THE LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

Project 115

Access to Western Australia's justice system by persons with disability

Consultation Paper

November 2026

Law Reform Commission of Western Australia

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This document can be provided in alternative formats for persons with disability.

The Commission respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast cultural diversity of Aboriginal people throughout Western Australia and recognise their continuing connection to country, water and sky.

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Language in this Paper

Discussing disability

1. The language used to discuss disability is important. As People with Disability Australia explain, language:

   > *… has an impact on the social narrative about people with disability, how we are perceived and treated by the general public, which affects the systemic structures in society. It also has an impact on our sense of self, how we feel about ourselves, how we navigate society, and interact with other people.*[1]

2. We recognise that people have different, and often strong, preferences about the language used to talk about disability.

3. We mainly use person-first language (for example, 'person with disability') in this paper.[2] Person-first language aims to recognise an individual as a person before describing their disability.[3]

4. However, we acknowledge that some individuals and communities may prefer identity-first language (for example, 'disabled person'). Identity-first language frames a person's disability as part of their identity.[4] In this paper, we use identity-first language when referring to a preliminary response from an individual or group who has expressed a preference for this.

5. We also understand that members of some specific disability groups, such as the deaf community, may prefer to capitalise the description of their community, or of their disability, as a mark of identity.[5] However, we acknowledge that not all members of a group will necessarily have the same preferences. For consistency, unless an individual or group has expressed a different preference to us in their preliminary response, we use lower-case letters to refer to all disability groups, and to all disabilities in this paper.

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1 People with Disability Australia, *PWDA Language Guide: A Guide to Language about Disability* (August 2021) 3 <https://pwd.org.au/wp-content/uploads/2021/12/PWDA-Language-Guide-v2-2021.pdf>.

2 People with Disability Australia, *PWDA Language Guide: A Guide to Language about Disability* (August 2021) 6 <https://pwd.org.au/wp-content/uploads/2021/12/PWDA-Language-Guide-v2-2021.pdf>; Department of Social Services Australian Government, *Good Practice Guidelines for Engaging with People with Disability* (30 June 2025) 18 <https://www.disabilitygateway.gov.au/document/9881>.

3 People with Disability Australia, *PWDA Language Guide: A Guide to Language about Disability* (August 2021) 6 <https://pwd.org.au/wp-content/uploads/2021/12/PWDA-Language-Guide-v2-2021.pdf>.

4 Department of Social Services Australian Government, *Good Practice Guidelines for Engaging with People with Disability* (30 June 2025) 19 <https://www.disabilitygateway.gov.au/document/9881>.

5 'Disability and neurodiversity', *Australian Government Style Manual* (Web Page, 26 August 2025) <https://www.stylemanual.gov.au/accessible-and-inclusive-content/inclusive-language/disability-and-neurodiversity>.

6. We welcome your views about the language we should use to discuss disability in future publications for Project 115.

Key terms

7. We note that some of the key words and phrases used in this paper may bear different meanings in different contexts.

8. For example, in our review we have been asked to adopt a broad definition of 'disability', which distinguishes disability from a person's impairment. By way of illustration, for a person with hearing loss, disability arises when social environments do not cater for their hearing impairment (for example, when the only way to contact an organisation or service is by telephone). We discuss this concept further below when we explain the social model of disability. We have tried to reflect this distinction in our terminology (including many of the key terms we identify below). However, this understanding of the term 'disability' is not always reflected in the laws and other sources we refer to in this paper.

9. In addition, many terms (such as cognitive impairment, intellectual impairment and learning impairment) have no universally agreed definitions and are sometimes used interchangeably or in overlapping ways.

10. We also note that the terms adjustment and accommodation are sometimes used interchangeably. In the United Nations Convention on the Rights of Persons with Disabilities, the term reasonable accommodation is relevantly defined in terms of 'necessary and appropriate modification and adjustments'.[6] In this paper, we generally use the term adjustment,[7] unless we are referring to a source or a stakeholder's preliminary response which uses the term accommodation.

11. Another example is that the terms 'court' and 'tribunal' may, in different contexts, refer to one, or all, of an institution, a building in which the institution sits, or an individual decision-maker within the institution.

12. The following table provides some guidance on how we use key terms in this paper. It does not aim to define these terms exhaustively. We welcome your feedback on our proposed use of these terms.

13. The first time we use a key term in the paper, we provide its definition and show the term in bold. These key terms are also included in the longer list of defined terms in Appendix A.

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6 *Convention on the Rights of Persons With Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3, Article 2 (entered into force 3 May 2008).

7 This is on the basis that it is more commonly used in Australian legislation: for example in the *Disability Discrimination Act 1992* (Cth).

The meaning of the key terms we use in this paper

Examples	
Accused person	When we refer to an accused person, we mean a person who is alleged to have committed a criminal offence.
Adjustment	When we refer to an adjustment, we mean any reasonable modification of a court's or tribunal's environment, processes or practices (including a modification to ensure the provision of support) that is needed by an individual in a particular case, to access or participate in the court and tribunal system.
Assistive technology	When we refer to assistive technology, we mean equipment or devices that increase or maintain the physical and cognitive ability of persons with disability to do certain things. Examples include screen readers and refreshable Braille devices, alternative keyboards and mice, screen magnification, and voice recognition.[8]
Convicted person	When we refer to a convicted person, we mean a person who has pleaded guilty to a criminal offence or has been convicted after a trial, and for whom a court has recorded a conviction.
Court and tribunal system	When we refer to the court and tribunal system, we mean all of the State courts and tribunals in Western Australia.
Court or tribunal	When we refer to a court or tribunal, we mean: • the Body established by law to hear and determine proceedings; • the individual decision-makers who are appointed to exercise decision-making functions and powers (judges, magistrates, registrars and tribunal members); and • the processes, systems and services underlying the operation of courts and tribunals. Many of these are provided or administered by the Department of

[8] Australian Human Rights Commission, *Guidelines on equal access to digital goods and services* (April 2025) 12 <https://humanrights.gov.au/__data/assets/file/0027/47358/Guidelines-equal-access-digital-goods-services.pdf>.

	Justice's Court and Tribunal Services division.[9]
Cognitive impairment	When we refer to cognitive impairment, we use it as a broad umbrella term to mean an impairment in a person's cognitive functions, including comprehension, reasoning, adaptive functioning, judgment, learning or memory. A person may experience cognitive impairment because of an intellectual impairment (**see below**), acquired brain injury, or a neurological condition (such as dementia).
Disability	When we refer to disability, we mean the experience arising from a person's long-term impairment (including physical, psychiatric, intellectual, sensory, neurological, and/or learning impairments) in interaction with barriers (including environmental, social and attitudinal barriers). This experience can include, but is not limited to, exclusion and restrictions on accessing and fully participating in the community.
Intellectual impairment	When we refer to intellectual impairment, we mean an impairment in a person's intellectual functioning (including their ability to reason, learn and problem solve) and adaptive behaviour (including their conceptual, social and practical skills), arising during the developmental period.
Intersectionality	When we refer to intersectionality, we mean the ways in which different aspects of a person's identity (for example, their gender, race and age) and circumstances (for example, their geographic location and economic conditions) interact with each other and with social structures, to shape a person's experience. These interactions can produce compounded and unique forms of disadvantage, which cannot be understood by looking at any one aspect of a person's identity in isolation.
Juror	When we refer to a juror, we mean a person selected to sit on a jury to hear the evidence and decide questions of fact in a trial.

[9] 'Court and Tribunal Services', *WA Government* (Web Page, 3 August 2026) <https://www.wa.gov.au/organisation/department-of-justice/court-and-tribunal-services>.

Learning impairment	When we refer to learning impairment, we mean an impairment in a person's learning or information-processing functions, including acquiring, organising, retaining or understanding information. Examples of learning impairment include dyslexia and dysgraphia.
Neurological impairment	When we refer to neurological impairment, we mean an impairment in the functioning of a person's brain and central nervous system.
Party in civil proceedings	When we refer to a party in civil proceedings, we mean a person who is involved in the proceedings either as an applicant/plaintiff (the person who started the proceedings to seek a remedy) or a defendant/respondent (the person who responds to the proceedings, generally by opposing the remedy sought).
Physical impairment	When we refer to physical impairment, we mean an impairment in a person's body structure or physiological function. It can affect a person's mobility, dexterity and/ or stamina.[10]
Psychiatric impairment	When we refer to psychiatric impairment, we mean an impairment in a person's mental functioning arising from a mental health condition. A psychiatric impairment may affect a person's mental functions in a variety of ways, such as that it may restrict a person's ability to concentrate, to cope with multiple tasks, to interact with others, to accept constructive feedback, and/or to manage stress. While this term has been used in our Terms of Reference, we recognise it is not commonly used. In this paper, we prefer to use the term psychosocial disability (**see below**).
Psychosocial disability	When we refer to psychosocial disability, we mean the experience arising from a person's psychiatric impairment in interaction with various barriers.[11]
Sensory impairment	When we refer to sensory impairment, we mean an impairment in the functioning of one or more of a

10 'What is disability?', *Australian Disability Network* (Web Page, 2024) <https://australiandisabilitynetwork.org.au/resources/disability-statistics/what-is-disability/>.

11 'Language Guide', *Australian Federation of Disability Organisations* (Web Page) <https://afdo.org.au/news/language-guide/>.

	person's senses, including their hearing or vision, as well as other senses like touch, taste or smell.[12]
Social model	The social model of disability, which is a way of thinking about disability that views a person as experiencing disability when they are excluded from society because its institutions and processes are not designed to include people with impairments and their functional needs.[13]
Support	When we refer to support, we mean formal or informal assistance provided to an individual to facilitate their access to, or participation in, the court and tribunal system. Examples include a trained person appointed by a court to provide communication assistance to an individual in proceedings, an Auslan interpreter and technology to support communication, such as assistive listening systems and devices.[14]
Victim of crime	When we refer to a victim of crime, we mean a person who has suffered injury, loss or damage as a direct result of an offence.
Witness	When we refer to a witness, we mean a person who gives information (known as evidence) to a court or tribunal about something they saw, heard, experienced or know about.

[12] 'Sensory impairments', *healthdirect* (Web Page, 2026) <https://www.healthdirect.gov.au/sensory-impairments>.

[13] Shane Clifton, *Hierarchies of Power: Disability Theories and Models and Their Implications for Violence Against, and Abuse, Neglect, and Exploitation of, People With Disability* (October 2020) 11.

[14] Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11 sess, UN Doc 14-03120 (19 May 2014) [17].

1. Introduction

1.1. The Attorney General has asked us to make recommendations on legislative reforms to improve access to Western Australia's court and tribunal system for persons with disability (**Project 115**).[15]

1.2. We will report to the Attorney General by 31 December 2027.

What we will consider

1.3. We will consider the experiences of persons with disability who engage with Western Australia's courts and tribunals as:

- accused persons
- convicted persons
- victims or family of victims of crime
- witnesses
- jurors
- parties in civil proceedings in courts and tribunals; and
- other persons appearing in civil proceedings in courts and tribunals.[16]

1.4. When we consider the experiences of persons with disability in tribunal proceedings, we will focus in particular on the State Administrative Tribunal (**SAT**). However, our discussion may also apply to other tribunals in Western Australia.

1.5. We will consider whether there is a need for legislative reform and the best way to implement that reform.[17]

1.6. In addition we will consider the need to legislate for the provision of supports (including communication partners, interpreters and technology) to enable persons with disability to participate effectively in court and tribunal processes.[18] Our Terms of Reference are set out in full in Appendix B.

1.7. While the focus of our review is legislative reform, it is important to acknowledge that this is not the only form of change required to remove many of the barriers to access and participation for persons with disability, which we discuss in this paper.

1.8. Other systemic measures, including infrastructure, workforce changes, education, increased cultural awareness and attitudinal change (and any accompanying staffing and financial implications), are all necessary components of any successful reform.

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15 Terms of Reference 1.

16 Terms of Reference 2b.

17 Terms of Reference 2c.

18 Terms of Reference 2d.

1.9. Our preliminary consultations have already demonstrated that persons with disability face a very wide range of issues which impede access to Western Australia's courts and tribunals. As a result, a broad variety of responses may be required to address those issues and to facilitate access to courts and tribunals by persons with disability.

1.10. That being the case, a further issue we will consider is whether an overarching legislative statement of principles for access and participation would be the most effective means of driving practical reform across the court and tribunal system in Western Australia.

What we will not consider

1.11. There are specific issues we will not consider in Project 115, for various reasons.

1.12. Our Terms of Reference ask us to review Western Australia's court and tribunal system. This means we cannot make recommendations about federal courts and tribunals which operate in Western Australia, such as the Federal Court of Australia, the Federal Circuit and Family Court of Australia, and the Administrative Review Tribunal.

1.13. We have been asked specifically not to review the *Criminal Law (Mental Impairment) Act 2023* (WA) (**CLMI Act**) because it will be reviewed five years after it commenced.[19]

1.14. We have also decided not to review Western Australia's evidence law, which has been the subject of recent and significant reform.[20]

1.15. The *Evidence Act 2025* (WA)[21] (**Evidence Act 2025**) will replace the *Evidence Act 1906* (WA) (**Evidence Act 1906**). The substantive provisions of the Evidence Act 2025 will commence on 18 September 2027.

1.16. As the Evidence Act 2025 will have only commenced operating in practice shortly before we will report on Project 115, we do not think recommendations for reform of this new legislation would be useful.

1.17. We have taken into account the recommendations of the Law Reform Commission of Western Australia (**Commission**) in its report on Project 114 – *Guardianship and Administration Act 1990* (WA) (**Project 114 Final Report**). We have therefore not revisited the issues canvassed in that report, including in relation to decision-making capacity.

1.18. We have also decided not to review issues or make recommendations specifically about the Children's Court or about court proceedings involving young people (that is, people who are under 18 years old) with disability.

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19 Terms of Reference 2g.

20 'Historic revamp of evidence laws gives victims greater support', *Government of Western Australia* (Media statement, 29 April 2025) <https://www.wa.gov.au/government/media-statements/Cook%20Labor%20Government/Historic-revamp-of-evidence-laws-gives-victims-greater-support--20250429>.

21 The *Evidence Act 2025* (WA) received Royal Assent on 25 September 2025.

1.19. How young people access and participate in court processes is governed by legal frameworks and principles which are different from those applying to adults.[22] We believe that access and participation in court processes by young persons with disability is best reviewed separately from access and participation by adults with disability. We therefore do not intend to specifically consider reforms to improve access and participation in courts and tribunals by young persons with disability.

1.20. That said, some of our recommendations in relation to courts and tribunals generally may apply equally to the Children's Court and to proceedings in other courts involving young persons with disability.

1.21. In addition, stakeholders' preliminary feedback referred to various systemic and structural issues outside courts and tribunals which affect whether, and how, persons with disability access and participate in the court and tribunal system.

1.22. For example, many stakeholders identified issues related to police interactions with persons with disability. These issues included that police commonly misunderstand or misinterpret disability-related communication and behaviour.[23] Another identified issue is a lack of crucial procedural adjustments, including the provision of communication assistance, interpreters and other support persons, for persons with disability who are interviewed by police.[24]

1.23. Stakeholders also referred to the experiences of persons with disability in custodial settings. They pointed to a lack of specialised communication support,[25] including a lack of appropriate cultural sign language interpreters, as well as visual alarms or accessible safety information.[26] Other stakeholders raised concerns about the lack of disability awareness and training; they were also concerned about a lack of treatment options, particularly for people experiencing mental health challenges and navigating psychosocial disability.[27]

1.24. We recognise that these issues have profound impacts on the lives of persons with disability.

1.25. In this paper we discuss possible options for legislative reforms that may respond to some of these issues, in so far as they relate to how persons with disability access and participate in the court and tribunal system. However, as we can ultimately only make recommendations for legislative

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22 *Children's Court of Western Australia Act 1988* (WA); *Young Offenders Act 1994* (WA) s 7.

23 Preliminary Response 16 (Autism Association of Western Australia) 1-11; Preliminary Response 1B (Equal Opportunity Commission) 2; Preliminary Response 11 (Advocacy WA) 8; Preliminary Response 14 (Kin Disability Advocacy) 9.

24 Preliminary Response 17 (Public Advocate) 5, 6; Preliminary Response 24 (South West Autism Network Inc) [7.3]; Preliminary Response 14 (Kin Disability Advocacy) 9; Preliminary Response 15 (Deafness Council Western Australia Inc) 4.

25 Preliminary Response 14 (Kin Disability Advocacy) 13.

26 Preliminary Response 15 (Deafness Council Western Australia Inc) [3].

27 Preliminary Response 28 (Consumers of Mental Health WA) 5; Preliminary Response 29 (Ruah Legal Services) [194]-[195].

reforms to improve access to courts and tribunals in Western Australia, it will not be possible for us to address all the issues raised in stakeholders' preliminary responses.

Guide to the consultation paper

1.26. We want to hear your views about the issues raised by Project 115. You may wish to consider all the issues raised in this paper or focus on particular areas.

1.27. In the following table we explain how we have divided up the topics discussed in this consultation paper.

Consultation Paper	Main topics
Part A - Introduction and context	• What is included in Western Australia's court and tribunal system • How we are thinking about disability, access and participation • What will guide our review
Part B - Common barriers in Western Australia's courts and tribunals	• Systemic issues affecting access to courts and tribunals • Physical access to courts and tribunals • Technology and access to courts and tribunals • Communications and access to courts and tribunals
Part C - Specific experiences of Western Australia's courts and tribunals	• Accused persons • Convicted persons • Victims and family of victims of crime • Witnesses • Jurors • Parties in civil proceedings • People involved in tribunal matters
Part D - Options for fundamental reform	• Principles for improving access and enabling effective participation for persons with disability • Other possible options for fundamental legislative reform

The review process

Preliminary responses

1.28. Project 115 was announced in March 2026.[28]

1.29. After the announcement, we sent a letter to 120 stakeholders informing them of Project 115. We asked if they wanted to provide any preliminary feedback to help guide the review.

1.30. We received 41 responses, which are listed in Appendix C.

1.31. We thank everyone who took the time to provide us with such valuable responses. The preliminary responses have informed how we propose to approach our review and have helped us to identify many issues discussed in this paper.

1.32. While we refer to some of these responses throughout this paper, we have not formed any preliminary views on the issues raised by the review based on this initial feedback.

Consultation Paper

1.33. The purpose of this paper is to open our conversation with the community about the issues raised by Project 115.

1.34. We provide an overview of the issues we intend to consider in Project 115. Throughout the paper we outline some options for responding to those issues and ask questions.

1.35. In addition to the preliminary responses we received, we conducted our own research to prepare this paper. In this process we reviewed the sources we were specifically asked to consider.[29]

1.36. We want to hear your views. If you want to share your views with us, you can:

- respond to this paper; and/or
- participate in our consultation meetings.

Responding to this paper

1.37. You can respond to us in writing in hard copy or electronically. You can send those responses by email or post, or by uploading them using the link on our website.

1.38. You can also record your response and send it to us in a video or audio file such as an MP3. You can email those responses to us or upload them using the link on our website.

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28 'Review focused on improving access to courts and tribunals', *WA Government* (Media statement, 19 March 2026) <https://www.wa.gov.au/government/media-statements/Cook%20Labor%20Government/Review-focused-on-improving-access-to-courts-and-tribunals--20260319>.

29 Terms of Reference 2c.

1.39. You do not have to follow a particular format in your response. We would prefer you to answer the questions we ask in this paper, but you do not have to answer all of them.

1.40. You can share personal experiences, as well as your ideas about how the law should change. You can provide as much detail as you like.

1.41. Please provide your response by **Tuesday 2 March**.

1.42. We will make our consultation paper available in as many formats as reasonably possible. Please let us know if you need an additional, alternative format or adjustments to provide a response and we will do our best to assist you.

Our contact details:

9264 9926

lrcwa@justice.wa.gov.au

GPO Box F317, Perth WA 6841

Participating in consultation meetings

1.43. We will also be holding consultation meetings with individuals and groups from the disability community, from the legal profession, and from courts and tribunals in Western Australia. We will do our best to ensure our consultation meetings are accessible to those with disability-related needs.

1.44. More details about our consultations will be posted on our website and sent to stakeholders.

Report

1.45. After consulting with the community and considering responses, we will write a report which details our recommendations for legislative reforms.

1.46. The report will be presented to the Attorney General and then tabled in Parliament. The Western Australian Government will then consider the report.

2. Our approach to Project 115

Western Australia's court and tribunal system

2.1. Western Australia's court and tribunal system comprises the Supreme Court, District Court and Magistrates Court, a number of specialist courts, such as the Family Court of Western Australia and the Children's Court, and a variety of tribunals, including the SAT. Tribunals are bodies which make decisions, or decide disputes, of specific and limited kinds. They are similar to courts in some ways, but operate more informally, speedily and cheaply, and in many cases the parties involved will not be represented by lawyers.

Key parts of the system

2.2. For many people, the Magistrates Court is their primary contact point with Western Australia's court and tribunal system. Along with the Central Law Courts in Perth, and various suburban court houses, the Magistrates Court sits in more than twenty court buildings across the State, from Albany to Kununurra.[30]

2.3. The District Court (an intermediate trial court) and the Supreme Court (the State's highest court) are both based in Perth. Judges from each court travel throughout the year to different regional locations to hear cases closer to where people live.

2.4. The Magistrates Court, District Court and Supreme Court each deal with a wide variety of criminal and civil cases.

Criminal cases

2.5. A person who is charged with a criminal offence (**accused person**) will first attend the Magistrates Court.[31]

2.6. The Magistrates Court deals with the least serious criminal offences (known as simple offences).[32]

2.7. The Magistrates Court commonly deals with cases like:

- common assault – such as where a person hits, kicks or pushes someone during an argument;
- minor stealing offences – such as where a person steals groceries from a supermarket; and
- traffic and vehicle regulatory offences – such as driving without a licence.

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30 'Court Locations & Contacts', *Magistrates Court of Western Australia* (Web Page, 28 April 2025) <https://www.magistratescourt.wa.gov.au/c/court_locations_contacts.aspx>.

31 *Magistrates Court Act 2004* (WA) s 11(2).

32 *Magistrates Court Act 2004* (WA) s 11(2).

2.8. More serious offences (known as crimes) start in the Magistrates Court and may then progress to the District Court or the Supreme Court.

2.9. The District Court commonly deals with offences such as:

- sexual assault;
- the possession of illicit drugs to sell or supply to others;
- assaults causing serious injury or death; and
- serious cases of stealing, robbery and burglary – such as breaking into a home and stealing goods when it is known that another person is in the home.

2.10. The Supreme Court deals with the most serious offences, including murder and manslaughter.[33]

2.11. Most criminal trials in the District Court and the Supreme Court are trials before a jury.

Civil cases in courts

2.12. The Magistrates Court, District Court and Supreme Court also deal with a wide range of civil disputes. These cases involve a party seeking a remedy from another, such as an award of money to compensate for loss or damage, or an order that a party do something (e.g. return property) or stop doing something (e.g. stop making defamatory comments). Examples of these proceedings include:

- disputes about breaches of contracts;
- disagreements between a landlord and a tenant about the return of a rental bond;
- a claim for compensation made by a person who is seriously injured in a car accident against the driver who caused the accident;
- an application for a court order intended to protect a person from certain behaviour by another person, such as violence, threats or harassment; and
- disputes about wills and inheritances.

2.13. Disputes involving larger sums of money or more complex legal issues are dealt with by the District Court or Supreme Court.[34]

Family law cases

2.14. The Family Court of Western Australia (**FCWA**)[35] deals with applications for divorce.

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33 *Supreme Court Act 1935* (WA) s 16(1); *District Court of Western Australia Act 1969* (WA) s 42(2)(a).

34 *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 6(1); *District Court of Western Australia Act 1969* (WA) s 50(1); *Supreme Court Act 1935* (WA) s 16.

35 *Family Court Act 1997* (WA).

2.15. It can also make a range of decisions following the breakdown of a marriage or de facto relationship, including:

- where children live, and how they are cared for (parenting orders);
- how much money one parent should pay to another parent to help meet the costs of raising a child (child support); and
- how a home, financial investments and other assets are divided (property settlement).

Cases in tribunals

2.16. There is a variety of tribunals in Western Australia, including the SAT, the Western Australian Industrial Relations Commission, the Mental Health Tribunal (**MHT**) and the Office of Criminal Injuries Compensation.

2.17. Some of them decide particular questions by reference to criteria set out in legislation, and others decide disputes between two or more parties. Many tribunals, such as the MHT, have a specialist focus.

2.18. The SAT deals with a wide variety of cases such as:

- whether a person is able to make decisions about their personal affairs or finances or needs someone to make decisions on their behalf (guardian or administrator);
- claims for compensation arising from discrimination by one person against another in certain contexts, such as employment; and
- Disputes between the owners of units in strata complexes, in relation to the rules governing the use of common property, or behaviour (such as noise complaints) at the complex.

How we are thinking about disability

The social model of disability

2.19. We have been asked to use a broad definition of disability in our review.[36] Our Terms of Reference refer to:

> *long-term physical, psychiatric, intellectual, sensory, neurological, and/or learning impairments that, in interaction with barriers, hinder full participation in the community.*[37]

2.20. This definition reflects a way of thinking about disability known as the social model of disability (**social model**).

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36 Terms of Reference 2a.

37 Terms of Reference 2a.

2.21. The social model says that a person experiences disability when they are excluded from society because its institutions and processes are not designed to include people with impairments and their functional needs.[38]

2.22. The social model is different from the medical model of disability, which views impairment as abnormal and as something to be fixed or cured by medical professionals.[39] According to the medical model, a person's impairment is itself a disability.

2.23. Consistent with the social model, stakeholders' preliminary feedback made important points about barriers to access and participation in courts and tribunals, including that those barriers:

- do not arise solely from a person's impairment;[40] and
- are not 'inevitable features' of WA's court and tribunal system.[41]

2.24. We will consider how people with different impairments interact with courts and tribunals (including their buildings, processes, rules and the people who work in them) and identify the barriers which prevent persons with disability from accessing or participating in courts and tribunals.

2.25. Based on the preliminary responses we have received so far, examples of these barriers include:

- inadequate wheelchair ramps, lifts and accessible pathways in court and tribunal buildings and hearing rooms, resulting in a lack of accessibility for persons with mobility impairments;[42]
- key documents being provided in formats which are incompatible with assistive technologies, making them inaccessible to individuals who are blind or have low vision;[43] and
- the use of complex legal language and a heavy reliance on written and spoken communication that creates barriers for persons with cognitive impairment.[44]

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38 Shane Clifton, *Hierarchies of Power: Disability Theories and Models and Their Implications for Violence Against, and Abuse, Neglect, and Exploitation of, People With Disability* (October 2020) 11.

39 Shane Clifton, *Hierarchies of Power: Disability Theories and Models and Their Implications for Violence Against, and Abuse, Neglect, and Exploitation of, People With Disability* (October 2020) 7-8.

40 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 6; Preliminary Response 34A (Ms Cátia Malaquias OAM) 1.

41 Preliminary Response 37 (Community Legal Western Australia) [16].

42 Preliminary Response 2 (Magistrates Court of Western Australia); Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 2; Preliminary Response 11 (Advocacy WA) 9; Preliminary Response 14 (Kin Disability Advocacy) 7; Preliminary Response 29 (Ruah Legal Services) [37].

43 Preliminary Response 10 (Ever Ability Group) [3].

44 Preliminary Response 4 (Mental Impairment Review Tribunal) 1; Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 9; Preliminary Response 37 (Community Legal Western Australia) 19.

Diverse and unique experiences of disability

2.26. We recognise that persons with disability in Western Australia are not a homogeneous group and that individual experiences of disability vary widely across the community.[45]

2.27. This is because:

> *Disability can be permanent or temporary, visible or invisible. Some conditions and impairments are present from birth. Other people acquire or develop disability during their lifetime from an accident, condition, illness or injury. For some people, support requirements can increase over time. Others can experience fluctuating or episodic disability. Some people may have multiple disabilities, giving rise to different support requirements.*[46]

2.28. Each type of disability, and every person's unique experience of it, means they may encounter different barriers at different points in the legal process. As Community Legal Western Australia (**Community Legal**) told us, 'reform must be responsive to this complexity'.[47]

Intersectionality

2.29. Further, as another stakeholder observed, a person's experience of disability is rarely experienced in isolation from other aspects of their identity, including their gender, race, age, cultural or linguistic background, or their circumstances, such as geographic location and economic conditions.[48]

2.30. The concept of intersectionality recognises that the different aspects of a person's identity, their relationships and their material circumstances interact, creating experiences that cannot be understood by considering any one aspect in isolation.[49] As a result:

> *The experiences of Aboriginal people with disability, women and girls with disability, culturally and linguistically diverse people with disability, people living in regional and remote communities, people experiencing poverty and people living in institutional or congregate settings may differ significantly from those of other people with disability.*[50]

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45 Australian Institute of Health and Welfare Australian Government, *People with disability in Australia* (2026) 19.

46 'Disability definition', *Victorian Government, Department of Premier and Cabinet*, 31 December 2024) <https://www.vic.gov.au/disability-access-and-inclusion-plan-2021-2025/disability-definition>.

47 Preliminary Response 37 (Community Legal Western Australia) 11.

48 Preliminary Response 34A (Ms Cátia Malaquias OAM) 8, 13.

49 See, for example Kimberlé Williams Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford Law Review* 1241, 1245-1246.

50 Preliminary Response 34A (Ms Cátia Malaquias OAM) 8-9.

2.31. As multiple stakeholders highlighted in their preliminary feedback, these intersections may result in unique and compounded forms of disadvantage or barriers that are different from those associated with any one aspect of a person's identity.[51]

2.32. Community Legal's preliminary response provided specific examples of some 'key intersections' relevant to Western Australia.

2.33. In relation to Aboriginal persons with disability, Community Legal observed that systemic racism can affect whether a person's communication, behaviour or support needs are understood, and whether appropriate adjustments are offered. Further, 'these barriers are intensified where culturally safe, Aboriginal-led and disability-informed services are unavailable.'[52]

2.34. Community Legal noted that there is evidence that women with disability:

- face a heightened risk of family violence compared to men with a disability;
- are also more susceptible to family violence than women who do not have a disability; and
- experience the same forms of violence experienced by women without disability but may additionally suffer violence that is specifically connected to their disability, such as the deliberate withholding of mobility aids or medication.[53]

2.35. Community Legal also explained that persons with disability from culturally and linguistically diverse (**CALD**) communities experience additional and unique barriers, including:

- language difficulties compounding communication impairments;
- cultural stigma surrounding disability that may prevent them from seeking help;
- a lack of culturally appropriate services and interpreters; and
- the intersection of immigration status with disability that can limit access to support services, including the National Disability Insurance Scheme (**NDIS**).[54]

2.36. Community Legal highlighted that barriers experienced by persons with disability from CALD communities may be compounded by other circumstances, including if the person with disability is homeless or lives in a regional, rural or remote community.[55]

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51 Preliminary Response 37 (Community Legal Western Australia) 22; Preliminary Response 34A (Ms Cátia Malaquias OAM) 8-9.

52 Preliminary Response 37 (Community Legal Western Australia) 23.

53 Preliminary Response 37 (Community Legal Western Australia) 23.

54 Preliminary Response 37 (Community Legal Western Australia) 25.

55 Preliminary Response 37 (Community Legal Western Australia) 24-25.

2.37. We appreciate the importance of 'ensuring that barriers affecting those who experience multiple forms of disadvantage are not overlooked'.[56]

2.38. We also recognise that it cannot be assumed 'that reforms which improve access for one group will necessarily address the experiences of others'.[57]

How we are thinking about access and participation

2.39. The United Nations Convention on the Rights of Persons with Disabilities (**CRPD**), especially Article 13, is important to our review.[58] Australia ratified the CRPD in July 2008 and the Optional Protocol to the CRPD in 2009.[59]

2.40. Article 13 states that persons with disability are entitled to effective access to justice on an equal basis with all other people.[60]

2.41. It also states that persons with disability are entitled to procedural and age-appropriate accommodations to facilitate their effective participation in all stages of legal proceedings.[61]

2.42. To help us think about what improving access and participation for persons with disability looks like in practice (and what legislative reforms it might require), we will refer to the International Principles and Guidelines on Access to Justice for Persons with Disabilities (**International Principles and Guidelines**).[62]

2.43. The International Principles and Guidelines were jointly developed by the UN Special Rapporteur on the rights of persons with disabilities, the Committee on the Rights of Persons with Disabilities and the UN Secretary-General on Disability and Accessibility, and were contributed to by the International Court of Justice. They were developed to help State Parties achieve their obligations to provide equal access to justice for persons with disability, by providing guidance on the interpretation and implementation of Article 13 and other provisions of the CRPD; they are based on international standards and best practices.[63] The UN Committee

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56 Preliminary Response 34A (Ms Cátia Malaquias OAM) 8-9.

57 Preliminary Response 34A (Ms Cátia Malaquias OAM) 8-9.

58 *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

59 The Optional Protocol allows for the making of individual complaints to the Committee on the Rights of Persons with Disabilities about violations of the CRPD by State Parties: *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008).

60 *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3, Article 13.1 (entered into force 3 May 2008).

61 *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3, Article 13.1 (entered into force 3 May 2008).

62 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020).

63 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 7; 'Groundbreaking new UN guidance on access to justice for persons with disabilities', *International Commission of Jurists* (Web Page, 28 August 2020) <https://www.icj.org/a2jpwd/>.

explicitly cites the Guidelines in its periodic reviews of State Parties, specifically their adherence to Article 13.[64]

What will guide our review

2.44. Our review, including our recommendations for reforms to improve access to and participation in the Western Australian court and tribunal system for persons with disability, will be guided by a set of review principles.

2.45. Our proposed review principles are informed by our Terms of Reference, as well as our early research and preliminary responses.

2.46. We want to hear your ideas about them, including whether we should apply additional review principles.

2.47. Our proposed review principles are:

- **Experience-informed** – Persons with disability have largely been excluded from policy-making and law reform affecting them. Reforms should be informed by the lived experience and expertise of persons with disability.
- **Dignity and respect** – Reforms should ensure that all persons with disability are treated with dignity and respect when they engage with courts and tribunals.
- **Equal access and participation** – Persons with disability are entitled to access courts and tribunals, and to participate in their processes, on an equal basis with others. Reforms should acknowledge the need for adjustments and support to facilitate equal access and participation for persons with disability.

2.48. All the review principles are important, but they may not be equally relevant to every issue we consider. We will also consider other factors when making our recommendations.

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64 See, for example, Committee on the Rights of Persons with Disabilities, *Concluding Observations on Finland*, CRPD/C/FIN/CO/1, UN Doc GE.25-14413 (24 September 2025) [25].

3. Systemic issues affecting access to courts and tribunals

Overview

3.1. In this chapter, we consider issues affecting the capacity of Western Australian courts and tribunals to identify, understand and respond to barriers for persons with disability. We consider whether, and if so how, the law should be changed to address these systemic issues.

3.2. A predominant systemic issue is that courts and tribunals do not have a consistent process for identifying a person's disability or determining and providing necessary disability-related adjustments or supports. This can prevent or limit the ability of persons with disability to access and effectively participate in proceedings.

3.3. Disability awareness and training are also central to ensuring that courts and tribunals can effectively understand and respond to the experiences of persons with disability. Currently, training is not uniformly required or provided across Western Australia's court and tribunal system.

3.4. The lack of comprehensive data about the interactions of persons with disability with Western Australia's courts and tribunals is a further systemic issue. Data is important for identifying patterns of barriers and developing meaningful reforms. It is also important for monitoring and evaluating the practical impacts of any reforms implemented.

3.5. Addressing these systemic issues (and indeed, many of the issues raised in this consultation paper) will likely require changes to the processes and practices governed by specific legislation applicable to courts and/or tribunals. It will likely also require changes to the administrative processes underlying the court and tribunal system.

Providing an accessible court and tribunal system

3.6. It is beyond argument that a fair and just court and tribunal system must be accessible, to the greatest extent possible, by everyone in the community.

3.7. As the International Principles and Guidelines recognise, this does not mean that every aspect of a court or tribunal must be designed to meet every person's needs, without taking into account individualised adjustments or the provision of support.[65]

3.8. When courts or tribunals are not accessible to a person with disability, the provision of adjustments and supports, by 'taking the dignity, autonomy

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65 See for example, United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) Principle 2, Guideline 2.1(d).

and choices of the individual into account', can help to achieve individual justice.[66]

3.9. However, as one stakeholder observed:

> *Accessibility is most effective when it is anticipated rather than requested, and embedded rather than exceptional. Traditionally, many justice processes have relied upon individuals identifying barriers and seeking accommodations after those barriers have arisen. Contemporary human rights approaches increasingly recognise that responsibility for preventing exclusion rests primarily with institutions rather than individuals experiencing disadvantage.*[67]

3.10. At the same time, options for legislative reforms to improve access and participation must take account of the context in which courts and tribunals operate. This context includes:

- fundamental legal principles, such as the open administration of justice and an accused person's right to a fair trial;
- the objective of resolving proceedings efficiently and without undue delay; and
- existing physical infrastructure and technologies.

3.11. There is no doubt that some possible options for legislative reform may necessitate new infrastructure, staff or other resources, which would require additional funding. That is not a reason not to pursue change, but it highlights that legislative obligations may be necessary to ensure that such funding is made available.

3.12. In addition, we note that each court in Western Australia has broad powers to regulate its own practice and the conduct of proceedings.[68] These are to be exercised for the purpose of the administration of justice, in accordance with, generally, the principles of natural justice and the rules of evidence.

3.13. The SAT also has a broad statutory power to adopt flexible procedures. Section 32(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) provides that the SAT is not bound by the rules of evidence, practice or procedures (unless adopted or made applicable) and must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

3.14. The SAT may also give directions at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding, on its own initiative or at the request of a party.[69]

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66 Committee on the Rights of Persons with Disabilities, *General Comment No 2*, 11 sess, UN Doc 14-03313 (22 May 2014) [25]-[26].

67 Preliminary Response 34A (Ms Cátia Malaquias OAM) [6.2].

68 *Supreme Court Act 1935* (WA) ss 16, 21; *District Court of Western Australia Act 1969* (WA) ss 44, 52-53; *Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 15, 16; *Criminal Procedure Act 2004* (WA) ss 64-65.

69 *State Administrative Tribunal Act 2004* (WA) s 34.

3.15. Throughout this paper, we identify various barriers to access and participation for persons with disability which may be addressed through the exercise of these existing powers: for example, by making orders to enable the provision of adjustments and support that an individual needs in engaging with legal proceedings. As we discuss in more detail in Chapter 14, it is possible that legislative amendment may also be necessary to explicitly require a court or tribunal, when exercising these general powers, to consider the relevance of disability to a person's ability to access and participate in proceedings.

A process for providing disability-related adjustments

Identifying disability in courts and tribunals

3.16. It will be important for a court or tribunal to know that a person involved in a proceeding before it has a disability, so the court or tribunal can:

- identify and provide relevant adjustments and support to the person, so they can effectively participate in the proceedings;
- avoid misunderstandings or assumptions about the person's communication or behaviour in a hearing; and
- identify whether certain legal issues, for example, a person's fitness to plead, need to be considered in the proceedings.

3.17. The Coroner's Court stated that early identification is important because it allows appropriate adjustments and supports to be considered and, where possible, arranged before a hearing begins.[70]

3.18. As we discuss in Part C, some specific contexts (for example, particular legislative provisions or proceedings such as those in the Mental Impairment Review Tribunal (**MIRT**)) may, by nature, require or facilitate the early identification of disability and its relevance to a person's participation in proceedings.

3.19. However, as some stakeholders identified, courts and tribunals in Western Australia do not currently use a standard process for identifying whether a person has a disability and requires any disability-related adjustments or support before they attend a hearing. Instead, courts and tribunals generally rely on individuals (or their legal representatives) to disclose this information.[71]

3.20. As Advocacy WA observed:

> *Public court records in Western Australia do not systematically capture, tag, or track a person's disability status. Furthermore, a review of the eCourts Portal WA or standard public data from the Magistrates, District,*

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70 Preliminary Response 22 (Coroner's Court of Western Australia) 2.

71 Preliminary Response 36 (Legal Aid Western Australia) [100]-[101]; Preliminary Response 25 (Sussex Street) 22.

> *or Supreme Courts revealed a complete absence of a designated 'disability' data field.*[72]

3.21. While there is no formal process for obtaining this information, a person with disability (or their lawyer) may contact a court or tribunal registry, a judge's associate or other support staff about their disability-related needs in advance of a hearing.

3.22. In this respect, the Centre for Human Rights Education identified that the design of registry counters and kiosk areas may require a person to disclose information about their disability (which may, in turn, require disclosure of other personal information including personal trauma) in 'open, public spaces within earshot of other court users'.[73]

3.23. As we discuss in Chapters 4, 5 and 6, a person with disability (particularly if they do not have a lawyer or someone to advocate on their behalf) may experience various barriers to accessing a court or registry building. They may also face barriers to accessing necessary information (for example, on a court or tribunal's website) and communicating with relevant court and tribunal staff.

3.24. As a result, in many cases, a court or tribunal will have received no information about a person's disability-related needs before a hearing.

3.25. In some cases, it may be apparent at the commencement of a hearing that it is necessary to make enquiries about a person's disability-related needs (for example, if a person enters a courtroom with mobility aids).

3.26. However, many types of disability are hidden or invisible; their presence and impacts on a person's ability to participate are not apparent to an onlooker. For example, Legal Aid Western Australia (**Legal Aid**) told us about a client with bipolar disorder and autism who, while verbal, suffered from situational mutism. When in the courtroom environment, his inability to access language was interpreted by the magistrate as a deliberate refusal to participate.[74]

3.27. For a variety of reasons, some people may not wish to disclose disability. For example, a person with an acquired brain injury (**ABI**) 'may be coming to terms with aspects of their ABI and be less likely to disclose or see it as relevant'.[75]

3.28. A person may also fear stigma, discrimination or adverse consequences if they disclose disability. Legal Aid told us that 'this is particularly evident in family law matters, where some clients are concerned that disclosure may be used to question their parenting capacity'.[76]

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72 Preliminary Response 11 (Advocacy WA) 17.

73 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 15.

74 Preliminary Response 36 (Legal Aid Western Australia) 12, Case study A.

75 Judicial College of Victoria and Victorian Equal Opportunity & Human Rights Commission, *Disability Access Bench Book* (7 November 2023) 7.2.

76 Preliminary Response 36 (Legal Aid Western Australia) [43].

3.29. Advocacy WA made the point that persons with disability 'frequently determine that the social and procedural costs of disclosing an impairment outweigh the benefits, choosing masking over disclosure'.[77]

3.30. In addition, research prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) explained that an Aboriginal or Torres Strait Islander person may not identify with disability-related language or diagnostic terms.[78] It stated:

> *The small amount of published research on disability in Aboriginal and Torres Strait Islander communities all settle on a conclusion that 'disability' is not a concept that readily translates in Aboriginal languages and cultures.*[79]

Possible options for reform

3.31. There is a range of different practical mechanisms which a court or tribunal could use to identify whether a person has a disability, depending on the nature of the proceedings and the role of the person in those proceedings.

3.32. For example, Advocacy WA suggested that 'the Department of Justice structurally integrate voluntary, culturally safe disability identifiers into the eCourts Portal and registry intakes across all jurisdictions'.[80]

3.33. The SAT stated that it specifically asks for information about disability in the application form for guardianship and/or administration orders.[81] It may be an option for other initiating court documents (and responses) in civil proceedings to do the same.

3.34. One way to require the adoption of such processes would be through a general legislative principle obliging a court or tribunal to expressly consider whether a person may have a disability which affects their ability to access or participate in the proceedings. We discuss possible options for the form of such a general legislative principle in Chapter 14.

3.35. Another possible option for reform, which we discuss in more detail below, would be to legislate a general principle requiring a court or tribunal to expressly consider and identify whether a person may have any disability-related needs for adjustments and/or support to access or participate in the proceedings. We also discuss possible options for the form of such a general legislative principle in Chapter 14.

3.36. In each case, compliance with such a principle would require the court or tribunal to make enquiries. Those enquiries could be made in a variety of ways, including by the completion of mandated fields in court forms filed

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77 Preliminary Response 11 (Advocacy WA) 5.

78 Scott Avery, *Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability* (23 November 2020) 73.

79 Scott Avery, *Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability* (23 November 2020) 73.

80 Preliminary Response 11 (Advocacy WA) 18.

81 Preliminary Response 21 (State Administrative Tribunal) 3.

by parties, through the registration process for users of the eCourts portal, or in information accompanying a summons issued to a witness.

3.37. Our preliminary research has not identified any legislative model for this kind of approach in the court and tribunal systems in other Australian jurisdictions. However, court rules and practice directions in the United Kingdom provide an example of this kind of approach. We discuss some of these in Chapter 14.

3.38. We invite your feedback on any or all of the following questions:

1. **Should courts and tribunals be required to enquire whether any person involved in a proceeding has a disability which affects their ability to access or participate in the proceedings? What processes should courts and tribunals adopt to make such enquiries?**
2. **Should all courts and tribunals be obliged to adopt the same processes for making such enquiries?**
3. **Should a person be obliged to respond to such enquiries by courts and tribunals?**
4. **What, if any, legislative reforms should support any process for identifying disability?**
5. **Should the process be subject to any safeguards, for example to protect a person's privacy?**

Identifying and providing disability-related adjustments and support

3.39. Because disability arises from the interaction between a person's impairment and various environmental and personal factors, every person's experience of disability is unique. People with the same type of impairment may experience different barriers and have different needs for adjustments.[82]

3.40. Accordingly, for the purpose of enabling an individual's effective access to, and participation in, proceedings, the precise name or type of that person's disability will not be as important as accurately determining whether they need adjustments or supports and if so, in what form(s).[83]

3.41. For example, the NSW Bench Book identifies a wide range of adjustments related to autism, in recognition of the fact that it is a spectrum condition (such that each person is unique in their presentation and skills). These needs may relate to sensory sensitivity to lights, sound and touch, communication and social interaction differences, literal thinking,

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82 Judicial Commission of New South Wales, *Equality before the Law Bench Book* [5.3.1] ('Disability types and intersectionality') <https://www.judcom.nsw.gov.au/publications/benchbks/equality/>.

83 Judicial Commission of New South Wales, *Equality before the Law Bench Book* [5.2.2] ('Conceptions and range of disabilities') <https://www.judcom.nsw.gov.au/publications/benchbks/equality/>.

difficulties with chronology or attention, anxiety and difficulties with unexpected changes in routine.[84]

3.42. As a result, a 'one size fits all' response to a particular kind of disability may not be appropriate. By way of example, academics cautioned against viewing the findings of a NSW trial – in which, for the first time, a judge appointed an intermediary to assist an autistic defendant[85] – as being applicable to all cases involving autistic defendants. This was because of the broad range of factors affecting a person's evidence and the intermediary role, as well as the fact that 'autism can result in widely divergent outcomes in courtroom engagement'.[86]

3.43. Preliminary feedback from Community Legal made a similar point. Community Legal said there is often an assumption that Australian sign language (**Auslan**) meets all communication needs for persons with hearing impairment. In practice, they may rely on other forms of communication, including lip-reading, written communication, or assistive technology. This means that even when an Auslan interpreter is secured for a proceeding, a person's communication needs may remain unmet.[87]

3.44. Furthermore, the disability-related needs of a person may fluctuate or change over time. As Victoria's Disability Access Bench Book recognises:

> *The effect of a person's disability on their capacity to participate in proceedings may fluctuate. For example, some mental health disabilities … can be episodic. Similarly, people with physical disabilities may require temporary adjustments to avoid standing or sitting for long periods, which may subsequently intensify or lessen during proceedings. Each person's support needs must be individually assessed and monitored throughout a hearing, in particular for a hearing over several days, to make adjustments as and when needed.*[88]

3.45. A related issue concerns how a person's ability, and their disability-related needs – to access and participate in proceedings – should be assessed.

3.46. Some stakeholders contended that any assessment should not consider the person's ability to navigate legal processes independently. Rather, it should consider their ability to participate in the context of any available supports. In other words, a person's ability to participate is not fixed; it may

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84 Judicial Commission of New South Wales, *Equality before the Law Bench Book* [5.3.10] ('Autism spectrum condition') <https://www.judcom.nsw.gov.au/publications/benchbks/equality/>.

85 In NSW, the relevant legislation does not enable the provision of communication assistance from a witness intermediary for a defendant, unless a specific referral has been made for one: see Rukiya Stein, Jane Goodman-Delahunty and Tania Sourdin, 'A communication intermediary, an autistic defendant and cross-examination: a novel Australian case' (2026) 33(3) *Psychiatry, Psychology and Law* 782, 782-783.

86 Rukiya Stein, Jane Goodman-Delahunty and Tania Sourdin, 'A communication intermediary, an autistic defendant and cross-examination: a novel Australian case' (2026) 33(3) *Psychiatry, Psychology and Law* 782, 800.

87 Preliminary Response 37 (Community Legal Western Australia) 15.

88 Judicial College of Victoria and Victorian Equal Opportunity & Human Rights Commission, *Disability Access Bench Book* (7 November 2023) [5.2].

instead be relational and support-driven, depending on the availability of supports such as communication assistance, advocacy, trusted supporters and supported decision-making arrangements.[89]

3.47. Clearly, to enable an individual to participate in the proceeding in question, it is important for courts and tribunals to identify and provide specific adjustments and supports which meet their disability-related needs. However, there is no standard process for doing so that is applicable across all courts and tribunals.

3.48. The consequence is that, at present, the onus lies primarily on a person (or their lawyer) to be proactive and request adjustments or supports. Various stakeholders provided feedback about this approach.

3.49. For example, the Disabled Lawyers Association observed that persons with disability 'continue to bear the burden of self-advocacy' when seeking adjustments.[90]

3.50. Legal Aid's preliminary feedback identified various issues with this approach:

- there are no clear, consistent or easily accessible processes for such requests;
- information about available adjustments is often limited, difficult to locate, or not provided in accessible formats; and
- it is not clear who is responsible for determining requests or what criteria are applied in decision-making in response to such requests.[91]

3.51. Legal Aid told us that, in practice, this can result in adjustments being arranged on an ad hoc basis, 'depending on local practice, individual awareness, or the involvement of a legal representative or support service'.[92] It said:

> *This model places a significant burden on individuals, particularly where their disability affects communication, cognition, executive functioning, insight or self-advocacy. It assumes a level of procedural awareness and self-identification that is not consistently present or readily achievable for many court users with disability.*[93]

3.52. The Centre for Human Rights Education expressed a similar view, describing the assumption that a person 'can identify, articulate, and pursue their own needs within formal processes' as 'frequently unrealistic' for persons with cognitive, psychosocial, or communication impairments.[94]

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89 Preliminary Response 34A (Ms Cátia Malaquias OAM) 12.
90 Preliminary Response 30 (Disabled Australian Lawyers Association) [23].
91 Preliminary Response 36 (Legal Aid Western Australia) [102]-[103].
92 Preliminary Response 36 (Legal Aid Western Australia) [104].
93 Preliminary Response 36 (Legal Aid Western Australia) [101].
94 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 5.

Possible options for reform

3.53. Some of the practical processes for identifying a person's disability discussed above could also be used to identify any need for disability-related adjustments or supports.

3.54. One option, for example, would be to include in any court forms initiating or responding to proceedings questions about whether a party has a disability-related need for adjustments or supports to enable their participation in the proceedings. Another option would be to include enquiries of this kind in the process for registration for the State's online digital case management and electronic lodgment system (**eCourts**).

3.55. Similarly, within either of these processes, parties could be asked to identify any impairment, and then to select adjustments and/or supports from a range of those commonly associated with that impairment. Alternatively they could be invited to provide information about their particular disability-related need for adjustments or supports.

3.56. The input of persons with disability would be essential to the design and implementation of any such processes.

3.57. The Disability Royal Commission supported the implementation, in custodial settings, of guidelines for screening and assessing disability, and a person's disability-related needs, in order to reduce reliance upon self-disclosure as the primary means of disability identification.[95] The adoption of similar guidelines may also be an appropriate approach in courts and tribunals to reduce reliance on self-disclosure.

3.58. Finally, some stakeholders expressed support for the enactment of a legislative obligation or positive duty on courts and tribunals to proactively identify disability and disability-related needs, and to accommodate them.[96]

3.59. Advocacy WA considered this would remove 'the burden on individuals to request accommodations they may not know exist or lack the capacity to articulate.'[97]

3.60. Stakeholders offered a variety of suggestions as to the appropriate legislation in which such an obligation or duty may be included, such as equal opportunity legislation,[98] as well as the *Criminal Procedure Act 2004* (WA) (**Criminal Procedure Act**), evidence law and court procedural rules.[99] We discuss some of these possible reform options in more detail in Chapter 14.

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95 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 190.

96 Preliminary Response 11 (Advocacy WA) 18; Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 5; Preliminary Response 16 (Autism Association of Western Australia) 11.

97 Preliminary Response 11 (Advocacy WA) 18.

98 Preliminary Response 16 (Autism Association of Western Australia) 4.

99 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 5.

3.61. We invite your feedback on any or all of the following questions:

6. Should courts and tribunals be required to enquire whether any person involved in a proceeding has disability-related needs for adjustments to enable them to access or participate in the proceedings?

7. Would it be preferable to enquire about disability-related needs rather than to enquire about whether the person has a particular disability?

