



LAW HACK 2021

**Disability
Justice**

HACK PACK

October 14 & 22

JOIN US



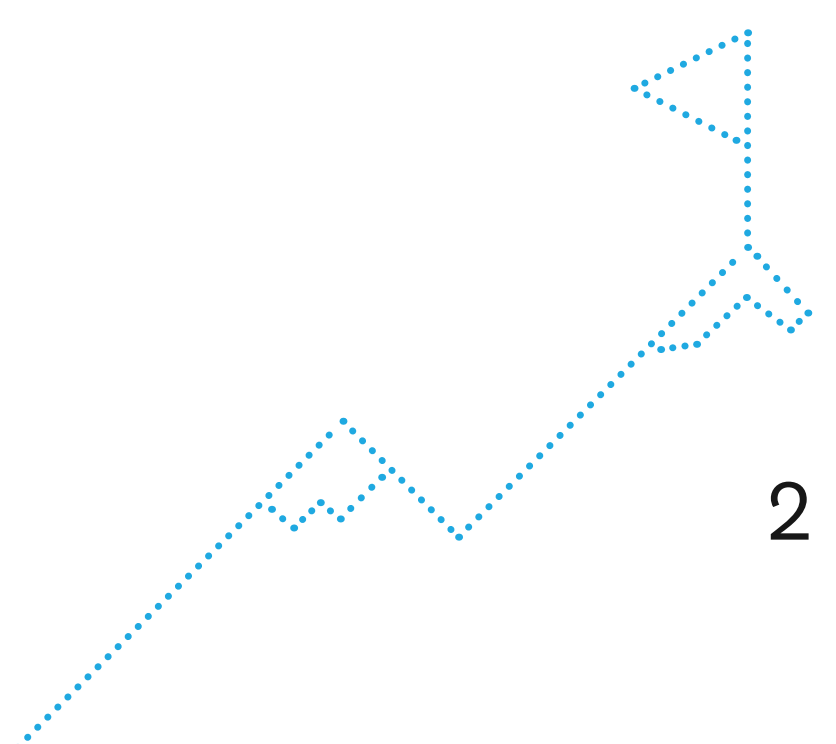
National
Justice
Project



Jumbunna
Institute for Indigenous
Education and Research

We acknowledge that we live and work on the lands of First Nations peoples, and we pay our respects to their Elders past, present and emerging. Our Sydney office is located on the lands of the Gadigal people of the Eora Nation, whose sovereignty was never ceded. This land is, and always will be, Aboriginal land.

Content Warning: This document contains confronting content that may cause distress. If you need support, you may wish to contact Lifeline on 13 11 14.





Let's DO SOMETHING for GENUINE CHANGE!

George Newhouse
CEO: NATIONAL JUSTICE PROJECT

...NOT JUST ANOTHER GALA EVENT

LAW HACK 2021

INNOVATIVE SOLUTIONS to SUPPORT the DISABILITY JUSTICE MOVEMENT

SPONSORS & PHILANTHROPIC PARTNERS

WHOLE HEARTED CONVERSATION
1 BRAVE CHAMP BECAME 2 BELIEVED IDEAS!
BEST PRACTICE ACCESSIBLE

PROMOTE OUR FEARLESS COMMUNITY PARTNERS

GIVE BACK STRATEGIES, SOLUTIONS AND CONNECTIONS. OPEN-SOURCE OUTCOMES for ANYONE AROUND WORLD

PRIORITISE CASES of INJUSTICE experienced by PEOPLE WITH DISABILITY to END DISCRIMINATION

PARTICIPANTS x50

BRIGHTEST MINDS
PASSIONATE HEARTS
BRILLIANT PROFESSIONALS

ROYAL COMMISSION SIGNALLED STATUS QUO HAD to CHANGE!

LAW HACK 2021: DISABILITY JUSTICE

D.I.S.R.U.P.T.!
ADVOCACY + LEGAL STRATEGIES + MULTI-DISCIPLINARY TEAMS

COMMUNITY PARTNERS
FEEDBACK, EXPERTISE & ADVICE on KEY ISSUES
CO-DESIGNED CHALLENGES

HACK PACK
RESOURCES, IDEAS + DATA

CARE PACK
SOCIALLY PROCURED GOODS

KEYNOTE SPEAKER

JUSTEN THOMAS - ADVOCATE

JUDGES-MENTORS PARTICIPANTS

POLICING & INCARCERATION

HEALTHCARE, DISABILITY SUPPORT & AGED CARE

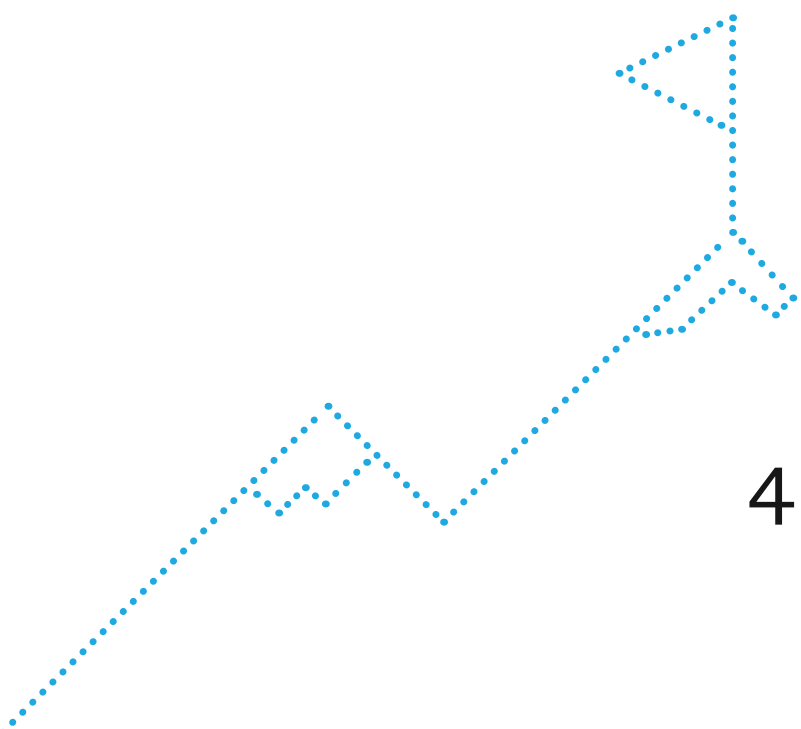
RIGHTS & LAW

EDUCATION & CHILD PROTECTION

HOUSING

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The Hack Pack



The Hack Pack is your go-to guide for the LawHack. Here, you'll find resources and inspiration to develop your innovative legal solution and advocacy campaign, to tackle some of the biggest issues facing people with disabilities.

We encourage you to review the early sections of the Hack Pack before you leap into your team's specific challenge. From videos to academic texts, news articles to case law, you can find resources, tips and facts in the pages that follow.

To help you get a handle on the Hack Pack, we have included a table of contents, footnotes, bookmarks, and hyperlinks to navigate your way through the issues.

LawHack Support

For more information and inspiration on the problem statements, speak with one of the LawHack mentors. They can help guide you in the right direction, give you tips and advice, and offer insights from their years of experience in tackling big issues.



How do I meet the mentors?

You will be able to request to speak with a mentor and invite them to join your team's discussion in your virtual workspace. Mentors will be available in the Litigation session (10:00 - 12:00 AEST) and Advocacy session (13:00 - 15:00 AEST) on Friday 22 October.

For support, speak with the National Justice Project LawHack Team.

Katy Tyrrell

Hack materials and general support

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Ariane Dozer

Team allocation and general support

arianed@justice.org.au

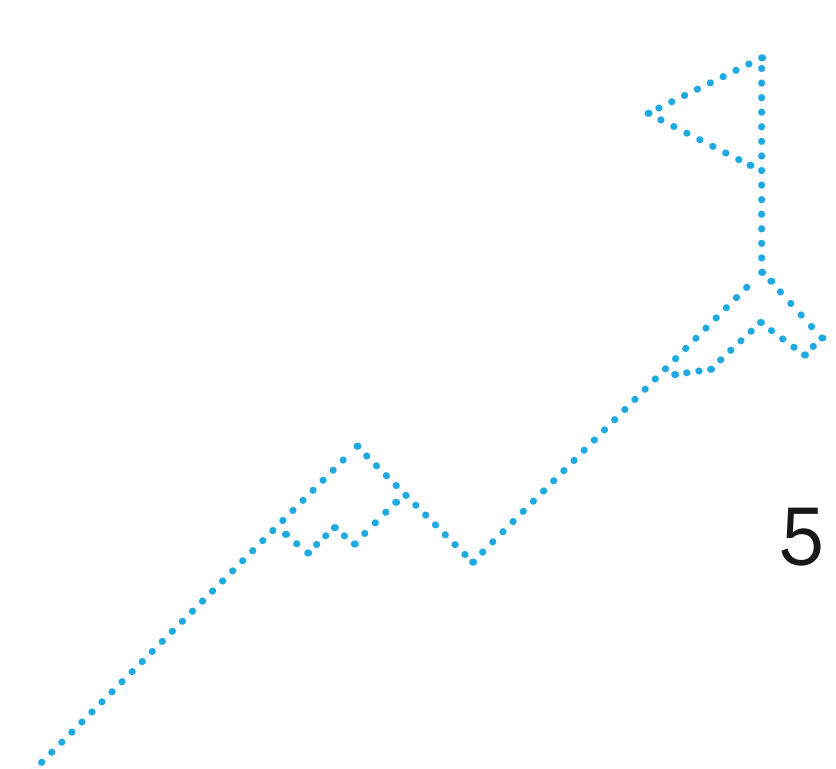
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Liz Clark

Event logistics and general support

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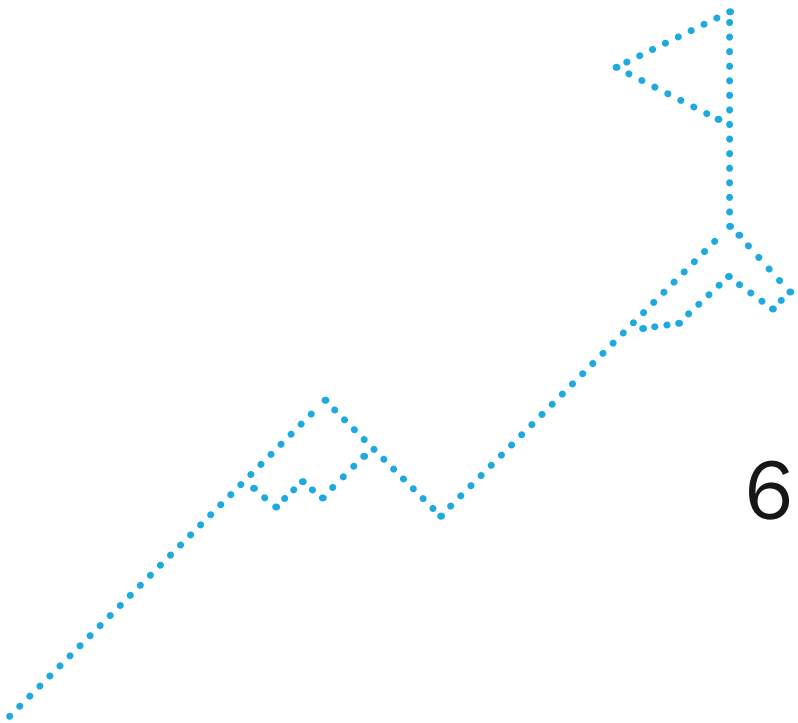
Mobile: 0415 682 700



Learn the Language



AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ADE	Australian Disability Enterprises
AIHW	Australian Institute of Health and Welfare
BSWAT	Business Services Wage Assessment Tool
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	The Convention on the Elimination of all Forms of Discrimination Against Women
CID	National Council for Intellectual Disabilities
CRPD	United Nations Committee in the Rights of Persons with Disabilities
DDA	Disability Discrimination Act (Cth)
DRC	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
FPDN	First Peoples Disability Network
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
NEDA	National Ethnic Disability Alliance
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NSWCAT	NSW Civil and Administrative Tribunal
SDA	Specialist Disability Accommodation
UNCRPD	Convention on the Rights of Persons with Disabilities
WWDA	Women With Disabilities Australia



LawHack Mentors



STRATEGIC LITIGATION MENTORS



Nicholas Andronicos

Expertise: AAT, NSID Act and Rules, NDIS Quality and Safeguards Commission, refugee and immigration law, CRPD.

Nicholas Andronicos is a lawyer with over 15 years’ experience advising on administrative law & human rights law matters and in advocating before the Administrative Appeals Tribunal (AAT).

Nicholas also worked on the NDIA AAT Legal Team where he interpreted and applied the NDIS Act and Rules. He advised the NDIA of administrative law matters before the AAT & Federal Court and represented the NDIA at AAT case conferences.

Currently, he works as a Senior Policy Officer with the Behaviour Support Team, NDIS Quality and Safeguards Commission where he is involved in conducting assessments of practitioner suitability, including around the exercise of restrictive practices, in accordance with the Positive Behaviour Support Capability Framework. He is involved in interpreting the United Nations Convention on the Rights Of Persons with a Disability (CRPD) to inform a more human rights centric approach by the Commission, in accordance with the CRPD.

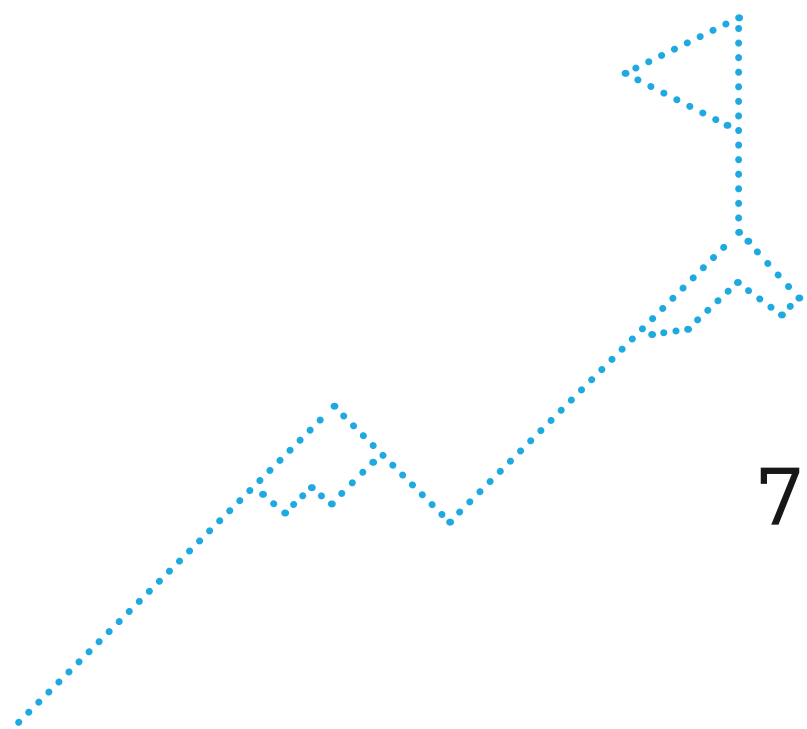


Matthew Hall

Expertise: Inclusion and accessibility, codes of conduct, inclusive arts.

Matthew is the Chief Executive Officer of Arts Access Australia, the national peak body for arts and disability, where he leads a team committed to building vibrant Australian arts and culture enriched by the strong voice and contribution of people with disability.

Matthew has extensive experience in the design, management and operation of best practice self-regulatory schemes to deliver sustainable sector and broader societal change. AAA is developing a national Disability Access & Inclusion Code of Conduct based on reasonable community expectations, to imbed awareness, education and accountability; and to provide mechanisms to integrate expectations into existing operations.





George Newhouse

Expertise: Strategic litigation and advocacy, technology and justice, social justice law, refugee and immigration law.

