</td>
</tr>
<tr>
<td>Neighbours</td>
<td>7</td>
</tr>
<tr>
<td>Family member</td>
<td>5</td>
</tr>
<tr>
<td>Former partner</td>
<td>5</td>
</tr>
<tr>
<td>Former friends</td>
<td>3</td>
</tr>
<tr>
<td>Former associates/colleagues</td>
<td>2</td>
</tr>
<tr>
<td>Stranger</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>102</strong></td>
</tr>
</tbody>
</table>

Services providing recreation and respite, employment, welfare, telecommunications, internet access, trades, advocacy and personal assistance featured less frequently and many of these services offered essential resources, assistance and care to the person with a disability. Families and personal networks also provided valuable assistance and support, as well as access to resources and information.

Just under a quarter of those identified as other parties were members or former members of such networks. That is, people significantly involved in the life of the person with a disability and whose involvement could help or hinder access to services, support, and meeting emotional, social
and physical needs. They included family members and relatives, former partners, friends, associates and colleagues. A significant number were neighbours.

It is striking to note that in all cases where the other party was identified by interviewees, only two were strangers and unconnected to any other part of the person’s life. In all other situations, the other party was integrally involved either as a service provider, an employer, or a source of care and assistance, income, or emotional and physical support.

Well over three-quarters of people with disabilities identified a number of barriers associated with the other party. These barriers related to who the other party was, what they did, how the other party was perceived by others, and the possible implications of taking action against them.

In most cases, people wanted to pursue legal proceedings against the other party, but several reported they decided against it because of who they were. For example, see Table 5. Regardless of the eventual outcome, people with disabilities clearly reported a comparative sense of disadvantage due to their unequal status and access to resources.

Table 5: Issues raised by relationship to other party

<table>
<thead>
<tr>
<th>Issue</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comparative power, status and resources of other party</td>
<td>31</td>
</tr>
<tr>
<td>Reliance on service provision</td>
<td>24</td>
</tr>
<tr>
<td>Provides essential care and assistance</td>
<td>22</td>
</tr>
<tr>
<td>Position of authority</td>
<td>19</td>
</tr>
<tr>
<td>Nature of relationship</td>
<td>14</td>
</tr>
<tr>
<td>Harassment, threats and intimidation</td>
<td>11</td>
</tr>
<tr>
<td>Impact on other relationships</td>
<td>9</td>
</tr>
<tr>
<td>Prevailing service culture</td>
<td>9</td>
</tr>
<tr>
<td>Perceptions of self-regulating accountability</td>
<td>7</td>
</tr>
<tr>
<td>Know where person lives</td>
<td>6</td>
</tr>
<tr>
<td>Access to person’s home</td>
<td>4</td>
</tr>
<tr>
<td>Living in person’s home</td>
<td>4</td>
</tr>
<tr>
<td>Living in other party’s home</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>162</strong></td>
</tr>
</tbody>
</table>
4.8 Profile of stakeholders interviewed

During interviews with people with disabilities, prospective stakeholders in the justice system were identified. They included employees in the NSW Attorney-General’s Department, the NSW Police Service, the Human Rights and Equal Opportunity Commission, the Health Care Complaints Commission, the Community Services Commission and the Legal Aid Commission, as well as private solicitors, Barristers, community legal centres, and disability advocacy organisations (see Table 6).

The diversity of stakeholder perspectives was further affected by who was available and willing to be interviewed. Most stakeholders approached readily agreed to participate, however time and resource issues sometimes prevented this. For example, a number of interviews with police officers fell through due to them being called away on other matters. There were similar difficulties with private solicitors, particular those specialising in personal injury compensation matters.

Table 6: Background of stakeholders interviewed

<table>
<thead>
<tr>
<th>Stakeholder role</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barrister/solicitor</td>
<td>5</td>
</tr>
<tr>
<td>Specialist CLC</td>
<td>2</td>
</tr>
<tr>
<td>Generalist CLC</td>
<td>4</td>
</tr>
<tr>
<td>Legal aid</td>
<td>4</td>
</tr>
<tr>
<td>Interpreter</td>
<td>1</td>
</tr>
<tr>
<td>Advocate</td>
<td>2</td>
</tr>
<tr>
<td>Police</td>
<td>4</td>
</tr>
<tr>
<td>Complaints body</td>
<td>2</td>
</tr>
<tr>
<td>HREOC</td>
<td>3</td>
</tr>
<tr>
<td>Attorney General’s Department</td>
<td>20</td>
</tr>
<tr>
<td>Including:</td>
<td>20</td>
</tr>
<tr>
<td>- DSP Coordinator</td>
<td></td>
</tr>
<tr>
<td>- Clerks of Court</td>
<td></td>
</tr>
<tr>
<td>- Magistrates</td>
<td></td>
</tr>
<tr>
<td>- Jury services</td>
<td></td>
</tr>
<tr>
<td>- Sheriff</td>
<td></td>
</tr>
<tr>
<td>DPP prosecutor</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>48</strong></td>
</tr>
</tbody>
</table>
As a result, it was not possible to interview the range of stakeholders identified by people with disabilities. Stakeholder perspectives are therefore skewed, with those from the Attorney General’s Department particularly predominant.

4.9 What did we learn?

1. Time and resources: This type of research takes time and it was necessary to extend the original timeframe.

2. The social model of disability: This was explicitly referred to in the grant application and informed the project’s design, planning, the type of questions asked and the way they were asked (see 2.2 Defining disability - medical and social models). However, it should not be assumed that all people with disabilities interviewed necessarily shared this perspective. Some clearly questioned assumptions about access issues, barriers, and how they may be addressed.

One person pointed out that the information flyer asked, ‘Have you had problems with the legal system?’ They believed this assumes people’s experiences to be negative and discourages informants who have had positive experiences from coming forward.

Another said, ‘We’re a minority group and we have to cooperate. We’re lucky to be here, it’s not the other way around’.

3. High level of unmet need: A significant number of people responded to information advertising the project with requests for direct, practical, emotional and legal assistance. They did not wish to be interviewed, but requested help, information and intervention. Many described crisis situations.

Those who were interviewed also raised questions about their current situation, available services and resources, relevant procedures and rights of redress. The Project Officer responded where possible and appropriate.

4. Interviews with Indigenous people with disabilities: During the initial stages of the project, the Project Officer approached Indigenous justice and disability organisations about issues for Indigenous people with disabilities in contact with the justice system. They included

During these discussions, it was suggested that exploration of the issues from an Indigenous perspective would require wide consultation with the relevant communities to identify key contacts, and time working alongside them to discover an inclusive and culturally appropriate methodology. It was suggested that Indigenous people should be carrying out the work, with clearly defined roles and power in the process. Unfortunately, this would have required resources and time beyond the scope of the project.

Bearing this in mind, Indigenous people were approached. They expressed concerns about discussing contact with the justice system, particularly with a white interviewer and also about disclosing disability and identifying with disability-related issues18.

An Indigenous person with a disability interviewed participants in central western NSW and efforts were made to engage another, city-based Indigenous researcher. Unfortunately, this was not successful within the interviewing timeframe. As a result, only three interviews were completed. Therefore, it has not been possible to generalise about the experiences and perspectives of Indigenous people with disabilities.

In a letter reflecting on the research process, the Indigenous researcher noted:


\textit{I feel, even though this [is] a report about people with disabilities, [among] Aboriginal people it was more of a colour issue than a disability thing. It seems that each person’s colour/race was noticed more by the legal system.}

5. Questioning vs listening: The use of a semi-structured interview schedule in pilot interviews with people with disabilities was found to limit their ability to tell their story in their own way, thereby undermining the value of their experiences and views.

As a result of this feedback, a much looser approach was used with the interviewer pulling back from the role of ‘questioner’ and adopting that of ‘listener’.
6. Participation: Having the confidence to participate in research is fundamentally related to perceptions of self-worth. Notable features throughout many of the interviews were questions such as: ‘Is my story worth telling?’, ‘Do I have a right to say this?’, ‘Are my experiences important?’ and ‘Will people think I’m whingeing?’ It seems fair to assume that many may have wished to participate but felt unable to do so.

There were also particular issues relating to access, communication, informed consent, ability to be involved, available supports and interviewing skills.

Conclusion

It is recommended that future research and initiatives involving people with disabilities should identify specific strategies at the planning stage to address the concerns listed above. These need to go beyond statements of intent and should take the form of concrete strategies with identified, allocated resources committed to their implementation.
Chapter 5

Research Findings: Disability Awareness, Attitudes and Barriers to Access for People with Disabilities in the Justice System

Attitudes influence and determine policies, processes and the allocation of resources and funding within the justice system. They may be explicitly expressed by individuals or they may be embedded within the culture, systems and procedures of institutions. They may also be evident in the low priority given to understanding and addressing the impact of a range of barriers to access by particular groups such as people with disabilities.

In the interviews, people with disabilities identified barriers to access and participation that varied according to their diverse experiences and extended across jurisdictions within the justice system. They related to a broad range of players and have been grouped under seven headings in this report:
1. Attitudes and expectations
2. Communication, flexibility and resources
3. Advocacy and support
4. Physical access
5. Citizenship and jury duty
6. Education and training
7. Roles, policies and procedures.

Each presents what people with disabilities say, followed by the responses of stakeholders to the issues raised. Excerpts and scenarios were devised based on what people with disabilities said and these were presented to stakeholders for comment (see Appendix E).

5.1 Attitudes and expectations

This section looks at assumptions about and attitudes towards people with disabilities. It reports on community and justice system perceptions about what constitutes a disability and types of disabilities, and the need for flexibility on the part of those working within the justice system to
ensure the requirements of people with disabilities are appropriately addressed.

5.1.1 What people with disabilities say

People with disabilities routinely report barriers that crucially affect their right to access, participation, communication, resources, support and quality of life across a range of issues. These include in housing, education, employment, relationships, health and citizenship.

A significant number of interviewees referred to the multiplicity of issues they were dealing with at any one time. With limited resources, support and wherewithal, the pressure on them was compounded by the multiplicity of issues they faced. Some involved contact with the justice system, some did not.

People with disabilities observed widespread community confusion about types of disability, which crucially affected their ability to have access to and participate in the justice system. People with a psychiatric disability, for example, were often assumed to have an intellectual disability, and vice versa. Similarly with people with acquired brain injuries and vision impairment.

*Police relate psychiatric disability to intellectual disability....*

*Just because you have a brain injury, it doesn’t mean you don’t have a brain....you just have a difficulty doing some things, that’s all.*

Although such assumptions were reported by people with a physical disability less frequently, people with cerebral palsy who had physical impairments reported similar experiences. One person recalled being ignored while her carer was asked, ‘can it hear, can it speak?’

People with intellectual disabilities felt they were often judged to have less understanding and ability than they actually had. This was due to others not taking the time or effort to assess their needs or, indeed, ask them. As a result, they were often prevented from participating as fully as they were able.

People with multiple disabilities reported a tendency to focus on one type of disability and ignore others. This could result in some needs being
overlooked in favour of others. For example, a woman with a physical
disability who was hearing impaired and had a psychiatric disability
reported that people often focused on the psychiatric disability.

The overwhelming majority reported experiencing reactions of fear,
confusion, hostility and dismissal in almost every sphere of their lives.
And, depending on the nature of their disability, this was also often true
of their dealings with the justice system.

*With a disability, you get put aside because you’re not
worth the trouble.*

*If you speak differently, they think you’re brain dead and
stupid…. [It’s] not just the system itself, but society….*

*If your body doesn’t look ‘normal’, and you have a reputation, you
scare them. People need educating - we are just normal people.*

People with psychiatric disabilities spoke of being:
• called ‘crazies’ and ‘mad’;
• assumed to be unpredictable, violent, and needing to be locked up;
  and
• characterised as dangerous offenders by society.

Many felt the stigma and consequences of disclosing a psychiatric
disability were such that it was better not to.

**Exclusion and lack of respect**

There was a belief that people working in the justice system often
appeared to focus on the person’s disability instead of responding to the
issue presented. This could result in people feeling or being undermined,
dismissed and excluded because of their disability. For example, matters
not proceeding because they were brought by a person with a disability.

*Because you have a disability, they have a tendency to
want to get rid of you quickly. This is because people with
disabilities are regarded as a problem, too much work,
difficult.*
One woman told how police had visited to investigate her report of ongoing vandalism. When they saw a poster on her wall about mental health they:

.... immediately changed. Treated [me] like a child, talked down to me. Before, very empathetic and taking me seriously. After, completely different. Very negative - oh no, another crazy. Is what she’s saying true?

It was assumed that people with disabilities made things up, were confused, or misunderstood the situation.

[I] think Legal Aid [was] unprepared for my disability - for discrimination against disabled people. Didn’t take it seriously, not worth pursuing. Impression that they hadn’t started defending people with disabilities. Especially psychiatric disability - she could be making it up?....Because our memory is ‘distilled’ [they] tend to dismiss us. We remember significant things, but perhaps not as others would. Not recognised as having legal authority in court, therefore.

The family of a man who had been seriously assaulted over several months in the group home where he lived approached several different justice agencies for assistance to take out an Apprehended Violence Order (AVO) on his behalf. Police were called to the home on a number of occasions.

One police officer said, ‘How can we take them to court? It will get thrown out....it won’t get anywhere....you have to prove intent, and you can’t prove that with them’.

The family subsequently approached a chamber Magistrate and Legal Aid. They were told, ‘This guy's disabled, it’s a different proposition’.

Lack of trust

There was a sense of distrust towards legal practitioners generally. Interviewees used terms such as ‘a club’ and ‘the old school tie’ to denote the socioeconomic and professional networks that serve the interests of legal practitioners, and exclude their clients.
Three whole days - I don't understand what all these lawyers are going on about, the legal arguments. Didn't really feel they involved me - in the court they all rub shoulders together, chat, and know each other. It's alienating - [I'm the] subject in the process.

This is a commonly expressed view in the wider community and may therefore relate to more general concerns about how the justice system operates and the interests it serves. It may also reflect a response to very complex technical processes as well as dissatisfaction and frustration with the degree of consultation.

The justice system was seen to operate in rigid and inflexible ways. It applied procedures, processes and resources that were shaped by ‘norms’ that resulted in barriers to access and participation. For example, procedures relating to time failed to acknowledge the comparative disadvantages experienced by people with disabilities or recognise that people are not all equally able, skilled and resourced to adhere to them.

Also, services and justice bodies tended to be centralised, with legal, advocacy and support services particularly limited to central city districts and unavailable in other areas or at a regional level.

Lack of consultation

Many felt the lack of disability awareness was compounded by practitioners inadvertently or explicitly failing to consult appropriately. In such cases they often felt their disability was used to limit their involvement:

The solicitor] didn’t aid me in understanding what was going on - didn’t help me. I kept saying I didn’t understand. [She’d say] leave it up to me then....[She consequently] made decisions without consultation.

He’d phone up and he wouldn’t want to talk to me, he’d only talk to my Mum....He’s supposed to talk to the client. I’d be so frustrated....That went on for about six months. Breaching client confidentiality by talking to [my] mother.

[The detective] didn’t contact me, didn’t recognise [my] rights to information. [He] made assumptions regarding
what I could and couldn’t understand, made decisions to speak to others rather than me - [assumed my] intellectual capacity as a blind person.

Labeling litigants as vexatious and unreasonable

Some people with disabilities reported a tendency in some parts of the justice system to label people with disabilities as ‘vexatious’ or ‘unreasonable’ litigants when they were involved in, or had previously undertaken, a number of legal actions.

In some cases these assumptions were regarded by people with disabilities as significantly influencing their access to legal representation and support, perceptions of legal merit, process through formal hearings, and final judgements and appeals. It was felt that both the assumptions and their effects denied the realities of their lives and ignored the complexity and difficulties they face in trying to exercise rights that are taken for granted by people who do not have disabilities. Moreover, they found it ironic that the very institutions and bodies set up to protect their rights appeared to punish them for exercising their entitlements.

This was a particular issue in disability discrimination matters where there is a tendency to treat complaints as one-off incidents rather than as part of an ongoing and systemic pattern of discrimination. In such situations, individualised outcomes do not address the wider pattern of discrimination and this can lead to people lodging a series of complaints in an effort to resolve the ongoing situation.

A further related issue was when the outcome of a discrimination complaint was ‘privatised’, that is, where a conciliated agreement contains a condition of confidentiality in which both parties are prevented from discussing the matter publicly. The effect of this is that the community is not educated about their rights and responsibilities under disability discrimination legislation and potential respondents and complainants may be unaware of previous rulings that apply to their concerns. Thus complaints may be being lodged that might otherwise have been avoided. They argued that ‘privatisation’ adds to the difficulties they experience in trying to exercise their rights in a complex area of law.
Educating others about disability

There was an overwhelming sense that people with disabilities were expected to assume responsibility for educating others about disability issues and in the circumstances this was generally seen as problematic.

Firstly, it assumes that the person with a disability identifies as having a disability and that the disability will be disclosed. Disability identity is a deeply complex and diverse issue (Shakespeare 1996: 94-113) and people with disabilities understand and interpret identity in a variety of ways. They may not, therefore, relate a particular concept of disability to themselves.

Secondly, it overlooks the fact that people with different disabilities will perceive access issues and barriers depending on their resources, supports, requirements and priorities. For example,

• people who have difficulty walking will have different requirements to those who use wheelchairs;
• not all people with a vision impairment read Braille; and
• not all who are deaf or hearing impaired use the same assistive technology or communicate in Auslan (Australian Deaf Sign Language) or require an interpreter.

There may also be differences between people:

• who have acquired brain injuries;
• with intellectual disabilities;
• with psychiatric disabilities;
• with neurological disabilities;
• with epilepsy; or
• who have had a stroke.

Thirdly, while the justice system relies heavily on verbal and written communication, emphasises memory and recall and works towards time-bounded outcomes, people with disabilities identify, verbalise, articulate and express their needs in different ways.

Given the nature of their contact with the justice system, people with disabilities pointed out that expecting to help improve service delivery at a time when they were seeking help was unreasonable.
[I] ask them if they can look at me, speak clearly. They get defensive, feel I’m criticising them. [You] end up helping them.

[The worker suggested] why not write to them and advise them of the need for other formats?....All through this I’ve had to expend a lot of energy about getting my needs addressed when I’ve felt least able to do it.

[They] asked me to tell them how and where [they needed to address barriers to access and participation].... [It’s] not my role as the aggrieved person.

While a small number perceived such requests as one way of ensuring they were heard and their needs met, as well as offering positive opportunities to educate and influence awareness and service delivery, others (the majority) resented the expectation and were reluctant to accept the responsibility.

[It’s] exhausting and frustrating - having to explain and tell the story all over again. Disability is part of my existence, not all of it. Having to re-explain, continue to go back over it, to reiterate, to inform - you’re not there as an educator and you get frustrated at being expected to do it all the time.

5.1.2 What stakeholders say

Despite widely diverging views, stakeholders who participated in interviews expressed a fundamental commitment to and concern about the issues affecting access and participation for people with disabilities in contact with the justice system. While not all sharing the same level of disability awareness, stakeholders responded genuinely to the experiences presented in the scenarios and excerpts (see Appendix E). They related the identified issues to their own areas of work and used the interviews as an opportunity to explore issues and pursue possible options.

For example, some sought out previously unknown or unseen policies and procedures relating to working with people with disabilities. Another surveyed local services and resources for people with disabilities with a view to developing a pool of readily available supports. Others consulted colleagues about local needs and possibilities for change. Several asked
to use scenarios and interview excerpts in training and information sharing forums.

They spoke of ‘struggling’ or ‘grappling’ with the issues in the absence of policies, resources and support. They did their best, but were limited by the culture they worked in, procedural requirements and assumptions, and the constraints of time, resources and training. They acknowledged a general lack of disability awareness and made requests for information, assistance and increased training.

_We put people with disabilities in boxes in a place all together and away from the rest of society. When we come to [include them] the rest of society is afraid of difference and I find it really sad._ (Police officer)

Stakeholders revealed they were already juggling multiple requirements, competing priorities, high volume workloads and an inadequate level of resources. In this environment the needs of people with disabilities run the risk of becoming additional demands imposed on top of ‘core business’. And, in the absence of clear policies and procedures, this makes it difficult for stakeholders to retain a sense of rights as opposed to privilege, different needs as opposed to special needs, and required responses as opposed to discretionary responses.

**Identifying disability**

Confusion as to what constitutes a disability was expressed in the initial stages of almost all discussions with stakeholders.

_How do you tell if a person has a disability? Just been to a conference where they’re saying 19% of the population has a disability i.e. any physical or mental condition or illness which affects their ability to participate. They include diabetes and things like that - you’d never pick up on it! And then you have those who are drug users, or people who have mental illness who might want to use it as an excuse._ (Magistrate)

The majority expected people with disabilities would disclose a disability and identify any related requirements. Few asked if people had a disability and few were monitoring any disability-related requirements. Most stakeholders simply did not know, and they were unable to guess, what proportion of their work involved people with disabilities.
They only asked about disability in rare situations, usually when the question was ‘triggered by something’. The range of triggers to suggest disability included:

- visibly recognisable or ‘obvious’ disability (eg use of a wheelchair, crutches, or other mobility assistance; being accompanied by a guide dog; using a cane; or wearing a hearing aid);
- use of a support person (eg a person with a hearing impairment bringing a friend or interpreter, or a support person accompanying a person with an intellectual disability); or
- receipt of the Disability Support Pension, or the provision of medical or other documentation:

  [For example] Question. How do you earn your money? Cross the box or tick for disability support pension. This can be an identifier....Other identifiers - the police fact sheet, an identity background which may refer to a client’s disability. [Also], on a criminal record, if Section 32 of Mental Health (Criminal Procedure) Act. As diversionary provisions for people with intellectual disability or mental illnesses exist where court can be allowed to discharge, evidence of their condition is required (eg, he went to Sunshine School or a Protective Officer is involved).

  (Legal Aid Solicitor);

or

- the person’s behaviour - usually described in negative terms: for example, behaviour that is ‘abnormal’, ‘unpredictable’, ‘abusive’, ‘demanding’, and/or ‘delusional’.

Stakeholders described training to assist service staff to deal with ‘difficult people’ and ‘demanding clients’.

  We’re looking for training on how to deal with demanding clients, for example, people who answer our phones get constantly harassed and abused - [I’m] not saying people with disabilities are demanding but it’s hard for the person at the other end of the phone to cope with this. (CLC solicitor)

  For example, sometimes people can be abusive, make compulsive telephone calls....To be honest, we may be
making an assumption on the basis of their behaviour to us that they have a mental illness - their behaviour may alert us to that.... In the past, we have called in an external trainer because we had a number of junior staff very confronted by difficult callers.... and the majority of them have tended to be people where we assume or know from the file there’s a mental illness. (External Complaints Commission)

The equating of ‘difficult’ with ‘disability’ raises concerns that such training might reinforce negative attitudes towards people with disabilities, and impact on their ongoing contact with a service. Many stakeholders who regarded behaviour as a potential identifier of disability did not formally record whether clients to the service had a disability. It was therefore difficult to establish a factual basis for such assumptions.

The majority who did not ask people about disability cited concerns about respect, privacy, stigma and labeling. They felt these were deeply sensitive questions that may offend, insult or annoy those asked.

*Sometimes people offer it, but my feeling is many people would be insulted if you asked. You have to be sensitive.* (Legal Aid Solicitor)

*[We] don’t ask people if they have a disability. People volunteer this information instead of us invading their sense of confidentiality, eg, if someone was having difficulties I’d take them aside privately.* (Sheriff)

While stakeholders were open about not wanting to stigmatise, label and embarrass people, they were keen to ensure the rights of people with disabilities were recognised and services were delivered appropriately.

*[It’s a] can of worms - [we] don’t want to label people, but [we] don’t want them to miss out on [targeted] services.* (CLC Solicitor)

*[There is] fear of embarrassment on both sides.... [You are] damned if you do and damned if you don’t. Although sometimes [you are] spot on when you ask.* (Clerk of Court, Chamber Magistrate)
I rely on non-obvious non-identification. I have suggested we send out a notice beforehand asking if [people] have a disability [so we can then make any necessary accommodations]. (Magistrate)

I don’t like to blurt it out in court, it’s sensitive. [I] prefer [a] court officer to speak to them privately, or [a] court registrar (especially if it’s [a person with] an intellectual disability). (Magistrate)

For one stakeholder, this was clearly an issue of staff training because if the purpose of a question is in context and clearly explained, then the issues of disclosure and identification may be rather different.

*Are [people with disabilities] comfortable [to disclose] what they need? This comes back to staff training. Staff can be comfortable given the proper training.* (Senior clerk)

As a case moves through the justice system, stakeholders at each stage rely on those at earlier points of contact to highlight disability and any associated needs. For example, front-line court staff expected people with disabilities or those accompanying them to notify them of disability-related requirements. Clerks of the court and chamber Magistrates also expected an individual to tell them about disability, or relied on colleagues to pass this information on to them. Magistrates similarly expected court staff, police, prosecutors and lawyers to duly inform them.

*People with disabilities [and] frontline [staff] in the court room, we don’t know until they tell us - how are we to know unless they make us aware.* (Court staff)

*It’s often not apparent that a person has a disability. Therefore we rely on our court officer so we can get these people in and out as quick as possible so don’t cause them problems. We also rely on solicitors [and] police to notify us of disability.* (Magistrate)

*I’m not in a position to make an assessment on the spot....Generally when people ring up, [they] may volunteer if they have a disability and need something in*
particular, but there is no formal policy to ask. (Clerk of Court/Chamber Magistrate)

How do we recognise people with hidden cognitive disabilities, we’re not skilled to recognise these people? (Clerk of Court)

Where people with disabilities or their representatives did identify requirements, stakeholders were often unsure how to respond appropriately to such needs and questioned whether the necessary resources and facilities were available.

Often when staff get faced with people with disabilities they get nervous. How far do I go to help them? Many people with disabilities get indignant if you go too far. Do we have the equipment? How do I use it? (Senior clerk)

Several commented that people with a ‘visible’ disability rarely presented to their service anyway because their premises were physically inaccessible.

Describing disability

Given that people with disabilities were often identified by a doctor’s certificate or medical condition and stakeholders are intimately involved in upholding and applying legislative definitions in the justice system, it is not surprising that the majority tended to describe disability in terms of individual impairment, illness and disorder (the medical model - see 2.2 Defining disability - medical and social models).

Disability was often described as ‘visible’, ‘noticeable’ or ‘easy to identify’. In such descriptions, stakeholders were generally referring to people with physical disabilities and, invariably, people who used wheelchairs. People with ‘obvious’ disabilities were often described in terms of pity, compassion, as victims of personal tragedy, of ‘suffering’ from a disability and, therefore, as ‘very resilient’. Moreover, the fact that some people with particular disabilities may take medication reinforced the tendency to regard disabilities as medical conditions.

There were additional elements of perceived danger, unpredictability, volatility and violence when stakeholders spoke about psychiatric disability and acquired brain injury, while people with intellectual disabilities were more often to be pitied and perceived as victims. Some
stakeholders referred to notions of ‘otherness’, ‘difference’ (as in different to the 'norm’), and ‘strangeness’.

[They are]...just as human as you and I and should be respected....It’s important you try to make them feel that they're not odd.

The many stakeholders who described disability in terms of systemic and individual responses to perceived impairment (social model) tended to draw on significant experience working with people with disabilities (see 2.2 Defining disability - medical and social models). They included legal representatives and staff from small local courts, particularly courts in rural and regional areas. It was their perception that lack of recognition and provision for people with disabilities defined the issue, and transformed impairment into disability.

....the structures are not informal, they are constructs.
They should be changed and they can be. If it doesn’t change then we are still expecting people to adjust to us.
(Legal Aid Solicitor)

Confusion about types of disability

Many described intellectual disability in terms of mental illness, and vice versa, and acquired brain injuries were also confused with intellectual and psychiatric disabilities. This confusion was widely acknowledged as a crucial factor in the criminal justice system where separate legislation is invoked to determine jurisdictions, proceedings and ‘disposal’ options depending on the type of cognitive disability.19

For example, it was generally reported that police officers often confused intellectual and psychiatric disability. This has also been highlighted in other research.20

[The] lack of knowledge and training - [there is] great confusion with mental illness. [The police] don’t understand what is going on for people, [they are] confused by [a person’s] behaviour. [There are] attitude problems also. (Advocate, rural/regional)

Other stakeholders felt that the lack of training for Magistrates on disability issues, particularly relating to psychiatric disabilities, contributes
to such confusion. A stakeholder who regularly worked with people with a psychiatric disability observed:

Some Magistrates hate doing mental health work....When you’re a Magistrate, first thing, [you’re] sent out to mental health for ‘learn as you go’. I think special training is needed.

The onus of responsibility

Stakeholders generally acknowledged the difficulties faced by people with disabilities as described in the scenarios (see Appendix E) even while tending to attribute these to characteristics of their disability, oversights on the part of the individual or features inherent in an adversarial based system.

Sometimes it was suggested responsibility lay with the individual because of their particular disability.

[The] credible witness issue for people with disabilities - [it is] not an issue unless they have some problem like a mental disability. They must be able to understand the proceedings - if they can’t, how can they be credible unless they understand what happens and why they’re there? (Police)

The bottom line is [that it is] not an attitude problem, it’s an understanding problem [for a person with an intellectual disability]. In courts, the attitudes from workers etc [are] generally very positive. It’s just about the cognitive difficulties a [person with an intellectual disability] experiences. [I] don’t think the system can get user friendly enough to cater for everyone. (Advocate)

Sometimes their comments reflected a view about personal attributes which may or may not be understood in association with a disability.

I’ve also had clients who have been deaf, partially sighted, mute. Don’t think much beyond ‘they need an interpreter’. [I have] found clients who are deaf have low frustration tolerance with regard to anything. Anecdotally, [they’re] easily frustrated with delay when [the] frustration
[is] unfounded. My gut feeling here - problems with their communication - it’s a barrier working through an interpreter as [there are] only a small group [available]....But, guy who works in the office is deaf. His disability is not an issue, [regarding] frustration. (Legal Aid Solicitor)

People with disabilities suffer more as they’re timid and don’t speak up. (Police)

Many are resilient - they’ve learnt from experience to find out first. (Clerk)

Sometimes the person’s experience was perceived to be the result of something he or she did or did not do.