8. What processes should courts and tribunals adopt to make such enquiries?

9. Should all courts and tribunals be obliged to adopt the same processes for making such enquiries?

10. Should a person be obliged to respond to such enquiries by courts and tribunals?

11. What, if any, legislative reforms should support any process for identifying disability-related needs for adjustments?

12. Should the process be subject to any safeguards, for example to protect a person's privacy?

Disability education and training

3.62. Disability education and training which addresses the rights and needs of persons with disability is central to improving access to, and participation in, courts and tribunals for persons with disability.[100]

3.63. The International Commission of Jurists summarised the importance of this training in the following way:

> *Without such training, evidence and practical experience suggest that in many countries, justice actors may be unaware of the legal rights of persons with disabilities; uninformed about disability more generally; and incapable of providing the accommodations and support required for persons with disabilities to enjoy access to justice on an equal basis.*[101]

3.64. The Australian Human Rights Commission (**AHRC**) also identified 'effective training' to court staff (as well as police and custodial services) as a core principle for disability justice. The AHRC identified the need for training to:

- improve responses and attitudes of staff;

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100 Office of the United Nations High Commissioner for Human Rights, *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities*, UN Doc A/HRC/37/25 (27 December 2017) [66]; United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) Principle 10; International Commission of Jurists, *Model Disability Bench Book* (31 July 2024) 40.

101 International Commission of Jurists, *Model Disability Bench Book* (31 July 2024) 40.

- address the impact of intersectional experiences of disability, gender and violence; and
- emphasise the rights of people with disabilities to make their own decisions, with support if necessary, and that those decisions deserve respect.[102]

3.65. In addition, recommendations for disability education and training reflect the need for any legislative reforms to be accompanied by broader cultural changes.[103]

Possible options for reform

3.66. Despite its importance, disability education and training is not uniformly required or provided to judicial officers and decision-makers, or administrative staff, within the court and tribunal system in Western Australia.

3.67. That raises for consideration whether, and if so how, education and training should be provided.

3.68. One possible option is to enact a statutory obligation for judicial officers, court and tribunal staff to be provided with disability education and training.

3.69. This would be consistent with the International Principles and Guidelines, which state that all persons who have a role in the administration of justice should be subject to a legal obligation to participate in human rights-based training on the rights of persons with disabilities.[104]

3.70. Under the SAT Act, the Attorney General, as the responsible Minister, is subject to an obligation to ensure that 'appropriate provision is made for the education, training, and professional development of the Tribunal members'.[105] This may be a useful model for a provision in relation to disability education and training in other settings. It would make it clear that the obligation to arrange for such education and training falls on the executive government.

3.71. Greater prescription of matters such as the development of any such training, its content and the number of hours of training required might best be included in subsidiary legislation. The structure of any such prescription may be informed by training requirements in other contexts (such as the different components of continuing professional development required for lawyers).

3.72. Consistent with the centrality of lived experience to any reforms, we anticipate that the experience and expertise of persons with disability

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102 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 36.

103 Law Council of Australia, *The Justice Project: People with Disability (Part 1)* (August 2018) 83.

104 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 26, Guideline 10.2(a).

105 *State Administrative Tribunal Act 2004* (WA) s 143(3).

would be integral to developing the content and implementation of any disability education and training programs.

3.73. An additional, or alternative, approach to a requirement for disability education and training would be the provision of resources to decision-makers and administrative staff, to which they could have recourse as and when required. The Disability Royal Commission recommended:

> *The Commonwealth, state and territory criminal justice systems should provide information about seeking or making adjustments and supports and services for people with disability, and the circumstances in which they may be required. This information should be made available to judicial officers, legal practitioners and court staff, including through practice notes or bench books.*[106]

3.74. The Western Australian government has accepted this recommendation and states that 'implementation is in progress'.[107]

3.75. In addition, we note that the Judicial Commission Bill 2026, if enacted, will establish and maintain a continuing professional development scheme for judicial officers. During the second reading of the Bill in the Legislative Assembly, it was recognised that:

> *[b]ringing the commission's education function together with its complaints function will also allow the commission to systematically identify emerging issues and tailor education and training accordingly.*[108]

3.76. We invite your feedback on any or all of the following questions:

13. Should disability education and training be required for judicial officers and court and tribunal staff?

14. If so:

(a) how, and on whom, should that requirement be imposed? and

(b) how should that education and training be provided?

15. Would other means for providing information – such as bench books – be an adequate way to ensure that judicial officers and court and tribunal staff are properly informed about disability-related needs, and how they may be accommodated?

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106 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 153, Rec 8.11.

107 Government of Western Australia, 'Appendix A: The WA Government's Response to the Disability Royal Commission Recommendations', *Disability Royal Commission - WA Response* (Online PDF, 23 December 2024) 51 <https://www.wa.gov.au/system/files/2024-08/wa_response_to_the_disability_royal_commission.pdf>.

108 Western Australia, *Parliamentary Debates*, Legislative Council, 8 September 2026, 3825 (Hon Dan Caddy, Parliamentary Secretary).

Data collection

3.77. High-quality research and data about the experiences of persons with disability who engage with courts and tribunals are central to the implementation of meaningful reforms intended to address barriers to access and participation.[109]

3.78. Without adequate data, it is difficult to know exactly:

- how many court and tribunal users have disabilities;
- what kinds of disabilities and disability-related needs are represented across different kinds of proceedings;
- the extent to which disability-related adjustments are requested, needed and provided; and
- the impact of disability on a person's engagement with court and tribunal processes.

3.79. The Disability Royal Commission identified national limitations in the availability and consistency of data about the experiences of persons with disability in the criminal justice system.[110] It also made recommendations to improve the collection of data related to the participation of persons with disability in legal proceedings related to support and representation arrangements (for example, the appointment of guardians and administrators).[111]

3.80. Stakeholders' preliminary feedback also indicated there is scope to improve the collection of disability-related data in the court and tribunal system in Western Australia.

3.81. Community legal service providers in Western Australia told us that in the 2025 financial year:

- 49% of people who sought legal assistance from Law Access self-reported as having a disability or serious physical or mental health condition.[112]
- Community Legal reported that 23% of all clients of community legal services in Western Australia were recorded as having a disability or mental illness or an unknown disability status. Of clients whose disability status was recorded, 32% were identified as having a disability or mental illness.[113]

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109 *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3, Article 31(1), (2) (entered into force 3 May 2008).

110 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 235-236.

111 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Enabling autonomy and access* (Final Report, 29 September 2023) Vol 6, 220-221, Recommendation 6.19.

112 Preliminary Response 3 (Law Access) 1.

113 Preliminary Response 37 (Community Legal Western Australia) 10, Figure 1.

3.82. However, as we outlined above, various stakeholders pointed to the fact that Western Australia's current justice system data does not systematically capture disability status.[114]

3.83. The Magistrates Court told us that it does not collect specific data relating to people with disabilities.[115] As we have already noted, the SAT told us that it invites applicants to contact it in relation to any specific accessibility requirements; however, it does not collect specific data in relation to applicants' disabilities, other than in guardianship and administration proceedings.[116]

Possible options for reform

3.84. Various stakeholders supported the enactment of legislation to mandate disability-related data collection by courts and tribunals.[117]

3.85. Some of those stakeholders identified the importance of any framework enabling the collection and use of disaggregated data, that is data which is capable of being broken down into specific subcategories.[118] Examples of specific data categories might include types of impairment; age; First Nations persons with disability; culturally and linguistically diverse persons with disability; lesbian, gay, bisexual, transgender, intersex, queer and asexual persons with disability; women with disability; and National Disability Insurance Scheme participants.[119]

3.86. In addition, the Centre for Human Rights Education also supported the conduct of targeted research and data collection which centres the voices and leadership of Aboriginal and Torres Strait Islander persons with disability and CALD communities.[120]

3.87. A legislative framework for the collection of data about disability would likely need to include:

- a definition of disability;
- safeguards, such as privacy and confidentiality provisions; and
- accountability mechanisms, such as reporting requirements.

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114 Preliminary Response 11 (Advocacy WA) 17; Preliminary Response 25 (Sussex Street) 11.

115 Preliminary Response 2 (Magistrates Court of Western Australia).

116 Preliminary Response 21 (State Administrative Tribunal) 3-4.

117 Preliminary Response 16 (Autism Association of Western Australia) 9; Preliminary Response 11 (Advocacy WA) 18; Preliminary Response 14 (Kin Disability Advocacy) 13; Preliminary Response 24 (South West Autism Network Inc) 18.

118 Preliminary Response 11 (Advocacy WA) 18; Preliminary Response 24 (South West Autism Network Inc) Recommendation K5.

119 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Enabling autonomy and access* (Final Report, 29 September 2023) Vol 6, Recommendation 6.19.

120 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 31-32.

3.88. We invite your feedback on any or all of the following questions:

16. What, if any, disability-related data should courts and tribunals collect?

17. Should the collection of disability-related data be mandatory for courts and tribunals?

18. Is there a need to prescribe legislatively the data which should be collected by all courts and tribunals?

4. Physical access to courts and tribunals

Overview

4.1. In this chapter, we consider barriers to access and participation for persons with disability involving the physical environment of Western Australian courts and tribunals. We also consider options for legislative reforms to address these barriers.

4.2. Traditionally the court and tribunal system has been premised on participants' physical attendance – both at a registry (for example, to file court documents) and in a hearing room, for any appearance. This requires a person to physically enter a court or tribunal building, access its facilities and navigate the layout of a hearing room. Doing so may pose a challenge for persons with disabilities associated with impaired mobility.

4.3. In addition, a person who attends and participates in proceedings in person will generally need to comply with various procedures and conventions, such as waiting for their matter to be called and standing when addressing the court. These requirements may also present barriers to access and participation for some persons with disability.

Some context

4.4. In many circumstances, people may be required to attend court and tribunal proceedings. If they fail to do so, various legal consequences may follow.

4.5. By way of example, for some simple offences tried in the Magistrates Court, the charge may be heard and determined in the absence of the accused, if the accused fails to attend after being given notice of the charge and of the hearing date.[121]

4.6. In some civil proceedings, if a person has been given notice of a hearing time and fails to attend, the hearing may proceed in their absence.[122]

4.7. Physically attending the court or tribunal in person remains the starting point for many proceedings, unless alternative arrangements are made (for example, allowing the person to attend remotely by audio or video link (**AVL**)).

4.8. As we discuss in Chapters 5 and 6, some persons with disability may experience difficulties due to a lack of knowledge that alternatives to in-person attendance may be arranged. This may also happen due to communication difficulties affecting a person's ability to make a request to the court or tribunal to permit them to attend remotely. These difficulties may be compounded by the absence of legal representation or support. Furthermore, remote attendance, especially by AVL, requires access to

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121 *Criminal Procedure Act 2004* (WA) s 55.

122 See, for example *Rules of the Supreme Court 1971* (WA) O 34 r 2; *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 21(1); *State Administrative Tribunal Act 2004* (WA) s 63(2).

(and the ability to use) appropriate technology, which is not always possible for persons with disability.

4.9. As a result, the expansion of opportunities for remote attendance and participation has not removed the need for physically accessible court and tribunal buildings. As Community Legal observed:

> *As a baseline requirement for enabling access to justice, all court buildings in Western Australia must be physically accessible to everyone, including people with impaired mobility.*[123]

4.10. The International Principles and Guidelines also emphasise the need for accessibility of facilities and services used in the justice system, including court buildings, jury facilities and administrative spaces, as well as toilets, offices, entrances, lifts, canteens and recreational spaces within them.[124]

4.11. In order to ensure physical accessibility by persons with disability to these facilities and services, the International Principles and Guidelines identify that States should:

- enact and implement enforceable laws, regulations, policies, guidelines and practices, and
- ensure that adequate financial resources are available to support this implementation.[125]

4.12. The International Principles and Guidelines also state that States should guarantee the provision of procedural accommodations where physical environment, information and communications are inaccessible for persons with disabilities.[126]

Court and tribunal buildings

Current law and practice

4.13. There is no single, comprehensive legal obligation for court and tribunals across the State to be accessible by persons with physical disabilities.

4.14. Rather, different legal requirements related to physical accessibility derive from:

- State building law, which establishes various technical standards for a building's physical accessibility, depending on its classification and use, and with which a building must comply when it is constructed (or when

123 Preliminary Response 37 (Community Legal Western Australia) 32.

124 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 14, Principle 2, Guideline 2.1(a).

125 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 14, Guideline 2.1(a), (c).

126 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 14, Guideline 2.1(a), (d).

renovations, alterations or extensions are made, or if its use is changed);[127] and

- Commonwealth and State anti-discrimination legislation, which prohibits discrimination (including on the ground of disability) in access to services and premises in certain circumstances.[128]

4.15. Complexities arise in the application of both of these areas of law to the court and tribunal system, for multiple reasons.[129] In addition, it is beyond our Terms of Reference to review either the operation of State building law, or anti-discrimination law in the context of courts and tribunals.[130]

4.16. It is also beyond our Terms of Reference to address some of the barriers for persons with disability which stakeholders identified, such as insufficient accessible parking in proximity to court facilities[131] and issues accessing public transport.[132] While they are outside the scope of our review, we recognise that these barriers can significantly impact the ability of a person with disability to access and participate in the court and tribunal system.

4.17. We now turn to outlining physical barriers to access and participation that persons with disability may experience inside a court or tribunal building. Our primary focus is on the barriers experienced inside hearing rooms.

Barriers to access and participation

4.18. Many stakeholders expressed concerns that court and tribunal buildings are not adequately accessible for people with mobility impairments.[133]

4.19. Barriers identified include:

- inadequate wheelchair ramps, lifts, and accessible pathways;
- inaccessible public galleries, witness boxes, jury boxes, and dock areas; and
- inadequate toilet facilities.

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127 The *Building Act 2011* (WA) and *Building Regulations 2012* (WA) give effect to the National Construction Code. A court building is classified as a Class 9b assembly building under the Code. Part D4 (Access for People with a Disability) dictates which specific areas of a Class 9B building must be accessible.

128 *Disability Discrimination Act 1992* (Cth) s 23; *Equal Opportunity Act 1984* (WA) s 66J(1).

129 For example, because a building must comply with the relevant building law at the time of its construction (and there is no legal obligation to retrofit an existing building to comply with contemporary building standards) court and tribunal buildings across the State were constructed in accordance with widely varying physical accessibility requirements.

130 We note that any review of Commonwealth legislation such as the *Disability Discrimination Act 1992* (Cth) is beyond our Terms of Reference. In relation to the *Equal Opportunity Act 1984* (WA), the Law Reform Commission of Western Australia reviewed this Act in Project 111.

131 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 2.

132 Preliminary Response 29 (Ruah Legal Services) 10.

133 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 2; Preliminary Response 11 (Advocacy WA) 9; Preliminary Response 14 (Kin Disability Advocacy) 7; Preliminary Response 29 (Ruah Legal Services) [37]; Preliminary Response 2 (Magistrates Court of Western Australia).

4.20. Ruah Legal Services told us that:

> *The doors to Courtrooms in the Central Law Courts and in SAT are heavy weighted doors that require users to pull the door open before accessing. This is particularly inaccessible to wheelchair users.*[134]

4.21. In addition, Ruah Legal Services observed that:

> *As of 9 June 2026, Midland Magistrates Court continues to have an out-of-service elevator for many months. Any Court participant with physical mobility disabilities is required to contact the Court in advance of a Court listing to ensure their matter can be listed in the one ground-level access Courtroom. This is not common or readily available knowledge which would mean any wheelchair user would not know they could not access the upper-level Courts without contacting the registry prior to their appearance.*[135]

4.22. Ruah Legal Services told us that due to the number of courtrooms with limitations on wheelchair accessibility, its clients are often required to make their appearance from the back of the courtroom, near the public gallery; this is because they are unable to approach the bench.[136]

4.23. Women's Legal Service WA also told us that 'duty law rooms are usually very small and can be completely inaccessible for people using wheelchairs or carts'.[137]

4.24. Stakeholder feedback illustrated that the design and layout of hearing rooms also present barriers for persons with sensory impairments. For example, John Curtin Law Clinic identified:

- the absence of hearing loops or assistive listening technology, for a person who is Deaf or hearing impaired; and
- signage that does not meet accessibility standards for people with vision impairments.[138]

4.25. Some people, including autistic persons, may experience sensory sensitivity or sensory processing differences. For these people, aspects of a hearing room, such as bright lighting or background noise, may present barriers to effective participation.[139]

4.26. These issues were also highlighted by the Law Society, which explained that:

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134 Preliminary Response 29 (Ruah Legal Services) [156].

135 Preliminary Response 29 (Ruah Legal Services) [157]-[158].

136 Preliminary Response 29 (Ruah Legal Services) [37], [155].

137 Preliminary Response 41 (Women's Legal Service WA) 7.

138 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 2.

139 K MacLennan, S O'Brien and T Tavasooli, 'In Our Own Words: The Complex Sensory Experiences of Autistic Adults' (2022) 52 *Journal of Autism and Developmental Disorders* 3061, 3064-3065.

> *In the experience of legal practitioners appearing in the [Intellectual Disability Diversion Program] Court, the courtroom itself does not consistently accommodate sensory needs, with factors such as lighting, noise, smells, and overcrowding continuing to impact meaningful participation.*[140]

4.27. While the Law Society was referring to the Intellectual Disability Diversion Program Court (**IDDP Court**) in particular, these barriers to meaningful participation by people with sensory needs are likely to be experienced across all courts and tribunals.

Possible options for reform

4.28. Stakeholders' preliminary feedback highlighted how many physical barriers to access and participation could be resolved or improved through practical responses.

4.29. Legal Aid observed that 'improving accessibility does not necessarily require large-scale infrastructure redevelopment in all cases.'[141] Legal Aid also suggested that meaningful improvements would arise from consistent maintenance, prioritising repairs and clearer operational protocols when accessibility infrastructure (for example, an elevator) is not working.[142]

4.30. Ruah Legal Services recommended the following specific solutions for improving physical access:

- where possible, modifications to accommodate wheelchair users, which in turn increases accessibility for individuals using other mobility aids such as crutches, canes, bicycles, prams and wheeled bags;
- a plan for better accessibility to bar tables, witness boxes and jury boxes for people with a disability;
- further consideration of the height of access buttons to courtroom doors and inclusion of automatic doors; and
- as an 'utmost priority', repairing the Midland Magistrates Court elevator.[143]

4.31. Ruah Legal Services' suggestions illustrate that in some respects, the specific accessibility requirements for a court or a tribunal hearing room will require bespoke responses (for example, making a jury box wide enough for a wheelchair) beyond the more general accessibility requirements that apply to public buildings.

4.32. Accordingly, one option for reform would be to legislate a general overriding principle with respect to the physical accessibility of court and

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140 Dr Kathy Ellem, Professor Leanne Dowse, Simone Rowe et al, *Insights from people with lived experience of disability and the justice system* (3 July 2023) 4.

141 Preliminary Response 36 (Legal Aid Western Australia) [77].

142 Preliminary Response 36 (Legal Aid Western Australia) [67].

143 Preliminary Response 29 (Ruah Legal Services) [167].

tribunal buildings, so that they accommodate the diversity of people's needs.

4.33. Without limiting the contexts in which such a principle might apply, it may extend to the design and construction of new court and tribunal buildings; the specific layouts of hearing rooms and features inside them; and the immediate surrounds of hearing rooms (such as interview rooms).

4.34. Such a principle might also require a court or tribunal to provide any reasonable adjustments that a person with disability needs to physically access a court or tribunal hearing room and participate safely and comfortably in proceedings.

4.35. We invite your feedback on any or all of the following questions:

19. How should the physical barriers to access and participation in courts and tribunals be addressed?

20. Should there be a general legislative principle which requires that court and tribunal hearing rooms, and their immediate surrounds, are designed to facilitate access to, and participation in, court or tribunal proceedings by people with physical disabilities? If so, why? If not, why not?

21. If so, what key points should inform the principle?

22. How else, if at all, should legislation address physical barriers to access to, and participation in, court or tribunal proceedings by persons with disability?

Court processes and conventions

Current law and practice

4.36. There are various processes, practices and conventions associated with attending and participating in court and tribunal proceedings in person. Ordinarily, a person will be required to arrive at a particular time, pass through security, move between different areas of a building, then wait for an uncertain period until their matter is called and remain at the court or tribunal until their matter has been dealt with. This process will often take considerable time.

4.37. Participants in proceedings will ordinarily be expected to sit or stand at particular times, to remain in the hearing room while their matter is being heard, and to participate for extended periods without a break or adjournment.

4.38. Rather than reflecting any legislative requirements, physical expectations of this kind reflect listing and case-management practices, courtroom protocols or longstanding conventions.

4.39. As we outlined in Chapter 3, each court in Western Australia and the SAT has broad powers to regulate its own practice and the conduct of proceedings. This may extend to making many of the adjustments a person with disability needs to access and participate in proceedings.

Barriers to access and participation

4.40. For people with physical impairments that involve chronic pain and fatigue, lengthy waiting times before a matter is called, and/or lengthy hearings, may exacerbate the effects of these impairments.[144]

4.41. Once a person is inside a hearing room, physical barriers to participation may arise from the court's processes or procedures. They may include:

- seating which may cause increased pain during lengthy proceedings;
- lengthy hearings without a break, in which a person's need for frequent breaks is not accommodated;
- rigid court schedules which do not accommodate medication schedules;
- lengthy hearings which mean that the effects of medication wear off before the end of the proceedings; and
- cognitive effects which result when pain interferes with giving evidence.[145]

Possible options for reform

4.42. Any attempt to address physical barriers to access and participation in courts and tribunals by specific legislative prescription is unlikely to be practicable, given the diversity of possible barriers that persons with disability might experience and the many sources of these barriers.

4.43. That being the case, a more practical option for reform may be to enshrine general principles in legislation. These principles could require courts and tribunals to use their existing powers to modify the way proceedings are conducted to facilitate the effective participation of a person with disability.

4.44. Such a principle might also be accompanied by specific examples of commonly required procedural modifications, including breaks in hearings, shorter hearing lengths, flexible hearing times (for example, to accommodate medication schedules), appropriate seating and a standing grant of permission for a person to move in the courtroom (to enable them to sit or stand as required).

4.45. An alternative possible option for reform may be to create additional hearing lists which are directed to the needs of parties with similar disability-related needs for adjustments. Such court lists might adopt a similar structure or framework to the existing IDDP Court and Start Court lists in the Magistrates Court (which we discuss further below). This would permit different disability-related needs to be accommodated in different court or tribunal hearing lists, rather than expect courts and tribunals to accommodate any and all disability-related needs in every hearing list.

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144 Judicial College of Victoria and Victorian Equal Opportunity & Human Rights Commission, *Disability Access Bench Book* (7 November 2023) 4.

145 Queensland Courts, *Equal Treatment Bench Book* (3rd ed, 2026) 91.

4.46. We invite your feedback on any or all of the following questions:

23. What is the best way to address physical barriers to access and participation in courts and tribunals?

24. Is legislative reform required? If so, is a legislative statement of general principles the preferable approach?

25. Alternatively, would it be better to encourage or require courts and tribunals to utilise hearing lists designed to accommodate parties with similar disability-related needs? If so, how should that be achieved?

26. Is there any other option that we haven't raised and should consider?

5. Technology and access to courts and tribunals

Overview

5.1. In this chapter, we consider barriers relating to the use of technology in courts and tribunals which impede persons with disability accessing or effectively participating in the Western Australian court and tribunal system. We also consider options for legislative reforms to address these barriers.

5.2. Over time, the use of technology has provided opportunities for people to access and participate in proceedings without being physically present in a court or tribunal.

5.3. The use of eCourts is now embedded in the Western Australian court and tribunal system, as is the option to attend a hearing remotely by AVL.

5.4. The rapid and widespread increase in remote participation in the court and tribunal system necessitated by the COVID-19 pandemic demonstrated that many proceedings traditionally conducted in person could be conducted remotely using AVL.

5.5. The use of these technologies may address some barriers to accessing and participating in the Western Australian court and tribunal system for persons with disability, including those barriers discussed in Chapter 4. It may, however, create other barriers for persons with disability.

Some context

5.6. As we discussed in the previous chapter, persons with disability experience various barriers associated with physically attending court and tribunal buildings.

5.7. In different ways, forms of information and communications technology, which are now commonplace in Western Australia's court and tribunal system, have reduced or removed the need for physical attendance.

5.8. For example, while procedural and administrative interactions with a court or tribunal have traditionally involved paper documents and a person's physical attendance at a registry, many of these interactions now take place online through the eCourts portal. Now, a person can (and in some circumstances must) use eCourts to obtain and lodge court forms, inspect a court file, obtain copies of court orders and pay fees.

5.9. Various stakeholders highlighted that while electronic court processes and AVL technologies are often framed as accessibility solutions, their use can also create barriers to access and participation for persons with disability.[146]

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[146] Preliminary Response 4 (Mental Impairment Review Tribunal) 2; Preliminary Response 14 (Kin Disability Advocacy) 5-6; Preliminary Response 36 (Legal Aid Western Australia) [73]-[75].

5.10. Relevantly, the International Principles and Guidelines:

- emphasise the need for accessible information and communications technology and systems, as a means of facilitating access and participation by persons with disability;[147]
- recognise the need to introduce and implement enforceable laws, regulations, policies, guidelines and practices to make information and communications technology and systems accessible;[148] and
- provide that States should guarantee the provision of procedural adjustments where information and communications technology and systems are inaccessible for persons with disability.[149]

Electronic court and tribunal processes

Current law and practice

5.11. Effective participation in court or tribunal proceedings may require a person to:

- access information from a court or tribunal's website;
- download forms and documents in downloadable Word or PDF format from a court or tribunal website;
- use eCourts to lodge forms and documents electronically ('eLodgment');
- access an eFile which contains eLodged documents and formal court orders (and which replaces the physical court file) using eCourts;
- pay fees (for example, a filing fee to lodge a claim) online; and
- communicate with other parties, lawyers or court staff by email.

5.12. The *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* (WA) provides the legal framework for these processes to be carried out. It generally provides that electronic documents or processes, when handled in accordance with the Act, have the same legal status as their paper-based or written counterparts.[150]

5.13. The Act's provisions are supplemented by regulations and court and tribunal rules which prescribe, in detail, the procedural requirements related to the use of electronic processes in particular circumstances, including when they must be used.

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147 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 14, Principle 2, Guideline 2.1(a).

148 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 14, Principle 2, Guideline 2.1(a).

149 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 14, Guideline 2.1(a), (d).

150 Western Australia, *Parliamentary Debates*, Legislative Council, 11 September 2013, 3840-3481 (Hon Michael Mischin, Attorney General).

5.14. Each of the courts' and the SAT's rules impose different requirements in relation to eLodgment via the eCourts portal.

5.15. In civil proceedings in the Magistrates Court, eLodgment is generally mandatory unless a relevant exemption applies.[151] When a person applies to a registrar for an exemption, they must complete and lodge an application to be exempt from mandatory eLodgment, setting out the reason why the exemption is required.[152]

5.16. In civil proceedings in the District Court, eLodgment is mandatory for legal practitioners but not for self-represented litigants, subject to the grant of an exemption.[153]

5.17. In the Supreme Court's civil jurisdiction and in civil appeals, eLodgment is generally mandatory, including for self-represented litigants, subject to various exemptions.[154]

5.18. The Magistrates Court, a District Court registrar and the Principal Registrar of the Supreme Court each have the power to permit filing other than by eCourts 'for any good reason and without a formal application or request'.[155] If such an exemption is granted, the Court or the registrar may give directions as to the manner in which the relevant document is to be presented for lodgment, including delivery by hand, or sending by email, post or fax.[156]

5.19. The Family Court of Western Australia also generally requires all court documents to be eLodged, unless a person is exempt or has been permitted by a registrar to file by other means.[157]

5.20. The *State Administrative Tribunal Rules 2004* (WA) permit documents to be eLodged through the eCourts portal and also allow for lodgment in-person, by post or fax (but not by email).[158]

5.21. In criminal proceedings, documents are usually lodged with a court by hand, email, post or fax. The use of eLodgment in criminal proceedings by prosecuting agencies is only acceptable for limited purposes (such as lodging a prosecution notice).

Barriers to access and participation

5.22. Stakeholders identified issues associated with the content and form of electronic court forms and documents, as well as with the requirements to eLodge forms and documents via eCourts.

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151 *Magistrates Court (Civil Proceedings) Rules 2005* (WA) rule 98C(1) and rule 96.

152 eCourts Portal User Guide 5.

153 *District Court Rules 2005* (WA) rule 20 (1) and rule 20(1A).

154 *Rules of the Supreme Court 1971* (WA); *Supreme Court (Court of Appeal) Rules 2005* (WA).;

155 *Magistrates Court (Civil Proceedings) Rules 2005* (WA) rule 96(2) (the Court); *Rules of the Supreme Court 1971* (WA) Order 67A rule 3(3) (the Principal Registrar).

156 *District Court Rules 2005* (WA) rule 20(1B) (a registrar).

157 *Family Court Rules 2021* (WA) rule 487(1).

158 *State Administrative Tribunal Rules 2005* (WA) rule 4.

5.23. Depending on their format, electronic court forms and documents may be inaccessible for some persons with disability. Issues include:

- electronic forms being overly complex and difficult to complete;[159]
- document formats being incompatible with assistive technologies,[160] including with screen reading software used by people who are blind or vision impaired;[161] and
- electronic forms existing in formats unsuitable for conversion to large print, Braille and audio formats.[162]

5.24. In relation to electronic filing using eCourts, Community Legal told us that:

> *Filing procedures present a related but distinct barrier. Courts maintain strict requirements for electronic lodgement, with limited flexibility for alternative methods. There is a high threshold for obtaining permission to file documents other than electronically. Our members report that a person must typically exhaust all other options before being permitted to file in person, including attempting to secure an advocate or relative to assist them. For people with cognitive impairment, limited digital literacy, or no access to suitable technology, these requirements function as a barrier to initiating and participating in legal proceedings.*[163]

5.25. The Centre for Human Rights Education also told us the eCourts portal can be 'difficult or impossible to navigate independently' by persons with cognitive, psychosocial, neurodivergent, communication or vision-related disabilities.[164]

5.26. Developmental Disability WA provided specific feedback about the use of eCourts in the SAT. They identified that while it is possible to file documents in person or by fax, these options are limiting for anyone outside the metropolitan area and are outdated in respect of faxes.[165]

5.27. Developmental Disability WA also observed that the eCourts portal 'embeds the SAT processes in a legalistic framework'. However, lawyers may not be frequent participants in the SAT's human rights stream, and interacting with eCourts is harder for people without experience or technical resources.[166]

5.28. Advocacy WA also said in relation to the SAT that:

> *The lived experience of regional individuals with cognitive or sensory impairments who lack access to a local advocate, is that applications or*

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159 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 14; Preliminary Response 36 (Legal Aid Western Australia) 73.

160 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 14.

161 Law Council of Australia, *The Justice Project: People with Disability (Part 1)* (August 2018) 29.

162 Preliminary Response 10 (Ever Ability Group) 3.

163 Preliminary Response 37 (Community Legal Western Australia) 17.

164 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 14.

165 Preliminary Response 12B (Developmental Disability WA) 8.

166 Preliminary Response 12B (Developmental Disability WA) 8.

reviews are frequently thrown out not on their legal merits, but via automated procedural defaults because the individual could not navigate the complex eCourts portal.[167]

Possible options for reform

5.29. Stakeholders' feedback predominantly identified practical responses to these barriers.

5.30. John Curtin Law Clinic suggested that court websites and digital services should be audited for their compliance with the World Wide Web Consortium's Web Content Accessibility Guidelines 2.2, the internationally recognised benchmark for digital accessibility. John Curtin Law Clinic also considered that accessibility audits should be required within a specific timeframe.[168]

5.31. EverAbility Group also emphasised the need for all platforms to meet accessibility standards and to be designed for compatibility with assistive technology.[169]

5.32. Alongside these practical responses, one legislative option for reform may be to amend the eLodgment exemptions in court rules.

5.33. For example, the existing provisions to exempt a person from eLodgment requirements 'for any good reason' and without a formal application could be amended to specifically include, as a relevant consideration, whether the person has any disability-related needs.

5.34. The existing exemption provisions in the Magistrates Court and the Supreme Court rules could also be amended so that the power to exempt a person from eLodgment lies with any registrar, rather than with the court or the Principal Registrar alone.

5.35. A second option for reform may be to legislate a general principle that reasonable adjustments must be made where a person is unable to use eLodgment due to an impairment.

5.36. We invite your feedback on any or all of the following questions:

27. What is the best way to ensure that the use of electronic processes in court proceedings will facilitate, rather than hinder, access to, and participation in, those proceedings by persons with disability?

28. Is a legislative response necessary or desirable? If so, why?

29. Are the existing exemptions to the requirement to eLodge forms and documents sufficient? Should they be broadened, or additional exemptions enacted?

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167 Preliminary Response 11 (Advocacy WA) 9.

168 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 2-3.

169 Preliminary Response 10 (Ever Ability Group) [7].

30. Would it be appropriate to legislate a general overarching principle that reasonable adjustments must be made where a person is unable, due to an impairment, to use eLodgment? If so, why? If not, why not?

31. How else, if at all, should legislation address barriers to access and participation for persons with disability arising from the use of electronic processes?

Remote participation by audio and video link

Current law and practice

5.37. AVL has long been used in court and tribunal proceedings for a range of purposes, including:

- enabling vulnerable witnesses to give evidence without being physically present in a court room or in proximity to an accused person;
- facilitating the participation of witnesses located interstate or overseas, to reduce cost and delay;
- enabling people in custody to appear without needing to be transported to court for matters such as remands, mentions and bail applications; and
- providing services such as interpreting remotely.[170]

5.38. As the former Chief Justice of Western Australia Hon Wayne Martin AC KC observed, the 'sheer size' of Western Australia and limitations in court resources support 'much greater use of [AVL] facilities to enable cases to be dealt with quickly and effectively wherever they might arise geographically'.[171]

5.39. Additionally, the COVID-19 pandemic led to 'an unprecedented shift in the way Australian courts and tribunals conduct proceedings', including significant increases in the conduct of remote hearings.[172] There were multiple aspects of this shift:

> *In contrast to one participant taking part remotely for improved accessibility, convenience, or efficiency, the context of the pandemic required all participants to appear by [AVL] to keep courts operating. Simultaneously, the range of subject matter expanded beyond criminal and family matters of vulnerable witnesses to all types of cases. Instead of for predominantly procedural steps, remote hearings were used across all*

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170 Michael Legg and Anthony Song, 'The courts, the remote hearing and the pandemic: from action to reflection' (2021) 44(1) *UNSW Law Journal* 126, 130.

171 Chief Justice of Western Australia The Hon Wayne Martin, 'Opening Address' (The Magistrates of Western Australia Annual Conference, Crawley, 8 November 2006) 6.

172 Law Council of Australia, *Principles for determining the appropriateness of online hearings* (December 2025) 1.

types of hearings, including fully contested hearings, at both trial and appeal.[173]

5.40. Various pieces of Western Australian legislation provide a broad framework for parties to appear and participate in proceedings by AVL, but the applicable rules vary according to the type and stage of proceeding and the person participating. We outline this legislation below.

Accused persons

5.41. The Criminal Procedure Act generally permits an accused person to appear before a court by AVL, other than for sentencing.[174]

5.42. If the accused is in custody, special provisions apply. For example, an accused person who is held in custody must be brought to court in person for their first appearance, unless the court has ordered that the appearance be by AVL.[175] For their second or subsequent appearance, however, appearance by AVL is required unless the court has ordered attendance in person.[176]

5.43. An accused person can also participate by AVL in bail proceedings.[177]

5.44. However, audio links are not to be used unless a video link is not available and cannot reasonably be made available.[178]

Convicted persons

5.45. If a person pleads guilty to a criminal offence or is convicted after a trial, the court will record a conviction for that person (**convicted person**). Under the *Sentencing Act 1995* (WA) (**Sentencing Act**), a court cannot sentence a convicted person unless they are personally present or they appear before the court by video link, pursuant to a direction of the court.[179]

5.46. The court cannot make a direction that a convicted person appear for sentencing by video link unless it is satisfied that the video link is available or can reasonably be made available, and the direction is in the interests of justice.[180]

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173 Michael Legg and Anthony Song, 'The courts, the remote hearing and the pandemic: from action to reflection' (2021) 44(1) *UNSW Law Journal* 126, 145.

174 *Criminal Procedure Act 2004* (WA) s 141(1), (2).

175 *Criminal Procedure Act 2004* (WA) s 77(2).

176 *Criminal Procedure Act 2004* (WA) s 77(3).

177 *Bail Act 1982* (WA) s 66B(2), (3). This includes proceedings relating to the variation or revocation of bail; to surety's undertakings; to bail proceedings in the Supreme Court in relation to an accused person in custody for murder; and to appeals against decisions in relation to breach of bail: *Bail Act 1982* (WA) s 66B(1) (definition of 'bail proceedings').

178 *Criminal Procedure Act 2004* (WA) s 77(3); *Bail Act 1982* (WA) s 66B(4).

179 *Sentencing Act 1995* (WA) s 14(1).

180 *Sentencing Act 1995* (WA) s 14A(2).

Witnesses

5.47. The Evidence Act 1906 provides that a court may, on its own initiative or on the application of a party to a proceeding, direct that evidence may be taken or a submission received by AVL.[181]

5.48. The court cannot make such a direction unless it is satisfied that the AVL is available or can reasonably be made available, and the direction is in the interests of justice.[182]

Civil proceedings

5.49. In addition to the provisions of the Evidence Act, there are court-specific procedural provisions which apply in civil proceedings.

5.50. In civil proceedings in the Magistrates Court, the Court's case management powers expressly include conducting a hearing by AVL.[183]

5.51. In the District Court, case management directions may provide for conferences and hearings other than trials to be conducted by AVL. The Court's rules also contemplate directions for witnesses to give evidence by AVL.[184]

5.52. The Supreme Court's case management powers similarly allow conferences and hearings other than trials to be dealt with by AVL or similar means and permit directions to be made about the use of AVL technology.[185]

5.53. Similarly, the SAT may permit parties to proceedings and witnesses to participate by AVL or any other system of communication.[186]

Benefits for access and participation

5.54. The use of AVL may address physical barriers to access and participation for some persons with disability.

5.55. Multiple stakeholders identified that, for a person with mobility impairment or chronic illness, the option to attend a hearing remotely can remove or reduce difficulties associated with travelling to a court or tribunal; entering and navigating the building and its facilities; and remaining there for uncertain and potentially extended periods of time.[187]

5.56. Remote access to legal proceedings, and especially formal court proceedings, enables parties to avoid an environment which is daunting

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181 *Evidence Act 1906* (WA) s 121(1).

182 *Sentencing Act 1995* (WA) s 14A(2).

183 *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 16(1)(l).

184 *District Court Rules 2005* (WA) rr 24(2)(g), 43(3)(f)-(g), 45I(1)(b).

185 *Rules of the Supreme Court 1971* (WA) O 4A r 1(2)(g)(ii)-(iii), (l)(ii).

186 *State Administrative Tribunal Act 2004* (WA) s 60(1).

187 Preliminary Response 37 (Community Legal Western Australia) 17; Preliminary Response 25 (Sussex Street) 18; Preliminary Response 29 (Ruah Legal Services) [172]; Preliminary Response 4 (Mental Impairment Review Tribunal).

for many people,[188] and which may have a particularly significant impact on persons with disability. For example, academic commentators have referred to 'research [which] shows persons with mental illness can more easily become stressed and aggressive in a court environment and have negative "experience[s] of justice" as a result'.[189]

5.57. Some stakeholders made similar observations in their preliminary submissions. For example, Legal Aid noted that courts are high-stimulus places that are not suitable for all court users.[190] The Centre for Human Rights Education submitted that the demands of navigating unfamiliar court environments under stress may disproportionately affect persons with cognitive, psychosocial or neurodivergent disability; it may also impact their ability to engage in the legal proceedings.[191] These impacts may be reduced or avoided through the use of AVL.

Barriers to access and participation

5.58. Stakeholders' preliminary feedback, along with our research, illustrated how the use of AVL can also create barriers for persons with disability.

5.59. Sussex Street observed that many persons with disability may experience challenges in hearing and processing information, communicating without visual cues and remaining engaged, without in-person supports.[192]

5.60. Community Legal elaborated on some of these challenges:

> *Video link hearings assume that a person can connect to remote proceedings, follow procedural steps in real time, and participate meaningfully without in-person support. Our members report that for many clients with disabilities, particularly those with intellectual or psychosocial disabilities, the isolation of remote participation is simply not appropriate, because they may not have the necessary level of executive functioning to navigate the technology, keep up with proceedings, or respond to questions in a timely manner.*[193]

5.61. Other stakeholders identified specific barriers related to remote participation for persons with psychosocial disability. Ruah Legal Services noted that a significant number of matters in the SAT and the MHT incorporate the use of AVL technology.[194]

5.62. The MIRT also identified how 'video-link appearances [in proceedings before it] can be particularly confusing in the case of persons suffering

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188 Carolyn McKay, *Digital Vulnerability in Criminal Justice: Vulnerable People and Communication Technologies* (Palgrave Macmillan (Open Access)) 95, 95.

189 Michael Legg and Anthony Song, 'The courts, the remote hearing and the pandemic: from action to reflection' (2021) 44(1) *UNSW Law Journal* 126, 132.

190 Preliminary Response 36 (Legal Aid Western Australia) [71].

191 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 2.

192 Preliminary Response 25 (Sussex Street) 18-19.

193 Preliminary Response 37 (Community Legal Western Australia) 16-17.

194 Preliminary Response 29 (Ruah Legal Services) [173].

from a mental illness inclusive of auditory hallucinations'.[195] This is because, often, the video-link set up means a person will hear the voices of Tribunal members or their advocates without being able to see them. The MIRT stated that this 'can make it challenging for a person to understand whether the voices they hear are real'.[196]

5.63. Research states that the use of AVL can remove visual or contextual cues that are particularly important in assisting persons with cognitive disability to understand and follow proceedings.[197] Stakeholders also made this point. In its preliminary feedback, Developmental Disability WA referred to a client who was 'adamant' that remote attendance would not work for her:

> *She says that she needs to see the faces of the people she is engaging with and cannot participate properly by phone due to difficulty speaking at a phone in the way she is expected to.*[198]

5.64. Conversely, the Victorian Aboriginal Legal Service pointed out that the use of audio links can deprive the judicial officer of the ability to discern that a person with disability who is appearing before them needs more support in order to participate:

> *If a person has an intellectual disability or an Acquired Brain Injury, this may make it difficult for them to understand what is happening during a hearing. If the hearing takes place in person, the Member can (at least theoretically) assess that person's body language and demeanour and recognise that the person needs more support. Over the phone, these nuances are lost.*[199]

5.65. In addition, research has found that remote hearings can be more tiring for participants than in-person hearings. The use of AVL increases fatigue as higher levels of concentration are required, and participants do not have the benefit of physical cues, for example in relation to turn-taking.[200]

5.66. As with some of the other challenges to which we have already referred, the use of AVL rather than in-person hearings may have more significant impacts on a person with disability or compound other barriers they experience.

5.67. Poor functionality and technological issues associated with AVL can also pose barriers to access and participation for any person. While these are

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195 Preliminary Response 4 (Mental Impairment Review Tribunal) 2.

196 Preliminary Response 4 (Mental Impairment Review Tribunal) 2.

197 Michael Legg and Anthony Song, 'The courts, the remote hearing and the pandemic: from action to reflection' (2021) 44(1) *UNSW Law Journal* 126, 153.

198 Preliminary Response 12B (Developmental Disability WA) 24.

199 Victorian Aboriginal Legal Service, *Submission to Public Accounts and Estimates Committee COVID-19 Inquiry* (September 2020) 55.

200 Michael Legg and Anthony Song, 'The courts, the remote hearing and the pandemic: from action to reflection' (2021) 44(1) *UNSW Law Journal* 126, 156-157.

not exclusively disability-related barriers, Ruah Legal Services observed that they can have a significant impact on persons with disabilities.[201]

5.68. Ruah Legal Services explained that the unreliability of sound and video during videoconferences can result in many disadvantages for persons with disability, including difficulty processing what is being said and who is speaking, and the inability to properly see or hear the proceedings or recognise people on screen.[202]

5.69. Similarly, Community Legal noted that in hearings using AVL, technical failures are common, hearings frequently start late, and audio quality is unreliable. Community Legal also indicated the importance of recognising the intersectionality factors that play into these issues, identifying some of the assumptions implicit in the use of AVL hearings:

> *Video hearings further assume access to a private space, a device with appropriate video and microphone functionalities, and reliable internet connection, resources which many people with disability do not have, particularly those who are elderly, unhoused, or in residential care.*
>
> *…*
>
> *The adoption of video link as a default process risks entrenching systemic barriers, particularly for persons with communication disabilities who require tailored accommodation.*[203]

5.70. Similarly, Women's Legal Service WA highlighted that women with disability, particularly in regional areas, cannot always easily access the resources required for remote participation.[204]

5.71. Advocacy WA also highlighted the interrelated nature of these factors, saying that 'a person with intellectual, learning or sensory disabilities (or low levels of education) often lacks the connectivity, hardware, digital literacy or support personnel required to meaningfully participate in a virtual hearing.'[205]

Possible options for reform

5.72. It is evident from stakeholders' preliminary feedback that some of the AVL-related barriers to access and participation for persons with disability could be resolved or improved through practical responses.

5.73. We note that some of the recent expansions in the use of AVL did not require legislative amendment but were achieved through flexibility in court practices alongside development in infrastructure and technology. At no stage was this more clearly illustrated than during the COVID-19 pandemic, when the need for remote hearings to enable the justice system

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201 Preliminary Response 29 (Ruah Legal Services) [172].
202 Preliminary Response 29 (Ruah Legal Services) [178].
203 Preliminary Response 37 (Community Legal Western Australia) 16-17.
204 Preliminary Response 41 (Women's Legal Service WA) 5.
205 Preliminary Response 11 (Advocacy WA) 9.

to continue operating created the impetus to use the available technology. It relied upon existing statutory permissions and occurred in different situations than had previously been considered appropriate.

5.74. The COVID-19 pandemic also saw the enactment of legislation to expand the use of AVL in contexts which had previously not been permitted, such as the use of audio links for sentencing, and expanded arrangements for special hearings and child witnesses.[206]

5.75. This history highlights that both legislative and practical responses have their place in the removal of barriers to access and participation in courts and tribunals.

5.76. Given the diversity of disability-related needs, and the variety of barriers that may arise for persons with disability in relation to the use of technology in court and tribunal hearings, prescribing the circumstances in which an AVL may be used for an appearance by a person with disability may not be desirable.

5.77. An alternative option for reform may be to legislate a general overarching principle which requires a court or tribunal, when considering whether to exercise its discretion to permit the use of AVL in the particular circumstances of a proceeding, to explicitly consider the appropriateness of its use by reference to its impacts on the ability of a person with disability (or indeed any person involved in the proceedings) to access and participate in the proceedings.

5.78. A related issue is whether the content of such a principle should be elaborated to provide examples of the kinds of issues that a court or tribunal may need to consider in the exercise of the discretion, such as:

- a person's preference for the way in which they attend and participate in proceedings;
- the effect of any AVL technology on the ability of a person to:
  - understand the proceedings; and
  - communicate with the court or tribunal and any lawyers or witnesses involved in the proceedings;
- the facilities available to a person, relevant to the use of the AVL technology; and
- the supports available to a person using the AVL technology.

5.79. Another option may be to amend each of the existing legislative provisions governing the use of AVL. Such amendments would expressly require a court deciding whether to order or permit remote participation to consider whether the proposed mode of participation would facilitate or impede a

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206 See, for example, *COVID-19 Response and Economic Recovery Omnibus Act 2020* (WA) s 48 (which inserted s 14B in the *Sentencing Act 1995* (WA) permitting a court to sentence an offender via audio link in specified circumstances) and s 90 (which amended s 106K of the *Evidence Act 1906* (WA) permitting the use of audio links in special hearings for an accused to listen to a child's evidence and closed circuit TV for the accused to observe the proceedings, while not in court).

person's effective participation, having regard to any disability and associated communication, cognitive, sensory, physical or support needs.

5.80. A further option for reform may be to impose a legislative requirement that all courts and tribunals:

- invite all parties and witnesses to proceedings to indicate whether they have a disability-related need to appear remotely – and if so under what conditions; and
- consider whether that need can be met in the manner described.

5.81. We invite your feedback on any or all of the following questions:

32. What is the best way to ensure that the use of AVL in court and tribunal proceedings will facilitate, rather than hinder, access to, and participation in, those proceedings by persons with disability?

33. Is a legislative response necessary or desirable? If so, why? If not, why not?

34. Should there be a general legislative principle requiring a court or tribunal to consider the impacts of the use of AVL on any person with a disability involved in the proceedings, before permitting their use? If so, why? If not, why not?

35. If a general principle were to apply to the court or tribunal's exercise of discretion as to whether to permit the use of AVL in any case, would it be desirable to give examples of the kinds of factors the court or tribunal should consider? If so, what kinds of factors should be included?

36. Alternatively, would it be preferable to amend existing legislative provisions permitting the use of AVL to expressly require that the court or tribunal take into account the impact of the use of such technology on any person with disability involved in the proceedings?

37. How else, if at all, should legislation address barriers to access and participation for persons with disability arising from the use of AVL?

6. Communication and access to courts and tribunals

Overview

6.1. In this chapter, we consider barriers related to communication which impede access to and participation in Western Australian courts and tribunals for persons with disability. We also consider options for legislative reforms to address these barriers.

6.2. The court and tribunal system is structured around particular forms of communication, requiring competency in speaking, reading and writing. Reliance on these forms of communication can present barriers for some persons with disability.

6.3. Barriers to access and participation may also arise from other features of the court and tribunal system, including the use of complex legal terminology, as well as standard procedural requirements and practices.

6.4. Communication barriers may overlap and interact. In some circumstances, one adjustment or form of communication assistance may address multiple communication barriers experienced by a person. In other circumstances, a person may require a range of measures to support their effective communication in the court and tribunal system. For those reasons, we outline the key communication barriers identified by stakeholders' preliminary feedback first, before discussing a range of possible options for reforms which may reduce or remove those barriers.

Some context

6.5. There are many different forms of communication, including speaking, writing, signing and using body movements or gestures. While spoken communication is commonly relied on in many interactions, the use of tools or strategies may replace or supplement it. These include sign language, a computer or device, communication books or other printed material.[207] Using something other than speech to communicate is described as augmentative and alternative communication (**AAC**).[208]

6.6. The International Principles and Guidelines emphasise the need for accessible information and communications in the justice system.[209] They identify the need for States to enact and implement enforceable laws,

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207 'Augmentative and Alternative Communication (AAC)', *Communication Hub* (Web Page, 2023) <https://www.communicationhub.com.au/CommunicationHub/Communication_Hub/Resources/Fact_Sheets/Augmentative-and-Alternative-Communication.aspx>.

208 'Augmentative and Alternative Communication (AAC)', *Communication Hub* (Web Page, 2023) <https://www.communicationhub.com.au/CommunicationHub/Communication_Hub/Resources/Fact_Sheets/Augmentative-and-Alternative-Communication.aspx>.

209 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) Principle 2 and Guideline 2.1(a)(ii).

regulations, policies, guidelines and practices to ensure accessibility by persons with disability to information and communications.[210]

6.7. In addition, the International Principles and Guidelines also require States to guarantee the provision of procedural accommodations where information and communications are inaccessible for people with disabilities.[211] The International Principles and Guidelines identify various accommodations related to communication and a range of specific communication supports, which we discuss throughout this chapter.

Barriers to access and participation

6.8. As we outline in detail below, stakeholders' feedback illustrated that persons with disability can experience a wide range of communication barriers arising from:

- the forms in which information is communicated;
- the complexity or content of information; and
- standard processes and practices.

6.9. These barriers may impact the extent to which a person can:

- receive or access information;
- understand and process the meaning of information;
- retain information; and/or
- express information to others in the course of proceedings.

6.10. Stakeholders' feedback also illustrated that a person with disability may potentially experience communication barriers at many different points in legal proceedings, and in a range of interactions with different people within the court and tribunal system.

6.11. While we received significant stakeholder feedback about communication barriers arising in hearings, we note that, particularly in civil proceedings, much of the business of courts and tribunals takes place in less formal settings – for example, pre-trial conferences and mediations, and communications with judges' associates by email.

6.12. Some stakeholders also identified that these barriers may arise in the context of the lawyer-client relationship, when a person with disability requires legal representation in court or tribunal proceedings.[212]

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210 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 14, Guideline 2.1(a), (c).

211 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 14, Guideline 2.1(a), (d).

212 Preliminary Response 4 (Mental Impairment Review Tribunal) 2; Preliminary Response 37 (Community Legal Western Australia) 14.

Forms of communication

Current law and practice

6.13. The court and tribunal system relies heavily on written and spoken forms of communication. Requirements assuming a person can read, write and speak are embedded in legislation and common law principles, procedural requirements and hearing conventions and practices.

6.14. For example, a person engaging with the court and tribunal system will need to use written communication skills to:

- commence or respond to proceedings, or make applications within them;[213]
- make legal arguments in written submissions;
- engage with documentary evidence;[214] and
- comprehend legally significant information (for example, a notice of a hearing, formal orders made by a court or tribunal, and in some circumstances written reasons for a court or tribunal's decision).[215]

6.15. The importance of spoken communication is reflected in:

- the statutory requirement for a person taking an oath or affirmation to 'say aloud the words' of the oath or affirmation;[216]
- the value placed on oral evidence given by a witness, particularly in a criminal trial;[217]
- the conventional question-and-answer structure of witness examinations and cross-examinations; and
- the oral advocacy tradition more broadly, where parties and lawyers present oral arguments and respond to questions from the presiding judicial officer.