George is the CEO and Principal Solicitor of the National Justice Project and an Adjunct Professor of Law at Macquarie University. He is well known for his extensive work in fighting for justice for people experiencing mental health issues, LGBTQI+, immigrants, prisoners, asylum seekers, youth detainees, and First Nations people.



ADVOCACY MENTORS



Daniel Ghezelbash

Expertise: Strategic litigation and advocacy, technology and justice, social justice law, refugee and immigration law.

Daniel Ghezelbash is a Special Counsel at the National Justice Project and an Associate Professor at Macquarie Law School. His main practice areas are refugee and immigration law and administrative law. He is the founder and director of the Macquarie University Social Justice Clinic.

His research focuses on Australian, comparative and international refugee law, and how technology can be used to promote accountability and access to justice. His book, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press 2018) examines the spread of restrictive asylum seeker policies around the world. Daniel has held visiting positions at the Refugee Studies Centre at Oxford University, Harvard Law School, Queen Mary Law School, New York Law School and Brooklyn Law School.

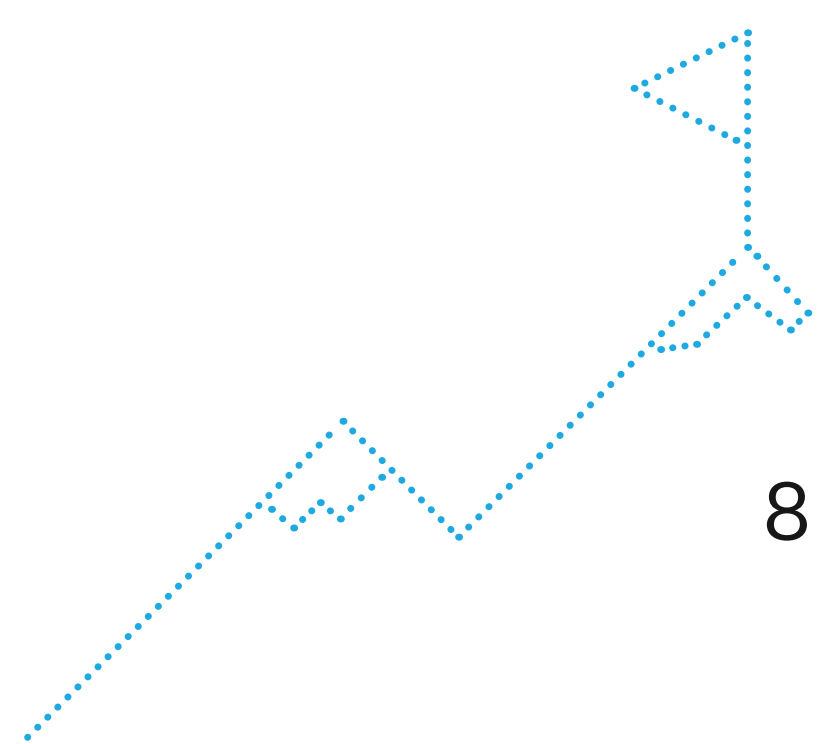


Fiona Given

Expertise: Guardianship, NSW NCAT, consumer accessibility.

Fiona has an Arts/Law degree from Macquarie University. She is a General Member of the NSW Civil and Administrative Tribunal. She sits on the boards of Assistive Technology Australia and Side by Side Advocacy.

Fiona lives with cerebral palsy including communication and swallowing disabilities. She is a Research Assistant with the University of Technology Sydney.





Catia Malaquias

Expertise: Inclusive education, CRPD, inclusion and diversity.

Catia Malaquias is a lawyer, director and award-winning human rights and inclusion advocate.

Catia is a co-founder of national not-for-profit organisation All Means All and was instrumental in establishing in 2019, the Australian Coalition for Inclusive Education (ACIE). She is also the founder of Starting With Julius, a not-for-profit organisation for disability inclusive media, and sits on not-for-profit boards including Down Syndrome Australia and the Attitude Foundation. Catia has participated in United Nations processes on the rights of people with disabilities and has spoken at the UN in New York and Geneva about the right to inclusive education.

Catia is an External Affiliate Member of the Centre for Inclusive Education at the Queensland University of Technology (QUT).



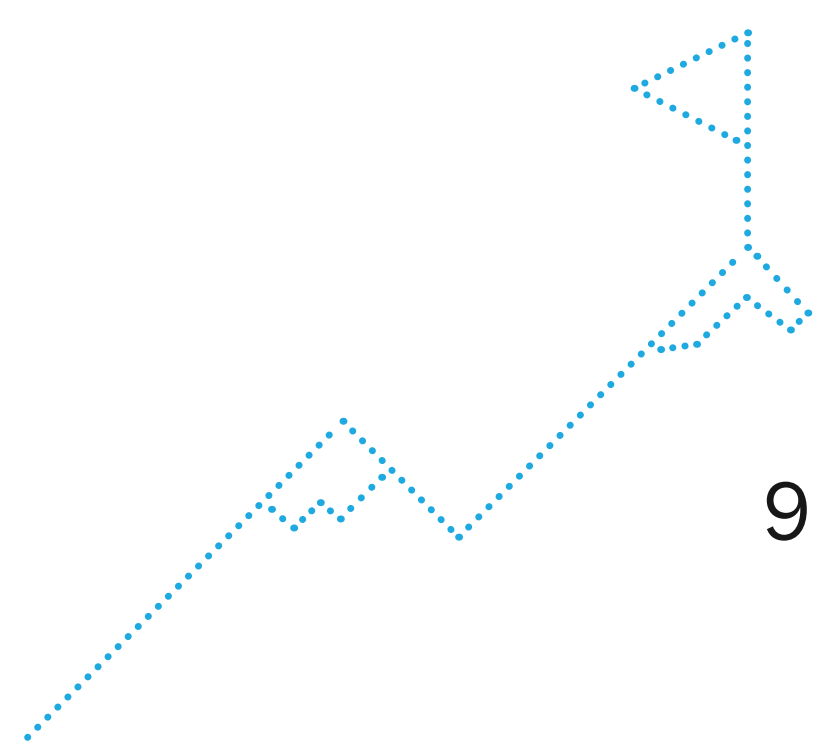
Tess Moodie

Expertise: Violence against women and children, gender, intersectionality.

Tess Moodie is a non-binary queer person with disability who is also a carer/parent of multiple family members with a disability. Tess is a passionate intersectional advocate, with a focus in the prevention of family, domestic and sexual violence in the disability and LGBTIQ+ community.

They participate in various advisory groups including the Minister for Disability (Tas) Consultative Group, ACON Queerability Advisory Group, UTS advisory – research for autistic girls and women, ACON's National Primary Prevention Advisory Group, have previously sat on the board of Autism Tasmania and Engender Equality and worked as an LGBTIQ+ Community Worker for Working It Out (Tas).

Alongside working at WWDA, Tess also works as a project coordinator for Engender Equality Tasmania, where they coordinate and support women who are victim-survivors of family and sexual violence to engage in media, public speaking and legislative change.



LawHack Judges



Graeme Innes AM



Former Disability Discrimination Commissioner (2005 - 2014)

Graeme is a lawyer, mediator and company director. His 30 years of human rights advocacy have included contributing to the drafting of the United Nations Convention on the Rights of Persons with Disabilities, and its ratification in Australia.

Margherita Coppolino



President, National Ethnic Disability Alliance

Margherita is an inclusion and intersectionality consultant who has served on the Victorian Ministerial LGBTI Taskforce, the SBS Community Advisory Committee, and as Chair on the ILGA Oceania Disability Sub-Committee.

Natalie Wade



Vice President, Australian Lawyers for Human Rights

Natalie is a well-respected expert in international human rights law. She is a leader in disability rights and reform.

Rob Silberstein



Advisory Board Member, National Justice Project

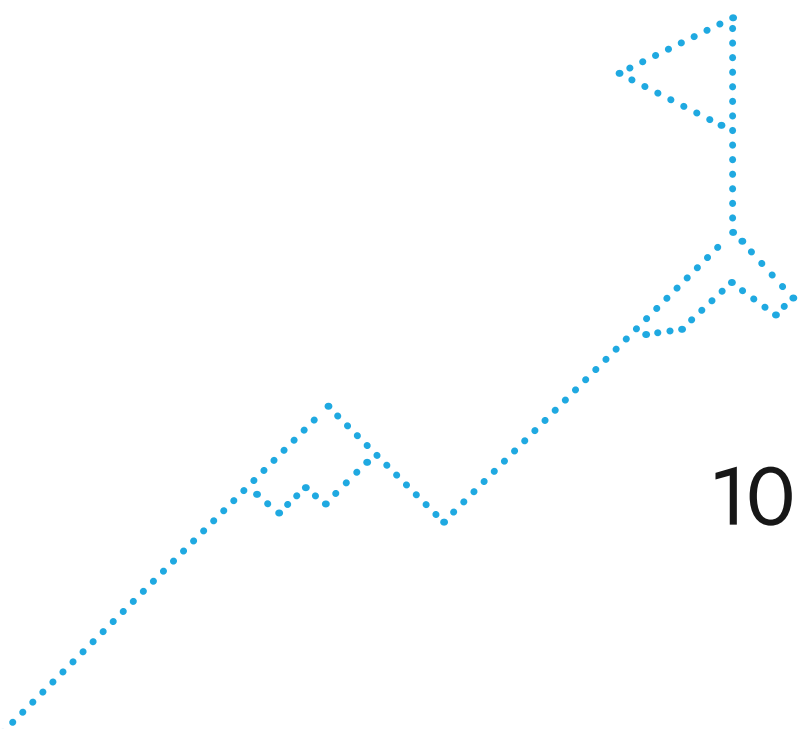
Rob is a lawyer, doctor and advocate who combines his extensive legal expertise with his formidable advocacy for equality and inclusion.

Dr Scott Avery



Research Partner, First Peoples' Disability Network

Scott is a Worimi man, researcher and expert advisor in the intersection of Indigeneity and disability in rights and social policy. He authored the landmark monograph *Culture is Inclusion: A narrative of Aboriginal and Torres Strait Islander People with disability* and is the lead investigator in the community-based disability research agenda for First Nations people.



LawHack Judging Criteria



Courage Brave, courageous and strategic, the ability to change the status quo (law, policy, culture and public perception), whilst tackling systemic discrimination.

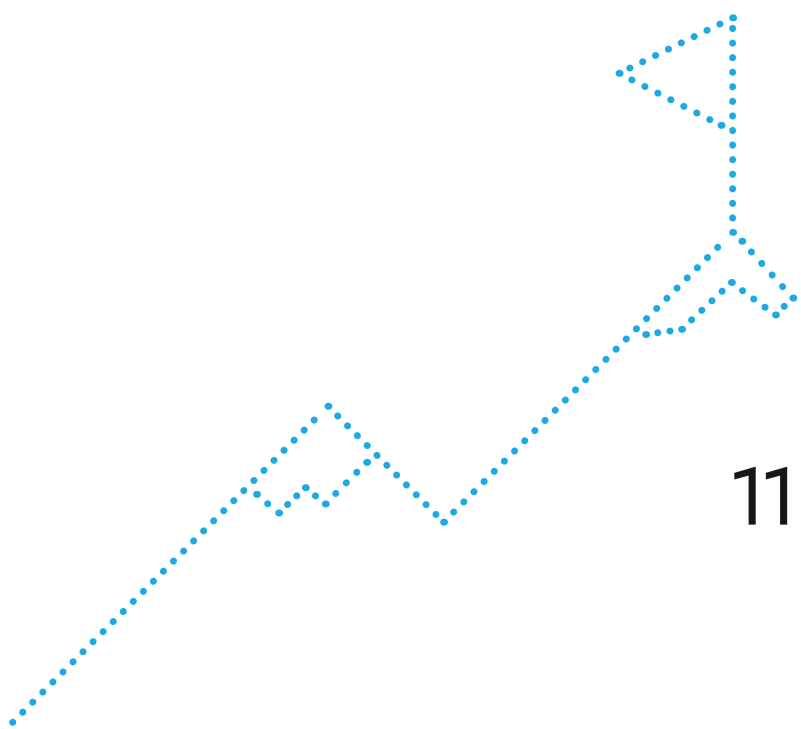
Humility Respects people with lived experience as experts, drivers, and catalysts of change.

Achievable Clearly defined plaintiff and clear actionable steps to delivering impact through litigation and advocacy.

Novel Original, creative and innovative. Using legal action and advocacy in novel ways.

Grounded Grounded in the challenge statements and lived experience, in particular multi-layered disadvantage and discrimination.

Evidence Identifies research, data and evidence of need.



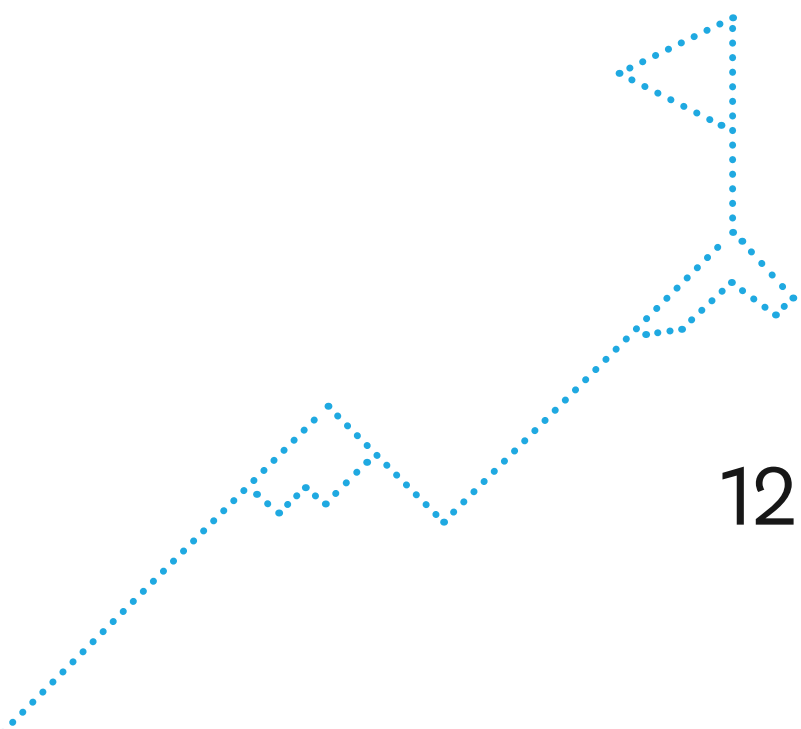
LawHack Timetable



LawHack will take place on Friday 22 October (10:00 – 18:00 AEST), following a kick-off event on Thursday 14 October (16:30 -18:00 AEST).

Here is a summary of the day’s events. You can download the complete runsheet on the [LawHack website](#).

Thursday 14 October	
16:30 – 18:00 AEST	LawHack Kick-off You will meet your team members, learn more about your tasks, and listen to a keynote speech.
Friday 22 October	
10:00 – 12:00 AEST	Litigation Strategy You and your team will develop your legal strategy, speak to mentors and workshop your ideas.
13:00 – 15:00 AEST	Advocacy Strategy You and your team will develop your advocacy strategy, speak to mentors and workshop your ideas.
16:00 – 18:00 AEST	Pitch Session You and your team will workshop your pitch and present your ideas to a judging panel who will award the most ground-breaking, disruptive and innovative solution.



Challenge Statements



Whether it is access to justice or disability support, whether it is in the criminal justice system or education, we know our systems are failing people with disabilities. Here are the big problems that your team will be hacking.