Did he ring? Had he rung, [jury services] probably would have told him not to come - it’s not about torturing people. (Attorney General’s Dept)

Nobody would be aware of his hearing disability unless he told them....I’m not aware that we have that facility here. I’ve not seen or heard of a case like this. I’ve had no-one here come forward to complain. (Clerk of Court)

[He] could have taken more responsibility in telling staff what his needs are. He seems to have suffered silently. If he speaks with us, we’d do what we could to alleviate problems, we’d excuse if they wanted, too distressing. All he’s done is said what his problems are without telling us how to address them. (Jury services)

If there are problems with the way the system is working, they’ll identify them and I’ll help refer to where they can get help. (Jury services).

The adversarial nature of the justice system - which is based on competing interests, arguments, evidence and judgements - was regarded as contributing to barriers experienced by people with disabilities. It was a practical reality across jurisdictions - in criminal matters, civil procedures and also alternative dispute resolution. Access to knowledge, information and resources as well as issues of
comparative status and credibility all essentially informed processes and outcomes.

And, while this was of considerable concern to some stakeholders because it highlighted fundamental social inequities, for others it was part and parcel of a system that tests, mediates and adjudicates.

_It is a formal process, it is intimidating, [that’s] something in the very nature of the judicial system, and it will take years for that to change._ (Jury services)

_Distress and delay happen to people with and without disabilities - it’s just the way the system works. Her experience is typical of victims’ experiences._ (Magistrate, city)

Even Alternative Dispute Resolution processes have been affected.

_Alternative Dispute Resolution processes - potentially friendly etc but also potentially adversarial and legalistic, especially when the stakes [are] very high and/or where [there is] poor legal expertise._ (External Complaints Commission)

_[Discrimination] jurisdictions - originally set up to provide short, friendly, simple, easy to use [processes]....Increasing use of lawyers by respondents make it very difficult for complainants [who are] unrepresented.... Lawyers generally wreck conciliation.... So many butcher [the] process because they take it one way....the only way they know is preparing for litigation.’_ (Solicitor, city)

(See also ‘Alternative Dispute Resolution’ in 5.7 Roles, policies and complaints).

In an adversarial system stakeholders generally regarded disability as just one of a number of issues that would be used to undermine participation and credibility of another party. This does not mean they supported it, however they recognised it as a particular feature of the justice system and one that people with disabilities needed to be realistic about. That is, people with disabilities should understand that their disability may be used against them in the process.
Therefore, legal representatives and advocates had a responsibility to ensure people with disabilities appreciated and understood the pressures they may be subjected to and that they weren’t alone in being subjected to them.

[Barriers re time, resources, flexibility] impact on all, but it may be said people with disabilities don’t have a lot of other options, so they impact particularly harshly on people with disabilities. (Legal Aid Solicitor)

All things raised here don’t just apply to people with disabilities, but are compounded [for them]. (Legal Aid Solicitor)

So far as I’m concerned, victims are treated poorly in any instance. [But] a person with a disability is further treated badly, further behind the eightball. (Police)

In one scenario (see Appendix E) a women who is sight impaired was upset about being challenged in court about variations in her signature. What is felt by her to be a very personal attack on her integrity is perceived as business as usual by one stakeholder.

Signature - she sees that as an issue of disability whereas the lawyer sees it as an issue of credibility - he’s just doing his job. To her, it’s probably a big issue, maybe just self-conscious regarding disability. To me, well, you’d know why the signature varied, so it wouldn’t carry any weight....It’s an adversarial system and I suppose the disadvantaged person is probably worse off in that....basically a tactic, but a very cruel one....it doesn’t matter whether you’re disabled or not, everyone is confused and bewildered in court....Raped once [by offender] and again by the system. Doesn’t only happen to people with disabilities, just one of the situations one gets with the adversarial system. (Magistrate, rural/regional)

My general view is she was treated not so differently to how any victims of any sexual assault are treated. [Disability] is just one thing....[She’s] got to learn to be a little more pushy....Her disappointment with this sentence
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is no different to other persons. But because of lack of understanding [and] explanation of the system, she’s internalised that…part of a sausage machine.
(Magistrate, city)

The system is disappointing for everyone. Victims say [there is] no justice system. The lack of understanding is a problem, though at least [people with disabilities] know they’re not isolated groups. (Magistrate, city)

5.2 Communication, flexibility and resources

This section focuses on barriers identified by people with disabilities when seeking information, advice and support and engaging with the justice system. It covers language and the need to use Plain English, explain procedures clearly, provide information in accessible formats, ensure proper consultation and flexibility in service delivery, use properly trained interpreters when required, and address customer service issues.

In ‘What stakeholders say’ below, they express their views about the role resources, or the lack thereof, play in limiting access for people with disabilities.

5.2.1 What people with disabilities say

Difficulties accessing information, advice and support

A major difficulty facing people with disabilities was knowing where and how to access information, advice and support about the justice system and their basic rights. Interviewees reported feeling disempowered, being actively discouraged from seeking information, and having to often rely on the assistance of others with basic tasks.

They might communicate in a range of ways that people working within the justice system did not recognise or understand, or be told they were delusional, imagined things, or were paranoid. They were often unable to travel to a service and/or could not afford the cost of getting there.

Pursuing justice issues means you need to know your rights, be able to communicate them and speak the language, and represent yourself effectively. [You] can do
this if [you] have those skills, but people with disabilities [are] often less likely to have gained these through work and social interaction etc, in the way able bodied people may have.

People with disabilities reported being disadvantaged as a result of lost educational opportunities which contributed to them not having the necessary knowledge, awareness, and skills to locate information or know what questions to ask. While the majority of those interviewed lived independently, many pointed out that access to information, advice and support were particular issues for people with disabilities living in institutions, hospitals and group homes. Many would not know where to begin and there are few resources and sufficiently funded services to assist them.

As a psychiatric patient I missed out on getting information on my rights - I've been away for 10 or 14 years, living in my head. If I'd been in the workforce etc, I'd know about my rights.

Long and complicated searches for information and assistance, variously described as ‘a merry-go-round’, ‘the run-around’ and ‘going in circles’, added to the stress associated with the justice issue for which they were seeking assistance and some even felt it was a deliberate discouragement from pursuing their rights.

There are blocks for people with disabilities - you phone up this organisation, they can't help you, they don't have enough resources, you have the ‘wrong’ kind of disability, they don't know. You go round in circles. It limits your options....Finding out about who’s who in the legal industry is really difficult. Who’s your first port of call? Who’s going to give you free, independent advice?

Ringing so many people, you get so confused....because you meet so many dead-ends in the process....Everything we found out, we had to find out on our own.

Those who persisted said it often took so long they ran the risk of falling outside statutory time limits.
Case Study 1

A man wanted to appeal a conviction and substantial custodial sentence. At the time of his trial he had an undiagnosed brain injury. This was diagnosed after sentencing and was said to have resulted in ‘Decreased attention span and ability to retain both verbal and visual information over time; Deficits in auditory verbal learning and conceptual skills; Inability to think quickly and flexibly; Impaired recall of complex visual information’. A month after sentencing, he lodged an appeal against his sentence and an application for extension of time. He had received ‘the wrong information on [the] time limits for appeal, and [I was] given [the] wrong forms, which I filled in and sent back’.

Six months later, his Legal Aid Solicitor lodged a further application for leave to appeal and extension of time, citing ‘psychological cognitive problems’. He reported his client had requested an appeal against sentence, without realising this did not also include an appeal against conviction. The application stated, ‘Because of client’s lack of understanding of the legal process, he appears to have thought ticking ‘severity’ on his original appeal application would lead to a conviction appeal also’. He noted that his client had filled in the original forms without legal advice.

The Crown opposed both applications, maintaining the original application ‘clearly’ only concerned the length of sentence. Furthermore, there was no evidence of ‘psychological cognitive difficulties exhibited by the applicant, either during the trial or the sentencing proceedings’. The result appeared to therefore question and dismiss this person’s disability.

Leave to appeal both sentence and conviction was subsequently granted. Legal Aid was granted for the appeal against sentence but refused for the appeal against conviction, as it had ‘no reasonable prospects of success’. The refusal was further based on legal opinion that noted the brain injury in terms of possible ‘criminality’ and ‘dangerousness’, without waiting for an agreed, forthcoming specialist’s report. This person was informed he had 28 days to appeal in writing the refusal of Legal Aid although the Legal Aid Review Committee could consider an extension of this time.

He eventually secured private legal representation at considerable cost. Five grounds for appeal were heard in the Appeals Court, relating to the conduct of the trial, the competence of representation, and summing up
by the trial judge. Both appeals were upheld and he was released immediately after years in custody.

In applying both to Legal Aid and the Appeals Court he found the information supplied was complex and the language bewildering. He was required to lodge the applications in writing, without assistance or support, while in custody. Confused by the forms, he filled them out incorrectly. He had to redo them. Decisions were further delayed while expert opinion was sought. His applications fell outside the time limits and he had to apply for extensions.

He feels that attitudes and procedures acted together against his best interests. Neither recognised the difficulties he experienced. Instead, he believes he was pathologised as a dangerous offender.

Language

Across the justice system and at all stages of contact, language can and does exclude people from participation. It was commonly reported to be confusing, difficult to understand and overly technical. Its use emphasised a gap between those with knowledge and power and those without.

[It’s] sometimes hard to understand police and what they say - I ask them to put it in plain language. Do that also with Government Departments - don’t understand that jargon.

....[lawyers play games in court] so [they are] not communicating at a standard level or in a standard way, [and] being different [is used against the person].

It was a particular issue at the front-end, when people sought information about their rights, asked for help, applied for legal aid, saw a solicitor, or were interviewed by police. These are crucial points of contact, when a person has little or no information, assistance or support. They may be experiencing a great deal of stress, especially when considering decisions that could have a fundamental impact on their future lives.

People reported poor communication with solicitors, particularly those involved in personal injury compensation cases, as well as waiting long periods for news on the progress of a case. Some remained confused
about why solicitors took particular decisions, which suggests these may not have been sufficiently explained and understood at the time. In some instances language was even seen to be used as a weapon, to disadvantage the person with a disability.

*He found himself becoming confused as he tried to explain to the police officer what had happened when he was robbed. The officer did not seem willing to take a statement. The longer he persisted, the less he could remember, and the more distressed he became. He decided not to continue with the report.*

*[In court, the lawyers] ask him a question, and he doesn't understand, and then [the] other side ask him and he says something different, and then they think he’s lying. [It] makes the fines more serious.*

Conducting proceedings in language that everyone could understand was believed to be in the interests of all, not just people with disabilities.

**Reliance on verbal and written skills**

A further barrier was the reliance of the justice system on written documentation including form-filling, written submissions and statements, and the assumption that written documentation is more valid than information in other forms.

*For legalistic reasons, courts take account of written word rather than verbal skills....Given this reality, the system needs more provision for advocates and disability aware lawyers, to facilitate matters for those who communicate differently.*

Similarly, reliance on verbal forms of communication presented particular difficulties for people who communicate non-verbally. In one case, non-verbal communication was cited as the single most significant barrier encountered in efforts to secure an Apprehended Violence Order (AVO). When family members tried to take out an AVO on a man's behalf, a chamber Magistrate told them the main difficulty was that he ‘couldn’t speak and wouldn’t understand the concept of the [AVO]’. Yet, there was no evidence to suggest he would not have understood the order.
Furthermore, while it is important that a person who is subject to such an order understands what it means and the consequences of breaching it, this should not be strictly necessary for the person on whose behalf it is issued. The man’s family felt he was denied his rights.

_The system decides if you aren’t verbal, you can’t pursue it. This does not change the fact that it has happened to you, it just means you can’t do anything about it._

There is a need for greater flexibility and understanding of people who are unable to verbally communicate what they are experiencing.

_Being non-verbal, [other] people are less likely to recognise the psychological distress and trauma he has experienced. Instead of relying on the spoken ‘I feel this’ etc, we need to broaden our concept of communication [to acknowledge other ways feelings and needs are expressed]._

It was acknowledged that training and resources are needed to address these issues:

_There are no facilities or developed ways of working with people who communicate non-verbally....Saying you don’t know how to do it is not the same as saying you can’t do it or you don’t need to do it._

**Use of Plain English, accessible formats and assistive technology**

Information and documentation used during formal processes should be available in accessible formats. Examples include:
- Braille;
- audio tape;
- computer disc;
- internet; and
- in plain English with graphics.

People with disabilities maintained that police, lawyers and courts should allow them to tell their story in their own words instead of forcing them into fixed lines of questioning they did not understand.
[They] need to show they’re willing to listen to you, allow you to say it in your own words. If they asked you direct what is the problem and then let you tell them, it would be better. Instead of all the questions running round in circles - it gets confusing, it gets silly.

A recent discussion of interview and communication techniques agrees, suggesting that recall and accuracy are significantly hampered by inappropriate styles of questioning (Kebbell & Hatton 1999: 179-87).

For people with specific requirements in relation to alternative formats, this was not generally unavailable. For example,

[I asked] what other formats were available, as a blind person. ‘Oh, we have it in other languages like Chinese’.

A woman who asked for copies of her statement in print and Braille was told she could not have a copy in Braille because this would be ‘in contravention of the Evidence Act, [it would be] seen as tampering with the statement’.

Interviewees believed alternative formats should be routinely offered as an integral part of the process. Furthermore, they suggested that alternative forms of participation in formal processes, using video and teleconferences, should be more widely adopted than it is at present.

Because venues, dates and times are often altered with little notice, assistive technology, including real-time captioning, hearing loops and infra-red systems, should be widely advertised and available on the day and not rely solely on advance notification. This would mean training on-site staff to use such technology as required.

For example, voice-assisted computer software and communication boards should be integrated into procedures and practice.

**Interpreters**

Justice services were often unable to supply or arrange access to interpreters, advocates and support persons at times of most need.

*She should have had an interpreter at the police station when she was charged - she was very distressed, did not*
understand what was happening, and no-one seemed to want to listen to her. When people don't speak the language, they should have an interpreter available straight away.

A woman from a non-English speaking background and with an intellectual disability gave a statement to police regarding a sexual assault. The police arranged for an interpreter to attend the interview. This person reported the interview was ‘hard’, and that the police and interpreter used words she didn’t understand. The interpreter spoke a different dialect and was not trained to work with people with disabilities. Her mother added that it would have been different if she did not have a disability.

She could not express herself, use the words, tell them what happened.

The police tried to address her language needs but did not acknowledge her disability-related needs (see also 5.3 The other party, advocacy and support).

Telephone help lines

While these provide access to advice and information that may be unavailable otherwise, people frequently reported difficulty getting through on them, especially when lines were only open for limited times such as two afternoons a week. Extra lines and longer opening times were necessary to avoid delays.

Trying to get through to them is very difficult. The telephone lines are only open at certain times, they’re constantly engaged, you just can’t get through.

It was also argued that telephone help lines should not be regarded as a substitute for face to face services, for example, for those living in rural and regional areas and those who are deaf or have a hearing impairment.

Changes in personnel

Distance and regional location, lack of assistance, a changing cast of players and time and money pressures also have an impact on communication. For example, the parent of a person with a disability identified the changing rota of Legal Aid duty Solicitors in rural/regional areas as a particular issue for her son.

_He can speak for himself, but needs a solicitor who is understanding and will take the time to communicate at his level....Difficult with a different duty [Solicitor] every month._

(See also ‘Lack of consistency and continuity’ in 5.7 Roles, policies and complaints).

5.2.2 What stakeholders say

Stakeholders clearly identified communication as an issue for all in contact with the justice system. The use of Plain English, avoiding jargon and taking time to facilitate the quality of communication with a client were all regarded as initiatives that would benefit members of the wider community as well as people with disabilities.

In relation to the scenarios (see Appendix E), one solicitor commented:

_A lot of the problems described are more generally problems of the client-solicitor relationship. Was she properly advised in the beginning and [the process] explained? [She] carried expectations. [There’s a] commitment but practice falls short....Solicitors keeping clients properly informed, lawyers become unnaturally arrogant - we know best, don’t tell them....Having a disability may make the difficulties worse, but is not simply the cause._ (Solicitor)

There were differing views on how (and whether) communication issues could be addressed. For some, the issue was how a person with a disability communicated.
As far as people with disabilities are concerned, people with mental disabilities would be more of a problem than people with physical disabilities as people with physical disabilities can communicate quite readily. It comes down to communication, where the main difficulty lies. (Police Sergeant, city)

One stakeholder gave an example of a case in his court with a person with a hearing impairment:

He said, ‘You’ll have to talk up, I’m deaf’. ‘YOU STOP ME MR SO AND SO IF YOU CAN’T HEAR ME.’ ‘What did you say?’ And everyone laughed and he said ‘Oh, I get you. (Magistrate, rural/regional)

Language and clarity

Around a third of stakeholders reported the importance of clear, direct communication (with an emphasis on the use of Plain English) as an effective approach when working with people with disabilities.

Speak with people in as plain and clear English as possible…. Employ patience…. [Be] conscious of the need to get clear instructions, so very important people are informed and aware enough to do that. (Solicitor)

Some felt clear communication was often hampered by the prevailing legal culture and common professional language. For example, some expressions used to describe contact with clients were inherently arrogant and directive.

Expressions such as] ‘talking sense’ to a client, when a lawyer explains issues and processes. ‘Knocking heads’ - sitting client down and making them really aware [about] going into court and getting case heard. (Legal Aid Solicitor)

It was also suggested that excessive reliance on legal terminology and complicated language during discussions with clients was often to disguise discomfort, inexperience and lack of knowledge….

Really good lawyers can speak very simply. Many others [lawyers] don’t get past the gobbledygook, don’t go the
extra stage, either because it’s time consuming or because they’re not confident or secure in knowledge, so [they] hide behind the language. (Barrister)

…or as a short-cut when time and resources are severely-restricted:

Law does have its own language and jargon - it’s an issue of time and resources. (Legal Aid Solicitor)

In some cases, however, it was felt that efforts to use Plain English could undermine the quality and validity of information, especially when attempting to communicate complex legal concepts and procedures.

AVO leaflets are presently atrocious - [they’ve] tried to make them so simple they’ve left crucial information out. We’re told to aim all Plain English at average reading level of eight years old but you just can’t adequately explain the legal concepts and requirements at that level….very difficult to put complicated concepts into Plain English without undermining what people need to know. Doesn’t point out (as old pamphlet does) what the penalties are if breached, and it should. People need to know that. (Chamber Magistrate, city)

Quality of communication with client

Difficulties in communication between client and legal representative were commonly reported. Lawyers expressed that they were often uncertain about the instructions they received, particularly from people with a psychiatric disability, acquired brain injury or an intellectual disability.

While they were conscious of the requirement to act on instruction, this often created dilemmas in situations where they felt unsure about the client’s ability to understand and ill-equipped to facilitate communication.

[We are] conscious of the need to get clear instructions, so it’s very important people [are] informed and aware enough to do that….Communication - we’ve tried to address [the issues]: a terms of engagement letter at start; [being] at pains to explain clearly, eg, your job is that you’re our boss and it’s our job to do what you tell us to do. The client is in charge. [It] helps to remind [the] lawyer
of that also, by stating it up front....Lawyers have to be instructed, and [it’s] our job to make sure they are able....and informed enough to instruct us. (Solicitor)

Lawyers - some may have felt left in the lurch [with] clients. With people with disabilities I [might] think I know [what they want done] but if instructions aren’t clear, [you’re] worried about being sued.... [There are] no mechanisms to check communications to see if [they] understand or not - I try and repeat what I say, get them to repeat it back, check if [we are] connected. Normal lawyers don’t check that. (Barrister)

[It’s a] big issue, regarding [how a] solicitor should take instructions from the client. [We] must be extremely careful to do this. If there was a problem here we would list the partner [of the person with an intellectual disability] as the client, which is a concern I’ve got. (Generalist CLC solicitor)

Time constraints

The length of time available could help or hinder the quality of communication and several stakeholders reported trying to set aside 'extra' time as 'people with disabilities take longer'. This was more difficult where the appointment length was predetermined or the time available was limited. Also, stakeholders may not know in advance or on the day that the person has a disability. Nor may they understand the particular communication requirements for that person.

One stakeholder did not believe time was an issue. In his opinion, professional expertise and ability ensured legal representatives delivered quality services even where time was limited to a brief consultation before court.

Our clients don’t think we can pick up our case as quickly as we can - but we can, even for people with disabilities....we can get enough evidence on the day. (Legal Aid Solicitor)
Flexible service delivery

People with disabilities identified flexible service delivery as an important strategy to address barriers to access and participation. Accordingly, stakeholders were asked how they worked with people with disabilities, what were their experiences and what were some strategies they had developed to facilitate access and participation.

On a listing day, you might have 300 matters, maybe 100 people. With people like him, I put it over on a hearing day, when I can spend more time. He is taking six weeks to get through something I know I could probably deal with in five minutes with someone else. Half of this job is time management, and you have to accept that you have to make compromises. (Magistrate, rural/regional)

To some extent, you have to adjust to a wide range of people who come in off the street. Comes down to [your] people skills. You don’t get it in Law School. (Legal Aid Solicitor)

Preferential assistance [is] given to people who are referred from other community health and welfare organisations. That is, give telephone advice there and then [rather than] queue [for appointment]. (Solicitor, generalist CLC).

[When seeing people with disabilities during general advice appointments, there is] no guarantee [it will be the] same solicitor next time, but you can give them [your] direct line or suggest [they come back] the next time [you are] rostered on. I have done that before - in terms of client service [it’s] a good option. Tell the front desk and if I can, I’ll try and see them. [I] can also see them outside formal interview time. (Legal Aid Solicitor)

The majority of stakeholders expressed a willingness to be flexible in order to meet the requirements of people with disabilities and referred to the importance of this. However, although desirable, it was not always achievable.

Flexible service delivery was also offered (albeit rarely) where disability was assumed. It was an additional, rather than integral, part of process and practice - ad hoc, individually offered, and rarely advertised. And, it
was invariably in response to an expressed requirement or request by a person with a disability and might take time to arrange or set up.

Examples of flexible service delivery were most often given in relation to known clients or service users. This was especially noted in rural and regional areas. The crucial factor here was that a person might be known to have a disability, and staff had developed understanding and flexible practices with them over time.

However, such knowledge and flexibility might not be possible in large, busy, city services and justice settings.

*He’s* well known in the town. We communicate with him the best we can, he communicates the best way he can. I think it’d be quite difficult for him in a large city court, because I don’t think staff would have the time to talk with him, to understand what he needs. (Clerk/chamber Magistrate, rural/regional)

Several stakeholders reflected that flexible work practices should be used more generally to address diversity in the communities they served.

*The* culture here is a very positive respect for others’ differences and needs. Even our most regular problem clients are treated with courtesy. Derogatory terms are not accepted. (Senior clerk, city)

Some stakeholders felt that practice and procedures in one sector directly influenced those implemented in another. In this context, flexible work practices needed to be consistently recognised and applied across different justice settings. Their view was that this was not, currently, the case and a whole of government approach was needed:

*Flexibility in terms of giving evidence is not there. [The] court interprets it very strictly and narrowly. [You see the effect] from police attitudes, to [the] whole legal system not being conducive to taking evidence from such a person. [It] may get to court but [it’s] likely to get thrown out because intent will be challenged by defence. [It’s] probably a budgetary issue [too] - people with disabilities are over-represented in the criminal justice system, what’s the point of punishing someone who didn’t understand*
what they were doing? Police actually get very frustrated because they want to do something often, but [they] also know it will get thrown out. [There] should be [a] whole of government response in [these] areas. (Police)

(See also ‘Need for a whole of government approach’ in 5.7 Roles, policies and complaints).

Part of the problem is to do with roles and expectations on the part of the justice system about what is required, regardless of a person’s ability or the support they have:

[...] sometimes think that when a person with a disability receives a letter asking please supply all the witness statements by this date, etc, then that may be difficult and overwhelming, depending on the disability. On the other hand, we need to have the limits because otherwise it would never happen, it would never get done. It may be about supporting people to do that, but we have to bear in mind our role, we can’t do it for them, we have to be impartial.

I think sometimes people with disabilities think we should be like legal aid or something, but we can’t do that. There is a misconception that we are there to do something we’re not. Goes down to lack of legal aid for people with disabilities and [the] lack of legal support in the wider community. (External Complaints Commission).

Interpreters, advocates and support persons

Several stakeholders understood flexible service delivery approaches as working alongside a support person, advocate or interpreter. Only a few had actually done so and many appeared uncertain about how, where and when to arrange such assistance.

The lack of available advocates and trained interpreters, the cost of interpreters and lack of funds to pay them, were some of the barriers identified. Support persons, advocates and interpreters therefore generally attended at the behest of people with disabilities (See also 5.3 Advocacy and support).
A para-professional Auslan interpreter, employed by private agencies and disability organisations to work in tribunal hearings and consultations with solicitors described how the lack of appropriately trained interpreters results in frequent requests for her to carry out work she is not qualified to do. For example, court work.

Unfortunately, some interpreters (not just in Auslan) accept work which is beyond them. Courts and their officials need to realise that having an inappropriately qualified (or unqualified!) interpreter is often worse than having no interpreter at all. The courts (not the deaf people who are not in a position to be assertive) need to have the strength and commitment to tell the agencies which supply them with interpreters that they will accept ONLY Interpreter-level (formerly Level 3) interpreters. (Para-professional Auslan interpreter)

Some other related concerns were the lack of appropriate training for para-professionals wishing to qualify at the higher interpreter-level and the failure of some private agencies to make a distinction in hourly rates between levels of accreditation.

This stakeholder also identified a general lack of understanding in the justice system about the role of an interpreter as a further barrier for people with disabilities.

Interpreters are trained to conduct ‘pre-interviews’ with their [hearing and deaf] clients, separately if possible. These occur in order to explain to clients (particularly hearing ones who are less likely to have worked with interpreters before) the role of the interpreter, to ensure appropriate lighting and seating for our deaf clients and, importantly, to gather information about the nature of the interpreting job. [However] it is rare for your hearing clients (i.e. the tribunal staff, solicitor etc) to make themselves available for this essential process. Even worse, I am constantly being refused access to information about the job by staff who do not fully understand my role. It is important that legal officials, staff etc, understand that what an interpreter hears/sees remains confidential, and also that if an interpreter cannot get basic information in order to prepare her/himself for
the job, the deaf client effectively is not getting genuine equal access. (Para-professional Auslan interpreter)

These issues were reflected more generally in interviews with other stakeholders.

**Alternative formats and assistive technology**

A very small number of stakeholders reported the use of alternative formats and assistive technology. This was not generally available and most revealed they had little knowledge, experience and training in their use.

*[The] biggest problem I have is with hearing deficient people - [the] technology [is] not available here. Because [we’re] in a modern complex, usually I have a sound system that comes booming across the court and deafens everyone. It magnifies my voice, but I know that other courtrooms have better systems.* (Magistrate, regional)

*Hearing deficient people [are] very difficult. e.g. [one person had an] almost complete hearing deficiency, probably other disabilities also. [He was] a complete recidivist, [identified in court as a] 'person at threat in prison system', [after his] hearing aids [were allegedly] taken/lost in prison. [I] sent him previously to a mental health institution under Section 33 under Mental Health Act - they said [he] didn’t qualify. [His] solicitor spent a long time with him down in [the] cells, and I’ve allowed extra time in adjournments. I’ve also ordered him a transcript of what I’ve said to him on sentence so that he understands why I’ve made the [decision]. Transcripts cost a fortune - [they are] very expensive so [it’s] not always possible. We cope by trying to be flexible - [I] don’t know whether he should have had headphones or something?* (Magistrate, regional)

Examples of assistive technology included:
- real time captioning systems for people who are deaf or hearing-impaired (speech converted into text and displayed via computer technology);
- computer-generated voice software;
- communication boards;
- assistive listening systems such as audio loops; and
• infra-red and FM systems.

They were not widely discussed nor did they appear to be generally available. A recent report entitled 'Communications Technology: Information and Access Issues for People with Disabilities' observed:

Some of the barriers to the use of communications information technology include: consumers and service provider lack of knowledge and in some cases; technophobia; time to learn about technology; poor infrastructure, including power supply and telephone lines, especially in rural areas; lack of equipment and software and the prohibitive cost of basic equipment and appropriate adaptive accessories. The cost of using equipment and Internet access also acts as a major barrier. (Wolstenholme 1997: 16)

**Telephone Typewriter (TTY) facilities**

The lack of trained and skilled staff who could use TTYs was a concern for stakeholders, as was the general scarcity of TTY facilities within organisations and across the system as a whole, particularly in organisations that had made commitments to universal installation.

**Non verbal communication**

Some stakeholders erroneously connected the ability to communicate with 'capacity' (or level of understanding) and credibility. This was especially evident during discussions of a scenario involving a person (Jerry) who communicated non-verbally and his family's attempts to take out an Apprehended Violence Order (AVO) on his behalf (see Appendix E).

*Prior to getting to court, the main barrier is the communication issue - the method of communication, his perceived credibility/validity as witness with a disability....At some point, victim will have to give evidence of assault happening, and that’s when things would probably act against [him] because of communication and credibility.*

*[Under the] Crimes Act, Section 562, police can apply on [his] behalf, and [he] wouldn’t have to give evidence. If the
AVO [is] defended, it’s at that point it would fall apart. If [there are] other witnesses, then OK, but if [there are] not, [it would] fall apart....I don’t agree with it but I can understand the reluctance [of the Chamber Magistrate to proceed] because it’s probably the most difficult request....[it is different for those who communicate verbally] because you can tell us it’s happened, and you have the intellectual capacity to run it yourself, if necessary.

The nature of our legal system is the defendant has a right to face the accuser, and that all falls in a heap if neither [is] able to give evidence - but, with the staff and incident reports, it shouldn’t be an issue....[Even so] the real problem is communication - that he can’t communicate in a way likely to be recognised by a Magistrate. (Chamber Magistrate, city)

The communication issue - having granted the interview [with the Chamber Magistrate], it might look like incomprehension [assuming Jerry does not understand, because he does not speak verbally]....[It] could only be proceeded with if the police get involved and took things up in an investigative role, but then you get into court with someone who seems to have very real difficulties in giving evidence. [There are] difficulties with Jerry going to court - with no-one to support what he’s saying....And, what’s he going to get out of it? If he loses, he’ll have costs awarded against him.... Other forms of communication - sign, Braille, [are] validated and recognised [by the court]. But not sure [about methods of non-verbal communication]. (Clerk of Court/Chamber Magistrate, city)

Others made the same connection between communication, understanding and witness credibility, but attributed this to systemic assumptions about disability.