Barriers

6.16. For some persons with disability, barriers to access and participation may arise when information is communicated, or a person is expected to communicate, in written or spoken forms.

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213 For example, in civil proceedings in the Magistrates Court, if a party wants to make an originating claim the party must lodge the approved form. A party against which a claim is made must complete the response served with the claim and lodge it with the Court within 14 days after the claim is served: *Magistrates Court (Civil Proceedings) Rules 2005* (WA) rule 7(1) and 9(1).

214 This is reflected in various court rules related to discovery and the documents a person might tender at trial: see, for example *Rules of the Supreme Court 1971* (WA) Order 26; *Magistrates Court (Minor Cases Procedure) Rules 2005* (WA) rule 25C.

215 For example, *State Administrative Tribunal Rules 2005* (WA) rule 18 expressly provides for notice of the time and place of a hearing to be given by endorsing those details on an application form or providing written notice.

216 *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 7(1)(b).

217 *Vella v The State of Western Australia* [2007] WASCA 59 [42], [44]-[45].

6.17. Community Legal identified that baseline assumptions that a person can read and write (for example, in order to file a form or make a statement) can operate as barriers to access for some persons with disability, including people with vision impairment or blindness and people with cognitive impairment.[218]

6.18. Community Legal elaborated:

> *These assumptions are particularly problematic because they operate at the foundational level of a person's interaction with the justice system, sometimes before substantive legal questions are considered.*[219]

6.19. Various stakeholders also identified that participating in proceedings ordinarily requires a person to independently:

- hear and follow complex oral exchanges;
- comply with spoken directions; and
- communicate fluently in at least one spoken language.[220]

6.20. Stakeholders identified that these requirements present barriers to participation for people who are deaf or hard of hearing, as well as people who are non-speaking or have significant speech impairments and use AAC.[221]

6.21. Additionally, the Centre for Human Rights Education told us that it is often wrongly assumed that a person with disability who uses speech to communicate can 'communicate effectively in all situations and fully understand everything said to them'.[222]

Content and complexity of communication

Current law and practice

6.22. Specialised language is an inherent feature of the court and tribunal system. Substantive legislation and court rules often express legal concepts and procedures in terminology that may be unfamiliar to a person who is not legally trained.

6.23. Those who engage with the court and tribunal system (particularly without legal representation) are regularly required to understand and respond to information expressed in this language.

6.24. To illustrate, an accused person may receive a prosecution notice which describes the charge of a criminal offence 'in the words of the written law that creates it'.[223] Understanding the nature of a criminal charge may

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218 Preliminary Response 37 (Community Legal Western Australia) 19.

219 Preliminary Response 37 (Community Legal Western Australia) 19.

220 Preliminary Response 4 (Mental Impairment Review Tribunal) 1; Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 9.

221 Preliminary Response 37 (Community Legal Western Australia) 19.

222 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 5.

223 *Criminal Procedure Act 2004* (WA) Schedule 1, cl 5(1)(a) and (2)(a). The Criminal Procedure Act provides that such a description is sufficient for the purpose of ensuring that the charge is

require an accused person to interpret specific legal concepts expressed in complex language, even for relatively familiar, common offences such as assault.[224]

6.25. As another example, in order to comply with the relevant rules, a party in civil proceedings in the Supreme Court must distinguish between the legal concepts of the 'material facts' on which they rely for their claim or defence and the evidence by which those facts are to be proved.[225]

6.26. As some stakeholders observed, the volume of complex or technical written material (which can also include reports and court orders, including conditions) is often substantial.[226]

6.27. Community Legal observed that complex legal language is also used during court appearances; they also noted that lawyers, judicial officers and court staff often use such language without explaining its meaning.[227]

Barriers

6.28. Our research and stakeholders' preliminary feedback identified that the complexity of legal language is a key barrier to access and participation in the court and tribunal system for persons with disability.

6.29. As the Victorian Legal Services Commissioner explained:

> *One of the biggest barriers to participation in the justice system is that of language. The most common criticism of the legal system encountered is the nature of the legal language used by lawyers and the courts. Legal terms are often incomprehensible to people with disabilities, especially for those who have received less formal education and are therefore unable to understand or follow longwinded conversations. This can often leave them feeling disempowered, inferior and intimidated, and less likely to want to participate in the process without a support person.*[228]

6.30. Many other stakeholders also discussed communication barriers arising from the widespread use of complex legal language in both written and verbal forms.[229]

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described in enough detail for the accused person to understand and defend the charge; and in particular, that the offence is described with 'reasonable clarity'.

224 *Criminal Code Act Compilation Act 1913* (WA) s 222.

225 *Rules of the Supreme Court 1971* (WA) Order 20, rule 8(1).

226 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 5; Preliminary Response 4 (Mental Impairment Review Tribunal) 2.

227 Preliminary Response 37 (Community Legal Western Australia) 14.

228 Law Reform Committee (Victoria), Parliament, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (Parliamentary Paper No 216, 2013) 178.

229 Preliminary Response 4 (Mental Impairment Review Tribunal) 1; Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 2; Preliminary Response 34A (Ms Cátia Malaquias OAM) 7; Preliminary Response 14 (Kin Disability Advocacy) 5; See also Law Council of Australia, *The Justice Project: Courts and Tribunals (Part 2)* (August 2018) 35; Preliminary Response 10 (Ever Ability Group) 2.

6.31. The MIRT observed that the general requirement to understand complex legal language and legal concepts without modification or support, can create substantial barriers for people with intellectual disability, acquired brain injury, autism spectrum disorder, cognitive impairment, neurodegenerative conditions and psychosocial disability.[230]

6.32. The Centre for Human Rights Education told us that requiring a person to read, understand and respond to complex written material within strict timeframes is problematic for people with intellectual disability, acquired brain injury or learning disabilities.[231]

6.33. Ruah Legal Services and Sussex Street both identified challenges related to understanding court orders as a significant barrier for persons with disability. Sussex Street said that, for persons with intellectual disability or other cognitive impairments, it may be challenging to interpret legal terminology, identify critical dates, understand appeal rights and comply with procedural requirements without assistance.[232] Ruah Legal Services told us that such misunderstandings often result in breaches of bail, non-compliance with conditions or failure to attend Court.[233]

6.34. Sussex Steet further told us that:

> *The issue is not simply whether a person can read. It is whether they can understand legal information well enough to act upon it. A person may understand each individual sentence in a court order while remaining unable to understand what the order requires of them in practice. Furthermore, assumed legal literacy also infers an understanding of both linear progression of files and an understanding of what comes after this document or hearing.*[234]

Court and tribunal processes and practice

Current law and practice

6.35. Many of the communication barriers arising from court and tribunal processes and practice are not attributable to legislative requirements.

Barriers

6.36. Barriers arising from the court and tribunal system's reliance on spoken and written forms of communication, and the fact that the content of such communication is often complex and legally technical, may be compounded by standard court and tribunal processes and practices.

6.37. John Curtin Law Clinic made the broad observation that court processes and procedures are designed for participants who are neurotypical and do not have a disability. As a result, people with cognitive, intellectual,

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230 Preliminary Response 4 (Mental Impairment Review Tribunal) 1.
231 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 5.
232 Preliminary Response 25 (Sussex Street) 14.
233 Preliminary Response 29 (Ruah Legal Services) 25.
234 Preliminary Response 25 (Sussex Street) 15.

psychosocial, or communication disabilities face significant disadvantage in understanding and participating in proceedings.[235]

6.38. The Disabled Lawyers Association told us:

- there is a poor understanding of the diverse types of communication adjustments that a person with disability might need; and
- there can be resistance to accepting adjustments that require changes to standard court procedure, such as permitting written, instead of oral, evidence to be given.[236]

6.39. Community Legal also identified that 'courts and tribunals operate within compressed timeframes that presuppose an ability to absorb, process, and respond to information quickly'. Community Legal explained how these timeframes may operate as barriers to communication:

> *Persons with cognitive disabilities may require additional time to understand what is being put to them, consider their response, and communicate their position because their disability affects the pace at which they can do so. Due to time pressures and a lack of support, our members have reported situations where clients with disabilities agree to orders they would not otherwise accept.*[237]

6.40. The Disabled Lawyers Association also identified specific communication barriers related to appearing in court, including the lack of sign language interpreters, and the limited availability of equipment like hearing devices, microphones or other assistive technology in a standard hearing.[238]

Possible responses to communication barriers

6.41. As the preceding discussion illustrates, communication barriers may arise in diverse ways, and a person with disability may experience multiple barriers to receiving, understanding or expressing information when they engage with the court and tribunal system.

6.42. Our research and stakeholders' preliminary responses identified various options for reform. Many of them do not directly correspond to a particular communication barrier; instead they may reduce or remove a range of barriers to access or participation for some persons with disability.

6.43. Additionally, a key theme emerging from stakeholders' preliminary feedback was the importance of responding to each person's individual communication needs to ensure effective access to and participation in the court and tribunal system.

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235 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 3.

236 Preliminary Response 30 (Disabled Australian Lawyers Association) 5.

237 Preliminary Response 37 (Community Legal Western Australia) 14.

238 Preliminary Response 30 (Disabled Australian Lawyers Association) 5; Preliminary Response 30 (Disabled Australian Lawyers Association).

Improving access to information and documents

Current law and practice

6.44. A person with disability may experience communication barriers in relation to a range of information and documents connected to court and tribunal proceedings. These include:

- information published on court and tribunal websites;
- legislation (including court rules) published on the Western Australian Legislation website, which is maintained by the Parliamentary Counsel's Office;
- documents produced or issued by a court or tribunal in relation to specific proceedings (such as orders, notices, written reasons and transcripts of hearings); and
- documents produced or filed by parties in proceedings (for example, applications, submissions and documentary evidence).

6.45. The Department of Justice's Disability Access and Inclusion Plan 2024-2029 (**Justice DAIP**) (which we have been asked to consider in our review) provides a framework for how the Department of Justice will ensure equitable outcomes and opportunities for persons with disability when performing its functions with regard to the general public.[239]

6.46. One outcome identified in the Justice DAIP is that persons with disability 'have the same opportunity to receive information from us in a format that enables them to easily access the information'.[240] It identifies the following key objectives related to accessing written information:

> *1. Undertake routine web accessibility audits to ensure the Department's digital contents are accessible and meeting the latest Web Content Accessibility Guidelines…*
>
> *3. Develop a Communications Guide that sets out the requirement for all Department communications, including alternate formats and the enhanced representation of people with disability within communications.*
>
> *4. Undertake a review to identify opportunities to expand the numbers of easy read publications.*[241]

6.47. While the Department of Justice is required to report annually on its implementation of the Justice DAIP,[242] it does not create any individual entitlement for people to receive information and/or documents in accessible formats.

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239 *Disability Services Act 1993* (WA) s 28(1).

240 Department of Justice Government of Western Australia, *Disability Access and Inclusion Plan 2024-2029* (4 September 2019) Outcome 3.

241 Department of Justice Government of Western Australia, *Disability Access and Inclusion Plan 2024-2029* (4 September 2019) 12.

242 *Disability Services Act 1993* (WA) s 29.

6.48. There is also no general legislative requirement for documents on a court file or written communications in the court and tribunal system to be in plain English or in an accessible format.

Court and tribunal websites

6.49. Court and tribunal websites are an important source of information for any person seeking to access and participate in proceedings. They provide information about the functions and jurisdiction of courts and tribunals, their processes and procedures, and daily court lists.

6.50. Court and tribunal websites may also provide access to court forms, procedural guidance, hearing information and published decisions of the court or tribunal, as well as information about available assistance and support services.

6.51. The websites of each Western Australian court and the SAT provide various accessibility options, including options to resize text to enhance readability and to listen to web pages and documents using ReadSpeaker. In addition, each website states that a person can request any documents on the website to be printed in hard copy or to be made available in an alternative format such as plain text file.[243]

Legislation and court rules

6.52. The Western Australian Legislation website provides public access to the official versions of Western Australian Acts, subsidiary legislation (including regulations and rules of court) and other legislative instruments.[244] A person can download an official version of legislation in PDF format or download a Word or HTML version.

6.53. The Western Australian Legislation website does not provide the same accessibility options as the websites of each Western Australian court and the SAT.

Court documents

6.54. A court or tribunal may produce a range of written documents in connection with proceedings, including notices of hearings, summonses, orders and judgments, written reasons for decisions, transcripts and correspondence from court or tribunal registries.[245]

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243 'Accessibility', *Supreme Court of Western Australia* (Web Page, 9 October 2020) <https://www.supremecourt.wa.gov.au/_misc/accessibility.aspx>; 'Accessibility', *District Court of Western Australia* (Web Page, 1 May 2019) <https://www.districtcourt.wa.gov.au/_misc/accessibility.aspx>; 'Accessibility', *Magistrates Court of Western Australia* (Web Page, 10 October 2020) <https://www.magistratescourt.wa.gov.au/_misc/accessibility.aspx>; 'Accessibility', *State Administrative Tribunal* (Web Page, 19 January 2022).

244 'Western Australian Legislation', *Government of Western Australia, Department of Justice and Parliamentary Counsel's Office*) <https://www.legislation.wa.gov.au/>.

245 As we discussed in Chapter 5, some of these documents (for example, orders, notices of hearings and registry correspondence) will be accessed by eCourts particularly in civil proceedings in courts and in the SAT.

Documents produced by parties

6.55. Separate to the documents produced by a court or tribunal, a person may need to access and understand documents prepared, filed or served by parties to the proceedings. These may include applications, submissions and documentary evidence.

6.56. Court and tribunal rules and practice directions prescribe various requirements relating to the formatting of documents, including the size of text and line spacing.[246] However, they do not explicitly require documents produced or filed by a party to be in any accessible format.

Possible options for reform

6.57. In our preliminary consultations, stakeholders made recommendations for broad reforms directed to making these sources of information and documents easier to access and understand for persons with disability.

6.58. There was some preliminary support for providing information and documents in various accessible formats. For example, EverAbility WA suggested specific key reforms for persons with vision impairment. Namely, that it should be mandatory for information to be:

- compatible with screen-reader software;
- available in large print; and
- provided in Braille on request.[247]

6.59. John Curtin Law Clinic suggested that it should be mandatory for documents produced by a court (summonses, notices and judgments) to be provided, on request, in Braille, audio and accessible PDF.[248]

Plain English and Easy Read

6.60. The same stakeholders also suggested reforms related to plain English and Easy Read, which are related but separate approaches to making information easier to understand.

6.61. Plain English (sometimes also referred to as plain language) is a style of writing that uses clear, straightforward language and structure to enable its intended audience to find, understand and use the information they need.[249] Easy Read aims to give more people access to information by combining text with layout and imagery to simplify and explain information.[250]

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246 See for example, *Rules of the Supreme Court 1971* (WA) Order 69, rule 2.

247 Preliminary Response 10 (Ever Ability Group) 4.

248 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 4.

249 'Quick guide: plain language', *Australian Government Style Manual* (Web Page, 2026) <https://www.stylemanual.gov.au/style-manual-resources/quick-guides/quick-guide-plain-language>.

250 'Easy Read', *Australian Government Style Manual* (Web Page, 2026) <https://www.stylemanual.gov.au/content-types/easy-read>.

6.62. EverAbility WA suggested that plain English and Easy Read options should be available 'across all justice system interfaces' as a minimum standard.[251]

6.63. John Curtin Law Clinic suggested that it should be mandatory for documents produced by a court (summonses, notices and judgments) to be provided, on request, in plain English and Easy Read.[252]

Possible legislative reforms

6.64. There are several possible options for legislative reforms.

6.65. One option for reform may be to legislate a general principle that persons with disability are entitled to receive information or documents from the court and tribunal system in a format that enables them to access the information as readily as other people can access it. This principle may be expressed to apply to court and tribunal websites.

6.66. Another option for reform may be to legislate another general principle that requires a court or tribunal to take reasonable measures to provide information or documents to a person with disability in alternative formats, upon request. Such a principle may be expressed to apply to documents produced by a court or tribunal, as well as to documents held on the court or tribunal file, which have been filed by parties to the proceedings.

6.67. A third option for reform may be to legislate a principle specifically in relation to communications generated by a court or tribunal. This principle would require those communications to be in a format that a person with disability can access or understand.

6.68. For example, the CLMI Act requires communication with an accused person or a 'supervised person' under that Act (which includes any advice, explanation, information, notification or reasons)[253] to be in a language, form of communication and terms that the person is likely to understand using any means of communication that is practicable.[254] The Mental Health Act contains an essentially identical provision, confined to communication with a person 'under this Act'.[255]

6.69. We welcome your feedback on any or all of the following questions:

38. Should courts and tribunals be required to provide information and court documents in plain English and/or different accessible formats?

39. What processes, if any, should courts and tribunals adopt in relation to the provision of information and documents in alternative formats?

40. Should a person be required to make a request for a particular format?

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251 Preliminary Response 10 (Ever Ability Group) 3.

252 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 4.

253 *Criminal Law (Mental Impairment) Act 2023* (WA) s 20(1).

254 *Criminal Law (Mental Impairment) Act 2023* (WA) s 20(1).

255 *Mental Health Act 2014* (WA) s 9.

41. What, if any, legislative reforms should support any process for providing information and court documents in plain English and/or different accessible formats?

Practice and procedure: modifications and explanations

Current law and practice

6.70. As we outlined in Chapter 3, each of the courts and the SAT have the power to control or regulate the conduct of its proceedings, including by giving directions.

6.71. These existing powers may enable a court or the SAT to modify its standard process or proceedings, for example, to provide adjustments to a person to facilitate their effective communication in the proceedings.

6.72. Stakeholders' preliminary feedback also identified the impact of communication barriers on the ability of a person to understand and follow legal processes and procedures. In this respect, section 32(6)(b) of the SAT Act requires the SAT to take measures that are reasonably practicable to:

> *explain to the parties, if requested to do so, any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceeding.*[256]

6.73. Legislation does not impose any equivalent general obligation on a Western Australian court.

Possible options for reform

Modifications to practice and procedure

6.74. Ruah Legal Services emphasised the need for flexibility in, and modification of, standard processes and procedures to respond to the many different communication barriers persons with disability may experience.[257]

6.75. In relation to modifying processes or procedures outside of a hearing, various stakeholders suggested that it should be possible to extend or adapt timeframes within proceedings.[258] The Centre for Human Rights Education also suggested it should be possible to limit the volume of communications that are to be served on a person with disability in proceedings.[259]

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256 *State Administrative Tribunal Act 2004* (WA) s 32(6)(b).

257 Preliminary Response 29 (Ruah Legal Services) 21; Preliminary Response 10 (Ever Ability Group) 4.

258 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 30; Preliminary Response 10 (Ever Ability Group) 3; Preliminary Response 24 (South West Autism Network Inc) 112.

259 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 31.

6.76. Other stakeholders suggested that various procedural adjustments in a hearing may reduce or remove communication barriers for some persons with disability, including:

- judicial officers modifying pace and tone of speech;[260]
- flexible timeframes and extended breaks;[261] and
- requiring visual information to be verbalised in hearings.[262]

6.77. The Centre for Human Rights Education also emphasised the importance of modifying hearing procedures where necessary, to facilitate the use of different forms of communication support.[263] We discuss some forms of communication assistance provided by other people in more detail in the next section.

6.78. We note that modifying court or tribunal procedures may also be necessary to enable a person to use AAC, including any technologies or devices the person uses. For example, the International Principles and Guidelines list a range of technologies which may provide communication support, including:

- assistive listening systems and devices;
- open, closed and real-time captioning, and closed caption decoders and devices;
- voice, text and video-based telecommunications products;
- videotext displays;
- computer-assisted real-time transcription;
- screen reader software, magnification software and optical readers; and
- video description and secondary auditory programming devices that pick-up audio feeds for television programmes.[264]

6.79. Some examples of adjustments to facilitate use of AAC may include allowing a person additional time to respond to questions (for example, by using a communication board or speech-generating device), specialised seating and mounting of devices, as well as shorter sessions and additional breaks.[265]

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260 Preliminary Response 29 (Ruah Legal Services) [123].

261 Preliminary Response 10 (Ever Ability Group) 4; Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 30; Preliminary Response 37 (Community Legal Western Australia) 32.

262 Preliminary Response 10 (Ever Ability Group) 4.

263 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 23-24, 27-28, 30.

264 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 16, Guideline 3.2(e).

265 Victorian Department of Justice and Community Safety, 'Communicating with people who use augmentative and alternative communication (AAC)', *Judicial College of Victoria* (Fact Sheet, 16 October 2026) <https://judicialcollege.vic.edu.au/resources/victims-and-witnesses>.

6.80. Given the diversity of potential modifications to a hearing which may be required, one option for reform may be to legislate a general principle that, in order to facilitate the participation a person with disability in proceedings, courts and tribunals should consider whether aspects of procedure should be modified to meet their communication needs.

6.81. There may be some benefit in a general legislative principle of this kind including examples of its application, without limiting the circumstances in which such a principle would apply. Examples suggested by stakeholders include modifications to the length of hearing days or the availability of breaks, modifications to the pace and tone of speech by the judicial officer, and modifications to ensure that the technology necessary for any communication supports can be used effectively.

Explaining practice and procedure to participants

6.82. Another possible option for reform may be to legislate a provision which requires a court or tribunal to explain aspects of its process or procedure, if requested to do so. Section 32(6)(b) of the SAT Act, set out above, is an example of such a provision.

6.83. Section 29 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) similarly requires the QCAT to 'take all reasonable steps' to ensure a party to a proceeding understands 'the practices and procedures of the tribunal'. It also prescribes that the steps that can be taken for ensuring a person's understanding include:

- explaining the matters to the person; or
- having an interpreter, or someone else who is able to communicate effectively with the person, give the explanation; or
- supplying an explanatory note in English or another language.[266]

6.84. In addition to imposing an obligation on the tribunal, the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) also imposes an obligation on the principal registrar to help parties and potential parties. Section 30 provides:

> *The principal registrar must give parties and potential parties reasonable help to ensure their understanding of the tribunal's practices and procedures, including, for example, reasonable help to complete forms required under this Act or the rules.*

6.85. We welcome your feedback on any or all of the following questions:

42. In what ways should court and tribunal processes and procedures be modified to reduce or remove communication barriers for persons with disability?

43. Do any existing legislative provisions require amendment to support modifications to court and tribunal processes and procedures?

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266 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(2).

44. Should a court or tribunal be explicitly required to consider whether, and if so how, its processes and procedures should be modified to reduce or remove communication barriers, or to provide communication support? If so, why? If not, why not?

45. Should courts and tribunals be subject to a legislative obligation to make reasonable adjustments for the communication needs of persons with disability?

46. Should a court or tribunal be subject to any legislative obligations in relation to ensuring that a person understands its processes and procedures? If so, why? If not, why not?

Communication assistance and support

Current law and practice

6.86. Existing Western Australian legislation recognises a range of people who can provide individualised communication assistance, to varying degrees of formality, in specific proceedings.

Intermediaries

6.87. The Evidence Act 2025 establishes a witness intermediary service.[267] When the Act comes into operation in September 2027, this service will be available for criminal proceedings, child protection proceedings and any other civil proceedings in the circumstances (if any) provided for by regulations made under the Act.[268]

6.88. The principal function of a witness intermediary is to facilitate communication to and by a witness to ensure that any evidence given by the witness is as complete, accurate and coherent as possible.[269]

Communication partners

6.89. Separately, the CLMI Act establishes a communication partner scheme to provide communication assistance in proceedings to accused persons or supervised persons with mental impairment.

6.90. A communication partner's role is to impartially facilitate communication and participation in proceedings.[270] When requested by the court or by the MIRT, their function is to:

- communicate and explain to the accused or supervised person, any questions put to them; and
- communicate and explain to the court or Tribunal the information given by the accused or supervised person.[271]

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267 *Evidence Act 2025* (WA) s 285.

268 *Evidence Act 2025* (WA) s 286(1).

269 *Evidence Act 2025* (WA) s 287(1).

270 Department of Justice Government of Western Australia, *Communication Partners Procedural Guidance Manual* (September 2024) 6 <https://www.wa.gov.au/media/49456/download?inline>.

271 *Criminal Law (Mental Impairment) Act 2023* (WA) s 21(2).

6.91. Information published by the Western Australian government suggests that it is intended that communication partners will be experienced allied health professionals, including speech pathologists, social workers, occupational therapists and psychologists, who have undergone rigorous training to become accredited.[272]

6.92. A court or the Tribunal may hold a hearing (known as a 'ground rules hearing'), at which it may make any rulings, directions or orders related to a person's communication needs.[273] For example:

> *Directions may be made that …a support animal will be present while evidence is given, and that all questions put to the accused person must be in short, simple form with ample time provided for the accused to respond. It may also be directed that the accused person is to have a support person present, or access to aids, breaks, translation services or other means of communication facilitation the judicial officer or Tribunal member deems fit.*[274]

6.93. The MIRT's preliminary feedback highlighted the prevalence of barriers to meaningful participation in proceedings[275] and praised the introduction of the communication partners scheme. The Tribunal identified the scheme as a useful mechanism for facilitating comprehension of proceedings by supervised persons, and for assisting the Tribunal to understand supervised persons.[276]

Other support persons

6.94. Both the CLMI Act and the Evidence Act permit the presence of support persons in certain circumstances.

6.95. Under the CLMI Act, the court or Tribunal may order that an accused or supervised person be provided with any support measure that is reasonably available.[277] A support measure includes having near them a person approved by the court or Tribunal who may provide them with support.[278]

6.96. The Evidence Act 2025 provides that, while giving evidence in a proceeding, a special witness is entitled to have a person nearby to

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272 'Communication Partner Program', *WA Government* (Web Page, 16 April 2026) <https://www.wa.gov.au/organisation/court-and-tribunal-services/communication-partner-program>. While s 21(6) of the CLMI Act states that regulations may provide for matters relating to communication partners, including the kinds of qualifications and experience to which a court or the Tribunal must have regard when considering whether to appoint a communication partner, the CLMI Regulations do not address these matters.

273 *Criminal Law (Mental Impairment) Regulations 2024* (WA) r 4(2).

274 Department of Justice Government of Western Australia, *Communication Partners Procedural Guidance Manual* (September 2024) 19 <https://www.wa.gov.au/media/49456/download?inline>.

275 Department of Justice Government of Western Australia, *Communication Partners Procedural Guidance Manual* (September 2024) 19 <https://www.wa.gov.au/media/49456/download?inline>.

276 Preliminary Response 4 (Mental Impairment Review Tribunal) 2.

277 *Criminal Law (Mental Impairment) Act 2023* (WA) s 20(3).

278 *Criminal Law (Mental Impairment) Act 2023* (WA) s 9 (definition of 'support measure').

provide them with support. The person who provides support must be a person approved by the court and must not be a person who is a witness in, or a party to, the proceeding.[279]

6.97. The Evidence Act 2025 also provides that a special witness may, with the approval of the court (and in compliance with any regulations), have a support animal nearby to provide the witness with support while they are giving evidence.[280]

6.98. In addition, there are provisions for support persons in a range of other pieces of legislation. These include:

- the *Mental Health Act 2014* (WA) (**MH Act**), which provides that an individual chosen by the person who is the subject of proceedings before the MHT may attend the hearing, unless the tribunal orders their exclusion;[281]
- the *Restraining Orders Act 1997* (WA) (**Restraining Orders Act**), which provides that a person seeking to be protected by an order is entitled to have one or more approved persons near to provide support;[282] and
- the *Workers Compensation and Injury Management Regulations 2024* (WA), which provide that a return-to-work case conference may be attended by the worker, with or without one support person.[283]

Possible options for reform

6.99. There are various possible options for reform that would broaden the availability of these existing forms of communication assistance.

6.100. Various stakeholders referred to the existing communication partner program under the CLMI Act and considered that communication partners should be more widely available within the court and tribunal system.

6.101. For example, South West Autism Network observed that victims, witnesses, people in civil (non-criminal) cases, and people before tribunals have no equivalent access to communication assistance.[284] South West Autism Network considered:

> *This is a fundamental gap: the communication barriers that make proceedings difficult for autistic accused are equally present for autistic victims and witnesses.*[285]

279 *Evidence Act 2025* (WA) s 231.
280 *Evidence Act 2025* (WA) s 232.
281 *Mental Health Act 2014* (WA) s 458.
282 *Restraining Orders Act 1997* (WA) s 44D.
283 *Workers Compensation and Injury Management Regulations 2024* (WA) reg 83(2).
284 Preliminary Response 24 (South West Autism Network Inc) 7.
285 Preliminary Response 24 (South West Autism Network Inc) 47.

6.102. One option for reform, supported by other stakeholders, including Advocacy WA,[286] Women's Legal Service WA[287] and the Centre for Human Rights Education,[288] may be to legislate for a broader communication partner scheme across the court and tribunal system.

6.103. The Centre for Human Rights Education considered that the service should be available to any individual who has speech, language, communication and cognitive needs, at all stages of the justice process.[289] It suggested that this could be established by 'amending the Magistrates Court Act 2004 – Part 5 (Miscellaneous), the District Court Act – Part 8 (Practice and procedure and rules of Court) and the Supreme Court Act 1935 – Part 11 (Miscellaneous)'.[290]

6.104. In relation to other less formal means of providing communication assistance, Community Legal considered:

> *For people with cognitive impairment or intellectual disability, the presence of a support person can be a fundamental prerequisite to meaningful participation.*[291]

6.105. In light of this, another possible option for legislative reform may be to provide that a person with disability who is a party to proceedings in a court or tribunal is entitled to have an individual nearby to provide support.

6.106. We welcome your feedback on any or all of the following questions:

47. Should it be possible for a court or tribunal to appoint a communication partner for persons who are involved in proceedings in courts and tribunals, in circumstances other than those set out in the CLMI Act?

48. If so, for whom and in what types of proceedings should a court or tribunal be able to appoint a communication partner?

49. If a broader communication partner scheme were to be legislated, what other differences to the CLMI Act would need to be considered and reflected in the scheme?

50. Should a support person be available to other persons who are involved in proceedings in courts and tribunals?

51. If so, to whom and in what types of proceedings should a support person be available?

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286 Preliminary Response 11 (Advocacy WA) 19.
287 Preliminary Response 41 (Women's Legal Service WA) 12.
288 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 5.
289 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 5.
290 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 5.
291 Preliminary Response 37 (Community Legal Western Australia) 19.

Interpreters

Current law and practice

6.107. Auslan interpreting services provide another form of communication assistance for persons who are deaf and use Auslan.

6.108. Various legislative provisions in this State confer an entitlement to an interpreter for a person engaging with the justice system in different contexts.[292]

6.109. None of these provisions expressly defines the term 'interpreter' to include an Auslan interpreter, although the ordinary meaning of the word 'interpreter' is sufficiently broad to encompass an Auslan interpreter.

6.110. Furthermore, some courts clearly recognise Auslan as a language that may require the use of an interpreter in a hearing. The District Court's website, for example, notes that ‘where a party or witness cannot adequately understand or communicate in English, or where a person uses Auslan (Australian Sign Language) as their primary language, an interpreter may be required to ensure procedural fairness and access to justice’.[293]

6.111. Various stakeholders identified the lack of consistently available Auslan interpreters in proceedings as a significant issue in the court and tribunal system.[294] For example, Community Legal said:

> *Our members report a significant and unaddressed shortage of qualified Auslan interpreters in Western Australia who are available and willing to appear in proceedings. Courts and registries have also demonstrated a reluctance to take responsibility for arranging interpreter services, with the burden and cost falling instead on the person with disability or their legal representative. The result is that persons with hearing impairments are placed in the position of either proceeding without adequate communication support or facing repeated adjournments while interpreter availability is pursued.*[295]

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292 In the context of criminal investigations, an accused person and an accused suspect (a person who has been arrested on suspicion of having committed an offence) are both entitled to be assisted by an interpreter: *Criminal Investigation Act 2006* (WA) ss 137(3)(d), 138(2)(d). Section 75 of the Criminal Procedure Act also enables a court to adjourn a charge, at any time, for any good reason, including for the purpose of allowing the services of an interpreter to be obtained. Witnesses in proceedings and parties or representatives in SAT proceedings are also entitled to an interpreter's assistance: *Evidence Act 2025* (WA) s 39.

293 'Interpreters', *District Court of Western Australia* (Web Page, 29 May 2026) <https://www.districtcourt.wa.gov.au/I/interpreters.aspx>.

294 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 9; Preliminary Response 30 (Disabled Australian Lawyers Association) 5.

295 Preliminary Response 37 (Community Legal Western Australia) 15.

Possible options for reform

6.112. Stakeholders suggested various practical measures, such as more funding to enable free qualified Auslan interpreters for legal advice appointments as well as court and tribunal hearings.[296]

6.113. In addition to these practical initiatives, one option for legislative reform may be to explicitly include an Auslan interpreter within the meaning of the term interpreter. This may be desirable as an explicit statutory recognition of Auslan as a language that can require interpretation. This could be done by amending the *Interpretation Act 1984* (WA).

52. Should the *Interpretation Act 1984* (WA) be amended to explicitly include an Auslan interpreter within the meaning of the term interpreter?

53. Are any other legislative amendments desirable or necessary to increase the availability of Auslan interpreting services for persons who engage with the court and tribunal system?

[296] Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 2-3; Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 5.

7. Accused persons

Overview

7.1. We have been asked specifically to consider the experiences of persons with disability as accused persons within the Western Australian court and tribunal system. An accused person is a person who is alleged to have committed a criminal offence.

7.2. There is no doubt that for every accused person, participating in the criminal process can be a fast-paced, complex and stressful experience, the outcome of which is likely to have significant implications. For an accused person with disability, these challenges may be compounded if barriers prevent their full participation in pre-trial processes, in related proceedings such as an application for bail, or in the criminal trial itself.

7.3. In the context of criminal proceedings, some of the general barriers related to physical access, technology and communications (which we discussed in Part B) will have specific impacts on, or consequences for, an accused person with disability. Additional specific barriers to the full or effective participation of accused persons with disability in different aspects of criminal proceedings may arise from procedural requirements imposed by legislation.

7.4. There are two specialist therapeutic courts in Western Australia, the IDDP Court and the Start Court, which are intended to assist some accused persons with disability. Stakeholders' preliminary feedback also identified specific barriers to accused persons with disability accessing and participating in these courts.

Some context

7.5. As we identified in Chapter 3, the lack of accurate, specific data about the experiences of persons with disability who engage with Western Australia's courts and tribunals is a systemic issue.

7.6. While 'the true number of persons with disability in the criminal justice system is unknown',[297] available data indicates that persons with disability are over-represented in various aspects of the criminal justice system. The Disability Royal Commission referred to research which suggests:

- ‘people with disability… have disproportionately high levels of contact with early stages of the criminal justice process’;[298] and
- 'the majority of people with disability who offend have been victims of frequent and recurring forms of violence’.[299]

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297 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 34.

298 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 35.

299 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 35.

Scope of this chapter

Interactions with police

7.7. As we explained in Chapter 1, our focus on the Western Australian court and tribunal system precludes us from specifically considering issues related to police interactions with persons with disability and the experiences of persons with disability in custodial settings.

7.8. Clearly, these experiences can profoundly impact the lives of persons with disability. They may also affect a person's participation in criminal proceedings. Consequently, while we do not discuss these issues further in this chapter, we acknowledge that real and very serious issues can arise if:

- the police, and in turn the courts, do not identify that an accused person has a disability; and
- accordingly, do not provide reasonable adjustments and support to the person to overcome challenges to their ability to understand and fully participate in the criminal justice process.

The *Criminal Law (Mental Impairment) Act 2023* (WA)

7.9. As we also explained in Chapter 1, we have been asked not to specifically review the CLMI Act. For accused persons with a mental impairment, the CLMI Act may govern the conduct and outcome of criminal proceedings. To clarify the issues about which we do not require feedback, we outline some of the key provisions of the CLMI Act below.

7.10. The CLMI Act uses the term 'mental impairment'[300] to mean any of, or a combination of:

- an intellectual disability;
- a mental illness;[301]
- an acquired brain injury; and
- dementia.

7.11. For an accused person with mental impairment, the CLMI Act governs:

- the determination of any question as to whether they are unfit to stand trial because of mental impairment;[302]

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300 *Criminal Law (Mental Impairment) Act 2023* (WA) s 9(1) (definition of 'mental impairment').

301 This term is defined by reference to s 1(1) of the Criminal Code to mean an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.

302 *Criminal Law (Mental Impairment) Act 2023* (WA) Part 3, Division 2.

- the procedure for dealing with the offences with which they are charged, if they are found unfit to stand trial because of mental impairment;[303] and
- the orders which may be made if they are acquitted on account of mental impairment.[304]

7.12. When determining a question as to whether an accused person is unfit to stand trial (which may be raised by any party, or the court, at any stage of a criminal trial),[305] a court can make various orders, including that:

- the proceedings be adjourned for up to six months in order to see if an accused person becomes fit to stand trial;[306] and
- the accused person is fit to stand trial while they have access to support measures (which, to the extent that they remain necessary for the person to be fit, must be made available to the accused person throughout the trial).[307]

7.13. As we discussed in Chapter 6, the CLMI Act defines support measures to include having an approved support person, having a communication partner, and the use of any device (for example, a communication board) to aid communication.[308]

7.14. Stakeholders raised various issues with respect to the CLMI Act, including its geographical reach and videoconferencing capabilities;[309] whether there should be a dedicated CLMI court list in each of the Magistrates, District and Supreme Courts;[310] and what South West Autism Network described as 'critical gaps for autistic people' in its operation.[311] However, as we have already noted, a review of the operation of the CLMI Act is expressly excluded from our Terms of Reference.

7.15. We therefore focus our attention on the experiences of accused persons with disability, other than those who fall within the CLMI Act.

Criminal proceedings for accused persons

7.16. As we have already observed, it is likely that every accused person will find participating in the criminal justice process to be a fast-paced, complex and highly stressful experience, which may have significant implications, especially if they are convicted.

7.17. For accused persons with disability, these challenges may well be compounded if a court's processes create barriers to their full participation

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303 *Criminal Law (Mental Impairment) Act 2023* (WA) Part 3, Div 3.
304 *Criminal Law (Mental Impairment) Act 2023* (WA) Part 5.
305 *Criminal Law (Mental Impairment) Act 2023* (WA) s 28.
306 *Criminal Law (Mental Impairment) Act 2023* (WA) s 35.
307 *Criminal Law (Mental Impairment) Act 2023* (WA) s 32.
308 *Criminal Law (Mental Impairment) Act 2023* (WA) s 9(1) (definition of 'support measure').
309 Preliminary Response 20B (Mental Health Tribunal) 5.
310 Preliminary Response 29 (Ruah Legal Services) [233].
311 Preliminary Response 24 (South West Autism Network Inc) 45.

in criminal proceedings. As we outlined in Part B, such barriers may arise from the physical environment of a court and the use of technology – as well as the use of complex legal language, court processes and conventions which prevent a person from fully understanding and effectively participating in the proceedings.

7.18. At an early stage in criminal proceedings, an accused person will generally need to enter a plea to the offence(s) with which they are charged.[312] Following a plea of guilty, an accused person will be convicted of the offence(s) and sentenced. We discuss the experiences of persons with disability as convicted persons engaging with courts in Chapter 8.

7.19. If an accused person pleads not guilty, the prosecution will generally progress to a trial. In the Magistrates Court, trials are conducted by a magistrate alone. For more complex or serious matters, which are heard in the District or Supreme Courts, the trial will generally be before a jury.

7.20. Accused persons will often appear before criminal courts on a number of occasions other than for trial or sentence. Some of these hearings may be short and procedural in nature. Others may deal with issues that have significant consequences, such as whether bail is granted, or whether particular evidence on which the prosecution seeks to rely will be admissible at trial.

7.21. If an accused person with disability is legally represented, their lawyer will advocate on their behalf. To the extent that the court's processes may create barriers to an accused person's full participation, having regard to their disability, their lawyer can draw those barriers to the court's attention and request that they be addressed. Even in those cases, however, the existing structures and processes of court hearings may result in challenges that cannot, or may not, be readily addressed.

7.22. Accused persons with disability who do not have legal representation are especially vulnerable if their disability means that they have difficulty understanding or otherwise fully participating in the proceedings. In those cases, their ability to advocate on their own behalf will be compromised.

7.23. That raises the question as to whether a change in approach is required to the way accused persons with disability are dealt with by courts, and if so, what kind of change.

7.24. We invite your feedback on any or all of the following questions:

54. Is it your understanding that courts adjust their processes to remove or minimise the barriers faced by an accused person with disability? If so, please provide examples of how this occurs.

55. Should courts adjust their processes to remove or minimise the barriers faced by an accused person with disability? If so, how?

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312 If an accused person, in any prosecution, does not enter a plea (or if there are certain issues with their plea), then the court must enter a plea of not guilty (as long as the person is not to be dealt with under the CLMI Act): *Criminal Procedure Act 2004* (WA) ss 126(5), 127(5).

Pre-trial processes, and the criminal trial

7.25. In criminal proceedings, many of the courts' processes are governed by legislation – especially the Criminal Procedure Act, the *Criminal Procedure Regulations 2005* (WA), and the *Criminal Procedure Rules 2005* (WA) (**Criminal Procedure Rules**) – and practice directions of the various courts. Within that framework, there are differences between the practices of the various courts and, to a lesser extent, of individual judges and magistrates.

7.26. Courts have expansive powers to make pre-trial orders, which may (subject to any express legislative requirement to the contrary) include orders for the modification of the court's processes to remove or alleviate any barriers that those processes may create, having regard to an accused person's disability. For example, a court may make directions before trial to provide for shorter sitting days or more frequent breaks, which may assist a person experiencing pain or fatigue as a result of physical impairment or a person who experiences cognitive fatigue as a result of neurological impairment.

7.27. There are no case management powers expressly permitting courts to modify their procedures or processes for the purpose of removing any barriers which could prevent an accused person with disability from fully understanding or participating in any pre-trial hearing or the trial itself.

7.28. However, the courts' case management powers include the power to order the parties to a case to 'do anything that in the court's opinion will or may facilitate the case being conducted and concluded efficiently, economically and expeditiously'.[313] It is possible that courts could rely upon this power to make orders directed to removing or alleviating any barriers that an accused person with disability may face in proceedings.

7.29. We invite your feedback on any or all of the following questions:

56. Does the Criminal Procedure Act require amendment to give courts an express power to make case management orders to modify their own processes or procedures, to remove or minimise barriers they may create to the full participation by an accused person with disability in any stage of the criminal justice process?

57. If so, how should courts be informed about what case management orders should be made in a particular case?

58. Should there be limits on courts' powers to make such case management orders?

59. Are there other legislative provisions whose operation may result in an accused person with disability being unable to fully understand, or participate in, criminal proceedings by virtue of their disability? Should any such provisions be amended, and if so, how?

313 *Criminal Procedure Act 2004* (WA) s 137(3)(a)(iii).

General barriers to participation in criminal proceedings

7.30. In this section, we discuss how some of the general barriers we identified in Part B may be experienced by accused persons with disability in the context of criminal proceedings.

7.31. As we have already noted, it may be possible for courts to remove or minimise some of these barriers, on a case-by-case basis, by exercising their existing powers with respect to pre-trial orders and case management.

7.32. It is also possible that these barriers may be addressed by some of the possible options for reform discussed in Part B. However, some specific legislative reforms may be required to enable the removal or minimisation of these barriers as they are faced by accused persons with disability in the criminal justice context. We identify some of those possible options for reform in this section.

Identifying disability and disability-related needs

Current law and practice

7.33. As we identified in Chapter 3, courts and tribunals do not have a consistent process for identifying disability or for determining and providing necessary disability-related adjustments for a person involved in proceedings.

7.34. Aside from the provisions of the CLMI Act, there are no express legislative requirements for a criminal court to consider whether an accused person has a disability which may impact their ability to understand or fully participate in criminal proceedings.

7.35. There is also no express legislative requirement for a criminal court to consider whether an accused person with disability may require support or reasonable adjustments (which may involve modification of the court's processes) to participate effectively in the proceedings.

7.36. The South West Autism Network identified that:

> *The Magistrates Court has no effective mechanism to identify and respond to cognitive impairment before a guilty plea is entered. A person with intellectual disability or autism may plead guilty without any assessment of fitness to plead. They may then be committed to a superior court for sentencing… Access to justice for accused persons with cognitive impairment requires active vigilance at every stage, including at the point of plea.*[314]

7.37. The MHT, in its preliminary response, also identified the absence of adjustments and supports in courts handling the general criminal law, noting that 'a person with psychosocial disability appearing in [the] District

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314 Preliminary Response 24 (South West Autism Network Inc) 49.

Court on indictable charges gets none of the procedural accommodations available at the MHT'.[315]

Possible options for reform

7.38. There are various possible options for reform related to identifying disability in criminal proceedings. As the Disability Royal Commission has observed:

> *Identifying that a person with disability requires support is a 'gateway step' to ensuring that appropriate adjustments can be made as early as possible in the criminal justice process.*[316]

7.39. One practical option for reform may be to introduce a specific court form designed to ascertain whether an accused person has any relevant disability and disability-related needs for adjustments and support in criminal proceedings. By way of example, criminal courts in England and Wales use a Plea and Trial Preparation Hearing court form. That form contains a 'special measures' box where an accused person or their representative can identify any adjustments required for their effective participation in the proceedings.[317]

7.40. In addition, the Equal Treatment Bench Book in England and Wales states that where a defendant in a criminal case has a disability, a 'ground rules hearing' should be held to discuss, in advance, the measures or adjustments needed for the hearing.[318]

7.41. Some stakeholders suggested different options for reform related to identifying disability in criminal proceedings. For example, South West Autism Network suggested that an accused person should be routinely screened for disability using 'a validated, non-self-report tool'. It suggested the tool should screen for autism, intellectual disability, FASD, brain injury, and complex trauma.[319]

7.42. John Curtin Law Clinic suggested another possible option for reform, namely that the Criminal Procedure Act and court procedural rules should be amended to introduce a proactive duty on courts to inquire whether an accused person has a disability and requires accommodation.[320]

7.43. We invite your feedback on any or all of the following questions:

60. How do courts become aware that an accused person has a disability which may affect their participation in criminal proceedings?

61. Should courts make enquiries about that, and if so, when and how?

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315 Preliminary Response 20B (Mental Health Tribunal) 5.

316 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 172.

317 Equal Treatment Bench Book Chapter 4 [21].

318 Equal Treatment Bench Book Chapter 3 [51].

319 Preliminary Response 24 (South West Autism Network Inc) 6, 52.

320 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 5.

62. Should there be an obligation on a court to consider whether an accused person needs reasonable adjustments to enable them to fully participate in criminal proceedings?

63. Should there be limits to that obligation?

64. Alternatively, should it be up to an accused person to identify their disability and any need for adjustments? Should any other persons be able to inform the court of an accused person's disability? If so, which persons?

Physical access to courts and technology

Current law and practice

7.44. Section 88 of the Criminal Procedure Act generally requires proceedings that relate to an accused person (including proceedings dealing with issues before trial[321] and under the *Bail Act 1982* (WA) (**Bail Act**) and the Sentencing Act, as well as the trial itself) to take place in their presence. It does not, however, prevent an accused person from appearing at, and participating in, proceedings remotely, including by giving evidence, via AVL.[322]

7.45. The Criminal Procedure Act generally permits an accused person to appear before a court by AVL,[323] other than for sentencing.[324]

7.46. Special provisions apply if the accused is in custody. For example, an accused person who is held in custody must be brought to court in person for their first appearance, unless the court has ordered that that appearance be by AVL.[325] For their second or subsequent appearance, however, the accused person must appear by AVL unless the court has ordered attendance in person.[326]

7.47. As we discussed in Chapter 4, significant barriers to participation for persons with disability can be created by a court's physical environment, including the layout of a courtroom. Court processes and conventions which embed expectations about certain physical capabilities can equally create barriers. In Chapter 5 we discussed how the use of technology, including AVL, may address physical barriers for some persons with disability (but may also create different challenges for others).

7.48. The WA Bar Association provided examples of how accused persons with physical disabilities may experience difficulties in fully participating in criminal proceedings:

> *A member recently acted for an accused person in custody who [was] in a wheelchair. That member had shorter prison visits than usual because the*

321 *Criminal Procedure Act 2004* (WA) s 98.
322 *Criminal Procedure Act 2004* (WA) s 88(5).
323 *Criminal Procedure Act 2004* (WA) s 141(1), (2).
324 *Criminal Procedure Act 2004* (WA) s 141(1), (2).
325 *Criminal Procedure Act 2004* (WA) s 77(2).
326 *Criminal Procedure Act 2004* (WA) s 77(3).

accused person took longer to get to the official visits room due to the lack of accessibility on the route to the official visits room. This resulted in a more hurried, pressured environment within which legal advice was to be given. When the same accused person appeared in court for a hearing, their wheelchair did not fit in the dock which meant that they needed assistance from security to get to the relevant chair inside the dock. Their movement between the dock and non-contact room for legal advice throughout the hearing was severely curtailed because of difficulties moving between the two areas.[327]

7.49. The Bar Association also told us about its members experiencing the following:

- acting for a person whose wheelchair was lifted in and out of the dock by security staff throughout a lengthy directions hearing; and
- magistrates or judicial staff demanding that people sitting at the bar table stand up, despite being in a wheelchair (sometimes not realising that the person is in fact in a wheelchair).[328]

7.50. As Women's Legal Service WA observed, for some persons with disability, lengthy waiting times can act as an impediment to their full participation in court hearings.[329] Ruah Legal Services identified the impacts of standard court listing schedules which require an accused person to arrive at court by a certain time, despite the fact that they may not appear in their hearing until much later in the day. Ruah Legal Services told us that long wait times can have the effect of 'exacerbating symptoms of mental illness, or deteriorations in mental state'.[330]

Possible options for reform

7.51. One option for reform, suggested by Ruah Legal Services, is:

to scatter the scheduled appearance times for accused persons, listed trials and administrative hearings…. This will ensure all Court participants are not scheduled to arrive at the exact same time and left to wait for hours until their matter is called. Scattered Court listing times will also allow people to have easier access to transportation or support services that would better allow them to attend Court outside peak travel times.[331]

7.52. Another option for reform, proposed by Ruah Legal Services, is making it possible for accused persons to be excused from attending court in person, instead attending remotely or having their counsel appear in their place. Ruah Legal Services suggested that this would alleviate costs of transport and long wait times, as well as burdens placed on parents/carers

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327 Preliminary Response 35 (WA Bar Association) 2.
328 Preliminary Response 35 (WA Bar Association) 2.
329 Preliminary Response 41 (Women's Legal Service WA) 4.
330 Preliminary Response 29 (Ruah Legal Services) [70]-[72].
331 Preliminary Response 29 (Ruah Legal Services) [82]-[84].

and the need to use funding allocated for the support of people with disabilities.[332]

7.53. The existing legislative provisions for attending proceedings by AVL (outlined above) enable a court to exercise judicial discretion in making an order for attendance in this way. They do not, however, expressly require a court, in the exercise of this discretion, to consider whether the use of AVL would facilitate the participation of a person in the proceedings (including an accused person) by removing any barriers to participation arising from their physical disability.

7.54. We invite your feedback on any or all of the following questions:

65. Should all criminal courts have separate lists for accused persons with disability?

66. If so, should:

(a) there be any modifications made to a court's processes or practices in that list (for example, shorter lists)?

(b) court lists for accused persons with disability be held in court rooms capable of modification (for example, for wheelchair access)?

67. Should the Criminal Procedure Act be amended to specifically require consideration of whether an order for appearance by video link or audio link would facilitate the participation of an accused person with disability?

Communication barriers

Current law and practice

7.55. In criminal proceedings, the Criminal Procedure Act provides that a court, before requiring an accused person to plead to a charge, must be satisfied that they understand the charge and the purpose of the proceedings.[333]

7.56. The Criminal Procedure Act also provides that a court must not accept a plea of guilty from a self-represented person, unless the court is satisfied that the accused person understands the plea and its consequences (unless the plea is a written plea).[334]

7.57. As said, the Magistrates Court is the one in which all criminal matters commence. Apart from proceedings under the CLMI Act, the court's ability to explore whether (or to what extent) an accused person understands the charges, the purpose of the proceedings, and a plea and its consequences may be very limited.

7.58. Similarly, apart from the CLMI Act, there is no legislative requirement for the provision of reasonable adjustments or communication supports to an

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332 Preliminary Response 29 (Ruah Legal Services) [82]-[84]..

333 *Criminal Procedure Act 2004* (WA) s 39(b).

334 *Criminal Procedure Act 2004* (WA) s129(2).

accused person who may have difficulty understanding or participating in criminal proceedings, to an extent that falls short of unfitness to stand trial.

7.59. The Criminal Procedure Act does explicitly provide that the court's general power to adjourn a charge at any time, for any good reason, includes an adjournment to allow the services of an interpreter to be obtained.[335] However, our research has not identified any case law indicating that the provision has been used to enable an Auslan interpreter to be engaged to assist an accused person.

Possible options for reform

7.60. One option for reform may be to legislate a general principle applicable to all courts which requires the court, at the outset of a proceeding, to consider whether a party, including an accused person, has a disability that:

- is likely to prevent them from fully understanding and/or effectively participating in the proceedings, and
- requires the court to modify its processes to facilitate the party's participation to the fullest extent possible.

7.61. Another option may be to amend the Criminal Procedure Act to include a similar legislative principle, applicable to the participation of accused persons in criminal proceedings.