CHALLENGE 1: Policing and Incarceration



How do we remove the role of police and corrective services in responding to people with cognitive, intellectual and psychosocial disabilities so that people with disability are not subject to force, violence and incarceration? →

CHALLENGE 2: Healthcare, Disability Support and Aged Care



How can we achieve a rights-based approach in healthcare, disability support services and aged care so that people with disabilities can receive the support they need while maintaining the rights to autonomy, personal integrity and legal capacity? →

CHALLENGE 3: Rights and Law



How can we protect the rights, dignity and autonomy of people with a disability by eliminating violence such as coercive and involuntary sterilisation and restrictive practices? →

CHALLENGE 4: Education and Child Protection

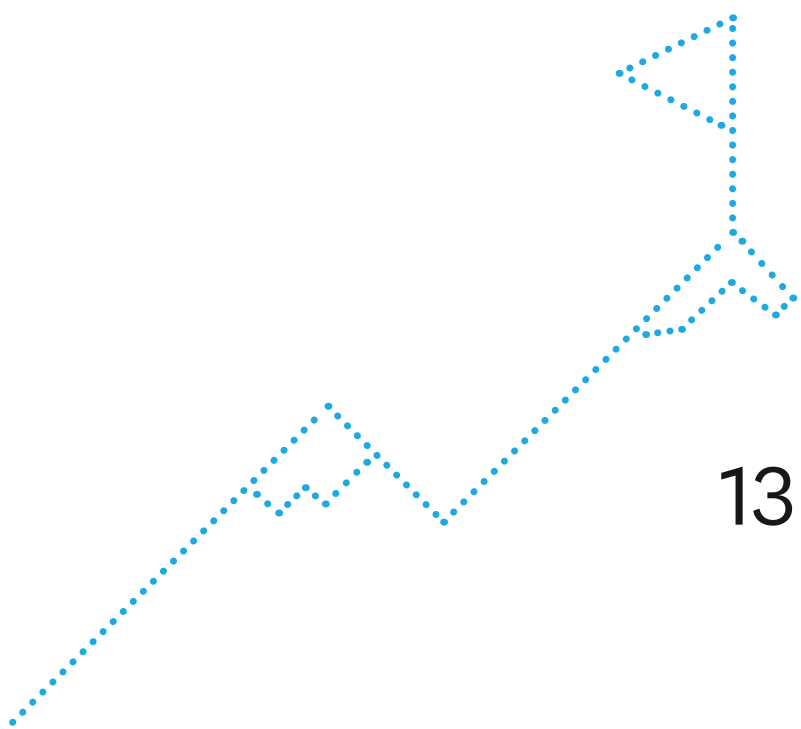


How can we ensure that schools and early childhood education providers deliver inclusion and equity in education for children with disabilities so that no child is left behind? →

CHALLENGE 5: Housing



How can we ensure people with disability have access to suitable housing so that they can live with dignity, freedom and be connected to supports, friends and family? →



Pre-LawHack Resources



[“What does Australia really think about disability?”](#)

SBS TV series

[“Disability and a Good Life: Discrimination”](#)

UNSW Taste Creative short video

[“Defiant Lives”](#)

Screen Australia Production on the
Australian Disability Rights Movement

[“Crip Camp: A disability revolution”](#)

A Netflix film

[“Justice Matters – Interview with Justen Thomas”](#)

YouTube video

[“Justen Thomas shares his experience of Juvenile Justice”](#)

YouTube video

[“Women with Disability Talk About Human Rights”](#)

YouTube video

[“Women with disability speak about the right to
freedom from all forms of violence”](#)

YouTube video



**Check out our community partners’ websites
to learn more about their important work:**

[People With Disability Australia](#)

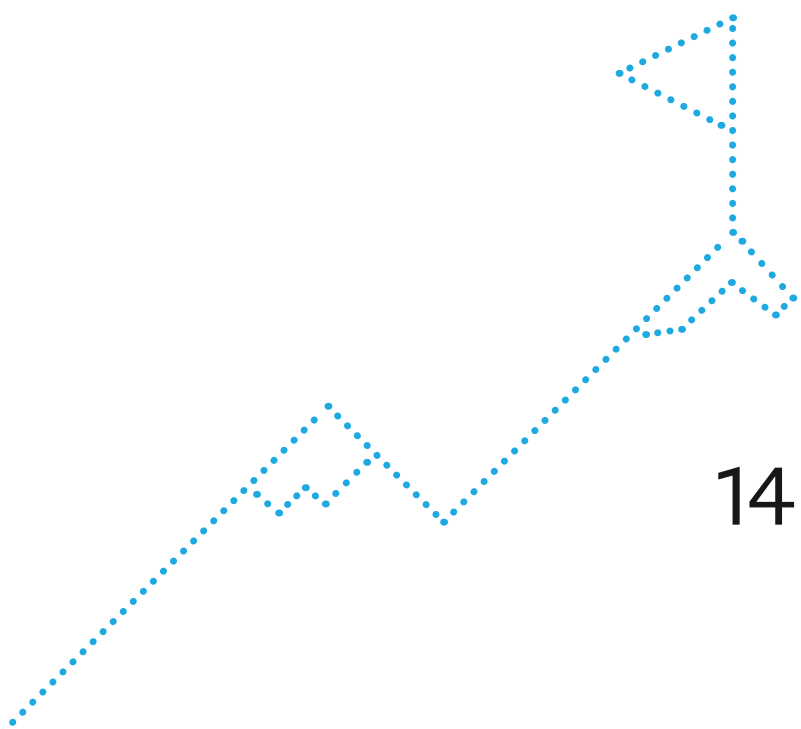
[Women With Disabilities Australia](#)

[First Peoples Disability Network Australia](#)

[National Ethnic Disability Alliance](#)

[Council for Intellectual Disability](#)

[Arts Access Australia](#)



Discrimination Law in Australia



International Treaties

[The Universal Declaration of Human Rights \(1948\)](#)

[The United Nations Convention on the Rights of Persons with Disabilities \(2006\) \(CRPD\)](#)

[The United Nations Convention on the Rights of the Child \(1989\)](#)

[The United Nations International Covenant on Civil and Political Rights \(1966\)](#)

[The Universal Declaration on the Rights of Indigenous Peoples \(2007\)](#)

Commonwealth Legislation

[The Disability Discrimination Act 1992 \(Cth\)](#)

[The Disability Services Act 1986 \(Cth\)](#)

[Australian Human Rights Commission Act 1986 \(Cth\)](#)

[The National Disability Strategy 2010-2020 \(2011\)](#)

[The National Disability Insurance Scheme 2013 \(Cth\)](#)



Did you know?

44% of complaints received by the Australian Human Rights Commission are about disability discrimination?¹

1 in 10 people with disabilities aged over 15 years have experienced disability discrimination in the past year?²



What about the states & territories?

There may be legislation in the States and Territories relevant to your challenge statement. You'll find a list of the relevant laws under each challenge statement.

1. AIHW.
2. AIHW.

The Limitations of Discrimination Law



Discrimination law in Australia provides for important protections for people with disabilities. However, there are serious limitations in the legislation and its application, including failing to meet international standards and obligations. Here are some of the key issues.

Indirect Discrimination

The Disability Discrimination Act (DDA) is not effective in addressing indirect discrimination. This is where a rule is applied to all people equally, but has an unfair effect on people with disabilities. While s6 of the DDA attempts to address indirect discrimination, the complex and technical evidentiary burden on the complainant makes it very difficult to prove.



Case Hack!

Take a look at [X v. Commonwealth](#) to see a successful challenge to indirect discrimination in the workplace.

Condoning Discrimination

The DDA favours mediation, compromise and settlement between complainant and respondent. This in effect condones discrimination rather than criminalising it through sanctions. There are significant power imbalances in mediated settlements. Often complainants have little access to representation, resources, skills and knowledge that would assist in securing a fair settlement and are often forced to make significant compromises.



In 2008-2009, only 35% of complainants in federal discrimination matters had some form of representation.³

Private and confidential settlement in disability discrimination cases may secure the peace but not necessarily deliver justice. Private settlement also denies the courts the opportunity to interpret the law and set precedents.

3. Dominique Allen, 'Against Settlement? Owen Fiss, ADR and Australian Discrimination Law' (2009) 10 (4) International Journal of Discrimination and the Law, 195.

Exceptions in Employment, Education and Immigration



Some areas of law expressly permit disability discrimination, including in Australian Disability Enterprises (ADE), education and immigration.

Disability discrimination is not unlawful under the [Migration Act 1958 \(Cth\)](#) as it is specifically exempt from the operation of the DDA.

Did you know?

The [Migration Regulations 1994](#) prescribe ‘[public interest criteria](#)’ that can prevent migrants with disabilities or their children from securing permanent residency?

In the workplace, Australian Disability Enterprises (ADEs) are not-for-profit businesses that are criticised for permitting wage discrimination against people with disabilities, who often work in ADEs with significantly reduced pay.

Did you know?

The Business Services Wage Assessment Tool (BSWAT) is a ‘competency based’ wage assessment tool often used to determine the wages of workers in ADEs.

The BSWAT disproportionately impacts people with intellectual disability,⁴ who make up 75% of the ADE workforce.⁵ The Australian Government has previously offered compensation to affected persons if they waived their rights to further litigation.⁶ Despite the BSWAT tool being widely found to be discriminatory, the Government refuses to accept that it is discriminatory and it continues to be utilised.



Case Hack!

Take a look at [Purvis v New South Wales](#) to see how courts have permitted indirect disability discrimination in education.



Case Hack!

To see some of the progress made against discriminatory wage practices, take a look at [Nojin v Commonwealth and Another](#), and the 2016 [class action against BSWAT](#).

4. [Nojin v Commonwealth of Australia](#) [2012] FCAFC 192; [Duval-Comrie v Commonwealth of Australia](#) [2016] FCA 1523; Sarah Hedger and Colin Biggers, ‘Wage assessment tools for Australian disability enterprises and supported employees’ (2012) 64(6) *Keeping Good Companies*, 354.
5. People with Disability Australia, [Wage Justice Campaign](#), November 2018.
6. Australian Greens, [Dissenting Report on the Business Services Wage Assessment Tool Payment Scheme Bill 2014](#) and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014’ (2014); Paul Cain, ‘[All the way to the moon and back: Ending discrimination against people with intellectual disability in employment](#)’ (2014) 125 *Precedent* (Sydney, N.S.W.), 46.

Intersectional Discrimination in Australia’s Legal Framework



Australia’s discrimination law framework is fundamentally ill-equipped for dealing with instances of intersectional discrimination. Discrimination legislation fails to capture the intersection of characteristics such as gender and race which co-exist and exacerbate discrimination. Australia’s legal framework is inadequate to fully consider an individual’s experience and is ‘highly resistant to intersectionality’.⁷

More broadly, intersectionality acknowledges there are multiple dimensions of a person’s identity as a frame for understanding the layers in which social inequity can accumulate. When two or more identities intersect – as for example for First Nations people with a disability – the systems of disadvantage intensify.⁸ Systemic barriers and the limitations of Australia’s State and Territory-wide policies and guidelines compound this disadvantage, resulting in poorer health and social outcomes for people living with disability and a significant lack of appropriate support and opportunities.

7. Alysia Blackham and Jeromey Temple, ‘[Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework](#)’ (2020) 43(3) University of New South Wales Law Journal, 6.
8. Scott Avery et al, ‘[Physical Violence and Violent Threats Reported by Aboriginal and Torres Strait Islander People with a Disability: Cross Sectional Evidence from a Nationally Representative Survey](#)’ (2020) 20 (1) BMC Public Health, 1760.

Disability Justice and First Nations People



First Nations people with disabilities experience multiple intersections of discrimination and structural violence within our Australian systems of criminal justice, health care, disability support, policing and education. First Nations people with disability can experience a ‘double disadvantage’ of ableism and racism.⁹ This reflects ‘intersectional inequality’, a multi-faceted discrimination that interacts to compound disadvantage and inequity.¹⁰

The First Peoples Disability Network (FPDN) is the peak body for First Nations people with disability. FPDN, together with the First Peoples Disability Justice Consortium, identified that there is an absence of coherent frameworks for holistic disability, education and human services support for First Nations people.¹¹ The historical exclusion of Aboriginal and Torres Strait Islander people with disability from society has allowed the amplified marginalisation and inequity faced to be kept from public scrutiny. And so there has been little redress for these injustices.

- More than 1 in 5 First Nations children and almost 1 in 2 (48%) of First Nations adults live with disability and it is accepted that these figures are under-representative.¹²
- Disability is twice as common for First Nations people (38%) as for the general population.¹³
- First Nations people are twice as likely to use disability support provided under the NDIS,¹⁴ but utilise less of their plan coverage on average (60%) than non-Indigenous participants (67%).¹⁵ Barriers to accessing support include inaccessible housing, lack of service support, and isolation.¹⁶
- Since 1991, over 40% of deaths in custody have involved a First Nations person with a disability.¹⁷
- First Nations people with a disability are 14 times more likely to be imprisoned than the general population.¹⁸

9. DRC, ‘[Public hearing 4: Health Care and Services for People with Cognitive Disability](#)’ (Report, 2020), 33.

10. Scott Avery, ‘[Aboriginal and Torres Strait Islander People with Disability: Falling through the Cracks](#)’ (2020) 159 Precedent (Sydney, N.S.W.), 13.

11. First Peoples Disability Justice Consortium, [Submission to Senate Community Affairs References Committee Inquiry](#), Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment, (April 2016), 11.

12. ABS 2019 - DRC (Interim Report, October 2020) 451. <[Interim Report \(royalcommission.gov.au\)](#)>. (‘Royal Commission Interim Report’)

13. DRC ([Infographic: First Nations People with a Disability](#), November 2020).

14. Institute for Urban Indigenous Health, [Submission to Queensland Productivity Commission Inquiry](#), Inquiry into The National Disability Insurance Scheme Market In Queensland, (October 2020), 4.

15. NDIS, [Aboriginal and Torres Strait Islander participants](#), Report (30th June 2019), 9.

16. Australian Civil Society CRPD Shadow Report Working Group, ‘[Disability Rights Now 2019](#)’, Submission to the UNCRPD in response to the List of issues prior to the submission of the combined second and third periodic reports of Australia (2019) 32.

17. DRC, ‘[Overview of responses to the Criminal Justice System Issues paper](#)’ (Issues Paper, December 2020) 6.

18. Australian Civil Society CRPD Shadow Report Working Group, ‘[Disability Rights Now 2019](#)’ (Submission to the CRPD in response to the List of issues prior to the submission of the combined second and third periodic reports of Australia, 26 July 2019) 24.

Disability Justice and Women and Girls



Women and girls living with disability experience multiple and intersecting forms of discrimination. This is compounded by the impacts of sexism, gender-based violence, workplace discrimination and breaches of sexual and reproductive rights.

The right to live free from all forms of discrimination and the right to full enjoyment of sexual rights and reproductive rights have been identified by Women With Disabilities Australia (WWDA) as the most urgent and unaddressed human rights issues they face.

- 17.8% of women in Australia have a disability.¹⁹
- Employment of women with disabilities (50.7%) is lower than that of men with disability (56.1%).²⁰
- The denial and limiting of the legal capacity of women with disabilities is also a form of violence.
- Legislative frameworks limit the sexual and reproductive autonomy of women with disabilities, as well as their decisions on treatment, are not followed.²²
- More than 70% of women with a disability have experienced sexual violence.²³



Women with disabilities are often subjected to a higher frequency of gender-based violence, for longer periods of time.²¹

19. ABS, [Disability, Ageing and Carers, Australia: Summary of Findings](#) (Reference Period 2018, 2019)
20. ABS, [Disability, Ageing and Carers, Australia: Summary of Findings](#) (Reference Period 2018, 2019)
21. WWDA (2021), [‘Response to Restrictive Practices Issues Paper of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability’](#), 86.
22. Maher et al. [‘Women, disability and violence: Barriers to accessing justice - Key findings and future directions’](#), ANROWS Compass, Issue 2 (April 2018) 1.
23. WWDA Youth Network, [‘Sexual & Reproductive Rights’](#) (Position Statement, 2017), 3.