[There are] issues regarding non-verbal communication - [the local courts] quality team and the [Criminal Justice and] Intellectual Disability committee are developing instructions for Magistrates and judges re non-verbal communication etc. [The] perception is that because he had a disability, [and was] non-verbal, he may not be a
good witness, [raising concerns about] validity, reliability.'  
(Attorney General's Department)

'Police can take out an AVO on behalf of another, so [it] doesn’t matter if Jerry can’t speak. The fact that Jerry can’t speak is irrelevant, because police have power to take it - on behalf of any person at all. Police Commissioner should instruct [that] police must do order - [he] says they should do it but not [they] must [do it]. Should be ‘must’. (Clerk of court/Chamber Magistrate, rural/regional)

A consultant in intellectual disability issues rejected any need for police to use a test to see if [a person] is intellectually disabled.

[It’s] more important to make sure we’re communicating properly. (Police Commander, rural/regional)

**Increasing focus on written communication**

Stakeholders referred to the reliance on written communication and expressed little hope that this would readily be changed. There was little awareness of alternative forms of communication although there were examples of stakeholders attempting to improve the quality of access in relation to these areas.

*We do have standard letters that go out at certain stages - about to revisit these with new staff, to emphasise the importance of adapting these where it’s evident there may be a person with a disability or a person from a non-English speaking background, to make it clearer, in Plain English. e.g. people have asked us re [use of word] ‘submissions’.* (External Complaints Commission)

*E-mail [is] relatively recent but very accessible. [It’s] useful, but [we are] not dependent on any one form. What is an issue is the legislative requirement for a written complaint, but we try to provide reasonable accommodation....* (External Complaints Commission)

Some stakeholders pointed out that time and cost issues are likely to further encourage the use of ‘paper processes’ to resolve certain kinds of legal issues.
As lawyers, it’s all content driven, driven by words. Communication [is understood to be] 80% spoken and written, when it’s actually the other way round - [it’s] 80% body language. The system relies so much on written communication. I think the system will become more written - the costs of going to court and general delays will drive us more and more to paper, and less on feet in court. (Barrister)

This tendency was thought to mainly apply to civil issues, where decisions and resolutions will be increasingly made on the basis of written documentation, and people may not be required to attend or be present with their legal representatives.

They also maintained that people with disabilities would be particularly affected by such developments because it would move professional accountability and performance out of the open court and into private forums. It would remove opportunities for direct participation by the person with a disability and create further barriers for those who experience difficulties with written and verbal communication, and for those unable to access legal representation.

Less opportunity then for direct intervention. The way in which you perform in court or outside [will] never really be scrutinised externally. (Barrister)

Finally, it would render disability-related requirements invisible because they are often considered only after face to face contact.

Customer service issues

Stakeholders generally reported that everyone who participates in the justice system experiences difficulties and that many of the barriers identified by people with disabilities were universal access issues, ‘across the board’.

This was highlighted in responses to various scenarios (see Appendix E).

It made no difference being [a person with a disability], to the way she was treated....[There are] lots of customer service issues. This is unfortunately what happens with police - we do have good people too though as well as bad. (Police)
The whole scenario is repeated every day in NSW for most victims, not just for people with disabilities. This would all be true, we prioritise what we can and can’t do. [There are] lots of things we can’t [do]. She wasn’t treated any differently due to her disability, in fact, [she was] treated just like everyone else....Her [disability] has nothing to do with this. (Police)

[It’s] the way in which lawyers deal with the community generally. Reflects the larger issues. (Solicitor)

Debate over resources

Resources emerged as a significant issue for stakeholders who identified barriers related to: attitudes, lack of disability awareness, limited community understanding of the justice system, inaccessible services and buildings, reliance on certain forms of communication, the time involved in legal processes, and scarce supports available to staff and participants in the justice system. They considered that these barriers (as exemplified in the scenarios in Appendix E) were essentially related to inadequate resource levels.

It’s possible that perhaps the [two year] delay [in setting dates for a conciliation conference] is due to the level of investigation required, the complexity of it, [the] available resources. Also, there are obvious resource issues for community legal centres, and that may affect the delay. (External Complaints Commission)

Everything said [by people with disabilities] is valid, and we’d like to answer all of these [issues]. [But we are] so poorly resourced it’s depressing. (Generalist CLC solicitor)

Everyone [is] so busy in [the justice] system, they try to do so many things for so many people. (Police)

[These are] all funding issues - [the] sad reality is that lack of funding means solicitors in criminal law have limited time and [this is] especially an issue if [you] need to take more time with a person....People’s caseloads [are] so high, [it's] very difficult to explain the information clearly
and effectively, in a less resource intensive way. [It] would be good to use videos to explain. [It’s about] finding ways of using resources more smartly....[We are] government funded but the government does not provide sufficient resources for us to do everything for everyone. (Legal Aid Solicitor)

To some extent our services are constrained by legal requirements, but we do try and respond as well as we can. I appreciate that we may not be as public about what we do as we could be, but we are constrained by resources and they tend to go into doing it, as opposed to talking about it. (External Complaints Commission)

They argued that resources are inevitably limited and reflect economic reality and identified three perspectives on the relationship between the barriers and limited resources. Therefore,

1. It is not possible to address the needs of all.
2. Inadequate resourcing and funding will impact on process, practice and experiences of access and participation, particularly for people with disabilities.
3. The allocation of resources reflects fundamental attitudinal and procedural assumptions about community needs. Resources should be prioritised to recognise community diversity and overcome established barriers to access and participation.

Given the scope and complexity of the justice system, they felt there would never be sufficient resources to address everybody’s needs and this was an unfortunate but unavoidable fact that had to be accepted.

[I] agree there is little information regarding [people’s] rights and support in court. Some of the modern courtrooms in city have touch screens explaining facilities in court. But she’s going to be disadvantaged [as a vision-impaired person]. It’s basically a financial constraint. (Magistrate)

Many community legal centres are in council buildings. Rent is cheap. [We] can’t afford to make them accessible. [We] can’t afford to rent [new] offices. (Generalist CLC solicitor)
The police service has no resources available other than to do [things the] conventional way. (Police)

They believed the barriers identified in scenarios were an unintended but undeniable consequence of inadequate funding.

[To] lodge [a discrimination] complaint takes forever, just because of resourcing issues. [It] takes a long time to come back to you, inevitably [in] a formal letter, [they request] more information. [There is] more delay, [and you] may be 3 months down the track, and [the] respondent still hasn’t had to say a word. (Barrister)

Both HREOC and ADB - significant backlogs - under-funded and under-resourced. [The] backlog is not [due to] sloppy practice but [they are] overworked. The system is not properly funded. [The] system creates a whole series of rights but [is] not resourced to protect them. (Solicitor)

'[There is] very little here [for people with disabilities], and management have very little idea of what's needed. We're very limited by what [services are] available here. [It’s a] resources issue which cuts us off from [meeting people’s needs]. (Clerk, rural/regional)

Specialist legal centres:

[...We’d like to see the turnover of legal representatives addressed, especially when [you see] several [legal] advocates on the one file. Returns you to ground zero each time. [It’s an] access issue [for] the complainant but a process issue from our point of view. (External Complaints Commission)

Regarding a police decision not to proceed with an AVO on behalf of a person with a disability against a person with a disability:

The criminal justice system is so overworked and under-resourced - [you] never have a situation with proper [support] for witnesses.... [You need] other support-type groups who can take up people with disabilities’ causes. (Prosecutor)
A number of stakeholders were obviously concerned and frustrated about the impact of resources on service provision and delivery. Awareness of their inability to address the needs of people in contact with the justice system had a particular impact. While they expressed a high degree of commitment towards those they perceived as disadvantaged by the system, they also expressed a sense of demoralisation and powerlessness.

Some also observed the risks of staff commitment and motivation being ultimately undermined by overwork and staff burnout.

\textit{Nationally [we have] six staff....[We] currently deal with the workload pressure by creating a backlog, and this has led to a lot of frustration among the parties.} (External Complaints Commission)

\textit{In summary, training and resources [are the] two biggest barriers.} (Legal Aid Solicitor)

\textit{....[We are] so poorly resourced it's depressing.'} (Generalist CLC Solicitor)

\textit{There's an organisational attitude within [a complaints commission], especially within [a particular unit]. Often [the] clients are so needy, [because the] complaints [are] complex and difficult.... [and due to] the nature of the everyday level of discrimination they experience. [Clients] come with expectations that conciliators find difficult, [they are] not particularly sensitive regarding disability issues. [This] tends to make [the unit] a hard unit to be in. [They are] not trained sufficiently, [they have] little funding. [They] try and get rid of you - keep the stats pumping through or sit [the case] in the too hard basket.} (Legal Aid Solicitor)

**Attitudes and assumptions informing allocation of resources**

While acknowledging a causal relationship between the economic climate and barriers, several stakeholders maintained that resource allocations reflect shared assumptions about community needs and requirements. Decisions about resources recognise what is required, what is important, what should be done, and how. They are not
distributed and applied in an economic vacuum, but in a context defined by awareness, understanding, competing priorities and differently-weighted values.

In 1996, we got together [30 people from across the department, including regional and city areas] and worked on ways to improve the system for people with disabilities. We came up with good ideas that day about what were the problems, how we helped [people with disabilities], what was the outcome, what could we do to improve things. [We] mainly dealt with structural problems with the buildings, also recommended 'internet' information for people with disabilities [and] everyone, and [the use of] more accessible formats. [We] mainly worked on ways to improve the system, we basically re-wrote a lot of Disability Guidelines....When they refurbished this centre, these policies were just coming out. Why wasn’t this considered? e.g. [providing physically accessible rooms and facilities] on at least one floor where people with disabilities [are] selected on juries? (Jury services)

It’s really time they looked at these buildings, and it’s something that could easily be fixed up. Probably $10 000 would fix up our access issues. But it’s a ‘gunna’ issue, and it’s been a ‘gunna’ issue for the last 10 years I’ve been here....I’m disappointed [it hasn’t been addressed]. (Clerk of Court/Chamber Magistrate, rural/regional).

The assumption that resources are defined purely by an economic reality was seen to overlook the underlying issues and to encourage those working in the justice system to abdicate responsibility. Further, it undermined efforts to address the issues by deflecting people away from considering possibilities for change or looking more creatively at reform options. At the same time, stakeholders felt change involved challenging fundamental assumptions, priorities and organisational cultures.

Resourcing issues comes down to the government being serious about [access issues]. (Legal Aid Solicitor)

Community legal centres are the end of the line for people looking for representation. If they can’t help you, who can?....[There are] big holes in this safety net. If community legal centres can’t help people they’ll fall out
and won't access the justice system. (Specialist CLC Solicitor)

Recently lobbied the Law Society to introduce voluntary guidelines regarding pro bono work....[You] can't tell lawyers you must do this charity work. [We] have a negative reputation [as a large commercial firm] but also a reputation for pro bono work. [It's a] good thing internally for morale and professional development. But [I] think most firms are reluctant to do it for no apparent gain. [They need to] entrench it as part of [the] culture of professional values in the firm. (Solicitor)

People with psychiatric disabilities - most people in private firms won't act for them - [they are] not cost effective [i.e. they take more time]. They don't want those people in their waiting rooms. Incredible prejudice, and many people with disabilities have no money so tend to come to Legal aid. (Legal Aid Solicitor)

5.3 The other party, advocacy and support

Advocacy and support were identified by many as key issues although there were differing views on what the terms meant. Some people used the terms advocacy, support, and legal representation interchangeably, although they were often referring to different aspects of each.

In some cases, the term advocacy was used in a legal sense, where the advocate was a solicitor or Barrister representing a person in particular proceedings. In others, the advocate was a support person, who may or may not be actively involved in intervening on behalf of another.

5.3.1 What people with disabilities say

People with disabilities often have people involved in their lives in ways that people who do not have a disability rarely experience. For example, they may:
- live in a group home, boarding house or institution with others without having been able to choose who they will live with;
- receive assistance and support where they live from a changing rota of paid staff;
require a carer to assist with personal needs or an assistant for professional needs; or
not be able to access public transport and, therefore, rely solely on accessible taxi services.

Their access to information and assistance may vary according to their skills, abilities, resources and support networks. As one participant with multiple disabilities noted:

_ I don't have the resources to fight back on my own, I need the assistance of others._

This includes having assistance to make telephone calls. She felt fortunate to have:

_...good carers who have never hesitated to help me get in contact [with advocacy and complaints bodies] - [they’re] good friends._

This contrasted with her prior experience of living in an institution and she observed that ‘many other people with disabilities were not so fortunate’.

**Issues of power, dependency and authority in everyday life**

In all cases where the other party was identified by interviewees in this study, only two were strangers and unconnected to any other part of the person’s life. In all other situations, the other party was integrally involved either as a service provider, an employer, or a source of care and assistance, income, or emotional and physical support (see 4.7 Relationship with the ‘other party’).

For example, becoming involved in a process might place service provision in jeopardy or undermine rights and compromise options. Therefore, participants reported taking action with a sense of trepidation and risk. This encouraged feelings of insecurity and dependency and, in some cases, resulted in a detrimental effect on their service and support needs.

_A person was involved in an unfair dismissal issue that went to conciliation. This created particular difficulties as the job had been facilitated by a worker in respite services_
who attended proceedings to support the employer. This person is seeking an apology from the worker for her part in the process, but this has not been forthcoming. He says it has made things very awkward as he relies on the services offered by the worker, and ‘she has the power to help or hinder [me]’. Moreover, she works for an organisation that arranges personal care assistance for him ‘so I have to be careful about it’.

The ability to persist often relied on the availability of alternative resources and support. For example,

A woman had been concerned that a complaint against her medical specialist would result in the termination of essential treatment. This had been a powerful argument for ignoring discriminatory behaviour in the past. With the assistance of carers and an advocate, she was eventually able to find another specialist before proceeding with the complaint.

The consequences of making a complaint or reporting an offence against family members, neighbours or fellow residents and services, had different implications. It could alienate people with disabilities from potential supports, exacerbate social isolation, and result in them being labelled a ‘problem’ or ‘troublemaker’.

A person made a complaint of disability discrimination against a club, and eight months later was waiting for conciliation to begin. He has since decided against pursuing other issues as formal discrimination complaints, partly because he feels the process results in people assuming entrenched adversarial positions. He now feels unable to return to the club, one of the few places previously accessible to him and used by all his friends.

Another issue is when professionals in the justice system assume a relationship between the person with a disability and the other party and conclude an offence has not occurred, even though this is not how it is perceived by the person with a disability. As the following case study illustrates, these assumptions may have a powerful bearing on whether or not action is taken.
Case Study 2

A person met a man on the street who offered to assist him as he visited the bank. Over the next few days the stranger befriended him, offering him a place to live, other assistance, and transport. He suggested he help him apply for a bank loan to buy a flat. Within a few days of the initial meeting, the person with a disability was living in the man’s home, was persuaded to withdraw a substantial amount of money from his account as a deposit on a flat, agreed the man should keep this safe ‘in case of robbery’, and had lent him several smaller amounts of money to ‘tide him over’ temporary business difficulties. At the same time, he became aware the man had a history of violence and reported feeling increasingly threatened by him. The man refused to repay the money and, soon after, the person moved out.

He believes he was defrauded but police and the local chamber Magistrate do not agree an offence has occurred ‘because I had given him the money of my own free will’. He was foolish to give money to the man and later change his mind but, he points out, ‘If I wanted to give away the money, it wouldn’t have been to him, a stranger’.

Role of a support person or advocate

While the role of a support person or advocate is generally perceived to be to assist the person with a disability, their presence can be of benefit in the whole process. They can facilitate understanding, communication and participation and enhance the quality of the process.

It was considered that they need to be an integral part of the process, and procedures should be adapted to value their contribution and assistance to avoid unnecessary, prolonged and expensive proceedings in future.

[They] should have a person who can stand and explain with [the] person, speak for them…. [They] ask him a question, and he doesn’t understand, and then [the] other side ask him and he says something different, and then they think he’s lying. [It] makes the fines more serious…. Now [he’s an] adult - [he has to] stand down
[the] front, in front of [the] mike, beside [the] duty
Solicitor....[It’s] very scary for him.

One person observed that in Alternative Dispute Resolution processes the presence of a support person or advocate is generally up to the discretion of the mediators but it was their view that it should be mandatory where a need has been identified or expressed. Co-mediators are usually ‘matched’ for age, gender and ethnicity as far as possible: this is based on information provided in a form filled out by workers at the point of referral which does not ask about disability.

Quality advocacy

The role of an advocate can often be particularly difficult and demanding. In a context of fundamental disadvantage, the quality of available advocacy may be crucial.

People with disabilities often live lives of extreme powerlessness, which can give rise to a more than usual reliance on effective advocacy. It is vital that advocacy is done well, because poor advocacy can very easily perpetuate the very injustices that it aims to remedy. (Parsons 1994: 10)

Quality advocacy was often linked in interviews to the personal skills and expertise an individual advocate brought to the situation. Whether the person was a formal or informal advocate, they were often described as an individual with qualities and abilities developed outside any organisational context.

I was very fortunate to get [her] as my advocate - she knows her job, she knows your rights, what she doesn’t know she’ll find out.

This advocate had worked in a variety of positions concerning justice and disability issues. The person she advocated for identified her background and networks as a definite bonus because she could draw on these resources informally. The advocate also had a legal friend who could advise them unofficially.

[I] went to see a court case, [a] compensation [case], with her. [She] explained what was happening in simple English. [It was] definitely a good thing to do. [She] said to
me - don’t laugh, [and] be honest if [you] don’t know or don’t remember.

This person was reassured by the advocate’s personal experience and trusted her advice. It was also important that the advocate was independent and able to offer an objective view that placed his interests first.

In relation to organisations, poor advocacy was generally expressed as ‘limited advocacy’, and was characterised by a lack of information about available services, strict referral criteria, funding and resource constraints and consequent concerns about recruitment and training processes.

Advocacy doesn’t go far enough - we all thought it would but it doesn’t.... It needs legal, para-professional legal people to help us. Legal knowledge would empower us. Advocacy should include information, education, and legal functions. It should not involve a runaround from services that say we don’t do this systems stuff, only individual.

Clarifying expectations about roles

Failure by those involved to clearly define what their roles are in relation to advocacy and support can result in unmet expectations. Some people with disabilities reported a lack of support by those they understood to be advocates on their behalf.

Lawyers have a right to protect their professionalism, but they need to understand the impact on their client. They are my advocate - had one saying if I don’t think it will succeed, I don’t have to take it - very undermining and not in my best interests to say that into the process, and not at beginning. Lawyers perceive themselves as real, true advocates, whereas I see [advocates] as the person who sits beside you who will go through shit in your interests, prepared to go down with you.

Need for recognition of the advocate role

Several people reported being asked to justify the presence of their advocate, a requirement that was seen as overlooking the need for advocacy in the first place. It removed their right to assess their own
support needs, and made that support an issue for others to judge. Exclusion of an advocate also reinforced the power imbalance.

[The advocate] and I were [at the conciliation conference] and [the respondent] and his wife were there and he kicked up a big stink about [the advocate] being there. And [she] had to tell them she had to be there to explain things to me....I didn’t think they’d let her stay....By [the] end of morning he softened, could see [she] was there as support for me, wasn’t going to do anything to interfere.

The concern that an advocate would ‘interfere’ in a process was commonly reported. People with disabilities reported that this reflected perceptions from some parts of the justice system that the presence of advocates and support persons was outside ‘normal’ process.

The potential of advocacy to facilitate communication and understanding among all the parties involved did not appear to be recognised. Rather, it was perceived to potentially undermine, derail or delay proceedings. This was particularly evident in experiences people had with police and the courts.

Perceptions of the comparative status of an advocate were regarded as important in facilitating or undermining outcomes for people with disabilities. One person reported attending a conciliation conference with her advocate, the respondents, and their legal representative. While her advocate was a positive and active support to her throughout the process, she was limited in what she could do.

*If she was a lawyer, she would have had the status and prestige to get the answers. That’s what it was about, status.*

As a result, this person felt the respondents were able to ‘dodge’ certain issues, while their lawyer was deferred to as the authority in the room.

Advocates are present to address the perceived power imbalance, by assisting, supporting and, in some cases, representing the interests of people with disabilities. They cannot do this effectively if they are judged to have little status and authority by those working in the justice system.
Case Study 3

A young man with an intellectual disability was questioned by police about charges of sexual assault. He was 15, living in a refuge, and was unaccompanied to the police station. He was offered the choice of a solicitor or a DOCS officer in the interview. He had met the DOCS officer once before, so chose him over a stranger. He says he now knows he was entitled to have both present, although at the time it was an either/or offer.

Soon after, he told his guardian he had been sexually assaulted. A parallel investigation began. After much discussion, police agreed his guardian could attend the interview to take his statement. At the door of the interview room, it was discovered that he had first disclosed to her. As a potential witness, she was therefore disqualified from attending. As a result, he was unaccompanied during the ensuing five-hour interview.

The young man says he does not know who he is ‘allowed’ to talk to now, as he ‘got into trouble’ for telling his guardian. He chooses not to speak about the assault with family members because he wants to make sure they can stay with him during interviews and in court.

His family met with police on several occasions to negotiate the presence of a family member in interviews. This was finally agreed to, with strict instructions - ‘[You] can’t open your mouth - if you open your mouth, you’re out the door.... [It will be] ...interfering with [the] evidence’.

Case Study 4

The informal advocate of a young man with an intellectual disability has attended a number of interviews with him at the local police station. On one occasion, when police were questioning him, he appeared confused and did not understand what the police were saying. The advocate tried to help. He reported, ‘I was basically told to shut up. [He] was confused, I tried to rephrase it and they told me to shut up.’

On another occasion, the young man was held in custody for hours while the police tried to contact his mother. They wanted
her permission to allow the advocate to attend an interview, even though the young man had asked for this himself.

The advocate reports that the young man no longer requests a support person in police interviews. He may want to 'save the hassle and get on with it himself even though he clearly does not understand what is happening'.

A duty solicitor has refused to interview the young man with the advocate present, and he has been refused entry into court. The advocate believes:

[The] advocacy role [is] often not recognised by police, courts, Solicitors. If [you are] not a family member, [you are] often prevented from participating, leaving the person with a disability without support. And [it leaves] the system without the benefit of relevant information to clarify issues of behaviour, ability to participate, levels of understanding etc. [It] prolongs [the] process unnecessarily and ratchets up the seriousness of penalties, by refusing to recognise the advocacy role.'

People with disabilities reported that in some cases their advocates had no clear status. Their role may have been recognised, but their status was such that fundamental power imbalances remained. This applied to formal as well as informal advocates.

**When the advocate has a disability**

Issues of perceived status and comparative disadvantage were especially apparent when the advocate was a person with a disability. In one situation, a person with an intellectual disability discussed who could help her report harassment to the police. One of her few remaining options was a friend who was willing to accompany her to the station. However, she decided against this 'because she has a disability and they won’t listen to her either'.

Another interviewee, himself an advocate for a person with a disability, reported that his disability may partly explain the negative responses of others towards his interventions. Although unsure whether his disability was known, he felt it could potentially impact on his effectiveness as an advocate.
Self advocacy

This relates to an individual’s experience of empowerment, self-determination and participation in community life. It has also been suggested that self-advocacy involves a risk, given that 'the power differentials between people with disabilities and decision makers are so great that there is every likelihood the person with a disability will be ignored or forced to forego rights (Banks 1999: 369). This view suggests that 'such self-advocacy may itself be damaging as it forces the person with a disability into a situation where failure is highly likely’.

Some participants with disabilities referred to difficulties they had representing their concerns (without assistance) to service providers and justice agencies. They clearly perceived themselves as disadvantaged and having less power in these situations. It was ‘confusing’, ‘frightening’, ‘they had all the power’, and 'I felt set up, with no-one to help me'.

Even so, participants maintained it was important to speak up for themselves wherever possible, without relying on others to do it for them. This also avoids the risk that their views and experiences will be filtered through those of their advocates or that the concerns of the person with a disability may be misunderstood, overlooked or not presented at all.

Limited advocacy services

Advocacy appeared to be available only on a limited basis. There were common inquiries about how and where you could find an advocate, with people reporting long waiting lists and limited telephone times at formal advocacy services. This was a particular issue in rural and regional areas where geographical distances, isolation and fewer services limited options. While telephone help lines managed by Sydney-based services could provide advice and information over the phone, many found this frustrating and expressed a preference for direct, face to face assistance24. People living in rural and regional areas especially felt there was a need for extending hours of operation of help lines.

Strict referral criteria also applied in formal advocacy services, and some people reported this could result in a judgement that a person did not need assistance. For example,

A person with an acquired brain injury contacted an advocacy organisation, but said, ‘They thought I was too bright’. She found this ironic, as she uses checklists and
notes to prepare for any contact with people, and this may have given a false impression that she does not need support.

There was clear support for existing advocacy services while recognising the limits imposed by prevailing funding and resource constraints. One person reported ‘[an] underlying barrier - lack of resources and funding to take all cases’. Others agreed, with another suggesting the lack of resources and strategic service development were further complicated by an insecure funding base. It was difficult to develop long-term plans for services when they had to re-apply for funding each year.

Insecure funding had particular implications for recruitment and training in advocacy services. It meant that services were rarely in a position to address these issues.

If we are going to have advocates, we need competent and confident advocates, people who are not nervous, not hesitant. People who are efficient, who follow up.

Informal advocates

Several people were in contact with informal advocates. They were usually described as a friend, carer or someone they knew from work or a service they used. They were not paid as an advocate, but were available to assist on an ad hoc basis. This was particularly the case for some people with an intellectual disability.

The ad hoc nature of such arrangements was a difficulty in some cases. Advocates move away, may have limited time outside work and family commitments, and there may be few other options available to a person with a disability.

It was a significant issue for people with intellectual disabilities, who often referred to their advocates as friends, and who relied on a relationship of trust and understanding developed over time. They reported considerable difficulty in accessing alternative forms of support and assistance.
5.3.2 What stakeholders say

If people with disabilities had differing views about the role of an ‘advocate’, so too did those working in the justice system. They also regarded advocates variously as a friend, family member, carer or legal representative.

How an advocate was defined often had an impact on how they were allowed to support the person with a disability within the justice system. For example,

- if regarded only as a friend, they may be excluded from proceedings because they were not a family member or carer;
- if regarded only as a family member or carer, they may be excluded for not being impartial; or
- if regarded as a professional advocate, they may be excluded by legal representatives who understood themselves to be the only advocate necessary.

There was considerable confusion and different views among stakeholders about the role and status of support persons, advocates, and interpreters. Although generally perceived to be additional, rather than integral, to proceedings, their involvement was often reported to be invaluable in facilitating communication and understanding. Yet there were no guidelines to refer to about how to work with them.

For some, a support person was present primarily to attest to procedural fairness. If they assisted understanding and communication for a person with a disability, this was a bonus. They did not relate the role of the support person to assisting their own work but were concerned that support persons could potentially hinder and interfere in the process.

[The] support person is [present] to show we’re being fair. It’s one thing having a support person there, another thing to have them being active, but still, if you’re interpreting [or] rephrasing so the person’s understanding is assisted....It’s up to how much common sense the interviewing officer has. (Police)

As far as people with disabilities [are concerned], the support person is only allowed to be there to oversee that the witness is being dealt with properly, not unfairly. [They are there] to observe only, [with] no commentary - they
shouldn’t interfere with the interview. If support person [is] present it is OK for them to provide explanation, as if they were an interpreter. But the support person should speak with the officer in charge before the interview and explain the problems/difficulties the person with a disability has. For example, [the person with a disability] may need to ask me questions during the interview to help them understand etc. (Police)

Stakeholders described different ways of working with support persons and advocates present. In some cases, they facilitated communication and reassured the stakeholder that the person with a disability understood the information presented to them. In others, the support person was perceived to be a proxy for the person with a disability.

[Disability organisation] is called upon to provide advocacy when dealing with people with a disability. This is to ensure that the client understands the information provided. (Generalist CLC Solicitor)

Quite often, may have support person there too - makes my job a bit easier - rely on them to explain. But the third party is the third party, I always talk to the person with a disability first. (Chamber Magistrate)

[I] remember a person with an intellectual disability and her social worker asking for some protection - basically [she] didn’t want her boyfriend to be around. [It was] very difficult to communicate to her the meaning of the AVO and what it meant. At the end of the day she couldn’t comprehend what was required so we decided it was unlikely [she wanted the AVO and would be able to see it through the court process] - did not proceed with order. (Clerk of Court/Chamber Magistrate, city)

With an advocate, [it] gives me greater assurance that the person is understanding me better, and it seems to give them confidence. [I] try to have a collaborative approach, a three-way approach. (Legal Aid Solicitor)

People with disabilities reported that they often felt sidelined by how others chose to interact primarily with their advocate or support person, rather than with them. Stakeholders seeking legal instructions
reported it was sometimes difficult to avoid relying on the advocate and/or support person to give instructions, as opposed to facilitating instructions from a person with a disability.

[We] do everything we can to make sure a client has proper support to give [us instructions]. If not, we would do it through [the] client’s partner - purely to protect ourselves through unprofessional behaviour, eg, sometimes referring person is put down as client - not for [an] ongoing matter, only [a] one off contact. (Generalist CLC Solicitor)

We need to [be more aware] in dealing with ethical and legal [questions when working with] psychiatrists. Vacuum of work in that area. It's not going to stand up. [It's] general knowledge, acting on client's instructions, how you work with an intermediary, eg, two women living in residential home. Advocates brought [them] to [the] centre…. [I was] still unclear, wanted to get instructions. Giving instructions, after some time [it became] too distressing [for the clients] - [you] rely on [your] own sense, trying to settle the matter. [In the] absence of [the client], [you] can be overly cautious. Working with people with disabilities - [we] are not sure. (Generalist CLC Solicitor)

In some cases, support persons, advocates and lawyers were used as the single point of contact between a justice agency and a person with a disability. This was reported as a purely practical decision to simplify a process that may involve complex matters and several different parties.