7.62. Alternatively, the Criminal Procedure Act may be amended to make clear how a court should comply with its existing obligations to be satisfied that the accused person understands the charge and the purpose of the proceedings. This could be done by including examples, such as requiring the accused person to demonstrate that they understand the nature of the charge, and the effect and consequences of a plea to the charge.

7.63. A further option for reform may be to amend the Criminal Procedure Act expressly to require a court to modify its processes if it becomes aware that an accused person has a disability preventing them from fully understanding or fully participating in criminal proceedings.

7.64. We invite your feedback on any or all of the following questions:

68. Should the Criminal Procedure Act be amended to:

(a) require a court to consider whether an accused person has a disability which prevents them from fully understanding or participating in the proceedings? If so, when and how should that be done?

(b) expressly require a court to modify its processes if it becomes aware that an accused person has a disability which prevents them from fully understanding or participating in the proceedings? Should there be limits to any such obligation? If so, what should those limits be?

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335 *Criminal Procedure Act 2004* (WA) s 75(3).

Bail proceedings

Current law and practice

7.65. When an accused person is arrested, they will generally need to be granted bail before they can be released from police custody into the community.[336] In general terms, bail is a written promise (described as a bail undertaking) by an accused person that they will attend court at the specific date and time they are next required to do so.[337]

7.66. In Western Australia, the grant of bail is governed by the provisions of the Bail Act. Bail can be granted, in some cases, by the police when a person is arrested (or shortly afterwards). If bail is not granted by the police, the police must arrange for an accused person to be taken to court 'as soon as is practicable'.[338] In practice, this may mean that the accused person will remain in custody overnight, until they are taken before the court to have their bail considered.

7.67. When an accused person's case for bail is considered for the first time, a judicial officer is required to ensure that they are given written information about the effect of the Bail Act and a Bail Information Form to complete. The latter provides sufficient information for the officer or court to make a decision about bail.[339] The Bail Act provides that:

> *…[an officer] called upon to consider an accused's case for bail, on the first occasion … shall ensure that the accused is, or has been, given —*
>
> *where the accused is unable or insufficiently able, to read, speak or write English, such assistance as he may reasonably require in order to have communicated to him the information [about the effect of the Bail Act] and complete the [Bail Information Form].*[340]

7.68. We have not identified any case law indicating that section 8 of the Bail Act has been applied to (or discussed as capable of application to) circumstances where an accused person cannot read, speak or write English as a consequence of disability.

7.69. A judge or magistrate will decide whether to give an accused person bail after considering various matters, including whether the accused would be likely to comply with their bail if released.[341]

7.70. The grant of bail can be made subject to conditions placing obligations on the accused person.[342] In addition to attending court on the next occasion, the accused person may be required to live at a particular address, comply

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336 In some cases, a person may be arrested and then released without charge.

337 *Bail Act 1982* (WA) s 28.

338 *Bail Act 1982* (WA) s 6.

339 *Bail Act 1982* (WA) s 8(1); *Bail Regulations 1988* (WA) reg 3(1), Schedule, Form 1.

340 *Bail Act 1982* (WA) s 8(1)(c).

341 *Bail Act 1982* (WA) Schedule 1, Part C, cl. 1.

342 *Bail Act 1982* (WA) Schedule 1, Part D, cl. 2.

with reporting requirements, not visit certain locations, and not contact certain people.

7.71. If bail is granted, the accused person must sign a bail undertaking, which is their promise to comply with the conditions of their bail. It is clearly very important that the accused understands those conditions, as failure to comply will constitute a breach of bail, which may result in their return to custody, and/or a requirement to pay any personal undertaking.[343] For that reason, the person granting bail must enquire whether the accused needs the bail undertaking and written notice of their obligations to be read or translated to them and to otherwise confirm that the accused has read the bail undertaking.[344]

Barriers

7.72. Our research and preliminary feedback identified that accused persons with disability can experience multiple barriers to participating in bail proceedings and complying with bail conditions. These barriers do not arise solely in the context of bail. As we note below, similar issues arise in relation to the imposition of restraining orders and in sentencing.

7.73. In relation to participation in bail proceedings, the Deaf Indigenous Community Consultancy told us that deaf Aboriginal people are often required to participate in proceedings without accessible legal advice and critical communication supports such as interpreters, which can result in deaf Aboriginal people misunderstanding bail outcomes.[345]

7.74. Community Legal also identified how expectations about courtroom behaviour can disadvantage accused persons with psychosocial disability, autism and ABI, when participating in bail proceedings:

> *People appearing from custody at bail hearings are in a highly stressful situation and are likely to have heightened emotions. Clients who try to interject can be reprimanded or have the matter adjourned for hours or to another day. Mental health assessments may be ordered without basis, purely on how a person presents in court. Our members have conveyed what appears to be a reluctance within the judiciary to deal with matters on the day when interactions like the above occur, instead deferring them, which can further compound stress and disadvantage.*[346]

7.75. Multiple stakeholders provided preliminary feedback that some persons with disability may find it significantly more difficult than others to comply

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343 *Bail Act 1982* (WA) ss 51, 55, 57. The court may impose a condition on an accused person's bail that they are required to pay a certain amount of money if they fail to comply with any requirement of their bail. This is often referred to as a personal undertaking: see *Bail Act 1982* (WA) Schedule 1, Part D, cl 1(2)(a).

344 *Bail Act 1982* (WA) s 30.

345 Preliminary Response 26 (Deaf Indigenous Community Consultancy) 4.

346 Preliminary Response 37 (Community Legal Western Australia) [12.2].

with complex bail conditions, for a range of reasons, including factors related to disability and other intersectional factors.[347]

7.76. The South-West Autism Network explained how a range of these factors may impact the ability of an autistic person to comply with bail conditions:

> *An autistic person may be unable to comply with bail or supervision conditions because of the autism itself: they cannot understand complex conditions, cannot manage appointments and reporting requirements without prompting, or cannot live in shared accommodation that is unsafe for them. These failures are then treated as wilful non-compliance rather than as disability-related support needs. The result is readmission to custody, not because of new offending, but because the community support system has failed.*[348]

7.77. The Autism Association provided us with a de-identified case study outlining the experience of 'Daniel' (a pseudonym), a 56-year-old autistic man. Daniel was charged with criminal offences and placed on strict bail conditions, including restrictions on the use of his phone.

7.78. The Autism Association told us that Daniel's 'complex bail conditions required a level of executive functioning and understanding beyond Daniel's capacity'.[349] It noted that Daniel's difficulty in interpreting social norms and conversational expectations compounded his risk of misunderstanding, including in communications with lawyers and participation in court proceedings. In July 2025, police confiscated Daniel's phone following a suspected breach of his bail conditions, which had a 'critical impact' on Daniel's ability to contact his lawyer and support services while awaiting court proceedings.[350]

7.79. The New South Wales Law Reform Commission (**NSWLRC**) has also discussed how people with cognitive disability may, for various reasons, experience challenges in complying with bail conditions, for example:

- they may state they understand the conditions of bail but may be unable to read and comprehend the conditions;
- they may experience difficulties in complying with conditions that require regular attendance, for example, at a police station at specific times, or that limit a person's movement;
- the imposition of bail conditions that require a particular behaviour to cease immediately can result in anxiety and an escalation of the offending behaviour in some people with cognitive disability; and

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347 Preliminary Response 16 (Autism Association of Western Australia) 9; Preliminary Response 24 (South West Autism Network Inc) 41-42; Preliminary Response 41 (Women's Legal Service WA) 6.

348 Preliminary Response 24 (South West Autism Network Inc) 41-42.

349 Preliminary Response 16 (Autism Association of Western Australia) 10.

350 Preliminary Response 16 (Autism Association of Western Australia) 9-10.

- they may experience difficulties understanding how they need to change their behaviour to adhere to bail conditions.[351]

7.80. These findings illustrate that it is critical for a court considering bail to properly understand the implications of an accused person's disability on their ability to understand and comply with any proposed conditions of bail. The findings also illustrate it is critical to ensure that the accused person is able to provide the necessary information for the court to be properly informed about the need for any conditions of bail, and their appropriateness.

7.81. Under the Bail Act an accused person will ordinarily be invited to complete a form, setting out information relevant to the decision to grant bail.[352] The terms of that form are not prescribed in the Bail Regulations.

7.82. The form presently in use invites the accused person, under the heading 'Special reasons for wanting bail', to outline 'special factors' to be taken into account by the court, and identifies 'illness, physical impairment, employment, domestic difficulties' as examples of such special factors.

7.83. The form does not, however, expressly invite an accused to identify whether they have a disability or disability-related needs which may affect their ability to participate in a bail hearing, or to comply with any bail conditions which may be imposed.

7.84. Further, where the accused is unable, or insufficiently able, to read, speak or write English, they must be provided with such assistance as they may reasonably require to complete the form.[353] We have not been able to confirm whether this assistance extends to disability-related communication needs.

Possible options for reform

7.85. In our preliminary consultations, most stakeholders did not propose specific reforms to address the issues we have identified above.

7.86. Other Australian jurisdictions take different approaches to whether a person's disability should be taken into account in relation to bail hearings, the decision to grant of bail, and any conditions imposed on the grant of bail.

7.87. Under the *Bail Act 1980* (Qld), for example, if a person is otherwise eligible to be released on bail, but is 'a person with an impairment of the mind'[354] who does not or appears not to understand the nature and effect of entering into a bail undertaking, a court may release them without bail; it may also release them into the care of another person with whom they

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351 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion* (Final Report, 2012) Vol 135, [6.30].

352 *Bail Act 1982* (WA) s 8(1).

353 *Bail Act 1982* (WA) s 8(1)(c).

354 A 'person with an impairment of the mind' means a person who has a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these, and whose disability results in a substantial reduction of their capacity for communication, social interaction or learning, and in their needing support. See *Bail Act 1980* (Qld) s 11A(7).

ordinarily reside, or who ordinarily cares for them.[355] The provision provides a mechanism to allow the release, without bail, of a person who has an impairment which means they are unable to understand the nature and effect of entering into a bail undertaking.[356]

7.88. Section 17 of the *Bail Act 1977* (Vic) expressly requires a bail decision-maker to be satisfied, before releasing the accused on bail, that the accused understands the nature and extent of the conditions of bail and the consequences of failure to comply with them.

7.89. In its Review of the Bail Act, the Victorian Law Reform Commission (**VLRC**) received no evidence that 'accused people with cognitive impairment were routinely refused bail because they lacked the capacity to understand the bail conditions'.[357] However, one example was provided where a magistrate had refused bail, as she:

> *could not be satisfied the accused understood 'the nature and extent of the conditions of his bail and the consequences of failure to comply with them' as required by section 17 of the Bail Act.*[358]

7.90. The ACT Legislative Assembly is presently considering a Bill to amend the *Bail Act 1992* (ACT) in relation to bail decisions for a person with a disability or health condition.

7.91. The proposed amendment would require a court or authorised officer, when making a bail decision in relation to a person with a disability or health condition, to consider:

- the treatment and support required to manage the disability or health condition;
- and the effect of the disability or health condition on the person's ability to understand their rights and obligations, to make and communicate decisions, and to represent their interests.[359]

7.92. More broadly, the Australian Human Rights Commission (**AHRC**) recommended that the terms and conditions of bail should be more closely aligned with an accused person's abilities and capacity to comply with them.[360]

7.93. Drawing on these approaches, and in light of the issues we have discussed, a number of possible reforms of the Bail Act may warrant consideration.

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355 *Bail Act 1980* (Qld) s 11A.

356 Explanatory Notes accompanying the Criminal Law Amendment Bill 2000 (Qld), which inserted sections 11A and 11B into the Bail Act (Qld), as discussed by the Supreme Court of Queensland in *Re MZU* [2024] QSC 154 [9].

357 Victorian Law Reform Commission, *Review of the Bail Act* (Final Report, October 2007) 205.

358 Victorian Law Reform Commission, *Review of the Bail Act* (Final Report, October 2007) 205.

359 See cl 10 of the *Bail Amendment Bill 2026* (ACT) which proposes the insertion of s 22C into the Bail Act 1992 (ACT).

360 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 33.

7.94. One option for reform may be to amend the Bail Act to expressly require a court:

- to consider whether an accused person has a disability which affects their ability to participate in bail proceedings; and
- to provide necessary adjustments and support to enable the accused person to participate.

7.95. A second option may be to amend the Bail Act to expressly confirm that an accused person must be provided with assistance to understand prescribed information about the process for granting bail if, by reason of a disability, they require such assistance. This would also be the case if they need assistance to:

- understand the obligations arising from the grant of bail;
- understand the potential consequences of non-compliance; and/or
- communicate with the court to provide it with information relevant to the grant of bail.

7.96. Such a reform might also extend to a requirement to ensure that bail decisions are communicated in a format and mode appropriate to the needs of an accused person with a disability. The AHRC also proposed a legislative reform of this kind.[361] Similarly, South West Autism Network recommended a requirement for bail conditions to be provided in Easy Read versions, where necessary, 'where plain English is the default'.[362]

7.97. A third option (similar to the Victorian provision discussed above) may be to amend the Bail Act to create an express obligation that before granting bail, a court must be satisfied that the accused understands the nature and implications of any conditions of bail, and the consequences of any failure to comply with them. Such an obligation might expressly require consideration of any disability which may affect the accused's understanding of these matters.

7.98. A fourth option, similar to that under consideration in the ACT (discussed above) may be to amend the Bail Act to impose an express obligation on a court to consider the relevance of a person's disability to any bail decision, including the appropriateness of any bail conditions.

7.99. A fifth possible option may be to adopt a similar approach to that adopted in Queensland (discussed above). That is, to amend the Bail Act to permit the release without bail of a person otherwise suitable for its granting, but whose disability renders them unable to understand the nature and effect of entering into a bail undertaking. An amendment of this kind would permit the person’s release but avoid the risk of their breaching bail conditions they do not understand.

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361 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 33.

362 Preliminary Response 24 (South West Autism Network Inc) 175.

7.100. A final option for reform, as suggested by the AHRC, may be to amend the Bail Act to require that an accused person is provided with support to remind them of their bail conditions and assist their compliance.[363]

7.101. We invite your feedback on any or all of the following questions:

69. Should the Bail Act be amended to require that the impacts of an accused person's disability are identified and considered in the formulation of bail conditions?

70. Should the Bail Act be amended to require that a court be positively satisfied that the accused person understands the nature and extent of any conditions of bail and the consequences of failure to comply with them?

71. Should any of the approaches adopted or under consideration in bail legislation elsewhere be a guide for reform in Western Australia?

An alternative approach: therapeutic courts

Current law and practice

7.102. Some specific supports are presently available to accused persons with disability through specialist lists within the courts, principally the Magistrates Court. These specialist lists were established to enable therapeutic support to be provided to accused persons with disability, including therapeutic programs tailored to their specific needs.[364]

7.103. There are presently two therapeutic court lists, each with an associated support program, which assist adult accused persons with disability in Western Australia. These are the IDDP Court, which offers the Intellectual Disability Diversion Program (**IDDP**) and the Start Court, which offers the Start Court Program (**SCP**).

7.104. Each of the lists in the IDDP Court and the Start Court is presided over by a single magistrate, who is assisted by specific court staff and by duty lawyers from Legal Aid, the Aboriginal Legal Service and, in some cases, lawyers from the Mental Health Law Centre.

7.105. Neither the IDDP Court nor the Start Court is established by legislation. The IDDP and the SCP offered by these two specialist courts involve co-operative arrangements between the Magistrates Court, staff of the Department of Justice, service providers, and legal representative bodies.

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363 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 33. These may include the provision of assistance to remind an accused about court hearings, to arrange transport to those hearings, to secure accommodation, and to provide links with government or community organisations which assist persons with disabilities.

364 Department of Justice Government of Western Australia, North Metropolitan Health Service and Mental Health Commission, *Start Court Guidelines* (October 2024) 4, 7-8 <https://www.magistratescourt.wa.gov.au/_files/Start_Court_combined_Guidelines.pdf>.

The IDDP Court

7.106. The IDDP Court aims to assist adult accused persons with a diagnosis of an intellectual disability, cognitive disability and/or autism by addressing their offending behaviour and support arrangements.[365]

7.107. It commenced as a pilot program in 2003 and, as the Department of Justice told us in its preliminary response, is currently under evaluation, with a report expected to be completed in late 2026.[366]

7.108. The IDDP recognises that people with these diagnoses are at significantly higher risk of interaction with the criminal justice system for a number of reasons, including:[367]

- vulnerability to the influence or exploitation of others;
- difficulties managing emotions; and
- difficulties understanding or complying with societal norms.

7.109. The aim of the IDDP is to work with participants to:

- *reduce their future contact with the criminal justice system and thereby improve community safety;*
- *increase their access to positive behavioural support with a focus on skill building and goal setting;*
- *identify undiagnosed or untreated disability or impairment as well as physical and/or mental health issues; and*
- *achieve an outcome in respect of their charge/s that is proportionate, fair and appropriate to the circumstances of the offence and their disability or impairment.*[368]

7.110. An accused person can be referred to the IDDP Court by a magistrate in any metropolitan court (including Northam and Mandurah in some cases).[369]

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365 Department of Justice Government of Western Australia, *Intellectual Disability Diversion Program (IDDP) Court Guidelines* (Revised October 2024) 3.

366 Preliminary Response 40 (Department of Justice) 8.

367 Department of Justice Government of Western Australia, *Intellectual Disability Diversion Program (IDDP) Court Guidelines* (Revised October 2024) 3-4.

368 Department of Justice Government of Western Australia, *Intellectual Disability Diversion Program (IDDP) Court Guidelines* (Revised October 2024) 5-6.

369 Department of Justice Government of Western Australia, *Intellectual Disability Diversion Program (IDDP) Court Guidelines* (Revised October 2024) 8. Referral can be made upon the request of the accused person, their lawyer, the Prosecutor, a Community Corrections Officer, a medical or mental health practitioner, supporting agency, carer or family member or upon the magistrate's own instigation.

7.111. To be eligible for referral, an accused person must meet the following criteria:

- they have been diagnosed with an intellectual disability, cognitive disability or autism by a suitably qualified person, or they are likely to be so diagnosed if assessed by a suitably qualified person;
- they have entered or are likely to enter a plea of guilty to at least a significant proportion of their charges;
- they are suitable for conditional bail; and
- they consent to participate in the IDDP Court Program.[370]

7.112. In addition, a magistrate must also be satisfied that there is not another less restrictive option open to the court in dealing with the accused person.[371]

7.113. An accused person is not eligible for referral to the IDDP Court if:

- their primary issue is a mental health issue; or
- there is no prospect of them being sentenced other than to an immediate term of imprisonment.[372]

The Start Court

7.114. The aim of the Start Court is to work with participants to reduce their contact with the criminal justice system, improve their overall mental health, increase their access to treatment support services, and to 'achieve an outcome in respect of their charge/s that is proportionate, fair and appropriate to the circumstances of the offence and their mental health issues'.[373]

7.115. An accused person can be referred to the Start Court by a magistrate in any metropolitan court (including Northam and Mandurah in some cases).[374]

7.116. To be eligible for referral, an accused person must meet the following criteria:

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370 Department of Justice Government of Western Australia, *Intellectual Disability Diversion Program (IDDP) Court Guidelines* (Revised October 2024) 8-9.

371 Department of Justice Government of Western Australia, *Intellectual Disability Diversion Program (IDDP) Court Guidelines* (Revised October 2024) 8.

372 Department of Justice Government of Western Australia, *Intellectual Disability Diversion Program (IDDP) Court Guidelines* (Revised October 2024) 9.

373 Department of Justice Government of Western Australia, North Metropolitan Health Service and Mental Health Commission, *Start Court Guidelines* (October 2024) 4-5 <https://www.magistratescourt.wa.gov.au/_files/Start_Court_combined_Guidelines.pdf>.

374 Referral can be made upon the request of the accused person, their lawyer, the prosecutor, a Community Corrections Officer, a medical or mental health practitioner, supporting agency, carer or family member, or upon the instigation of the Magistrate: see Department of Justice Government of Western Australia, North Metropolitan Health Service and Mental Health Commission, *Start Court Guidelines* (October 2024) 16 <https://www.magistratescourt.wa.gov.au/_files/Start_Court_combined_Guidelines.pdf>.

- they have been diagnosed with a mental illness that is susceptible to treatment, such as a psychotic disorder, an affective disorder or an anxiety disorder;
- they intend to plead guilty to at least a significant proportion of the offences with which they have been charged;
- they are suitable for conditional bail; and
- they consent to participate in the Start Court program.[375]

7.117. In addition, a magistrate must be satisfied there is not another less restrictive option open to the court in dealing with the accused person.[376]

7.118. An accused person is not eligible for referral to the Start Court if:

- their primary support needs relate to an intellectual disability or alcohol or drug use;
- they are in custody with no reasonable prospect of bail being granted; or
- there is no prospect of them being sentenced other than to an immediate term of imprisonment.[377]

7.119. A clinical team (including mental health practitioners) and representatives of Outcare (a community services provider with a focus on justice-related support), Adult Community Corrections, and the Alcohol and Other Drug Diversion Service works with each accused person who is referred to the Start Court.[378]

Barriers to access and participation

7.120. We are aware of evidence that participation in therapeutic courts (and diversionary programs offered by those courts) can provide significant benefits to accused persons with disability.[379]

7.121. However, stakeholders' preliminary responses identified how some accused persons with disability in Western Australia experience various barriers to accessing and participating in both the IDDP Court and the Start Court.

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375 Department of Justice Government of Western Australia, North Metropolitan Health Service and Mental Health Commission, *Start Court Guidelines* (October 2024) 6 <https://www.magistratescourt.wa.gov.au/_files/Start_Court_combined_Guidelines.pdf>.

376 Department of Justice Government of Western Australia, North Metropolitan Health Service and Mental Health Commission, *Start Court Guidelines* (October 2024) 16 <https://www.magistratescourt.wa.gov.au/_files/Start_Court_combined_Guidelines.pdf>.

377 Department of Justice Government of Western Australia, North Metropolitan Health Service and Mental Health Commission, *Start Court Guidelines* (October 2024) 6-7 <https://www.magistratescourt.wa.gov.au/_files/Start_Court_combined_Guidelines.pdf>.

378 Department of Justice Government of Western Australia, North Metropolitan Health Service and Mental Health Commission, *Start Court Guidelines* (October 2024) 30 <https://www.magistratescourt.wa.gov.au/_files/Start_Court_combined_Guidelines.pdf>.

379 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 295.

7.122. Some stakeholders described each court's eligibility criteria as presenting barriers to access for some accused persons with disability. For example, Advocacy WA said:

> *Access to the IDDP is constrained by strict eligibility criteria, including the requirement that there be a reasonable prospect of a non-custodial sentence (Magistrates Court of Western Australia, 2025). As a result, many individuals with complex support needs, repeated justice contact, co-occurring psychosocial disability or histories of noncompliance may be excluded from participation despite their heightened vulnerability within the justice system.*[380]

7.123. The preliminary response provided by the Consumers of Mental Health WA shared one of its member's experiences of being ineligible for Start Court. In the member's words:

> *I am not eligible for START court, I have a lot of charges, but I was making mixed pleas of not guilty and guilty… If I plead guilty to all of the charges I would have been in prison for 10 years.*[381]

7.124. The response provided more detail of the experience of that person:

> *This member spoke extensively about how Start Court's requirement that a person 'accept that he or she committed the offence(s) that led to the court appearance' blocked their access to a space that could have understood the profound intersection of their offending with the context of their mental health challenges. This member noted that they accepted the majority of their offenses occurred, and took full ownership and accountability for their actions in this regard. However, they were also facing charges for offenses they did not commit, that would likely have led to an extensive prison sentence were they to plead guilty to them. The member felt that, because of this requirement, they were unable to use the one pathway that could have viewed their complex situation with appropriate regard to their psychosocial disability (sic).*[382]

7.125. Multiple stakeholders also identified how the metropolitan locations of both courts present access barriers to accused persons with disability who live in regional or remote parts of Western Australia.[383]

7.126. Other stakeholders identified how accused persons with disability who do access these courts may experience various barriers to full participation.

7.127. Ruah Legal Services described how the extensive wait times for court appearances in Start Court can present particular challenges for clients with mental health conditions, as well as clients who experience physical

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380 Preliminary Response 11 (Advocacy WA) 8.

381 Preliminary Response 28 (Consumers of Mental Health WA) 11.

382 Preliminary Response 28 (Consumers of Mental Health WA) 11.

383 Preliminary Response 17 (Public Advocate) 5; Preliminary Response 11 (Advocacy WA) 8.

challenges with sitting for long periods of time.[384] As a result, according to Ruah Legal Services:

> *Many clients choose not to avail themselves of the diversionary Court program due to these significant wait times and obligations to attend Court every fortnight impairing their ability to work or engage in the community.*[385]

7.128. The Law Society also identified that the courtroom in the IDDP Court does not consistently accommodate sensory needs, with factors such as lighting, noise, smells, and overcrowding continuing to impact meaningful participation.[386]

Possible options for reform

7.129. Stakeholders suggested various options for reforms to respond to these barriers to access and participation.

7.130. Consumers of Mental Health WA recommended that the eligibility criteria for the Start Court should be relaxed to allow for mixed pleas.[387]

7.131. Multiple stakeholders supported the expansion of the IDDP Court and the Start Court to regional and remote locations throughout the State, where practicable.[388] Advocacy WA considered this to be necessary to eliminate the geographically discriminatory outcome gap between metropolitan and regional areas.[389] The MIRT and Legal Aid identified ways in which this could be facilitated, including the use of:

- videoconferencing;
- circuit sittings; and
- coordination with locally embedded justice and support (such as community health) services.[390]

7.132. Another possible option for reform may be to enact legislation to support the IDDP Court and the Start Court. In their preliminary responses, both the Chief Psychiatrist and Legal Aid suggested that the IDDP Court should be underpinned by legislation.[391]

7.133. We also note that the Commission has previously recommended that court intervention programs be legislatively recognised, and that their operation

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384 Preliminary Response 29 (Ruah Legal Services) [74].

385 Preliminary Response 29 (Ruah Legal Services) [75].

386 Preliminary Response 19 (Law Society of Western Australia) 4.

387 Preliminary Response 28 (Consumers of Mental Health WA) [3.2.4].

388 Preliminary Response 11 (Advocacy WA) 19; Preliminary Response 20B (Mental Health Tribunal) 5; Preliminary Response 36 (Legal Aid Western Australia) [155]; Preliminary Response 17 (Public Advocate) 5.

389 Preliminary Response 11 (Advocacy WA) 19.

390 Preliminary Response 20B (Mental Health Tribunal) 5; Preliminary Response 36 (Legal Aid Western Australia) [155].

391 Preliminary Response 6 (Chief Psychiatrist) 2; Preliminary Response 36 (Legal Aid Western Australia) [154].

be extended and facilitated through amendments to the Criminal Procedure Act and Regulations.[392]

7.134. We invite your feedback on any or all of the following questions:

72. Should the processes or powers of the IDDP Court and Start Court be modified in any way?

73. Should the operation of the IDDP Court and Start Court be extended by changing the criteria for eligibility for referral to these courts? If so, how should that be achieved?

74. Should the existence and operation of the IDDP Court and/or the Start Court be recognised in legislation?

75. Is there a need to establish other therapeutic courts for accused persons with other kinds of disabilities? If so, what kinds of disabilities?

Restraining order proceedings

Current law and practice

7.135. A restraining order is an order made by a court in relation to a person, which places limitations on their behaviour and activities, with the aim of preventing family and personal violence.[393]

7.136. A person who is the subject of an application for a restraining order is not an accused person and proceedings for restraining orders are not themselves criminal proceedings. Nevertheless, it is convenient to discuss restraining orders in this chapter for the following reasons:

- in some instances, conduct that forms the basis for a restraining order may also be the subject of criminal proceedings;[394]
- breach of a restraining order itself is a criminal offence, which may, depending on the order breached, result in a term of imprisonment;[395]
- some persons with disability may experience similar barriers to complying with restraining orders as those discussed above in relation to complying with bail conditions.

7.137. The Restraining Orders Act enables a range of orders to be made to address different circumstances and degrees of misconduct and violence, including family violence. Each type of order imposes certain restraints on the person subject to it, including restraints on being on or near certain premises, as well as on approaching, communicating or attempting to communicate with the person to be protected by the order.[396]

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392 Law Reform Commission of Western Australia, *Project 114 - Guardianship and Administration* (Final Report, December 2025) Recommendation 2.

393 *Restraining Orders Act 1997* (WA) long title.

394 See, for example, *Restraining Orders Act 1997* (WA) s 13A.

395 *Restraining Orders Act 1997* (WA) s 61.

396 See, for example, *Restraining Orders Act 1997* (WA) ss 10G(2), 13(2) and 36(2).

7.138. The Restraining Orders Act does not explicitly require that a court consider a person's disability when deciding whether to make an order which applies to them, or in relation to their ability to participate in the proceedings, or to comply with any order made.

7.139. The only context in which a court must consider disability is when dealing with an application for a family violence restraining order. In that case, a court must have regard to various factors, including 'the need to understand the impact of factors such as…disability…in reporting family violence or leaving a family relationship in which family violence is being committed'.[397]

7.140. When a court makes a restraining order, section 8(1) of the Restraining Orders Act provides that the court is to explain various matters to both the person who is subject to the order and the person protected by it. These matters include:

- the purpose, terms and effects of the order;
- the consequences that may follow if the person who is the subject of the order contravenes it; and
- the consequences that may follow if the person protected by the order —
    - encourages or invites the person who is the subject of the order to contravene it; or
    - by his or her actions causes the person who is the subject of the order to breach the order.

7.141. Section 8(2) provides:

> *If a person to whom an explanation is to be given under subsection (1) does not readily understand English, or the court is not satisfied that the person understood the explanation, the court is, as far as practicable, to arrange for someone else who is 18 years of age or older to give the explanation to the person in a way that the person can understand.*

7.142. The Restraining Orders Act provides that a person seeking to be protected by a restraining order is entitled to have one or more persons (who are approved by the court, and are not a witness in, or a party to, the proceedings) nearby to provide support.[398]

Barriers to participation

7.143. Our research and stakeholders' preliminary feedback identified various barriers for persons with disability participating in restraining order proceedings and complying with orders.

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397 *Restraining Orders Act 1997* (WA) s 10B(1)(f).

398 *Restraining Orders Act 1997* (WA) s 44D.

7.144. The Victorian Federation of Community Legal Centres, for example, identified that people with cognitive disability who are both applicants and respondents face various barriers at court including:

- *lack of training of court staff, lawyers and magistrates concerning disabilities, and the relevance of gender to disability issues;*
- *lack of time for lawyers to take proper instructions from a client with a cognitive disability; and*
- *lack of support for the woman with a disability to be assisted to understand proceedings or obtain help with other disability-related needs.*[399]

7.145. Sussex Street also identified specific assumptions implicit in restraining order proceedings which may present barriers for some persons with disability, specifically:

- the restraining order process assumes that parties understand the various choices for settlement and the ramifications of a breach of an order to settle; and
- the court proceedings assume that people understand chronological events and are able to contextualise events in a chronological nature.[400]

7.146. In addition, the Public Advocate observed that:

> *An application for a restraining order against a person with a decision-making disability also presents issues. A person bound, or proposed to be bound, may not have funded legal representation at a hearing and the consequences of non-compliance are severe.*[401]

7.147. In relation to the provision in the Restraining Order Act for the presence of a support person approved by the court, Community Legal told us that, in practice, it is highly variable as to whether the presence of a support person is permitted. Community Legal noted that the presence of a support person may 'be a fundamental prerequisite to meaningful participation' for a person with cognitive or intellectual disability, and submitted that 'it should not be left to judicial discretion whether the law is complied with'.[402]

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399 Federation of Community Legal Centres (Victoria), *Submission to Law Reform Committee of the Parliament of Victoria's Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (September 2011) 7.

400 Preliminary Response 25 (Sussex Street) 60-61.

401 Preliminary Response 17 (Public Advocate) 8.

402 Preliminary Response 37 (Community Legal Western Australia) 19.

7.148. In relation to the barriers faced by a person with disability to understanding and complying with restraining orders, Sussex Street provided the following case study:

> *Our client in Case Study 4 was a Respondent to two restraining orders. In both circumstances the stress and restrictions associated with the order exacerbated her disability which served to both heighten her paranoia and vulnerability and at the same time also heighten her inability to comply with the terms of the order, including the restrictive requirements not to breach…*[403]
>
> *The respondent's cognitive impairments place her at a particular disadvantage in the context of restraining order proceedings. The stress and restrictions associated with the order exacerbate her underlying disability, increasing her vulnerability, impairing her ability to effectively participate in the proceedings, and elevating the risk of inadvertent non-compliance…*[404]
>
> *Client presented with increased distress from restrictions of the [interim violence restraining order] and the inability to move around her complex as necessary because she feared she may run into the other party. This heightened her anxiety, paranoia, fear, and emotional dysregulation caused by the existence of the order. The client became socially isolated as she was extremely anxious about breaching the order, felt entrapped and would not leave her home to take out her rubbish or check her mail.*[405]

Possible options for reform

7.149. The feedback we received highlights the need for a court to consider disability when determining an application for an order under the Restraining Orders Act, or in applying the existing provisions of the Act (such as in relation to the presence of a support person). That raises the question whether the Restraining Orders Act should be amended to require that that occurs.

7.150. One option for reform may be to adopt the approach used in the *Personal Safety Intervention Orders Act 2010* (Vic). That provision gives a discretion to a court to determine whether making an order in relation to a person with cognitive impairment is appropriate. In making such an order, the court may have regard to the person's ability to understand the nature and effect of the final order and comply with its conditions.[406]

7.151. Another option for reform may be to include a more general obligation – applicable at any stage of an application for a restraining order – for the court to have regard to whether the applicant or the person proposed to be

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403 Preliminary Response 25 (Sussex Street) 25.

404 Preliminary Response 25 (Sussex Street) 59.

405 Preliminary Response 25 (Sussex Street) 60.

406 *Personal Safety Intervention Orders Act 2010* (Vic) s 61(2)(b).

subject to the order has a disability which may affect their ability to participate. This option would also require the court to modify its procedures to facilitate participation by that person in the proceedings.

7.152. We invite your feedback on any or all of the following questions:

76. Should the Restraining Orders Act be amended to expressly require a court to consider whether the applicant for the order, or the person who is proposed to be subject to the order, has a disability which may affect their ability to participate in the proceedings, or to understand and comply with any terms of a restraining order?

77. If yes, what should the court do to address that?

8. Convicted persons

Overview

8.1. If a person pleads guilty to a criminal offence or is convicted after a trial, the court will record a conviction for that person. We have been asked specifically to consider the experiences of persons with disability within the Western Australian court and tribunal system who have been convicted of an offence.

8.2. The primary context in which a convicted person engages with a court is when they appear before the court to be sentenced for the offence(s) of which they have been convicted.

8.3. In appearing before a court for a sentencing hearing, a convicted person with disability may face the same barriers to fully participating in the hearing as they would in any other hearing which occurs during the criminal process.

8.4. However, there may be additional barriers which impede their ability to fully participate in the hearing. There may be barriers interfering with the courts' ability to obtain an adequate understanding of the implications of their disability relevant to the sentence which should be imposed. We explore these additional barriers in this chapter.

Some context and the scope of this chapter

8.5. There is limited data available as to the number of persons with disability in prison in Western Australia. Some estimates suggest the proportion of the prison population in Western Australia affected by mental illness and/or cognitive disability alone ranges from 35% to 50%, although the true figure may be higher because of the likelihood of under-diagnosis.[407]

8.6. The Disability Royal Commission referred to research which suggests:

- there are higher rates of persons with disability in custodial settings, than in the broader Australian community;[408] and
- in particular, people with intellectual disability and people with psychosocial disability are over-represented in custodial settings.[409]

8.7. The Disability Royal Commission also described a 'stark'[410] picture in relation to incarcerated Aboriginal and Torres Strait Islander people, noting

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407 *AH v The State of Western Australia* [2014] WASCA 228 [1].

408 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 34.

409 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 34-35.

410 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 38.

that 'there are high rates of disability within this already over-represented group'.[411]

8.8. The Disability Royal Commission observed that:

> *It is clear from the evidence that the disproportionate rate of imprisonment of people with disability is not the result of any inherent causal relationship between disability and crime. Rather it reflects the disadvantages experienced by many people with disability, such as poverty, disrupted family backgrounds, family violence and other forms of abuse, misuse of drugs and alcohol, unstable housing and homelessness.*[412]

8.9. It is beyond the scope of our Terms of Reference to review the complex factors contributing to the over-representation of persons with disability in prisons, or to make recommendations directed to these issues.

8.10. Instead, our focus in this Chapter is solely on the barriers affecting access to, and participation in, court proceedings by convicted persons with disability.

The sentencing process

8.11. The maximum penalty which may be imposed by a court on a convicted person will be set out in the legislation creating the offence of which they were convicted. Some offences attract mandatory penalties. For all other offences, the court has a discretion to impose a sentence less than the maximum penalty for the relevant offence.

8.12. The framework within which the courts exercise that discretion, and the various penalties which may be imposed (such as a fine, a community-based order (**CBO**) or intensive supervision order (**ISO**), or a term of imprisonment) are set out in the Sentencing Act. There are, at times, other orders which may form part of a sentence, such as the suspension of a convicted person's driver's licence.

8.13. A court must impose a sentence that reflects the seriousness of the offence.[413] In determining the seriousness of an offence, the court must consider:

- the statutory penalty for the offence;[414]
- the circumstances in which it was committed (including any vulnerability of the victim);[415]

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411 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 38.

412 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 33.

413 *Sentencing Act 1995* (WA) s 6(1).

414 *Sentencing Act 1995* (WA) s 6(2)(a).

415 *Sentencing Act 1995* (WA) s 6(2)(b).

- any aggravating factors (that is, factors that increase the convicted person's culpability for the offence);[416] and
- any mitigating factors (that is, factors that reduce the convicted person's culpability or decrease the extent to which they should be punished).[417]

8.14. A convicted person's disability may affect the court's determination of the appropriate sentence to be imposed on them in various ways.[418] These include that:

- The court may have regard to the convicted person's disability when assessing the seriousness of the offence, especially having regard to aggravating and mitigating factors. Information about the convicted person's disability may be important to correct any misapprehension the court may have arising from the convicted person's response to the charge. For example, as South West Autism Network identified, some autistic people may demonstrate limited emotional expression, literal compliance or apparent lack of concern which could, absent expert evidence, be misconstrued as a lack of remorse for the offending conduct.[419]
- The court may have regard to the convicted person's disability when determining the kind of penalty to be imposed, the quantum of any penalty,[420] and in the case of a CBO or ISO or conditionally suspended imprisonment order, any requirements that should be imposed as part of such an order.

8.15. The Sentencing Act expressly allows a court to 'inform itself in any way it thinks fit' when sentencing an offender.[421] However, there is no express requirement for the court to ascertain if a convicted person has a disability relevant to the sentencing process. If that information is known to the court, it can be taken into account in the ways we have noted above. But if that information is not disclosed to the court prior to or during the sentencing hearing, injustice may result. This may be a particular risk if the convicted person is not legally represented and does not, or is unable to, inform the court of their disability.

8.16. We invite your feedback on any or all of the following questions:

78. Should a sentencing court be required to ascertain whether a convicted person has, or may have, a disability? If so, how?

79. If a sentencing court has information to suggest that the convicted person has, or may have, a disability, should the court be expressly

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416 *Sentencing Act 1995* (WA) ss 6(2)(c), 7(1).

417 *Sentencing Act 1995* (WA) ss 6(2)(d), 8(1).

418 See, for example, *Krijestorac v The State of Western Australia* [2010] WASCA 35 [17].

419 Preliminary Response 24 (South West Autism Network Inc) 63.

420 *NE v the State of Western Australia* [2021] WASCA 172 [53], [55].

421 *Sentencing Act 1995* (WA) s 15.

required to consider whether that disability is relevant to the sentencing of that person?

Pre-sentence reports

Current law and practice

8.17. As we have discussed, a convicted person's disability will be relevant in the determination of the appropriate sentence. It may also be relevant to the sentencing process itself.

8.18. In this context, the Disability Royal Commission noted that it is essential that information about a person's disability, including any procedural adjustments or support they may need to participate in a sentencing hearing, should be made available to the court for sentencing purposes.[422]

8.19. In preparation for a sentencing hearing, the convicted person or their lawyer (if they have one) may be able to provide some information to the court. However, if the court considers that it requires more detailed information, or expert opinion, it may order a pre-sentence report to be prepared.[423]

8.20. There is no requirement under the Sentencing Act for a court to obtain a pre-sentence report in every case. If the court intends to sentence the accused person to a 'pre-sentence order' or an ISO, it must request a pre-sentence report.[424] If a convicted person with disability has a lawyer, their lawyer may request that a pre-sentence report be obtained.

Barriers

8.21. Unless it is required under the Sentencing Act, a pre-sentence report will only be ordered by the court if requested by one of the parties (usually the convicted person or their lawyer), or if the court itself decides a report should be obtained. A convicted person who is not legally represented may not, or may not be able to, inform the court that they have a disability which may be relevant to their sentence. If the court is unaware that the personal circumstances of the convicted person warrant the preparation of a pre-sentence report, it may not order that one be prepared.

8.22. If a pre-sentence report is not requested for a convicted person with disability, there is a risk that the court might not become aware of the convicted person's disability and of any potential relevance of their disability to the determination of the appropriate sentence.

8.23. Pre-sentence reports are prepared by staff of the Department of Justice, except where they involve psychological and/or psychiatric assessments. The Chief Executive Officer of the Department of Justice responsible for

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422 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 178.

423 *Sentencing Act 1995* (WA) s 20(1).

424 *Sentencing Act 1995* (WA) s 20(2a)-(3).

corrections is required to ensure that pre-sentence reports are made by 'appropriately qualified people'.[425]

8.24. If a pre-sentence report is ordered, the sentencing court may give instructions as to the issues to be addressed by the report.[426] A pre-sentence report 'may include reports as to the physical or mental condition of the offender, whether or not the court has asked for them'.[427] That would not necessarily include a psychological or psychiatric assessment.

8.25. However, the sentencing court may request that the pre-sentence report include an assessment of that kind. The instructions given by the court for what is to be addressed in a pre-sentence report will necessarily depend on the information available to the court about the circumstances of the convicted person, including the nature of any disability they may have.

8.26. In its preliminary response, the WA Bar Association told us about some other difficulties that arise in obtaining adequate pre-sentence reports for convicted persons with disability:

> *A neuropsychological or psychiatric report ordered to establish the presence of a mental illness or impairment for sentencing purposes will take at least several months for Community Corrections to provide. Those wait times are often increased in regional places and with the use of interpreters. There have been instances where reports are not prepared as requested and another request must be made (for example, a psychiatric report prepared instead of a fitness report, or an addendum psychiatric report not being prepared at all). This inevitably results in longer time spent on remand or bail awaiting sentencing for vulnerable accused people, and a longer wait for complainants and families who are awaiting the outcome of sentencing.*[428]

8.27. The court may 'inform itself in any way it thinks fit' when deciding on the proper sentence (or any additional order) to be imposed.[429] Accordingly, in the event that a court-ordered pre-sentence report does not provide the court with adequate information about the implications of a convicted person's disability relevant to their sentencing, the convicted person may be able to provide the court with relevant information.

8.28. However, this would require that, first, the convicted person is aware that they can present information to the court; second, that they have the appropriate financial means to obtain the right information (which is often not the case according to one submission we received);[430] and third, that the court is willing to receive and consider the information presented.

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425 *Sentencing Act 1995* (WA) s 22(1)(a).

426 *Sentencing Act 1995* (WA) s 21(1).

427 *Sentencing Act 1995* (WA) s 21(3).

428 Preliminary Response 35 (WA Bar Association) 2.

429 *Sentencing Act 1995* (WA) s 15.

430 Preliminary Response 24 (South West Autism Network Inc) 63.

Possible options for reform

8.29. One option for legislative reform to address the issues we have discussed above may be to require a sentencing court to order a pre-sentence report if a convicted person has, or appears to have, a disability.

8.30. Our research has not identified any provision in other Australian jurisdictions which requires a court to obtain a pre-sentence report for convicted persons with disability.

8.31. However, the *Youth Justice Act 2024* (Vic) is an example of a provision of that kind in relation to juvenile offenders. Under that Act, both the Children's Court and an appellate court sentencing a child must order a pre-sentence report if the child has, or appears to have, a relevant impairment.[431] A 'relevant impairment' is defined to mean an intellectual disability, an acquired brain injury or a neurodevelopmental disorder, which has resulted in the child having substantially reduced functional capacity in relation to communication, social interaction, learning, self-care or self-management.[432]

8.32. That Act also allows a court not to order a pre-sentence report in various circumstances. These circumstances include if the child has a relevant impairment, but the court is satisfied that:

- a pre-sentence report is unnecessary; or
- that it would not be in the interests of justice to order a pre-sentence report, having regard to factors like the timeliness of sentencing and the likely length of any sentencing order.[433]

8.33. The Australian Law Reform Commission (**ALRC**), in its report on sentencing federal offenders, also recommended that federal sentencing legislation provide that a court must request a pre-sentence report when:

> *(a) an offender has a mental illness or intellectual disability, or such a condition is suspected; and*
>
> *(b) there is a reasonable prospect that the court will impose a sentence that deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty.*[434]

8.34. An alternate option for reform, discussed by the ALRC in the same report, may be to legislatively mandate pre-sentence reports in certain, more limited circumstances.[435] This was also recommended by the NSWLRC, which proposed that a mandatory pre-sentence report be limited to circumstances where a person with an intellectual disability is

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431 *Youth Justice Act 2024* (Vic) s 357(1) and s 415(1).

432 *Youth Justice Act 2024* (Vic) s 6.

433 *Youth Justice Act 2024* (Vic) s 357(2) and s 415(2).

434 Australian Law Reform Commission, *Same Time, Same Crime* (Report No 103, April 2006) 695, Recommendation 28-11.

435 Australian Law Reform Commission, *Same Time, Same Crime* (Report No 103, April 2006) [28.97].

unrepresented and a sentence of imprisonment is a reasonable possibility. This recommendation was intended to ensure that a report is prepared in serious cases where the person may not have anyone to raise the need for such a report on their behalf.[436]

8.35. We invite your feedback on any or all of the following questions:

80. If a sentencing court is aware that a convicted person has a disability that may be relevant to their sentencing, should it be required to obtain a pre-sentence report?

81. Apart from ordering a pre-sentence report from the Department of Justice, should a court be required to consider hearing from persons who:

(a) provide support to a convicted person with disability; and/or

(b) are appropriately qualified or experienced to provide information?

The sentence

Current law and practice

8.36. Many of the sentences which may be imposed by a court require the convicted person to satisfy conditions, such as:

- making financial payments (in the case of a fine or a compensation/restitution order);
- refraining from reoffending (if they have been given a term of imprisonment which is suspended, or given a conditional release order, or a CBO or ISO); or
- engaging with external services, attending appointments or complying with program requirements (if they have been sentenced to, for example, a CBO or an ISO).

Barriers

8.37. As we identified in Chapter 7, some accused persons with disability may experience barriers in complying with conditions of bail and restraining orders restricting their behaviour or requiring them to take certain actions.

8.38. Similarly, a convicted person's disability may mean that they will have difficulty in complying with the requirements of some sentences, such as those typically imposed in relation to CBOs or ISOs (for example, reporting requirements, attendance at programs or completing community service).

8.39. A failure to comply with these requirements can have serious consequences for the convicted person. For example, they might be required to serve a term of imprisonment which was suspended, be re-

[436] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System,* (Report No 80, [8.57].

sentenced for the original offence,[437] or be charged with an offence for breaching an order.[438]

8.40. The Western Australian Court of Appeal has recognised the importance of alerting a sentencing court to any potential difficulties a convicted person may have in complying with a prospective sentence. That will ensure that the sentencing court does not impose a sentence the convicted person is unlikely to be able to comply with, which may lead to further penalties in the event of a breach.[439]

8.41. As the Court of Appeal acknowledged, the ability of a convicted person with disability to comply with the requirements of a sentence may depend on whether they will need support to do so, and whether that support will be available to them.

8.42. Information about the need for such support, and its practical availability to a convicted person with disability is the kind of information the Court of Appeal was concerned to ensure was placed before the sentencing court.[440] Such information could be provided through a pre-sentence report. However, there is no express requirement that such a report include information about these matters.

Possible options for reform

8.43. One possible option for reform (to ensure that a sentencing court is advised of the supports a convicted person with disability may need to enable them to comply with a sentence) may be to require that a pre-sentence report address these matters, where appropriate.

8.44. Under the *Youth Justice Act 2024* (Vic), for example, a pre-sentence report for a child with a relevant impairment may address a list of matters. These include:

- an outline of any supports required by the child to address any behaviours of concern that are related to the relevant impairment and that impact the child's offending; and
- an outline of available, suitable services that address the impact of the child's impairment on their functional capacity and may reduce the likelihood of the child re-offending.[441]

8.45. Legislation in some other jurisdictions makes provision for a court to obtain information (other than through a pre-sentence report) in relation to the supports which would be available to a person with disability in the event that certain orders are made. One example, albeit outside the sentencing context, is section 47 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

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437 *Sentencing Act 1995* (WA) s 78-80.

438 *Sentencing Act 1995* (WA) ss 131-133.

439 *AH v The State of Western Australia* [2014] WASCA 228 [122]-[126].

440 *AH v The State of Western Australia* [2014] WASCA 228 [122]-[126].

441 *Youth Justice Act 2024* (Vic) s 418.

8.46. That section applies where the court is considering imposing orders for the detention in custody of an adult person with mental impairment, or for the provision of treatment or other services to that person. In such circumstances, the court must request the Secretary to the Victorian Department of Health and Human Services to provide the court with a certificate of available services.[442] The certificate must state whether facilities or services are available and, if so, outline what they are; if no services are available, the certificate may identify other options for the court to consider.[443]

8.47. The ALRC recommended the enactment of a similar provision in federal sentencing legislation but extended to include persons with intellectual disability.[444]

8.48. Another option for legislative reform may be to require a court, when imposing a CBO or ISO, to explicitly have regard to a convicted person's disability (amongst other relevant factors) and its impact on their ability to comply with the sentence.

8.49. By way of example, in a report on sentencing options, the Queensland Sentencing Advisory Council recommended that, when deciding on appropriate additional conditions (in CBOs), courts should be legislatively required to consider:

> *(i) the circumstances and any vulnerabilities of the person being sentenced (with respect, for example, to their physical health, age, maturity, the existence of any mental illness or cognitive or intellectual disability, whether they are homeless, or are experiencing domestic and family violence), as well as the particular circumstances of Aboriginal and Torres Strait Islander offenders;*
>
> *(ii) the ability of the person to comply with the proposed conditions of the order, including any geographical constraints in complying, and/or availability of services in that region; and*
>
> *(iii) whether the person consents to the making of the conditions.*[445]

8.50. We invite your feedback on any or all of the following questions:

82. Should there be an express requirement for a sentencing court to consider the ability of a convicted person with disability to comply with any particular requirements which form part of a sentence?

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442 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 47(1).

443 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 47(2) and (3).

444 This recommendation was made in relation to circumstances where the court is considering an order that the offender receive treatment or participate in a rehabilitation program: see Australian Law Reform Commission, *Same Time, Same Crime* (Report No 103, April 2006) 697, Recommendation 28-12.

445 Queensland Sentencing Advisory Council, *Community-based sentencing orders, imprisonment and parole options* (July 2019) 182, Recommendation 16.

83. Should a pre-sentence report be required to alert the sentencing court to whether a convicted person with disability:

(a) is likely to be able to comply with any requirements applicable to the kinds of sentence that may be imposed by the court, such as the requirements that ordinarily attach to CBOs or ISOs?

(b) would need support to assist them to comply with the requirements of any sentence, should they remain in the community (that is, if not sentenced to an immediate term of imprisonment)?

Explaining the sentence to the convicted person

Current law and practice

8.51. Section 34(1) of the Sentencing Act requires a court to explain to a convicted person, in language likely to be understood:

> *(a) the effect of; and*
>
> *(b) the obligations of the [convicted person] and the consequences of not complying with them that result from,*
>
> *the sentence and any order in addition to the sentence.*[446]

Barriers

8.52. Our research and preliminary responses highlighted the importance of explaining to convicted persons with disability, in ways they can understand, the requirements of a sentence, and especially of any ongoing obligations attached to a sentence (such as requirements applicable to CBOs or ISOs). This is especially so for those whose disability involves a cognitive impairment.[447]

8.53. The ALRC has identified that the impacts of mental health conditions and cognitive impairment on compliance with the requirements of a sentence by Aboriginal and Torres Strait Islander persons can be compounded by:

- a person's literacy;
- the use of legal terminology by lawyers and court staff explaining conditions;
- lack of plain language and translated material for non-English and Aboriginal and Torres Strait Islander first language speakers; and
- the stress of being in court and high levels of emotion experienced in sentencing.[448]

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446 *Sentencing Act 1995* (WA) s 34(1).

447 See, for example, Preliminary Response 11 (Advocacy WA) 10.

448 Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) [7.100]-[7.101].