Disability Justice and Culturally and Linguistically Diverse People



National Ethnic Disability Alliance (NEDA) emphasises that people with disability from culturally and linguistically diverse backgrounds experience multifaceted discrimination, including on the basis of their disability, ethnicity, language spoken, migration status or pathway, and religion (among other things).

People with disability from culturally and linguistically diverse backgrounds face additional barriers to accessing disability support, education, healthcare, education and legal rights because of systemic racism, structural and social ableism, lack of access to adequate and accessible, economic precariousness, and visa constraints.

- Approximately 18% of culturally and linguistically diverse people have a disability,²⁴ a similar rate as the general population.
- Of the 715,000 people with a severe disability in Australia, 29% identify as having a culturally and linguistically diverse background.²⁵
- Only 7% of NDIS participants are from a culturally and linguistically diverse background, with research suggesting that low rates of participation are due to difficulties in understanding and navigating the model’s complex structure and access points, and difficulty accessing information.²⁶
- S52 of the DDA exempts its application to Migration Law. As such, migration officials have the power to discriminate against people with disabilities on the basis of the health requirements under public interest criteria 4005 and 4007.²⁷ Between 2008-09, of the total number of migrants refused visas under PIC 4005, 30% were refused on the basis of intellectual or physical disability.²⁸
- Culturally and linguistically diverse people with disabilities experience higher unemployment rates (70%) in comparison to other disabled people (61%).²⁹



People with disabilities who migrate to Australia have to wait 10 years to meet [residency and eligibility requirements](#) for the Disability Support Pension.

24. Settlement Services International, ‘[Still Outside the Tent: Cultural diversity and disability in a time of reform – a rapid review of evidence](#)’ (Occasional Paper, 2018).
25. DRC, ‘[Culturally and linguistically diverse engagement principles](#)’ (Report, 2020), 9.
26. Heneker, K.J., Zizzo, G., Awata, M., Goodwin-Smith, I. (2017), ‘[Engaging Culturally and Linguistically Diverse Communities in the NDIS](#)’. Australian Centre for Community Services Research, Flinders University, 31.
27. [Migration Regulations 1994](#) (Cth), sch 4.
28. Department of Immigration and Citizenship, ‘[Submission to Joint Standing Committee on Migration \(Attachment C\)](#)’ Inquiry into Immigration Treatment of Disability (2009), 42.
29. Joint FECCA & NEDA [Submission to the Australian Human Rights Commission’s ‘Willing to Work’ Inquiry: Employment Discrimination Against Older Australians and Australians with Disability](#) (2015).



CHALLENGE

1

Policing and Incarceration

How do we remove the role of police and corrective services in responding to people with cognitive, intellectual and psychosocial disabilities so that people with disability are not subject to force, violence and incarceration?



'KENNY THE POLICE COP'
A POLICE COP IS SOMEONE
THAT MAKES SURE U WON'T
END UP IN JAIL.
A NICE POLICE COP WOULD
B SOMEONE LIKE MY FRIEND,
HE WON'T PUT U IN JAIL.
THEY WATCH OVER US AND
THEY CATCH PEOPLE WHO
DO FAST SPEEDING,
I ALWAYS GIVE THEM THE
NICKNAME THE GIANTS
BECAUSE THEY ARE LIKE
GIANTS,



The Background

People with disabilities are particularly vulnerable to being trapped in the criminal justice system, which exposes them to violence and brutality from police and corrective services. Having a disability does not make you more likely to commit a crime, but it does increase your chance of being criminalised.³⁰ People with disability experience discrimination and unjust outcomes in police interactions. Arrests too often lead to indefinite detention.

As police are often the default frontline responders, people with disabilities are too often treated with potentially fatal force rather than compassionate care. Prisons are unable to adequately meet the needs of people with disabilities and to ensure that their welfare is not harmed by incarceration.³¹ Prison practices such as solitary confinement, a form of physical and sensory isolation, cause irreparable harm. People with disability are disproportionately represented in solitary confinement units in Australia.³² While prison authorities justify the use of solitary confinement as a behaviour and risk management tool, solitary confinement is frequently used as a substitute for proper health care for people with disability.³³



Think about it

Deeper than police practices and prison systems are the legal concepts (such as ‘capacity’) and jurisdictions (such as mental health, inherent jurisdiction, *parens patriae* jurisdiction) that provide the justification of legal violence.³⁴

30. Ruth McCausland and Eileen Baldry, ‘[I Feel Like I Failed Him By Ringing The Police](#)’: [Criminalising Disability In Australia](#)’ (2017) 19(3) Punishment & Society, 294.
31. New South Wales Law Reform Commission, ‘[People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion](#)’ (Report 135, 2012), 31.
32. Human Rights Watch, ‘[Abuse and Neglect of Prisoners with Disabilities in Australia](#)’ (Report, 2018).
33. Human Right Law Centre, ‘[Explainer: Solitary Confinement of people in prison](#)’ (Factsheet, 2020).
34. Linda Steele, ‘[Submissions on Redress to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#)’ (August, 2020).

Key Statistics and Facts

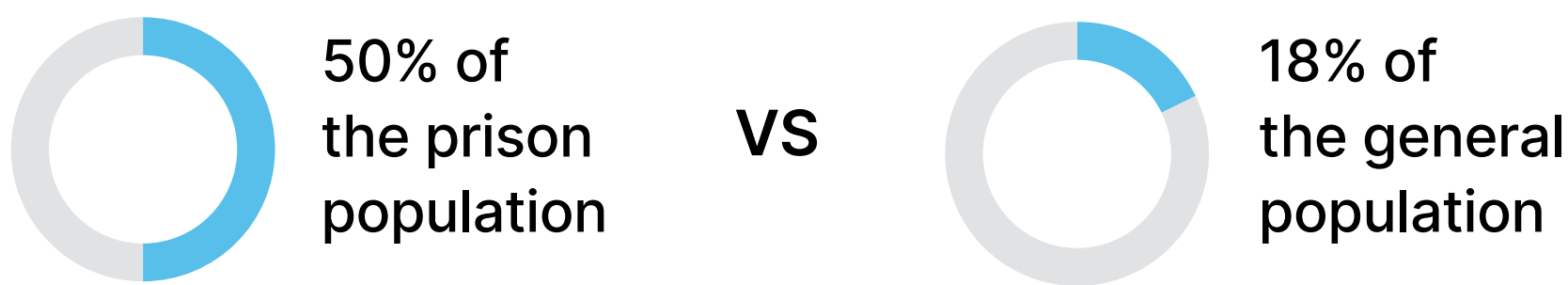


There is a serious lack of data relating to the prevalence of people with disability coming into contact with police or the carceral system, and what we do know demonstrates that the criminal justice system is systemically discriminating against people with disability.

There are also limitations on accessing comprehensive and aggregated data relating to complaints about police arrests and detention, and demographic factors including cultural background and disability.

Did you know?

People with disability make up 50% of the prison population in Australia, despite being only 18% of the general population?³⁵



An estimated 20-25% of people in the criminal justice system have a cognitive impairment. This rises to over 50% in the youth justice system.³⁶

35. AIHW, [‘The health of Australia’s prisoners 2015’](#) (Report, 2015).
36. Parliament of Australia, [‘Chapter 5 - The provision and continuation of services for NDIS participants in receipt of forensic disability services’](#) Parliament of Australia (Web Page, 2021) [5.4].



Key Legislation

Arrest: Australia's common law has recognised that special procedures may be required when arresting a person with a disability³⁷ but such special procedures are not enshrined in any State or Territory statutes concerning powers of arrest.

Detention: Modifications to procedures of detention are required by police when detaining a person with disability in certain jurisdictions. These modifications are inconsistent but can apply to access to support, adjustments of interview processes, and clear understandings of rights.

These procedures for detaining people with disabilities are contained in:

- [Criminal Procedure Act 1986 \(NSW\)](#) s 306 M
- [Crimes \(Forensic Procedures\) Act 2000 \(NSW\)](#) s 7 (2)(b)
- [Law Enforcement \(Powers and Responsibilities\) Regulation 2016 \(NSW\)](#) CI 31(1)
- [Police Powers and Responsibilities Act 2000](#) (Qld) s 422
- [Law Enforcement \(Powers and Responsibilities\) Act 2002 \(NSW\)](#) s 128.
- [Police Powers and Responsibilities Act 2000 \(Qld\)](#) s 433.
- [Summary Offences Regulations 2016 \(SA\)](#) r 19.

Indefinite Detention: Under current laws and practices in Australia, people with cognitive, intellectual and psychosocial disabilities who are charged with a crime but found not guilty or 'unfit to stand trial' may be detained for indefinite and prolonged periods which can arbitrarily and unjustly detain people with disability. The practice of indefinite and prolonged detention disproportionately affects First Nations people with disability.³⁸

Queensland, Western Australia and Tasmania's custodial supervision regimes operate on an indefinite detention model under:

- *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(5), 19(4), 35.
- *Mental Health Act 2016* (Qld) ss 134, 137–8.
- *Criminal Justice (Mental Impairment) Act 1996* (Tas) ss 24, 26 (Indefinite/Nominal hybrid).

37. Stephenson LJ in [R v Inwood \[1973\] 2 All ER 645 \[649\]](#).

38. First Peoples Disability Justice Consortium, 'Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment' Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment (April 2016).

Victoria and the Northern Territory impose custody for a nominal term under:



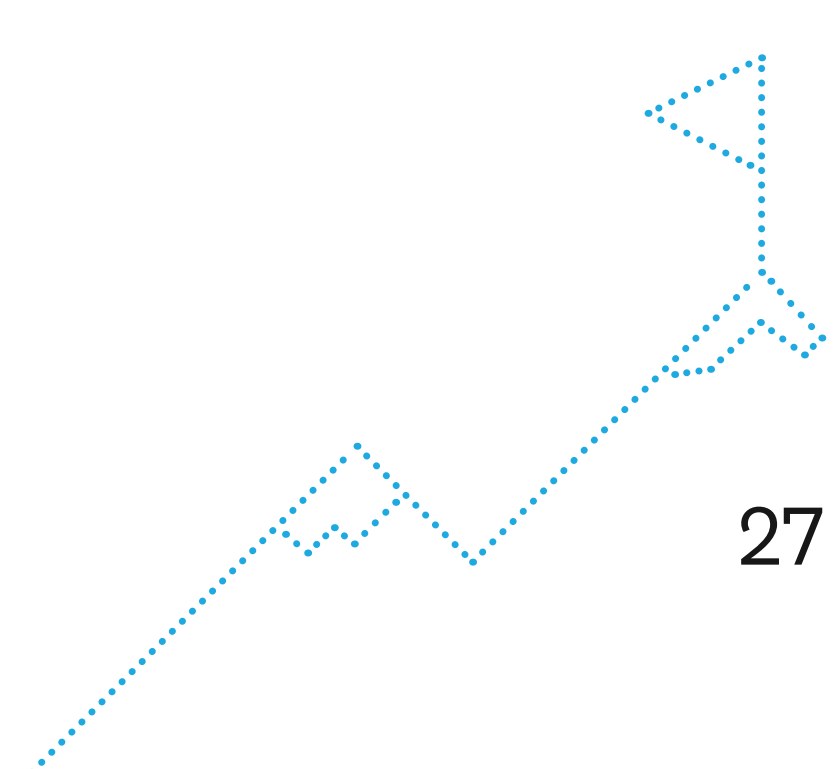
- Criminal Code Act 1983 (NT) ss 43ZC, 43ZG
- Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Vic) ss 27–8.

The nominal term is set by the court. At the end of that term, there is a review to assess whether the person would be a serious risk to themselves or members of the public.

Key Literature

To learn more about this issue, take a look at the following publications:

- [Criminal Law Justice System – DRC Submission](#)
Law Institute of Victoria
Inadequate police training results in inappropriate police responses to, and hyper-criminalisation of vulnerable people including people with cognitive, intellectual and psychosocial disabilities. Health professionals need to accompany police including in conducting welfare checks.
- [“I needed help, instead I was punished”: Abuse and Neglect of Prisoners with Disabilities in Australia](#)
Human Rights Watch
Prisoners with disability are at serious risk of violence and abuse. Persistent institutional racism and discrimination further marginalises First Nations people with a disability in prison, often discouraging them from accessing services. The Australian Government must address these rights violations.
- [People with Disability and the Criminal Justice System – DRC Submission](#)
Australian Human Rights Commission
The overrepresentation of people living with disabilities in the criminal justice system may be attributed to factors such as: not understanding that some behaviours are wrong; being persuaded to admit to crimes they did not commit; negative attitudes and a lack of awareness about disability; and a lack of disability and culturally appropriate supports.





- [Redress – DRC Submission](#)

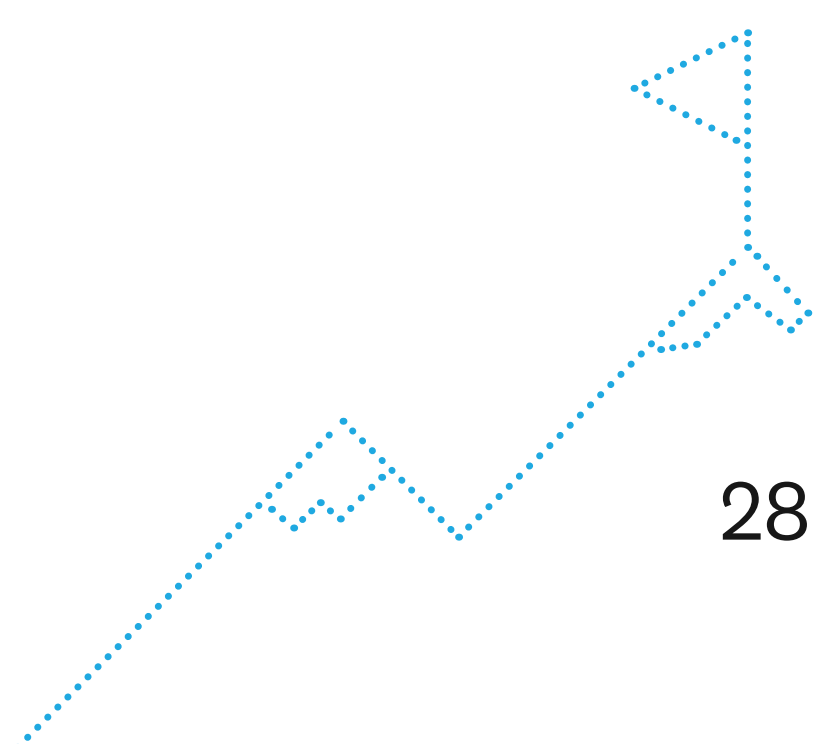
Linda Steele, UTS Disability Network

Violence is permitted by law as it is framed as ‘protective’ or ‘just’. The legal frameworks embed disability-specific legal violence into the structure of the Australian legal system. These concepts need transformation to reduce police violence against those with disability.

- [Indigenous People, Mental Health, Cognitive Disability and The Criminal Justice System](#)

**UNSW Sydney, Ruth McCausland,
Elizabeth McEntyre and Eileen Baldry**

People living with disabilities often have more difficult interactions which escalate in frequency and intensity. First Nations people with disabilities interact with police at a younger age and higher frequency than non-Indigenous people with disability. Poor police relations and a lack of understanding and identification of disability is problematic as police are the default frontline responders.



Key Cases



Doolan v Australia (CRPD, 2019)

A First Nations man was held in a maximum-security prison for more than seven years after being deemed unfit for trial due to his intellectual impairment.

The CRPD [found that](#):

- Australia did not provide Mr Doolan with the accommodation and supports he needed to stand trial, to exercise legal capacity and access justice.
- Mr Doolan was deprived of his rights to a fair trial and to the protection of and benefit of the law.
- Mr Doolan's indefinite detention was arbitrary.
- His treatment (including solitary confinement, involuntary treatment, violence from other prisoners, and denial of rehabilitation, mental health and support services) was degrading and in violation of [Article 15 of the UNCRPD](#).