If someone has an advocate, we’ll deal direct through them, rather than complainant - [we] need a single point of contact, a single set of instructions. If [there is a] lawyer or advocate, [we] see it as their responsibility to pass [information] on to the client, especially if [it’s] very complex. (External Complaints Commission)

However, this assumes that the support person, advocate or lawyer is maintaining effective contact and communication with the person with a disability. Many people with disabilities reported experiencing quite the opposite. One stakeholder reported that people with disabilities often
contacted the justice agency for information because they did not feel involved and informed by their representatives.

*We tend to deal with the solicitor, if they have one, because [it’s] easier to deal with one, but we find that invariably with [community legal centres] and specialist disability discrimination centres, the clients inevitably ring up because they don’t feel involved, they may not be kept informed. So in those cases, with [community legal centres] and specialist centres, we will tend to have contact with the client and not just rely on the solicitor.*

(External Complaints Commission)

### 5.4 Physical access issues

Physical access issues relate to barriers in the built environment as well as transport issues, geographical distance, living in rural and regional areas, and location of services in central Sydney.

(See also ‘Debate over resources’ in 5.2 Communication, flexibility and resources).

#### 5.4.1 What people with disabilities say

Inaccessible offices, distance, lack of transport and the cost of accessible travel, all conspire to make visits to legal offices particularly difficult.

*Having a disability, things often take a lot longer. If I could drive, I could drop by the local legal aid office and ask for their advice, but I don’t. I have to book a taxi, pay for it, rearrange my other commitments etc. So the difficulties are disability-specific.*

Inflexible procedures could also compound physical barriers. For example, a person with a vision impairment approached several justice agencies for legal advice and assistance, including Legal Aid. On the last occasion, he asked to lodge a claim for victims’ compensation and managed to fill out the necessary print forms with considerable difficulty. He was then told he would have to find another Solicitor to assist with the claim.
They are a government-funded service - why couldn’t she do it there? Why did I have to try and find someone else?....This is not a matter of a person who can drive, walk, see what they need to. I am a person with a disability.

In rural areas, access to legal advice and information was a particular issue.

Up here a monthly appointment if that - a monthly visiting service from [nearest city] at the community centre. Everyone knows. Information tends to get out of date quickly when you have to wait....Phone service only available limited times and days.

[The] legal system is falling down in the bush - distances, transport, less access, less choice.

Many of these issues have also been explored in 5.2.1 Difficulties in accessing information, advice and support.

Despite recent efforts to improve physical access, buildings throughout the justice system remained largely inaccessible and this was perceived by several people to be symptomatic of the more general lack of provision for people with disabilities.

[They] don’t take accessibility in its broadest context - [They say] ring us before, then come and we’ll open the back door for you. [At one community legal centre] I couldn't get in. They said they would come to the house - I didn't want them to, I wanted to go to them.

**Internal and external access**

Although there are many different aspects to physical access, people with disabilities reported that the system generally only understood access issues in the narrowest sense. For example, can a person using a wheelchair get inside this building? Therefore a building is regarded as accessible if a ramp is provided to an entrance.

However, inside the building there may be stairs and no lift, narrow doorways, highly polished floors and inaccessible toilets. As one person pointed out, at present accessible toilets are generally designed for
people using wheelchairs but, for those with other mobility issues the height and angle of the seat, the width of the cubicle, and the lack of rails on both sides may cause problems.

Many people with an ambulatory disability pointed out that ramps are not necessarily appropriate for all. They may be too narrow and too steep for someone using a walking stick or crutches. There may not be any railings, or perhaps only one, to support use of the ramp. Tables and chairs from nearby cafes and restaurants may block access (a particular issue in central Sydney).

Interviewees discussed the impact of access provisions on their ability to physically and mentally participate in proceedings.

[It is] generally assumed that everyone comes through the door equally. Except for [the Guardianship Board] and [the Community Services Appeals Tribunal], [there is] no recognition that a ½ hour lunch break [is] insufficient, [there is] no acknowledgment of sufficient toilet breaks, no questions about what you need to participate.... Participation physically very much impacts on [your] ability to participate mentally - [your] ability to concentrate, communicate etc.

They particularly emphasised the importance of being able to see a legal representative or advocate in their own home, or at an accessible venue of their choice, as a key flexible service delivery strategy. They believed lawyers should advertise, and routinely make, home visits to see clients.

[It is] important that solicitors are able to come and see you. Many people with disabilities are unable to get to the legal firm.

This would also overcome the problem of a lack of accessible transport or parking.

As well as inaccessible legal offices, several people involved in personal injury compensation matters spoke of the difficulties, stress and cost of attending medical and legal specialists who were often concentrated in large cities (in particular, central Sydney). For those living outside the metropolitan area, for whom taxis may be the only accessible form of transport available, one-way fares of $100 plus to see legal
representatives or medical specialists as part of the case were commonly reported.

One person recalled there was no parking outside her Barrister’s building so she had to be dropped off some distance away. She was able to enter the building only with considerable difficulty, before being ‘squeezed into the service lift’, the only lift that could carry her wheelchair. She faced similar issues when sent for medical tests as part of a personal injury compensation case.

*I had to go to a neurologist and I couldn’t get into the consultation room with my wheelchair - I had to have [the consultation] in the waiting room.*

Such experiences were surprisingly common given that people with disabilities must be disproportionately represented in the caseload of those specialising in injury compensation issues.

*Compensation solicitors, they’re all upstairs! [You are] limited by whether you can actually get in and see them. And they don’t even have lifts!*

**Physical access and resources**

Some participants reported that access was basically compromised by limited resources and it was always going to be difficult to address access issues within existing budgets. Many disagreed, however, arguing that access issues reflect priorities and norms. Therefore a different approach to funding and resources is required that recognises access as integral rather than additional.

*Community Legal Centres usually get the cheapest, dingiest resources because that’s all they can afford. They should be lobbying for funding on a basis that integrates accessibility.*

### 5.4.2 What stakeholders say

Physical access was often seen as a capital works or resources issue and barriers related to physical access were generally explained by a lack of resources. External access to a building was a key issue for a
significant number of stakeholders, most of whom worked in buildings that were not physically accessible.

[I] remember [a] person who couldn’t get into the building - [a person using a] wheelchair....[We] had to lift and carry [him] up [the] steps. (Clerk of Court/Chamber Magistrate, city)

When we’re dealing with people with obvious disabilities you tone it down a gear! For example, [a person made an] application for a driving license. [He was] called to the microphone....[The] court [was] chockablock, it took him several minutes to negotiate [his] way across [the] courtroom. [He had] to get across 4 to 5 people to get to [the] mike. [The] only mirth involved was that he was applying for a driver’s license, and he took so long to get across! (Magistrate, regional)

The few stakeholders who worked in accessible premises reported there were generally internal physical access issues. For example, toilets were not physically accessible, were located a considerable distance away, or were without appropriate signage. Counters were too high and glass partitions made hearing difficult.

Court and hearing rooms were generally inaccessible, as were legal offices. Furniture was generally fixed, and assistive technology was reported to be unavailable or inadequate. In one case, a stakeholder overcame physical access issues by arranging to see clients in a ground floor office.

A number commented that the general lack of physical access demonstrated a lack of awareness about and, in some cases, a lack of commitment towards removing barriers for people with disabilities. Some experienced this as a professional embarrassment.

Physical access is a huge problem....Therefore people with physical disability [enter] through back doors etc. People with disabilities feel they’re overlooked, and they are....[For example] a female speaker with a physical disability in a wheelchair, the other day at [the] Magistrates Conference - they had no access for her on [the] podium. She got up but we couldn’t see her. We hung on every word. I was embarrassed - here’s a woman
coming to see us about increasing access for people with disabilities, we couldn’t even get it together for our conference. She handled it so well, she was magnificent, she must be used to it! (Magistrate, city)

Others pointed out that practical realities can often get in the way of access, for example, on a crowded day in court.

[We have a] relatively new building [with] ramps and accessible toilets....[but there is] no disabled car park at the front....[Regarding] people in wheelchairs - we manage. It’s difficult to get [a] wheelchair in [to the courtroom] but it’s possible, but people just have to move [out of the way]. [The] doors [are] adequate for [a] wheelchair to come in, [the] aisles [are] adequate for [a] person to come down, but you get a list day, and it’s full of people. (Magistrate, regional)

Physical access however could mean different things, and this was not always appreciated when premises were arranged, particularly in rural and regional areas where the options were already limited. As one stakeholder observed, it was essential staff understood it was not sufficient to simply ask if premises were accessible. One had to be quite specific, for example: Were there any lifts or only internal stairs? Was the furniture fixed or at an appropriate height? What was the width of doorways? Was there appropriate signage, lighting, and toilets? Were guide dogs and assistant animals permitted? Were there adequate food and drink facilities nearby? What were the transport links like? Was accessible parking available?

Very few stakeholders saw people with disabilities anywhere other than at their office or building. This applied most particularly to legal representatives and advisers, although some claimed to be flexible.

[I] mostly see them in the office - they’re paying for my time, it’s better for them to come to me. But if [I’m] made aware of a disability, I will see them elsewhere. (Barrister)

Rural and regional venues

Stakeholders who conducted proceedings in various rural and regional venues reported that while they endeavoured to ensure premises were
physically accessible, they were often forced to accept less than ideal access provisions, simply because nothing else was available.

**Accessible transport**

A very small number of stakeholders stated that their organisation offered to pay for accessible transport for people with disabilities. This was offered by one legal firm and jury services at the Attorney General’s Department.

The facility was not widely advertised, however, as there was a concern that people might ‘abuse’ it. Guidelines about how and when it could be offered weren’t available.

### 5.5 Citizenship and jury duty

#### 5.5.1 What people with disabilities say

People with disabilities defined citizenship as a set of political, social and economic rights that they are entitled to exercise by virtue of their ‘humanness’. As citizens, they believed they were entitled to be seen as inherently useful, valuable members of society. However, they felt that their potential and actual contributions to the community were not recognised.

Not only did their experiences suggest a sense of exclusion and lack of entitlement, but people with disabilities were often prevented from exercising their rights because of the way the system constructs and understands citizenship, access and participation.

**Jury participation**

The right to participate in a jury was clearly expressed in interviews as a right of citizenship. Yet people with disabilities reported that the jury system operated in ways that prevented them from participation.

*Jury duty is central to citizenship. To not get onto [jury duty] says another system operates for me - [I am regarded as a] second-class citizen.*
If [you are] a citizen of this country, you do your duty as a citizen. If [you’re] called to be a juror, you should be prepared to do it.

Interviewees argued that juries should reflect the community from which they are drawn, with all of its diversity and range of experience. They felt that the systemic exclusion of people with disabilities from jury duty denied their role and rights as peers\(^\text{25}\).

Someone [was] there talking about juries and the importance of peer review - [juries made up of the] young, old, men, women, balanced. [Everyone was] sent upstairs, [I was] left outside on [my] own [unable to go upstairs as there was no wheelchair-accessible provision]. [I] asked what was going on. [The] sheriff said you don’t really want to do this, do you? [I said] yes, I do, it’s about peer review. [He said] people like you can be exempt - it upsets your pension. [It was all about] inaccessibility, the lack of provision, [their] attitudes. [He said] you should go back and ask to be excused. [I said] no, you are refusing me, not excusing me. [That is] illegal. Jury duty [is] a responsibility and a right - you don’t have a choice, why should they [make that choice]. It’s taking away my rights.

The exclusion of people with disabilities from juries robbed the juries of valuable experience and contributions, and relegated people with disabilities to a subordinate citizenship status. The phrase ‘second-class citizens’ was used repeatedly.

* Aren’t they supposed to get a cross-section of the community?
  ....if the jury was to reflect a cross-section of society, it would include all people. I could provide an asset to a jury.

One person spoke of the role that attitudes towards disability can play in matters involving a defendant with a disability. This person felt that a jury member with a disability would bring awareness and objectivity about disability issues to their deliberations. Their contribution would be particularly valuable because it would focus on the issues presented in evidence, and not on those relating to perceptions of disability.
This person was neither arguing that people with disabilities should only sit in judgement of other people with disabilities, nor that they should be responsible for the disability awareness of others.

**Disability and eligibility**

It was felt that attitudes and responses to disability influenced judgements about people’s ability to participate in juries. Several people gave specific examples of the way the jury system excludes people with disabilities. Firstly, people are ‘randomly’ selected from the electoral rolls to be on a jury roll. It was pointed out that many people with disabilities are not on the electoral register, either because they are perceived as not having the ‘capacity’ to vote, or because they have difficulty with or are unable to complete written forms and documentation.

Secondly, people with disabilities are excluded by Schedule 2 of the Jury Act 1977. Schedule 2 describes who is not eligible to serve as a juror. Among those it excludes is ‘a person who is unable to read or understand English’. This could disqualify many people from non-English speaking backgrounds, people with literacy issues or learning difficulties, and people with disabilities who use other modes of communication. For example, a deaf person who signs Auslan may experience particular barriers in reading and understanding English as another language\(^\text{26}\).

Schedule 2 also excludes ‘a person who is unable because of sickness, infirmity or disability, to discharge the duties of a juror’. Information for jurors sent out by the NSW Sheriff states clearly that:

\[
\text{Having a disability does not disqualify you from serving on a jury. It is your right and your responsibility if you are eligible.}
\]

It goes on to say that people can claim exemption with a doctor’s certificate ‘if you feel your disability will affect your capacity to participate in jury duty’.

Selection processes were also reported to be long, complicated, and stressful and there were insufficient staff available to explain the process appropriately and assist potential jurors. A perceived association between disability, sickness, infirmity, and inability to participate was regarded as unfair and discriminatory and participants spoke of people working in the justice system automatically offering exemptions on the basis of a disability.
They argued that this reflected a widespread lack of disability awareness as well as a systemic abdication of responsibility. The justice system appeared to overlook the requirement that exemption should only be claimed ‘if you feel your disability will affect your capacity to participate’. In their experience, people with disabilities were excluded because the system failed to ensure they could participate by addressing disability-related requirements.

For example, where a person with a disability may be forced to claim exemption from jury duty because the court was inaccessible.

*People with disabilities....are excluded by virtue of access issues - it’s scandalous.*

A person who required an assistant was aware that this might affect perceptions of his ‘capacity’ and ability to participate on a jury. A person with a psychiatric disability described himself as ‘high-functioning’, and asked how he would have been perceived had his disability been disclosed. A person with a vision impairment compared herself to another who had been selected on a jury, saying:

*Her eyes probably look better than mine. People selecting the jury may have felt more comfortable about selecting her.*

**Physical access and flexibility in courtrooms**

Difficulties in attending for jury selection for people with disabilities included limited and expensive accessible transport, lack of accessible car parking and inaccessible buildings and courtrooms. Seating in jury boxes was fixed and there was no provision for people using wheelchairs. Nor was there provision for any support persons or assistants required to accompany people with disabilities in the jury box (see also 5.4 Physical access issues).

**Jury duty and disability-related requirements**

Some common difficulties in attending for jury duty included confusing and difficult to understand information or information being unavailable in accessible formats. The language used to describe proceedings (eg, being ‘summonsed’, ‘empanelled’) was not understood by some, nor was the reference to a fine for failure to attend.
While jury summonses offered a contact number to call and arrange a disability-related accommodation, it did not specify available accommodations apart from the examples of a hearing loop or wheelchair access. The lack of assistive technology and physical access were widespread issues across the courts and there was no guarantee that the accommodation could or would be provided.

Thus, even when they did phone, it may only result in them being told their particular disability-related requirements could not be addressed after all, and they were therefore prevented from participating further. One person was prevented from accessing any assistance because a TTY contact number for people who are deaf or hearing-impaired was not advertised on forms received.

Perceived limits to available disability-related accommodations were emphasised by several participants. One person noted that he required an appropriately trained support person to assist with physical tasks. These may include displaying documents before him, taking notes, and assisting with personal needs. He asked who would supply such a person and who would pay for them. He believed the justice system would most likely see this as an expense it could ill-afford27.

People with disabilities reported there was resistance to the use of alternative formats for members of juries. Even so, these issues could be resolved.

[They] told me [there] would be photographs - I said no problem, I would ask for [them] to be described to me. Then [I was] asked to go in and see [the] judge - [he] said look, I have a few problems with this, but I’d like to talk to you first. [He] asked about [the] use of photographs, [a] person’s appearance, [their] body language. [I said I] judge by what they say [and] do, [what their] voice is like, therefore [I’m] able to judge perhaps a little better than you....[I said] if I am selected, I would make as little trouble as possible. Because if I say they have to Braille everything, it might make it difficult for other blind people. [I] don’t think there’s ever been a blind person in NSW empanelled on a jury.... [A friend] has been on [a] jury [elsewhere]. Quite a bit of documentation in court [was] arranged, [and] to have [it] all read to her. [She] made Braille notes (using her machine), [there was] some
security condition on her notes. And they gave her the
time [during the trial] - having things read, and [they]
waited so she could make Braille notes. Photographs
[were] described [to her] - [the court] couldn’t have been
more cooperative - [she] didn’t have to ask [for anything].

A number reported being asked to publicly identify their grounds for
exemption in front of other potential jurors. Those with a psychiatric
disability in particular said they were likely to experience this as
embarrassing and stigmatising.

[You] go in, [everyone is] sitting down. [They say] people
wanting exemptions, please stand up. [You are] asked
why, in front of everyone. A couple didn’t have to say so,
[but] some had to go and see the Judge. [They] nearly
always ask me if I’ve come in for an exemption.

If I’d had to ask to leave, it would have just been terrible to
say to the sheriff, and the Magistrate or whoever, and
saying I have a mental illness in front of everyone. [It]
would have been terrible.

5.5.2 What stakeholders say

While stakeholders agreed that people with disabilities should be able to
participate in jury duty, they pointed out there were certain legislative
requirements that needed to be met. For example, a person with a
disability who required the assistance of a support person could not
participate because the Jury Act permits a jury of 12 people only, and not
13. This shows a basic misunderstanding of the role of the support
person.

Some stakeholders recognised that the reported Jury Act requirement to
produce a medical certificate in order to ‘prove’ a disability was 'stupid,
but Parliament says we have to.'

If [a] person with a disability rings up and says [she/he]
has a disability, and can’t attend court, well we tell them
they have to produce [a] medical certificate - sickness,
illness or disability. Everyone has to provide that,
irrespective of disability or not....[The] Jury Act says if [a]
person’s disability prevents them from serving, then they
can’t serve. [I’m] not sure how [that] relates to [the Disability Discrimination Act], but [I] think if [it was] an issue, [it] would have been raised…. If [the] person had rung up, [we] could have made all the necessary arrangements. A person with this sort of disability, agoraphobia, would have been told the nature of jury duty is to attend with a number of people crowded in the jury assembly room. [I’m] concerned that he thinks he’d be forced to tell everyone he was ill and yell it across a crowded room - maybe [he] experienced it this way because of [his] disability - things may appear very threatening, [it’s a] very stressful time. Are we the ones putting in the barriers, or is it the disability? The line here is it’s the disability. If it’s about our staff and their attitudes, then I’d be really worried. (Jury services)

(See also ‘Attitudes and assumptions informing allocation of resources’ in 5.2.2 What stakeholders say).

5.6  Education and training issues

5.6.1 What people with disabilities say

This was a key issue for the majority of people with disabilities. It includes training to raise levels of disability awareness in the community, to assist staff in their professional practice to address disability-related requirements, and to enable systemic change. One example of best practice was given:

[The] Board did everything I expected them to do - [they offered] flexible times, offered services and facilities, [the] investigation officer understood my needs, [and the] board members [were] all very sensitive and flexible. [They] advertise widely for key people, offer quality ongoing professional training. Only one tribunal member is a lawyer, another [is a] professional and another [is] a community member - [the] power relationship between [the] legal and disability factors is more equal. They understand [disability] - [a] very positive experience
People with disabilities reported widespread confusion about their rights, how to exercise them, and lack of knowledge about available resources and supports. These were fundamental barriers and they identified community education about the justice system as essential for them to exercise their rights knowledgeably.

Community education

This needs to be targeted at people with disabilities. It needs to be accessible, appropriate and relevant to their situation and should aim to empower those people living in isolated, dependent and vulnerable situations. For example, people with disabilities living in group homes and institutions.

Disability awareness for all those in the justice system

The justice system has a responsibility to address barriers to access and participation by training professionals working at all levels in the justice system, and across all areas. It was particularly important for those at the ‘front-end’ of the system, such as complaints-handlers, lawyers, advocates, and police. It was also important that the requirement for disability awareness training apply to volunteers and students, given reports that many advice services relied on them at initial stages of contact.

Similarly, it was regarded as crucial for those at the more formal ‘back-end’ of the system, such as court staff, Magistrates and judges. Magistrates and judges were generally perceived to lack disability awareness and knowledge and, given their role and authority, this resulted in a number of difficulties for people with disabilities.

People with disabilities emphasised disability awareness in the context of a diverse community. They also experienced barriers related to gender, ethnicity, sexuality, race, class and culture. The justice system was based on ‘norms’ that overlooked such diversity and this lack of awareness suggested training was also required to complement a specific focus on disability.

*What do legal stakeholders think of involving advocates, and what kind of training and role should they have? How can they overcome the ethnocentricity of their own workers and embrace multiculturalism?*
People with disabilities felt it was important that disability awareness training be required at all levels and across all areas, because the justice system was interconnected and interdependent. People with disabilities experienced barriers to access and participation across different parts of the system.

The effects of these barriers were exacerbated when they were encountered at different points of contact. This situation was compounded as a case moved through the system. Assumptions and decisions made at each stage informed those made subsequently. People with disabilities therefore felt that universal disability awareness training should be consistent across the system.

[Disability awareness training] should be part of basic degrees and ongoing professional training. Certainly judges require a lot of intensive training.

Compulsory, ongoing, and experiential training

People with disabilities believed that training could address both individual and systemic requirements if it was compulsory, ongoing, and experiential. They did not believe that existing ad hoc, discretionary initiatives were effective in the long term. Discretionary initiatives relied on people to identify a training need and assumed they were willing and able to attend a course. Training needs had to be prioritised against other demands, and the training perceived as relevant and useful.

Given the general lack of disability knowledge and the attitudes they experienced, people with disabilities were sceptical that training needs would be recognised and addressed. They also doubted that discretionary disability training would ever be a priority, given that disability issues consistently appeared to be regarded as ‘special’ and ‘extra’ in the justice system.

Instead, people with disabilities advocated compulsory disability awareness training initiatives. These should be an integrated requirement of professional qualification and practice. The earlier the training, the better.

People with disabilities felt that a one-off training requirement was insufficient. Individuals needed to update, reflect, and apply their knowledge in different situations. Ongoing training initiatives were perceived to help to maintain this. Ongoing initiatives would also ensure
that knowledge and experience was not lost when staff left or handed over their involvement to another.

A program of integrated, continuous professional learning demonstrates a systemic commitment to disability issues. It allows organisations and institutions to assess skills and knowledge levels, resource staff to deliver service obligations, and review performance. It works best in large organisations and professional bodies with the necessary infrastructure and resources to facilitate participation. Suggestions included the Attorney General's Department or the NSW Police Service. This model also applies to the Legal Aid Commission and organisations such as the NSW Community Legal Centres.

People with disabilities recognised small legal firms and private solicitors were less likely to be in this position. Nevertheless, they suggested a strong disability component in tertiary education and initial professional training. They also suggested that disability issues constitute part of the annual professional learning required by the Law Society. Moreover, they recommended that legal representatives involved in personal injury compensation matters and disability discrimination matters should have to qualify as specialists in these areas of law. Part of this specialist qualification should involve a focus on disability issues and community diversity.

If you are going to work with disability [discrimination law], you want that knowledge upgraded to a specialty - like they do with other specialising. They should understand the differences in rules of evidence between that required in a formal court and that required under disability discrimination legislation.

These suggestions were also made regarding services and complaints bodies involved in disability discrimination law. There was a perception that disability discrimination matters appeared to be rather more straightforward than they actually were. Those advising people with disabilities were often reported to assume they required no specialist knowledge or experience. These assumptions, coupled with a lack of disability awareness, created major difficulties for complainants with disabilities.

People with disabilities therefore felt it was crucial that those purporting to advise them were appropriately trained and experienced. They felt that those upholding the legislation also needed specialist training. People
with disabilities reported procedural bias, attitudinal issues, and a lack of disability awareness from External Complaints Commissions. They also believed that staff misunderstood legislative requirements.

They should improve the representation of people with disabilities in HREOC. They should improve staff education and training. They should upgrade their knowledge of disability.

People with disabilities felt strongly that training about disability issues needed to be experiential. Information can educate people to become more disability aware. However, it does not necessarily translate into a full understanding of the way ‘norms’ impact on people with disabilities and create barriers to access and participation. People with disabilities felt that training without an experiential element simply provided information. Training that allows people who do not have disabilities to explore the issues more directly facilitated understanding and attitudinal change.

They should do it as part of their training, like two weeks work experience. Lawyers should also be given similar ‘hands-on’ experience.

A popular suggestion was for training that required people to directly ‘experience’ disability. For example, one person referred to an initiative in the UK where social work students used a wheelchair for two weeks to develop an appreciation and understanding of some disability issues.

While such exercises may offer insight into the barriers for people with physical or sensory disabilities, they do not offer opportunities to consider the perspectives of people with cognitive or psychiatric disabilities.

Involving people with disabilities

People with disabilities recommended that their experiences and professional skills as facilitators, experts, and trainers be recognised and that they should be actively involved in the training and education of people working in the justice system.

The disabled and the elderly have a lot of knowledge and experience that has no currency in the present system - [it] needs to be incorporated into the system to benefit the
‘young turks’ who are running around and making all the same mistakes again.

A small number spoke of their involvement in workshop discussions and forums where their presence had challenged, confronted and stimulated those attending and had helped to demystify disability issues. Their contributions had helped ‘make the issues real’ by encouraging participants to look beyond theories of equality and consider the realities.

On a personal level, people with disabilities referred to the positives they gained from participating in this way. They felt valued and empowered by the experience and felt that it had encouraged them to exercise their rights in other forums.

Above all, people with disabilities wished to be appropriately involved (see also ‘Educating others about disability’ in 5.1 Attitudes and expectations). It was not appropriate to expect people with disabilities to educate staff when they were trying to access a service. Nor was it appropriate to expect a person with a disability to accept an invitation to discuss the issues in a staff meeting after they had pointed out the barriers they experienced while trying to use a justice agency or related service.

Such expectations and requests imposed additional pressures on people with disabilities, and the effect was to further disempower them and undermine ongoing access and participation in the justice system. For example, a person with a vision impairment reported a sexual assault to the police. Over the next several months, she repeatedly raised concerns regarding physical access issues, the provision of alternative formats, attitudinal issues and the progress of the investigation. She was then asked if she would address a staff meeting of police officers at the station regarding issues related to working with people with disabilities. She declined, ‘I felt too vulnerable’.

5.6.2 What stakeholders say

In many cases, stakeholders were unsure about what the issues were and how to address them and, with the best of intentions, wished to involve people with disabilities as crucial participants in those discussions. However, requiring a person who is trying to access a service or justice environment, to assist in this way may unfairly impose on them responsibility for addressing service provision and delivery issues.
During interviews about their experiences, people with disabilities asserted their skills, expertise and knowledge and stakeholders recognised these abilities as valuable resources to assist them. The problem is not that they asked and expected assistance from people with disabilities - the problem is the context in which this occurred.

Stakeholders with more extensive experience of the issues recognised that people with disabilities were often unfairly and inappropriately expected to assist in educating and reforming. They believed people with disabilities should actively participate in these processes, but only in a way that is appropriate.

[Regarding a scenario where a victim of sexual assault was asked to address a police staff meeting about disability issues] I’m sure their hearts were in the right place, but given the history of the matter, [it was] not appropriate. [It] would have been better to go to a peak [disability] body or professional organisation, to do that. (Police)

Mass awareness campaign needed to change culture and understanding. Needs to happen via government but reality is it probably won’t. So [it’s] down to people with disabilities and specialist lobbyists - [they are] the most effective but also under-resources and over-worked. (Legal Aid Solicitor).

(See also ‘Need for a whole of government approach’ in 5.7.2 below).

5.7 Roles, policies and complaints

Policies determine the allocation of resources within the justice system and shape priorities in staff training and procedures, methods of service delivery, access for groups such as people with disabilities, as well as monitoring, evaluation and accountability.

This section looks at barriers, structures, constraints, roles and practices, and the right to complain. Stakeholders distinguished between formal and informal policies, noted the interrelationship between various parts of
the justice system, and advocated for a whole of government approach to address the needs of people with disabilities across all jurisdictions (see also 'Debate about resources' in 5.2 Communication, flexibility and resources).

5.7.1 What people with disabilities say

Lack of consistency and continuity

Some of the barriers highlighted by people with disabilities in their dealings with the justice system were:

- frequent changes of Solicitors;
- difficulty accessing the allocated person;
- little communication and hand-over between Solicitors;
- the use of students to staff Community Legal Centres;
- the lack of time spent with Solicitors, prior to court;
- constantly changing duty rotas;
- quality of legal advice; and
- differing understanding about what services Legal Aid-funded practitioners could provide.

These perceptions concerned legal representatives, legal aid services and community legal centres in particular. While interviewees recognised that this situation often reflected limits to resources and funding, community legal centres and Legal aid (in particular) were often the only forms of legal advice available to them, and access was therefore crucial.

[I’m] on to my fourth solicitor [in eight months] and they still haven’t closed the case....I have to keep repeating myself. The second one apologised because he was only there for another week, as a condition of a grant and part of his legal training. Third one, leaving next day. Fourth one began in January. I feel like they’re all using me to practise on....

This had particular implications for those in rural and regional areas.

Legal Aid - five minute consultation before going into court - absolute farce.... lack of consistent forms of advice - interruptions after interruptions, you had to keep re-explaining and re-explaining.
They wanted to see the duty solicitor to see what preparation he is doing for the trial. [He said] I’m not doing anything until the trial because I don’t get paid until then. I’m not paid for the preparation.