8.54. Advocacy WA told us:

> *Individuals with disability often experience worse sentencing outcomes and lower success rates completing Community Based Orders or Intensive Supervision Orders. These outcomes are frequently linked to 'net-widening' caused by technical breaches. For example, a person who lacks the executive functioning to remember a court date, or the regional transport access needed to attend a mandated counselling session in a major hub such as Bunbury or Albany, may be recorded as 'wilfully non-compliant'. This can transform minor, non-violent offences into custodial sentences through repeated administrative breaches of court orders.*[449]

8.55. However, judges and magistrates are not necessarily equipped to explain the effect of a sentence, the obligations it involves, and any consequences of non-compliance to a convicted person with disability involving psychiatric, intellectual, sensory, neurological or learning impediments.

Possible options for reform

8.56. One option for legislative reform may be to impose a more onerous obligation on a court to take steps to ensure that a convicted person understands:

- the effect of the sentence and obligations imposed on them; and
- the consequences of non-compliance.

8.57. Section 34 of the Sentencing Act requires the court to provide an explanation, 'in language likely to be understood', but without any requirement that the court be satisfied that the convicted person understands that explanation.

8.58. As a possible model for such a reform (and as we discussed in relation to communication barriers more broadly in Chapter 6, in the context of tribunals), section 32 of the SAT Act provides that:

> *(6) The Tribunal is to take measures that are reasonably practicable —*
>
> *(a) to ensure that the parties to the proceeding before it understand the nature of the assertions made in the proceeding and the legal implications of those assertions.*[450]

8.59. As another example, section 50 of the *Youth Justice Act 1997* (Tas) requires a court to take steps to ensure that both the relevant young person and their guardian (if present) understand the purpose and effect of a sentence, including the consequences of failure to comply with it. It then provides that such steps may include:[451]

- directly explaining the matters in the Court; or

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449 Preliminary Response 11 (Advocacy WA) 10.

450 *State Administrative Tribunal Act 2004* (WA) s 32(6)(a).

451 *Youth Justice Act 1997* (Tas) s 50(2).

- having some appropriate person give the explanation; or
- having an interpreter, or other person able to communicate effectively with the youth and the guardian, give the explanation; or
- causing an explanatory note in English or another language to be supplied to the youth and the guardian.

8.60. We invite your feedback on the following question:

84. Should the Sentencing Act be amended to require a court to be satisfied that a convicted person with disability has understood the effect of a sentence and its implications? If so, how?

Appealing a conviction

Current law and practice

8.61. In certain circumstances, a convicted person may appeal their conviction or sentence. If they later want to discontinue their appeal, or settle the appeal, then ordinarily they lodge the relevant document[452] and the appeal will be discontinued or settled.

8.62. In the case of appeals to a single judge of the Supreme Court against a decision of the Magistrates Court, rules 72(2) and 73(3) of the Criminal Procedure Rules provide that 'if it appears' to the court that an appellant is a 'person under disability' (as defined in Order 70 of the Rules of the Supreme Court) then the discontinuance or consent notice does not have effect unless it is approved by a single judge.

8.63. In the case of criminal appeals to the Court of Appeal,[453] rules 59(2) and 60(3) of the *Supreme Court (Court of Appeal) Rules 2005* (WA) (**Court of Appeal Rules**) provide that if the appellant 'is a person under disability' (as defined in Order 70 of the Rules of the Supreme Court) then the discontinuance or consent notice does not have effect unless it is approved by a single judge.

8.64. In other words, in criminal matters, the requirements for discontinuance or settling an appeal differ between appeals made to a single judge of the Supreme Court and those made to the Court of Appeal.

8.65. The difference lies in when the requirement for approval of a single judge for the discontinuance or consent notice arises. In single judge appeals, the requirement arises when it 'appears' to the Court that the appellant seeking to end the appeal is a 'person under disability', whereas in

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452 A discontinuance notice must be filed under the *Criminal Procedure Rules 2005* (WA) r 72(1) or the *Supreme Court (Court of Appeal) Rules 2005* (WA) r 59(1). To settle an appeal, a consent notice must be filed under the *Criminal Procedure Rules 2005* (WA) r 73(1).

453 These are appeals against the decision of a single judge, in an appeal from a decision of the Magistrates Court; or appeals against a conviction recorded, or sentence imposed, in the prosecution of an indictable matter in the District Court or Supreme Court: see *Supreme Court (Court of Appeal) Rules 2005* (WA) r 3 (definition of 'criminal appeal', which is defined to mean an appeal under the *Criminal Appeals Act 2004* (WA) Part 2 Division 3, Part 3 or 3A).

appeals to the Court of Appeal, the requirement arises only when the appellant 'is a person under disability'.

8.66. Our research has not identified an explanation for, or the implications of, that different threshold. However, it is not necessary to explore it further. The focus of our discussion is on what the appellant is required to do in each case to obtain approval to end the appeal they commenced.

8.67. In each case, the notice of discontinuance or consent must be:

- accompanied by an affidavit; and
- accompanied by an opinion of an independent legal practitioner, unless a judge orders that that opinion need not be provided.[454]

8.68. Under the Rules of the Supreme Court, a 'person under disability' includes:

- a person in respect of whom a guardian or administrator has been appointed under the *Guardianship and Administration Act 1990* (WA) (**Guardianship and Administration Act**); and
- a person who by reason of 'mental illness, defect or infirmity' is declared by the Court to be incapable of managing their affairs in respect of any proceedings to which the declaration relates.[455]

8.69. The operation of the Rules of the Supreme Court, as well as issues arising from the appointment of litigation representatives, is discussed in further detail in Chapter 12.

Barriers

8.70. The purpose of these special requirements for approval of a discontinuance or consent notice is to ensure that all parties are afforded protection of the court's processes, and that the court's own processes are protected.[456] An appellant who has discontinued their appeal will ordinarily not be able to pursue a further appeal, and in the case of appeals to a single judge, will ordinarily face costs orders.[457]

8.71. However, the requirement to obtain an independent legal opinion may be experienced as a barrier by some persons with disability, for various reasons. For example, a person may experience barriers attempting to engage and communicate with a lawyer (as we discussed in Chapter 6).

8.72. That said, the rules permit a single judge to waive the requirement for the appellant to file an opinion by a lawyer. At a minimum, however, the appellant will need to file an affidavit explaining why they wish to discontinue or settle the appeal. Either way, the additional procedural requirements may increase the time, cost and complexity involved in discontinuing or settling an appeal.

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454 *Criminal Procedure Rules 2005* (WA) rr 72(3), 73(4); *Supreme Court (Court of Appeal) Rules 2005* (WA) rr 59(3) and 60(4).

455 *Rules of the Supreme Court 1971* (WA) Order 70, Rule 1.

456 See, for example, *TJD v BRJ* [2025] WASC 433 [72].

457 *Criminal Procedure Rules 2005* (WA) r 72(4).

8.73. It would be open to an appellant who is unable to meet these requirements not to end the appeal by a discontinuance or consent, but rather to let the appeal run its course without advancing their case, in which case the appeal is very likely to be dismissed.

8.74. In those cases where the appellant did not wish to pursue the appeal, or accepted that it was likely that the appeal would be dismissed, the outcome of the appeal would not (subject to a costs order) be different than if they had obtained the approval of a single judge to end the appeal.

8.75. The requirement to obtain the approval of a judge to discontinue the appeal, or to resolve it by consent, does not operate as a barrier to access the court – but it may operate as a barrier to equal participation by a person with disability, in that their ability to determine whether to continue participating in proceedings is constrained.

Possible options for reform

8.76. One option for reform may be to amend the rules to permit the court to waive the additional procedural requirements (affidavit and/or independent legal opinion) if the judge does not consider them necessary, in the particular case, to protect the appellant, or the court's processes.

8.77. We invite your feedback on any or all of the following questions:

85. Should the Criminal Procedure Rules and the Court of Appeal Rules be amended to permit a judge to waive the procedural requirements (filing an affidavit and/or an opinion of a legal practitioner) for a person who is or appears to be a person under disability to obtain the Court's approval to discontinue or settle an appeal against conviction or sentence? If so, what should the criterion be for the Court to waive those procedural requirements?

86. Should the Criminal Procedure Rules and the Court of Appeal Rules be amended in some other way to address this issue?

Other issues

8.78. In this chapter we have focused on convicted persons with disability, who appear and participate in courts for sentencing.

8.79. Bearing this in mind, we invite your feedback on the following:

87. Are other legislative reforms required to assist convicted persons with disability to better access or engage with courts, in their capacity as convicted persons (rather than in other capacities, such as parties to civil proceedings)?

9. Victims and family of victims of crime

Overview

9.1. We have been asked specifically to consider the experiences of persons with disability as victims of crime, or as family members of victims of crime, in their engagement with the Western Australian court and tribunal system. A victim of crime is a person who has suffered injury, loss or damage as a direct result of an offence.[458]

9.2. While it is recognised that one function of criminal proceedings is to vindicate the dignity of victims of crime, there is no doubt that navigating the demands of the court and tribunal system (in addition to living with the impacts of the offending conduct) presents a very challenging experience for a victim of crime. For victims of crime with disability, these challenges will be compounded if there are barriers preventing them from accessing and fully participating in proceedings.

9.3. The *Victims of Crime Act 1994* (WA) (**Victims of Crime Act**) acknowledges the impacts on victims of both the crime(s) committed and engagement with the criminal justice system. It prescribes guidelines as to how victims should be treated. For the most part, it does not specifically deal with, or provide for, the treatment of persons with disability who are victims of crime.

9.4. One primary way in which a person with disability who is a victim of crime may engage with a court is when they provide the court with a victim impact statement outlining the impact of the offence(s) committed against them.

9.5. A person with disability who is a victim of crime may also be invited to participate in a mediation with a convicted person, ordered by a court prior to that person's sentencing.

9.6. A person with disability who is a victim of crime may also be a party to civil proceedings (for example, in an application for compensation brought in their capacity as a victim of crime).

Some context and the scope of this chapter

9.7. According to the Disability Royal Commission, the limited data available suggests that persons with disability are over-represented in the criminal justice system as victims, alleged offenders and those who are incarcerated.[459] The John Curtin Law Clinic made the same point in its preliminary response.[460]

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458 This definition is drawn from the first paragraph of the definition of 'victim' in the *Victims of Crime Act 1994* (WA).

459 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Nature and extent of violence, abuse, neglect and exploitation of people with disability* (Final Report, 29 September 2023) Vol 3, 237.

460 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 1.

9.8. Advocacy WA told us that:

> *Women with disability in regional WA are disproportionately victims of violence and abuse which frequently acts as a pathway into both the criminal justice system and State Administrative Tribunal (SAT) guardianship proceedings.*[461]

9.9. The Public Advocate highlighted that 'a person's disability and prior trauma can make them more vulnerable to crime, and in many cases makes violent offences against them more severe'.[462] While it is beyond the scope of our Terms of Reference to address these issues directly, they provide important context to our consideration of issues related to how victims of crime with disability access and participate in the court and tribunal system.

9.10. Like other victims of crime, a person with disability who is a victim of crime may access, or engage with, courts and tribunals in a variety of ways. They may be:

- a witness in a criminal trial against the accused;
- a person permitted to appear in other proceedings in courts or tribunals, such as in coronial enquiries in the Coroner's Court;
- invited to provide their views to the police as to whether an accused person should be granted bail;
- entitled to provide a court sentencing an offender with a statement outlining the impact on them of the offence committed by the offender (**victim impact statement**);
- invited to participate in a mediation with a convicted person, ordered by a court prior to their sentencing; or
- a party to civil proceedings (for example, in an application for compensation brought in their capacity as a victim of crime, or in a civil proceeding against an offender to recover any loss or damage they have suffered because of the commission of a crime).

9.11. We consider issues related to access and participation for persons with disability in some of these capacities in other chapters of this paper, including Chapter 10 (witnesses), Chapter 12 (parties to civil proceedings) and Chapter 13 (people involved in tribunal matters).

9.12. Persons with disability who are victims of crime may also be entitled to make submissions to the Prisoners Review Board in relation to whether the offender should be released on parole. We have taken the view that the Prisoners Review Board should not be treated as a tribunal for the purposes of this reference. We therefore do not propose to consider issues relating to parole.

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461 Preliminary Response 11 (Advocacy WA) 7.

462 Preliminary Response 17 (Public Advocate) 6.

9.13. As we explain further below, the Victims of Crime Act establishes principles with respect to the treatment of victims by public bodies and officers subject to that Act. It is beyond the scope of our Terms of Reference for us to consider the effectiveness of the operation of that Act as a whole. However, it is appropriate for us to consider the operation of the provisions of the Victims of Crime Act in their application to persons with disability who are victims of crime.

The Victims of Crime Act

Current law and practice

9.14. The Victims of Crime Act prescribes guidelines in Schedule 1 to that Act (**Victims of Crime Guidelines**) which 'public officers and bodies' should have regard to and apply, to the extent that it is within or relevant to their functions and practicable for them to do so.[463]

9.15. The definition of 'public officers and bodies' includes judges, magistrates and other judicial officers, as well as officers of courts.[464]

9.16. A failure to have regard to a guideline, or a failure to treat a victim in accordance with a guideline, does not affect the validity of any action or proceeding; nor does it provide any grounds to challenge a decision.[465]

9.17. The Victims of Crime Guidelines include requirements that a victim (who so requests) be kept informed about the progress of criminal investigations, bail applications, variations to charges, the trial process, their role as a witness (if they are a witness), the result of the trial, any sentence imposed and the outcome of any appeal.[466] Compliance with those guidelines will usually fall to the police and prosecutors in the Office of the Director of Public Prosecutions, rather than the courts or tribunals.

9.18. However, a number of the Victims of Crime Guidelines may be relevant to the role of courts and tribunals, and of court officers, including that:

- a victim should be treated with courtesy and compassion, and with respect for their dignity;
- a victim should be given access to counselling about the availability of welfare, health, medical and legal assistance services and criminal injuries compensation;
- inconvenience to a victim should be minimized;
- the privacy of a victim should be protected; and

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463 *Victims of Crime Act 1994* (WA) s 3(1).

464 *Victims of Crime Act 1994* (WA) s 2 (definition of 'public officers and bodies'). It also includes police and prosecutors in the Office of the Director of Public Prosecutions.

465 *Victims of Crime Act 1994* (WA) s 3(3).

466 *Victims of Crime Act 1994* (WA) Schedule 1, cls 6-8.

- a victim should be informed about the availability of lawful protection against violence and intimidation by the offender.[467]

9.19. Further, the Guidelines state that 'arrangements should be made so that a victim's views and concerns can be considered when a decision is being made about whether or not to release the offender from custody (otherwise than at the completion of a term of imprisonment or detention)'.[468]

9.20. With one exception, the Victims of Crime Act does not deal specifically with persons with disability who are victims of crime. That exception, outlined in section 3(2) of the Act, is that if, because of disability:

> *it is not practicable for a victim to receive counselling or information, make requests or express views or concerns under the guidelines, another person may do those things on the victim's behalf if the public officer or body concerned is satisfied that it is appropriate for that other person to do so.*

Barriers

9.21. Our research and preliminary responses have not identified any specific barriers in the Victims of Crime Act, relevant to accessing or participating in the court and tribunal system, for victims of crime with disability.

9.22. However, the Department of Justice noted in its review of the Victims of Crime Act:

> *WA Police submitted to the Review that some victims may have special needs including in relation to … disability. It was highlighted that assistance with [victim impact statement] preparation should be provided by appropriately trained persons…*
>
> *However, the Guidelines do not explicitly recognise the provision of assistance to enable a victim to prepare and provide a [victim impact statement].*[469]

9.23. Further, if courts and tribunals fail to identify that a victim of crime has a disability and disability-related needs for adjustments and supports, then that may be a barrier to the realisation of the intended purpose of the Victims of Crime Act, namely, to support victims of crime.

9.24. For example, for a victim with disability who experiences barriers to physically accessing a court hearing room, it will be important to identify and provide adjustments to remove those barriers – both to treat the victim with respect for their dignity and to minimise inconvenience to them.

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467 *Victims of Crime Act 1994* (WA) Schedule 1, cl 1-5.

468 *Victims of Crime Act 1994* (WA) Schedule 1, cl 3(1).

469 Western Australian Department of Justice (Western Australia), Legislative Assembly, *A Report on the Statutory Review of the Victims of Crime Act 1994 (WA)* (Tabled Paper No 1017, May 2021) 26.

Possible options for reform

9.25. One possible option for legislative reform may be to amend the Victims of Crime Act and Guidelines to provide that disability is a relevant consideration for courts, in their engagement with victims of crime.

9.26. That outcome may be achieved through the inclusion of a specific obligation, or by the amendment of section 3(2) of the Victims of Crime Act and/or of the Guidelines.

9.27. By way of example, the *Victims' Charter Act 2006* (Vic) (which prescribes principles for agencies responding to victims and persons adversely affected by crime) states that agencies:

> *are to take into account, and be responsive to, the particular needs of persons adversely affected by crime, particularly needs relating to differences such as … disability.*[470]

9.28. With respect to communicating with victims, the principles in the *Victims' Charter Act 2006* (Vic) include a specific obligation for agencies to take into account, and be responsive to, a victim's preferred method of contact, and whether they have a disability.[471]

9.29. The Department of Justice has similarly recommended the inclusion of an additional guideline requiring 'public officers and bodies to treat victims in a way that is respectful of their particular needs inclusive of… disability'. [472]

9.30. We invite your feedback on any or all of the following questions:

88. Do the needs of persons with disability require specific recognition in the Victims of Crime Guidelines in order to facilitate their access to and participation in courts and tribunals as victims of crime?

89. If so, how should that be achieved?

90. Does section 3(2) of the Victims of Crime Act (which is set out above) need to be amended? If so, how?

91. Should the Victims of Crime Guidelines be amended to:

(a) specifically provide that courts and tribunals must enquire whether a victim faces any disability-related barriers to participating in the criminal justice system as a victim?

(b) specifically provide that courts and tribunals must make any reasonable adjustments to overcome any disability-related barriers to participation for a victim with disability?

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470 *Victims' Charter Act 2006* (Vic) s 6. We note these principles apply to investigatory agencies, prosecuting agencies and victims' services agencies, which are defined in the Act (and do not include courts, tribunals or their officers).

471 *Victims' Charter Act 2006* (Vic) s 7B.

472 Western Australian Department of Justice (Western Australia), Legislative Assembly, *A Report on the Statutory Review of the Victims of Crime Act 1994 (WA)* (Tabled Paper No 1017, May 2021) Recommendation 14.

Victim impact statements

Current law and practice

9.31. Under the Sentencing Act, a victim may give a victim impact statement to the court to assist it in determining the proper sentence for the offender.[473]

9.32. The purpose of a victim impact statement is both to ensure that the courts are aware of the impact of the crime on the victim and to 'involve victims in the workings of the criminal justice system'.[474]

9.33. For a primary victim (that is, a person against whom the offence was committed or who was a witness to an offence involving violence, sexual assault, bodily harm or death) the victim impact statement is a statement containing particulars of any personal harm suffered by the victim as a direct result of the offence.[475]

9.34. In the case of a 'family victim' (that is, a member of the primary victim's immediate family), their victim impact statement may set out the impact of the primary victim's personal harm on the members of the primary victim's immediate family.[476] A victim impact statement may be accompanied by a report by any person who has treated the victim in connection with the effects on them of the commission of the offence.[477]

9.35. A victim impact statement is not permitted to address the sentence which should be imposed on the offender.[478] The court may also rule the whole or part of a victim impact statement inadmissible.[479]

9.36. When the Sentencing Act was enacted, it expressly permitted a victim impact statement to be made orally or in writing.[480] That provision has since been repealed[481] and the Sentencing Act now refers only to victim impact statements in written form.[482]

9.37. Nothing undertaken in our research of the available Parliamentary materials concerning that amendment discloses the reason for it. The Office of the Commissioner for Victims of Crime has observed that it is not known whether the removal of oral statements was intentional, or, if it was,

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473 *Sentencing Act 1995* (WA) s 24(1).

474 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Consultation Paper, July 2015) [9.26].

475 *Sentencing Act 1995* (WA) s 23A.

476 *Sentencing Act 1995* (WA) s 23A.

477 *Sentencing Act 1995* (WA) s 25(3).

478 *Sentencing Act 1995* (WA) s 25(2).

479 *Sentencing Act 1995* (WA) s 26(2).

480 *Sentencing Act 1995* (WA (as originally enacted)) s 25(1).

481 *Sentencing Legislation Amendment Act 2016* (WA) s 11.

482 Section 26(1) of the *Sentencing Act 1995* (WA) states that a court may make a written victim impact statement available to the prosecutor and to an offender, on such conditions as it thinks fit.

on what policy basis the decision to remove them was made.[483] It went on to observe that:

> *While it is understood that there existed differing interpretations as to whether the former section 25(1) provided the victim a right to provide their statement orally or whether the discretion was retained by the court, anecdotal accounts indicate that the removal of an explicit reference to an oral submission has resulted in a marked decrease in the number of victims reading their statement aloud to the court.*[484]

9.38. The position, therefore, appears to be that, while the Sentencing Act does not prohibit victim impact statements from being delivered orally, the Act assumes that ordinarily the statement will be provided in written form.[485]

9.39. The question whether a victim may read that statement aloud to the court at a sentencing hearing is a matter left to the discretion of the sentencing judge or magistrate.[486] A publicly available guide to Victim Impact Statements published by the Department of Justice[487] states that if a victim of crime wishes to make a verbal statement, this will need to be discussed with the prosecutor, who will consult with the judge or magistrate, who will then make a formal decision.

Barriers

9.40. For many victims of crime, giving a victim impact statement may be difficult. For example, it may revive the trauma experienced by the victim because of the offending. A victim of crime with disability may also experience specific barriers to providing a victim impact statement. These barriers may impede their ability to engage with the court in a way that effectively conveys the harm that they (or their family member) suffered as a result of the offence.

9.41. For victims of crime with cognitive disability, for example, these barriers may include that their impairment may affect their capacity to recall, process, or communicate traumatic events. This may result in difficulties where there is an expectation that information be communicated in a structured legal form.[488]

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483 Office of the Commissioner for Victims of Crime, *Improving experiences for victim-survivors: Review of criminal justice responses to sexual offending in Western Australia* (December 2025) 177.

484 Office of the Commissioner for Victims of Crime, *Improving experiences for victim-survivors: Review of criminal justice responses to sexual offending in Western Australia* (December 2025) 177.

485 See, for example, *Sentencing Act 1995* (WA) s 26(1).

486 Supreme Court of Western Australia, *Consolidated Practice Directions* (23 September 2026) Practice Direction 5.11(1); District Court of Western Australia, *Practice Directions - Criminal* (21 October 2026) Practice Direction 7.7.1.

487 'Victim Impact Statement', *Government of Western Australia, Department of Justice* (Guideline pamphlet, 3 January 2025) <https://www.wa.gov.au/service/community-services/counselling-services/victim-impact-statement>.

488 Queensland Public Advocate, *Adults with Cognitive Disability in the Queensland Criminal Justice System* (Discussion Paper 5: Victims and Witnesses, February 2026) 21.

9.42. There is no obligation on the sentencing court to permit those victims who wish to deliver their victim impact statement orally to do so. There may be reluctance to permit it if delivering a witness statement orally will take a lengthy period of time (and thus protract a sentencing hearing), such as if a victim with disability requires the use of a communication device or Auslan interpreter to communicate.

9.43. Section 24(2) of the Sentencing Act specifically provides for some adjustment to be made for victims with disability. This section addresses the situation where a victim with disability is personally incapable of giving a victim impact statement:

> *If because of age, disability or any other reason a victim is personally incapable of giving a victim impact statement, another person may give it on the victim's behalf if the court is satisfied that it is appropriate for that other person to do so.*[489]

9.44. Our research has not identified any evidence as to how this section is applied. It is not clear in what circumstances a victim of crime would be considered 'personally incapable', and in what situations it would be appropriate (or inappropriate) for another person to provide the statement on their behalf. However, as the terms of the section make clear, the adjustment it provides is limited to the victim impact statement being made by another person on behalf of the victim of crime with disability. The section does not contemplate adjustments being made for a person with disability (who without those adjustments would be incapable of giving a victim impact statement) to enable that person to give the statement themselves.

Possible options for reform

9.45. The preliminary responses we received did not propose specific reforms to deal with the barriers we have discussed above in relation to the provision of victim impact statements by persons with disability. However, various options for reform could be considered to address those barriers.

9.46. One option for reform may be to amend section 24(2) of the Sentencing Act to extend its operation to require that a sentencing court consider the provision of any reasonable adjustments to enable a victim of crime with disability to provide a victim impact statement to the court, including in person if they so wish.

9.47. Another possible option for reform may be to amend the Sentencing Act to expressly provide that a victim of crime with disability be permitted to give a victim impact statement in whatever format is necessary to enable them to provide the statement personally. Examples might be given of some alternative formats, such as through a pre-recorded video, by the use of a communication device or an Auslan interpreter, or by another person on the victim's behalf.

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489 *Sentencing Act 1995* (WA) s 24(2).

9.48. We invite your feedback on any or all of the following questions:

92. What barriers do persons with disability face when making a victim impact statement?

93. Should a sentencing court be required to consider any reasonable adjustments for a victim of crime with disability to provide a victim impact statement to the court, including to provide this in person if they so wish?

94. Should the Sentencing Act be amended to expressly permit a victim of crime with disability to give a victim impact statement in a format other than in writing?

95. Should particular formats be prescribed (eg by pre-recorded video, through an Auslan interpreter, or by another person on their behalf)? If so, what should they be?

Participation in mediation with a convicted person

Current law and practice

9.49. Under the Sentencing Act, if a court considers that it would be of assistance in sentencing an offender, it may order that a mediation report be prepared.[490] Mediations are voluntary, and if the victim and the offender are willing to participate, the mediation will occur with the assistance of a neutral mediator.[491]

9.50. Mediations will ordinarily occur face to face but may be able to be conducted using a 'shuttle method' (where the victim and accused person are not in the same room), or virtually.[492] Both parties are also permitted to have a support person attend the mediation.[493]

9.51. The purpose of such a mediation is reparative, in that it allows the offender and victim to have a discussion about the consequences of the offence. It also gives the offender the opportunity to demonstrate remorse and insight into the consequences of their offending, and to make amends for their conduct, such as by offering an apology or the payment of compensation or the return of property.[494]

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490 *Sentencing Act 1995* (WA) s 27(1).

491 'Restorative Justice: Commissioner for Victims of Crime', *WA Government*, 5 January 2026) <https://www.wa.gov.au/organisation/department-of-justice/commissioner-victims-of-crime/restorative-justice-commissioner-victims-of-crime>.

492 'Restorative Justice: Commissioner for Victims of Crime', *WA Government*, 5 January 2026) <https://www.wa.gov.au/organisation/department-of-justice/commissioner-victims-of-crime/restorative-justice-commissioner-victims-of-crime>.

493 'Restorative Justice: Commissioner for Victims of Crime', *WA Government*, 5 January 2026) <https://www.wa.gov.au/organisation/department-of-justice/commissioner-victims-of-crime/restorative-justice-commissioner-victims-of-crime>.

494 'Restorative Justice: Commissioner for Victims of Crime', *WA Government*, 5 January 2026) <https://www.wa.gov.au/organisation/department-of-justice/commissioner-victims-of-crime/restorative-justice-commissioner-victims-of-crime>.

9.52. The mediation report provided to the court will provide information about:

- the attitude of the offender to both the victim and the effects of the commission of the offence on the victim; and
- any agreement between the offender and the victim as to actions by way of reparation.[495]

9.53. A mediation provides an opportunity for victims of crime to tell the offender about the consequences of the offending. This process, especially if an offender gives an apology or expresses remorse, can be beneficial to a victim's recovery from the consequences of an offence. In this respect, the Commissioner for Victims of Crime website emphasises that:

> *The [Restorative Justice] Unit takes a flexible approach to ensure processes are tailored to the individuals involved. Processes are always victim-centred and are entirely voluntary.*[496]

Barriers

9.54. For many victims, participating in a mediation will be a stressful experience. For persons with disability, participating in a mediation of this kind may not be possible, or may be more difficult. As the Disabled Lawyers Association outlined:

> *Mediations and other forms of [alternative dispute resolution] are often not set up in an accessible way as a starting point, which requires parties to advocate for access needs and sometimes negotiate these before they even get to negotiating the actual substance of their claim. This places a considerable burden on disabled people who are unrepresented in the justice system.*[497]

9.55. At this stage, we have not identified any barriers experienced by persons with disability which arise specifically in the context of participating in mediations as a victim of crime. However, it is conceivable that a victim with disability may be unable to participate in a mediation for reasons related to their disability. They would therefore not receive any of its benefits unless reasonably appropriate adjustments were made to improve their access to, and participation in, the process.

Possible options for reform

9.56. One option for reform may be to require a court choosing to order a mediation report to consider if there are any barriers to participation which a victim with disability may experience, and to order that appropriate adjustments be made in response to those barriers.

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495 *Sentencing Act 1995* (WA) s 28(2)

496 'Restorative Justice: Commissioner for Victims of Crime', *WA Government*, 5 January 2026) <https://www.wa.gov.au/organisation/department-of-justice/commissioner-victims-of-crime/restorative-justice-commissioner-victims-of-crime>.

497 Preliminary Response 30 (Disabled Australian Lawyers Association) [32].

9.57. We invite your feedback on any or all of the following questions:

96. What specific barriers, if any, do victims of crime with disability experience in relation to participating in mediations under the Sentencing Act?

97. Should the Sentencing Act be amended to expressly require that a court ordering a mediation report make enquiries as to whether a victim with disability may experience any barriers to participation in a mediation, and to order that any appropriate adjustments be made?

Criminal Injuries Compensation

Current law and practice

9.58. A victim of crime may make an application for criminal injuries compensation in respect of certain offences. In WA, the legislation governing this process is the *Criminal Injuries Compensation Act 2003* (WA) (**CIC Act**).

9.59. Compensation can be awarded if there is a 'proved' offence (where the offender has pleaded guilty or been found guilty), and in some circumstances where there is an allegation of an offence that has not been proved.[498]

9.60. An application for compensation must be made in writing, using an approved form.[499] An application may also be made and submitted using the electronic case management system via the eCourts portal.[500] Applications can be made by an individual personally, or by a solicitor on their behalf.[501]

9.61. The application is submitted to the Office of Criminal Injuries Compensation (**OCIC**), for determination by a criminal injuries compensation assessor (**assessor**).[502] An assessor must decide applications informally, and is not bound by the rules of evidence or procedure, but may inform themselves in any way they see fit.[503]

9.62. While a hearing may be conducted if an assessor thinks it fit to do so,[504] an assessor may determine an application for compensation without conducting a hearing, that is, on the basis of the documents before

498 *Criminal Injuries Compensation Act 2003* (WA) ss 12-17.
499 *Criminal Injuries Compensation Act 2003* (WA) s 11(1)(a).
500 *Criminal Injuries Compensation Regulations 2003* (WA) reg 4A.
501 Criminal Injuries Compensation eCourts Portal Application User Guide 12.
502 *Criminal Injuries Compensation Act 2003* (WA) s 18(1).
503 *Criminal Injuries Compensation Act 2003* (WA) s 18.
504 *Criminal Injuries Compensation Act 2003* (WA) ss 24, 25.

them.[505] This is intended to reduce the instances of re-traumatisation of victims.[506]

9.63. A decision by an assessor to make or refuse to make a compensation award, or a decision as to the amount of a compensation award, can be appealed to the District Court.[507]

Barriers

9.64. Victims with disability who attempt to access the CIC Scheme may experience many of the physical barriers to access and participation outlined in Part B. They may also experience the barriers associated with the use of technology and communications discussed in that Part. As summarised by the South West Autism Network:

> *The Criminal Injuries Compensation Act 2003 (WA) provides compensation for victims of crime who have been injured as a result of a criminal act. People with disability are among the most frequent victims of crime, yet face specific barriers when accessing the CIC scheme. These include difficulty making and documenting complaints, communication barriers at the police reporting stage, and the complex interaction between CIC awards and NDIS funding.*[508]

9.65. Further, the fact that the application process is generally written may cause issues for persons who have difficulty communicating in a written format. As we have noted, applications for compensation must be in writing (whether submitted electronically or not) and the CIC Act does not contain any provision permitting an assessor to receive an application in another format.[509]

9.66. The time frame for making an application may also represent a barrier to accessing the scheme. The CIC Act outlines that an application must be made within three years after the (alleged) offence was committed, unless the assessor believes it is 'just' to extend that time frame.[510]

9.67. The legislation does not outline the relevant considerations for whether an extension would be 'just'. However, case law[511] establishes that the factors which the court may take into account in determining whether it is just to extend the time allowed to make an application include:

- the history of and background to the proposed application;
- the length of the delay;

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505 *Criminal Injuries Compensation Act 2003* (WA) s 24(2).

506 'Welcome to the Office of Criminal Injuries Compensation', *Office of Criminal Injuries Compensation*) <https://cict.justice.wa.gov.au/default.aspx>.

507 *Criminal Injuries Compensation Act 2003* (WA) s 55.

508 Preliminary Response 24 (South West Autism Network Inc) 143.

509 'Welcome to the Office of Criminal Injuries Compensation', *Office of Criminal Injuries Compensation*) <https://cict.justice.wa.gov.au/default.aspx>.

510 *Criminal Injuries Compensation Act 2003* (WA) s 9.

511 *Re CJR* [2023] WADC 111 [52].

- the reasons for the delay;
- the prospects of the compensation application succeeding;
- the consequences for the parties of the grant or refusal of an extension of time, including the extent of any prejudice to the offender; and
- whether injustice will be suffered if an extension of time is refused.

9.68. For victims with disability, the three-year time limit may be insufficient. As expressed by the South West Autism Network:

> *[…] psychological harm that creates the [criminal injuries compensation] entitlement is often the very harm that stops timely lodgement of the application.*[512]

9.69. While it is arguable that the factors listed above would take into account disability-related barriers, the South West Autism Network suggested this is not sufficient in addressing the barriers experienced by persons with disability:

> *The just test for extension requires the court to weigh merits and delay together. Where the delay is disability-related, where the person's psychological injury from the abuse itself prevents them from engaging with the legal system, that disability dimension should carry significant weight in the extension analysis. The [CIC Act] provides the just test but no explicit disability gateway.*[513]

Possible options for reform

9.70. The South West Autism Network suggested reforming the CIC Act in relation to the application of the test for whether it is just to extend the time frame for an application:

> *Amend the CIC Act to require the assessor and the District Court, when applying the just test under section 9 for extension of time, to give specific weight to disability-related incapacity to engage with the legal system, including the impact of the very psychological injury for which compensation is sought. The provision should … make redress meaningfully available to victims of violence with disability.*[514]

9.71. In specifically addressing some of the barriers further explored in Part B, the South West Autism Network also made this suggestion:

> *Amend the [CIC Act] to expressly accommodate people with disability throughout the claims process, including communication support, plain language documentation, and extended limitation periods.*[515]

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512 Preliminary Response 24 (South West Autism Network Inc) 144.
513 Preliminary Response 24 (South West Autism Network Inc) 144.
514 Preliminary Response 24 (South West Autism Network Inc) 152, Recommendation K1A.
515 Preliminary Response 24 (South West Autism Network Inc) 152, Recommendation K1.

9.72. These proposals have largely been addressed in Part B.

9.73. We invite your feedback on any or all of the following questions:

98. Should the Criminal Injuries Compensation Act be amended to:

(a) permit applications for compensation to be made other than through the submission of the approved written form (for example, by making an application orally to a staff member of the Office of Criminal Injuries Compensation, who records the details of the application)? If so, what other formats for applications should be permitted?

(b) specifically require that the impact of an applicant's disability be taken into account in determining whether an extension of time to bring an application should be granted?

10. Witnesses

Overview

10.1. We have been asked specifically to consider the experiences of persons with disability as witnesses within the Western Australian court and tribunal system. A **witness** is a person who gives information (known as evidence) to a court or tribunal about something they saw, heard, experienced or know about. For example, a witness may be:

- a victim of a crime;
- a person who saw an accident happen;
- a doctor who treated a person;
- a person with expertise on a particular subject, for example a fingerprint expert; or
- an accused person.

10.2. Witnesses are involved in both criminal and civil proceedings in courts, as well as in tribunal proceedings (which we discuss in Chapter 13).

10.3. Participating in court proceedings can be an intimidating and stressful experience for any witness: it can require a person to recall and communicate information (about potentially distressing events and experiences) in an unfamiliar, formal environment under scrutiny. For a witness with disability, these challenges may be compounded if barriers prevent their full and effective participation in the process of giving evidence.

10.4. For some persons with disability, the rules relating to the competence of witnesses may operate as barriers to participating in proceedings as a witness.

10.5. Stakeholders' preliminary feedback also identified how certain assumptions and expectations (for example, about communication style and social interaction) are embedded in assessments of the reliability and credibility of witnesses. These can also operate as barriers for some witnesses with disability.

10.6. Witnesses with disability may also experience barriers to participation arising from the processes for requesting (and the requirements for obtaining) adjustments and supports to provide evidence in proceedings.

Some context

10.7. Under the CRPD, witnesses with disability have the right to equal participation in all legal proceedings.[516]

10.8. The International Principles and Guidelines also recognise the importance of ensuring that processes in the court and tribunal system enable

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[516] *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3, Article 13(1) (entered into force 3 May 2008).

witnesses (along with parties and jurors) to use any form of communication necessary to fully participate in proceedings.[517]

10.9. The ALRC found that persons with disability face a range of practical and procedural barriers that may limit their ability to participate in the justice system as a witness.[518] The AHRC further observed that persons with disability often experience prejudicial assessments of their ability to give evidence;[519] this can also operate as a barrier to their being called as a witness.

Scope of this chapter

10.10. The primary law in Western Australia that sets out who may be a witness and how a witness can give evidence in court is the laws of evidence.[520]

10.11. However, the laws of evidence do not always apply to all proceedings in courts. For example:

- the Coroner's Court does not have to apply the laws of evidence in an inquest;[521] and
- another law may limit the application of the laws of evidence in specific proceedings.[522]

10.12. As we explained in Chapter 1, we are not specifically reviewing Western Australia's laws of evidence in Project 115, as they have been the subject of recent and significant reform.

10.13. However, in this chapter we refer to some parts of the laws of evidence in Western Australia, primarily the Evidence Act 2025 (which will soon replace the Evidence Act 1906).[523] We do so to identify how this legislation is relevant to some of the barriers experienced by witnesses with disability (including by enabling the provision of adjustments and supports for some witnesses with disability), so that you can provide us with feedback on what, if any, additional options for legislative reform we should consider in relation to witnesses.

10.14. As we are not reviewing the Evidence Act 2025, we are not seeking feedback on how its provisions could or should be changed, unless we expressly request that feedback. On the whole, we will only make

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517 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) 16, Guideline 3.2(e).

518 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.156].

519 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 21.

520 Other laws may affect how witnesses give evidence. We welcome your feedback on whether we should consider any other laws that apply to witnesses.

521 *Coroners Act 1996* (WA) s 41.

522 See, for example, *Family Court Act 1997* (WA) s 202H.

523 As stated in Chapter 1, the substantive provisions of the Evidence Act 2025 will commence operation on 18 September 2027.

recommendations in relation to matters that are not addressed by the Evidence Act 2025.

Participating in court proceedings as a witness

10.15. Giving evidence in court can be intimidating and stressful for many witnesses: it places significant pressure on a person's recall and communication skills, in an adversarial and highly formal environment.

10.16. Witnesses are frequently compelled to give evidence, and some witnesses would not agree to participate in court proceedings if given the choice. Witnesses may not be given the same opportunities for support as other participants in court proceedings as they cannot have their own legal representation, and they usually do not communicate directly with the court.

10.17. While all witnesses face these challenges, their impact may be exacerbated for witnesses with disability, especially if the laws and processes for giving evidence create barriers to participating fully in hearings.

10.18. In most cases, a witness is compelled by a document called a 'summons' or subpoena to attend a court in person to give evidence at the request of one of the parties to the proceeding. On the day of the hearing, the witness will usually be required to wait outside the courtroom until they are called to give their evidence, so that they do not hear the evidence of other witnesses. When the court is ready to hear their evidence, the witness will enter the courtroom and sit in the witness box.

10.19. The party to the proceedings that required the witness' attendance will ask questions first. This is called the 'examination-in-chief' of the witness. During the examination-in-chief, the witness can only be asked open questions – for example, questions that start with 'who', 'what', 'how' or 'when'. The person asking the questions cannot ask leading questions – for example, questions that suggest the answer, or that permit the witness to answer 'yes' or 'no'.

10.20. The other party to the proceedings is then permitted to question the witness. This is called the 'cross-examination' of the witness. During the cross-examination, the witness can be asked leading questions. The party questioning the witness may be trying to challenge the witness' evidence, point out inconsistencies, or suggest a different version of events.

10.21. The party that called the witness may ask the witness further questions after the cross-examination, but only to clarify any issues that arose. This is known as the 're-examination' of the witness.

10.22. The length of a witness' evidence depends on the facts of the case. Some witnesses may be required to give evidence over multiple days. During the course of their evidence, a witness may be asked to examine or consider documents or other things (such as photographs) which form part of the evidence, and answer questions about them.

10.23. In order to decide whether a witness' evidence should be accepted, a judge, magistrate or jury will decide whether a witness' evidence is reliable

(its 'reliability') and the extent to which it can be accepted as truthful and believable (which is referred to as the witness' 'credibility').

General barriers arising from the process of giving evidence

10.24. The process for giving evidence reflects assumptions about what a witness can and cannot do. For example, it assumes that a witness can sit still for extended periods of time, follow and answer questions posed by lawyers and parties and regulate their emotions throughout the process.

10.25. Some stakeholders observed in their preliminary responses that the assumptions embedded in the process of giving evidence present barriers to the equal participation of some witnesses with disability. Many of the issues identified by stakeholders in this regard align with our discussion of communication barriers across the court and tribunal system in Chapter 6.

10.26. For example, Sussex Street noted that the justice system assumes that witnesses can recall events, communicate them clearly and withstand sustained questioning. It submitted that these assumptions do not hold for some persons with disability, for example, because they may recall information in a non-linear way, or because fatigue may affect their communication.[524]

10.27. Community Legal observed that witnesses are assumed to be able to recall events in a coherent, ordered and consistent sequence. It commented that memory impairment, fragmented recall and difficulty with chronological sequencing are common features of many disabilities. Community Legal submitted that, if witnesses with a memory impairment are not provided with appropriate adjustments, they will be structurally disadvantaged in giving evidence.[525]

10.28. Consumers of Mental Health WA submitted that giving evidence can be particularly challenging for neurodivergent people. It referred to the experience of a witness with ADHD who had memory issues and sometimes found it difficult to recall things precisely. The witness said that the high-pressure environment of the courtroom resulted in their having a 'mental blank' and made them feel that they could not fully answer the questions asked of them.[526]

10.29. In its Equal Before the Law report, the AHRC also outlined some ways in which the process of giving evidence can disadvantage persons with disability. For example:[527]

- witnesses with communication difficulties may be disadvantaged by the emphasis on oral evidence in court proceedings;

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524 Preliminary Response 25 (Sussex Street) [5.3].

525 Preliminary Response 37 (Community Legal Western Australia) 14.

526 Preliminary Response 28 (Consumers of Mental Health WA) 16.

527 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 23.

- the hostility of cross-examination and the use of coercive questioning strategies can result in some persons with disability giving inconsistent evidence if they are not provided with appropriate supports; and
- for a witness whose disability affects their memory and recall, a long delay between the relevant events and the court proceedings can impact evidence more negatively than it does for a person without that disability.

10.30. We invite your feedback on the following question:

99. What legislative amendments, if any, might address the barriers to participation for witnesses in court proceedings?

Rules on the competence of witnesses

Current law and practice

10.31. A person can only give evidence in a court if they are considered 'competent' to do so. The law sets out rules to determine if a person is competent to give evidence.

10.32. The Evidence Act 2025 states that every person is assumed to be competent to give evidence.[528] However, a person will not be competent to give evidence about a fact if, for any reason, including a disability:[529]

- the person 'does not have capacity' to understand a question about the fact or to give an answer that can be understood to a question about the fact; and
- the person's incapacity cannot be 'overcome' (**competence test**).

10.33. The Evidence Act 2025 recognises that a person who is not competent to give evidence about a fact may be competent to give evidence about other facts.[530] For example, a person may not be competent to give evidence about certain facts, such as their financial transactions or medical history, but may be competent to give evidence about other facts, such as who they saw or what they did on a particular day.

10.34. The way that a person gives their evidence – that is, whether they give evidence under an oath or affirmation (known as sworn evidence) or without taking an oath or affirmation (known as unsworn evidence) – depends on the application of an additional test, which we discuss below.

10.35. A person who is competent to give evidence (because they can understand and give an answer to a question about a fact) can only give sworn evidence if they 'have the capacity' to understand that they have an obligation to tell the truth when giving evidence.[531]

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528 *Evidence Act 2025* (WA) s 22.
529 *Evidence Act 2025* (WA) s 23(1).
530 *Evidence Act 2025* (WA) s 23(2).
531 *Evidence Act 2025* (WA) s 23(3).

10.36. If a person is not competent to give sworn evidence, they may be competent to give unsworn evidence provided the court tells them that:[532]

- it is important to tell the truth;
- they should tell the court if they do not know, or cannot remember, the answer to questions asked of them; and
- they may be asked questions that suggest some things are, or are not, true and that they should agree only with those things they believe to be true, and feel no pressure to agree with things they believe are untrue.

10.37. Witnesses are expected to give sworn evidence unless the court finds they are not competent to do so.

10.38. The ALRC observed that the wording of the competence test implies that a person's lack of capacity to understand a question about a fact may be overcome if the person is provided with support or assistance to give evidence. For example, a court could consider what supports are available to a witness (such as a support person or alternative communication methods), and whether the witness would be competent to give evidence if they were provided with those supports. However, the competence test does not expressly require a court to assess a witness' competence in the context of the provision of supports.[533]

Barriers

10.39. As discussed, the laws of evidence give a court the power to decide whether a witness is competent to give evidence. However, in practice, other participants in the justice system will reach a view as to whether a witness with disability is likely to be found to be a competent witness and will decide whether that person should be called to give evidence.

10.40. Sometimes these decisions will have implications for whether a case will be commenced or continued. For example, a police prosecutor may decide not to proceed with a criminal prosecution because of assumptions made as to whether a complainant or a key witness with disability is competent to give evidence. Similarly, a party may decide not to commence civil proceedings because of assumptions about whether a key witness with disability is competent to give evidence in support of their case.[534]

10.41. Even if parties to proceedings form the view that a person with disability meets the competence test, they may decide not to call that person as a

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532 *Evidence Act 2025* (WA) s 23(5).

533 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.166]. The ALRC was considering the competence test in the *Evidence Act 1995* (Cth). The competence test in the Evidence Act 2025 is based on the competence test in the Commonwealth law.

534 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 23; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.156]-[7.160]; *The Justice Project: People with Disability (Part 1)* (August 2018) 46-47.

witness if they are concerned that because of their disability, the person's evidence will not be regarded as reliable or credible.

10.42. In this context, the ALRC identified the competence test as a barrier that may limit the ability of persons with disability to participate as witnesses. It noted that the competence test may result in people with intellectual disabilities being perceived as unable to give evidence.[535]

10.43. The AHRC also observed that persons with disability frequently experience prejudicial assessments of their competence to give evidence.[536] The ALRC noted that in the criminal context, this may result in some crimes going unprosecuted because of preconceived views about the ability of a complainant, or key witness, with disability to give evidence.[537]

10.44. In her preliminary response, the Public Advocate told us that some parties to proceedings, such as police investigators and prosecutors, take an inconsistent approach when assessing whether a person with a 'decision-making disability' is competent to give evidence. The Public Advocate observed that sometimes an assumption is made that a person who is subject to a guardianship order is not competent to give evidence, which is not necessarily the case.[538]

10.45. The Public Advocate noted that it is possible that a person may be under a guardianship order because they do not have capacity to make complex medical treatment decisions. However, they may still be able to understand and answer a question about a fact, particularly if support is provided to them. The Public Advocate commented that an 'all-or-nothing' approach may deprive persons with disability of a chance to participate in the justice system as witnesses.[539]

10.46. In some cases, the competence test may influence the decisions made by parties to criminal or civil proceedings as to whether to call a person with disability as a witness. In other cases, the competence test may have no impact if parties are making such decisions based on other criteria (or assumptions) as to whether the person with disability is likely to be considered by the fact-finder as an honest and reliable witness.

10.47. As we have noted, our concern is with the competence test which is applied by the courts to determine whether a person with disability is competent to give evidence.

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535 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.156]-[7.157].

536 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 21.

537 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.156]-[7.160].

538 Preliminary Response 17 (Public Advocate) 7.

539 Preliminary Response 17 (Public Advocate) 7.

Possible options for reform

10.48. In its Equality, Capacity and Disability Report, the ALRC recommended that competence tests be changed to explicitly require the competence of a witness to be determined in the context of the supports available.[540]

10.49. This would require the competence test in the Evidence Act 2025 to be amended to provide that a person is not competent to give evidence about a fact if the person is unable to understand or answer a question about that fact, even if provided with support.

10.50. The ALRC noted that this proposed reform would, however, have little practical effect if courts are not obliged to provide supports to witnesses.[541]

10.51. We invite your feedback on any or all of the following questions:

100. Should the competence test in the Evidence Act 2025 be amended to require a court to take into account whether the witness would be competent to give evidence if provided with the support or assistance they require to give their evidence?

101. What information would a court need to make that assessment?

102. Should there be any obligation on the court to provide the required supports to the witness?

103. How should any such obligation be imposed?

Assessments of witness reliability and credibility

Current law and practice

10.52. When assessing the evidence of a witness, a finder of fact will need to consider their credibility and their reliability. As we have already explained, 'credibility' refers to a witness' honesty or truthfulness – that is, whether they genuinely believe that they are telling the truth.

10.53. 'Reliability', on the other hand, refers to a witness' ability to give an accurate account – that is, their ability to accurately discern and relay the truth as to an event, including their ability to observe and remember facts.[542]

10.54. Credibility and reliability are not the same things. A witness may be entirely honest or truthful, but inaccurate,[543] because, for example, they have a faulty memory. A trier of fact (whether a judge, magistrate, or jury) will not rely on evidence which they do not find to be honest and reliable.[544]

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540 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Recommendation 7-7, [7.170].

541 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Recommendation 7-7, [7.170].

542 *IMM v The Queen* (2016) 257 CLR 300, [114].

543 *State of Western Australia v Davidson* [2022] WASC 70 [15].

544 Cf *ZNO v State of Western Australia* [2025] WASCA 178 [37].

10.55. The question-and-answer style used to examine a witness can limit and distort the accuracy of the witness' testimony.[545] Adversarial questioning styles can unfairly impact witnesses who may be more suggestible than others, such as some people with intellectual impairment.[546] The nature of this questioning can diminish the accuracy of evidence that is given in court.[547]

10.56. The Evidence Act 2025 allows a court to control the questioning of a witness. For example, a court can make orders about:

- the way in which a witness is to be questioned;
- the use of documents and other things during the questioning a witness; and
- the presence and behaviour of any person in connection with the questioning of a witness.[548]

10.57. A court can prevent a witness from being asked leading questions where the witness' disability may affect their answers to such questions.[549]

10.58. In addition, a witness who cannot hear adequately may be questioned in 'any appropriate way'.[550]

10.59. None of these measures is available under the Evidence Act 1906. However, a court's general power to control the conduct of proceedings would allow it to control, to some extent, the manner in which a witness is questioned.

10.60. Under the Evidence Act 2025, a court must also prohibit any question that is:[551]

- misleading or confusing;
- intimidating, offensive or humiliating;
- asked in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- based on a stereotype, including a stereotype based on the witness' disability.

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545 Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 16 August 2010) [5.7].

546 Mark R Kebbell, Christopher Hatton and Shane D Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?' (2004)(9) *Legal and Criminological Psychology* 23, 31-32.

547 Mark R Kebbell, Christopher Hatton and Shane D Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?' (2004)(9) *Legal and Criminological Psychology* 23, 32.

548 *Evidence Act 2025* (WA) s 35.

549 *Evidence Act 2025* (WA) ss 51(1),(4)(d).

550 *Evidence Act 2025* (WA) s 40(1).

551 *Evidence Act 2025* (WA) s 50.

10.61. The Evidence Act 1906 contains a similar provision, although it does not expressly require a court to prohibit a question that is based on a stereotype of a witness' disability.[552]

Barriers

10.62. A key concern of stakeholders was that the evidence of some witnesses with disability may be regarded as unreliable or as not credible, particularly if the witness does not conform to conventional communication and behavioural expectations.

10.63. For example, as one stakeholder explained:

> *Courts and tribunals frequently rely on implicit expectations regarding communication style, eye contact, body language, emotional expression, responsiveness and social interaction. These behaviours are often treated as indicators of credibility, reliability, engagement or respect.*
>
> *However, such expectations frequently reflect socially constructed norms rather than objective measures of truthfulness or competence.*
>
> *Many people with disability communicate, process information, express emotion or engage socially in ways that differ from these expectations. Some autistic people, for example, may avoid eye contact, communicate in a direct or atypical manner, or express emotion in ways that differ from conventional expectations. People with psychosocial disability, intellectual disability, or who are non-speaking may similarly communicate or interact in ways that may be unfamiliar within legal settings.*
>
> *Without an awareness of disability-related differences in communication and presentation, these behaviours may be misinterpreted as evasiveness, unreliability, lack of credibility, non-compliance or disrespect. Historically, the evidence and experiences of people with disability have too often been discounted or afforded less weight because they did not conform to conventional expectations of communication or behaviour.*[553]

10.64. South West Autism Network noted:

> *Autistic people giving evidence in court face credibility challenges that come directly from autism-related communication differences. Atypical eye contact, flat or inconsistent affect, literal responses to questions, difficulty with narrative coherence under questioning, and sensitivity to sensory overload in a courtroom can all lead juries and judicial officers to discount an autistic witness's evidence.*[554]

10.65. Sussex Street told us that, in some instances, a witness with disability may be perceived as unreliable because of the way they respond to questions,

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552 *Evidence Act 1906* (WA) s 26.