Leo v Australia (CRPD, 2019)

Mr Leo had a history of epilepsy, mental illness, intellectual and psychosocial disability from a brain injury. After heavy alcohol use and a failure to take his regular medication, he suffered a psychotic episode leading to him pursuing and assaulting a woman. Mr Leo was arrested and charged with common assault. Due to his intellectual disability, Mr Leo was found unfit to stand trial and subsequently found not guilty due to mental impairment. Mr Leo was placed under a 12-month Custodial Supervision Order. Under first review after a year, he was ordered to remain in custody, no subsequent review was completed and he was held in indefinite detention for more than nine years, six of which were in maximum-security prison.

The CRPD [found that](#):

- Disability must never be grounds for denying legal capacity.
- People with disabilities must not be obliged to live in a particular living arrangement due to their disability, as this constitutes differential treatment and is discriminatory.
- The existence of a disability does not justify the deprivation of liberty.



- Governments need to pay special attention to the needs and vulnerability of people deprived of liberty because of their disability.
- Indefinite detention can lead to ‘irreparable psychological effects’.

Noble v Australia (CRPD, 2016)

After a WA court decided an intellectually impaired teen facing criminal charges was unfit to plead, Mr Noble was imprisoned indefinitely without trial. After ten years in prison, the man was released on restrictive conditions of unlimited duration and with no avenue of appeal to have them lifted.

The CRPD [found that](#):

- Mr Noble was denied a fair trial, equal protection under the law, and the support he required to exercise his legal capacity.
- His disability was the ‘core cause’ of his deprivation of liberty, which the CPRD deemed arbitrary and a form of inhuman and degrading treatment.

R v Inwood (UK, 1973)

The court considered the level of clarity in communication required when placing a person under arrest. Stephenson LJ found that ‘different procedures will have to be followed with different persons, depending upon their [circumstances, including] intellectual qualities, physical or mental disabilities’.³⁹

[John’s experience](#): **violence against a disability support pensioner**

In September 2017, while conducting a welfare check, police were found to have used excessive and unjustified force on a disability pensioner.

39. [R v Inwood](#) [1973] 2 All ER 645 [649]

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CHALLENGE

2

Healthcare, Disability Support and Aged Care

How can we achieve a rights-based approach in healthcare, disability support services and aged care so that people with disabilities can receive the support they need while maintaining the rights to autonomy, personal integrity and legal capacity?

Nurse



my favourite Nurses are men and
women. This one is the boss,
and she helps me sort lots of
things like meds for when I get sick
and operations and when my arms and legs
are not working properly. She gives
me exercises for my arms
and legs and neck to
be strong. Her superpowers
help me be a superwoman.
She is happy, clever, a good
person with a smiley face.
The nurses walk around to see
all the patients in all the beds

The Background



Despite NDIA claims that the NDIS provides “the reasonable and necessary supports participants need to live an ordinary life”,⁴⁰ there are serious failings in the current system.

Here are the critical issues:

- Government austerity is leading to more people being denied access to the NDIS scheme, and appeals to the AAT against NDIS decisions are increasing.
- R 7.23-7.25 of the [NDIS \(Supports for Participants\) Rules 2013](#)⁴¹ set out the NDIS’s obligations in relation to those in custody and prison/parole. Under these rules the NDIS’s responsibilities are limited to transition supports and ‘reasonable and necessary’ supports other than the day-to-day care. As NDIS support is highly restricted, a greater responsibility is placed on the substandard state-run health services which operate in the justice system to provide access to support for people living with disability.
- Access to the NDIS for people in prisons is limited and operates alongside the substandard state-run health services. Under s 19(2) Health Insurance Act the federal health minister has discretion whether to make Medicare/PBS available in prisons or not. Resulting from this discretion is an inequity of access to health services; people living with disability in custody and prison/parole are not able to access the same level of support as in the community.
- The [Community Restorative Centre \(NSW\) report into NDIS and Prisons](#) identified an absence of support mechanisms for people with disabilities in most prisons in NSW, no systematic identification of people with disabilities, a lack of transparency in how to access support, lack of clarity as to government/community responsibilities, and a lack of consistency in NDIS planning.

40. NDIS, ‘[Access to the NDIS Operational Guidelines](#)’ (‘Operational Guidelines’), Overview.

41. [NDIS \(Supports for Participants\) Rules 2013](#), r 7.23-7.25.



- NDIS obligations under R 7.24 of the [NDIS \(Supports for Participants\) Rules 2013](#) are limited within the community:
 - NDIS is not responsible for general housing and accommodation, housing for the homeless, emergency accommodation, routine tenancy support, or home maintenance.⁴²
 - Nor is it responsible for improving community infrastructure when it is managed through other planning and regulatory systems.⁴³
- The age requirement under s 22 of the National Disability Insurance Scheme Act 2013 (Cth)⁴⁴ excludes people aged 65+ from accessing the NDIS. People aged 65+ must rely on the aged care system resulting in inequitable access to comprehensive disability services and supports which are available under the NDIS.⁴⁵
- Ineligibility for the NDIS or ineligibility for specialist disability accommodation under the NDIS is causing young people with disability to live in residential aged care.⁴⁶
- People with cognitive, intellectual and psychosocial disability can face barriers to accessing the NDIS where there is insufficient evidence of permanency of conditions and substantially reduced functioning. Recent events, diagnosis and complex conditions can cause some people with disability to be excluded from the NDIS.
- Insufficient education and training for health professionals on the needs of people with intellectual disability is one of the primary barriers to quality healthcare facing people with cognitive, intellectual and psychosocial disabilities.⁴⁷

42. [NDIS \(Supports for Participants\) Rules 2013](#), r 7.24(a)-(b).

43. [NDIS \(Supports for Participants\) Rules 2013](#), r 7.24 (c).

44. [National Disability Insurance Scheme Act 2013 \(Cth\)](#), s 22.

45. [Royal Commission into Aged Care Quality and Safety \(Final Report, March 2021\)](#), vol 1, 94.

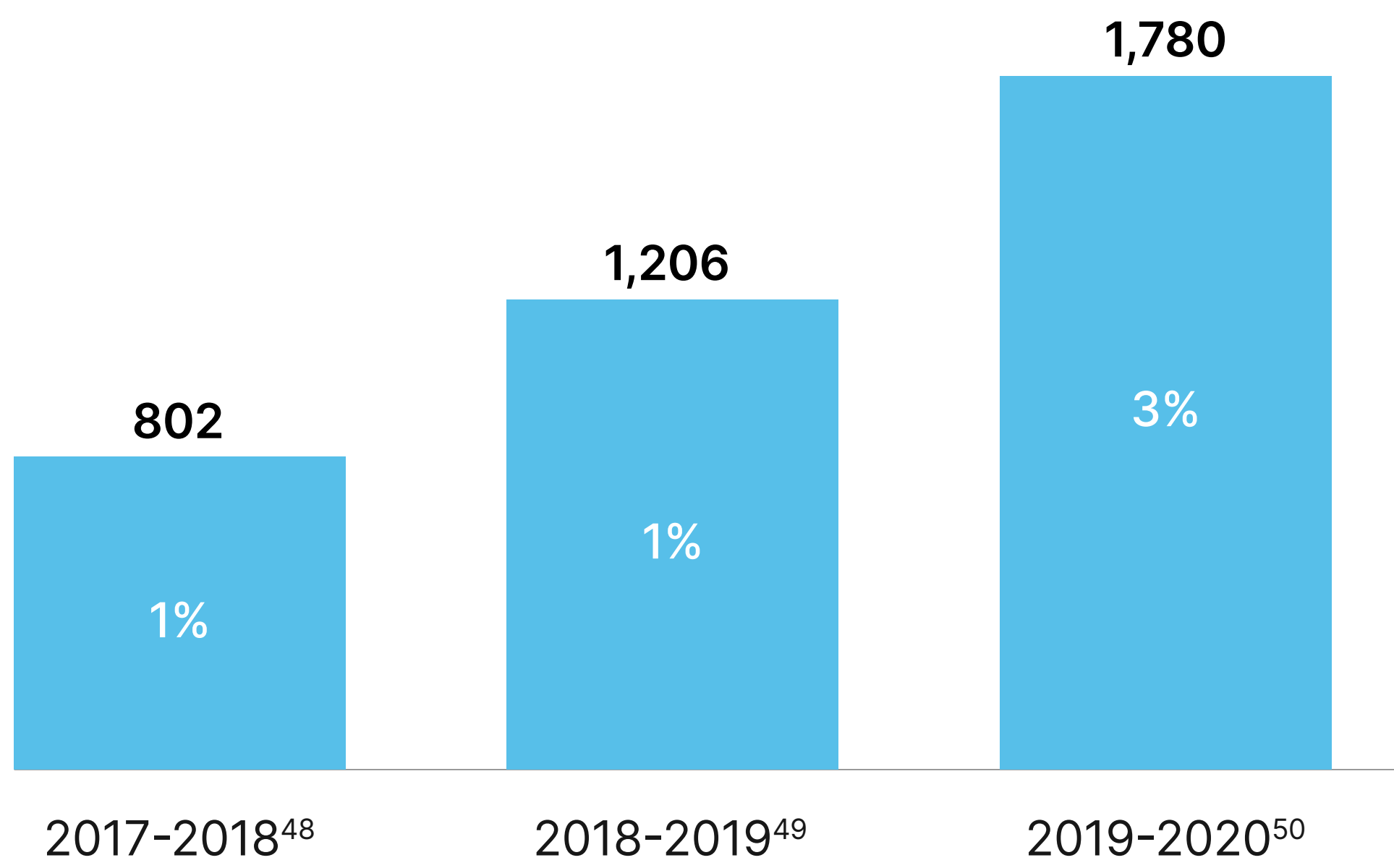
46. [Royal Commission into Aged Care Quality and Safety \(Final Report, March 2021\)](#), vol 1.

47. Julien Trollor et al, 'Has teaching about intellectual disability healthcare in Australian medical schools improved? A 20-year comparison of curricula audits' (2020) 20 BMC Medical Education, 8.

Key Statistics and Facts

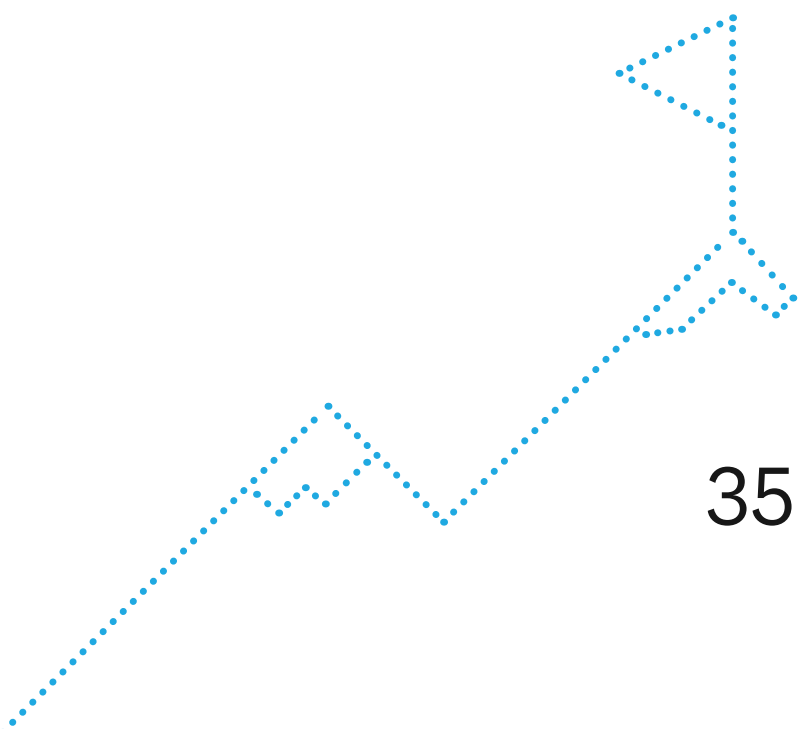


Complaints lodged in the AAT related to the NDIS by number and % of total complaints, 2017-2020

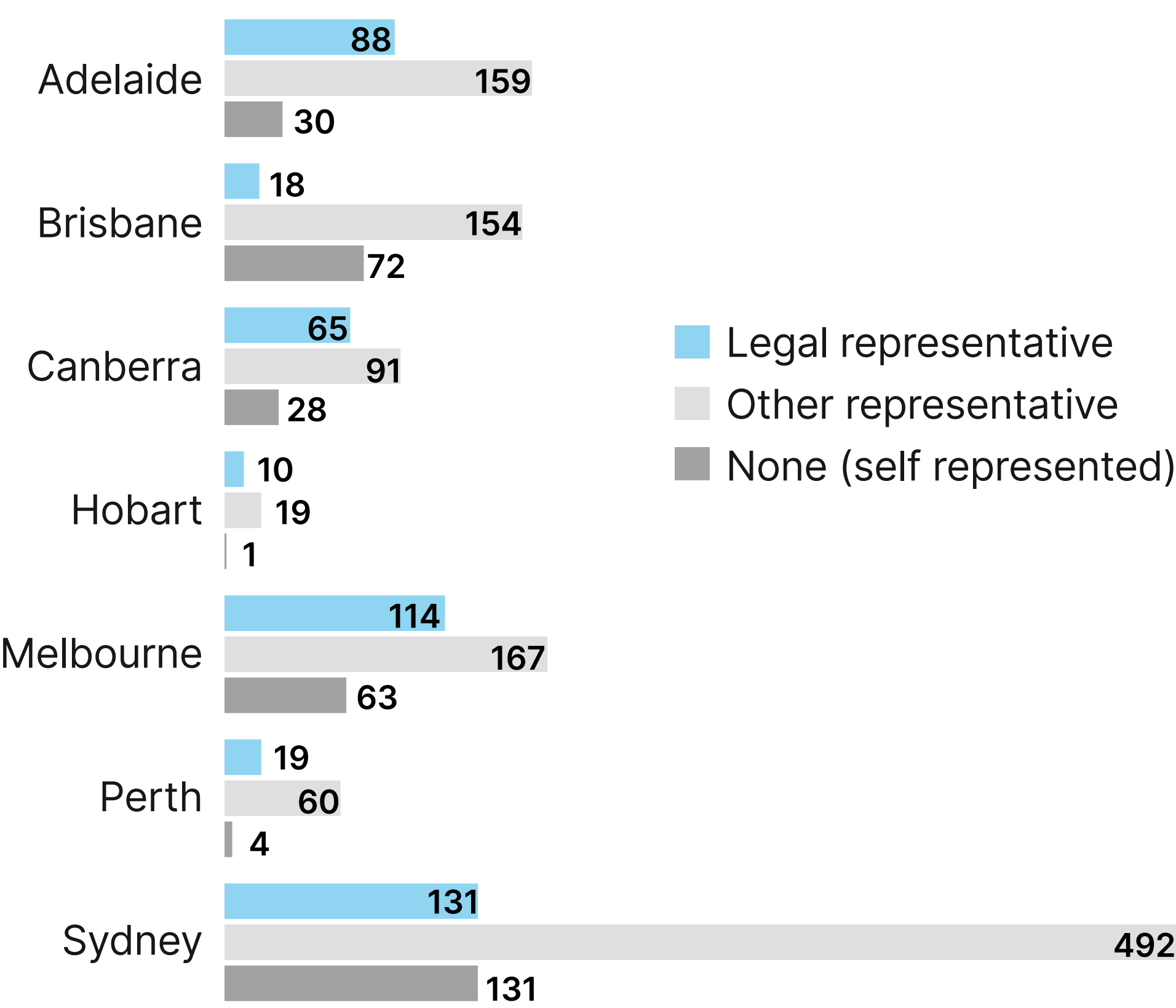


- Of the 3,891 cases that the NDIA has defended in the AAT since its creation in 2013, [33%](#) have been contracted out to private law firms. This contrasts with [over 75%](#) of complainants who did not have legal representation at their NDIS appeals.
- In Senate Estimates, it was revealed that the NDIA spent [\\$13.4 million](#) in legal fees at the AAT in 2019-20, up from \$9.4 million in the previous 12 months. The Guardian reports that the NDIA's total legal bill hit [\\$28.9 million](#) in 2019-20, an increase from \$18.4 million in 2018-19.