She tried to arrange an appointment with the duty solicitor before the court appearance. Her secretary said we were unable to see her unless [we were] prepared to pay $120, as Legal Aid only covers court appearances....[The] last two duty solicitors saw [us] before the court date, all on Legal Aid. Why not this time?

Several people reported difficulties accessing legal advice to begin with, particularly when lists of specialists issued by the Law Society were out of date. Then, having found a solicitor, they reported they were often unhappy with the quality of legal advice, lack of consultation, and lack of action in pursuing the case.

Access to free one hour initial consultations with private solicitors and free consultations with Legal Aid duty solicitors outside and prior to court was recommended.

They should say, as a general rule [we] don’t necessarily need to see people face to face, but we should allow for this in our resources - provide a car in the budget, staff time freed up to visit [those who are] housebound, and [have a] separate space [or] office available. [You] should be allowed to have that face to face contact as appropriate. [I was] not offered that at all.

If they decided to change solicitors there were further hurdles to overcome. For example, a person employed and dismissed three solicitors over nine years while seeking personal injury compensation. He also made a complaint to the Legal Services Commission regarding the actions of one Barrister. Each time he changed solicitors there were delays while they negotiated to transfer the files, and then further delays while the new solicitor familiarised him or herself with the case and decided on a course of action.

Progress was further affected by one solicitor moving to four different firms in less than three years. Each time the person was not informed of the move. He had to ‘track him down and get the work moving’, and then the solicitor would move again.
As a person with a brain injury, he pointed out that it created particular difficulties for him because each move involved an application for the release of files from the old company to the new. Three years after taking on the case, the solicitor held a file of only twelve pages. The remainder were still held elsewhere.

Confusion over roles

Legal proceedings involve a range of professionals in a variety of roles. If not clarified at the outset, this can lead to general confusion about who does what and why. As a result, some people reported that it was only after they were a significant way through a process that they understood the roles of those involved.

Several people reported that they assumed complaints-handlers, investigators and conciliators were there to act on their (the person with a disability’s) behalf, represent their interests, and provide advice on rights and options. Some spoke of these roles in terms of advocacy, support and representation.

In a couple of cases, they were a considerable way through the process before they found out that these assumptions were false.

Case Study 5

Six months after a complaints-handler was allocated, and while waiting for confirmation of a conciliation date, a person contacted the officer for advice regarding an approach by the respondents.

She couldn’t advise me, [she said she] had to be impartial as the mediator....[I felt] a bit annoyed - this person’s role was not explained [as a] conciliator. [I] thought they were there to offer me support, be my advocate.

The person felt there had been little clear information about the process - who it involved and what were their respective roles and responsibilities. She went into the conciliation meeting accompanied
by an advocate, but feeling ‘at a great disadvantage’ knowing that the officer ‘wasn’t there on my behalf’.

She left the conciliation rather more confused about the officer’s role:

> She was not impartial....she answered questions on behalf of the other side and interpreted events [in their favour].

**Adversarial nature of the system**

This report has already noted the perception of many participants that their disability was used to undermine their status, abilities and participation. Where there is a request or need for variation, this can be viewed as a potential weakness to be exploited in the justice system. Thus frequent breaks in court could be withheld to disadvantage one side and unnecessarily delay proceedings. Video or telephone testimony could be regarded as undermining the rights of the accused to face an accuser in person. Support people could be instructed not to speak or excluded for fear they may interfere or unfairly assist one party over another.

For example, in criminal law, the status and credibility of participants were explicitly tested, evidence was assessed, and judgements were handed down with people with disabilities reporting that disability crucially determined how these processes occurred. In sexual assault cases, subpoenas might be issued for psychiatric records to use against victims with a psychiatric disability. This could jeopardise the trust and treatment relationship between practitioner and client at a time when the client may be feeling most vulnerable. Participants reported that the rights to support, justice and redress essentially become irreconcilable when records were used in this way.

Those with experience of personal injury compensation matters spoke of other forms of victimisation such as being sent for psychiatric reports although they did not have a psychiatric disability. This was often some way into the process, as both sides prepared for upcoming court dates and was a strategy to undermine their claims. A person with multiple disabilities felt that compensation law placed great emphasis on incapacity.

Arguments of procedural fairness are often used to mask a fundamentally unfair, adversarial reality and it was felt that Magistrates
and judges could play a more proactive role by intervening more directly to protect the rights of people with disabilities.

They brought me into court, and then they said ‘If you’re hearing impaired, come forward in the court’. I stood between [the] prosecutor and [the] Magistrate, practically on the bench....I was much more confident, more able to convince [the Magistrate], by coming forward in the court. I could hear him perfectly. The strength of being in that triangle of power. [You are] in front of the defence (who are supposed to speak for you), [and the] dynamics [are] very different.

Alternative Dispute Resolution (ADR)

A report by the National Disability Advisory Council (1999) suggests Alternative Dispute Resolution (ADR) offers key advantages to people with disabilities, including adaptability (that is, potential to accommodate ‘special’ needs), a consensual approach (crucially important where ongoing relationships are involved); and cost (less expensive than going to court). Many people with disabilities, however, felt that ADR, as they experienced it, camouflaged an adversarial reality. And, while it may offer an illusion of fairness and justice, in practice this is not always possible and some participants reported feeling ‘set up’. Several commented that, with the benefit of hindsight, they would have preferred their ‘day in court’.

Costs

The financial, physical and emotional costs of legal proceedings were major barriers reported in interviews. Given that people with disabilities are disproportionately represented among low-income earners, they are less likely to be able to afford private legal advice and more likely to rely on community legal resources, pro bono schemes, and Legal Aid.

In a severely constrained funding climate people with disabilities often are crucially disadvantaged when trying to compete for diminishing free, accessible community services, and yet these are often the only options remaining to them. They commonly reported being given the ‘run around’ before securing the assistance and information they sought. After that,
financial costs were a significant factor in whether or not to continue - this was not just the financial cost incurred by them, but also the costs incurred by the ‘other party’.

The more time involved, the higher the costs. Clear communication, written documentation, and a task-focused approach are all ways of reducing time and expenses, however this could create additional pressures for people with disabilities. Several spoke of receiving warnings about this prior to and during legal proceedings and in some cases they were dissuaded from pursuing the matter further.

Financial cost was a barrier to securing high profile legal advice, especially in disability discrimination issues. Those who had initiated complaints of disability discrimination all referred to the inequality of legal resources. For example, respondents were often high profile organisations that were able to employ Queen’s Counsels (QCs), even at the conciliation stage.

Similarly in personal injury compensation matters. Several of those suing large corporations and government bodies for compensation reported feeling overwhelmed, intimidated, and frightened when confronted by high-profile legal teams and this greatly added to the pressure to settle.

Most compensation litigants referred to ‘no win, no fee’ arrangements with their legal representatives, although several were unclear what these arrangements specifically meant. For example, one person understood it to mean ‘it won’t cost me anything if we don’t win’. The possibility of covering the other party’s legal costs in the event of a loss did not appear to have been discussed by the person and their legal representative. Another understood his legal and medical costs would come out of the compensation payment but had never discussed the basis of these costings with his lawyer.

As well as material costs, there were also emotional and physical costs associated with engaging with the justice system. Many experienced enormous stress and pressures, to the point where these issues sometimes overtook the feelings aroused by the original incident or concern. In some cases, people directly linked this distress to the way others had responded to their disability.
Length of time proceedings take

The degree of distress and pressure experienced by people with disabilities was further exacerbated by the length of time legal proceedings often took. This was particularly noted by those involved in personal injury compensation cases, which often took several or more years to resolve.

It was also a feature in disability discrimination complaints. One person waited two years after lodging a complaint before a conciliation meeting was arranged in 1998. This was unsuccessful and it was almost a year later before a formal hearing was held. Meanwhile, the person continued to experience incidents of discrimination by the respondent, the effects of which caused her to withdraw from her studies.

While the length of time involved has reportedly improved in disability discrimination matters, several people with disabilities still felt it took too long. One person waited six months before an officer was allocated to investigate her complaint. Another had his complaint accepted for conciliation, but was still waiting on further news five months later.

I haven’t been told anything about it [what’s happening] - I’ve rung and asked and left messages but I haven’t heard about it....you lose impetus....For me, it needs to be dealt with within six months, because otherwise it takes away the impact of the legislation.

Where a person with a disability is taking action against an essential service provider, time can be crucial. When there are few or no other options for provision of that service, the longer a process takes to be resolved, the more difficulties this creates in daily existence.

Time is also an issue once a case has reached a hearing or formal process. For instance, the way in which courts operate may be a particular issue for people with disabilities, who may ‘need to do things differently’.

A system that assumes everyone does things in the same way, and uses that assumption to calculate how much time a case will take, puts unnecessary pressure on a person with a disability.
With a disability, everything takes longer. Participants reported that free, legal services often operated in slow, bureaucratic, and unnecessarily cumbersome ways. In one case, this belief was reinforced by private lawyers who refused to represent a person on a grant of Legal Aid funding. While agreeing with their view of Legal Aid, this created additional pressure because he was not in a position to privately fund his legal representation. It made a substantial financial settlement all the more crucial.

Accountability and the right to make a complaint

In general people maintained there was little accountability in the justice system and identified examples of unprofessionalism, inconsistency, poor practice, and discriminatory attitudes and behaviour. On an individual level, they were either unaware of their rights, unclear about how to pursue them, or frustrated in their efforts to do so.

Existing systems of accountability were widely regarded as self-regulating, ineffective and biased. This was especially marked in discussions about legal representatives. Even where people were able to identify independent review bodies, they felt they were primarily staffed by the peers and colleagues of those held accountable. Independents on review panels were judged as tokenistic and less powerful than ‘professional players’ in the process.

While people working in the justice system may point out that there are, in fact, a number of different systems of accountability in place, people with disabilities argued that information is rarely accessible and available to explain these options. Several observed that the justice system is supported by public funding and, as taxpayers and citizens, they felt appropriate service and accountability were their basic right.

Making a complaint

To make a complaint often involves negotiation and conciliation with parties intimately or directly involved with the original transgression. Sometimes those parties have the power to decide whether or not to accept a complaint. People with disabilities reported it was often difficult to make a complaint when they were unsure they had the right, were worried about the consequences, did not know how to do it, and/or lacked support and assistance during the process.
This report has previously described the comparative disadvantage and barriers relating to the identity of the other party (see 4.6 Relationship with the ‘other party’ and 5.3 The other party, advocacy and support). Given the predominance of service providers among the other parties identified, and their involvement in ongoing service provision, informal processes may discourage people with a disability from making a complaint because they offer insufficient assurances and protection from adverse repercussions.

Some participants who made complaints felt that the informal processes suggested their complaint might not be taken seriously. They associated serious processes with written documentation, submissions and formal statements. Others reflected that lodging a complaint in a written form was a major stumbling block and that the insistence on written forms at the outset reinforced their sense of disadvantage and disempowerment. For them, the emphasis on written documents, complicated printed forms and strict procedure often made the process of making a complaint inaccessible and excluding. In some cases this discouraged people from proceeding.

Interviewees also commented on the apparent irony of external complaints processes which they regarded as inherently discriminatory and unaccountable. This was a direct reference to disability discrimination complaints processes.

5.7.2 What stakeholders say

Formal policies

Just over half the stakeholders interviewed indicated their service or organisation had formal policies relating to working with people with disabilities. Of these, half had never seen them.

Never seen [policy] once, can’t recall ever seeing anything regarding working with people with disabilities. May be there at [organisational] level, but not filtered down to local level. (Clerk of Court/Chamber Magistrate)

We have guidelines in that it is our job [and] duty to help [those we see] in any way we can, and we do encourage everyone to participate even if they have a disability because they’ve got the right to. I’ve never seen the guidelines though. (Jury services)
[We have] a client services manual (I haven’t seen it). (Clerk of Court)

While others were cautious about suggesting their organisation did not have policies, these were not common knowledge at their level, even though many had supervisory and managerial responsibilities in a large justice organisation.

Almost half said they did not have any formal policies related to working with people with disabilities in the justice system. Some believed a formal policy would lead to preferential treatment and an unfair advantage over people who did not have a disability or that such a policy was uncalled for.

We don’t differentiate between [people with disabilities] and others.

We don’t treat them any differently than anyone else.

In doing so they appeared to equate ‘different’ with ‘discriminatory’, and ‘the same’ with ‘fair’.

Question: Do you have any policies, procedures or guidelines specific to working with people with disabilities?

Answer: No. None whatsoever. We deal with every matter on its own merits. [There are] no barriers for people with disabilities in the justice system really, they’re equally able to make representations as any other member of the community. (Police officer)

Question: How do you work with people with disabilities?

Answer: Not differently, as such, in discriminatory view - as far as I’m concerned people with disabilities have same right to access to justice as anyone else. (Clerk of Court/Chamber Magistrate, rural/regional)

When asked about formal policies, stakeholders often referred to an existing disability strategic plan, a disability action plan, or an access and equity plan. However, they did not equate a plan with a policy, with
several observing that plans ‘begin’ to identify issues, priorities and possible strategies, but do not translate into policy.

Stakeholders appeared to regard policies, procedures and guidelines as relating to do’s and don’ts, shoulds and musts, options and resources. As such, they believed they should involve monitoring, evaluation and accountability, both at an individual and corporate level.

_I believe in a general sense there is not enough accountability....I’m amazed that....there are no report mechanisms to say, for example, what have you been doing in relation to disability awareness? Sure, it’s part of a business plan or regional access plan, but it never goes anywhere!_ (Clerk of Court/Chamber Magistrate)

Others noted that strategic and action plans are often regarded as expendable. In a context of funding cuts and diminished resources, priorities may change, staff are reallocated or cut, and plans remain on the shelf. Then, if necessary, they will have to begin all over again at a later date.

_The [Legal Aid Commission] as a whole [was] developing a disability access plan. The Access and Equity Plan was released [in June 1996], then the legal aid cuts, policy expendable and [staff] restructured. Only recently, people have been able to start work on that again. [We] should all know about this Access and Equity Plan, and we should have completed a Disability Action Plan and [it] should be disseminated._ (Legal Aid Solicitor)

Access and equity policies in Community Legal Centres (CLCs)

A number of stakeholders (but not all) from generalist and specialist CLCs referred to the Access and Equity Resource Kit (the Kit) produced by the Management Support Project for the NSW Community Legal Centres Secretariat. One Solicitor from a generalist CLC observed that it was potentially quite useful, but wondered how many CLCs ‘actually get it down off the shelf’. Another commented,

_We’ve fairly recently participated in the Access and Equity Project by [the Management Support Project] but [there] was a problem with this - not sure what it was, it wasn’t finalised._
It was suggested that despite containing potentially useful information to assist community legal centres in the development of policies and procedures to address access and equity issues, this had not occurred.

Others, however, referred to local policies implemented in their CLC. For example, one generalist CLC reported initiatives to target services for people with a psychiatric disability. This took the form of information to raise staff awareness about issues such as barriers to access, stigma, communication, taking instructions, and discriminatory practice. The extent to which this information was translated into accountable policy is unknown.

Specialist CLCs referred to policies that defined who the client is (a person with a disability rather than a carer or advocate) and client agreements, outlined casework aims and objectives, and included:
- an inclusion policy - defining concepts of inclusion and exclusion and the implications for people with disabilities;
- a language policy - defining language that reflects respect for the rights and dignity of people with disabilities; and
- a service and access policy - defining principles of inclusive service provision, strategies for access and participation, and confidentiality, complaints and grievance procedures.

**NSW Police Service Disability Action Plan**

Three stakeholders referred to initiatives relating to a Disability Action Plan by the NSW Police Service, which was in draft at the time of the interviews. It was overseen by a coordinator and steering committee of senior managers across the service, all of whom had participated in disability awareness training involving people with disabilities.

The Disability Action Plan was based on a number of initiatives including individual and group consultations held with representatives from peak disability groups, physical access audits of police buildings and commonly used public buildings, and a survey of participation by people with disabilities on police committees. Members of the committee participated in forums with the Attorney General’s Department and peak disability groups to discuss criminal justice processes and practice, and their effect on people with disabilities. The committee also consulted

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about Memorandums of Agreement with other services regarding work with people with disabilities.

A survey of existing policies and procedures related to working with people with disabilities, which were reportedly incorporated into a range of codes of conduct and resource manuals, was also undertaken. For example, ‘Policing Issues and Practice Journal’ includes discussions of issues such as psychiatric disability and various communication strategies. The ‘NSW Police Service Handbook’ also included sections on intellectual disability and psychiatric disability and the ‘1998 Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)’ included practice guidelines and procedures involving ‘vulnerable persons’ in custody.

Stakeholders involved in developing the plan were in the process of identifying where disability-related issues were covered in training for police. It was observed (by one stakeholder) that existing courses at the Police Academy included training on disability issues and these tended to concentrate on intellectual and psychiatric disability, with an emphasis on custodial issues. Stakeholders from other parts of the justice system questioned whether disability awareness training was available to police officers.

While work with suspects and offenders is obviously an operational priority, stakeholders noted that, overall, there was little information or training regarding working with people with disabilities as victims and witnesses. If disability-related issues are emphasised only in relation to people as suspected offenders, it is perhaps not surprising that people with disabilities spoke in interviews about negative responses from police.

**Attorney General’s Disability Strategic Plan**

The majority of those who referred to an existing disability strategic plan were stakeholders from the Attorney General’s Department. The Department established its Disability Strategic Plan in 1997. At the time of interview, an upcoming review would be identifying priorities for the second stage of development including physical access issues, ongoing training of staff and judiciary, in-court procedures, and flexible service delivery. Guidelines regarding inclusive communication were also being developed, to apply to all Department literature. They covered the use of Plain English, font styles and formats and the use of graphics.
The Department conducted consultations with people with disabilities, front-line staff and middle managers, to inform the development of a Flexible Service Delivery Pilot Project. The 12-month Pilot Project was due to begin during 2000 and aimed to facilitate, inform and support the development of flexible service delivery strategies to be piloted at two local courts. Surveys of staff and clients in local courts will be used to evaluate the project.

**Informal vs formal policies**

At least one police officer spoke with sadness about his view of the reality of policy.

> As far as offenders [are concerned] we put them into the system and let the system work them out, but [it’s a] poor option, they don’t identify as having a disability and get a raw deal. [There is] no one and nowhere to take them. They’re left to the justice system - [it’s] poor because they’ll end up in jail (for example, they stop taking medication, [no support] and get into trouble, and get arrested). Nothing we can do. We send them for physical evaluation but this just tells the Magistrate they have a problem, but there’s still nowhere for them to go anyway. **In summary, the policy is, put them into the [custodial] system.** (Police officer)

The overwhelming majority of stakeholders said they applied ‘informal’ policies and procedures when working with people with disabilities. In doing so they relied on the person with a disability (or someone else) to disclose and make explicit their requirements. This relies on requirements being expressed in a way that all parties understand, some level of disability awareness, and the ability of the system to be able to respond appropriately as and when required.

A significant number of stakeholders felt informal policies and procedures were preferable to formal documents ‘set in concrete’. They maintained that an informal approach allowed stakeholders to respond creatively and flexibly to the needs of the individual, and resulted in staff appreciating different requirements in a practical, rather than theoretical, manner.

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* The AG Dept released the Attorney General’s Department Disability Strategic Plan 2000-2002 on 29th August 2000. The Flexible Service Delivery Project referred to was part of the Plan, and commenced in March 2001.
Where formal policies, procedures and guidelines existed they were regarded as being fixed, with no ability for review and amendment. They were discussed as limited, rather than informed, appropriate responses to service user requirements.
Some stakeholders also argued that in the absence of other training opportunities this approach provided a ‘hands-on’ learning experience. There was a sense that formal policies could undermine professional independence and practice. In these situations, formal policy was perceived to reflect a centralised control agenda, rather than localised service delivery issues.

....It’s a reactive situation because we have no training....
[The staff] may be aware but [we’re] not necessarily in a position to do something....At the moment, [we’re] not asking people with disabilities what they need. (Clerk of Court)

Complaints handlers have a manual and a training program regarding offering services and working in an inclusive way. Because we administer the law and the law says thou shalt not discriminate, we are obviously aware of that. But [there are] no documents regarding ‘do this, do that’. [We have an] internal culture of working with alternative formats, holding meetings in accessible buildings etc. (External complaints body)

If things are brought to our attention, we need to look at what else we can do - [we’re] always open to suggestions. (Private Solicitor)

At the local level, [we] haven’t [got guidelines] because [we’ve] just reopened and no-one with a disability has yet come in. [It] may not be the best way, but I think it makes it more real for staff. (Clerk of Court/Chamber Magistrate)

Personally, I have a problem with manuals (they sit on the shelf). [It is] more effective to make it part of your professional responsibilities. (Prosecutor)
Evaluation and monitoring

The most significant issues relating to such informal policies is that they are generally ad hoc, cannot be monitored or evaluated, and are therefore lacking accountability. Most stakeholders reported no formal evaluation of existing policies, procedures and guidelines apart from central reviews of the Disability Strategic Plan at the Attorney General’s Department, which did not involve input from staff at a local level.

Where there had been informal evaluations of existing policies, procedures and guidelines, these usually involved the staff and management committees of small organisations. Apart from the small number of disability specialist organisations, few involved people with disabilities either as staff, management committee members, or advisory board members.

Most stakeholders reported that they assessed their own practice, rather than conducting or contributing to more formal, organisational or service-wide processes. This evaluation was based on individual reflection and, as such, was limited by available knowledge, resources and skills. It may not relate to wider policy initiatives and priorities, be accountable, or lead to further organisational support, options, resources and responsibility.

Policies are evaluated when workers within organisations feel there are problems in policies. Informal evaluation staff meetings, discussions, special meetings. People within [the] organisation are [the] ones who identify when a problem exists. (Generalist CLC Solicitor)

We get used to the system in which we work therefore it’s hard to recognise if the system was changed, how it could be different for people with disabilities. (Magistrate)

[Our evaluation is] complaints-based - [it’s] not very satisfactory. Just [because there are] no complaints [it] doesn’t mean there’s not a problem. (Magistrate)

[There is] value in [the] policy area formalising some of the cultural expectations developed - writing [them] down in the policy manual. Whenever you rely on individuals and cultures, obviously they can fall down. [There is] value in systematically looking at how we use inclusive
practice when working with disabilities. (External Complaints Commission)

Need for a whole of government approach

The National Disability Advisory Council held a workshop in 1999 to identify best practice models for whole of government approaches to providing goods and services for people with disabilities\(^{31}\). The workshop highlighted barriers to access for people with disabilities as including:

- fragmented and uncoordinated policies, programs and services based around jurisdictional and departmental boundaries;
- accountability based on fragmented goods and services delivery which does not meet the needs of people with disabilities and their families; and
- individual focus on goods and services delivery by each responsible area within government, without recognising the need to integrate across jurisdictions and departments.

Opportunities for change were:

- networking and sharing to bring together planning and coordination at all levels and across jurisdictions; and
- continuity between services over types, time and infrastructure and based on individuals’ needs (National Disability Advisory Council 1999).

Stakeholders identified similar barriers for people with disabilities in contact with the justice system. They pointed out that the justice system consists of interconnected processes, forums, jurisdictions and service providers and what happens in one part of the justice system often directly impacts on experiences and outcomes in another. Therefore, partnerships and strategies across a range of services, jurisdictions and government departments are needed in order to successfully implement changes in the system requires

One example is the relationship between police and the courts. It was commonly reported that police decisions about time and resources expended in investigations were often based on assessments of credibility and ‘capacity’ of the witness giving evidence in court.

> Challenging the traditional ways of the court system - [the] process, how [the] courts operate is very formal and doesn’t allow for [a] variety of ways to get information from people. It’s too strict. A combination of legislation
needs to be changed to allow evidence to be given in different ways (eg, via carers) but more than that, the attitudinal barriers have to be broken as well, and a coordinated approach to change [undertaken] in the criminal justice system....People have a view that police say we can’t take the matter further because you are not a good witness, but the [Department of Public Prosecutions] will look at it and say this is the percentage chance of succeeding. [Justice] agencies all impact on each other and nothing will be achieved unless [we are] simultaneously working together. (Police)

Stakeholders reported that budget cuts and resource issues were also significant factors in police decisions not to proceed. In addition, police may be reluctant to risk court decisions that publicly comment on the validity of police investigation and prosecution. Even so, such decisions fundamentally impact on the rights of people with disabilities who are victims of criminal offences.

The police and courts are not the only sections of the justice system that impact upon, and inform decisions, in each area. The availability and quality of support, advocacy and legal representation can crucially affect processes and outcomes at each point in the justice system, from recognising a justice issue, through to making a complaint, using alternative dispute resolution processes, and formally contesting the issue.

Sometimes [it] can be a battle between the person with a disability and their legal representative, the person with a disability feeling they’re not fully involved, [matters are] out of their control. That impacts on our process, because if they get to a hearing feeling like that, [they] may express [their frustration] in terms of the formal process when it actually may be about difficulties before. Sometimes legal representatives need to be more sensitive and more open with their clients before they get to us, so that they feel involved and understand the process. (External Complaints Commission)

It was widely acknowledged that despite such interactions and influences across the justice system there was little formal and systematic coordination between jurisdictions, departments and services. Therefore,
monitoring and evaluation was fragmented, while the few interagency protocols in place were problematic and in need of review.

Furthermore there was a need for a whole of government approach that recognises the impact of policy, practice and accountability on the lives of people with disabilities and brings together partnerships involving stakeholders both within and beyond the justice system. For example, with disability and advocacy services, the Departments of Community Services, Health and Housing, and the welfare sector.

....training/awareness in police service is not all that’s needed, ie, mental disability - we try and call Mental Health crisis team etc. and they’re a poor option! No assistance to us and less assistance to people with disabilities. (Police)

Biggest complaint - accommodation services....not been dealt with by care provider....Difficulty in getting police involved. Legal aid - sometimes they provide information. There are confusions about all the agencies - there are gaps.... (External complaints body).

....nearly every complaint I’ve come across has the general theme of uneven service delivery - no matter how many policies out there, this always seems to be the issue. Lack of standards and accountability in a general sense [across the system]. (Clerk of Court/Chamber Magistrate).

We need a whole of government approach - cops, DOCS, mental health, all need to be involved in the case management of people with disabilities. We have to train Magistrates and judges how to deal with people who are different (people with disabilities). Law Reform Commission is important. Court and shift officers, even people like them - need to be trained in disability issues. As soon as you say to someone [they’re] intellectually disabled they talk louder to them which underlines the real lack of understanding. (Police)
Chapter 6

Summary and Recommendations

Stakeholders working in the justice system and people with disabilities interviewed for this project all agreed that there were difficulties in how the justice system catered for people with disabilities. They also shared similar views about major barriers to access and participation for people with disabilities:

- Inadequate community education and information about the justice system.
- Lack of disability awareness among those working in the justice system.
- Lack of available resources and support for people with disabilities.
- Limited access to legal advice and representation.
- Inaccessible built environments.
- The time, cost and complexity involved in legal proceedings.
- Communication and language issues.
- Inflexible procedures.
- The adversarial nature of the justice system.
- The lack of consistency and continuity between services and across jurisdictions.

There were also some differences between the views expressed by people with disabilities and stakeholders working in the justice system. For example, people with disabilities clearly identified attitudinal issues as paramount in explaining barriers to access and participation. They argued that access, participation, process and practice within the justice system were defined by social and community assumptions and expectations about people with disabilities that ignore and devalue community diversity.

Such attitudes play a part in determining funding decisions, allocation of resources, and priorities for change. They contribute to real barriers for people with disabilities when they try to access services. For example, inaccessible services and built environments, reliance on limited and inappropriate forms of communication, and procedures and practices that
assume all people can and will participate in the same way. They result in people with disabilities being stigmatised, their lack of credibility and validity in the eyes of the law, the lack of consultation and communication from justice professionals, and the failure to consider legal complaints seriously and take appropriate action.

Stakeholders agreed that attitudinal issues were important in understanding barriers to access and participation for people with disabilities in contact with the justice system. However, such attitudes were seen as a consequence of more fundamental problems related to procedural requirements and limits imposed by inadequate funding and resources. For many, the link between attitudes and barriers was incidental, rather than consequential.

6.1 Strategies for change

People with disabilities and stakeholders identified a range of strategies for change in the justice system. There was broad agreement about what needed to be done, but with some differences of emphasis about how this should occur and who needed to be involved.

They agreed that change should involve:

- community education;
- training;
- increased access to legal advice and representation;
- an assessment of procedural issues;
- flexible work practices;
- systematic monitoring and evaluation;
- increased accountability;
- assessment of legislative issues;
- the involvement of people with disabilities; and
- a whole of government, multidisciplinary approach.

6.2 Justice and citizenship

Throughout this research, it was clear that people with disabilities understood ‘justice’ as a reflection of citizenship, that is, as part of a set of civil, political and social rights that people are entitled to exercise by
virtue of their ‘humanness’. Put another way, one is a citizen because one is a person. The extent to which a person can exercise citizenship relies on the extent to which they can access and participate in the community. Accordingly, society is obligated to assist and enable people with disabilities to achieve citizenship.

As citizens, people with disabilities asserted they were inherently useful and valuable members of society, however, they felt their potential and actual contributions to the community were not recognised. They were excluded and prevented from exercising their rights because of the way the justice system constructs and understands citizenship, access and participation. This overlooks social responsibilities and obligations (enshrined in legislation and human rights declarations) to ensure people with disabilities are able to participate in, contribute to, and develop the society they live in.

Almost without exception, people with disabilities reported that inclusive values and principles were not translated into action and practice. Society generally, and the justice system in particular, needed to take responsibility for meeting disability-related requirements. This was regarded as essential if ‘special needs’ were to be integrated as requirements to facilitate access and participation for citizens with disabilities.

6.3 Access and participation

The basic dilemma of social dependency is that of reconciling the responsibility of the state to ensure equality with the rights and needs of those who are dependent. The social, legal and economic policies in place at any given time in history reflect the ways that principles of justice have legitimated differential treatment. (Rioux 1994: 67)

The concept of citizenship asserted by people with disabilities is informed by a notion of equality that values history, experience and actual and potential participation. This is expressed as equality of well-being or outcomes, against which all else is measured. Equality of outcomes is citizenship in action.