553 Preliminary Response 34A (Ms Cátia Malaquias OAM) 7.

554 Preliminary Response 24 (South West Autism Network Inc) 79.

rather than because of their actual knowledge of events as conveyed in their evidence.[555]

10.66. The AHRC and the ALRC also observed in their respective reports that witnesses with disability may face barriers to establishing credibility and reliability.

10.67. For example, the AHRC said that:

> *Failure to identify disability, provide the necessary supports and adjustments or take disability into account during communications, compounded by negative attitudes, assumptions and stereotypes of people with disabilities, often results in people with disabilities being seen as not credible and their evidence as not reliable.*[556]

10.68. The ALRC referred to comments from stakeholders that people with cognitive disability are vulnerable to prejudicial assessments of their credibility because of assumptions made by the court, prosecutors and juries about their ability to understand their obligation to tell the truth.[557]

10.69. In addition, the ALRC referred to feedback that people with cognitive disability are vulnerable to having their evidence discredited or considered unreliable in court because of their behaviour and communication style.[558]

10.70. The ALRC noted that this is despite research indicating that:

> *contrary to public perception, most people with intellectual disabilities are no different from the general population in their ability to give reliable evidence (as long as communication techniques are used that are appropriate for the particular person).*[559]

Possible options for reform

10.71. Despite the assessment of witnesses with disability being a key concern in preliminary responses, stakeholders we consulted in our preliminary consultations did not raise possible reforms to address these issues. Relevantly, the provisions of the Evidence Act 2025 may, when they come into effect, operate to address these issues.

10.72. Alongside these provisions, this may be an area in which the need for disability education and training is particularly important. For example, the ALRC identified, as a primary area of concern, the need for education of the judiciary and the profession in relation to 'the identification of vulnerable witnesses and the use of the uniform Evidence Acts to

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555 Preliminary Response 25 (Sussex Street) [5.3].

556 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 20.

557 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.157].

558 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.157].

559 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.162].

constrain the use of improper questions in cross-examination of such witnesses, and of witnesses generally'.[560]

10.73. We invite your feedback on any or all of the following questions:

104. What legislative amendments, if any, are necessary to respond to barriers experienced by witnesses with disability in relation to assessments of their credibility and reliability as witnesses?

105. Should there be mandatory judicial education in relation to issues affecting witnesses with disability?

Adjustments and supports for witnesses with disability

Current law and practice

10.74. The Evidence Act 2025 allows certain adjustments and supports to be provided to witnesses with disability. Some of these adjustments are not currently available to witnesses under the Evidence Act 1906.

Manner of giving evidence

10.75. In addition to the provisions related to the questioning of witnesses, the Evidence Act 2025 provides that a witness who cannot speak adequately may give evidence by 'any appropriate means'.[561]

10.76. This adjustment is not expressly provided for in the Evidence Act 1906.

Adjustments for special witnesses

10.77. The Evidence Act 2025 also allows for the provision of certain adjustments and supports for a 'special witness'.

10.78. A court must treat a witness as a special witness if they have a 'mental impairment' that affects their ability to give evidence.[562] A court may treat a witness as a special witness if they have a disability that would prevent them from giving evidence if they did not have the benefit of adjustments available to special witnesses.[563]

10.79. The following adjustments and supports may be made available to a special witness while giving evidence in both criminal and civil proceedings:

- a special witness may have a support person or support animal sit with them while they give evidence;[564]

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560 Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 16 August 2010) [3.57].

561 *Evidence Act 2025* (WA) s 40(2).

562 *Evidence Act 2025* (WA) s 229(1)(d). A 'mental impairment' means any, or any combination, of an intellectual disability, a mental illness, an acquired brain injury or dementia. See s 3 of the *Evidence Act 2025* (WA), which adopts the definition in s 9(1) of the *Criminal Law (Mental Impairment) Act 2023* (WA).

563 *Evidence Act 2025* (WA) s 230(1).

564 *Evidence Act 2025* (WA) ss 231, 232.

- a person can be appointed to act as a communicator for the special witness. A communicator's role is to communicate and explain to the witness the questions they have been asked, and to explain the witness' evidence to the court. A communicator can be any suitable and competent person (including a family member or carer of the witness). This person does not need to have any particular training, study or experience;[565] and
- a special witness may give their evidence by video link from a separate room. The purpose of this measure is to enable the witness to give their evidence from a separate place from the accused in a criminal proceeding, or another party in a civil proceeding.[566]

10.80. In criminal proceedings, a court may permit the evidence of a special witness to be pre-recorded before the hearing.[567]

10.81. The Evidence Act 1906 also provides for the above adjustments for a special witness, except for allowing a support animal to assist the witness.[568]

Communication directions

10.82. As we identified in Chapter 6, one of the new measures introduced by the Evidence Act 2025 is communication directions. A court can give communication directions to ensure that the communication, support or other needs of a witness are met in a fair and effective manner.[569] For example, a court may give communication directions about:[570]

- the manner in which a witness must be questioned;
- the duration of questioning and breaks in questioning;
- the use of models, plans, maps or other similar aids to question a witness; and
- the cross-examination of a witness.

10.83. A court may hold a hearing, called a ground rules hearing, to determine the communication, support or other needs of a witness and to decide whether any communication directions should be made to meet those needs.[571]

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565 *Evidence Act 2025* (WA) s 233.

566 *Evidence Act 2025* (WA) Part 7, div 7.

567 *Evidence Act 2025* (WA) s 263(1)(c).

568 *Evidence Act 1906* (WA) s 106R(4)(a). See also Department of Justice Western Australia, *Equal Justice Bench Book* (2 September 2021) 251.

569 *Evidence Act 2025* (WA) s 294(1).

570 *Evidence Act 2025* (WA) s 294(2).

571 *Evidence Act 2025* (WA) s 295.

Use of witness intermediary

10.84. The Evidence Act 2025 also establishes a witness intermediary service in Western Australia.[572] The primary function of a witness intermediary is:

> *To facilitate communication to and by a witness for the purpose of ensuring that any evidence given by the witness is as complete, accurate and coherent as possible.*[573]

10.85. A witness intermediary is only available to assist a witness during a court hearing, but not during any procedures outside the court, for example, during an interview with police or a lawyer for the purpose of obtaining a witness statement.

10.86. The witness intermediary service is to be available for use in criminal proceedings, child protection proceedings and any civil proceedings prescribed by regulations.[574] As the Evidence Act 2025 is not yet in force, regulations have not been made, and it is not yet known if or when witness intermediaries will be available in other civil proceedings.

10.87. A witness intermediary may be appointed to assist a witness if one of the following circumstances applies:[575]

- the witness is a special witness;
- the witness appears to have specific communication needs and to require the assistance of a witness intermediary to give complete, accurate and coherent evidence; or
- the court otherwise considers it appropriate for the witness to be assisted by a witness intermediary.

10.88. The court may request an assessment of whether a witness requires the assistance of a witness intermediary to give evidence in a proceeding.[576]

10.89. In general, if a witness intermediary is appointed to assist a witness, the court must hold a ground rules hearing.[577] At the ground rules hearing, the witness intermediary can inform the court of their recommendations as to any communication directions which should be made, and the court can consider if any such directions should be made.

10.90. If a witness intermediary is assisting a witness in a proceeding, they:[578]

- must be present whenever the witness is giving evidence;
- may make recommendations to the court about how best to communicate with the witness;

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572 *Evidence Act 2025* (WA) s 285.
573 *Evidence Act 2025* (WA) s 287(1).
574 *Evidence Act 2025* (WA) s 286.
575 *Evidence Act 2025* (WA) ss 290(4)(b)-(d), 291.
576 *Evidence Act 2025* (WA) s 289.
577 *Evidence Act 2025* (WA) s 295(4).
578 *Evidence Act 2025* (WA) s 288.

- may intervene in the questioning of the witness if they identify a communication difficulty;
- may communicate and explain to the witness any questions asked to the witness; and
- may communicate and explain to the court the evidence given by the witness.

10.91. A witness intermediary is different from a communicator in that they are:[579]

- required to be accredited, and to have certain qualifications, training or experience;
- an officer of the court, meaning they have an overriding duty to the court to act honestly and impartially; and
- required to take an oath or make an affirmation that they will exercise their functions to the best of their ability.

10.92. The appointment of a witness intermediary for a witness does not prevent the witness having a support person or using a communicator while giving evidence.[580]

Barriers

Inconsistent access to adjustments and support

10.93. Several stakeholders commented that supports and procedural adjustments for witnesses are provided inconsistently.[581] This may result in some witnesses with disability experiencing challenges in giving evidence that could have been avoided had the necessary adjustments been provided.

10.94. For example, the Centre for Human Rights Education submitted that:

> *Access to support persons, communication assistants, and other reasonable adjustments is inconsistent and poorly understood by many court users and, in some cases, court staff. Persons with disability face particular difficulty engaging effectively as…witnesses…when these supports are unavailable, unknown to them, or dependent on individual staff awareness and goodwill.*
>
> *Knowing that adjustments exist, knowing how to request them, and knowing how to assert that entitlement when met with uncertainty or resistance all require a level of institutional knowledge that the system does not proactively provide.*[582]

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579 *Evidence Act 2025* (WA) ss 285(2)-(3), 287(2)-(3), 288(5).

580 *Evidence Act 2025* (WA) s 288(6).

581 Preliminary Response 17 (Public Advocate) 7; Preliminary Response 5 (John Curtin Law Clinic, Curtin University) [1.2]; Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 17-18.

582 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 17-18.

10.95. Consistent with the broader issues discussed in Chapter 3, one of the reasons identified by stakeholders for the inconsistent provision of adjustments is the current process for requesting witness adjustments.

10.96. The Public Advocate noted that, at present, it is the responsibility of the party calling the witness to make an application for adjustments to be provided. As a result, adjustments or support will not be provided for a witness unless the party calling the witness knows of their need for adjustments or support and raises it with the court. Moreover, as a witness does not have their own legal representation, they cannot themselves apply to the court for adjustments.[583]

10.97. Curtin Law Clinic similarly observed that courts fail to conduct a proactive inquiry into whether the witnesses in a proceeding have a disability and require adjustments.[584]

10.98. The AHRC found that many persons with disability fail to receive support services in court, despite these services being available. The AHRC gave a number of reasons for this gap, including that:[585]

- persons with disability and their legal representatives are not aware of the available supports;
- the courts do not provide sufficient information about available supports; and
- the necessary services are under-resourced or unavailable.

10.99. In the Justice Project, the Law Council of Australia referred to the AHRC's findings and highlighted a submission which noted that the effectiveness of flexible rules of evidence and other adjustments depends on the willingness of the courts to use these measures. This in turn depends on the courts being informed and competent to recognise the communication needs of witnesses.[586]

10.100. Several stakeholders made submissions about witnesses with disability being unable to receive the support of an intermediary under the current law.[587] Some of the concerns raised by these stakeholders will be addressed once the Evidence Act 2025 begins to operate, and the witness intermediary service begins operation.

Witnesses with disability may have to provide personal information to access adjustments or support

10.101. The Public Advocate highlighted that a witness may be requested to provide sensitive and detailed medical reports and personal information to

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583 Preliminary Response 17 (Public Advocate) 7.

584 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) [2.3].

585 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 24.

586 Law Council of Australia, *The Justice Project: Courts and Tribunals (Part 2)* (August 2018) 46.

587 Preliminary Response 24 (South West Autism Network Inc) 6, 46; Preliminary Response 38 (Community and Public Sector Union/ Civil Service Association of WA) 2.

support an application for the provision of adjustments.[588] This may pose an additional barrier to a witness with disability securing appropriate adjustments.

10.102. The Public Advocate expressed the view that a person should not be required to share highly sensitive information about themselves unless it is absolutely necessary.[589]

10.103. We invite your feedback on any or all of the following questions:

106. In your experience, are witnesses with disability required to provide detailed medical reports and personal information when an application is made to a court for the provision of adjustments?

107. If yes, what kind of information is requested and how is it used?

Possible reform options

10.104. One possible option for reform may be to explicitly require a court to consider whether any person who is a witness in any proceedings has a disability and needs any adjustments or supports to give evidence in the proceedings.

10.105. One possible approach to imposing such a requirement may be through a legislative statement of principles, which we have identified at various points throughout this paper, and discuss in more detail in Chapter 14.

10.106. As we explained above, under the laws of evidence, a court has the power to provide adjustments to a witness with disability.

10.107. However, a court is not required to make enquiries about, or consider, whether every witness appearing before it requires any adjustments or supports in order to participate. The onus is on the party calling the witness to identify the adjustments required by a witness, and to request that the court provide these adjustments.

10.108. In its preliminary submission, the John Curtin Law Clinic submitted that the courts should be required to enquire whether a witness has a disability and requires accommodations to enable them to effectively give evidence.[590]

10.109. We invite your feedback on any or all of the following questions:

108. Who should be responsible for identifying that a witness needs disability-related support (for example, the court, the party calling the witness or the witness themselves)?

109. Should the law impose a positive obligation on courts to enquire whether, as a result of a disability, a witness requires adjustments or support to give evidence effectively?

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588 Preliminary Response 17 (Public Advocate) 12.

589 Preliminary Response 17 (Public Advocate) 7.

590 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 5.

110. What personal information (including medical reports) should a court be able to request from a witness with disability when considering whether to allow adjustments?

111. What other changes (if any) are required to ensure witnesses with disability receive the adjustments they require?

Should the witness intermediary service be extended?

10.110. As outlined above, a witness intermediary service will be available in Western Australia when the Evidence Act 2025 takes effect. An intermediary will be available to witnesses with disability in criminal proceedings and child protection proceedings, and in prescribed civil proceedings (if any). Some tribunal proceedings – such as in the SAT and the MHT – frequently involve witnesses with disabilities.

10.111. In the Justice Project, the Law Council of Australia recommended that witness intermediary schemes in Australian jurisdictions be made available to assist witnesses across the justice system.[591]

10.112. As already noted, an intermediary will only be made available to a witness in court. They will not be available to assist a witness in any processes outside the hearing. The question of whether witness intermediaries should be made available to assist witnesses outside of court or tribunal proceedings is beyond the scope of Project 115.

10.113. We invite your feedback on the following question:

112. Should the witness intermediary scheme be expanded to assist witnesses with disability in other proceedings in courts and tribunals? If so, which other proceedings?

10.114. We invite your feedback on the following general question:

113. How else, if at all, should the law be changed to enable persons with disability to participate as witnesses in court proceedings?

[591] Law Council of Australia, *The Justice Project: Courts and Tribunals (Part 2)* (August 2018) Recommendation 4.4.

11. Jurors

Overview

11.1. We have been asked specifically to consider the experiences of persons with disability as jurors within the Western Australian court and tribunal system. A **juror** is a person selected to sit on a jury to hear the evidence and decide questions of fact in a trial.

11.2. In this chapter we consider the position of persons with disability participating as jurors in criminal and civil trials. We also consider whether, and if so how, the law should be changed to remove barriers that prevent or impede persons with disability from serving as jurors.

11.3. Trial by jury is an important part of Western Australia's court system. Juries allow the community to directly participate in the administration of justice by hearing evidence and deciding questions of fact in a case. Juries are intended to be representative of the wider community, bringing together people with different views and backgrounds.[592]

11.4. However, current laws and practices operate to prevent many persons with disability from serving as a juror. Some persons with disability may experience barriers to participation as a juror arising from the operation of the *Juries Act 1957* (WA) (**Juries Act**), which prescribes, amongst other matters, who is eligible for jury service and the processes for selecting jurors.

11.5. Other persons with disability who are eligible to serve as jurors may experience environmental and attitudinal barriers when attending court for jury duty which limit or prevent their full participation as a juror.

11.6. There is undoubted value in facilitating more inclusive juries, which benefit from the perspectives and experiences offered by persons with disability. However, ensuring an accused person's right to a fair trial is the bedrock of the criminal justice system. Any reforms intended to facilitate the participation by persons with disability in juries cannot take place without consideration of this fundamental principle.

Some context and the scope of this chapter

11.7. Australia has obligations under the CRPD to facilitate the equal participation of persons with disability in the jury system.[593]

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592 *Cheatle v R* (1993) 177 CLR 541, 560.

593 For example, under Article 5 (equality and non-discrimination), Article 9 (accessibility), Article 13 (effective access to justice, including in relation to the provision of procedural accommodations), Article 21 (freedom of expression and opinion, and access to information) and Article 29 (participation in political and public life). See Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [6.10].

11.8. The International Principles and Guidelines specifically refer to providing equal opportunities to persons with disability to participate in the administration of justice, including as a juror. The Guidelines outline two ways in which states may facilitate the participation of people with disabilities on juries:[594]

- First, by removing all barriers, including laws, that prevent persons with disabilities from serving as jurors.
- Second, by providing all necessary supports and reasonable adjustments to ensure that persons with disability can participate on an equal basis in the jury system.

11.9. We have been informed by the approach outlined in the International Principles and Guidelines in considering the barriers to jury participation faced by persons with disability, and how these may be overcome.

11.10. In recent years the issue of enabling the equal participation of persons with disability in the jury system has attracted public attention.[595]

11.11. In particular, the barriers preventing deaf people and people with vision impairments from being jurors have been the subject of scrutiny. For example:

- In 2006, the NSWLRC published a report on blind and deaf jurors.[596]
- In 2014, a mock trial involving deaf jurors communicating through Auslan interpreters was organised by researchers in New South Wales to assess the impact on a criminal trial.[597]
- Between 2013-2018, the United Nations Committee on the Rights of Persons with Disabilities (which is responsible for overseeing implementation of the CRPD) (**Convention Committee**) considered several complaints from people who were not allowed to participate in jury service in Australia because they were deaf. In three of the cases, including a case brought by a woman from Western Australia, the Convention Committee found that Australia breached its obligations under the CRPD by failing to enable the deaf complainants to serve as jurors with reasonable accommodations.[598]

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594 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) Principle 7, Guidelines 7.1 and 7.2(b)-(c).

595 'Deaf Australians and those with disabilities push to end exclusion from juries', *ABC News Australia*, 8 April 2023) <https://www.abc.net.au/news/2023-04-08/deaf-jury-duty-disability-australian-court-inclusive-juries/102170502>.

596 Law Reform Commission of New South Wales, *Blind or Deaf Jurors* (Final Report No 114, September 2006).

597 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [9.29]-[9.32].

598 Committee on the Rights of Persons with Disabilities*, Views: Communication No 11/2013,* 15th session, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) [9]; Committee on the Rights of Persons with Disabilities*, Views: Communication No 11/2013,* 15th session, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) [9]; Committee on the Rights of Persons with Disabilities, *Views: Communication No 35/2016,* 20th session, UN Doc CRPD/C/20/D/35/2016 (31 August

- In 2020, the Attorney General of Western Australia requested that the Department of Justice consider possible amendments to the Juries Act to enable the participation of persons with disability as jurors in court proceedings. The Department of Justice published a discussion paper seeking feedback but has not publicly released its recommendations to the Attorney General.[599] In its preliminary response to Project 115, the Department of Justice told us that 'legislative amendments are currently being progressed to remove barriers that prevent people who are Deaf from serving as jurors.'[600] The Department of Justice identified that the proposed reforms include amendments to the Juries Act and the Criminal Procedure Act.[601]
- In 2022, the VLRC published a report on making juries more inclusive for people who are deaf, hard of hearing, blind or have low vision.[602]

11.12. Public and international attention has focused on removing barriers to jury service for people with hearing and vision impairments. We recognise, however, that people with other types of disabilities also face barriers to participating equally as jurors.

11.13. Similarly, the Equal Opportunity Commission noted in its preliminary submission that reforms which only reflect the experiences of certain groups of persons with disability may exclude other groups.[603]

11.14. In Project 115 we will consider the experiences of all persons with disability as jurors.

Juries in Western Australia

The role of juries in Western Australia

11.15. Jury trials have been used in this State since the colony of Western Australia was first established.[604] Juries may be used in both civil and criminal trials. Although juries may be used in certain kinds of civil trials, such as defamation trials,[605] juries are used infrequently in civil trials in Western Australia.[606] They are used for serious criminal offences heard in the District Court and the Supreme Court.[607]

2018) [8]; Committee on the Rights of Persons with Disabilities, Views: Communication No 12/2013, 13th session, CRPD/C/13/D/12/2013 (29 May 2015).

599 Department of Justice Government of Western Australia, *Participation of People with a Disability in Jury Service* (March 2020).

600 Preliminary Response 40 (Department of Justice) 12.

601 Preliminary Response 40 (Department of Justice) 12.

602 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022).

603 Preliminary Response 1A (Equal Opportunity Commission).

604 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Final Report No 99, April 2010) 7.

605 *Supreme Court Act 1935* (WA) s 42; *Defamation Act 2005* (WA) s 21.

606 *Kingsfield Holdings Pty Ltd v Sullivan Commercial Pty Ltd [No 2]* [2014] WASC 408 [5].

607 *Criminal Procedure Act 2004* (WA) ss 81, 92.

11.16. While we identify barriers to participation in both civil and criminal juries, our focus is on criminal trials, as this is the main context in which juries operate in Western Australia.

11.17. The role of a jury is to consider the evidence presented in court to decide the facts of the case and apply the law (as directed by the trial judge) to those facts to return a verdict. For example, in a criminal case the jury's verdict will either be that the accused person is guilty or not guilty of the alleged crime.

11.18. A jury is ordinarily comprised of 12 jurors in a criminal trial and six jurors in a civil trial.[608] A jury will usually be required to give a unanimous verdict, however, a majority verdict will be accepted in some circumstances.[609] Juries are not required to give reasons for their verdict.[610]

The selection of juries in Western Australia

11.19. The Juries Act sets out who is eligible for jury service in Western Australia. It also sets out the process for choosing juries for criminal and civil trials, as well as other matters relating to juries. The Criminal Procedure Act contains some specific provisions concerning juries in criminal trials.

11.20. In general terms, the process for selecting a jury for a criminal trial is as follows:

- A list of potential jurors (**jury pool**) is selected randomly from the people on the electoral roll in the geographical area where the trial will be held.[611]
- The people in the jury pool are sent a document called a 'summons' requiring them to attend court on a particular date for jury duty.[612]
- Before the summons date, a jury officer can excuse a person from serving as a juror on application, or on their own initiative, if they are of the view that the person is not capable of performing the functions of a juror.[613] A jury officer can also defer a person's jury service for a short period of time if attending court on the summons date would cause the person hardship or serious inconvenience.[614]
- The people in the jury pool attend court on the summons date. On that date a number of criminal trials will commence. The jury for a particular trial will be selected randomly from the jury pool.[615] Not every person in the jury pool will be selected to sit on a jury.

608 *Juries Act 1957* (WA) ss 18(1)&(4), 19.
609 *Juries Act 1957* (WA) s 49; *Criminal Procedure Act 2004* (WA) s 114.
610 *State of Western Australia v Bell [No 3]* [2014] WASCA 341 [8].
611 *Juries Act 1957* (WA) ss 4, 14, 16A, 26, 29A, 32C.
612 *Juries Act 1957* (WA) s 32D.
613 *Juries Act 1957* (WA) ss 34E-34G, 34I-34J.
614 *Juries Act 1957* (WA) s 34H.
615 *Juries Act 1957* (WA) s 36.

- A person who is randomly selected for a jury will not always be sworn in as a juror for that trial. The accused and the prosecution each have the right to challenge up to three jurors without giving a reason, known as a 'peremptory challenge'.[616] In addition, the prosecution and accused can challenge a juror for specific reasons, including for example that the juror is not eligible or qualified to serve as a juror because they do not meet the criteria in the Juries Act.[617] The trial judge may also excuse a person selected to be a juror if they are of the view that the person is not capable of sitting on the jury.[618]
- Once 12 jurors have been selected, the jurors are sworn in by taking an oath or affirmation to give a true verdict based on the evidence in the trial.[619] The trial will then commence.
- In some cases, particularly in longer trials, the trial judge may decide that more than 12 jurors should be selected and sworn in to sit on the jury in case a juror needs to be discharged by the trial judge because they become unwell or an issue arises in relation to their continued participation.[620] If more than 12 jurors remain on the jury when it is time for the jury to deliberate and decide their verdict, a ballot will be conducted so that only 12 jurors remain.[621]

Barriers arising from the law with respect to juries

11.21. Existing laws prevent some persons with disability from being jurors, or result in some persons with disability being excluded from service on a jury.

11.22. As we discuss in further detail later in this chapter, the parties to a civil or criminal trial by jury have the right to have the matter determined by competent jurors. A competent juror is a person who is able to comprehend the evidence presented to them, follow the court proceedings and deliberate effectively with the other members of the jury to reach a decision.[622]

11.23. The Juries Act imposes criteria which are intended to ensure a trial is heard and determined by competent jurors. However, some of these criteria may operate to prevent a person with disability from serving as a juror, even though they may be capable of performing the functions of a juror.

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616 *Criminal Procedure Act 2004* (WA) ss 104(2)-(4); *Juries Act 1957* (WA) s 40.

617 *Criminal Procedure Act 2004* (WA) s 104(5); *Juries Act 1957* (WA) s 40.

618 *Juries Act 1957* (WA) s 34G.

619 *Criminal Procedure Act 2004* (WA) s 105; *Juries Act 1957* (WA) s 40.

620 *Criminal Procedure Act 2004* (WA) s 115; *Juries Act 1957* (WA) s 40.

621 *Juries Act 1957* (WA) s 18.

622 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [9.64].

Some persons with disability may not be asked to do jury duty

Current law and practice

11.24. As we outlined above, only a person who is enrolled to vote in Western Australia may be given a summons to attend court for jury duty.[623] Some people with particular types of impairment, including cognitive and intellectual impairment, may not have been enrolled to vote,[624] or may have had their name removed from the electoral roll.[625] This is one way in which some persons with disability are excluded from being a juror.

11.25. The Juries Act does not contain a general exclusion for persons with disability from serving as jurors. However, certain groups of persons with disability are deemed to be not qualified to serve on a jury, including people who are involuntary patients under the MH Act, people for whom a guardian or administrator has been appointed under the Guardianship and Administration Act, and people covered by the CLMI Act.

11.26. The Juries Act requires people who are not qualified for one of these reasons to disclose it if they receive a summons for jury service, and they must then be excused from the summons.[626]

Possible options for reform

11.27. South West Autism Network gave preliminary feedback that the Juries Act should be amended to remove the presumptive exclusion of certain persons with disability from jury duty. It further submitted that an accommodation-based framework consistent with the CRPD and the International Principles and Guidelines should be introduced.[627]

11.28. We invite your feedback on the following question:

114. Should the eligibility criteria in the Juries Act for being summoned for jury duty be changed? If so, how?

Potential jurors are required to tell the court if they have a disability that may impact their ability to be a juror

Current law and practice

11.29. Unlike the position discussed in many other chapters in this paper, the Juries Act explicitly requires the identification of some types of disability which may impact a person's ability to participate as a juror.

11.30. A person who attends court for jury duty in response to a summons is required to tell the court if they have a physical disability or 'mental

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623 *Juries Act 1957* (WA) s 4.

624 For example, because the Electoral Commissioner has determined that they do not have capacity to vote: see *Electoral Act 1907* (WA) ss 18, 206A.

625 For example, where the SAT makes a declaration that a person is not capable of voting under s 111 of the *Guardianship and Administration Act 1990* (WA) and the person's name is consequently removed from the electoral roll pursuant to s 51AA of the *Electoral Act 1907* (WA).

626 *Juries Act 1957* (WA) s 34G(2).

627 Preliminary Response 24 (South West Autism Network Inc) 228, Recommendation K4.

impairment' that may mean they are 'not capable of effectively serving as a juror'.[628] The term 'mental impairment' is used in the Juries Act to mean intellectual disability, mental illness, brain damage, dementia or senility.[629]

11.31. Similarly, a person must tell the court if their ability to understand spoken or written English, or to speak English, may mean they are not capable of effectively serving as a juror.[630] For example, this would require a person to tell the court that they use Auslan to communicate.

11.32. If a person discloses that they have a disability that may mean they are not capable of effectively serving as a juror, a judge or jury officer will then assess whether the person is able to fulfil that role. The Juries Act does not expressly require the judge or jury officer to consider if a person with disability could serve as a juror if they were provided with appropriate supports or reasonable adjustments.

11.33. If the judge or a jury officer is satisfied that the person will not be capable of serving effectively as a juror because of their disability or inability to understand spoken or written English, they must excuse the person from jury duty.[631] This means that the person is not eligible to be a juror on that occasion.

11.34. Further, if a jury officer is of the view that the person is 'permanently incapable of serving effectively as a juror because of a physical disability or mental impairment', they may issue a certificate to that person which permanently excuses them from serving as a juror.[632] If a person is permanently excused from jury duty, they will not be eligible to ever be a juror.

11.35. Even if a person with a disability is not excused from answering a summons, they may nevertheless be excused if they are then selected from the jury pool for a particular jury. Practical barriers – such as the physical layout of a court room (including the availability of wheelchair ramps), or whether technology (such as a hearing loop) is available and operating in a court room – can result in a person with a disability being excused by a trial judge, because the adjustments they need to permit them to effectively participate as a juror are not available to them.

Possible reform options

11.36. One option for reform to enable more persons with disability to serve as jurors may be to require jury officers and the courts to consider whether a person with disability could serve as a juror if reasonable adjustments were provided.

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628 *Juries Act 1957* (WA) ss 32FA(1), 34B(3), Schedule 2, cl 8.

629 *Juries Act 1957* (WA) s 3(1) (definition of 'mental impairment').

630 *Juries Act 1957* (WA) ss 32FA(1), 34B(3), Schedule 2, cl 9.

631 *Juries Act 1957* (WA) ss 34G(2)(e)-(f).

632 *Juries Act 1957* (WA) s 34E(1).

11.37. The law relating to juries in the ACT imposes such a requirement. Under the *Juries Act 1967* (Act) (**ACT Juries Act**):[633]

- where a person may be unable to properly discharge the duties of a juror because of a mental or physical disability, the court is required to consider if support can reasonably be provided to the person;
- if the court is satisfied that support that would enable the person to properly discharge the duties of a juror can reasonably be given, the court must make a direction that the support be provided to the person; and
- when determining if support can reasonably be given, the court may consider any issue it considers relevant, including whether the support would impose a disproportionate burden on court resources, facilities and timeframes.

11.38. The ACT Juries Act gives several examples of the supports that may be provided to a prospective juror. These examples are: an interpreter (including an Auslan interpreter), an assistance animal, a disability aid and a support person.[634]

11.39. The law in NSW contemplates that a person's ability to serve as a juror is to be assessed in the context of reasonable accommodations available to the juror. The *Jury Act 1977* (NSW) (**NSW Juries Act**) provides that a person with a disability may be excused if, 'without reasonable accommodation', the person would be unable to serve effectively as a juror.[635] However, the NSW Juries Act does not require or authorise the court to make a direction that accommodations be given to a prospective juror.

11.40. In its report on Inclusive Juries, the VLRC recommended that the approach in the ACT be adopted in Victoria, with some changes. It recommended that the *Juries Act 2000* (Vic) (**Victorian Juries Act**) be changed to require courts to direct that reasonable adjustments be provided where the court considers that they would enable a person with disability to serve as a juror.[636]

11.41. The VLRC further recommended that the court be required to consider the interaction between the potential juror and the issues in the trial to determine whether reasonable adjustments would allow the potential juror to perform jury service in that trial.[637]

11.42. This would require the court to consider the type of evidence that is likely to be led in the trial, and whether the potential juror's disability will impact their ability to comprehend and assess that evidence. We note that the

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633 *Juries Act 1967* (ACT) s 16.

634 *Juries Act 1967* (ACT) s 16(2).

635 *Jury Act 1977* (NSW) s 14A(b).

636 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) 106.

637 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) Recommendations 1-3, Chapter 11.

VLRC's inquiry, and therefore its recommendations, were limited to people who are deaf, hard of hearing, blind or have low vision.

11.43. The ALRC made a similar recommendation in respect of federal juries. It recommended that federal law be changed to provide that a person is qualified to serve on a jury if, in the circumstances of the trial for which the person has been summoned, the person can be supported to perform the duties of a juror.[638]

11.44. Some stakeholders in their preliminary responses addressed the possibility of amending the Juries Act in this way.

11.45. Sussex Street was in favour of the proposal, submitting that the Juries Act should be amended to place a positive duty on the courts to provide reasonable adjustments to potential jurors with disability.[639]

11.46. In its preliminary response, the District Court of WA stated that it supports the inclusion of people with 'communication difficulties' as jurors. However, it emphasised that the Court does not always have the required resources in terms of court space or funding to facilitate this. The District Court further commented that limitations also arise if the technology used to aid communication in courtrooms fails.[640]

11.47. In addition, the District Court stated that it is currently at capacity and is regularly required to use other metropolitan courts for trials, such as the Central Law Courts and Fremantle Courthouse. The availability of suitable courtrooms with the capacity to provide accessibility is therefore limited. The District Court noted that ramps can be installed in courtrooms to improve physical accessibility to the jury box, however, installation can take up to two hours.

11.48. The District Court also commented that the limited number of available courtrooms means it is often not possible to switch courtrooms at short notice if an issue regarding accessibility arises, particularly if it is only brought to the Court's attention on the day of, or after the commencement of, a hearing.[641]

11.49. The District Court's response highlights that resourcing constraints impact its ability to provide adjustments to prospective jurors with disability. As we acknowledged in Chapter 1, many of the possible options for reform discussed in this paper may involve changes to infrastructure and related resourcing considerations.

11.50. We invite your feedback on any or all of the following questions:

115. Should the Juries Act be amended to require consideration of whether reasonable adjustments can be provided to a person with disability to enable them to serve as a juror?

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638 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Recommendation 7-12.

639 Preliminary Response 25 (Sussex Street) 44.

640 Preliminary Response 7 (District Court of Western Australia) 1-2.

641 Preliminary Response 7 (District Court of Western Australia) 2.

116. If yes, what factors should a court or jury officer be required to consider when determining if adjustments can reasonably be given?

11.51. Another possible reform is to amend the Juries Act to make it clear that one of its objects is to make juries representative of the community.

11.52. An object of the Victorian Juries Act is to make juries more representative of the community.[642] The Northern Territory Law Reform Committee has previously recommended that the law relating to juries in the Northern Territory be amended to include a preamble emphasising the importance of jurors representing the community.[643]

11.53. The Juries Act does not contain a section setting out the objects of that Act. However, the Juries Act could be changed to clearly state that one of the purposes of the Act is to ensure that juries are broadly representative of the community as a whole, or to ensure that so far as is reasonably practicable, persons with disability should be able to serve on juries. A court is required to consider the objects and purposes of a law when applying it. Further, judges and jury officers could be expressly required to do so when determining whether jurors with disabilities should be excused from jury service.

11.54. We invite your feedback on any or all of the following questions:

117. Should the Juries Act be amended to state the objects and purposes of the Act?

118. If yes, what object would best ensure that persons with disability are able to serve on juries?

119. If yes, should judges and jury officers be expressly required to take the objects of the Juries Act into account in determining whether a person with disability is excused in a particular case?

The '13th person rule' prevents persons with disability who require an interpreter or support person from being a juror

Current law and practice

11.55. A significant barrier which prevents some persons with disability from serving as a juror is a common law rule known as the '13th person rule'. This rule prohibits a person other than a juror from being present in the jury room during its deliberations. The purpose of the rule is to protect the secrecy of jury deliberations and to protect against external influences.[644] However, the rule effectively excludes some persons with disability from serving as a juror.

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642 *Juries Act 2000* (Vic) s 1(b).

643 Northern Territory Law Reform Committee, *Report on the Review of the Juries Act* (Report, March 2013) Vol 37, Recommendation 13.

644 *Lyons v Queensland* [2016] HCA 38; 259 CLR 518 [33].

11.56. The 13th person rule underpins section 111 of the Criminal Procedure Act, which provides that there must not be any communication between a juror and a person who is not a juror, except as expressly permitted by the trial judge, and subject to any condition that the judge thinks necessary to impose in the interests of justice.

11.57. In 2016, the High Court decided that a deaf person who required the assistance of an Auslan interpreter was not eligible for jury service in Queensland because of the 13th person rule. The High Court decided that the 13th person rule prohibited the interpreter from being present during jury deliberations, even if the interpreter did not take part in the deliberations. The High Court also observed that the relevant law in Queensland did not provide for an interpreter assisting a juror to take an oath that they would accurately interpret the proceedings and not participate in the jury's deliberations. Accordingly, as the person was unable to effectively perform the functions of a juror without the assistance of an interpreter, the person was ineligible for jury service.[645]

11.58. In its decision, the High Court observed that the relevant law could be amended to enable a jury's deliberations to be disclosed to an interpreter. It commented that the secrecy of jury deliberations may not be compromised by the presence of an accredited Auslan interpreter in the jury room.[646]

11.59. The law in Queensland is similar to the law in Western Australia, and the High Court's decision is therefore relevant to the position in Western Australia.

11.60. In its preliminary response, the District Court of WA noted that it is bound by the 13th person rule.[647] As a result, a person with disability who requires the assistance of another person to perform the functions of a juror is ineligible for jury service in Western Australia.

11.61. The operation of the 13th person rule may exclude a number of persons with disability from being a juror, including a deaf person who requires an Auslan interpreter, or a person with a mental health condition who requires the assistance of a support person.

Possible reform options

11.62. One possible reform option to enable more persons with disability to be eligible to serve as jurors may be to introduce a statutory exception to the 13th person rule to allow an interpreter or support person to be present during jury deliberations for the purpose of assisting a juror with disability.

11.63. This would complement the proposal outlined above (namely, requiring a court to consider whether a person with disability could serve as a juror if reasonable adjustments were provided), by allowing reasonable

645 *Lyons v Queensland* [2016] HCA 38; 259 CLR 518 [33], [35], [38].

646 *Lyons v Queensland* [2016] HCA 38; 259 CLR 518 [37].

647 Preliminary Response 7 (District Court of Western Australia) 1-2.

adjustments in the form of an interpreter or a support person to be provided to a juror.

11.64. The ACT Juries Act allows a court to make a direction allowing an interpreter or support person to assist a juror. The law provides that, if a court makes a direction:[648]

- the 13th person rule does not apply and the interpreter or support person is permitted to be in the jury room;
- the interpreter or support person can only be present for jury deliberations to assist the person to discharge their duties as a juror. They cannot take part in the jury's deliberations; and
- the interpreter or support person must give an oath or affirmation that they will not participate in the jury's deliberations and that they will not disclose anything about the jury's deliberations.

11.65. Under the ACT Juries Act, a 'support person' means a person who provides assistance or services to another person because of a disability the other person has.[649]

11.66. In its report on Inclusive Juries, the VLRC recommended that the approach in the ACT be adopted in Victoria.[650] The NSWLRC also previously recommended that interpreters and stenographers be permitted in the jury room during deliberations to assist jurors with hearing or vision disabilities.[651] These recommendations have not been adopted in Victoria or NSW to date.

11.67. Changing the Juries Act and the Criminal Procedure Act to allow an interpreter or support person to be present with a juror throughout their jury service, including during deliberations, would be consistent with the International Principles and Guidelines. It would also address the findings made by the Convention Committee when determining the complaints brought by deaf people who were not allowed to participate in jury service in Australia.

11.68. We invite your feedback on any or all of the following questions:

120. Should the Juries Act and the Criminal Procedure Act be amended to allow interpreters and support persons to be present with a juror with disability throughout their jury service, including during jury deliberations, for the purposes of assisting that juror?

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648 *Juries Act 1967* (ACT) s 16(4), Schedule 1, Part 1.1A & 1.1B.

649 *Juries Act 1967* (ACT) Dictionary (definition of 'support person'), which refers to the definition of 'support person' in s 5AA(3) of the *Discrimination Act 1991* (ACT).

650 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [11.20]-[11.25].

651 Law Reform Commission of New South Wales, *Blind or Deaf Jurors* (Final Report No 114, September 2006) Recommendation 1(e).

121. If yes, should an interpreter or support person be required to give an oath or affirmation stating they will not participate in the jury's deliberations and they will not disclose the jury's deliberations?

Environmental and attitudinal barriers

11.69. Not all persons with disability will be excluded from being a juror by the barriers we have outlined so far in this chapter. Many persons with disability will be eligible for jury duty under the Juries Act and will be sworn in as a juror if selected.

11.70. However, the participation of a person with disability as a juror may be prevented or hindered by features of the court environment, the trial process, and the attitudes of other participants in the trial.

A person with disability may be prevented from being a juror by a challenge made by the accused or the prosecution

Current law and practice

11.71. As we outlined earlier in this chapter, a person who is selected for a jury may be challenged by the prosecution or the accused using a peremptory challenge. If a juror is the subject of a peremptory challenge, they are prevented from serving as a juror in that particular criminal trial. The challenged juror will be returned to the jury pool and may be selected to be on a jury for a different trial.

11.72. The accused's right to challenge jurors has been described by the High Court as 'fundamental' to the system of trial by jury, as it ensures fairness and impartiality.[652]

11.73. However, in its report on Inclusive Juries, the VLRC was concerned that stereotypes and biases about persons with disability may result in challenges being used to prevent a person with disability from serving as a juror.[653] Jury selection is not covered by discrimination laws, and peremptory challenges may be exercised on discriminatory grounds.[654]

11.74. It is impossible to determine if challenges are being used based on assumptions around disability, as the reason for the challenge is not provided. The VLRC noted that, if reforms are implemented to enable more persons with disability to serve as jurors, the risk of challenges being used to prevent persons with disability from serving as jurors may increase.[655]

11.75. We invite your feedback on the following question:

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652 *Johns v R* (1979) 25 ALR 573, 587-588.

653 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [17.3], [17.21].

654 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [17.17].

655 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [17.3]

122. Are you aware of peremptory challenges being used to prevent a person with disability from serving as a juror?

Possible reform options

11.76. The VLRC considered several options to prevent peremptory challenges being used to exclude persons with disability from serving as jurors. The VLRC stated that peremptory challenges should not be abolished, as there was not enough evidence to show they would be used to prevent persons with disability from serving as jurors.[656]

11.77. This is consistent with a recommendation made by the Commission in its 2010 report on the system of jury selection.[657] In that report, the Commission recommended that peremptory challenges be maintained. One of the reasons provided by the Commission was that there was insufficient research or data to show that peremptory challenges were being used inappropriately.[658]

11.78. The VLRC further considered that the following possible reforms would not be helpful:[659]

- The development of guidelines for barristers outlining that peremptory challenges should not be exercised solely on the basis of disability.
- Requiring a judge to give a statement before the selection of the jury discouraging the use of challenges on discriminatory grounds.

11.79. The VLRC recommended the following practices be adopted to prevent peremptory challenges being used to exclude persons with disability from serving as jurors:[660]

- If needed, the judge could give a brief and simple direction before the exercise of challenges stating there is a person with disability in the pool of potential jurors and that adjustments have been made to enable them to serve. The VLRC recommended that the direction be given before the pool is brought into the courtroom, so that only the lawyers and the accused are present. The VLRC noted that directions may not be required in future, once jurors with disabilities become more commonplace.
- Provide the legal profession with education about jurors with disabilities and the adjustments that can be provided to jurors.

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656 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [17.44]

657 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Final Report No 99, April 2010) 24, Recommendation 3(1).

658 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Final Report No 99, April 2010) 24, Recommendation 3(1).

659 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [17.45]

660 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [17.47]-[17.49].

11.80. We invite your feedback on the following questions:

123. Should the law be changed to reduce the risk that peremptory challenges could be used to exclude persons with disability from serving as a juror?

124. If so, how should the law be changed to achieve that outcome?

Attending court for jury duty

11.81. If a person with disability is considered eligible for jury duty, they will be required to attend court until they are either chosen as a juror or discharged. The person may be required to wait for long periods of time and may need to attend court for several days in a row for jury duty.

11.82. In its preliminary submission, the District Court of WA highlighted that prospective jurors are required to queue out the front of the District Court Building for up to an hour when they first attend the Court to answer their summons. The District Court stated that during this time, prospective jurors do not have access to water, bathrooms, shelter or seating. The District Court stated that while jury officers try to minimise the wait time, limited space and resources can result in unavoidable delays.[661]

11.83. These requirements may pose additional challenges for some persons with disability, particularly if necessary adjustments are not provided to them. In its preliminary submission, the Centre for Human Rights Education noted that the requirements of physically attending court disadvantage people with mobility impairments, chronic pain conditions, fatigue-based disabilities and conditions that affect sustained physical presence.[662]

11.84. We received a preliminary submission from a stakeholder with disability who faced barriers to participating in jury service. This stakeholder told us she is ambulant but uses two walking sticks and requires step-free access to buildings. When she received a summons for jury duty in 2025, she contacted jury services to enquire how her disability could be accommodated to enable her to fulfil jury duty. The stakeholder was advised that her needs could not be accommodated due to two systemic barriers. First, there are insufficient ACROD parking facilities close to the District Court Building. Second, the jury box would be inaccessible to her due to its tiered layout. She was advised that, while people who use wheelchairs have occasionally been seated outside the jury box, this may not be possible in her circumstances. The stakeholder also stated she would have felt uncomfortable being seated separately from other jurors.

11.85. As a result, this stakeholder was advised to apply for a permanent exemption from jury service on the grounds of being permanently incapable of performing jury service. She described the impact of her experience as follows:

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661 Preliminary Response 7 (District Court of Western Australia) 2.

662 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 9.

> *[It] left me feeling excluded from civic life, not because of my disability, but because the justice system was not designed to include me. Being told that I could not fulfil my civic duty due to inaccessible facilities was deeply disheartening and reinforced a sense of exclusion from a society I have grown up in and am committed to as a proud Western Australian.*[663]

11.86. A person with a physical disability or mental impairment can apply to be excused from jury duty if being a juror would cause them hardship or serious inconvenience.[664] This stakeholder's experience demonstrates that some persons with disability may be advised to apply to be excused from jury duty, or feel that they have no choice but to do so, because of environmental and attitudinal barriers to their participation.

Expectations of jurors

11.87. If a person with disability is chosen to be a juror, it may be more challenging for them to perform the role's functions, if they are not provided with necessary adjustments, than it would be for a person without disability.

11.88. As explained above, the role of a jury in a trial is to consider the evidence presented in court to decide the facts of the case, and apply the law as directed by the trial judge to those facts, to return a verdict.

11.89. Jurors are expected to listen to, understand and remember oral evidence given by witnesses, as well as oral directions given by the judge, without assistance. This contrasts with other participants in the justice system, who will often have access to written materials, lawyers or other supports such as note-takers.

11.90. This is expected of jurors because the justice system, and in particular the criminal justice system, has developed over time on the basis that oral evidence is the best evidence.[665] For example, in many criminal trials there is evidence from medical professionals, such as a doctor. The doctor may have prepared a written report. The doctor may refer to that report when giving evidence in court, but usually the report is not given to the court and therefore is not made available to the jury. Instead, the jury is expected to listen to, understand and remember the doctor's oral evidence.

11.91. The courts have acknowledged that the expectations placed on jurors to understand and recall oral evidence may pose difficulties for any person, regardless of whether they have a disability.[666] However, for some persons with disability, performing the functions of a juror may be more difficult or challenging than for a person without disability if necessary adjustments are not provided.

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663 Preliminary Response 31 (Name withheld on request).

664 *Juries Act 1957* (WA) s 34H.

665 *Vella v The State of Western Australia* [2007] WASCA 59 [42]-[50].

666 *Vella v The State of Western Australia* [2007] WASCA 59 [48].

The existing law enables some adjustments to be made for jurors with disability

11.92. Existing laws may be able to be used to provide some adjustments to jurors with disability.

11.93. The law enables evidence to be given in the form of a chart, summary or other explanatory document if the judge considers that the document would help the jury to understand other evidence that has been given to them.[667] For example, complicated evidence of financial transactions may be summarised in a document which will then be tendered as evidence in the trial.

11.94. In addition, a judge may permit a record, document or thing to be given to the jury to assist it to understand the evidence, and the law that it must apply.[668] Sometimes this power is used to give the jury a summary of the law they are required to apply, or a path of reasoning required in the application of the law. It can also be used to give the jury a transcript of recorded evidence that the jury is required to consider, for example a recording of intercepted telephone calls.[669]

11.95. A judge also has the discretion to give the jury a copy of all or part of the written transcript of what has been said in the trial to use in their deliberations.[670]

11.96. While these adjustments are available, there may be barriers to their use, including:

- The court may be unaware that a juror would benefit from the provision of adjustments;
- The lawyers for the prosecution or the accused may oppose the provision of adjustments for reasons unrelated to the juror (for example, a concern that providing a copy of the transcript will distract the jury from the way the oral evidence was delivered); and
- Attitudinal barriers in the courtroom.

11.97. There will be cases in which a person's disability will prevent them from serving as a juror, and for which no adjustments could enable their effective participation.

11.98. For example, in some criminal trials a jury is required to listen to recordings of intercepted telephone calls, and, as the triers of fact, decide for themselves what was said and what it meant. In such a case a deaf person would not be able to discharge the obligations of a juror, even with the assistance of an Auslan interpreter. This is because the person could not personally assess what was said in the recorded conversation, and in

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667 *Evidence Act 1906* (WA) ss 27A, 27B; *Evidence Act 2025* (WA) ss 66, 67.

668 *Criminal Procedure Act 2004* (WA) s 110.

669 See, for example, *Ottaway v The State of Western Australia* [2012] WASCA 20.

670 *Criminal Procedure Act 2004* (WA) s 110; *YBG v The State of Western Australia* [2019] WASCA 126 [113].

interpreting the recording, the Auslan interpreter would need to rely on their own view of what was said in it.[671]

11.99. In other cases, a jury may need to make a finding of fact as to the identity of a person depicted in a photograph or on CCTV. A person who cannot see that evidence would not be able to adequately perform the role of a juror in that particular case, irrespective of any supports which may be provided.[672]

Possible reform options

11.100. There are various options for reforms which may reduce or remove environmental and attitudinal barriers to persons with disability serving as jurors. The law does not necessarily need to be changed for all of these proposals to be implemented, however, additional funding would be required to achieve some of these proposals.

Other adjustments that could be provided to jurors

11.101. In the context of jury duty, reasonable adjustments may be required to ensure that a juror with a disability can understand and follow proceedings, navigate the courtroom and building, and communicate effectively with their fellow jurors. Some persons with disability may require more than one type of adjustment to participate effectively as a juror.

11.102. In its report on Inclusive Juries, the VLRC identified a number of additional adjustments that could be provided to jurors who are deaf, hard of hearing, blind or have low vision. For example:[673]

- technology such as hearing loops or captioning and Auslan interpreters may be required by people who are deaf or hard of hearing;
- people who are blind or have low vision may require reading assistance software or Braille materials, and materials to be provided in accessible formats;
- a support person or assistance dog may be required by some persons with disability;
- emerging technologies such as automated speech recognition, lip-reading devices and sign language translators may be able to be used;
- environmental adjustments can be made, for example allowing a juror with low vision to move positions in the courtroom as the light changes; and
- some changes to the conduct of a trial may be provided, such as allowing extra time for jurors with disability to read material.

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671 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [9.65].

672 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [9.65].

673 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) Chapter 13.

11.103. The VLRC also recommended that the courts employ trained accessibility officers to provide logistical support to jurors with vision and hearing disabilities. An accessibility officer's role would be to provide practical support in and around the courtroom, for example, assisting the juror to move around the court building and to assist with basic technical support such as headphones. An accessibility officer would not enter the jury deliberation room. The VLRC noted that a similar model exists in England and Wales.[674] We discuss a position or service of this nature as a possible option for reform in Chapter 14.

11.104. The VLRC recognised that the circumstances of every person with a disability will vary and that people experience disability differently. It noted that flexibility in the provision of reasonable adjustments will be required.[675]

11.105. We invite your feedback on any or all of the following questions:

125. What adjustments should be made available to jurors with disability?

126. Should any of these adjustments be specifically established in legislation? If so, why?

127. Should accessibility officers be employed to provide support to jurors with disability?

Changes to court processes to enable the provision of reasonable adjustments

11.106. In some jurisdictions, many of the steps involved in arranging and assessing the provision of reasonable adjustments occur before the potential juror is required to attend court as part of the jury pool. For example, in the ACT and in England and Wales:[676]

- information sent out with the jury summons advises people to contact the court if they have a disability and require supports in order to serve;
- the information package encourages potential jurors to notify the court well in advance of their summons date about their need for adjustments;
- a potential juror can visit the court before the date on their summons to discuss their needs;
- a person's jury service can be deferred while supports are arranged; and

674 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) Recommendation 30, [15.5]-[15.7], [15.13]-[15.14].

675 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [13.59].

676 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [12.18], [12.20], referring to information provided to the VLRC by the ACT Sheriff and Her Majesty's Court and Tribunal Services (UK).

- a senior court official will undertake a preliminary assessment about the provision of reasonable adjustments. If necessary, a judge can make a final decision in a hearing attended by the person with disability.