48. AAT, [‘2017-18 Annual Report – At a glance’](#).
49. AAT, [‘2018-19 Annual Report – At a glance’](#).
50. AAT, [‘2019-20 Annual Report – At a glance’](#).



Number of applicants making NDIS appeals by type of representation and city, 1 Jan 2019 to 31 Jan 2020⁵¹



- Between 1 January and 30 September 2020, more than 1,000 younger people with a disability were admitted to residential aged care.⁵²
- In 2018, 82% of younger people in residential aged care rarely or never visited friends and approximately 13% never went outside.⁵³ The experience of younger people with disability in residential aged care is isolating, lonely and causes desperation.⁵⁴

51. Source: AAT, obtained under freedom of information by Shirley Humphris.
52. [Royal Commission into Aged Care Quality and Safety \(Final Report, March 2021\), vol 1, 67.](#)
53. Aged Care Guide, ‘[The issue facing younger people with disability in aged care](#)’ (Web Page, 19 June 2018).
54. [Royal Commission into Aged Care Quality and Safety \(Final Report, March 2021\), vol 1, 121.](#)

Key Legislation



[National Disability Insurance Scheme Act 2013 \(Cth\)](#)



FAQ: What are the eligibility requirements for the NDIS?

To be a “participant” in the scheme and therefore entitled to “reasonable and necessary” supports (s34), a person must be able to meet 3 criteria:

1. the age requirements ([s22](#))
2. the residence requirement ([s23](#))
3. the disability requirements ([s24](#))
 - Be deemed to have a “substantially reduced functional capacity”
 - Be deemed to have an impairment and meet the threshold if a person is “unable to participate effectively or completely” in the activity.⁵⁵

Key Literature

To learn more about this issue, take a look at the following publications:

- [In Sickness and in Prison: The Case for Removing the Medicare Exclusion for Australian Prisoners](#)
Craig Cumming, Stuart Kinner, Ann-Claire Larsen.
Journal of Law and Medicine
Granting prison health services an exemption under s 19(2) of the Health Insurance Act 1973 (Cth) would make the Medicare Benefits Schedule and the Pharmaceutical Benefits Scheme-funded services available to prisoners who meet the eligibility criteria.
- [Locked Out: The implementation of the NDIS for people in prison in NSW – DRC Submission](#)
Community Restorative Centre
There are no comprehensive mechanisms in place to support people with disability in prisons. A small number are housed in specialist units but the majority go without supports. The process for accessing supports should be clearer for incarcerated people with disabilities.

55. [NDIS \(Becoming a Participant\) Rules 2016](#), rule 5.8.



- [NDIS – Defining what is reasonable and necessary](#)

Joshua Dale, Carroll & O’Dea

- The NDIS has been criticised in its application and delivery of inadequate supports that do not consider individual circumstances of participants which is the very object of the scheme.
- Cases highlight the difficulty people living with disability face to meet eligibility requirements to receive benefits and specific supports. Cases also illustrate a pattern of NDIS re-directing participants to a State-funded scheme which in some cases, may not be sufficient to meet a participant’s needs.

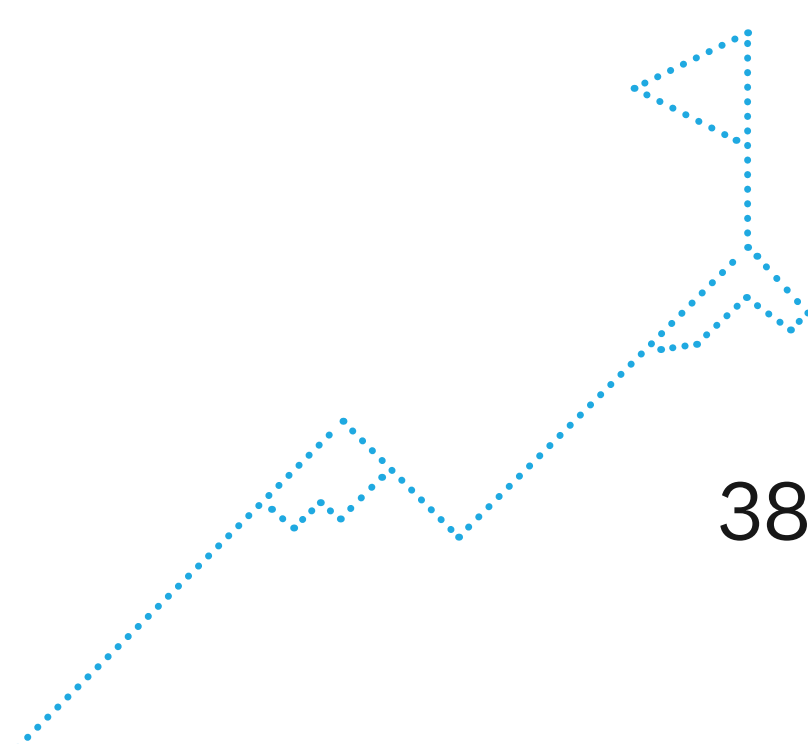
- [A scoping review to explore the experiences and outcomes of younger people with disabilities in residential aged care facilities](#)

Stacey Oliver et al.

- Young people with disability are inappropriately placed in aged care. For young people placed in aged care the commonly identified negative experiences include a lack of community participation and social interaction, limited autonomy, financial stress and a lack of housing choice.
- To support the rights of young people with disability to live independently, there is a need for policy and practice changes to ensure access to timely rehabilitation, housing and support.

- [DRC: Fourth Progress Report](#)

Recurring themes in the inadequacies of support for people living with disabilities included: lack of culturally appropriate health and disability services, and problems accessing them when they were available, geographical barriers and lack of access to reasonable adjustments or supports.



Key Cases



Evans and NDIA (AAT, 2019)

The NDIA tried to rely on a 65-decibel threshold for hearing loss to limit support access. The AAT found that the NDIA cannot rely on blanket thresholds to deny or limit someone’s access to the NDIS and the AAT must rely on the functional capacity test.⁵⁶ The AAT relied on previous decisions⁵⁷ to reaffirm that policy statements that are inconsistent with the legislative scheme should be disregarded.

FSQQ and NDIA (AAT, 2019)⁵⁸

The AAT confirmed that a “beneficial” approach should be taken to interpreting the Act. In this case, it was insufficient for the NDIA to deny a claim simply because there was insufficient information. This suggests that the NDIA has an investigative role and is required to make its own enquiries where necessary.⁵⁹

Burchell and NDIA (AAT, 2019)⁶⁰

In this case, the Appellant was being forced to use cheaper substitutes which led to subsequent health problems because the health system did not fund the kind of support sought. The AAT found that it was reasonable and necessary for the NDIA to grant the support because it wasn’t adequately provided by the healthcare system. This case highlights the issues between inconsistent State and Federal schemes.

Madelaine and NDIA (AAT, 2020)⁶¹

This case demonstrates the extremely low threshold for achieving ‘functional capacity’ (in this case, relating to mobility) and thereby not being eligible for NDIS participation.



Movement in the home does not need to be achieved by walking; a person might even crawl from room to room⁶²

In Madelaine and NDIA, the AAT showed a worrying disregard for the dignity of the appellant.

56. [Evans v NDIA](#) [2019] AATA 754, 33.
57. [McGarrigle v National Disability Insurance Agency](#) [2017] FCA 308; [Drake v Minister of Immigration and Ethnic Affairs](#) (1979) 46 FLR 409
58. [FSQQ v National Disability Insurance Agency](#) [2019] AATA 186.
59. Joshua Dale, ‘[Australia: NDIS – Defining what is reasonable and necessary](#)’ (Webpage, 2020)
60. [Burchell and NDIA](#) [2019] AATA 1256.
61. [Madelaine and NDIA](#) [2020] AATA 4025.
62. [Madelaine and NDIA](#) [2020] AATA 4025, 104.

Complete Nursing and Home Care Pty Ltd and NDIA (AAT, 2020)⁶³



The NDIA refused to reimburse a registered NDIS provider, CNHC, when they provided services to a child for ten months after the child’s NDIS plan ran out.

The AAT found that it had no jurisdiction to review an appeal regarding payment under [s99](#). This limitation has been described as “a [deficiency in the Act](#) and one that would almost certainly lead to participants and their families being out of pocket even in circumstances where a decision by the NDIA is overturned”.

63. [Complete Nursing and Home Care Pty Ltd and NDIA](#) [2020] AATA 360.

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CHALLENGE

3

Rights and Law

How can we eliminate violence against people with disability, such as coercive and involuntary sterilisation and the use of restrictive practices, to protect rights, dignity and autonomy?

The Background



Violence against people living with disability exists in various forms. Some of the critical issues are:

- The dimensions of violence include: institutional violence, legal violence, medical/psychological violence, economic violence, settler-colonial violence, structural violence, slow violence, epistemic violence, and ontological violence.
- ‘Legal violence’ refers to non-consensual interventions in the bodies and lives of people with disability permitted by law specifically on the basis of disability (or characteristics associated with disability).⁶⁴
- Australian courts and tribunals have a role in enabling legal violence. Practices such as coercive and involuntary sterilisation and restrictive practices are framed as ‘protective’, or ‘just’ by reason of the regulative framework surrounding them and judicial oversight.⁶⁵
- The use of restrictive practices can lead to physical injury, psychological harm or death.⁶⁶
- International bodies have condemned forced sterilization under the CRPD, CAT, CEDAW and Australia has been encouraged to enact legislation to prohibit and prevent unnecessary and involuntary sterilization.

FAQ: What are restrictive practices?

Restrictive practices include seclusion, confinement, and the use of physical, chemical, mechanical, environmental or psychosocial restraints.⁶⁷

64. Linda Steele, ‘[Submissions on Redress to DRC](#)’ (August 2020), 2
65. Linda Steele, ‘[Submissions on Redress to DRC](#)’ (August 2020), 2.
66. DRC, [Restrictive Practices](#) (Issues Paper, May 2020), 2.
67. Physical example: holding a person down on the ground so they cannot move; Chemical example: using medication to sedate a person; Mechanical example: tying a person to a chair in a classroom or disconnecting the power of an electric wheelchair or taking a person’s communication device away from them; Environmental example: locking a garden area or fridge in a group home to stop people accessing it; Psychosocial example: constantly telling a person that doing an everyday activity is too dangerous, without reasonable justification.

Key Statistics and Facts

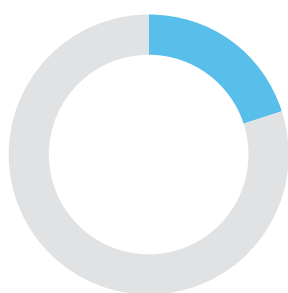


- In Australia, the majority of applications made for the sterilisation of girls and young women under 18 years of age are approved.⁶⁸
- The Family Court is more likely to approve a sterilisation procedure compared to the Guardianship Tribunals.
- Of the applications that proceed to hearing, the Family Court approves 95% of applications for sterilisation compared to the Guardianship Tribunal approval rate of 43% in New South Wales and 78% in South Australia.
- Persons with disability who display ‘challenging behaviour’ or ‘behaviours of concern’ may be subjected to restrictive practices or medical intervention. Of the 10–15% of persons with disability that will show ‘behaviours of concern’, between 44–80% of them will be administered a form of chemical restraint.⁶⁹

? Did you know?



47% of adults with disability have experienced violence, compared with 36% of people without disability.⁷⁰



20% of adults with disability have experienced abuse before the age of 15.⁷¹

68. Susan Brady, John Britton and Sonia Grover, ‘[The Sterilisation of Girls and Young Women in Australia: Issues and Progress](#)’ (2001) Australian Human Rights Commission Report.
69. Australian Law Reform Commission, ‘[Equality, Capacity And Disability In Commonwealth Laws: Restrictive Practices - The Use Of Restrictive Practices In Australia](#)’ (Report 124, 2014).
70. AIHW, ‘[People with Disability in Australia](#)’ (Web Report, 2020), 145.
71. AIHW, ‘[People with Disability in Australia](#)’ (Web Report, 2020), 145.

Key Legislation



[The NDIS Quality and Safeguards Framework](#)


FAQ: What are the limitations of NDIS Quality and Safeguards Framework?

The Framework is limited in scope, and does not address the multiple forms of violence and abuse perpetrated against people with disability across the broad circumstances and settings in which it occurs, and it does not hold people and systems to account for abuses.⁷²

- [National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector](#), 2014 seeks to reduce the use of restrictive practices in disability services.
 - The regulation of restrictive practices in Australia primarily arises under State and Territory disability services and mental health legislation, and under a range of policy directives, statements and guidance materials. There is significant inconsistency in the regulation of restrictive practices across jurisdictions.
 - Restrictive practices regulation in [Victoria](#), [Queensland](#) and [Tasmania](#) occur through disability services legislation. The approach in other jurisdictions includes policy-based frameworks, voluntary codes of practice, and regulation through the guardianship framework.

There is no national legislation that expressly regulates the forced sterilisation of children. Thus, it is governed and enforced by a combination of:

- [Family Law Act 1975 \(Cth\)](#) s.67ZC allows the Family Law Court to make decisions on child welfare in the “best interests” of the child
 - Marion’s case confirmed that this encompasses matters related to the forced sterilisation of children.
- Common Law principles
- Family Law regulations

 “Persons with disabilities have the right to recognition everywhere as persons before the law... Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” UNCRPD, [Article 12](#)

72. Disabled People’s Organisations Australia, ‘[Violence and Abuse Against Persons with Disability](#)’ (Factsheet, 2018).

Key Literature



To learn more about this issue, take a look at the following publications:

- [Good Practice in Supported Decision-Making for People with Disability](#)

Social Policy Research Centre, UNSW

This report highlights the barriers and facilitators to the operationalisation of article 12 of the CRPD. This report also proposes Principles and a Guide to enable organisations to implement supported decision-making.

- [Restrictive Practices Issues Paper](#)

DRC

People with disability may be subject to restrictive practices across many areas of life and in many settings such as group homes, the community, detention settings, mental health settings or work. Restrictive practices conflict with many human rights of people living with disabilities. Though there have been national agreements towards the elimination of such practices, they are not laws.

- [Redress – DRC Submission](#)

Linda Steele, UTS Disability Network

Non-consensual interventions in the bodies and lives of people with disability is permitted by law, specifically on the basis of disability. Despite being overt acts of violence, practices such as coercive and involuntary sterilisation and restrictive practices are framed as ‘protective’, or ‘just’. Preventing and redressing disability-specific lawful violence will require transformative change of Australian legal systems as a whole.

- [Restrictive Practices and Behaviour Support Rules 2018](#)

NDIS

States and Territories remain responsible for the authorisation of restrictive practices. Though it is recognised that restrictive practices can present serious human rights infringements, registered providers are still permitted to use restrictive practices within the scope of the NDIS Quality and Safeguarding Framework.



- [The Sterilisation of Girls and Young Women in Australia: issues and progress](#)

Australian Human Rights Commission

The majority of sterilisations involve female children with intellectual disabilities. The protection of the rights and integrity of girls and young women with intellectual disabilities remains dependent upon appropriate law reform and the service landscape for children and their families.

- [Factsheet: Forced Sterilisation of People with Disability and People with Intersex Variations](#)

Disabled People's Organisations Australia

Forced sterilisation and 'sex normalising' practices remain legal and sanctioned by the Australian Government. The Government accepts current legislative and practice frameworks for the authorisation of forced sterilisation and 'sex normalising' medical interventions and has passed responsibility for action to States and Territories.