This notion of equality is one of a number used to underpin attitudes and approaches to access and participation for people with disabilities. At the beginning of this report, these were described as:

- the formal theory of equality, or the equal-treatment model
• the liberal theory of equality, including both the ideals of equality of opportunity and special treatment

• the equality of outcomes or equality of well-being model.

During this research, people with disabilities and stakeholders expressed views that illustrate each of the three models.

The formal theory of equality (see 3.6 Three approaches to access and equity) is reflected in the views of some stakeholders who maintain that people with disabilities are treated no differently to anyone else in contact with the justice system. Everybody experiences difficulty when they try to access a complex and monolithic system and all are as badly off or as unequal as everyone else.

This leads to the view that differential treatment is discriminatory and unfairly advantages a minority over the majority. It is reflected in a systemic emphasis that equates 'fair' with 'the same.'

The liberal notion of equality (see 3.6 Three approaches to access and equity) recognises that people with disabilities have been historically, socially and economically disadvantaged and therefore do not participate in a 'level playing field'. Therefore, interventions that focus on equality of opportunity and specialist assistance are required to enable people with disabilities to access social institutions and participate fully, as do other citizens.

This model concentrates on getting people 'to the door'. It assumes the system operates in an inherently inclusive and fair manner and all are able to access and participate fully. It does not challenge prevailing 'norms' about access, participation and diversity in how people may achieve this. It works most effectively for those who closely resemble cultural, non-disabled, educated 'norms.'

Most stakeholders recognised the historical disadvantage experienced by people with disabilities and supported legislation designed to enhance equality of opportunity and eliminate discrimination. Most agreed with specialist services that would assist people with disabilities to gain access to social institutions within which to exercise their rights.

They suggested that information on legal rights should be available in alternative formats and Plain English, buildings and offices should be made physically accessible by providing ramps at the entrance, and they supported the use of discrimination legislation, and employment of people with disabilities as peers and colleagues.

The liberal notion of equality assumes that once a person is ‘at the door’, access and participation has been achieved. Any further difficulties are due to individual impairments (or limits) and ‘incapacity’. This translates
into projected responsibility and results in the belief that barriers can be explained by individual attributes and actions. Thus, the liberal notion of equality adds inadequacy to individual impairments, limits and 'incapacity' to explain the experiences of people with disabilities.

The onus of responsibility on an individual with a disability was repeatedly raised by people with disabilities as a core issue that created attitudinal and practical barriers for people with disabilities, and encouraged stakeholders to overlook systemic responsibilities and service obligations. For example, justice organisations and personnel expected people with disabilities to disclose a disability, explain any disability-related requirements, and to ensure their requirements were met by those responsible for service provision and delivery.

Although a liberal understanding of equality emphasises the need for legislation that is specialist and reflects diversity in the community, the assumptions contained within legislation and the way in which these were applied can have an impact on people with disabilities. Thus, legislative 'requirements' were commonly used to explain attitudinal and procedural barriers. This was evident in disability discrimination matters where there appeared to be an expectation that complainants would demonstrate discrimination had occurred before the respondent was asked to respond and conciliation investigations begun.

In discussions with stakeholders about the participation of people with disabilities in juries, while they agreed that people with disabilities should be able to participate in jury duty, they pointed out there were certain legislative requirements that needed to be met. For example, a person with a disability who required the assistance of a support person could not participate because the Jury Act permits a jury of 12 people only, and not 13. This shows a basic misunderstanding of the role of the support person. Some stakeholders recognised that the reported Jury Act requirement to produce a medical certificate in order to 'prove' a disability was 'stupid, but parliament says we have to.'

Finally, the liberal notion of equality was exemplified by the expressed views of stakeholders who accepted unquestioningly the reliance of the justice system on certain forms of communication and participation as inherently more valid, credible and just, than disability-related alternatives. Systemic assumptions about visual evidence, verbal communication and written documentation, were all accepted as necessarily legitimate tests of legal weight. Thus, a person with a vision impairment was not perceived as a credible 'eye witness', while a person who communicated non-verbally was assessed as unable to pursue legal action because he could not 'speak for himself.'
Procedural requirements to lodge and document action in a written form did not consider the impact on people with disabilities who do not read, write, or understand print matter. It was similarly evident in the reliance on structured questioning and interviewing techniques that did not consider the variety of methods used by people with cognitive disabilities to remember, relate and understand events.

The equality of outcomes model (see 3.6 Three approaches to access and equity) maintains that equality will only be fully realised when a society enables its citizens to express choice, self-determination and participation. This involves a fundamental reassessment of social norms, processes, and resources and requires integrated, practical and specialist assistance to facilitate access and participation. Equality is measured by the extent to which these outcomes are achieved.

Equality of outcomes may be achieved by employing a political strategy of universalism, which requires policy that accepts diversity as normal, and focuses on enabling associated access and participation requirements (Zola 1999: 113). This approach is evident in the assertion that people with disabilities have the same citizenship rights as other members of society and, on that basis, are entitled to assistance to exercise them.

It is illustrated when people with disabilities emphasise the responsibility of society and its institutions to recognise and provide for disability-related requirements and facilitate access for the wider community. And when people with disabilities observe that the quality and efficiency of process and practice will be much improved when the system recognises diversity as normal and practically enables participation on that basis.

Finally, equality of outcomes is evident in the emphasis on involving and including people with disabilities in the design, development and implementation of policy and practice.

6.4 Areas of reform

Equality of outcomes and universal access underpin the following discussion of possible areas for reform. Suggestions made by people with disabilities and stakeholders include:

6.4.1 Community education

People with disabilities asserted their rights to knowledge, choice, and self-determination and believed it was incumbent on the justice system to
provide and deliver information and education about these rights in an accessible and appropriate manner. Given that people with disabilities are included in the population it is required to serve, it was also incumbent on the system to practically assist and support them to use the information and knowledge gained to exercise their rights.

Recommendations:

- *Education and training about the justice system aimed at people with disabilities.*
- *Education and training about the justice system aimed at people who informally assist people with disabilities.*
- *Increased advertising of existing services and resources for people with disabilities.*
- *Provision of accurate information to people with disabilities about legal rights, procedural criteria, limits to the law and alternative options.*
- *Provision of information in accessible formats.*

6.4.2 Training

Training for those working within the justice system was identified as a key strategy in addressing barriers to access and participation.

Disability awareness training should be mandatory, universal, and ongoing across all areas and jurisdictions in and it should be linked to ‘core’ business, integrated within management structures, and regularly reviewed. It should have a skills-focus, particularly in the areas of working with third parties and in the use of alternative formats, communication requirements and assistive technologies.

Training about the justice system should be also be a requirement for professional support persons, advocates, interpreters and staff in disability services and anyone else employed to assist people with disabilities.

All training should be informed by people with disabilities (see also 6.4.3 Increased access to legal advice and representation).
Recommendations:

• *Universal disability awareness education and training for all personnel in the justice system.*

• *Mandatory and ongoing training requirements for all personnel in the justice system.*

• *Disability awareness training informed by people with disabilities.*

• *Skills-based training on working with support persons, advocates and interpreters.*

• *Skills-based training in the use of alternative formats, communications and assistive technology.*

• *Training about the justice system for professional support persons, advocates, interpreters, and staff in disability services.*

6.4.3 Increased access to legal advice and representation

Publicly funded legal representation was perceived as critically under-resourced, with services of ‘last-resort’ increasingly being regarded as services of ‘no resort’ at all. Community legal centres and legal aid services require increased funding and resources and there was a need for increased structured provision of pro bono representation, supported by the Law Society of NSW and the New South Wales Bar Association. Existing specialist services were clearly considered unable to address the high levels of unmet need among people with disabilities and the establishment of a new fully-funded, skilled and specialist advocacy and legal advice centre was recommended by people with disabilities. Stakeholders agreed, generally because people with disabilities had ‘special needs’ best met by ‘special’ services.

Such new specialist services could play a pivotal role in education, training, and the development of new strategies and partnerships in the transition towards universally accessible services.

…there will always be a place for distinct programs that address particular interests and needs. However, these.... should not be in place because we cannot rise to the challenge of addressing the systemic barriers and attitudinal barriers that continue to marginalise people, particularly people with disabilities.

(Westland 1999: 3-5)
It was recommended that all staff in private and public legal services undergo mandatory, skills-based disability awareness training. This was particularly important in community legal centres where volunteers and students support advice services. It was also important for counter staff in legal aid services and private solicitors fulfilling a legal aid duty solicitor role in criminal courts.

Advice centres and legal services provide an early formal point of contact with the justice system. It was therefore important that such services emphasise ‘front-end’ engagement with clients with disabilities. This should be supported by clear client agreements (in accessible formats), skills-based training, and formally structured professional supervision and review.

Recommendations:

- *Increased funding and resources for community legal centres and legal aid services.*
- *Increase structured provision of pro bono representation.*
- *Establish new disability-specialist advocacy and legal centres.*
- *Disability awareness training and skills development for all staff.*
- *Emphasis on front-end engagement, with professional supervision and support.*

6.4.4 Physical access and the built environment

Physical access involves people with disabilities being able to get to, enter and freely move around with a building. It covers internal design, layout, and surfaces. In general both internal and external access in the built environment in the justice system was believed to be generally inadequate. Where it addressed access requirements for people with physical disabilities who use a wheelchair for example, it did not adequately consider the range of requirements of people with other disabilities.

Concepts of physical access need to be broadened to address external and internal access requirements for people with sensory disabilities, intellectual and cognitive disabilities, and mobility impairments. Agreed minimum standards of physical access, signage and design, are required for all justice settings and their implementation should be supported by staff training, practice guidelines on access issues, and established arrangements with accessible, alternative venues.
Some forms of technology require structured provision within the built environment and there was limited provision and access to communications and assistive technology resources to facilitate communication and participation for some people with disabilities. There also appeared to be little information on available options, limited understanding of how they could be used, and little practical experience of available technology.

An agreed and coordinated minimum provision of such technology across the justice system is necessary and this should be supported by staff training on communications and assistive technology, practice guidelines on their use, and established arrangements with alternative venues, available resources and support services.

Physical access provision involves both attitudinal and structural issues. Inadequate provision of physical access is generally explained by stakeholders across the justice system as ‘capital works’ and resource issues. It is an explanation that encourages small justice services and agencies to assume provision of physical access is largely beyond their resources.

All services across the justice system should be required to conduct physical access audits and assess existing barriers to access and participation for people with disabilities. Audits should be informed by training in access issues and they should be required to develop a framework for implementation and review.

Funding and resource allocations should be subject to systematic review of such access audits and frameworks for implementation (see also 6.4.7 Monitoring and evaluation issues, below).

Recommendations:

- **Physical access provision that recognises the range of disability-related access requirements.**
- **Physical access provision that recognises external and internal access requirements.**
- **Agreed and coordinated minimum standards of physical access, design and signage, across the justice system.**
- **Agreed and coordinated minimum provision of communications and assistive technology across the justice system.**
- **Requirement to audit access provision and review implementation, as part of resource and funding allocations.**
6.4.5 Procedural issues

Specialist disability policies are needed to address systemic issues relating to the responsibilities of service providers and the rights and requirements of service users. These would detail expectations, guidelines and training needs. They would provide a framework for measuring accountability, a focus for structured reviews and ongoing monitoring and evaluation and they should be incorporated within mainstream service provision and delivery.

Realistic practice guidelines would be informed by local contexts, available resources, and recognised expertise. They would assist staff in flexible service provision and delivery for people with disabilities and clearly define the integral role and status of support persons, advocates and interpreters across all jurisdictions. They would be supported by information and training on methods of working with third parties and available resources to assist staff.

Such policies, policies and guidelines would involve producing and communicating in accessible formats information about professional boundaries, negotiated client agreements, procedural requirements and allow any attitudinal bias camouflaged as procedural requirement to be challenged through continuing professional review.

The justice system operates under enormous time, money and resource pressures, which influence professional practice and judicial processes. These pressures were acknowledged as currently impinging on disability-related issues of communication, participation and understanding. Therefore flexibility in predetermined processes and timeframes is required and this should be clearly outlined as an integral part of policies, procedures, and workload management (see also 6.4.6 Flexible service delivery, below).

A small number of stakeholders suggested the appointment of designated personnel, trained and skilled in disability-related issues, who could offer specialist support and assistance to staff and people with disabilities across the justice system. They would be located regionally and resourced and supported from centralised organisations. However, there were concerns that a regional disability ‘specialist’ may not be able to address the high level of need and such a role may actually reinforce perceptions of disability issues as additional and different and discourage staff from integrating new knowledge, skills and resources into existing practice because they may refer people with disabilities to the ‘disability person’, rather than engage with them themselves.
It was considered essential that specialist disability policies, procedures and guidelines be coordinated across different justice organisations and services to ensure a consistent and complementary outcome.

Recommendations:

- **Development of specialist disability policies and procedures incorporated within mainstream service provision across the justice system.**
- **Development of realistic practice guidelines informed by local contexts, resources and expertise.**
- **Coordination of specialist disability policies, procedures and guidelines, across the justice system.**
- **Clear professional boundaries and negotiated client agreements available in accessible formats.**
- **Need to challenge attitudinal bias camouflaged as procedural requirement.**
- **Integral recognition of the role, status and use of support persons, advocates and interpreters.**
- **Greater flexibility in predetermined processes and timeframes.**
- **Designated personnel trained and skilled in disability issues, resources and supported by justice organisations.**

**6.4.6 Flexible service delivery**

Flexible service delivery approaches fundamentally rely on readily available resources and supports. This is particularly important in regional and rural areas where on-site services may have limited resources and few other available options. Commitment to flexible service delivery approaches should therefore be supported by an increase in resources and support, so that services are consistently available across sites.

Flexible service delivery should also be supported by creative interagency networking and liaison with other support services. Some forms of flexible service delivery may involve skills and resources other services can offer (such as access to technology, advice on alternative formats, and access to support persons and advocates). Disability services, government agencies and other justice organisations may all be useful resources. Such arrangements should be negotiated and
agreed in advance, so that protocols are clear, staff are aware, and respective roles are identified.

Given the high levels of unmet need generally reported throughout this research, increased resources and supports for people with disabilities are clearly required. Increased provision and community resources would additionally underpin flexible service delivery frameworks across the justice system.

Flexible practice and service delivery were identified as key strategies to facilitate access and participation for people with disabilities. This should be advertised, proactive, and incorporated within mainstream service delivery. Flexible approaches should be reflected in policies, procedures, guidelines and be supported by trained and skilled staff, available to respond on-site and as required.

They require the identification of disability-related requirements, which means it is important that justice organisations and services ask people about disability-related requirements, without making assumptions about what may or may not be required. Questions about disability status and requirements need to be asked in the context of needing to ensure they are effectively providing services to all sections of the community in an appropriate and accessible manner. This requires a framework of available resources, supports, and flexible approaches to meet such requirements once they are identified.

Methods of giving evidence, making statements, and lodging complaints, should all reflect a flexible approach. This requires recognition of the variety of ways a people may communicate and participate. It acknowledges flexibility as a pre-requisite to effective participation, rather than as a deviation from a procedural and administrative norm.

Support persons, advocates and interpreters should be available to people with disabilities at all stages of contact with the justice system whether these are informal contacts or formal judicial proceedings. Their availability should be coordinated and consistent across different justice settings, their role and status clearly defined and understood, and staff should be equipped to work with them to enhance the quality of the process.

Policies, procedures and guidelines are required that recognise the need for flexible timeframes when working with people with disabilities to enhance communication and understanding for all concerned. This particularly applies to legal aid duty solicitor appointments prior to court and may help to avoid difficulties at a later stage. Wherever possible, flexibility should be employed when arranging appointment times. When
this is not possible, staff should be assisted to arrange alternative appointments.

Flexible service delivery should be available in formal forums such as courts and tribunal hearings. It is important that such provisions are not overridden by assumptions and practicalities on the day. For example, physical access in court and hearing rooms may be made ineffective by the practical need to accommodate large numbers of people on the day. Similarly, the routine practice of ‘calling’ people into court overlooks the requirements of people who are deaf or hearing impaired. Placement and position within court and hearing rooms also affect access and participation. It should not be assumed that previously ‘customary’ and ‘practical’ arrangements will enhance participation for all.

If the aim is to facilitate participation, then plain English, clear symbols and alternative formats should be employed as an integral element in any form of communication and participation in a justice setting. This applies not only to information and communication about legal rights, options and support, but also to signage, documentation, communication between individuals, and throughout legal processes. They should be coordinated across different services and jurisdictions so that their use is consistent, complementary and clearly understood.

There is a need to increase the provision, advertisement and use of TTYs (for people who are deaf or hearing impaired) in all services across the justice system. Many legal advice and advocacy services rely on telephone help lines for initial contact and for people living in regional and remote areas these might be their only way of sourcing information. Regular mandatory training in the use of TTYs is required for staff.

Other forms of communications and assistive technology should also be provided and advertised.

Recommendations:

- **Introduce flexible work practices.**
- **Proactively offer and advertise flexible work practices and associated resources.**
- **Provide appropriately trained and skilled staff to respond on-site and as required.**
- **Identify disability-related requirements.**
- **Alternative ways of giving evidence, making statements, lodging and making complaints.**
**Access and Participation for People with Disabilities in Contact with the Justice System**

- **Clear and agreed definitions and role of support persons, advocates and interpreters.**
- **Increase availability of support persons, advocates and interpreters at all stages of contact.**
- **Build in flexible timeframes.**
- **Flexible approaches to physical access issues.**
- **Use of plain English, symbols and alternative formats.**
- **Increase provision and use of TTYs, communications and assistive technology.**
- **Increase resources to facilitate flexible service delivery at all stages of contact, and particularly in rural and regional areas.**
- **Increase community and support resources.**

**6.4.7 Monitoring and evaluation issues**

Monitoring and evaluation of disability-related issues in service provision and delivery, based on an established framework of review and implementation, should be professionally accountable and be linked to management, supervision and the definition of roles and responsibilities. It should be a funding requirement, with funding bodies playing a pivotal role in reviewing strategies for implementation and assessing change.

Few people working with in the justice system were aware of systematic monitoring and evaluation of disability-related issues. This was not regarded as a priority even though there was strong support for organisations to identify and address barriers to access and participation for people with disabilities.

As part of their commitment to monitoring and evaluation, justice agencies and services should seek feedback from people with disabilities, disability organisations and community agencies about ways to improve service provision and delivery. For example, through community consultations and forums with people with disabilities and ongoing assistance from people with disabilities in management committees, service user groups, advisory bodies and in policy and review processes.

Monitoring and evaluation would involve surveys of service users for feedback and these should be linked to service objectives and strategies to ensure access and participation for people with disabilities.
Recommendations:

- **Systematic monitoring and evaluation of disability issues across the justice system, to identify barriers to access and participation for people with disabilities.**
- **Monitoring and evaluation that involves ongoing surveys of service users for feedback.**
- **Services and organisations across the justice system seek informal and formal feedback from people with disabilities.**
- **Ongoing monitoring and evaluation of service provision and delivery.**
- **Monitoring and evaluation based on an established and accountable framework of review and implementation.**

### 6.4.8 Accountability issues

People with disabilities regarded the justice system as primarily self-regulating, and therefore effectively unaccountable. This was particularly reported in relation to lawyers and members of the judiciary, and was informed by a range of negative experiences, while some stakeholders maintained that people with disabilities misunderstood respective rights and responsibilities, and pursued inappropriate avenues of complaint. They maintained the system was accountable, if only people did things in the right way.

Accountability mechanisms should be widely advertised, in all literature and in accessible formats, and a person’s rights and the option to make a complaint should be discussed during the initial stages of contact so they are clearly understood. This information should continue to be available on an ongoing basis.

Such mechanisms should be:

- accessible (for example, clearly advertised at point of contact; complaints that can be lodged in alternative formats);
- transparent (for example, clear information, guidelines, and communication; regular reviews of mechanisms);
- responsive (for example, a telephone line that is not constantly engaged; unprompted and regular updates on progress);
- independent (for example, lawyers not investigating lawyers); and
- external (for example, not regulated by a professional body).
There should be appropriate resources so that people with disabilities who seek redress felt supported and assisted throughout the process.

Recommendations:

- **Perceptions of self-regulation and lack of accountability should be recognised and addressed.**
- **A positive response mechanism.**
- **Accountability mechanisms should be accessible, transparent, responsive, independent and external.**
- **Accountability mechanisms should be advertised widely, and routinely, in accessible formats.**
- **Accountability mechanisms should be supported by appropriate resource levels.**

**6.4.9 Legislative issues**

Given the adversarial culture of the justice system, it is important that legislation includes clear guidelines on access and participation issues for people with disabilities. This is especially important in areas of civil litigation that increasingly rely on processes of conciliation and alternative dispute resolution procedures.

There is also a need for legislation to include clear guidelines about supports and assistance to facilitate access and participation for people with disabilities. Legislation such as the NSW Evidence Act 1995 currently contains references to interpreters, but the role and status of an interpreter remains undefined. Advocates and support persons are not mentioned at all, and there is only a vague mention of alternative forms of participation. The Act was used by stakeholders to explain why disability-related requirements for access and participation could not be addressed.

Legislation needs to clearly endorse the use of third parties, accessible formats and alternative modes of communication and participation as integral parts of the process to enhance the quality of proceedings for all concerned. It is not sufficient to rely on policies developed from the legislation to reflect this provision, nor is it acceptable to rely on discretionary decisions, available resources, inclination and awareness, to recognise disability-related requirements. They need to be acknowledged within legislation as integral to processes that seek, by their very purpose, to address access and participation issues.
References to disability status in different forms of legislation are confusing and inconsistent. They are primarily medically driven, and focus on impairment and incapacity, irrespective of the context of the legislation. Definitions should reflect social and cultural contexts, and their impact on access and participation for people with disabilities.

People with disabilities repeatedly stated the need for clear, simple, and relevant information about the process and application of legislation, particularly in relation to disability discrimination complaints. There was commonly reported confusion about which legislation is most appropriate and why (State, Federal, Industrial, Workers’ Compensation), the process involved, and the roles and responsibilities of the various participants. This is exacerbated by the reported lack of disability discrimination expertise in the general legal profession, limited services and under-resourcing of specialist discrimination legal centres, as well as a failure to translate non-adversarial legislative values and principles, into practice.

Clear information is required to educate people with disabilities and professionals in the justice system about the use and limits of legislation. This should be widely distributed in accessible formats. Publishing information on a website is insufficient, as many people do not have access to the internet and email facilities.

Recommendations:

- **Agreed definitions of disability, included in legislation.** Definitions should not focus on a medical model view of individual impairment, but should also reflect the impact of social and cultural contexts.

- **Clear, simple and relevant information about the application and limits of legislation.**

- **Legislation that involves alternative dispute resolution processes needs to include clear guidelines relating to access and participation issues for people with disabilities.**

- **Legislation needs to include guidelines that define the use of accessible formats, support persons, advocates and interpreters, as integral parts of the process.**

6.4.10 Involving people with disabilities

People with disabilities have a range of personal and professional skills and expertise to offer justice organisations and agencies. This applies to
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all people with disabilities and it is crucial that services and organisations recognise the value of their contributions and facilitate their participation.

Justice organisations and agencies should therefore intrinsically and formally include people with disabilities in needs assessment, service design, monitoring and evaluation, recognise and employ people with disabilities as professional educators, trainers, advisers and consultants, and actively involve people with disabilities in management committees, advisory forums, and review bodies.

This input of people with disabilities should be validated with appropriate resources, supports, and access provisions.

Recommendations:

- **Recognising personal and professional skills and expertise.**

- **Including people with disabilities in needs assessments, service design, monitoring and evaluation.**

- **Engaging professional educators, trainers, advisers and consultants with disabilities.**

- **Including people with disabilities as members of management committees, advisory forums, and review bodies.**

- **The input and contributions of people with disabilities should be supported by appropriate resources, assistance and access provisions.**

### 6.4.11 Whole of Government approach

A whole of government approach - involving social institutions, legislators, policy makers and funding bodies - is needed to ensure a coordinated and consistent approach across all departments and jurisdictions in the justice system. This is essential to the provision of a reform framework in which to effectively address barriers to access and participation for people with disabilities. Such an approach would underpin notions of citizenship, universal access and participation and ensure recommendations and strategies are neither piecemeal nor short-term.

A significant number of people with disabilities maintained that the barriers they encountered could be avoided given awareness, forethought, strategic planning and commitment. This applied to individuals, the organisation, and the system as a whole. They felt that
individuals and decision-makers in the justice system often overestimated the level of difficulty involved in addressing barriers to access and participation.

With appropriate knowledge, understanding, skills and resources, they maintained that positive change was possible and that this would include:

- streamlining of processes, protocols, referral arrangements;
- formalising information and skills-sharing;
- coordinated service provision and delivery across departments and jurisdictions;
- flagging from one jurisdiction to the next; and
- networking of specialist services.

Moreover, they pointed out that the benefits of addressing these issues far outweighed the difficulties involved. A more inclusive system would work to enhance the quality of justice processes and practice. It would ensure time and resources were used more effectively to deliver outcomes for all, avoid unnecessary delays, reduce levels of frustration, facilitate clear access, communication and participation, and improve accountability, evaluation and strategic planning.

Large capital outlays are not necessarily required nor should such changes be perceived as too difficult.

Recommendations:

- *That the processes, protocols, referral arrangements be streamlined.*
- *That information and skills-sharing within the justice system be formalised.*
- *That the service provision and delivery to people with disabilities, across departments and jurisdictions, be coordinated.*
- *That a process of flagging from one jurisdiction to the next be implemented.*
- *That a system of networking of specialist services be developed and implemented.*
Appendices

Appendix A: Invitation to participate

Disability Council of NSW Official Adviser to the NSW Government
LEVEL 21, 323 CASTLEREAGH ST, SYDNEY NSW 2000
The Justice System Research Project

Have you had problems with the legal system?

Have you got something you’d like to say about:
• making a complaint?
• being listened to?
• finding a lawyer?
• using community legal centres?
• going to police?
• using the courts?
• going to a tribunal or hearing?

My name is Susan Rudland and I work for the Disability Council of NSW. The Disability Council is made up of people with all kinds of disabilities and some people who work with people with disabilities. The Council tells the NSW Government about things that are important for people with disabilities. We have been funded by the Law Foundation of NSW to look at problems people have using the legal system.

We are asking people with disabilities in New South Wales about their experiences and what needs to change. We will not use anyone’s names or any information that tells other people who we have talked to. I can meet you or we can use the telephone and TTY. We are offering to pay people $25.00 for their time and expenses.

Interested? For more information, please feel free to contact me:
FREECALL NO (VOICE/TTY): 1800 044 848
PH/TTY: (02) 9211 2866
FAX: (02) 9211 2271
EMAIL: info@discoun.nsw.gov.au
Appendix B: Organisations contacted to publicise project

- Acoustic Neuroma Association of NSW
- Australian Association of the Deaf (AAD)
- Australian Quadriplegic Association (AQA)
- Blind Citizens of Australia
- Brain Injury Association of NSW (BIA)
- Council for Intellectual Disability (CID)
- Disability Advisory Council, NSW Attorney General's Department
- Disability Advocacy Network (DAN)
- Disability Discrimination Legal Centre (DDLC)
- Housing Connection
- Indigenous Social Justice Association
- Intellectual Disability Rights Service (IDRS)
- Macarthur District Disabled Person's Resource Service
- Multicultural Disability Advocacy Association (MDAA)
- Muscular Dystrophy Association of NSW
- Nepean Area Disabilities Organisation (NADO)
- NSW Consumer Consultant Forum
- North Shore Consumer Advocacy Group
- Northcott Society
- OZADVOCACY (internet mailing list)
- Paraplegic and Quadriplegic Association
- Penrith Disabilities Resource Centre
- People with Disabilities (PWD)
- Physical Disability Council of NSW
- Post-Polio Network of NSW
- Radio for the Print Handicapped
- Self Advocacy
- Self Help for the Hard of Hearing
- Sunshine Homes
- Supported Living
- Spastic Centre Consumer Action Group
Appendix C: Interview consent form

Disability Council of NSW Official Adviser to the NSW Government
LEVEL 21, 323 CASTLEREAGH ST, SYDNEY NSW 2000

If you would like to talk to me about your views and experiences of the legal system, please sign your name below. You can tear this page off and return it to me at the Disability Council at the above address.

Date:_________

I, ________________________________ (name), agree to be interviewed by Susan Rudland, of the Disability Council of NSW, as part of the Justice System Research Project.

The Disability Council of NSW agrees that they will not use names or any other information that will tell people who they have spoken to.
Appendix D - Pilot interview prompts

- Demographics (age, sex, race/ethnicity, home area, living with, employment status, disability, support networks and resources eg support person/advocacy/family?)
- Contact (date of first contact, length of contact, response to contact, subsequent actions/processes/consequences)
- How did they make contact, who made the contact
- If initial contact not made by person with a disability, when and how did they get involved?
- Presenting issue - defined by whom? (Did the presenting issue change over time - why and how?)
- What did the person with a disability want?
- What did they get?
- Outcomes - positive/negative (defined by whom?)
- Where else had person with a disability gone re this issue?(before/during/after)
- Who else was involved, and why
- Any apparent barriers to access and participation - points of potential difficulty/opportunities for change?
- What could have been done differently - how, why and with whom?
- What's happened since?
**Appendix E - Scenarios & excerpts from interviews with people with disabilities, used during telephone interviews with people working in the justice system.**

Personal details have been changed, to protect the identity of individuals.