11.107. In its report on Inclusive Juries, the VLRC recommended that a similar process be adopted in Victoria, by:[677]

- changing the jury summons form to request that potential jurors contact jury services in advance of their summons date if they require reasonable adjustments to serve as a juror;
- requiring jury services to contact potential jurors who request adjustments to discuss their needs and to offer a visit to the court before the summons date;
- enabling jury services to make a recommendation to the court about the provision of reasonable adjustments to the potential juror; and
- requiring a judge to make the final decision about whether a potential juror with disability can serve on a jury.

11.108. Drawing on these examples, one option for reform may be that the processes in Western Australia could be changed to request that potential jurors notify jury services and the court of their need for adjustments as early as possible. Processes could be adopted to ensure jury services and the court have sufficient time to consider requests for adjustments.

11.109. We invite your feedback on any or all of the following questions:

128. How can the process for requesting reasonable adjustments for jury service be improved? Is an amendment of the Juries Act required to improve that process?

129. Should a court be given the power, under the Juries Act, to direct that supports be provided, whether generally or in a particular case? How would that work?

Education and training

11.110. Any reforms to the Juries Act to enable more persons with disability to participate as jurors may be ineffective if cultural change does not occur.

11.111. As the VLRC acknowledged, some people believe persons with disability cannot serve as jurors based on discriminatory beliefs and misconceptions. During the jury selection process, a jury officer, a judge, and lawyers for the parties and the accused all have the power to prevent a person with disability from serving as a juror.

11.112. Sometimes a person with a disability may themselves have misconceptions about jury service which may cause them to believe that they cannot serve on a jury.

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677 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) Recommendations 11-18.

11.113. Education and training are vital to overcome general misconceptions and to improve understanding of the adjustments that can be made to assist persons with disability to serve effectively as jurors.[678]

11.114. Education and training can take a variety of forms. The VLRC recommended that, if jury laws were changed to enable more persons with disability to serve as jurors:[679]

- disability awareness training should be required for judges, jury staff, court staff, and barristers and lawyers likely to work with juries;
- professional development training should be provided to judges, legal professionals and jury staff about any changes to the jury laws;
- the courts and jury services should develop internal protocols to guide staff; and
- information about the new laws and policies should be widely distributed within the community in accessible formats.

11.115. We invite your feedback on the following question:

130. Is education and training required to overcome misconceptions about the ability of persons with disability to serve as jurors? Who should receive this education and training? What type of education is required?

11.116. We also invite your feedback on any or all of the following general questions:

131. What else should be done to remove barriers that prevent or limit persons with disability from effectively serving as jurors?

132. Are there any barriers preventing persons with disability from serving as jurors that we have not identified?

133. Apart from the options discussed in this paper, are there any other ways the law should be changed to enable persons with disability to participate as jurors?

Competing considerations: inclusive juries and the right to a fair trial

Benefits of more inclusive juries

11.117. Facilitating the participation of more persons with disability in jury service is likely to result in more inclusive juries that better represent the Western Australian community.

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678 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [18.1], [18.5], [18.7].

679 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) Recommendations 43-46, 48.

11.118. In its report on Inclusive Juries,[680] the VLRC identified several benefits that will flow from the greater participation of persons with disability as jurors, including:[681]

- representative juries encourage impartial decisions by bringing more diverse views to the decision-making process, which may balance out individual biases;
- participating in the jury system increases people's confidence in the justice system. The exclusion of persons with disability from juries means that they are only experiencing the justice system as litigants, witnesses, accused persons or victims;
- representativeness is linked to the idea of 'trial by one's peers'. Under the current system, defendants with disability may be denied the opportunity for a trial by a jury that includes other persons with disability; and
- greater representativeness shares the obligation of jury duty more broadly across the community.

Ensuring an accused person receives a fair trial

11.119. An accused's right to a fair trial is the bedrock of the criminal justice system. Therefore, any discussion of reforms intended to increase participation by persons with disability in juries cannot take place in the absence of consideration of the implications of those reforms for an accused's right to a fair trial.

11.120. The right to a fair trial involves:[682]

- the 'hearing rule', which is the right to be heard before a competent decision-maker; and
- the 'bias rule', which is the right to have a matter determined by a decision-maker who is free from bias.

11.121. It is well accepted in international law that everyone is entitled to a fair and public hearing before a competent, independent and impartial decision-maker.[683]

11.122. Juror eligibility criteria aim to ensure a case is heard and determined by competent jurors as part of the right to a fair trial.

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680 It is noted that the VLRC's terms of reference were limited to making recommendations to improve access for people who are deaf, hard of hearing, blind or have low vision. However, the observations made by the VLRC about the benefits of facilitating the participation of these groups of people in the jury system apply more broadly.

681 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [8.6]-[8.18], [8.22]-[8.24].

682 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [9.1].

683 *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN Doc A/6316, (16 December 1966, adopted 23 March 1976) Article 14.

11.123. All jurors, including jurors with disability, must be able to:[684]

- perceive evidence;
- comprehend evidence;
- follow court proceedings; and
- deliberate effectively with other members of the jury.

11.124. As we have already explained, in some situations, a potential juror may be unable to perform their role because of the nature of the evidence in a particular trial and their ability to adequately comprehend or assess it, even with adjustments. However, this does not necessarily mean that that person should be prevented from being a juror in all cases.

Balancing these competing considerations

11.125. Any reforms to enable the participation of person with disability in jury service should not operate to prejudice the accused's right to a fair trial.[685] However, there are many options for reform which would enhance the opportunities for person with disability to participate in the justice system as jurors. With appropriate safeguards, these options would not operate to prejudice the accused's right to a fair trial.

11.126. The VLRC has expressed the view that safeguards can be put in place to protect an accused's right to a fair trial while facilitating the involvement of persons with disability as jurors. These safeguards include the following actions or conditions:[686]

- a comprehensive assessment of the reasonable adjustments required by the potential juror;
- a judge making the final decision about the ability of a person with disability to perform jury duty in a particular trial with reasonable adjustments;
- any interpreter or support person should be required to provide an oath to the court that they will maintain the confidentiality of the jury deliberations and will not be involved in the deliberations; and
- an interpreter or support person must meet certain basic training requirements and comply with standards and a code of conduct.

11.127. One safeguard that already exists is found in section 115 of the Criminal Procedure Act, which permits a trial judge to discharge a juror during a criminal trial if the trial judge is satisfied that the juror should not be

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684 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [9.64].

685 This position was previously adopted by the Commission in Project 99, and was also endorsed by the VLRC and the NSWLR: Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [9.7]; Law Reform Commission of New South Wales, *Blind or Deaf Jurors* (Final Report No 114, September 2006) [1.20].

686 Victorian Law Reform Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Final Report, July 2022) [9.65].

required or allowed to continue as a juror.[687] This power could be exercised to discharge a juror with disability if, during the trial:

- the court became concerned that the person was not able to perform the functions of a juror; or
- the juror requested that they be discharged because they were experiencing difficulties in carrying out their role as a juror, despite any supports they were provided.

11.128. Similar powers have been exercised by courts in other States. In one instance,[688] a trial judge in Victoria discharged a juror on the grounds that the juror was no longer capable of acting as a juror. In that case, the juror had stated in a note to the judge that he had a history of bipolar disorder, which had been successfully managed for several years, but that the juror felt his judgment was potentially being clouded as a result of his illness. This concern was also supported by a note from other jurors to the trial judge.

11.129. Similarly, in a Queensland case,[689] a trial judge discharged a juror on the grounds that she lacked 'the intellectual capacity to engage in a meaningful discussion'. Although the trial judge had erred in the process by which they came to this conclusion, the decision to discharge the juror was nevertheless upheld on appeal.

11.130. There would be no basis for the exercise of such a power unless the trial judge became aware of difficulties experienced by a juror, as a result of their disability, which impeded their ability to carry out their role as a juror. One option may be for the jury to be directed to raise any such concerns with the trial judge. Another may be to ensure that at least one additional juror was empanelled, so that if a juror with disability, or any juror, was unable to continue, a jury of 12 could nevertheless retire to consider the verdict.

11.131. We invite your feedback on the following question:

134. If reforms are made to the Juries Act, what safeguards should be put in place to ensure that an accused's right to a fair trial is not compromised?

687 *Criminal Procedure Act 2004* (WA) s 115.

688 *Wahid Najibi v R* [2016] VSCA 177.

689 *R v Par* [2014] QCA 248.

12. Parties in civil proceedings

Overview

12.1. We have been asked specifically to consider the experiences of persons with disability as parties in civil proceedings in the Western Australian court and tribunal system. A **party in civil proceedings** is a person who is involved in the proceedings either as an applicant/plaintiff (the person who started the proceedings to seek a remedy) or a defendant/respondent (the person who responds to the proceedings, generally by opposing the remedy sought).

12.2. Participating as a party in civil proceedings may be a stressful and demanding experience. It may require a person to navigate complex procedures, process significant amounts of information and make consequential legal decisions which may have a significant impact on a person's life.

12.3. Stakeholders' preliminary responses identified that persons with disability can experience additional barriers to effective participation as parties in civil proceedings. A key issue is the lack of funded legal representation or funded supports for parties with disability in civil proceedings.

12.4. Barriers to participation in civil proceedings may also arise from the laws and practice with respect to the appointment and conduct of litigation representatives for persons with disability.

12.5. In addition, persons with disability may experience barriers to commencing and participating in civil proceedings as a result of strict procedural requirements and timeframes. Some stakeholders also identified how persons with disability have experienced issues in requesting adjustments and supports to facilitate their participation as parties in civil proceedings.

Some context and the scope of this chapter

There is a broad range of civil proceedings

12.6. As we explained in Chapter 1, a civil proceeding usually involves a dispute between two or more parties, where one party seeks a remedy from the other. The remedy can take many forms, including an award of money to compensate for loss and damage caused by the conduct of the other party, or an order that the person do something (such as return property) or stop doing something (for example, stop contacting the person). The parties to civil proceedings may be individuals, corporate bodies or government agencies.

12.7. Other types of civil proceedings may involve the State intervening to protect people from harm. For example, in child protection proceedings the State is seeking to remove a child from their family to protect them from neglect, abuse or violence. In coronial proceedings, a death is investigated to determine if similar deaths can be prevented in future.

12.8. As discussed in Chapter 2, a number of courts in Western Australia have the power to deal with civil proceedings.

12.9. In Chapter 2, we also explained that the SAT has the power to hear certain civil proceedings. In addition, many other tribunals in Western Australia have the power to determine civil matters. As courts and tribunals operate in different ways, we have focused on parties to civil proceedings in courts in this chapter. We discuss people involved in tribunal proceedings in Chapter 13.

12.10. Civil proceedings can take many forms. They may involve preliminary hearings and trials, as well as alternative dispute resolution processes such as mediation. They can relate to many different areas of the law and affect people's lives in different ways. Further, each of the courts that has the power to deal with civil proceedings has different laws and rules which it must follow.

12.11. In light of this, it is not possible for us to identify and discuss every barrier faced by parties to civil proceedings in the courts. In this chapter we have been guided by the issues that were specifically raised by stakeholders' preliminary responses. As this chapter is intended to open the discussion, we welcome feedback on issues and reform options that are not raised in this chapter.

Persons with disability are often parties to civil proceedings

12.12. Stakeholders provided us with statistics which demonstrate that many people involved in civil proceedings in Western Australia have a disability.

12.13. For example, Legal Aid told us that in the 2025-2026 financial year, 49% of the clients they assisted with civil law matters identified as persons with disability. Further, 35% of the clients it assisted with family law matters identified as persons with disability.[690]

12.14. Community Legal noted that 34% of the clients that community legal centres assisted with civil law matters in the 2024-2025 financial year identified as persons with disability. In addition, persons with disability made up:[691]

- 53% of clients assisted with child protection matters;
- 32% of clients assisted with a housing matter;
- 30% of clients assisted with a consumer law matter (including credit and debt matters);
- 27% of clients assisted with an employment law matter; and
- 19% of clients assisted with family law matters.

12.15. Community Legal told us that clients with disability are also more likely than other people to receive intensive or ongoing services from community legal centres.[692]

690 Preliminary Response 36 (Legal Aid Western Australia) [125].
691 Preliminary Response 37 (Community Legal Western Australia) 10-11.
692 Preliminary Response 37 (Community Legal Western Australia) 21.

12.16. While this data is drawn from a small sample group, it is an indicator of the extent to which persons with disability are involved in civil proceedings in Western Australia.

Civil proceedings can have a significant impact on people's lives

12.17. While all civil matters can have serious outcomes for parties, stakeholders emphasised that several types of civil matters can have an especially significant impact on people's lives. For example, parenting and child protection proceedings can result in losing custody of a child. Tenancy matters can result in homelessness. Restraining order applications can place restrictions on a person's liberty.

12.18. Stakeholders also told us that persons with disability are more likely than people without disability to be involved in certain types of civil proceedings.

12.19. South West Autism Network highlighted that autistic parents and parents with intellectual disability are more likely to be involved in child protection proceedings. It referred to research which found that the primary cause of this elevated involvement is not parenting deficits, but systemic issues. These include discriminatory assumptions built into assessment frameworks and the inaccessibility of family law and child protection proceedings for persons with disability.[693]

12.20. Community Legal similarly observed that mothers with intellectual disability are particularly affected by child protection proceedings, as their behaviour and demeanour in court is weighed against them even where they are competent parents.[694]

12.21. The Disability Royal Commission found that women with disability are much more likely than women without disability to experience family and domestic violence over the course of their lives.[695]

12.22. Consistent with this finding, stakeholders submitted that persons with disability (and particularly women with disability) are disproportionately involved in family violence and restraining order proceedings. For example:

- Legal Aid highlighted that, in the 2025-2026 financial year, 47% of its clients with disability were experiencing or at risk of experiencing family violence;[696] and
- Community Legal said that persons with disability are increasingly asking community legal centres for assistance with family violence restraining orders.[697]

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693 Preliminary Response 24 (South West Autism Network Inc) 108-109.

694 Preliminary Response 37 (Community Legal Western Australia) 21.

695 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Nature and extent of violence, abuse, neglect and exploitation of people with disability* (Final Report, 29 September 2023) Vol 3, 329.

696 Preliminary Response 36 (Legal Aid Western Australia) [116].

697 Preliminary Response 37 (Community Legal Western Australia) 10.

12.23. While the causes of the increased involvement of persons with disability in these kinds of civil proceedings are beyond the scope of Project 115, we acknowledge that persons with disability may be disproportionately involved in such civil proceedings.

Court hearings for civil parties

12.24. Parties to civil proceedings may appear before a court on multiple occasions. Some of these hearings may be short and procedural in nature – for example, a preliminary hearing where the court gives directions about the conduct of the proceedings, such as dates for filing documents. Parties may also be required to attend court for alternative dispute resolution processes such as mediations or conferences. If the proceeding is not resolved by an agreement between the parties, the parties will be required to attend a final hearing or trial where the court will determine the issues between them.

12.25. The formality of civil proceedings can vary depending on the nature of the proceeding and the court in which it is determined. For example, minor cases heard in the Magistrates Court are usually dealt with in a more informal and flexible manner than mortgagee repossession claims in the Supreme Court.

12.26. Parties to civil court proceedings may be expected to comply with a number of procedural requirements, including completing technical documents such as pleadings, preparing draft court orders and filing affidavits and other evidence with the court. Parties may be required to adhere to strict timeframes and rules about how documents are to be completed and provided to the court. Some of these may be set out by the court for the particular matter, while others are set out in a number of documents, including Acts, Regulations, rules of the court and practice directions published by each court.

12.27. The nature of civil proceedings can make them challenging for any person to navigate without the assistance of a lawyer. For parties with disability, the challenges will be compounded if the court's processes create barriers to their full participation or if they are not provided with adjustments to enable them to participate fully.

Lack of funded legal representation or funded supports

Current law and practice

12.28. There is no general statutory entitlement to publicly funded legal representation for a party to civil proceedings in Western Australia.

12.29. In some instances, a person may be eligible to receive legal assistance through Legal Aid, in accordance with the provisions of the *Legal Aid*

Commission Act 1976 (WA). However, grants of aid for legal representation are only available in limited civil proceedings.[698]

Barriers

12.30. The International Principles and Guidelines recognise the importance of free or affordable legal assistance for persons with disabilities in proceedings that relate to, or could negatively affect, human rights or fundamental freedoms, including the rights to property, adequate housing, decision-making autonomy and family integrity.[699]

12.31. However, stakeholders identified that persons with disability often do not have access to free or low-cost legal assistance or disability advocacy services when participating in civil proceedings. This can be contrasted with the criminal justice system, as many accused people have access to a duty lawyer in court.

12.32. The Public Advocate highlighted that often a person with disability is expected to navigate complex court processes without the support of legal aid or other funded or pro bono legal assistance. The Public Advocate submitted that in civil proceedings such as family law and tenancy matters it may be particularly difficult for a party to understand their options and to advocate for their own accessibility needs.[700]

12.33. In addition, the Public Advocate highlighted that respondents to restraining order applications may not receive funded legal representation at a hearing. For respondents with a 'decision-making disability', this could be a significant issue as the consequences of not complying with a restraining order can be severe.[701]

12.34. Community Legal submitted that community legal services in Western Australia were unable to assist people who were eligible for their services on 16,450 occasions in 2025, solely because they lacked the capacity and resources to do so. It submitted that this shortfall is felt acutely by persons with disability and other intersecting forms of disadvantage.[702]

Possible options for reform

12.35. The Public Advocate suggested that people with a 'decision-making disability' which affects their ability to understand legal processes should be provided with funded legal representation or other support or advocacy services to navigate legal matters which may have a significant impact on their life, such as civil matters involving eviction and restraining orders.[703]

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698 'Civil law', *Legal Aid Western Australia* (Web Page, 28 August 2025) <https://www.legalaid.wa.gov.au/about-us/what-we-do/civil-law>.

699 United Nations Special Rapporteur on Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (August 2020) Guideline 6.1.

700 Preliminary Response 17 (Public Advocate) 7.

701 Preliminary Response 17 (Public Advocate) 7.

702 Preliminary Response 37 (Community Legal Western Australia) 25.

703 Preliminary Response 17 (Public Advocate) 10.

12.36. Community Legal submitted that substantial increases in funding are required for community legal and disability advocacy services. It stated that 'the current funding model does not allow community legal services to provide the intensive, individualised, and often protracted assistance that people with intersecting disadvantages require'.[704]

12.37. South West Autism Network submitted that legal aid should be available for all persons with disability involved in civil, family and child protection proceedings.[705]

12.38. We invite your feedback on any or all of the following questions:

135. Should persons with disability who are unable to afford their own legal representation be entitled to free legal assistance in certain civil proceedings?

136. If yes, should that assistance be available irrespective of the type of disability?

137. As an alternative approach, should that assistance be confined to persons with specific types of disability? If so, what types of disability should qualify a person for free legal assistance?

138. In what types of civil proceedings should free legal assistance for persons with disability be available?

Litigation representatives

Current law and practice

The law with respect to a person's capacity to participate in legal proceedings

12.39. The law assumes that every adult person can manage their own affairs, including by participating in civil proceedings, unless the contrary is proven.[706]

12.40. The test for whether a person has the capacity to participate in legal proceedings[707] involves a consideration of whether the person has sufficient mental capacity:

- to understand the case and the legal issues involved;
- to make decisions in relation to the case and (if instructing a solicitor) to give instructions; and
- not merely to understand in broad terms what is involved in the decision to prosecute, defend or compromise proceedings, but also to understand the nature of the litigation, its purpose, and its possible outcomes, including the potential costs.

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704 Preliminary Response 37 (Community Legal Western Australia) 31.

705 Preliminary Response 24 (South West Autism Network Inc) 186, Recommendation K3.

706 *BIF23 v Minister for Immigration* [2024] HCA 44 [37]; *W v S* [2025] WASCA 21 [41].

707 *W v S* [2025] WASCA 21 [47], referring with approval to Snook v Magistrate Trevor Darge [No. 2] [2024] WASC 91 [89].

12.41. In a case where the person will not be represented by a lawyer, their capacity must be greater than that required to instruct a solicitor, because a self-represented litigant has to manage court proceedings in an unfamiliar and stressful situation.[708]

12.42. A person's ability to participate in civil proceedings is specific to the proceedings themselves.[709] Their capacity must be assessed in light of the complexity of the proceedings, including that of the underlying transaction or dispute.[710]

12.43. If a person does not have capacity to participate in civil proceedings, they must be represented by a:

- guardian or administrator appointed by the SAT under the Guardianship and Administration Act to be their next friend or guardian ad litem in those proceedings; or
- litigation representative appointed by the court dealing with the proceedings.[711]

12.44. A litigation representative may also be called a next friend, guardian ad litem, litigation guardian, case guardian or tutor, depending on the court and on whether the person is bringing or defending the proceedings.

12.45. A litigation representative acts in the place of the person and is responsible for the conduct of the proceedings.[712]

The courts have different rules regarding litigation representatives

12.46. Different courts have different rules regarding the appointment and conduct of litigation representatives.

12.47. For example, Order 70 of the Rules of the Supreme Court sets out when a litigation representative can be appointed for a party to civil proceedings in the Supreme Court. It also applies to proceedings in the District Court.[713] Under Order 70:

- An adult 'person under disability' can only participate in proceedings through a guardian or administrator appointed by the SAT to act as their next friend or guardian ad litem in the proceedings, or by their litigation representative (also referred to as their next friend or guardian ad litem) appointed by the Court.[714]

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708 *W v S* [2025] WASCA 21 [47], referring with approval to Snook v Magistrate Trevor Darge [No. 2] [2024] WASC 91 [89].

709 See, for example, *Rules of the Supreme Court 1971* (WA) O70 r 1.

710 *W v S* [2025] WASCA 21 [47], referring with approval to Snook v Magistrate Trevor Darge [No. 2] [2024] WASC 91 [89]. See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.92]-[7.95].

711 Rachel Joseph and Benjamin Tomasi, *Civil Procedure Western Australia* (at SL 197 of 2025) [70.0.01], [70.0.01].

712 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.96].

713 *Rules of the Supreme Court 1971* (WA) Order 70; *District Court Rules 2005* (WA) r 6.

714 *Rules of the Supreme Court 1971* (WA) Order 70, Rule 2(1) and (2).

- Other than in the case of a person for whom the SAT has appointed a guardian or administrator to act as a litigation representative, the Court can only appoint a litigation representative for a person who 'by reason of mental illness, defect or infirmity, however occasioned, is declared by the Court to be incapable of managing their affairs in respect of any proceedings to which the declaration relates'.[715] Accordingly, a litigation representative can only be appointed for a person with a mental illness or cognitive impairment that affects their ability to participate in the court proceedings.
- The litigation representative must be represented by a lawyer; this means that the person under disability must pay legal costs and loses their right to be self-represented.[716]
- The role of the litigation representative is to conduct the proceeding on behalf of the person under disability. The Supreme Court has recognised that the appointment of a litigation representative impacts an important civil right of a person to freely participate in court proceedings.[717]
- The litigation representative must make decisions based on what is in the best interests of the person, rather than based on what the person wants.[718]

12.48. In the Magistrates Court, a person in respect of whom a guardianship or administration order is in force under the Guardianship and Administration Act must have a litigation representative to conduct civil proceedings on their behalf, unless the Magistrates Court orders otherwise.[719] The rules of the Magistrates Court do not provide for the appointment of a litigation representative for a person with disability who is not subject to guardianship or administration orders.

12.49. In the FCWA, a 'person with a disability' may only conduct civil proceedings by a litigation representative. A 'person with a disability' is a person 'who, because of a physical or mental disability does not understand the nature or possible consequences of the case or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case'.[720]

12.50. The laws and rules applying to the Coroner's Court and the Children's Court do not expressly provide for the appointment of litigation representatives.

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715 *Rules of the Supreme Court 1971* (WA) Order 70, Rule 1 (definition of 'person under disability').

716 *Rules of the Supreme Court 1971* (WA) Order 70, Rule 1(3).

717 *W v S* [2025] WASCA 21 [45].

718 *Donaldson v Nolan [No 5]* [2017] WASC 44 [10]; *Hicks v Burstall* [2021] WASC 167 [19].

719 *Magistrates Court (Civil Proceedings) Rules 2005* (WA) r 118; *Magistrates Court (Minor Cases Procedure) Rules 2005* (WA) r 71.

720 *Family Court Rules 2021* (WA) rr 4 (definition of 'person with a disability'), 103.

Barriers

12.51. The practice of appointing a litigation representative has a long history. It arose from the ancient power of the courts to take steps to protect those who were unable to care for themselves.[721] Legislation permitting the appointment of litigation representatives continues to reflect that historical view that persons with disability ought to be protected, rather than supported to participate in court proceedings.

12.52. The ALRC identified a number of issues with the appointment of litigation representatives for civil proceedings in Commonwealth courts. These issues include:[722]

- the test for the appointment of a litigation representative does not require a court to consider the decision-making supports available when deciding if a person needs a litigation representative;
- the drafting of court rules is inappropriate in some cases and does not reflect contemporary understandings of capacity and disability;
- there is no obligation under the law for a litigation representative to make decisions that reflect the will, preferences and rights of the person they are representing;
- there is no obligation under the law for a litigation representative to consult with or facilitate the participation of the person represented; and
- the cost of litigation representatives and the lack of legal aid funding for litigation representatives.

12.53. These issues may also arise in relation to the appointment of litigation representatives in Western Australian courts.

12.54. The Public Trustee is often appointed as the litigation representative for a party to civil proceedings. In its preliminary response, the office of the Public Trustee identified some practical difficulties that arise from the current laws concerning litigation representatives, including:[723]

- The person may not accept or support the Public Trustee's appointment as their litigation representative. Further, they may not agree with the decisions the Public Trustee makes on their behalf during the proceedings. This can affect the Public Trustee's ability to carry out its role effectively, as the person may refuse to provide the Public Trustee with evidence or information that it requires.
- The party may still attend court hearings and mediations in person. This can cause problems, especially if the party makes statements that

721 *TJD v BRJ* [2025] WASC 433 [40]-[50].

722 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [7.96]-[7.138].

723 Preliminary Response 27 (Public Trustee) 4-5.

are against their own interests during mediations or engages in arguments with other parties.

12.55. The Public Advocate may also conduct litigation not involving financial matters on behalf of a person where they are appointed as that person's plenary guardian or limited guardian with legal authority. In her preliminary response, the Public Advocate noted that her office is not always informed in a timely manner of legal matters involving a person for whom they are appointed guardian.[724]

Possible options for reform

12.56. The ALRC recommended that the rules for the appointment of litigation representatives be changed, so that they explicitly require a court determining whether a person with disability needs a litigation representative to consider whether the person could be supported to participate effectively in the relevant proceedings.[725]

12.57. The ALRC also recommended that the law be changed to require litigation representatives:[726]

- to support the person they are representing to express their will and preferences in making decisions;
- to make decisions that reflect the will and preferences of the person;
- in a case where it is not possible to determine the will and preferences of the person, to determine what the person would likely want based on all the information available; and
- to act in a manner promoting the personal, social, financial and cultural wellbeing of the person represented.

12.58. We invite your feedback on the following question:

139. How, if at all, should the laws relating to litigation representatives be changed to enable persons with disability to participate in civil proceedings more effectively?

Procedural requirements and requests for adjustments in civil proceedings

Current law and practice

12.59. Courts have broad powers to manage the conduct of civil proceedings, including by extending the timeframe for doing things (such as filing a

724 Preliminary Response 17 (Public Advocate) 7.

725 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Recommendation 7-3.

726 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Recommendation 7-4.

defence or complying with directions) and to waive some procedural requirements.[727]

12.60. As we discussed in Chapter 5, there are existing legislative provisions for the use of AVL to enable a party to attend a court hearing remotely.

Barriers

Procedural requirements in civil proceedings

12.61. Stakeholders highlighted that parties to civil proceedings are usually required to comply with strict procedural requirements and to provide information to courts in accordance with fixed, and at times inflexible, timeframes. The Centre for Human Rights Education submitted that these features of the system assume a capacity for sustained, consistent engagement that many persons with disability do not have.[728]

12.62. South West Autism Network noted that limitation periods, which require a person to commence civil proceedings within a certain period of time, do not accommodate disability-related delay in recognising that a legal wrong has occurred.[729]

Challenges relating to requests for adjustments

12.63. Several stakeholders also shared examples of clients with disability facing barriers when requesting adjustments from courts in civil proceedings, including flexible procedures.[730]

12.64. For example, Legal Aid gave the example of a client with a neurodevelopmental disability, who wrote to the FCWA to advise them that their disability prevented them from completing the required court documents to engage in the proceedings. The client provided the FCWA with medical evidence and requested that reasonable adjustments be made for them. The FCWA advised the client that they needed to make a formal application to the FCWA for adjustments using the required court form, despite the client advising the FCWA that they were unable to complete court forms to make that application. The FCWA further made orders that if the client did not file their documents, the matter would proceed without their involvement. The client was unable to complete the forms requesting adjustments due to their disability. The client was referred to Legal Aid, which was able to arrange legal representation for the client.[731]

12.65. Legal Aid also gave the example of a client with a hearing impairment who needed to use closed captioning to participate in civil proceedings in the FCWA, as she did not know how to lip read or understand Auslan. She

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727 *Rules of the Supreme Court 1971* (WA) Order 4A, Order 3, r 5; *District Court Rules 2005* (WA) r 6, Part 4.

728 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 14.

729 Preliminary Response 24 (South West Autism Network Inc) 151.

730 Preliminary Response 36 (Legal Aid Western Australia) 31; Preliminary Response 28 (Consumers of Mental Health WA) 24.

731 Preliminary Response 36 (Legal Aid Western Australia) 31.

requested closed captioning, which was initially declined by the FCWA. When Legal Aid advocated on behalf of the client, the FCWA agreed to provide closed captioning access. However, at the hearing the FCWA was unable to set up the closed captioning. The hearing was adjourned to allow the client to obtain legal representation due to the technology being unavailable. Ultimately the client was required to represent herself at the hearing as a lawyer was unable to be arranged, and she was unable to meaningfully participate as the requested adjustment was not made available to her.[732]

12.66. We invite your feedback on the following question:

140. What has been your experience, if any, in requesting the provision of adjustments for a person with disability as a party to civil proceedings?

Possible options for reform

12.67. The Centre for Human Rights Education recommended several legislative and non-legislative reforms to court processes to improve access for persons with disability, including:[733]

- providing consistent access to plain language materials explaining court processes, rights and obligations;
- providing flexible procedural adjustments, including extended timeframes, breaks and alternative hearing formats;
- mandatory disability awareness and inclusion training co-designed with persons with disability for all judicial officers and staff;
- improved access to communication supports (including interpreters, communication assistants and assistive technology);
- access to support persons during proceedings;
- improved information about what adjustments are available and how to request them; and
- the establishment of a system for recording adjustments requested by parties with disability and communicating those adjustments to all staff.

12.68. As outlined above, courts generally have the power to extend the timeframe for doing things and to waive some procedural requirements. Courts also have some flexibility in allowing alternative hearing formats, such as permitting a party to attend a hearing by AVL.

12.69. However, the courts may be limited in their ability to use these powers to reduce or remove barriers for parties with disability for a number of reasons, including those we discussed in Chapter 3. For example, a court may not be aware that a party has a disability, or it may not be made aware until the party attends the court for a hearing.

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732 Preliminary Response 36 (Legal Aid Western Australia) 31.

733 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 28-33.

12.70. A court may also be limited by resourcing pressures, such as lengthy daily hearing lists, which require many matters to be heard within a short timeframe each day. These factors may limit a court's ability to offer adjustments including flexible procedures and timeframes to a party with a disability.

12.71. Further, the court's ability to extend timeframes (especially limitation periods) may be limited by statutory criteria beyond its control.

12.72. Some of the possible options for reform discussed in Chapter 3 may also address these issues. As we discussed there, the courts could adopt new processes to enable them to identify whether a party has a disability that requires adjustments (including flexible procedures and timeframes).

12.73. For example, the court forms a party is required to complete to commence or defend civil proceedings could ask whether the party has a disability, and whether they require adjustments or support to enable them to participate effectively in the proceedings.

12.74. Alternatively or in addition to such processes, another possible option for reform may be to legislate a general principle or obligation requiring a court to enquire whether any of the parties to a civil proceeding have a disability that requires adjustments, and to provide such adjustments where it is reasonable and practicable to do so. As we discuss in Chapter 14, the civil court rules and practice directions in the United Kingdom provide an example of such an obligation.

12.75. In addition, courts could manage civil proceedings that involve one or more parties with disability differently, for example, by establishing a separate, dedicated hearing list that is conducted at a slower pace and has greater flexibility for adjustments to be provided.

12.76. We invite your feedback on any or all of the following questions:

141. Should court processes in civil proceedings be changed to remove procedural barriers for parties with disability? If so, which processes and in which courts?

142. Should the law impose a positive obligation on the courts to enquire whether any of the parties to a civil proceeding require adjustments as a result of a disability to participate effectively?

143. If so, should the law impose a positive obligation on the courts to provide any reasonable and practicable adjustments they determine are required where it is reasonable to do so?

12.77. We also invite your feedback on the following general question:

144. How else, if at all, should the law be changed to enable persons with disability to participate in civil proceedings in courts?

13. People involved in tribunal matters

Overview

13.1. We have been asked specifically to consider the experiences of persons with disability who appear in civil proceedings before tribunals in the Western Australian court and tribunal system. A person may participate in tribunal proceedings as a party, a witness, or as a person entitled to be heard in proceedings.

13.2. Of the many tribunals established by different pieces of legislation in Western Australia, our research and stakeholders' preliminary responses indicated that persons with disability are most likely to interact with the SAT and the MHT.

13.3. Each of these tribunals have processes for facilitating the participation of persons with disability, which can inform our review. Alongside these processes, stakeholders identified some specific barriers to participating in the SAT and the MHT, which we discuss in this chapter.

Some context and the scope of this chapter

What is a tribunal?

13.4. The term tribunal can be used to describe a broad range of different bodies with decision-making powers. In the present context, however, a tribunal is a body established by statute which:

- comprises members who are independent of government;
- reviews government decisions and/or decides questions, complaints or disputes;
- is not a court; and
- is intended to operate more speedily, with less formality and technicality, and more cheaply than a court.

13.5. Tribunals often utilise informal procedures designed to enable parties to appear without legal representation, engage in active case management, use alternative dispute resolution approaches such as mediation, and often do not award costs.[734]

Tribunals in Western Australia

13.6. The SAT is the largest tribunal in Western Australia. It has the power to determine a broad range of matters, including disputes between private citizens, disciplinary proceedings for people engaged in certain professions or occupations, and reviews of the merits of some government decisions. There is a tribunal similar to the SAT in every other Australian State and Territory.

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[734] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 349-350.

13.7. There are also many specialised tribunals in Western Australia that have the power to make specific types of decisions.[735] Each of these tribunals is established by different laws and has its own individual procedures. Not all of these bodies are called tribunals. For example, the Office of Criminal Injuries Compensation and the Western Australian Industrial Relations Commission are tribunals.

Scope of this chapter

13.8. It is not possible for us to consider every tribunal in Western Australia, given the number of tribunals and the differences in the ways they operate.

13.9. In this chapter, we have chosen to focus on how the law can be changed to remove barriers that prevent persons with disability from participating in proceedings before the SAT and the MHT.

13.10. Our research and the preliminary responses indicate that these are the tribunals with which persons with disability are most likely to interact. Further, these tribunals have processes for facilitating the participation of persons with disability, which can inform our review. However, we welcome feedback on whether there are other tribunals that we should consider in our review.

13.11. Our Terms of Reference specifically ask us not to undertake a review of the CLMI Act, which established the MIRT. Therefore, we do not intend to consider possible reforms of the MIRT's governing law and processes. Nevertheless, we acknowledge that, as the MIRT makes decisions in relation to accused persons who are unfit to be tried, many of the individuals affected by its decisions are persons with disability.

13.12. We invite your feedback on the following question:

145. Are there any other tribunals in Western Australia that we should specifically consider in our review? If so, why?

The State Administrative Tribunal

Current law and practice

13.13. The SAT is established by the SAT Act. The SAT Act sets out the general functions and powers of the SAT; however, it does not set out the specific types of matters that the SAT is authorised to decide. Rather, other laws give the SAT the authority to make decisions about certain matters (**enabling laws**). There are over 160 enabling laws that give the SAT authority to make decisions; they are grouped by the SAT into four areas:[736]

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735 For a list of the tribunals in Western Australia, see Council of Australasian Tribunals, *Register of Australasian Tribunals* (June 2025) 47-53 <https://coat.asn.au/wp-content/uploads/2025/07/Register-of-Tribunals-June-2025.pdf>.

736 State Administrative Tribunal, *Annual Report 2024-2025* (19 September 2025) Appendix 1, 23 <https://www.sat.justice.wa.gov.au/_files/SAT_Annual_Report_2025.pdf>.

- Human Rights: primarily involves guardianship and administration applications, but also includes matters such as equal opportunity and mental health;
- Commercial and Civil: includes matters such as commercial tenancy disputes, building and construction disputes, strata disputes, firearms matters and retirement village matters;
- Development and Resources: includes reviews of government decisions in respect of applications for planning and development approval, as well as matters about land valuation and compensation, water allocation, agriculture and fisheries; and
- Vocational Regulation: concerns applications for disciplinary action brought by regulatory bodies against members of regulated professions (such as lawyers, nurses and doctors), as well as reviewing decisions made by vocational registration boards (such as the Teacher's Registration Board).

13.14. Importantly, approximately 84% of the applications received by the SAT in the 2024-2025 financial year were brought under the Guardianship and Administration Act.[737] Most of the applications brought under the Guardianship and Administration Act are about a person with a disability.[738] Accordingly, a significant proportion of the SAT's proceedings involve at least one person with a disability.[739]

Objectives of the SAT

13.15. The SAT Act sets out the main objectives of the SAT when dealing with matters that it has authority to determine. These objectives are:[740]

- to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;
- to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and
- to make appropriate use of the knowledge and experience of Tribunal members.

Procedure of the SAT

13.16. The SAT Act outlines the general procedures of the SAT. An enabling law may also set out processes and procedures for the SAT to follow. The SAT has the power to determine its own procedures in relation to matters that are not set out in the SAT Act or enabling laws.[741]

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737 State Administrative Tribunal, *Annual Report 2024-2025* (19 September 2025) 8, 14 <https://www.sat.justice.wa.gov.au/_files/SAT_Annual_Report_2025.pdf>.

738 Preliminary Response 21 (State Administrative Tribunal) 3.

739 The SAT does not collect data in relation to the number of people with disability who are a party to a proceeding before the SAT: Preliminary Response 21 (State Administrative Tribunal) 3.

740 *State Administrative Tribunal Act 2004* (WA) s 9.

741 *State Administrative Tribunal Act 2004* (WA) s 32(5).

13.17. Under the SAT Act, the SAT is:[742]

- bound by the rules of natural justice;
- not required to apply the rules of evidence or other procedures applicable to a court, unless the SAT decides to adopt those rules or procedures;
- to act according to equity, good conscience and the substantial merits of a case without regard to technicalities and legal forms;
- required to ensure that parties to proceedings have the opportunity to present evidence and to make submissions to the SAT; and
- able to give directions and do whatever is necessary for the speedy and fair conduct of proceedings.

13.18. The procedure that the SAT follows depends on the type of matter it is deciding. In matters other than those under the Guardianship and Administration Act:

- the SAT may hold one or more preliminary hearings such as a directions hearing;[743]
- in almost all cases, the SAT will require the parties to attend a mediation to try and resolve the dispute by agreement;[744]
- if the matter is not referred to mediation or is not resolved by the parties at mediation, the SAT may hold a hearing to decide the matter. Alternatively, the SAT may make a decision entirely on the basis of the documents given to it without requiring the parties or any witnesses to participate in a hearing;[745] and
- the SAT may require a person to attend a hearing to give evidence as a witness or require a person to produce a document or other evidence to it.[746]

13.19. In matters under the Guardianship and Administration Act, the SAT adopts different procedures, including:

- an inquisitorial approach, so that the SAT itself identifies the persons who should be heard in relation to an application or who may be able to provide information relevant to an application, and the SAT itself asks those persons to attend or to provide the information;
- not usually requiring the parties to attend mediation;
- a strong emphasis on informality. Those who attend are rarely required to give evidence on oath or affirmation, and cross examination is very uncommon;

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742 *State Administrative Tribunal Act 2004* (WA) ss 32(1) & (2), 32(6)(c), 34(1).
743 *State Administrative Tribunal Act 2004* (WA) s 52.
744 *State Administrative Tribunal Act 2004* (WA) s 54.
745 *State Administrative Tribunal Act 2004* (WA) s 60(2).
746 *State Administrative Tribunal Act 2004* (WA) s 66.

- obtaining the views of the person with disability who is the subject of the proceeding; and
- being particularly conscious of the need to ensure that the person the subject of the proceedings, and all others involved, can understand and participate in the proceedings.

13.20. In all proceedings before the SAT, the parties are to pay their own costs (including legal fees) unless the SAT orders otherwise.[747]

13.21. The SAT operates throughout Western Australia and may conduct hearings in any place in the State,[748] although it primarily operates out of the SAT building in Perth. The SAT may conduct hearings electronically by allowing parties and witnesses to participate by AVL.[749]

Decision-makers

13.22. The decision-makers in the SAT are called Members. The SAT has Members who are legally qualified, as well as members who are specialists in the areas in which the SAT makes decisions.[750] For example, the SAT has members who are qualified as doctors and town planners. The President and Deputy Presidents of the SAT are judges.[751]

13.23. When deciding matters, the SAT will usually be constituted by one, two or three Members.[752]

Witnesses and the laws of evidence in the SAT

13.24. The laws of evidence do not apply to the SAT.[753] The SAT may choose to adopt the laws of evidence and the practices and procedures adopted by courts in relation to witnesses in its proceedings.[754] However, it also has the power to determine its own practices and procedures in relation to witnesses.[755] The SAT itself can call any person to give evidence as a witness, and a member of SAT can examine or cross-examine witnesses.[756]

13.25. Because of this procedural flexibility, the SAT is able to receive evidence, and treat witnesses, in ways different from courts, and in ways which suit the nature of the specific proceedings and the needs of the witnesses themselves. For example, in a guardianship and administration hearing, the SAT will decide which persons should attend and give evidence, and it

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747 *State Administrative Tribunal Act 2004* (WA) ss 87, 88.
748 *State Administrative Tribunal Act 2004* (WA) s 10.
749 *State Administrative Tribunal Act 2004* (WA) s 60(1).
750 *State Administrative Tribunal Act 2004* (WA) s 117(3).
751 *State Administrative Tribunal Act 2004* (WA) ss 108(3), 112(3).
752 *State Administrative Tribunal Act 2004* (WA) s 11(2).
753 *State Administrative Tribunal Act 2004* (WA) ss 32(2), 67; *Evidence Act 2025* (WA) ss 3(1) (definition of 'WA tribunal'), 15.
754 *State Administrative Tribunal Act 2004* (WA) s 32(5).
755 *State Administrative Tribunal Act 2004* (WA) ss 32(2)(a), (5).
756 *State Administrative Tribunal Act 2004* (WA) s 67.

will usually receive evidence from those persons without requiring them to be formally examined and cross-examined.

13.26. We invite your feedback on any or all of the following questions:

146. Do witnesses with disability in the SAT face the same barriers in giving evidence as are faced by witnesses with disability in courts?

147. If not, what barriers are faced by witnesses with disability in the SAT?

The law enables some adjustments to be made for persons with disability

13.27. As we outlined earlier, tribunals are intended to be more flexible and informal than courts. In light of these overarching objectives, the SAT Act provides several mechanisms which the SAT can use to facilitate the equal participation in proceedings of persons with disability.

13.28. For example:

- the SAT is required to give reasonable assistance to a person wishing to make an application to the SAT, if they request assistance;[757]
- the SAT may allow a party to be represented by another person who is not a lawyer;[758]
- a party may be assisted during a proceeding by an interpreter or by another person if it is necessary or desirable to make the proceeding intelligible to that party;[759]
- the SAT has an obligation to take reasonable measures to ensure that the parties to a proceeding understand the assertions made in the proceeding and the legal consequences of those assertions;[760]
- the SAT has an obligation to take reasonable measures to explain to the parties any aspect of its procedure or any decision it has made, if requested to do so;[761] and
- rules made under the SAT Act may allow the SAT to extend the time limit for a party to do anything in connection with a proceeding, and to waive the need for a party to comply with a procedural requirement.[762]

13.29. We invite your feedback on the following question:

148. In your experience, does the SAT Act allow reasonable adjustments to be provided to persons with disability to enable their participation in proceedings before the SAT?

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757 *State Administrative Tribunal Act 2004* (WA) s 42(2).
758 *State Administrative Tribunal Act 2004* (WA) s 39(1)(e).
759 *State Administrative Tribunal Act 2004* (WA) s 41.
760 *State Administrative Tribunal Act 2004* (WA) s 32(6)(a).
761 *State Administrative Tribunal Act 2004* (WA) s 32(6)(b).
762 *State Administrative Tribunal Act 2004* (WA) s 92.

Benefits of the SAT model

13.30. In its preliminary submission, the SAT highlighted several features of its processes that encourage the equal participation of persons with disability, including:[763]

- allowing people to use AAC during hearings, and providing additional hearing time to enable a person to use this method of communication;
- offering different ways for people to attend hearings, including by AVL or in person;
- allowing a party to bring a support person to a hearing;
- modifying its procedures to the needs of the individual, for example, by conducting the hearing at a slower pace or ensuring there are frequent breaks;
- providing information to parties in a range of formats, including Easy Read documents, information videos, practice notes and information sheets; and
- providing website design has been reviewed and modified in response to accessibility feedback.

Barriers to participation in SAT proceedings identified by stakeholders

13.31. Many stakeholders identified that the barriers we discussed in Chapters 4, 5 and 6, such as those related to physical access to buildings[764] and the use of technology[765] can also apply to the SAT.

13.32. In addition, stakeholders identified other specific barriers to the equal participation of persons with disability in proceedings before the SAT.

Lack of free advocacy support or legal representation

13.33. A barrier identified by a number of stakeholders was the lack of free advocacy support or legal representation for persons with disability appearing before the SAT, especially in guardianship and administration proceedings.

13.34. The SAT submitted that many parties who interact with the SAT would benefit from free advocacy support or legal representation. The SAT noted that organisations that provide these services currently have limited capacity to accept referrals.[766]

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763 Preliminary Response 21 (State Administrative Tribunal) 4-6.

764 See, for example, Preliminary Response 21 (State Administrative Tribunal) 2; Preliminary Response 17 (Public Advocate) 2.

765 Preliminary Response 21 (State Administrative Tribunal) 2; Preliminary Response 11 (Advocacy WA) 9; Preliminary Response 12B (Developmental Disability WA) 4; Preliminary Response 17 (Public Advocate) 8-9; Preliminary Response 19 (Law Society of Western Australia) 3; Preliminary Response 28 (Consumers of Mental Health WA) 17; Preliminary Response 27 (Public Trustee) 16-17.

766 Preliminary Response 21 (State Administrative Tribunal) 1-2.

13.35. Developmental Disability WA noted that advocates offer an independent and valuable service to individuals and the SAT in guardianship and administration proceedings. Further, advocates can operate as communication partners for people with complex communication needs and can also prepare profiles or summaries of the communication needs of their clients to assist the SAT.[767]

13.36. Community Legal explained that individuals are expected to self-advocate in the SAT. This requires individuals to navigate the hearing process, respond to claims and engage with procedural requirements that assume a certain degree of literacy and executive capacity. The expectation that all individuals are able to self-advocate can impact the outcome of proceedings in the SAT for some persons with disability.[768]

13.37. Similarly, other stakeholders noted that guardianship and administration proceedings in the SAT require a high level of comprehension. They considered that, without advocacy support, legal representation or communication assistants, persons with disability are at risk of being made subject to guardianship or administration orders because they lack necessary supports to meet the requirements of the SAT.[769]

13.38. The Law Council of Australia made a similar observation in the Justice Project. It commented that self-representation in this context is problematic, as:

> *Guardianship, mental health and administration proceedings have the potential to impact significantly upon an individual's life and deprive him or her of his or her liberty in a way not dissimilar to the criminal justice system.*[770]

13.39. In Project 114, the Commission recommended that a free independent advocacy service be established by legislation to provide advocacy support to people the subject of guardianship and administration proceedings under the Guardianship and Administration Act.[771] We discuss the establishment of an independent advocacy service for persons with disability who engage in the court and tribunal system as one potential general option for reform, in Chapter 14.

13.40. We invite your feedback on the following question:

149. Are there particular kinds of proceedings in the SAT in which the assistance of a lawyer or an advocate is particularly important for persons with disability?

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767 Preliminary Response 12B (Developmental Disability WA) 6, 22-26.

768 Preliminary Response 37 (Community Legal Western Australia) 13.

769 Preliminary Response 11 (Advocacy WA) 9; Preliminary Response 25 (Sussex Street) 37.

770 Law Council of Australia, *The Justice Project: People with Disability (Part 1)* (August 2018) 58.

771 Law Reform Commission of Western Australia, *Project 114 - Guardianship and Administration* (Final Report, December 2025) Recommendations 315-316, 394-396.

Lack of processes to identify communication and support needs

13.41. Some stakeholders reported that the SAT does not have a process for identifying the communication and support needs of parties to proceedings.[772]

13.42. On the other hand, in its preliminary response the SAT drew our attention to the support it is able to provide, on request, to persons with disability. For example, the SAT invites people who use augmentative and alternative communication to bring their devices or books to a hearing, and it allocates more time to a hearing in these circumstances.[773]

13.43. The SAT's website also invites persons with disability who have needs that would impact their ability to participate in a hearing, including communication difficulties, to contact the SAT to discuss how assistance can be provided.[774]

13.44. In addition, application forms for proceedings under the Guardianship and Administration Act ask whether the applicant or proposed represented person require supports (such as hearing loops).

13.45. It may be that these options for support are not sufficiently well known to people appearing in the SAT or rely too heavily on persons with disability requesting assistance.

13.46. We invite your feedback on any or all of the following questions:

150. If you have been involved in SAT proceedings, were you made aware of ways in which the SAT could meet the needs of persons with disability to enable them to participate effectively in proceedings?

151. How were you made aware? What was the process?

152. In your experience, have persons with disability faced barriers to participating in proceedings in the SAT because the SAT did not become aware of their need for support before the hearing? What were those barriers? And how did the SAT deal with that situation?

Possible reform options

13.47. Stakeholders proposed some reform options that could remove or reduce the barriers identified.

Advocacy and legal services for persons with disability

13.48. In the Project 114 Final Report, the Commission made a number of recommendations regarding the provision of free advocacy support and legal representation to people the subject of proceedings before the SAT

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772 Preliminary Response 20B (Mental Health Tribunal) 8; Preliminary Response 37 (Community Legal Western Australia) 31.

773 Preliminary Response 21 (State Administrative Tribunal) 4.

774 'Disability Support', *State Administrative Tribunal* (Web Page, 21 August 2023) <https://www.sat.justice.wa.gov.au/D/disability_support.aspx?uid=0-0-688-5511>.

under the Guardianship and Administration Act. These recommendations included:[775]

- the establishment of a free advocacy service for people the subject of proceedings before the SAT under the Guardianship and Administration Act;
- the provision of support measures similar to those in the CLMI Act to a person who does not have, or may not have, decision-making capacity. The CLMI Act states that a person may be provided with any support measure that is reasonably available to facilitate the person's participation in proceedings before a court or tribunal. Support measures may include a communication partner, a support person or the use of a communication device;[776] and
- if a person the subject of proceedings under the Guardianship and Administration Act is unable to attend a hearing, the SAT must ensure the person is represented by a lawyer, an advocate or someone of the person's choosing.

13.49. In line with our recommendations in Project 114, the SAT Act could be amended to provide a right to free advocacy services and legal representation to persons with disability who are a party to additional proceedings (apart from those under the Guardianship and Administration Act) or in all proceedings before the SAT. We discuss this as a general option for reform in more detail in Chapter 14.

13.50. We invite your feedback on any or all of the following questions:

153. Should the SAT Act be amended to entitle persons with disability to free support from a lawyer or advocate in SAT proceedings?

154. If yes, in what proceedings, or in what circumstances, should a person with disability be entitled to receive such support?

155. Should the SAT Act be amended to provide that persons with disability appearing in SAT proceedings be provided with any reasonable adjustments to facilitate their participation?

156. What adjustments for persons with disability should be available in the SAT as a matter of course?

Introduce processes to identify communication and support needs

13.51. Another option for reform is to establish additional processes specifically to identify a person's disability-related needs for adjustments and/or supports to participation in SAT proceedings.

13.52. For example, Community Legal submitted that pre-hearing conferences should be required where a party has a cognitive disability or other condition affecting their ability to process information or participate

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[775] Law Reform Commission of Western Australia, *Project 114 - Guardianship and Administration* (Final Report, December 2025) Recommendations 315-316, 394-396.

[776] *Criminal Law (Mental Impairment) Act 2023* (WA) ss 9(1) (definition of 'support measure'), 20(3).

effectively in proceedings. The pre-hearing conference could be used to identify communication and support needs and other barriers to participation, and to explain the process to the party.[777]

13.53. Another possible option for reform, as we have identified in other chapters in this paper, may be to supplement any changes in process with a general legislative principle obliging the SAT specifically to consider whether a person engaging in SAT proceedings requires adjustments or supports to participate effectively in the proceedings.