- [Dehumanised: The Forced Sterilisation Of Women And Girls With Disabilities In Australia](#)

WWDA

The practice of forced sterilisation contravenes every international human rights treaty to which Australia is a party. Areas to address the elimination of this practice may cover areas such as legislative reforms; transitional justice and redress; informed consent; parenting; violence prevention and supportive decision-making.

- [CERD, Concluding Observations – 2019](#)

The CPRD has expressed concern regarding multiple aspects of Australia's NDIS scheme and domestic legal framework's incompatibility with the UNCRPD. Reasons for concern include the contravention of specific rights including the Right to Life, Access to Justice and Freedom from Torture.

- [Equality, Capacity and Disability in Commonwealth Laws](#)

Australian Law Reform Commission

Chapter 8 highlights concerns around inappropriate and under-regulated use of restrictive practices in Australia and possible pathways forward, including a national preventative mechanism.



- [Disability, abnormality and criminal law: sterilization as lawful and 'good' violence](#)

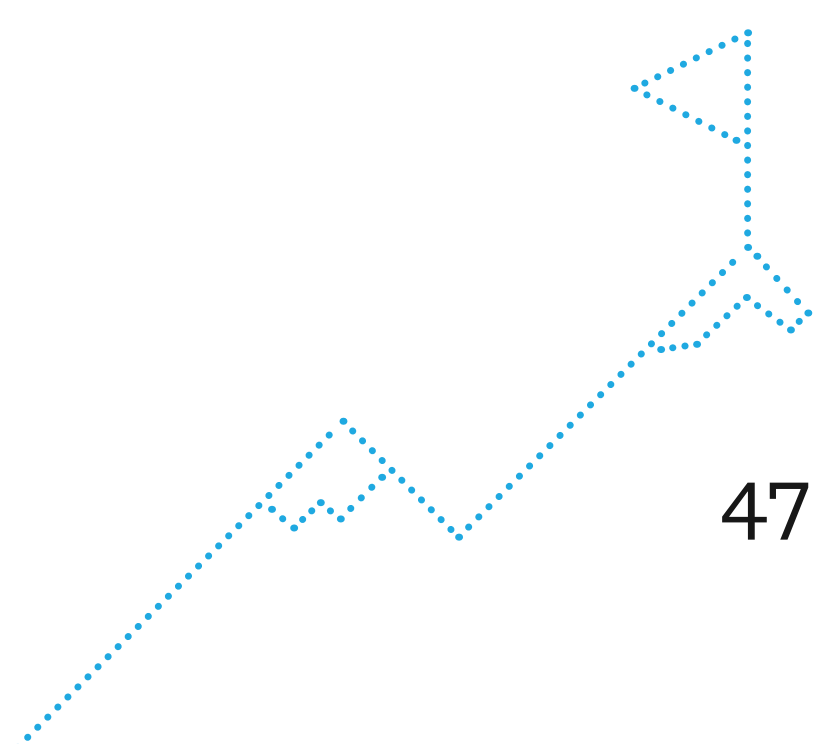
Linda Steele, Griffith Law Review

The article examines the intersections between the criminal law of assault and the Family Court's welfare jurisdiction when authorising the sterilisation of girls with intellectual disability as a legally permissible form of violence. It also examines concepts of 'Legal violence' and 'abnormality'. As girls with intellectual disability are deemed 'abnormal', the lawfulness of sterilisation is not dependent on their consent but on their parents consent as authorised by the Family Court rendering the practice as a form of 'lawful' and 'good' violence.

- [Court authorized sterilization and human rights: inequality, discrimination and violence against women and girls with disability](#)

Linda Steele, UNSW Law Journal

The article illuminates the Senate Committee's approach to court authorised sterilisation and issues including protecting a woman or girl's human rights by promoting their equality and non-discrimination; the legal framework applicable to girls with a disability and the defence of necessity.



Key Cases



Marion's case (HCA, 1992)⁷³

The High Court of Australia held that courts had the authority to force sterilisation upon people – even young children. The High Court ruled that the decision to sterilise must be a step “of last resort”; that authorisation may only be given if sterilisation is determined to be in the child’s “best interests” after alternative and less invasive procedures have all failed or it is certain that no other procedure or treatment will work.⁷⁴

P v P (HCA, 1994)⁷⁵

This case concerned authorisation of medical treatment of an ‘incapable’ child. Despite the facts not explicitly relating to forced sterilisation, the effect was that State legislation, insofar as it related to the sterilisation of incapable children, continued in operation as the courts failed to find any fettering of State law.

BH v CCH (2004)⁷⁶

The Family Court authorised the forced sterilisation of an intellectually disabled 12-year-old girl who had Tuberous Sclerosis (TS). The Court considered the 50% chance that any child she had would be born with TS, as factor weighing in favour of sterilisation.

73. [Secretary Dept of Community Services and Health v JWB and SMB 1992 CLR 218](#) (‘Marion’s Case’).

74. Brady, S. M., Grover, Sonia, Briton, John, & Australia. Human Rights Equal Opportunity Commission, ‘[The sterilisation of girls and young women in Australia: issues & progress](#)’ (2001) Human Rights and Equal Opportunity Commission. Also see: Marion’s Case [259-60].

75. [P v P \[1994\]](#) HCA 20.

76. [BH v CCH \[2004\]](#) FamCA 496.



CHALLENGE

4

Education and Child Protection

How can we ensure that schools and early childhood education providers deliver inclusion and equity in education for children with disabilities so that no child is left behind?



MY ART Teacher from School
is my favourite teacher
In The whole world because he
is Amazing. He is a great artist
he supported me and taught me
everything About painting and drawing
birds and writing ~~how~~ to do clay
making He is sweet with good
humour and makes me happy
He told me I could be an Artist.
Art is my life now

[Meagan Pelham](#), My Favourite
Art Teacher in Whole World, 2021
supported by Studio A



The Background

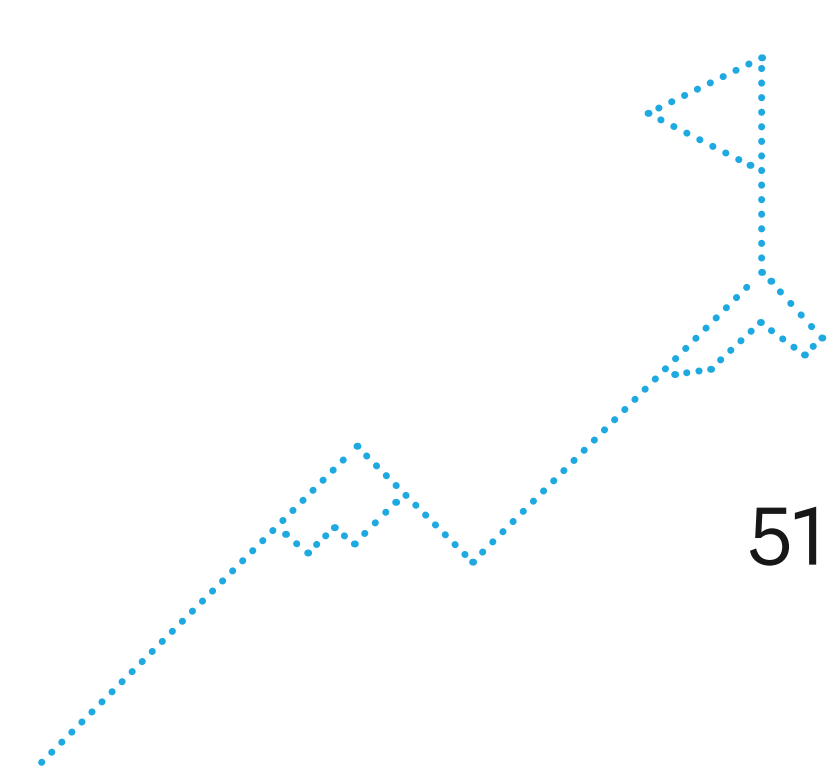
Inclusive education has been linked to broader social inclusion, academic, social and emotional benefits for people with disability and the broader community. Discrimination happens on an individual basis, but it also happens at a structural level due to ongoing segregation of education. Not only is segregation bad in itself, but there are indications that segregated schools and closed spaces have increased levels of violence and discrimination. Furthermore, how do we prevent restrictive practices, low attendance, and promote inclusive school environments?

Key Statistics and Facts

- According to the most recent ABS data, 292,600 students with disabilities attend school in Australia and of those children, one third do not learn in regular classroom settings (71,000 attend special classes and 28,900 attend special schools).
- More than three quarters of teachers (85%) have worked with a child with a disability.

Key Legislation

- UNCRPD [Article 24](#) – the right to inclusive education and [Article 5](#) – segregation is inherently unequal and discriminatory
- [Convention on the Rights of the Child](#) (CROC) (1990)
- [Disability Standards for Education 2005](#)
- National Assessment Program Standards



Key Literature



To learn more about this issue, take a look at the following publications:

- [Segregation of People with Disability Is Discrimination and Must End](#)
Disability Advocacy Sector Joint Position Paper
Many people with disability are separated from the rest of the community by law, policy and practice frameworks that directly and explicitly enable ‘special’, segregated arrangements. It is important that the segregation of people with disability is recognised and conceptualised as discrimination and action is taken to end the segregation within disability reform processes.
- [Education and Learning Issues Paper](#) and its [responses](#)
DRC
Lack of inclusion in education maintains structural discrimination against those with a disability whereas there is clear and consistent evidence that inclusive education settings can confer substantial short- and long-term benefits for students with and without disabilities. In secluded education, there is an increased risk of violence, a lack of resources and increased pressures.
- [The Right of Persons with Disabilities to an Inclusive Education without Discrimination](#) – Submission to the Office of the United Nations High Commissioner for Human Rights, CID
There must be an update to the definition of inclusive education that can be applied at a classroom-teacher level, and also at a national policy level to clarify how the delivery of inclusive education can be achieved.
- [Submission to the CRPD Inclusive Education in Australia](#) – **All Means All**
Australia’s education of students with disability evidences serious systemic failures that fall below the standards mandated by national treaties.



- [Inclusive Education for People with Disability: DRC Submission to the DRC,](#)

Australian Human Rights Commission

- There are many actors impeding the process of implementing the right to inclusive education in Australia such as persistence in the use of restrictive practices in schools, lack of support, training and resources for teachers and principals, and inadequate policy. This lack of communication, support and uniformity (of policy) prevents equity in education from being achieved.
- Equity of education must also overcome issues of intersectionality, in particular regarding First Nations students with disability.

- [Work and Education: Youth Position Paper](#)

WWDA

Schools and workplaces should be inclusive of young women and girls with disability and they should have a right to be educated in mainstream settings.

- [Response to DRC Education and Learning Issues Paper](#)

WWDA

It is important to identify and address the human rights violations specific to and/or that disproportionately affect women and girls with disability. Equality in education cannot exist if the intersectional experience of women and girls with disability is not addressed.

- [Strapped In And Locked Up: Shocking Photos Reveal How Autistic Children Are Treated In Australian Schools](#)

Sarah Dean, Aspergers Advocacy Australia

Children with disabilities are being subjected to disproportionate force and restrictive practices that “mainstream” children are not. The practice of ‘strapping’ children is occurring in both ‘Special’ schools and mainstream schools.

Key Cases



Walker v State of Victoria (FCA, 2011)⁷⁷

A boy with behavioural problems, ASD and dyslexia was excluded from school activities in a mainstream high school and not allowed to attend full time. The Federal Court found that exclusion from school activities did not breach National Assessment Program Standards. The DDA does not empower the Court to undertake a general inquiry into the best interests or the vulnerabilities of a child with disability.

Purvis v NSW (HCA, 2003)

Appellant was excluded from a NSW high school on the basis of assaults on pupils and teachers. Appellant argued that it was unlawful discrimination as his behaviour was a result of brain damage. In order for conduct to fall under prohibited conduct under the DDA, disability must be the main reason for discrimination and not merely a causal factor. The HCA overcame the claims of direct discrimination by separating the behaviours caused by the disability from the disability itself. The decision has been critiqued for permitting exclusionary and discriminatory practices.

Kiefel v State of Victoria [FCA, 2013]⁷⁸

This case looked at the requirement of the school to make adjustments for a student who needed additional supports such as speech therapy and applied behavioural analysis. The Court found that the failure of the school to provide services to children with additional needs does not amount to discrimination. The Standards were found to “not require an education provider to seek additional specialist expertise for the student’s benefit, provide the student with remedial assistance, or to facilitate medical input in developing the student’s program”. The obligation upon the school is, rather, to “take reasonable steps to ensure that the student has access to the service” where it is demonstrated that a specialised support service is necessary for a student to participate in the activities in which the student is enrolled.

Izzo v State of Victoria (DET, 2020)⁷⁹

This hearing was procedural, however there is interesting obiter on application of discrimination: if a student cannot comply with a requirement due to their disability, enforcing the requirement is discriminatory.

77. [Walker v State of Victoria \(Walker\)](#) [2011] FCA 258 (Tracey J, Federal Court of Australia, 23 March 2011) (2011).

78. [Kiefel v State of Victoria](#) [2013] FCA 1398.

79. [Izzo v State of Victoria](#) (Department of Education and Training) [2020] FCA 770.



Housing

How can we ensure people with disability have access to suitable housing so that they can live with dignity, freedom and be connected to supports, friends and family?

MY HOUSE IS BRAND NEW
I LIKE 2 LIVE IN IT

RED RATTLER ANGEL MOUSE



RED RATTLER ANGELMOUSE
MY NEW NEW GROUP HOME
THOM'S DREAM ROOM IS NEXT 2
MR TODD'S ROOM AND WE
SHARE THE SAME BATHROOM.
MY DREAM HOUSE MAKES ME
FEEL HAPPY - I LOVE THOM
NEW ROOM I CAN LOOK OUT
AND SEE THE MIRROR FERRIES
GO BY. I FEEL SUPPORTED AT
HOME, MY NEW CARE ALWAYS
LOOK 4 BIG TOY SHOPS 4 ME,
SO I CAN BUY MORE TOYS.

[Thom Roberts](#), Red Rattler Angel Mouse
- My New Group Home, 2021 supported
by Studio A

The Background



People with disability are entitled to live with dignity, freedom and connected to community, and this means having access to appropriate housing. Most NDIS participants will find it difficult to find affordable housing due to low income, minimal assets, and specific needs, so access to housing for people with disability is critical.

The SDA is a programme designed to provide accommodation for people who require specialist housing solutions. However, funding and [eligibility](#) is limited. The SDA is critiqued as failing to address the housing needs of a large proportion of people with disability. Funding is only provided to small proportion of NDIS participants with extreme functional impairment or very high support needs who meet specific eligibility criteria

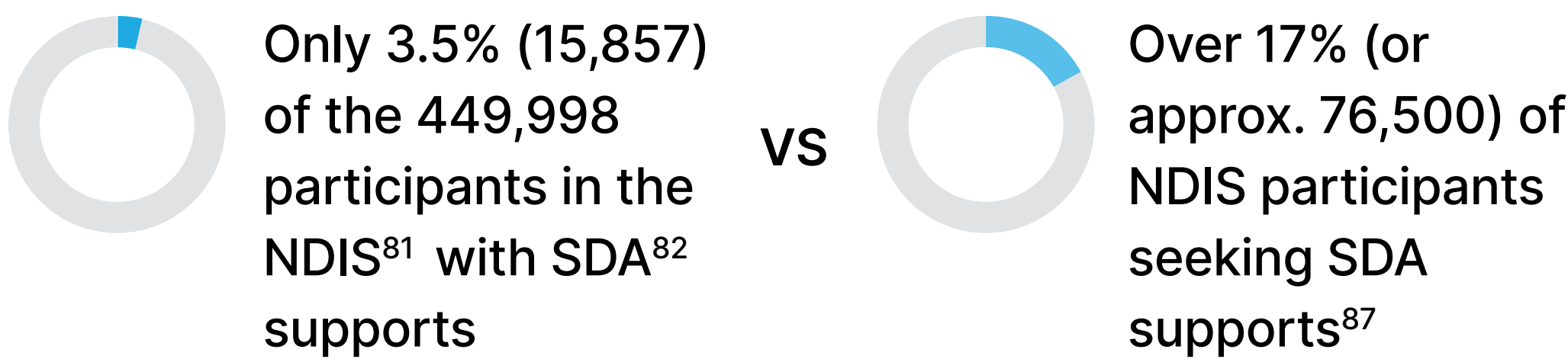
This means that SDA overlooks the widespread distribution of unaffordable housing and risk of homelessness amongst people with a disability.