**Advocacy and support**

She had previously phoned [an advocacy body] for help, but thinks ‘*they thought I was too bright.*’ She prepares carefully for all discussions, but this can mean that people assume she has no or few difficulties, and therefore do not qualify for their help. *(person with an acquired brain injury)*

‘*If I ring them up and ask for help with writing a letter, she says its not her job and she knows I can’t read or write.*’ *(person with an intellectual disability)*

‘*My advocate left, new one allocated. Then informed couldn’t continue advocacy. [Advocacy organisation] say I’m able to be advocate myself. [But] formally told case effectively closed because [respondents] no longer involved [respondents declined to participate in conciliation]. [Advocates] have certain criteria – they choose what they like – make a moral or professional judgement. As well, underlying barrier – lack of resources and funding to take all cases.*’ *(person with a vision impairment)*

‘*Advocacy doesn’t go far enough - we all thought it would be, but it doesn’t go far enough. It needs legal, para-professional legal people to help us. Legal knowledge would empower us....Advocacy should include information, education, and legal functions. It should not involve a runaround from services that say we don’t do this system’s stuff, only individual.*’ *(person with a psychiatric disability)*

She appreciated the support of the advocate. But the advocate was not able to get all the answers she wanted. ‘*If she was a lawyer, she would have had the status and prestige to get the answers. That’s what it was about, status.*’ She felt that the respondents were able to dodge certain issues, because of this. The respondents’ lawyer ‘*stepped in at certain times, on technicalities [re employment].*’ There is an implication that the lawyer was the ‘authority’ in the room. *(person with a vision impairment)*
‘I’ll phone [the advocacy organisation] and ask for [the advocate], and she will ask what it’s about, if [the advocate is] not there, and then if it’s not really serious, she’ll say what I should do but if it is, then she’ll try to get [the advocate] to see me. I know [the advocate] is really busy.’ (person with an intellectual disability)

‘Many people with disabilities don’t know about their rights, legislative changes and services [are] not resourced to keep people up to date’. (person with a psychiatric disability)

‘There are blocks for people with disabilities - you phone up this organisation, they can’t help you, they don’t have enough resources, you have the ‘wrong’ kind of disability, they don’t know. You go round in circles. It limits your options.’ (person with a physical disability)

On the basis of existing funding, services are rarely in a position to address needs. ‘If we are going to have advocates, we need competent and confident advocates, people who are confident, not nervous, not hesitant. People who are efficient, who follow up. ‘ (person with a vision impairment)

Sometimes she needs help on the weekend, but the service is not open then. In that case she goes to the Salvos for informal advice. ‘Big gap, hardly any services on weekends.’ (person with an intellectual disability)

Making a complaint to an external body

Scenario:

Tori is in her 20s. She and her carer, Clare, share a house. She comes from an English speaking background. Tori has a psychiatric disability.

The health service Tori attended instructed her therapist to terminate treatment and transfer it elsewhere. This was justified on the basis of limited resources and changes in the allocation of cases. There were also concerns at the open-ended nature of the treatment, the frequency of therapy sessions, and her eligibility to receive treatment in a particular service context.

Her therapist, GP, local MP and a disability advocacy organisation all wrote to the service indicating that transferring her treatment effectively ended her access to therapy. There were no other specialist therapists offering free treatment, she could not afford to pay private fees, and to
cease at this point placed her at extreme risk. The news came when Tori was experiencing seizures and an increasing vulnerability to self-harm.

The advocacy organisation had assisted Tori previously with another issue. They were going through ‘enormous transition and couldn’t follow through.’ Tori and Clare decided it was better for them to pursue it on their own. However, the advocate did tell them to approach an external complaints body.

Tori lodged a formal complaint with the complaints body, ‘even though they tell you it takes too long.’ She maintained that if the service went ahead, they would be breaching their duty of care by terminating treatment halfway though to her acknowledged detriment and risk to her wellbeing. She requested upgraded, rather than diminished, services for people with the particular disorder. Moreover, she requested that her name be kept confidential when dealing with others apart from her therapist. She also asked that future contact be with Clare as her carer, as she found discussion of the issue too distressing.

Tori was allocated a worker from the external complaints body. ‘She spoke to the service, we spoke to her, it dragged on and on.’

Several weeks later, Tori received a letter from the service. The letter noted that no request for review and investigation had been received directly from Tori, although treatment records clearly indicated Tori had authorised Clare to act as her advocate in all contacts regarding this matter.

The service was not prepared to change the decision. Tori’s request regarding the upgrade of services for people with [the disorder], had been forwarded to another department ‘with your name and identifying details removed’.

Tori collapsed, and in doing so sustained physical injuries that kept her confined to bed for several weeks. Her psychiatric condition deteriorated severely, with episodes of self-harm and attempted suicide. She was heavily sedated.

Clare says the service ignored all the reports attesting to the risk to Tori’s wellbeing if treatment ceased. She believes they breached their duty of care under the Health Services Act 1997 and were negligent by knowingly endangering Tori’s life.
Clare researched the legislation governing the operation of the complaints body, and understood ‘it was their responsibility to pursue that breach of duty of care and negligence’. However, the complaints body said ‘their concern was about whether Tori was to continue having treatment in future.’ In doing so, Clare feels they ignored the negligence and duty of care issues.

Five months after the complaint was lodged, conciliation was suggested. This took place two months later, and was attended by the senior manager who had initially made the decision to terminate treatment. Clare felt it was inappropriate that he attended as the service representative, given his intimate level of involvement in the issue.

Clare represented Tori at the conciliation. The first session took 4 hours, during which the service refused to move from the original position. They agreed to meet the next day. Overnight, Clare did some research and prepared a submission, outlining specific breaches to the service duty of care as indicated by the relevant acts and codes of conduct. On the basis of this submission, Clare told the manager they would take legal action unless the service reconsidered. The service agreed to seek a second opinion about Tori’s treatment needs.

This was delivered 2 months later and supported the recommendations and concerns of Tori’s therapist. It unequivocally recommended that treatment continue unchanged. One month later, the service agreed to treatment continuing for a further 2 - 3 years, subject to regular review. It had taken 12 months to reach this agreement.

Tori says ‘[The] personal effect on me has been tremendous. [This was] brought to their attention and ignored. [You are] invalidated, a 2nd class citizen, as if you don’t have rights.’

**Making a complaint - other experiences**

Re making a complaint about a Solicitor - The assumption is that ‘no Solicitor does anything illegal....there’s no control mechanism, and [the system] is open to exploitation, with fearful consequences.’” (person with an acquired brain injury)

Re using internal review and complaints mechanisms to protect person from ongoing resident on resident violence in a group home - Elaine thinks ‘DOCS might have felt, in the scheme of things, it was probably a minor thing.’ (parents of a person with an intellectual disability)
Making a complaint in a health service - ‘They have the power to interpret and they have to decide what is valid and what isn’t – who can complain and who can’t.’ (person with a psychiatric disability)

‘Another incident – driver forcibly grabbed walking stick and flung it down the front – assault – Taxi Complaints Service pulled him in for interview – said he was frightened she was going to attack him – they believed him – him 35 and me 78’. (person with a physical disability)

She has been pursuing a complaint against a health service for breach of confidentiality, approaching several bodies for assistance. Each one has referred her on to another, including the police, a Legal Aid Solicitor, HREOC, the Privacy Commission, the HCCC, and the Health Department. '[The HCCC] wrote back and said couldn't deal with it, for the Health Department to deal with, which agreed with police. Was confused because weren't they a complaints body?.. Rang the Health Dept phone number and they said to go back to local health service..[I was] furious because it was their workers who’d done it, and they wouldn't admit it.’ (person with a psychiatric disability)

She wrote to the health service to lodge a formal complaint of breach of confidentiality. It was several months before the service responded. They wrote to say they noted the seriousness of the complaint, however a lengthy investigation had concluded no breach had occurred. ‘Surprised I never received a phone call about the investigation – hoped they would talk to me directly to give me answer and then formally in writing. Would have liked a little more involvement.’ (person with a psychiatric disability)

‘I asked for the forms, filled them in, and sent them back. They asked me to be more specific. [Sent back] a huge, handwritten thing [hard work to pull together and write up]. 8 or 9 months later, I got a phone call saying the Barrister hadn’t responded and they would be asking him again soon. [Barrister still didn’t respond - Legal Services Commission asked him again]. Then he finally responded, and I sent an answer back to his response - no further word. It was getting on for two years, and then I found out it had been passed to a person at the Law Society because Legal Services Commission only deals with some cases - those of a certain age are passed to Law Society. No further word since last year.’ (person with an acquired brain injury)

She phoned a private solicitor, who defined the breach of confidentiality as a personal injury compensation matter. A specialist legal firm agreed.
‘[They said] it was a crime, [I] should take [them] to court.’ They estimated this would involve around $40,000 in legal costs. K was concerned about the cost, especially as a government department was involved, and decided against court action. (person with a psychiatric disability)

‘I was very fortunate to get Marie as my advocate - she knows her job, she knows your rights, what she doesn’t know she’ll find out.’ She also pointed out that Marie’s background and contacts were a definite bonus, as she could draw on those resources informally. For example, Marie had a legal friend who could advise them unofficially. Marie wrote many letters on her behalf ‘back and forth’. She ‘put on the pressure’. (person with multiple disabilities)

Re protecting a person from resident-on-resident assault in a group home - They contacted the Minister for Community Services, internal complaints mechanisms, the police, a Chamber Magistrate, Legal Aid Commission, IDRS, Community Services Commission, a Community Visitor, and the Disability Complaints Service. ‘Ringing so many people, you get so confused....you don't have a how-to guide when you’re trying to do this - the bureaucracy relies on you giving it up, because you meet so many dead-ends in the process.’ There was no central resource for them to use, and they did not know what they could do and who was there to help. ‘Everything we found out, we had to find out on our own.’ (parents of a person with an intellectual disability)

‘There are policies in place, but they are pieces of paper with a vital part missing, due to lack of money.’ For example, the family was not informed of numerous and serious assaults. Furthermore, there was no placement policy committee – it was only constituted extraordinarily to discuss the person’s situation in response to family pressure. (parents of a person with an intellectual disability)

Criminal justice issue - taking out an AVO in a group home

Scenario:

Jerry is in his 30s. He used to live in a small group home, visiting his parents George and Elaine regularly. Jerry has an intellectual disability. He communicates with sounds, gestures, and using pictures and symbols.
Last year, Elaine heard a staff member casually refer to ‘the time Jerry got stabbed in the eye.’ She requested incident reports for the previous year. There were 13 incidents recorded during that time, including 2 stabbings and several severe assaults requiring medical attention. They had not previously been informed of this. George and Elaine learned that assaults and violence were commonplace in the house. It involved resident-on-resident as well as resident-on-staff violence. They heard that the police had been called to the house a number of times by neighbours.

Their ensuing experience of the justice system involved the Minister for Community Services, internal complaints mechanisms, the police, a Chamber Magistrate, Legal Aid Commission, a specialist legal centre, Community Services Commission, a Community Visitor, and an advocacy organisation.

In the beginning, Elaine and George just wanted the assaults to stop. They defined the assaults on Jerry as domestic violence. They say ‘DOCS avoided acknowledging the accuracy of this assessment.’ They pursued this via DOCS internal complaints mechanisms, but the agreed strategies were ineffective, the assaults continued, and Jerry became increasingly distressed. Elaine and George requested that one of the residents be moved, but were told ‘there were no vacancies in the area where the resident should be.’ They asked that Jerry be moved to a safer environment but were told there were no other appropriate placements available.

Elaine and George decided to approach the assaults as a criminal issue, to force DOCS to take effective action. The Guardianship Board informed them they could take action on Jerry’s behalf.

George phoned the police, explained the situation and asked for their help. He says ‘they were happy to talk with us [on the phone] but not keen to go to the house. [They] didn’t tell us they’d been there before. I felt the attitude was "what can we do about it?"’

The fact that the assaults involved people with disabilities appeared to be a major consideration for police. ‘One police officer said, how can we take them to court? It will get thrown out”. Because it’s a person with a disability, it won’t get anywhere.’ George said they did not see the assaults in criminal terms. He says they told him ‘you have to prove intent, and you can’t prove that with them - because they believe that people with disabilities just randomly hit out or something.’
George then phoned the local Chamber Magistrate to ask for an appointment for himself and Jerry about taking out an AVO. The Chamber Magistrate was reluctant to see them, and told him he should contact DOCS and take it up with them. ‘They were adamant that we had to take it to DOCS - not specific as to why. The whole tone was that they really didn’t want to deal with it.’ There was a further difficulty, in that Jerry ‘couldn’t speak and wouldn’t understand the concept of the AVO.’

George contacted a specialist legal centre. The solicitor he spoke to confirmed their right to proceed with the AVO. George was told he should go back to the local court and take it from there.

George then went to see a Legal Aid Solicitor to clarify the AVO process. This solicitor also began with the same response that George had received from the Chamber Magistrate - ‘this guy's disabled, it’s a different proposition.’ He said ‘why do you want to do that, why bother, DOCS are under-resourced and doing the best they can, why make more trouble for them?’ George asked ‘[if it happens to me] why can I take action and Jerry can’t?’

Elaine phoned an advocacy organisation to ask for their help. Soon after, she heard that DOCS were about to make a decision. She decided to hear this before involving the advocacy organisation further.

On being informed that Elaine and George were taking out an AVO, DOCS specifically assigned a worker for Jerry and agreed a transfer to another house. Jerry is moving in 3 weeks, and the individual worker has been withdrawn. Elaine was contacted during the week to say Jerry had been assaulted again. ‘You begin to think, oh well, he’s being moved soon. And then I thought, hang on, that's wrong, and I rang back and started asking questions.’
[Since the interview took place, one further assault took place. Jerry did not actually move until 2 months after we spoke.]

**Access to legal advice - community legal centres**

‘[I] have volunteered [hearing-impairment] when using the service - they don’t know what to do, what to say. [I] ask if they can look at me, speak clearly. They get defensive, feel I’m criticising them. [You] end up ‘helping’ them.’ (person with multiple disabilities)
'Exhausting and frustrating – having to explain and tell story all over again. Disability is part of my existence, not all of it. Having to re-explain, continue to go back over it, to reiterate, to inform, you’re not there as an educator and you get frustrated at being expected to do it all the time.' (person with a neurological disability)

'Solicitor – she was good, she really listened to what I had to say, she told me what I could do.’ (person with an intellectual disability)

'Telephone help lines – difficult [when] people talk softly/fast. Difficult without lip reading.’ (IV No. 20, person with multiple disabilities) Another person said ‘Having to do it totally over phone and by letter, not entirely satisfactory. These are personal issues.’ (IV No. 47, person with a psychiatric disability) A final comment included ‘[They] don’t take accessibility in its broadest context – [they say] ring us before, then come and we’ll open the back door for you. [At one CLC] I couldn’t get in. They said they would come to the house – I didn’t want them to, I wanted to go to them.’ (person with a physical disability)

His partner says ‘Solicitor gives instruction to me, me to him, and then he goes to see him….He needs the back-up, needs reminding….because he sometimes has a problem understanding things, he doesn’t realise.’ (person with an intellectual disability)

Four changes of solicitors at one specialist CLC in 8 months - ‘I wonder whether they just take people on to let them practice, before they go out in the legal world.’ (person with a physical disability)

In a rural area - ‘Up here, a monthly appointment if that – a monthly visiting service from [nearest regional city] at community centre and everyone knows [you’ve been there]. Information tends to get out of date quickly when you have to wait, especially an issue re 28 day leave and appeal decisions. Phone service only available limited times and days….If you dealing on your own, you give up. Feels like that’s what most of the processes are designed to do. No good if criminal law [with court appearances possibly only days apart] – more for civil law, [where its usually] long drawn out processes.’ (advocate for a person with an intellectual disability)

‘….incredibly helpful but always sounding really harassed, incredibly overworked…. [I] would have preferred not to have had people so obviously harassed and pressured.’ (person with a psychiatric disability)
'What could be done is videos made, in a few different languages. You could pop it in and turn it on, and someone could come up and explain to you these are your rights, these are how you protect them, these are how you can pursue them. And they could tell you who to speak to, and where you could go for help. It could be really brilliant and helpful, something nice and easy to get you started.' (person with a physical disability)

‘There should also be a place to get legal advice from people who understand disability issues and the implications, like what the informal networks currently provide. On the other hand, that’s what the CLCs are supposed to do.’ (person with a physical disability)

‘The step-by-step stuff for women with an intellectual disability is excellent for me....You need a psychiatric legal rights service, like what you have for intellectual disability. The same information they have, we need’. (person with a psychiatric disability)

A specialist CLC is ‘so finely resourced, [there’s] no continuity of service. They really want to help, but [they're] limited. They are trying to be fair to people with disabilities and help as many people as possible’. He feels they do the best they can, under the circumstances. (person with a physical disability)

‘CLC’s usually get cheapest, dingiest resources because that’s all they can afford. They should be lobbying for funding on basis that integrates accessibility.’ (person with a physical disability)

**Access to legal advice - Legal Aid**

The legal aid lawyer ‘didn’t aid me in understanding what was going on – didn’t help me, [I] kept saying I didn’t understand – [she would say] leave it up to me then. Lack of comprehension on her part [as if] a psychiatric disability is in some way congruent with intellectual disability....[She consequently] made decisions without consultation....She got frustrated with me a lot, [it was] hard to follow what was going on.’ (person with multiple disabilities)

The legal aid lawyer she went to see [re disability discrimination complaint] said ‘I don’t think its worth pursuing - there’s no physical damage. We know what’s best for you.. Some people in the system are ignorant. Professionals look down on us.’ (person with multiple disabilities)
Access and Participation for People with Disabilities in Contact with the Justice System

‘Solicitors need to talk more with you, explain it lots, because they talk their own little language, a lot of people do....I don't think anyone listens to you, because they don't care, they just want their money at the end of the week.’ (person with an intellectual disability)

Application for legal aid with advocate's assistance. ‘I filled out a lot of paperwork with [advocate], a real pain, and then they rejected it.’ He could not remember the grounds for rejection, but said even the advocate found the number and nature of the forms confusing. (person with a physical disability)

‘It sometimes takes several phone calls and follow-up work before they tell you the specific criteria you haven’t met....they speak of criteria and priorities, but its not clear what they mean by it. No-one takes responsibility.’ He says letters rejecting applications appear to be form letters, without reference to the person and their particular circumstances. ‘Individual cases are unique and should be assessed as such. [People] should not be sent form letters.’ (person with a psychiatric disability)

One person reported separate contacts with a solicitor and a Barrister, both of whom said they were unprepared to represent him through legal aid. He said the Solicitor told him ‘he wouldn't have anything to do with Legal Aid’. He said Legal Aid were ‘too slow, they seem to do things over and over, got three letters all the same in one month, couldn’t believe it.’ The Barrister told him ‘they were sending him in circles. He said he wouldn't carry on if he had to keep dealing with Legal Aid.’ (person with a vision impairment)

Re legal aid and an application for victims compensation - He filled out the forms, and then ‘i was told to go elsewhere....Why do I have to go and find someone else - they are a government-funded service, why couldn’t she do it there? Why did I have to try and find someone else? This is not a matter of a person who can drive, walk, see what they need to. I am a person with a disability.’ (person with a vision impairment)

‘Legal aid - 5 minute consultation before going into court - absolute farce.. lack of consistent forms of advice - interruptions after interruptions, you had to keep re-explaining and re-explaining.’ (person with a physical disability)
‘Have to go to court and represent self. Told can’t get Legal Aid re family law, although did receive Legal Aid to grant orders for access visits to son – why?’ (person with multiple disabilities)

She tried to arrange an appointment with the duty Solicitor before the court appearance. ‘Her secretary said we were unable to see her unless prepared to pay $120, as Legal Aid only covers court appearances....Last 2 duty Solicitors saw [us] before the court date, all on legal aid. Why not this time?’ (relative of a person with an intellectual disability)

The solicitor told Clare she wanted to bring in a Barrister, ‘but legal aid would not fund it. [They] said a solicitor was sufficient’. (person with a psychiatric disability)

‘Legal Aid should cover all people with disabilities and DDA cases, because there is no level playing field.’ He goes on to suggest the state has a responsibility to provide legal advice and representation, saying ‘If it’s a Commonwealth law, then the Commonwealth should prosecute it.’ (person with a physical disability)

Legal aid said they could not attend the court to represent them re the AVO against them, but ‘they told me what to do, how to do it, who to see.’ She always saw the same lawyer, each time she visited the office. (person with a psychiatric disability)

**Access to legal advice - Barristers and Solicitors**

[We] asked what hearing assistance was available. The Barrister immediately advised ‘an Interpreter’ is always available obviously taking it for granted that all deaf persons are Signing Deaf. No other solution was offered.’ (person with a cochlear implant)

‘[He] started talking about ‘scrambled eggs, you know, you’ve had your eggs scrambled, ha ha.’ [I] didn’t know what he was talking about, but he kept making these jokey comments. [I] asked him ‘what, you mean a brain injury?’ and he said yes....when [I] would ask about things the solicitor would say, don’t worry, you’ve had your eggs scrambled, like [I] didn’t know what was going on and the solicitor and Barrister knew best.’ (person with an acquired brain injury)

‘[You’re] not seen as a dollar sign but as a hindrance, because you have no money and you have a disability.’ (person with a physical disability)
Access and Participation for People with Disabilities in Contact with the Justice System

After the initial consultation ‘he kept insisting he’d send things home for me to look at instead – it didn’t feel supportive, I felt I was being distanced from him, from my right to consult privately with him, my right to involvement and guidance.’ It has been difficult to make contact over the phone. In addition, he only sends print materials, which meant she had to rely on a sighted person to read them through with her. She says this removes her right to decide what information she chooses to share and with whom. (person with a vision impairment)

He can’t recall any discussion of the legal costs of the compensation claim. ‘I can’t remember even discussing it. You just have to trust blindly.’ (person with a physical disability)

He says he was a ‘novice’ when it came to the settlement. His whole legal team ‘strongly recommended’ he accept the offer. ‘The other side had a Barrister, it would have cost me more to continue. [They] said most cases would settle out of court.’ He describes feeling ‘naive and lost - I didn’t know how things were done and they knew that too. Their work is fast-paced and they’re not teachers, they have to [get on and] do it.’ (person with multiple disabilities)

‘People say leave it up to lawyers, the professionals, but I need to be informed too. Should be better communication between us all – only occasional letters....Would be better to have regular meetings, phone calls, letters....All high, top lawyers doing their own thing. I’m not part of the jigsaw – I need to be included. ‘ (person with a brain injury)

‘You go to a Solicitor to protect your rights and to give you legal rights, and they tell us we’ll do what you tell us. And then you get letters saying ‘as you have instructed us, we will do blah and this will cost blah. Please find enclosed our bill’. I mean, you haven’t instructed them to do anything, that’s just how they operate.’ He says that such letters make you think that maybe you have instructed them but ‘you can’t remember, or else you think, oh well, they must know what they’re doing, and it must need to be done, and so you accept it, as a fait accompli, in the interests of getting it over and done with and the case resolved as quickly as possible.’ (person with an acquired brain injury)

Tom’s Solicitor asked him to sign a form, guiding his hand to the place to sign. He was told it was a loans agreement ‘indemnification’, the purpose of which was never explained. He later discovered ‘[It meant] I was lumbered with mortgage repayments – identified as guarantor of loan, by
[family member] who then cleared out.' A chamber Magistrate later advised him the solicitor had 'breached his duty of care, because [he] knew [I was] visually impaired and [he] got me to sign documents without reading them'. He also discovered the Solicitor was then acting for him, the family member, and the vendor of the property, amounting to a fundamental conflict of interest. (person with a vision impairment)

‘Society is all about being able to pay a fee – access to services and level of service often related to socio-economic status....If I was rich it wouldn’t matter. It’s about my financial status and my disability. If I was Christopher Reeve and rich, I’d be fine because of the money.’ (person with multiple disabilities)

Access to a lawyer - ‘Legal Aid defunded, how many Solicitors’ offices are accessible for people with disabilities?....Legal system is falling down in the bush - distances, transport, less access, less choice. Rural, country and outback, no real way it can be overcome. There isn’t the money, the populace isn’t here to support the finances needed. People often don’t understand because they haven’t lived in remote areas.’ (person with a physical disability)

‘We can’t get a lawyer – rung Law Society several times – send out info sheets with lawyers – match up to specialty. Sheets aren’t up to date. [And you] have to pay fees up front ‘ (parent of a deaf child).

Established white lawyers ‘know which judges are good, their biases and specialties and what practitioners to use.’ He adds their working relationships are often reinforced by social networks. It made sense to use this, even though he felt his legal team and the court generally were challenged by his ethnicity. (person with multiple disabilities)

The police

Tom is 20. He lives in a small town in rural/regional NSW. Tom has an intellectual disability. It is also thought he may have an acquired brain injury. He cannot read or write. His friend acts as his advocate, particularly around his contact with the criminal justice system.

Tom has had a long history of contact with the police in his town over several years. This began with quite small things, like being fined for not wearing a helmet on his pushbike. He has been fined for offences such as theft, malicious damage, offensive behaviour, however he has no capacity to pay the fines. His friend says his contact has now escalated
to the point where he is facing custodial penalties. His mother and advocate maintain his history as an offender has prevented police from considering him as a victim. They say he has often gone to police as a victim, to be arrested instead.

For example - charged with assault and robbery: Tom is apparently well known in town, ‘he goes down street and people have a go at him.’ About 12 months ago, he was standing at an ATM withdrawing some money, when a person he knew drove up in a car and robbed him. Tom fought him off and the other man was injured. Tom phoned his friend and told him he’d been robbed. He was confused and did not know what to do. His friend said he’d better report it to the police.

Tom asked his friend to meet him at the station. He arrived to discover Tom had been arrested and charged with assault and robbery. The other person said Tom had tried to rob him. His friend asked to sit in on the interview, but the police would not agree. They said Tom’s mother was the only person who could attend. They held Tom until his mother arrived, at which point she said she wanted his friend to attend the interview. She said he had more experience than she and would be better able to protect Tom’s interests. The police agreed, and the interview was recorded electronically.

At one point, Tom was confused and his friend says the police were ‘obviously getting exasperated.’ He tried to rephrase the question for Tom, put it in simpler language, and was ‘basically told to shut up’ or leave.

Tom was questioned on several occasions alone, before the case proceeded to court. There were several witnesses who supported his version of events. Tom’s friend says the police would not investigate the robbery allegations ‘right up until the other guy finally admitted he’d stolen from him, in court.’ The robbery charges against him were dropped, but the assault charges still stood. The police were ‘buck-passing until they finally agreed to take a statement’ from Tom about being robbed. This has not been acted upon.

For example - malicious damage: A car full of people drove past Tom one day pointing what he believed to be guns at him and shouting 'bang bang'. He ran to the police station, very distressed, saying ‘they are going to shoot me.’ The police went after the car, stopped it, searched but found no guns. They returned and told him ‘you’d better go or we'll shoot you.’ Tom’s mother says that on other occasions Tom has reported
harassment to the police, they have laughed at him, told him to go home and called him a loser.

A couple of nights later, Tom is in the pub having a drink when he is harassed by some of those from the car incident. He leaves and goes home. He and his mother are woken in the early hours of the morning by someone outside the house. Tom believes someone is trying to steal their motorbike, so goes out to confront them. The same people are there. He tells them to leave, they refuse, and in the process, Tom breaks two of their car windows.

They reported him to the police, saying they were visiting the house next door to play a prank on someone, when Tom attacked the car. Tom was arrested and charged with malicious damage. Tom’s friend says nobody lives next door and the people were clearly there with the intent to steal and intimidate him. He and his mother both say Tom acted in self-defence.

**Police**

Sally is in her 50s and lives in a city. She comes from an English-speaking background. Sally has a vision-impairment.

A couple of years ago, Sally was indecently assaulted by a taxi driver. The following day, a friend accompanied her to a local hospital, where she spoke to a sexual assault counsellor. She was given printed leaflets on the effects of sexual assault and available supports, and examined by the doctor.

She then went to the police and reported the assault to a female police officer, who was ‘very nice’. Prior to taking her statement, a male police officer came out to escort Sally through to the interview room – ‘he had no idea of how to guide a blind person, [he was] obviously uncomfortable. I was very stressed, [it was] very difficult. They need training about people with a vision impairment.’ Sally says ‘Also, I noticed lots of stairs, a nightmare for physical access.’

Her statement was taken, and she was given a print copy. Despite several requests over the next several months, this was not made available in an alternative format. In fact, her print copy was borrowed by investigating detectives but never returned. Similarly, her taxi subsidy book was borrowed to identify the driver, but subsequently lost.
Sally describes a series of contacts with the investigating detective. During the first interview, he said he would question the man the next day, but then went on leave. Over the next several months, she was variously told he had no staff to go and question him, there were no available interview rooms at the police station due to renovations being carried out, they had gone to arrest him but he had ‘disappeared’, and after seeing him and his family at home ‘well, he has a nice home.’ Sally felt the implication was that he had a ‘lifestyle’ that suggested he was unlikely to be an offender.

In the meantime, she had to use taxis knowing the driver was still working. When she pointed this out ‘[the detective] went mad and said you can’t be worrying about that the rest of your life….absolutely shouting and carrying on. I was terribly upset, came home and wrote a letter to him saying [his] behaviour [was] abominable and saying I wanted to ask exactly what was going on and it wasn’t just me but also other women with and without disabilities.’

She discovered that the detective was contacting the sexual assault counsellor and updating her because ‘he found me hard to cope with because [I was] asking questions and [I] couldn’t get answers from him.’

In the months after the assault, she wrote two letters of complaint to the detective, approached his superiors, and finally lodged a formal complaint with an external complaints body. The matter was referred back to an internal complaints inquiry, resulting in an apology to Sally and increased supervision of the detective. However, he remained on the case and the difficulties continued. For example, Sally still had not received copies of her statement in print and Braille. The detective told her a Braille copy would be ‘in contravention of the Evidence Act, seen as tampering with the statement.’ Sally says ‘I knew DDA overrode other laws – [I] said [they] had to because [otherwise it would be] discriminatory’.

The police invited her to address a staff meeting of officers at the station about issues related to working with people with disabilities. She declined. Nine months after the assault, the driver was arrested and charged with aggravated indecent assault. The hearing was scheduled for 5 months later. At Sally’s request, a police support person accompanied her to hearings. Sally understood the police support person would support her by describing the proceedings, who was present and where they were
sitting. However, her counsellor told Sally the police officer was ‘coming and going’ from the court room at different times.

The taxi driver was convicted and sentenced to weekend detention. He is now appealing the conviction.

The courts

Tom is 20. He lives in a small town in rural/regional NSW. Tom has an intellectual disability. It is also thought he may have an acquired brain injury. He cannot read or write. His friend acts as his advocate, particularly around his contact with the criminal justice system.

Tom has had a long history of contact with the police in his town over several years. This began with quite small things, like being fined for not wearing a helmet on his pushbike. He has been fined for offences such as theft, malicious damage, offensive behaviour, however he has no capacity to pay the fines. His friend says his contact has now escalated to the point where he is facing custodial penalties.