Furthermore, people who are ineligible for NDIS and SDA support, but who have a disability that affects their capacity for sustained employment are likely to require social housing as they are unable to afford private rents, and they have significant needs that leave them just under the threshold for support. Inadequate income support payments also contribute to this hardship.⁸⁰

Suitable housing that affords people with disabilities dignity, freedom, and connection cannot involve use of restrictive practices. For example, accommodation may be physically accessible in its design, but the habitant may be immobilised, be subject to surveillance or have their movement restricted through lawful restrictive practices.

80. Kathleen Flanagan, '[Understanding the experience of social housing pathway](#)' (2020) AHURI Inquiry.

Key Statistics and Facts



It is estimated that the housing needs of 35,000-55,000 NDIS participants will remain unmet in the first decade of the scheme⁸³.

- The SDA is only intended to meet the housing needs of 6% of persons eligible for NDIS support, effectively rationing housing⁸⁴.
- There is a much larger cohort of people with disability who will not qualify for NDIS packages, and many are impacted by unsuitable or unaffordable housing.
- Housing affordability is an acute issue for many people with disability – research indicates there is a strong link between disability and poor housing outcomes⁸⁵.
- Four years after the commencement of SDA payments, just 54% of the estimated 28,000 eligible participants have SDA in their plans⁸⁶.
- More than 5,000 people (all under the age of 65), are forced to live in nursing homes because there are no other appropriate housing options.
- Despite Article 19 of the UNCRPD expressing the right to live independently and inclusively in the community, the SDA requires a person to register an additional co-habitant.
- People with schooling or employment restrictions, psychological and intellectual disabilities or mental illnesses are especially vulnerable to extreme levels of relative homelessness risk⁸⁸.

81. NDIS, ‘[Explore data](#)’ (2021).
82. NDIS, ‘[Explore data](#)’ (2021).
83. National Affordable Housing Consortium, ‘[Disability Housing Futures Working Group, Final Report](#)’ (2016).
84. A. Beer, E. Baker, ‘[The Shifting Risk of Homelessness among Persons with a Disability: Insights from a National Policy Intervention](#)’ (2020).
85. National Affordable Housing Consortium, ‘[Disability Housing Futures Working Group, Final Report](#)’ (2016).
86. Summer Foundation, ‘[Specialist Disability Accommodation \(SDA\) Explainer for Investors](#)’ (2020).
87. NDIS, ‘[SDA data](#)’ (March 2021).
88. A. Beer, E. Baker, L. Lester and L. Daniel, ‘[The Relative Risk of Homelessness among Persons with a Disability: New Methods and Policy Insights](#)’ (2019) International Journal of Environmental Research and Public Health.

Key Legislation



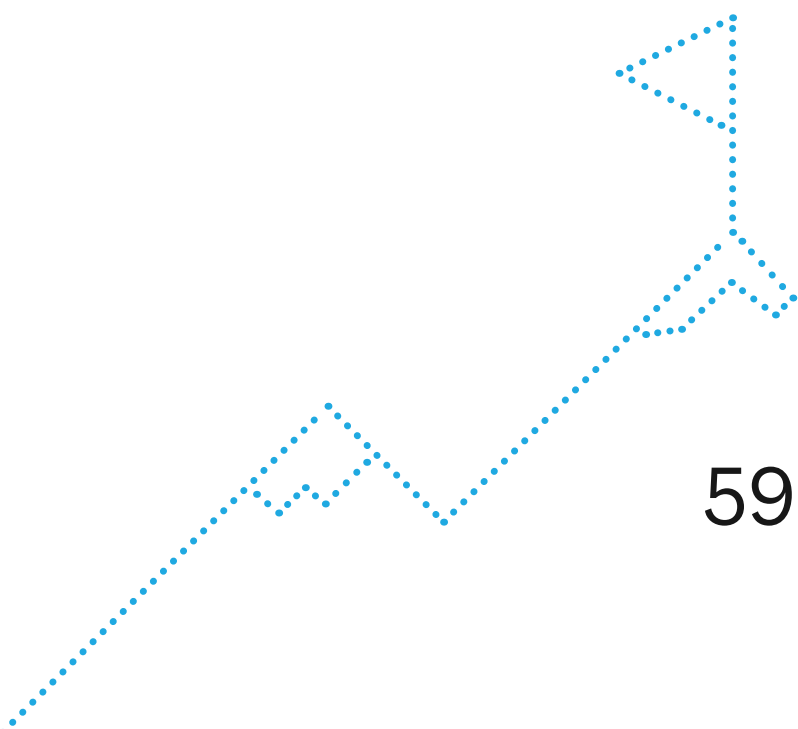
- [National Disability Insurance Scheme \(Specialist Disability Accommodation\) Rules 2020 \(Cth\)](#) Rules 11-13
- [National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector](#)
- [Summary of the NDIS Quality and Safeguarding Framework](#)
- [Regulated restrictive practices](#), NDIS Quality and Safeguards Commission



“States recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.” [Article 19](#), Convention on the Rights of Persons with Disabilities



Learn more about the [eligibility requirements](#) of the SDA.



Key Literature



To learn more about this issue, take a look at the following publications:

- [Restrictive Practices Issues Paper](#)

DRC

Restricting the rights or freedom of movement of certain people in society has a long history, including people with disability and First Nations people. People from culturally and linguistically diverse backgrounds, particularly refugees, may have traumatic experiences of restriction of movement and freedom prior to coming to Australia.

- [Response to the DRC Restrictive Practices Issues Paper](#)

NSW Trustee & Guardian

There has been an increasing use of surveillance cameras and CCTVs in supported accommodation settings (e.g. SDA) that may not have been disclosed. This may have significant implications on the disabled person's right to privacy, as well as their dignity and freedom. NDIS registered providers must show they have applied processes and practices that protect and respect the participants' privacy and dignity.

- [The Shifting Risk of Homelessness among Persons with a Disability: Insights from a National Policy Intervention](#)

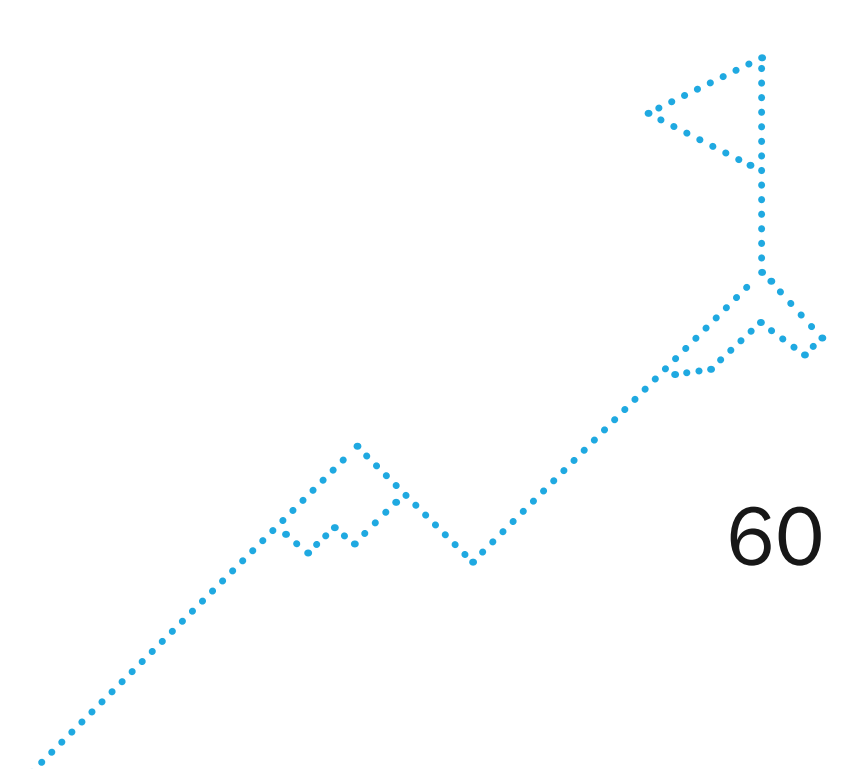
Andrew Philip Beer and Emma Baker

NDIS has not removed or reduced the risk of homelessness for disabled persons in Australia. The SDA's focus on those with the most acute needs overlooks the widespread distribution of unaffordable housing amongst Australians with a disability, and this in turn adds to the risk of homelessness.

- [The top 10 things to know about SDA](#)

Victorian Advocacy League for Individuals with Disability

The NDIS itself predicts only 6% of participants will qualify for SDA as most people can meet their housing goals through mainstream housing, supports or modifications. However most NDIS participants will still face barriers to securing suitable accommodation.



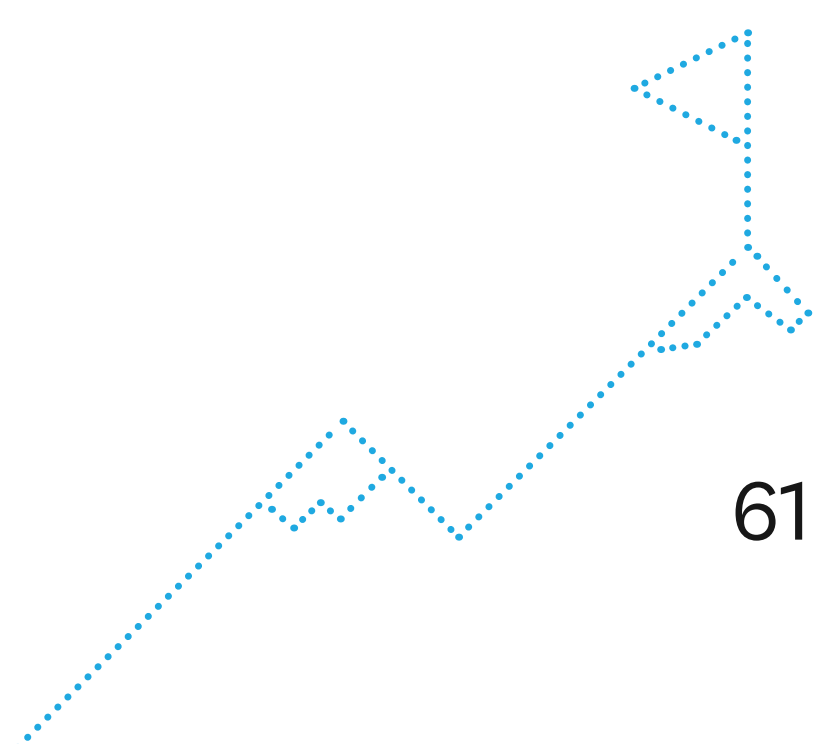
- [Disability Housing Futures Working Group, Final Report](#)
National Affordable Housing Consortium



Housing affordability is an acute issue for many people with disability and disability is strongly linked to poor housing outcomes. Specialist housing targets are unlikely to be met and the need exceeds the program's potential and the investment. Many people with disability who do not qualify for NDIS will be impacted by unsuitable or unaffordable housing.

- [Land costs distort disability housing provision](#)
Michael Bleby, Australian Financial Review

Fast-rising housing prices and expensive land costs create a shortage of larger disability housing as well as limit NDIS's ability to erect dwellings in many areas where people want to live to be close to family and community.



Key Cases



Hughes and National Disability Insurance Agency (AAT, 2018)⁸⁹

Applicant sought to overturn a decision of the NDIA that denied provision of SDA. The Member ruled that AAT has jurisdiction to hear the matter and consider the application made by the applicant.

Colson Pty Ltd v Woods and Bunyarra Transitional Accommodation for People with Disabilities (NSWCAT, 1997)⁹⁰

Landlord terminated lease due to tenant's behaviour which was as a result of an acquired brain injury. Despite Tribunal's disapproval of the landlord's attempt to terminate the tenancy, a termination was granted.

ZDB v The University of Newcastle (NSWCAT, 2017)⁹¹

International university student with major depressive illness had accommodation terminated as didn't meet the scholarship grade requirement of 75%. Argument for direct and indirect discrimination (later refer to 75% standard). Appeal of termination unsuccessful.

Consideration by the Court/Tribunal of Disability: A prominent issue in tenancy and housing cases where the tenant has a disability, is that the Tribunal does not consider disability as the key factor. Many cases relating to tenancy terminations are for illegal use (drug possession) including in cases where the drug use for was medicinal cannabis.

89. [Hughes and National Disability Insurance Agency](#) [2018] AATA 4572.

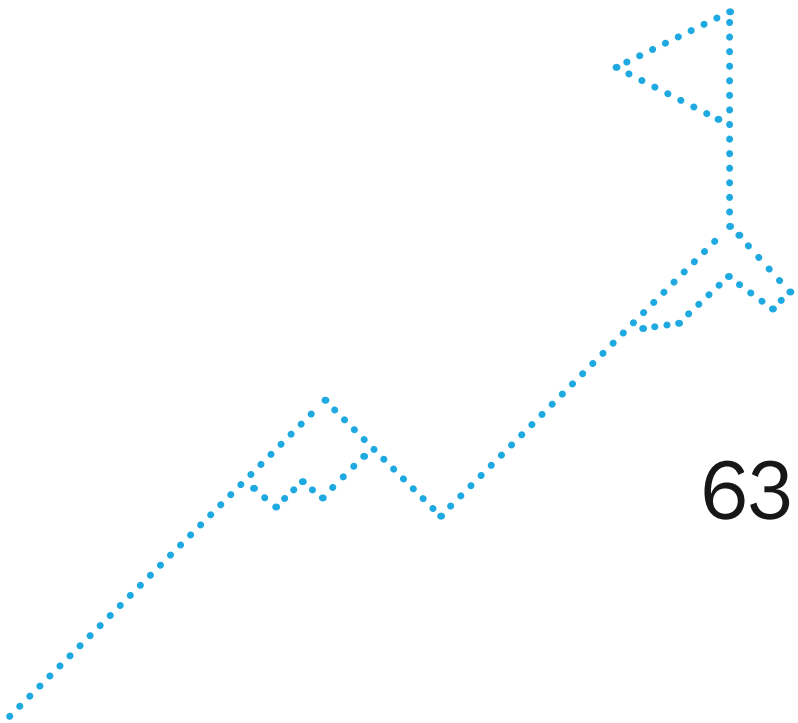
90. [Coslen Pty. Ltd. \(Landlord\) v Woods, Raylene \(Tenant\), and Bunyarra Transitional Accommodation for People with Disabilities Incorp. \(Tenant\)](#) [1997] NSWRT 228.

91. [ZDB v The University of Newcastle \(2017\)](#) NSWCATAP 70.

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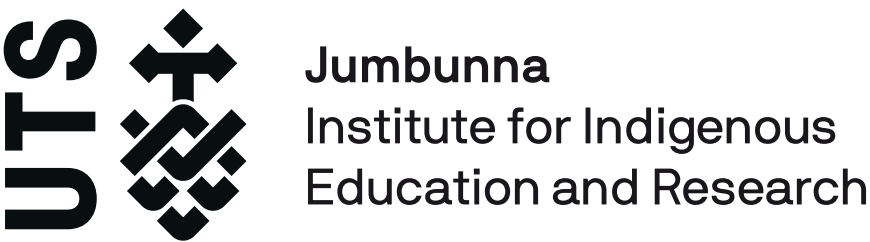
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