Tom has recently appeared in court on charges of robbery (since dropped), assault, and malicious damage. On each occasion he has been represented in court by a duty Solicitor. These change each time. His advocate comments ‘we’re now on the third different one. Difficulty with duty solicitor arrangement, because no or little understanding of the issues Tom faces, of his needs.’ Tom’s mother says ‘He can speak for himself, but he needs a Solicitor who is understanding and will take the time to communicate at his level. Just got to be able to relate. Its difficult when its a different duty every month.’

Tom’s mother says he prefers to see the duty solicitors on his own. ‘[He] reckons he can handle it on his own, but he really can’t. [He] doesn’t like the past being brought up, gets jittery and uneasy, just leaves the room. If left to himself, [I] don’t think he’d tell the solicitor what he needed to. Don’t think he understands that they need to know, so they can help him. Might think he’d get into more trouble, but its worse saying nothing. Also, too painful for him – eg they ask about family background, which brings up [a recent bereavement].’

On one occasion, Tom’s advocate says the duty Solicitor refused to see Tom with him present. The Solicitor insisted he leave, while she spoke with Tom.
Tom’s mother and advocate report they are usually only able to have 5 minutes with the duty solicitor on the day of the court appearance. They have therefore tried to arrange appointments with Solicitors beforehand. In the present case of malicious damage, the duty Solicitor refused to see them unless they paid a private consultation fee of $120. Other duty Solicitors have done so without any charge.

She apparently refused to represent Tom some years ago, when he became upset prior to a hearing. His mother said ‘Tom was very upset, fearful, he became abusive [and] walked out. She wiped her hands of him.’ Tom and his mother went into court unrepresented. ‘[I was] trying to help him with words, to get the meaning, and I was told to sit down. [They] totally made fools of us…. [They] ask him a question, and he doesn’t understand, and then the other side ask him and he says something different, and then they think he’s lying. It makes the fines more serious.’

Tom’s advocate reports that in the past, he was excluded from attending a hearing in the Children’s Court to offer support to Tom because ‘the Magistrate did not recognise my role – if you’re not a relative or a Solicitor, you’re refused entry, even when the young person might ask you to speak.’ He says that Tom associates the court building with other times he’s been there. ‘When he’s distressed [he’s] unable to talk – the court is a small room, dark, very distressing…. it’s beyond him to attend. But I’m not allowed to.’ He adds that Tom is extremely conscious of his visibility in court, in a small town. This has sometimes added to the harassment he has experienced on the street.

The current matter of malicious damage has been adjourned, as Tom has been declared medically unable to attend. A psychiatrist’s report recommends against him appearing in court, due to the extreme distress it causes him. The duty Solicitor was aware of this but did not present it to court. The family had instructed her to use the Mental Health Act to say he was unfit to plea and move to have the charges dismissed. They are concerned at the ongoing distress this is causing him. The duty Solicitor did not do this, another adjournment was granted, and the Magistrate has now indicated the matter will be tried in his absence if he does not appear next time.

His mother says ‘All his previous, only got good behaviour bonds [and fines], but the last judge warned him, next time you go out the other door.’
The courts

Sally is in her 50s and lives in a city. She comes from an English-speaking background. Sally has a vision-impairment.

In 1996 Sally was indecently assaulted by a taxi driver. The offence was subsequently defined as aggravated indecent assault.

Sally went to the hospital the next day and saw a sexual assault counsellor, who gave her a number of printed leaflets about sexual assault and available support services. She was examined by a male doctor. He later wrote a report for court and for the Victims Compensation Tribunal (VCT). The report did not refer to her disability.

After visiting the hospital, Sally reported the assault to the police. Nine months after the assault, the driver was arrested and charged. The hearing was scheduled for 5 months later.

There was little information made available about Sally’s rights and support in court. There were difficulties getting the information in alternative formats, and the sexual assault counsellor had to arrange a specific translation of one booklet into Braille. Sally asked for a police support person to accompany her to court beforehand, and to be present during the trial. This was arranged. However the case was then adjourned to another court, three months later.

A meeting with the prosecutor was arranged 2 days prior to the hearing, but he did not arrive. Sally was not allowed to visit the new venue prior to the date. Her counsellor specially negotiated early access to the court-room on the morning of the hearing. Sally then waited until the afternoon before being called into court.

The sexual assault counsellor and the police support person were both in court with her. The counsellor was ‘technically not supposed to talk to me’ but be there as a supportive ‘presence’. Sally understood the police support person was there to explain the proceedings and who was present but her counsellor told her she was ‘coming and going’ at different times.

‘The Magistrate was very aware of me and my disability – she made sure she absolutely identified herself, so I knew who she was and where she was sitting...No-one else did’. She adds that the Magistrate specifically gave her ‘permission to voice my needs.’
Sally was questioned by the prosecutor for about 1½ hours. She says he had little understanding of disability and related issues. He asked questions about visual cues and evidence. For example, Sally says he asked her in court. ‘What colour was the car? I don’t know. And why don’t you know? Because I can’t see.’ Sally later wrote to the prosecutor about this. His response was ‘we all make mistakes – oh yes, I hadn’t thought of that.’

The defence solicitor had just begun cross-examination, when he stopped and asked instead to call a defence witness who had been ‘inconvenienced’ by waiting all day. This witness was questioned for 15 minutes before the case was adjourned. She was also vision impaired, had used the taxi before and had a guide dog. The relevance of the witness was not challenged by the prosecutor, and Sally was not able to brief him about ‘certain things regarding travel as a vision impaired person – like, people with guide dogs tend to sit in the back, not the front....it [is] unlikely they would be threatened in any way, because the dog would react.’

The case was adjourned to a date several weeks later. Sally was still formally regarded as being under cross-examination. The Magistrate instructed her that she was therefore unable to discuss anything related to the case until the cross examination was complete. She and her counsellor were forced to renegotiate the boundaries of her counseling, to include her general emotional support needs, but nothing particular to the assault and the case.

The case resumed at another court on the other side of Sydney. The Police Service drove Sally to the court. Her cross-examination resumed and lasted all morning. During cross-examination, the defence lawyer ‘seized’ on the variation in signatures in her taxi subsidy book, ‘to say someone else was signing my book – like I was defrauding the Government.’ She pointed out that signatures of vision-impaired people often do vary, and the prosecutor did challenge the defence on this matter. However, Sally still had to sign several times before the court to prove the variation in signatures, all of which was ‘very demeaning.’ The defence asked Sally ‘did I understand what a radio was – I don’t believe a sighted person, or a person without a disability would have been asked that.’ The defence also implied the police officer ‘put words into my mouth when [I was] making [my] statement – the inference was I couldn’t think for myself.’
Sally says ‘Then there was the issue about Braille’. There were three aspects to this. The first relates to the process of brailling evidence before it is produced in court. There are few places one can go to for brailling documents, and there may be issues regarding confidentiality within one’s own community. Therefore, certain parts of the statement were ‘blanked out’ for Braille translation. ‘In doing so, the transcriber puts in notes which indicate where certain identifying information has been deleted.’

This process led to the second issue. The defence asked ‘had the statement been tampered with?’ Sally believes this forces a vision-impaired person to choose between information they can access and verify but which may identify them to others, or trusting to people with information they cannot access.

The third issue was raised when the various parties in court ‘kept referring to paragraph 3, page 4, whatever – I had to keep pointing out that print pages are different to Braille pages’. Sally says ‘It took enormous energy to continually point these issues out.’ She later spoke to the prosecutor about these issues. ‘He said well you have been well looked after, we have driven you here – the message was that you should be grateful.’

The following day, the taxi driver was found guilty. He was sentenced to 12 months weekend detention. Sally says that according to the Crimes Act, aggravated sexual assault where the victim is a person with a disability attracts a 7 - 10 year custodial sentence.

Sally was not formally informed of the sentence and only found out because her father attended the court in her place that day. The investigating detective told her the offender had three weeks in which to appeal against the sentence. For 6 months, she heard nothing further.

Then the police contacted her to ask if she was available for the appeal in a couple of months time, although no-one had informed her an appeal had been lodged. She understands it was lodged 3 months after the sentence date.

The appeal will be heard by a judge but no jury. She has been told she will have to reappear as a witness, for the whole case to be retried. She says there will be less support available to her at this hearing. The police support person is on leave, the senior police manager in charge of her complaint has retired, and the detective has been transferred.
In preparation, Sally is looking for additional support. She has tried to contact a specialist women’s legal service ‘on many occasions’ without success. Victims support services have not offered information in accessible formats, and she has been therefore been forced to involve others to assist her. In response, services have suggested she write to senior management to advise on the need for alternative formats. She is in the process of lodging a victims compensation claim, however she says this will be delayed while the relevant files are required in court for the appeal case.

Jury duty

Scenario 1:

Craig is in his 40s and lives in a city. He comes from an English speaking background, works part-time and he has a physical disability.

Several years ago, Craig was summoned for jury duty. A list of exclusion criteria was provided, including one referring to illness or infirmity. This appeared to be the only criteria that applied to people with a disability unable to attend. Craig was required to send in a doctor’s certificate ‘even though I was not sick or infirm...I didn’t feel it was appropriate, I wanted to say this is because your system isn’t adequately resourced to cater for me, not because I am ill or infirm’.

He doesn’t see the jury system as catering for his needs. He asks ‘what if we were locked up overnight to consider a verdict? Who would arrange carers, address my support needs? Who would pay? And what about the confidentiality issues [if support person present]?’

Furthermore, he asks ‘what about if a person is on the eligibility list and all of a sudden they acquire a disability?’ He wanted to know if this made them any less qualified to contribute as a member of the jury.

Craig says that the issues regarding jury duty also relate to other people and their ability to participate, not just to people with disabilities - '....like with single parents, mothers etc'. He assumes that the court will not cater for their needs and responsibilities any more than for people with disabilities. He asks ‘aren’t they supposed to get a cross-section of the community? What do you end up with, if that's how the system works.’
These access issues apply more widely for people with disabilities in the court setting. ‘What happens if a judge has a disability, or a court worker? How are they catered for?’ He points out that people with disabilities also work in the justice system, and yet this is often ignored and overlooked by policies that only consider people with disabilities in particular roles as victims, witnesses, or defendants.

**Scenario 2:**

Nicholas is in his 20s and lives in a city. He comes from an English speaking background and has worked in a range of occupations. Nicholas has a psychiatric disability.

He was recently summoned for jury duty. The printed jury summons asks people with a disability to phone for assistance. It includes an item that says ‘Access to jury service is available to all qualified individuals with disabilities in keeping with the DDA 1992. If you have a physical or cognitive disability that affects your ability to serve on a jury and you would like an accommodation (e.g. hearing loop, wheelchair access) please ring us with your request. Please ring no later than 7 days prior to your reporting date.’ It adds that failure to attend may result in a fine of up to $550.00.

Nicholas duly attended the court, which he described as ‘very intimidating’, with metal detectors and crowded with lawyers and police. ‘[I] had to go into room, jam packed with about 60 people. Really felt affected by being crammed in with all those people and knowing I couldn’t leave the room. Had to wait an hour...If I’d had to ask to leave, it would have just been terrible to say to the sheriff, and the Magistrate or whoever, and saying I have a mental illness in front of everyone.’

People were given a card with a jury number on it, and a number of forms to fill out. ‘This was very complicated....[The] Sheriff tried to explain, one for 60 people. Should have had more people there, someone to help you fill it out.’

‘People claiming exemption had to stand up and say so, in front of everyone. When you claim some medical thing, people usually ask why, it’s a human thing, to ask. About 8 out of 60 claimed exemption.’

People were allocated a jury number and asked to wait in a small courtyard to be called, ‘once again difficult if agoraphobic.’ An hour later, people were discharged for the day. They were asked to phone an
answer-phone the following morning. Nicholas was not required to report again.

**Courts - assistive technology**

James is in his 50s and lives with his family in a city. He comes from an English speaking background. James has a hearing impairment and uses a hearing aid.

James has represented himself in court several times on minor matters. He has also attended local and district courts, as well as the Supreme Court. Many of the newer courts are ‘actually quite good acoustics-wise’ while older buildings are more difficult. For example, the Supreme Court is badly designed if you are ‘out of the circle of four’, the judge, the court reporter, the witness and the Barrister. Members of the jury have to rely on less effective speakers in the wall, while people in the public gallery rely on an overhead speaker.

James says he has never been asked if he has a disability when he has gone to court. He says ‘you have to ask’ for hearing assistance and ‘the court staff don't want to get it out.’

In one case, he says he ‘helped myself win a case by being hearing impaired.’ He was pleading guilty to a traffic offence. He told court staff he was hearing impaired, and they agreed the clerk of the court would go and find him, rather than simply call his name out. James was called, the clerk took him into the court ‘and then they said 'if you’re hearing impaired, come forward in the court’. He says he stood between the prosecutor and the Magistrate, ‘practically on the bench’. ‘I was much more confident, more able to convince him, by coming forward in the court. I could hear him perfectly. The strength of being in that triangle of power. In front of the defence (supposed to speak for you), dynamics very different.’ The Magistrate agreed with his argument, dismissed the charge, and he paid $50 costs.

James says hearing-impaired people have to ask for assistance prior to their court appearance. ‘The person on the other end of the phone has to have it authorised, staff have to know how to use it, it takes time to set it up and they have to call you up to check the levels – you feel like a problem.’

James says that hearing impairment is a hidden disability, with a very real stigma that acts as a barrier. He once asked for provision of a
hearing loop. This was not provided, and ‘I was so good, they didn’t think I had a hearing problem, and I chose not to persist because it was actually distracting me from preparing for the case. But even though they knew, they did not provide it for me the following time I had to appear. Is the loop available for me? No. I did not pursue it, it was going to be a bad day.’

He points out that the pressure on hearing-impaired people depends on which level of proceedings you are appearing in. For example, he says ‘at the higher level, you have a Barrister to speak for you, you only have to make sure you can hear him. But at the local court level, there’s 6 or 7 other people involved and that’s very stressful because you spend your whole time thinking is it my turn to talk? My turn to present argument? My turn to ask questions? If you have to fight own case, it puts you under immense pressure.’

‘When people can’t hear, and under pressure, they can feel very angry and frustrated – in interests of court to avoid this. In interests of court to provide it publicly and non-verbal signaling very important. It should be there, on show, and people can see it as available, and then you’d see just how many hearing-impaired people you have there.’

**Personal injury compensation and access to legal advice**

Cassandra is 37. She lives in a city and comes from a Non-English speaking background. Cassandra has cerebral palsy.

A couple of years ago, Cassandra was injured in a train accident. She was about to board, the train took off, and she was dragged down the line. She sustained considerable injuries. The incident was witnessed by others on the platform at the time.

Cassandra spent several weeks in hospital. Her mother’s friend was a Solicitor, and he visited her in hospital soon after the accident. He suggested she could make a claim for personal injury compensation, and offered to represent her. ‘[I was] very confused, very emotional, he just sort of assumed. Took me the consent forms and all that, but I didn’t really know.’

Cassandra returned home to continue her recovery. The Solicitor would phone her mother to discuss the compensation case. Cassandra says he appeared unwilling to discuss it with her. He did not recognise her concerns that her existing disability may be used to dismiss the
seriousness of the injuries sustained in the accident. She says ‘He’d phone up and he wouldn’t want to talk to me, he’d only talk to my Mum. [He] didn’t really talk to me, he’s supposed to talk to the client. I’d be so frustrated…what are you going to do, I already have a disability, what are you going to do in court? That went on for about 6 months. Breaching client confidentiality by talking to [my] mother.’

The Solicitor wrote to the railway asking what had happened on the day and requesting the video record. They denied that they had any record of the accident. Months later ‘they sent him an apology – ‘apologise for inconvenience to you and your client’.

Cassandra spoke to a friend, who suggested she change Solicitors. She put her in touch with another private Solicitor. Cassandra felt the new solicitor was aware of disability-related issues and that she understood and respected her concerns. She told the other Solicitor she was therefore transferring the file. ‘He phoned me and went ape-shit at me – who is this woman? I want to speak to your mother – I said the case is closed. It’s my case, not my mother’s. It took 6-8 months for him to transfer the files.’ He sent a bill of several thousand dollars for work undertaken, although Cassandra says he did very little.

The new solicitor accepted the case on a no win no fee basis. She interviewed Cassandra, the people she worked with, and members of her family to establish the impact of the accident and the injuries. Cassandra says the accident has fundamentally affected her life, and she reports significant effects physically, emotionally and mentally. She is about to begin visits to neurologists in preparation for the court case.

Cassandra’s Solicitor expects the case to be heard in a couple of months. Witnesses to the accident have agreed to testify in court, and she has secured a Barrister to argue the case. Cassandra has met the Barrister who she says is very good. ‘[He] doesn’t treat people like you’re stupid, quite sincere, sensitive to disability issues because he’s worked with [the solicitor] and known her for a while. He’s not alienated by my disability.’

She says her solicitor has received a letter from the railway suggesting that she was at fault. There is also a suggestion that perhaps she was not aware of the safety issues when approaching the train ‘cos they think my disability makes me stupid, like I’m thick.’

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Cassandra has been told the case will probably be heard over 4 days. ‘I’m going to be hounded and questioned, and all that. That’s what they do, they’re horrible. Even the doctors are horrible, on their side. They’re sarcastic, they’re rude, they’re bastards’. She recounts a recent visit to a psychiatrist who commented that she had a good vocabulary. ‘Oh, I guess that means I’m not so dumb after all.’ Cassandra remains extremely concerned that the fact she has cerebral palsy will detract from the recognition of disabilities incurred as a result of the accident.

Disability Discrimination

Neelie is in his 30s and lives in rural NSW. He comes from a non-English speaking background and has a neurological disability.

Neelie lodged a disability discrimination complaint regarding a number of incidents over several years, triggering a series of seizures. Neelie reports an increasing level of hostility and intimidation from the respondent during that time.

Neelie phoned HREOC about the situation. He was told there was a backlog of cases and he may have to wait 6 - 8 months before the complaint could be investigated. In the meantime, further incidents occurred, and Neelie wrote again to update his complaint. A conciliator was allocated and asked the respondent to reply to the complaint.

Neelie believes the conciliator was uncomfortable about dealing with the complaint as a series of incidents. He thinks the conciliator wanted to see it as 'a one-off, easier to manage, handle, and apply [the] act to.'

Neelie was told the respondent said they had abided by all their existing policies. He said there were no policies, only a reference to one that did not exist. He searched through several years worth of public documents for the policy the respondent said was there. The respondent was not required to produce the relevant paperwork. Neelie never found it. He says the conciliator seemed unclear as to what took precedence, Commonwealth legislation or organisational policy.

Conciliation dates were set, 2 years after the formal complaint was lodged. Neelie was in contact with a specialist legal centre, who had agreed to support him during the conciliation process. It was based several hours away, and discussion was limited to the phone.
The evening before the first conciliation, the respondent informed HREOC a representative was unable to attend. New dates were set one month later. HREOC were unable to attend these dates, and it was deferred once more. On the eve of the conciliation, the respondent was again unable to attend. The conciliation process broke down, and a full hearing was set.

A new Solicitor began work at the specialist legal centre. The new solicitor did not appear to be aware of disability-related issues, kept asking for paperwork that was already on file, and generally appeared ‘frantic and panicky.’ Neelie was concerned at what this may mean in the hearing and did not think the solicitor understood the nature of the complaint he was bringing.

For example, ‘There are 2 rules of evidence, beyond reasonable doubt and on the balance of probabilities. [The Solicitor] wanted to know why I hadn’t gone to a ‘doctor after each seizure’ – because I don’t have to. [The Solicitor said] the rules of evidence require proof, documentation [and] wanted me to produce medical documentation to prove each seizure. [They] should understand the differences in the rules of evidence – the difference between what is required in legal arena and that required in [disability discrimination] arena.’

Neelie was concerned that the legal centre only employed one Solicitor, leaving people with no choice of representative. He phoned the centre and raised his concerns. Soon after, this person left and another was appointed.

The hearing was set in a local office building. Neelie says physical access was poor. There was no natural light, and 8 people crowded into the 10-foot by 8-foot room. These were potential triggers for seizures, however Neelie says nobody present seemed aware of this potential, and no alternatives were offered.

Neelie was represented by the legal centre Solicitor and Barrister. He had several witnesses he wished to call, however two were unable to travel to court on the day. Neelie says he asked if they could testify by phone, and ‘this seemed difficult’. On the day of the hearing, the respondent agreed to attend mediation instead and try to negotiate a settlement. Mediation took place over 10 hours, with one half hour break. Neelie says there was no opportunity for him to tell his story and ‘put it on record’. The mediation was ‘taken out of my hands’, moving on to focus purely on the terms of settlement. Neelie wanted a formal apology from
the respondents and financial compensation. He received no apology and little compensation. He has been asked to act in a consultant capacity to the respondents to advise them on future disability awareness training needs.

Looking back, Neelie feels the process has been a waste of time, money and effort. He thinks perhaps he should have ‘cut my losses in the beginning’, rather than lodge a disability discrimination complaint. He thinks that he should have pursued the matter, if at all, as a workers compensation issue. He has since discovered he was entitled to do this, but this was never an option presented to him before. As a workers compensation case, he says he would have had a greater entitlement to financial compensation and he could have had ‘my day in court.’
Appendix F: Interview questions for stakeholders in the justice system.

How do you work with people with disabilities, in the context of your involvement in the justice system?

Do you have any policies, procedures or guidelines specific to working with people with disabilities?
- What are they?
- How are they applied?
- How are they evaluated?
- What could be done differently?
- What else might be needed?

What do you think are the main ways to encourage access and participation for people with disabilities who use the justice system? (give examples)

This is a scenario/series of excerpts based on what people with disabilities have told us about their experiences of the justice system. Reading through these:
- What do you see as the particular issues about access and participation for people with disabilities in these situations?
- How does this relate to your experience?
- How could these issues be addressed/what could be done differently?
- Who should that involve?
- How should they be involved?
- What would they need to do?
- How should they do this?
Appendix G: The research team

Included a Project Officer, a peer researcher who was employed to conduct interviews with indigenous people with disabilities in regional NSW, and two interviewers to conduct interviews with stakeholders.

The researchers were managed and administered by the Secretariat of the Disability Council of NSW. The project was overseen by the Research Sub-Committee at the Disability Council of NSW and was informed and directed by a Reference Group made up of people with a range of specialist professional and personal expertise.

Reference group

Rosemary Kayess - Chair of Reference Group; member of Disability Council of NSW; lecturer, School of Social Science and Policy, University of NSW; person with a disability.

Sandy Watson - member of Disability Council of NSW; founder of Umbrella; Area Consumer Coordinator, South Eastern Sydney Area Health Service; person with a disability.

Robin Banks/Elizabeth Morley - Coordinator, Disability Discrimination Legal Centre

Lynette Byrnes/Georgina Connolly - Solicitor, Intellectual Disability Rights Service

Marie Delaney - social researcher and evaluator with expertise in justice and disability issues.

Marilyn McMahon - member of the Brain Injury Association; member of Women with Disabilities; Recreation Officer & Social Educator, Nepean Area Disability Organisation Inc (NADO); person with a disability.
Bibliography


Endnotes


2. See [www.mailbase.ac.uk/lists/disability-research](http://www.mailbase.ac.uk/lists/disability-research) for archived discussion on this topic.

3. The Australian Bureau of Statistics also reported that the greater the degree of restriction experienced by people with disabilities (i.e. assistance needed or difficulty experienced in self-care, mobility, communication, schooling and employment), the higher the likelihood that they will be represented among lower income groups (50% of people with disabilities with specific restrictions; 60% with severe/profound restrictions).

4. The survey found that 57% of people with disabilities required assistance with at least one activity and just over half received assistance. Nearly one third of those who needed assistance reported that their needs were only partly met and 4% indicated that their needs were not met at all. Almost all people experiencing profound/severe restrictions in core activities received assistance. However, over one third had their needs only partly met and 3% had their needs not met at all. In both cases, informal assistance was predominant. Less than half of all people with disabilities requiring assistance (and less than half of those people who experienced severe/profound restrictions) received formal assistance.


6. Murphy’s article commented on a submission by Dr Susan Hayes to the NSW Parliamentary Inquiry into the Increase in Prisoner Population. Dr Hayes reported that 19% of women prisoners had an intellectual disability, as did 26% of Aboriginal and Torres Strait Islander prisoners. She attributes the increase in the numbers of
people with intellectual disabilities in prisons to a lack of facilities for people with intellectual disabilities, deinstitutionalisation, drug and alcohol use and the lack of secure places for alternative diversions from custody.


presented at the National Deafness Conference, Hobart, 22-26 May 1996.


16. Three interviews carried out by an indigenous peer researcher were tape-recorded. The peer researcher had a physical disability, and preferred to tape rather than write notes, during interviews. She commented 'The people I interviewed did speak freely, but I also noticed them watching the cassette recorder. After the recorder was
switched off they did continue to speak [in one case, at length]. I think they felt more comfortable [with the recorder off].’

17. One person did not wish to participate directly, and authorised his advocate and a family member to speak on his behalf. Another person with a disability was aged under 5, and a family member spoke on his behalf.

18. Lester Bostok raises similar issues in a paper entitled Aborigines and Disabilities – Background Paper for ADD Disability Policy Framework Panel Discussion and Workshop, 30th July 1999. He referred to work carried out by the Aboriginal Medical Service. He noted that many indigenous people did not ‘regard themselves as having a disability.’ For many people, living in a context of financial, cultural and social deprivation may mean that ‘having a disability is minor compared to the need for survival.’ Moreover, available services and support for people with disabilities may not be culturally accessible or relevant, and many people may therefore be supported within family and community frameworks. In this context, ‘identifying with disability’ may raise very different issues and different expressions than occurs in white European culture. In addition, Bostok notes ‘Aboriginal people often regard attempts to categorise people as eroding community solidarity and community identity.’ (Bostok, L. (1991). The Meares Oration: Access and Equity for People with a Double Disadvantage. Australian Disability Review, 2, pp 3-8)

19. Compare, for example, the approaches to intellectual disabilities in the Crimes Act 1900; the Mental Health (Criminal Procedure) Act 1990; and the Evidence Act 1995. See also the reference to ‘developmental disability’ as an indicator of ‘a mental illness or condition’, in Section 32 of the Mental Health (Criminal Procedure) Act 1990.


21. The 1997-98 Annual Report from the Office of the Legal Services Commissioner (OLSC) comments ‘The perception that many lawyers are poor communicators is backed up by OLSC statistics showing a
significant number of complaints are caused by poor communication. The figures illuminate the real need within the profession to seriously address this problem.’ (p 20). The OLSC plans to conduct qualitative research into the communication training needs of Sydney lawyers. In view of the experiences reported by people with disabilities, this research should include a consideration of disability-related communication requirements, and the need for specialist training in accessible communication.


24. People with Disabilities NSW Inc is an organisation offering systemic and individual advocacy to people with disabilities. Their 1999 Annual Report states ‘For every person we agreed to assist, there are four to whom no assistance can be provided…In the course of the year, PWD provided information and referral services for thousands of people. PWD is currently not funded to provide this type of service.’ (p 32).

25. We recognise there is a broader community debate concerning the role and effectiveness of the jury system within contemporary legal structures. This debate is outside the scope of this research. Suffice to say, while the jury system is retained as an essential feature of the justice system, people with disabilities wish to participate in juries in accordance with their rights as citizens. For further discussion on the merits and effectiveness of the jury system, see (i) Cassidy, B. (1998). Twelve Angry Persons Still Needed: The Competence and Representativeness of Juries. Alternative Law Journal, 23(1), 9-12; (ii) Fife-Yeomans, J. (1996). Juries on Trial. In The Australian, 14th -15th

26. Reliance on written English can create a number of barriers for people who are deaf. It has been said that people who are deaf may have limited educational opportunities; English may not be their first language; and that there are substantial differences between how concepts are communicated and understood in English and how this occurs in sign language (such as Auslan). See (i) **Banks, R., & Casey, B.** (1996). Deafness, Discrimination and the Legal System. Paper presented at the National Deafness Conference, Hobart, May 22\(^{nd}\) –26\(^{th}\); (ii) **Currenti, M., & Smith, P.** (1989). Discrimination and Disadvantage – Legal Services for People who are Deaf. Sydney: Deaf Society of New South Wales.

27. These concerns may also apply when interpreters are used. In *Gradidge v Grace Bros Pty Limited* (1988) 93 FLR 414 (NSWCA) the NSW Supreme Court of Appeal considered the role of an interpreter and the rights of a deaf person to full translation of proceedings in open court. Much attention was paid to the authority of the Judge, his or her discretion to allow or refuse interpreters in court, the role and behaviour of an interpreter, and issues of procedural fairness. Careful consideration was paid on balancing the rights of a person with a disability against the role and authority of the Judge. Justice Samuels said ‘The task of the interpreter, in short, is to remove any barriers which prevent understanding or communication. This must, of course, be subject to the overriding right of the Judge, first, to determine whether those barriers exist and, secondly, to decide in what way the corrective mechanisms can be applied, without disrupting or adversely affecting the forensic procedures which he is charged to undertake….sometimes a Judge may have to ask an interpreter to speak a little more quietly, or remonstrate when altercations develop, as they sometimes do, between the interpreter and the party. All of these things, when they occur, must be determined and dealt with by the trial Judge.’

28. The Law Society offers accredited training qualifications for solicitors specialising in personal injury compensation matters. Some solicitors have formed networks of accredited specialists, for example, Austlaw, a cartel of medium-sized law firms arranged into interest groups. However, people with disabilities were clearly not aware of
any benefits for them, given the predominance of concerns about personal injury compensation lawyers.


30. **NSW Community Legal Centres’ Secretariat** (1998). *The Access and Equity Resource Kit for NSW Community Legal Centres* (‘the Kit’). Sydney: NSWCLC Management Support Project. The Kit defines concepts of access and equity, and outlines legislative responsibilities and requirements. It describes barriers to access and how they may be experienced, identifies principles of implementing access and equity, and explores the development of Access and Equity Plans and Disability Action Plans. In addition, it discusses audits and available resources as the basis of access and equity initiatives. The Kit is designed as a resource manual for all centres to use in adopting and developing their own policies according to local needs.