13.54. The MHT suggested another related option for legislative reform. In its preliminary response, the MHT noted that there is no equivalent to the concept of 'fitness to plead' in criminal proceedings in guardianship and administration proceedings before the SAT. It submitted that a person with acute psychosocial disability may not have the functional capacity to participate meaningfully in guardianship and administration hearings.

13.55. The MHT proposed that the SAT Act be amended to introduce a functional participation assessment framework, to enable the SAT to assess a person's functional ability to participate in proceedings and provide support where appropriate.[778]

13.56. We invite your feedback on any or all of the following questions:

157. Who should be responsible for identifying that a person with disability requires adjustments to be made to enable them to participate effectively in SAT proceedings (for example, the SAT or the person themselves)?

158. Should the SAT introduce additional or different processes to those which currently exist to identify the adjustments required by persons with disability involved in SAT proceedings?

159. If so, what processes should it adopt?

160. Should the SAT Act be amended to impose a positive obligation on the SAT to enquire of all parties and witnesses whether they require reasonable adjustments as a result of a disability to facilitate their participation in proceedings?

Obligation to provide reasonable adjustments

13.57. The SAT Act could also be amended to impose an obligation on the SAT to provide reasonable adjustments to assist a person with disability, such as allowing a communication partner or the use of a communication device.

13.58. Ruah Legal Services submitted that communication partners should be introduced in the SAT to allow persons with disability to participate actively in proceedings, particularly in guardianship and administration proceedings which impact their rights and liberties.[779] The South West

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777 Preliminary Response 37 (Community Legal Western Australia) 31.

778 Preliminary Response 20B (Mental Health Tribunal) 8.

779 Preliminary Response 29 (Ruah Legal Services) [186].

Autism Network Inc also supported the introduction of communication partners in the SAT.[780] We outlined the CLMI Act provisions for communication partners in more detail in Chapter 6.

13.59. In addition, the SAT Act could be amended so that a person appearing before the SAT is entitled to be assisted by a support person without requiring the SAT's approval. The laws applicable to the civil and administrative tribunals in Tasmania, South Australia, Queensland and Victoria entitle a person to be assisted by a support person unless the tribunal orders otherwise.[781]

13.60. We invite your feedback on any or all of the following questions:

161. Should the SAT Act be amended to impose a positive obligation on the SAT to provide reasonable adjustments to a person with disability?

162. Should the SAT Act be amended to entitle a person with disability involved in SAT proceedings to be assisted by a support person?

Amend the SAT Act so that accessibility for persons with disability is an express objective of the SAT

13.61. Another option for reform may be to amend the objectives of the SAT Act (which guide the SAT's processes and its decisions) to expressly include accessibility as an objective.

13.62. To illustrate, the law governing the Tasmanian Civil and Administrative Tribunal states that it is an objective of that tribunal:

> *To be accessible by being easy to find and easy to access, and to be responsive to parties, especially people with greater needs for assistance than others.*[782]

13.63. The law governing the South Australian Civil and Administrative Tribunal contains a similar objective for that tribunal.[783]

13.64. Similarly, the Queensland Civil and Administrative Tribunal is required to:

> *Ensure the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal.*[784]

13.65. The SAT Act could be amended in a similar way to expressly refer to accessibility for persons with disability as one of the objectives of the SAT.

13.66. We invite your feedback on any or all of the following questions:

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780 Preliminary Response 24 (South West Autism Network Inc) 212.

781 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 44, 91; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 56(2); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 98(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 63A.

782 *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 10(1)(b).

783 *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(1)(b).

784 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 4(e).

163. Should the SAT Act be amended to include accessibility for persons with disability as one of the objectives of the SAT?

164. How should that objective best be expressed?

13.67. We invite your feedback on the following general question:

165. How else, if at all, should the law be changed to enable persons with disability to participate effectively in SAT proceedings?

The Mental Health Tribunal

Current law and practice

13.68. The MHT is established by the MH Act. The role of the MHT is to safeguard the rights of involuntary mental health patients in Western Australia.

13.69. The MH Act permits psychiatrists to treat some mental health patients without their consent, by making an 'involuntary treatment order'. An involuntary treatment order requires the patient to receive treatment as an in-patient in a hospital, or as an out-patient in the community, even if they do not consent to the treatment. The treatment can include psychiatric, medical, psychological and psychosocial treatments.[785]

13.70. The primary function of the MHT is to review involuntary treatment orders made by a psychiatrist. Under the MH Act, the MHT must conduct an initial review and then regular periodic reviews of involuntary treatment orders. It must also review an involuntary treatment order if a patient, someone close to them, or their mental health advocate requests a review.[786]

13.71. The MHT is also given the power under the MH Act to make other decisions relating to the treatment of people with mental illness. For example, it has the power to consent to electroconvulsive therapy being performed on an involuntary patient, or psychosurgery being performed on an adult patient. It also has the power to review orders made by a psychiatrist which limit a patient's right to receive visits from, or communicate with, other people.[787]

Procedure of the MHT

13.72. The MH Act outlines the general procedure of the MHT. It provides that:[788]

- a proceeding must be conducted with as little formality and technicality and as speedily as possible;
- the MHT is bound by the rules of natural justice;

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785 *Mental Health Act 2014* (WA) ss 4 (definition of 'treatment'), 22-25.

786 *Mental Health Act 2014* (WA) ss 386, 387, 390.

787 *Mental Health Act 2014* (WA) ss 404-405, 409-410, 416-417, 427.

788 *Mental Health Act 2014* (WA) ss 439, 456, 459, 460(1).

- the MHT has the power to determine its own procedures in relation to matters not set out in the MH Act or rules made under the Act;
- every party must be given a reasonable opportunity to call evidence and to make submissions;
- the MHT is not bound by the rules of evidence; and
- hearings of the MHT must be held in private.

13.73. In general terms, the procedure in the MHT is as follows:[789]

- Hearings are held in person at the hospital or health service treating the patient, or by videoconference. If the patient is located regionally, the hearing will usually be held by videoconference.
- Before the hearing, the patient's psychiatrist will prepare a medical report and provide the report to the patient and the MHT. The patient's psychiatrist and treating team are expected to attend the hearing and answer questions about the report.
- The patient may or may not attend the hearing themselves. A patient may also be represented by a mental health advocate or a lawyer at no cost.
- The MHT will consider information given by the patient.
- At the end of the hearing, the MHT will verbally provide its decision and reasons for decision. A party can request a written copy of the MHT's reasons.
- The MHT does not charge any fees to parties.
- Decisions of the MHT are reviewable by the SAT.

[789] Mental Health Tribunal, *Annual Report 2024-2025* (11 July 2025) 16; *Mental Health Act 2014* (WA) ss 438, 443, 449, 454, 457, 469.

Decision-makers

13.74. The decision-makers in the MHT are called Members. In every hearing, the MHT will usually be represented by a panel of three Members – a lawyer, an independent psychiatrist and a person who is not a lawyer, medical practitioner or mental health practitioner.[790]

Witnesses and the laws of evidence in the MHT

13.75. Similarly to the SAT, the MHT is not bound by the laws of evidence and can inform itself as it considers appropriate.[791] Its practices and procedures regarding witnesses and evidence are as set out in the MH Act and its rules and otherwise are as determined by the MHT.[792]

13.76. Like the SAT, the MHT has procedural flexibility to receive evidence, and treat witnesses, in ways which suit the nature of the specific proceedings and the needs of the witnesses themselves.

13.77. We invite your feedback on any or all of the following questions:

166. Do witnesses with disability in the MHT face the same barriers in giving evidence as are faced by witnesses with disability in courts?

167. If not, what barriers are faced by witnesses with disability in the MHT?

The MH Act enables some adjustments to be made for persons with disability

13.78. As outlined above, the MHT's decision-making powers affect people with mental illness. As the MHT noted in its preliminary submission, 'a person with a psychosocial disability is the focus of every [MHT] hearing'.[793]

13.79. The MH Act contains several provisions which are intended to facilitate the participation of persons with disability in proceedings before the MHT. For example:

- the MH Act requires any communication with a person to be in a form that the person is likely to understand, using any means of communication that is practical, and using an interpreter if necessary and practicable;[794]
- the fact that a person has a mental illness is presumed not to be a barrier to the person being represented by a lawyer in proceedings before the MHT, or to the person giving instructions to a lawyer for that purpose;[795]

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790 *Mental Health Act 2014* (WA) s 383.
791 *Mental Health Act 2014* (WA) s 460(1).
792 *Mental Health Act 2014* (WA) s 439(3).
793 Preliminary Response 20B (Mental Health Tribunal) 1.
794 *Mental Health Act 2014* (WA) s 9(2).
795 *Mental Health Act 2014* (WA) s 453.

- patients are entitled to be represented at a hearing of the MHT by a lawyer, a mental health advocate or any other person willing and able to represent their interests;[796] and
- the MHT may engage a person with relevant knowledge or experience to assist the MHT in a proceeding.[797] This could include, for example, a person with specialised communication skills or expertise in the care of people with intellectual disability.

13.80. We invite your feedback on the following question:

168. In your experience, does the MH Act allow reasonable adjustments to be provided to persons with disability to enable their participation in proceedings before the MHT?

Advocacy and legal services

13.81. The Mental Health Advocacy Service is a consumer advocacy body established under the MH Act.[798] It provides free, independent advocacy to all involuntary patients on an opt-in basis. In addition, the Mental Health Law Centre operated by Ruah Legal Services is funded to provide free legal representation to patients at MHT hearings.

Benefits of the MHT model

13.82. In its preliminary response, the MHT highlighted several features of its processes that encourage the equal participation of persons with disability, including:[799]

- the MHT adopts person-centred and trauma-informed procedures;
- hearings are informal, held at the patient's treatment facility or online, and decisions are given in plain language;
- the MHT offers different ways for patients to participate in hearings and enables patients who do not wish to attend hearings to share their views and wishes in writing;
- the MHT offers different ways for patients to provide information and documents to the MHT, including by using an online portal, by email or with assistance from registry staff; and
- patients have a right to an advocate who assists them in understanding their rights, expressing their wishes and participating meaningfully in hearings.

796 *Mental Health Act 2014* (WA) s 449(1).
797 *Mental Health Act 2014* (WA) s 453.
798 *Mental Health Act 2014* (WA) Part 20.
799 Preliminary Response 20B (Mental Health Tribunal) 1-3.

Barriers to participation in MHT proceedings identified by stakeholders

13.83. Stakeholders identified some specific barriers to the equal participation of persons with disability in proceedings before the MHT.

13.84. Some stakeholders identified that technological issues in MHT hearings can have a significant impact on the ability of a person with disability to participate in a hearing.[800] We discuss barriers arising from the use of technology by courts and tribunals in Chapter 5.

13.85. Ruah Legal Services identified another barrier in its preliminary response. It noted that legal assistance for hearings in the MHT is 'severely limited' and frequently unable to meet demand. Ruah noted that failing to provide free legal representation to patients in MHT proceedings is contrary to the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, which entitles persons with mental health conditions to legal representation.[801]

Possible reform options

13.86. We have identified some reform options that could remove or reduce the barriers identified by stakeholders.

13.87. One option for reform may be to mandate legal representation for patients appearing before the MHT.

13.88. In NSW, an involuntary patient receiving treatment as an in-patient at a hospital without their consent must be represented by a lawyer in any proceedings before the NSW Mental Health Review Tribunal, unless the patient decides they do not want to be legally represented.[802]

13.89. The MH Act could be amended to mandate legal representation for involuntary patients appearing before the MHT.

13.90. We invite your feedback on the following question:

169. Should the MH Act be amended to require that all involuntary patients appearing before the MHT are represented by a lawyer?

13.91. Another option for legislative reform may be to amend the MH Act to mandate the provision of a person's medical records to their representative prior to a hearing.

13.92. The Mental Health Commission recently reviewed the MH Act. It recommended that the MH Act be amended to require a health service to provide an involuntary patient's medical records to the patient's representative at least 72 hours before a MHT hearing. This change would

800 Preliminary Response 29 (Ruah Legal Services) [172]-[175], [178].

801 Preliminary Response 29 (Ruah Legal Services) [203].

802 *Mental Health Act 2007* (NSW) s 154(2A).

be consistent with other Australian jurisdictions and would improve procedural fairness for persons with disability.[803]

13.93. We invite your feedback on the following question:

170. Should the MH Act be amended to require a health service to provide an involuntary patient's medical records to the patient's representative well in advance of a MHT hearing?

13.94. We invite your feedback on the following general question:

171. How else, if at all, should the law be changed to enable persons with disability to participate effectively in MHT proceedings?

803 Mental Health Commission, *Report on the Statutory Review of the Mental Health Act 2014* (Final Report, February 2024) 53-54, Recommendation 38.

14. Options for fundamental reform

Overview

14.1. Persons with disability face a wide range of barriers to accessing and participating in the court and tribunal system. Some of these barriers are practical in nature, while others relate to specific legislative provisions or procedural requirements. Many of these barriers reflect systemic and structural inequalities experienced by persons with disability.

14.2. In light of the breadth of the issues raised by this review, we are considering whether an effective way to address these inequalities would be through fundamental reform options which have both a broad and deep reach. One possible reform of this nature may be an overarching legislative statement of principles, or of obligations, for access and participation by persons with disability in courts and tribunals in this State. A generally applicable statement of that kind may be the most effective means of driving practical reform across the court and tribunal system in Western Australia.

14.3. Another potential legislative reform may be to establish a specific statutory office holder with responsibility for assisting persons with disability by identifying and arranging the reasonable adjustments and supports that persons with disability need to access and participate in the court and tribunal system. Alternatively, legislation could require that every court and tribunal appoint a staff member with responsibility for arranging such reasonable adjustments and supports.

14.4. A third option for reform may be to establish a statutory oversight mechanism, such as a statutory office holder with functions related to monitoring, reviewing and reporting on access and participation issues in the court and tribunal system.

14.5. We do not envisage that any of these approaches would be enough, on its own, to address the range of barriers to access and participation in courts and tribunals which we have discussed in this paper. Rather, we envisage that in addition to broad legislative reforms of this kind, specific amendments would be required to address barriers in particular contexts, or where a more prescriptive response is warranted. Examples of such specific responses have been discussed in each of the earlier chapters in this consultation paper.

14.6. We want to know your views about each of these reform options. To help you provide your views, we outline each option and preliminary feedback we received in relation to it, as well as some potential models for any reforms. We also want to know if you think there are alternative options for reforms of this nature which we should consider in Project 115.

The nature of the issues in this review and the role of legislative reform

14.7. Many of the issues identified in this paper concern systemic and structural inequalities experienced by persons with disability in relation to the court and tribunal system in Western Australia.

14.8. It is also apparent from stakeholders' preliminary feedback that barriers to access and participation experienced by persons with disability in the court and tribunal system are often practical in nature and highly diverse. For these reasons, they are not addressed in existing legislation.

14.9. The corollary is that legislative reform is not necessarily required to remove some of these barriers or for meaningful improvements to be made. For example, as we discussed in Chapter 4, stakeholders illustrated how many physical barriers to accessing courts and tribunals could be addressed through operational changes. Despite this, there may be a need for legislative reform to create enforceable obligations in order for these barriers to be addressed.

14.10. As we have highlighted at various points in this consultation paper, some existing legislative provisions are potentially broad enough to enable the use of measures to remove some barriers to access and participation for persons with disability. An example is the wide and flexible powers of case management conferred on courts by the Criminal Procedure Act, which we discussed in Chapter 7. However, relying on provisions of this nature, which apply in specific contexts, may be insufficient to ensure 'a sufficiently proactive and consistent approach'[804] to enabling the full participation of persons with disability across the court and tribunal system.

14.11. Legislative reforms may therefore be necessary to signal the importance of access and participation for persons with disability, as an integral element of a fair and just court and tribunal system.

14.12. In addition to the need for legislative reforms, we have been asked to consider the best approach to implementing any reforms in the Western Australian context. Given the diverse barriers to access and participation experienced by persons with disability, and the diverse laws, procedures and practices related to those barriers, we have identified some potential options for broad, systemic reforms.

14.13. These options are also informed by the compelling point advanced by one stakeholder, that 'accessibility is most effective when it is anticipated rather than requested, and embedded rather than exceptional'.[805] Other stakeholders expressed similar views in their preliminary responses.[806]

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804 Civil Justice Council, *Vulnerable Witnesses and Parties in Civil Proceedings* (Final Report, February 2020) [4].

805 Preliminary Response 34A (Ms Cátia Malaquias OAM) 12.

806 Preliminary Response 11 (Advocacy WA) 18; Preliminary Response 15 (Deafness Council Western Australia Inc) 4; Preliminary Response 16 (Autism Association of Western Australia) 4; Preliminary Response 36 (Legal Aid Western Australia) 28-29.

14.14. We are interested in your views as to whether any of these options would be an effective means of driving practical and wide-ranging reform across the court and tribunal system in Western Australia.

An overarching legislative statement of principles

Outline of reform option

14.15. One possible option for reform may be to enact an overarching legislative statement of principles related to access and participation in the court and tribunal system.

14.16. A statement of high-level principles could establish a positive obligation to facilitate access and participation in the court and tribunal system, while leaving room for judicial officers, court and tribunal staff and administrators to determine how the principles should be applied in the specific (and diverse) contexts in which a person with disability may engage with the court and tribunal system.

14.17. As we have already observed, there is a wide range of barriers to access and participation experienced by persons with disability. Alongside the reality that every individual has a unique experience of disability, this means that bespoke responses may often be required.

14.18. The introduction of an overriding obligation on courts and tribunals to consider and address any impact of disability on participation in proceedings may ensure that courts and tribunals consider the need for provision of any reasonable adjustments and support while also preserving flexibility as to what adjustments and supports are provided in a particular case.

14.19. To illustrate, a legislative statement of general principles might state that persons with disability should:

- be able to access the physical environment of a court and tribunal safely, comfortably, with dignity and to the same extent as others;
- be able to access the information they need to commence, defend, respond to, and otherwise participate in, court and tribunal proceedings; and
- be able to communicate with, and within, the court and tribunal system.

14.20. It may also include principles which oblige a court or tribunal to:

- expressly consider whether a person may have a disability which affects their ability to access or participate in the proceedings;
- expressly consider and identify whether a person may have any disability-related needs for adjustments and/or support to access or participate in the proceedings;
- ensure, to the extent it is practicable to do so, that a person is provided with the adjustments and/or support they need to access or participate in the proceedings; and

- if it is not practicable to ensure that a person is provided with the adjustments and/or support they need to access or participate in the proceedings, provide reasons as to why it is not practicable.

14.21. In addition to considering what principles may be included in this possible reform option, it is also important to address the issue of how these principles may be expressed. For example, they may be expressed to apply to any person with disability who accesses a court or tribunal, or who participates in court or tribunal proceedings.

14.22. An alternative approach may be to express the principles in terms of the various roles in which a person may participate in the court and tribunal system (including, for example, as a person accused or convicted of a criminal offence, a party, a witness, a juror, or any other person appearing in a matter).

14.23. It is likely that any legislative statement of high-level obligations will require practical responses, including changes to infrastructure, administrative arrangements and court processes. These responses might also need to be accompanied by more specific amendments to court and tribunal rules.

14.24. If legislative obligations are imposed on courts and tribunals, a further question will be what consequences should flow from non-compliance or inadequate compliance with any such obligations.

Preliminary feedback about this reform option

14.25. Multiple stakeholders expressed support for an overarching legislative response to access and participation barriers for persons with disability in the court and tribunal system. Kin Disability Advocacy observed:

> *People with disability often experience uneven access to reasonable adjustments, no unified disability justice strategy across the justice continuum and implementation depends heavily on individual agencies, leading to gaps in practice.*[807]

14.26. In light of this, Kin Disability Advocacy said there is a need for a 'statewide Disability Justice Framework with enforceable standards.'[808]

14.27. The Autism Association also suggested that there should be legislation establishing accessibility standards for justice environments. It specifically noted that minimum standards should exist in relation to the physical environment of courts and tribunals, flexible scheduling and access to remote participation.[809]

14.28. John Curtin Law Clinic also considered that Western Australia should enact or adapt legislation that 'establishes a positive duty on courts, tribunals, and justice agencies to consider access for people with

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807 Preliminary Response 14 (Kin Disability Advocacy) 4.

808 Preliminary Response 14 (Kin Disability Advocacy) 12.

809 Preliminary Response 16 (Autism Association of Western Australia) [7].

disabilities'. It considered this could be in the form of a Human Rights Act, or disability-specific legislation.[810]

14.29. In their preliminary responses, some stakeholders expressed support for a specific legislative duty or obligation on courts and tribunals related to identifying disability and disability-related needs for adjustments.

14.30. For example, John Curtin Law Clinic also considered that the Criminal Procedure Act, evidence law and court procedural rules should be amended to introduce a positive duty on courts to inquire whether a witness or accused person has a disability and requires accommodation.[811]

14.31. More broadly, Advocacy WA suggested the introduction of enforceable statutory obligations requiring all justice and tribunal systems to 'proactively identify and implement reasonable adjustments' for persons with disability, rather than 'placing the burden on individuals to request accommodations they may not know exist or lack the capacity to articulate'.[812]

Possible models for this reform

Family law proceedings in the United Kingdom

14.32. Court rules and practice directions in the United Kingdom provide an example of legislatively prescribed principles of this kind.

14.33. By way of example, the Family Procedure Rules 2010 (UK) and related practice directions provide a comprehensive framework requiring family courts to explicitly consider, and respond to, the impact of any 'vulnerability' on a person's ability to participate in family law proceedings.[813] Factors relevant to the vulnerability of a person include whether the person:

- experiences mental disorder or otherwise has a significant impairment of intelligence or social functioning;
- has a physical disability or experiences a physical disorder; or
- is undergoing mental treatment.[814]

14.34. A variety of obligations exist under this framework. They include:

- the court and all parties to the proceedings have a duty to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings;[815]

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810 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 4.

811 Preliminary Response 5 (John Curtin Law Clinic, Curtin University) 5.

812 Preliminary Response 11 (Advocacy WA) 18.

813 *Family Procedure Rules 2010* (UK); *Practice Direction 3AA - Vulnerable Persons: Participation in Proceedings and Giving Evidence*; *Civil Procedure Rules* (UK); *Practice Direction 1A - Participation of Vulnerable Parties or Witnesses* (UK).

814 *Family Procedure Rules 2010* (UK) Rule 3A.7(b).

815 *Practice Direction 3AA - Vulnerable Persons: Participation in Proceedings and Giving Evidence* 1.3, 1.4. In relation to a party, *Practice Direction 3AA* cites the source of this duty as rule 1.3,

- the court is subject to a duty to consider how a party can participate in proceedings.[816] This duty applies as soon as possible after the start of proceedings and continues until the resolution of the proceedings;[817]
- when considering whether a person's participation in the proceedings is likely to be diminished by reason of the various factors relevant to vulnerability, the court is required to consider the person's ability to understand the proceedings and their role in them; their ability to put their views to the court, to instruct representatives before, during and after the hearing; and their ability to attend the hearing without significant distress;[818]
- if a court considers that a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability, it must, after hearing from that party, consider whether it is necessary to make one or more 'participation directions';[819]
- a participation direction is a general case management direction for the purpose of assisting a person to give evidence or participate in proceedings; or a direction that a person should have the assistance of a range of measures,[820] such as allowing a person to participate and give evidence in hearings by video link, or to use a device to help them communicate, or to participate with the assistance of an intermediary;[821]
- to assist a person to give evidence or participate, the court may also give general case management directions in relation to matters such as the structure and timing of the hearing, the formality of the language to be used, and measures designed to prevent the parties coming into contact with each other in the public areas of the court building;[822]
- the court must set out, in an order, its reasons for making, varying or revoking participation directions, or deciding not to do so;[823] and

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which provides 'the parties are required to help the court to further the overriding objective'. The 'overriding objective' is 'enabling the court to deal with cases justly' and this includes 'ensuring that the parties are on equal footing': *Practice Direction 3AA - Vulnerable Persons: Participation in Proceedings and Giving Evidence* 1.3; *Family Procedure Rules 2010* (UK) Rule 1.1(1) and (2)(c). As we discuss below, the overriding objective of the Civil Procedure Rules in the UK directly refers to participation.

816 The court also separately has a duty to consider how a party or a witness can give evidence: see *Family Procedure Rules 2010* (UK) Rule 3A.5.

817 *Family Procedure Rules 2010* (UK) 3A.9(1).

818 *Practice Direction 3AA - Vulnerable Persons: Participation in Proceedings and Giving Evidence* [3.1].

819 *Family Procedure Rules 2010* (UK) Rule 3A.4.

820 The various measures are set out in the *Family Procedure Rules 2010* (UK) Rule 3A.8.

821 *Family Procedure Rules 2010* (UK) 3A.1 (meaning of 'participation direction').

822 *Practice Direction 3AA - Vulnerable Persons: Participation in Proceedings and Giving Evidence* [4.2].

823 *Family Procedure Rules 2010* (UK) 3A.9(2).

- if a court considers that a particular measure is necessary but is not available to the court, it must set out, in its order, the reasons why the measure is not available.[824]

14.35. Non-compliance with the Family Procedure Rules or practice directions does not invalidate any step in the proceedings unless the court so orders; and the court may make an order to remedy the error.[825] The Court of Appeal of England and Wales has held that:

> *It does not follow, however, that a failure to comply with these provisions, whether through oversight or inadvertence, will invariably lead to a successful appeal. The question on appeal in each case will be, first, whether there has been a serious procedural or other irregularity and, secondly, if so, whether as a result the decision was unjust.*[826]

14.36. The effectiveness of principles of this kind will depend upon the commitment of courts to comply with them. In 2020, the UK's Civil Justice Council considered whether similar principles should be implemented in the civil jurisdiction of the courts. For that purpose, the Civil Justice Council examined the effectiveness of the Family Procedure Rules and practice directions concerning vulnerable persons. It reported that:

- there was only limited understanding as to the provisions' operation in practice, as well as 'anecdotal evidence of the patchy and inconsistent implementation of these provisions';[827]
- there was a need for improved physical facilities of court buildings;[828] and
- there was a need for 'greater proactivity and coordination on the part of the courts to identify and respond to parties' vulnerability, especially where litigants in person [are involved]'.[829]

14.37. It also reported that there was a need for:

> *more detailed guidance on dedicated training for judges, practitioners and court staff on matters such as identifying vulnerability – including those made vulnerable because of their engagement with the court – considering which measures and what kind of participation directions may*

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824 *Family Procedure Rules 2010* (UK) Rule 3A.8(5).

825 *Family Procedure Rules 2010* (UK) Rule 4.7.

826 *S (Vulnerable Party Fairness of Proceedings)* [2022] EWCA Civ 8 [41]-[42].

827 Civil Justice Council, *Vulnerable Witnesses and Parties in Civil Proceedings* (Final Report, February 2020) [80].

828 Civil Justice Council, *Vulnerable Witnesses and Parties in Civil Proceedings* (Final Report, February 2020) [80].

829 Civil Justice Council, *Vulnerable Witnesses and Parties in Civil Proceedings* (Final Report, February 2020) [80].

be appropriate, conducting a ground rules hearing and other strategies available to protect vulnerable witnesses.[830]

United Kingdom Civil Procedure Rules and Practice Direction

14.38. Following the report of the UK Civil Justice Council, and notwithstanding the limitations it identified in the application of the principles in the Family Court, a similar (although not identical) framework was enacted in the Civil Procedure Rules and Practice Direction 1A.[831]

14.39. Under that framework, there is no explicit statutory duty on a court (or on another party) to identify vulnerability at the earliest possible stage; nor is there a duty to consider how vulnerability may affect participation.

14.40. Instead, the Civil Procedure Rules expressly state that their overriding objective, which is to enable the court to deal with cases justly and at proportionate cost, includes ensuring that the parties 'can participate fully in proceedings'.[832] The parties 'are required to help the court to further the overriding objective'.[833]

14.41. Practice Direction 1A then makes provision for how the court is to give effect to the overriding objective in relation to vulnerable parties or witnesses.[834] A person is considered to be vulnerable when a factor – whether personal or situational, permanent or temporary – may adversely affect their participation in proceedings or the giving of evidence.[835] Those factors include:

(a) Age, immaturity or lack of understanding;

(b) Communication or language difficulties (including literacy);

(c) Physical disability or impairment, or health condition;

(d) Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties).[836]

14.42. Practice Direction 1A provides broad guidance for considering a person's ability to participate in civil proceedings, and to give evidence. A court should consider a person's ability to:

- understand the proceedings and their role in them;
- express themselves throughout the proceedings;
- put their evidence before the court;

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830 Civil Justice Council, *Vulnerable Witnesses and Parties in Civil Proceedings* (Final Report, February 2020) [80].

831 The Civil Procedure Rules apply to the civil division of the Court of Appeal, the High Court and the county court: *Civil Procedure Act 1997* (UK) s 1(1).

832 *Civil Procedure Rules* (UK) Rule 1.1(2)(a).

833 *Civil Procedure Rules* (UK) Rule 1.3.

834 *Civil Procedure Rules* (UK) Rule 1.6.

835 *Practice Direction 1A - Participation of Vulnerable Parties or Witnesses* (UK) [3].

836 *Practice Direction 1A - Participation of Vulnerable Parties or Witnesses* (UK) [4].

- respond to or comply with any request of the court, or do so in a timely manner;
- instruct their representative/s (if any) before, during and after the hearing; and
- attend any hearing.[837]

14.43. As for non-compliance with these rules, the Civil Procedure Rules provide that an error does not invalidate any step taken in the proceedings unless the court so orders. There is also a general power to rectify errors of procedure.[838]

14.44. We invite your feedback on any or all of the following questions:

172. Should there be a general legislative statement of principles for facilitating access and participation by persons with disability in courts and tribunals in Western Australia? Why or why not?

173. If a general legislative statement of principles for access and participation were to be enacted, what principles should the legislation include?

174. If a general legislative statement of principles for access and participation were to be enacted, what, if any, limitations should there be on the application of those principles to courts and tribunals?

175. If a general legislative statement of principles for access and participation were to be enacted, what consequences, if any, should flow from non-compliance with the legislation?

Court liaison officers

Outline of reform option

14.45. Another option for legislative reform may be to establish a specific statutory office to assist persons with disability to access and participate in the court and tribunal system.

14.46. Such an office could provide individualised assistance and operate as a central point of contact with the court and tribunal system for persons with disability.

14.47. Potential functions of this statutory office could include:

- providing information to a person with disability about the adjustments and supports which can be provided by a court or tribunal;
- working with a person with disability to identify what adjustments and supports the person needs;

837 *Practice Direction 1A - Participation of Vulnerable Parties or Witnesses* (UK) [5].

838 *Civil Procedure Rules* (UK) Rule 3.10.

- arranging adjustments and supports, including by communicating with court or tribunal registry staff, associates and/or judicial officers where necessary; and
- ensuring that relevant information about a person's disability, adjustments and supports is (where appropriate) tracked across a person's engagement with the court and tribunal system, to ensure continuity of information and access to adjustments and supports.

Preliminary feedback about this reform option

14.48. Multiple stakeholders expressed support for an office of this nature. For example, Ruah Legal Services said:

> *There should also be Court Liaison Officers who are the 'point of contact' for administrative matters such as ensuring the person with a disability is able to attend Court, and making the necessary arrangements and accommodations on behalf of the person with a disability, rather than the burden of seeking accommodations being placed on the person with a disability.*[839]

14.49. The Disabled Lawyers Association recommended the creation of a Disability Liaison Officer position in all courts and tribunals, with the same functions. The Disabled Lawyers Association also suggested that it should be possible for a person to contact a Disability Liaison Officer to discuss adjustment requests confidentially, without having to disclose their disability to other parties in a matter.[840]

14.50. In a slightly different approach, but aligned with this possible reform option, the Law Society also supported the provision of funded advocates to formally assist people with disabilities and self-represented litigants in navigating court and tribunal processes, particularly in relation to electronic services.[841]

Possible models for this reform

14.51. Various other jurisdictions may provide a model for such a position or role. In this section we outline key features of the disability liaison officer (**DLO**) position in the ACT and the position of 'access officers' within public bodies in Ireland.

Disability Liaison Officers in the ACT

14.52. There are DLOs engaged in a variety of public sectors across the ACT, including ACT Courts and Tribunal.[842]

14.53. Their role is to work directly with persons with disability and ACT Court and Tribunal staff to 'aid and support court users who require reasonable

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839 Preliminary Response 29 (Ruah Legal Services) [68].

840 Preliminary Response 30 (Disabled Australian Lawyers Association) [38].

841 Preliminary Response 19 (Law Society of Western Australia) 4.

842 'For People With Disability', *ACT Courts*) <https://www.courts.act.gov.au/coming-to-court/get-support/people-with-disability>.

adjustments, enabling independence, access and participation in their legal matters'.[843]

14.54. When engaging with a court user who requires adjustments and/or support, a DLO uses a needs-identification tool intended to focus on a person's functioning rather than on disability in and of itself.[844]

14.55. The ACT Courts website states that a DLO can arrange for:

- a pre-hearing tour (for example, to assist a person who needs assistance or adjustments to move around a court building, to become familiar with the layout and what to expect on the day);
- a person to use court-provided portable hearing loops or equipment to enable a person to use the infrared hearing systems fitted in hearing rooms;
- screen reader software compatible copies of hearing transcripts;
- audio versions of transcripts;
- assistance with communication needs; and
- support for a person to bring their assistance animal to a court or tribunal.[845]

14.56. A DLO can be accessed by any person at a court or tribunal, including parties to criminal and civil matters, judicial officers, and lawyers. While a person can self-refer, it is also common that registry staff and/or judicial officers will recommend that a person speak to the DLO if it appears that adjustments may assist the person in engaging with the court or tribunal.[846]

14.57. There is no direct legislative basis for the DLO position. However, it is expressly recognised in the ACT Courts Disability Action and Inclusion Plan 2025-2027[847] (and in the preceding ACT Disability Justice Strategy).[848]

Access Officers in Ireland

14.58. Under section 26 of the *Disability Act 2005* (Ireland), where a service is provided by a public body (which is expressly defined to include 'any

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843 Justice and Community Safety Directorate ACT Government, *Position Description - Disability Liaison Officer* (May 2025) <https://static.ethicaljobs.com.au/media/1749796669_IxQOu_.pdf>.

844 ACT Courts and Tribunal, *Disability Action and Inclusion Plan 2025-2027* (December 2024) 7, Action 3.1.1.

845 'For People With Disability', *ACT Courts*) <https://www.courts.act.gov.au/coming-to-court/get-support/people-with-disability>.

846 See, for example, *R v McHughes* [2021] ACTSC 92 [17].

847 ACT Courts and Tribunal, *Disability Action and Inclusion Plan 2025-2027* (December 2024) 5, Action 1.1.1 and 7, Action 3.1.1.. Pursuant to s 15 of the *Disability Inclusion Act 2024* (ACT), the responsible person for a public sector entity must make a disability inclusion plan for how the entity will implement disability inclusion and address ableism.

848 ACT Government, *Disability Justice Strategy 2019-2029* (August 2019) 14. In the strategy, the position is described as the Courts and Tribunal Assistance Officer.

service provided by a court or other tribunal'),[849] the head of the body is required, where practicable and appropriate, to:

- ensure that the provision of access to the service by persons with and without disabilities is integrated;[850]
- and to provide for assistance to persons with disabilities to access the service if necessary to ensure compliance with the obligation for integrated access to the service.[851]

14.59. The head of the public body is also required to authorise at least one of the officers in the body (known as 'access officers') to provide or arrange for and co-ordinate the provision of assistance and guidance to persons with disabilities in accessing its services.[852]

14.60. In Ireland, each courthouse has an access officer whose role is to coordinate adjustments and arrange supports.[853]

14.61. Like DLOs in the ACT, access officers are available to assist 'all users of the courts' including judges, staff, legal practitioners, victims, witnesses, accused persons, media and members of the public.[854]

14.62. The Irish Courts Service website refers to a range of adjustments and supports similar to those outlined on the ACT Courts website.

14.63. Persons who need adjustments to access the 'services' provided by the courts are able to contact the access officer and explain what adjustments would assist them. The access officer then discusses the request with a court registrar and, if necessary, the judge, who 'makes the final decision about adjustments inside the courtroom'.[855]

14.64. Under s 38 of the *Disability Act 2005*, a person may complain about the failure of a public body to comply with its obligations under section 26. Complaints are dealt with through an inquiry process,[856] and there is an avenue for appeals to the Ombudsman.[857]

14.65. We invite your feedback on any or all of the following questions:

176. Should legislation be enacted to establish a specific office to assist persons with disability to access and participate in all courts and tribunals?

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849 *Disability Act 2005* (Ireland) s 2(definition of 'service').

850 *Disability Act 2005* (Ireland) s 26(1).

851 *Disability Act 2005* (Ireland) s 26(1).

852 *Disability Act 2005* (Ireland) s 26(2).

853 'Accessibility at court', *Court Service* (Web Page, 2 April 2025) <https://www.courts.ie/guides/accessibility-at-court>.

854 'Accessibility at court', *Court Service* (Web Page, 2 April 2025) <https://www.courts.ie/guides/accessibility-at-court>.

855 'Accessibility at court', *Court Service* (Web Page, 2 April 2025) <https://www.courts.ie/guides/accessibility-at-court>.

856 *Disability Act 2005* (Ireland) s 39.

857 *Disability Act 2005* (Ireland) s 40.

177. If so, what functions should be given to the holder of that office?

178. Should the holder of that office be given the function of identifying and assessing a person's needs for adjustments?

179. What powers, if any, should legislation confer on the office to enable the performance of their functions?

180. What duties, if any, should legislation impose on the office?

181. Would it be preferable, instead, to enact a legislative requirement that each court or tribunal appoint a staff member to facilitate adjustments to assist persons with disability to access and participate in proceedings in that court or tribunal?

An independent advocacy service

Outline of reform option

14.66. Another possible option for legislative reform is to establish an independent advocacy service for persons with disability who engage with courts and tribunals.

14.67. Many issues identified in this paper highlighted the broad range of adjustments that may be required to facilitate the participation of a person with disability in proceedings.

14.68. An independent advocate (as distinct from a legal representative) may be better able to provide individualised support to enable a person with disability to access and participate in court or tribunal proceedings.

Preliminary feedback

14.69. Community Legal provided detailed feedback in this regard:

> *Disability advocates can assist with communication, emotional regulation, explaining processes in accessible ways and supporting participation, allowing lawyers to focus on legal advocacy. There were different views amongst members as to the preferred model for delivering this support. Some supported the establishment of a funded statutory duty disability advocate service embedded within courts and tribunals. Others considered that the priority should be to strengthen existing infrastructure by increasing the capacity of community legal services. Members emphasised that these approaches are not necessarily mutually exclusive. Regardless of the model adopted, our members agree that legislative and funding reform is required.*[858]

14.70. Community Legal said that:

> *While lawyers provide legal advice and advocacy, they are not always able to provide the intensive, disability-specific support that some clients*

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[858] Preliminary Response 37 (Community Legal Western Australia) 30.

require. Members reported that where disability advocates have accompanied clients to court, outcomes are improved for clients, legal representatives and the proceedings themselves.[859]

Possible models for this reform

14.71. In Project 114, the Commission recommended that the provisions of the CLMI Act and the Mental Health Act should be used as models to establish a free, independent advocacy service for represented people and people who are the subject of proceedings before the SAT.[860] The Commission considered that this would facilitate the meaningful participation of people in SAT hearings.[861]

14.72. A similar model may be adopted to provide an advocacy service for all persons with disability involved in proceedings in courts and tribunals in this State.

14.73. We invite your feedback on any or all of the following questions:

182. Should legislation establish a free and independent advocacy service for persons with disability who are involved in proceedings in all courts and tribunals in Western Australia?

183. If so, to whom should the independent advocacy service be available? For example, should it be available to all persons with disability who access or participate in courts and tribunals?

184. Should an independent advocacy service be available only to persons involved in proceedings in specific capacities? If so, which capacities (eg accused persons, convicted persons, victims or their families, witnesses, jurors, parties in civil proceedings in courts or tribunals)?

185. What functions do you think an independent advocacy service should perform?

A monitoring and oversight mechanism

Outline of reform option

14.74. Another possible option for legislative reform may be to establish an independent position or office to monitor, research and report on systemic issues related to access and participation by persons with disability in the court and tribunal system.

14.75. Rather than providing individualised assistance or support to persons with disability, this position or office might function to research and report on issues related to access and participation at a systemic level.

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859 Preliminary Response 37 (Community Legal Western Australia) 30.

860 Law Reform Commission of Western Australia, *Project 114 - Guardianship and Administration* (Final Report, December 2025) Recommendation 394.

861 Law Reform Commission of Western Australia, *Project 114 - Guardianship and Administration* (Final Report, December 2025) [19.58].

14.76. Possible functions of this statutory position or office might include:

- collecting data about the engagement of persons with disability in the court and tribunal system;
- conducting regular reviews of systemic issues related to access and participation in the court and tribunal system by persons with disability;
- receiving and reporting on complaints about non-compliance with any legislative obligations to facilitate access and participation in court and tribunal proceedings by persons with disability; and
- reporting to Parliament on systemic issues related to access and participation in the court and tribunal system by persons with disability.

Preliminary feedback about this reform option

14.77. Multiple stakeholders emphasised the importance of oversight and accountability mechanisms as an element of any legislative responses to barriers to access and participation for persons with disability.

14.78. As one stakeholder observed:

> *Effective complaint and accountability mechanisms are fundamental to the practical enjoyment of legal rights. Rights that cannot be enforced, or the enforcement of which is inaccessible in practice, risk becoming largely theoretical.*[862]

14.79. The Centre for Human Rights Education also supported legislative reforms to establish enforceable accessibility obligations with 'meaningful consequences for non-compliance'. It suggested these reforms should include:

- an independent external complaints mechanism with disability expertise and jurisdiction over both current and concluded proceedings; and
- public accountability and reporting requirements.[863]

14.80. The Autism Association of WA also suggested there should be an independent oversight body to monitor systemic issues and recommend ongoing reforms, alongside public reporting requirements on justice outcomes for autistic individuals.[864]

Possible models for this reform

14.81. Existing Western Australian legislation which establishes the Office of the Inspector of Custodial Services (**OICS**) may be a useful starting point for a model for any possible reforms.

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862 Preliminary Response 34A (Ms Cátia Malaquias OAM) [4.2].

863 Preliminary Response 8 (Centre for Human Rights Education, Curtin University) 2.

864 Preliminary Response 16 (Autism Association of Western Australia) [9].

14.82. The OICS is an independent statutory agency which oversees the operation of custodial facilities and the rights of people in custody.[865]

14.83. The Inspector is appointed on terms which ensure their independence from government.[866]

14.84. In addition, the Inspector is not subject to direction by the Minister of Custodial Services, except to the extent that the *Inspector of Custodial Services Act 2003* (WA) (**Inspector of Custodial Services Act**) provides.[867] Any such directions, and the Inspector's responses to them, must be included in the Inspector's annual report.[868]

14.85. The key functions of the Inspector include conducting periodic mandatory inspections of each custodial facility, and other occasional inspections of custodial facilities or services, and reporting on the findings of those inspections, including the provision of advice or recommendations.[869]

14.86. The Inspector has the broad power to do all things necessary or convenient to be done for or in connection with the performance of the Inspector's functions.[870]

14.87. The Disability Royal Commission identified that the Inspector of Custodial Services Act does not require the Department of Justice to respond or make public any response to the Inspector's recommendations.[871]

14.88. Noting that it was told 'the government often does not adopt the Inspector's recommendations,'[872] the Disability Royal Commission recommended legislative amendment to:

> *provide the Inspector with a discretion to demand a response from the department or other relevant agency, within a specified time, to recommendations of the Inspector included in a report to Parliament. This should include the steps (if any) taken by the agency in response to the recommendations and an explanation of why steps have not been taken (if that be the case).*[873]

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865 'Our role', *Office of the Inspector of Custodial Services* (Web Page, 14 March 2024) <https://www.oics.wa.gov.au/about-us/our-role/>.

866 *Inspector of Custodial Services Act 2003* (WA) s 6.

867 *Inspector of Custodial Services Act 2003* (WA) s 17(2).

868 *Inspector of Custodial Services Act 2003* (WA) ss 17(4), (6).

869 *Inspector of Custodial Services Act 2003* (WA) ss 19-23.

870 *Inspector of Custodial Services Act 2003* (WA) s 27.

871 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 117.

872 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, 117.

873 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Criminal Justice and People with Disability* (Final Report, 29 September 2023) Vol 8, Recommendation 8.8.

14.89. The ability to mandate a response to any report made as a part of a monitoring and oversight mechanism may be a useful additional feature to encourage compliance with recommendations of any oversight body.

14.90. We invite your feedback on any or all of the following questions:

186. Should legislation establish an independent office to monitor, research and report on systemic issues related to access and participation by persons with disability in the court and tribunal system?

187. If so, what functions should the office perform?

188. What powers, if any, should legislation confer on the office to enable the performance of its functions?

15. Questions asked in this paper

Questions asked in Part B – Common barriers in Western Australia's courts and tribunals

Chapter 3 – Systemic issues affecting access to courts and tribunals

Questions about identifying disability in courts and tribunals

1. Should courts and tribunals be required to enquire whether any person involved in a proceeding has a disability which affects their ability to access or participate in the proceedings? What processes should courts and tribunals adopt to make such enquiries?
2. Should all courts and tribunals be obliged to adopt the same processes for making such enquiries?
3. Should a person be obliged to respond to such enquiries by courts and tribunals?
4. What, if any, legislative reforms should support any process for identifying disability?
5. Should the process be subject to any safeguards, for example to protect a person's privacy?

Questions about identifying and providing disability-related adjustments and support

6. Should courts and tribunals be required to enquire whether any person involved in a proceeding has disability-related needs for adjustments to enable them to access or participate in the proceedings?
7. Would it be preferable to enquire about disability-related needs rather than to enquire about whether the person has a particular disability?
8. What processes should courts and tribunals adopt to make such enquiries?
9. Should all courts and tribunals be obliged to adopt the same processes for making such enquiries?
10. Should a person be obliged to respond to such enquiries by courts and tribunals?
11. What, if any, legislative reforms should support any process for identifying disability-related needs for adjustments?
12. Should the process be subject to any safeguards, for example to protect a person's privacy?

Questions about disability education and training

13. Should disability education and training be required for judicial officers and court and tribunal staff?

14. If so:

    (a) how, and on whom, should that requirement be imposed? and

    (b) how should that education and training be provided?

15. Would other means for providing information – such as bench books – be an adequate way to ensure that judicial officers and court and tribunal staff are properly informed about disability-related needs, and how they may be accommodated?

Questions about data collection

16. What, if any, disability-related data should courts and tribunals collect?

17. Should the collection of disability-related data be mandatory for courts and tribunals?

18. Is there a need to prescribe legislatively the data which should be collected by all courts and tribunals?

Chapter 4 – Physical access to courts and tribunals

Questions about court and tribunal buildings

19. How should the physical barriers to access and participation in courts and tribunals be addressed?

20. Should there be a general legislative principle which requires that court and tribunal hearing rooms, and their immediate surrounds, are designed to facilitate access to, and participation in, court or tribunal proceedings by people with physical disabilities? If so, why? If not, why not?

21. If so, what key points should inform the principle?

22. How else, if at all, should legislation address physical barriers to access to, and participation in, court or tribunal proceedings by persons with disability?

Questions about physical barriers arising from court processes and conventions

23. What is the best way to address physical barriers to access and participation in courts and tribunals?

24. Is legislative reform required? If so, is a legislative statement of general principles the preferable approach?

25. Alternatively, would it be better to encourage or require courts and tribunals to utilise hearing lists designed to accommodate parties with similar disability-related needs? If so, how should that be achieved?

26. Is there any other option that we haven't raised and should consider?

Chapter 5 – Technology and access to courts and tribunals

Questions about electronic court and tribunal processes

27. What is the best way to ensure that the use of electronic processes in court proceedings will facilitate, rather than hinder, access to, and participation in, those proceedings by persons with disability?

28. Is a legislative response necessary or desirable? If so, why?

29. Are the existing exemptions to the requirement to eLodge forms and documents sufficient? Should they be broadened, or additional exemptions enacted?

30. Would it be appropriate to legislate a general overarching principle that reasonable adjustments must be made where a person is unable, due to an impairment, to use eLodgment? If so, why? If not, why not?

31. How else, if at all, should legislation address barriers to access and participation for persons with disability arising from the use of electronic processes?

Questions about remote participation by audio and video link

32. What is the best way to ensure that the use of AVL in court and tribunal proceedings will facilitate, rather than hinder, access to, and participation in, those proceedings by persons with disability?

33. Is a legislative response necessary or desirable? If so, why? If not, why not?

34. Should there be a general legislative principle requiring a court or tribunal to consider the impacts of the use of AVL on any person with a disability involved in the proceedings, before permitting their use? If so, why? If not, why not?

35. If a general principle were to apply to the court or tribunal's exercise of discretion as to whether to permit the use of AVL in any case, would it be desirable to give examples of the kinds of factors the court or tribunal should consider? If so, what kinds of factors should be included?

36. Alternatively, would it be preferable to amend existing legislative provisions permitting the use of AVL to expressly require that the court or tribunal take into account the impact of the use of such technology on any person with disability involved in the proceedings?

37. How else, if at all, should legislation address barriers to access and participation for persons with disability arising from the use of AVL?

Chapter 6 – Communications and access to courts and tribunals

Questions about improving access to information and documents

38. Should courts and tribunals be required to provide information and court documents in plain English and/or different accessible formats?
39. What processes, if any, should courts and tribunals adopt in relation to the provision of information and documents in alternative formats?
40. Should a person be required to make a request for a particular format?
41. What, if any, legislative reforms should support any process for providing information and court documents in plain English and/or different accessible formats?

Questions about modifying and explaining practice and procedure

42. In what ways should court and tribunal processes and procedures be modified to reduce or remove communication barriers for persons with disability?
43. Do any existing legislative provisions require amendment to support modifications to court and tribunal processes and procedures?
44. Should a court or tribunal be explicitly required to consider whether, and if so how, its processes and procedures should be modified to reduce or remove communication barriers, or to provide communication support? If so, why? If not, why not?
45. Should courts and tribunals be subject to a legislative obligation to make reasonable adjustments for the communication needs of persons with disability?
46. Should a court or tribunal be subject to any legislative obligations in relation to ensuring that a person understands its processes and procedures? If so, why? If not, why not?

Questions about communication assistance and support

47. Should it be possible for a court or tribunal to appoint a communication partner for persons who are involved in proceedings in courts and tribunals, in circumstances other than those set out in the CLMI Act?
48. If so, for whom and in what types of proceedings should a court or tribunal be able to appoint a communication partner?
49. If a broader communication partner scheme were to be legislated, what other differences to the CLMI Act would need to be considered and reflected in the scheme?
50. Should a support person be available to other persons who are involved in proceedings in courts and tribunals?
51. If so, to whom and in what types of proceedings should a support person be available?

Questions about interpreters

52. Should the *Interpretation Act 1984* (WA) be amended to explicitly include an Auslan interpreter within the meaning of the term interpreter?

53. Are any other legislative amendments desirable or necessary to increase the availability of Auslan interpreting services for persons who engage with the court and tribunal system?

Questions asked in Part C – Specific experiences of Western Australia's courts and tribunals

Chapter 7 – Accused persons

Questions about criminal proceedings for accused persons with disability

54. Is it your understanding that courts adjust their processes to remove or minimise the barriers faced by an accused person with disability? If so, please provide examples of how this occurs.

55. Should courts adjust their processes to remove or minimise the barriers faced by an accused person with disability? If so, how?

Questions about pre-trial processes, and the criminal trial

56. Does the Criminal Procedure Act require amendment to give courts an express power to make case management orders to modify their own processes or procedures, to remove or minimise barriers they may create to the full participation by an accused person with disability in any stage of the criminal justice process?

57. If so, how should courts be informed about what case management orders should be made in a particular case?

58. Should there be limits on courts' powers to make such case management orders?

59. Are there other legislative provisions whose operation may result in an accused person with disability being unable to fully understand, or participate in, criminal proceedings by virtue of their disability? Should any such provisions be amended, and if so, how?

Questions about identifying disability and disability-related needs in criminal proceedings

60. How do courts become aware that an accused person has a disability which may affect their participation in criminal proceedings?

61. Should courts make enquiries about that, and if so, when and how?

62. Should there be an obligation on a court to consider whether an accused person needs reasonable adjustments to enable them to fully participate in criminal proceedings?

63. Should there be limits to that obligation?

64. Alternatively, should it be up to an accused person to identify their disability and any need for adjustments? Should any other persons be able to inform the court of an accused person's disability? If so, which persons?

Questions about physical access to courts and technology in criminal proceedings

65. Should all criminal courts have separate lists for accused persons with disability?

66. If so, should:

    (a) there be any modifications made to a court's processes or practices in that list (for example, shorter lists)?

    (b) court lists for accused persons with disability be held in court rooms capable of modification (for example, for wheelchair access)?

67. Should the Criminal Procedure Act be amended to specifically require consideration of whether an order for appearance by video link or audio link would facilitate the participation of an accused person with disability?

Questions about communication barriers in criminal proceedings

68. Should the Criminal Procedure Act be amended to:

    (a) require a court to consider whether an accused person has a disability which prevents them from fully understanding or participating in the proceedings? If so, when and how should that be done?

    (b) expressly require a court to modify its processes if it becomes aware that an accused person has a disability which prevents them from fully understanding or participating in the proceedings? Should there be limits to any such obligation? If so, what should those limits be?

Questions about bail proceedings

69. Should the Bail Act be amended to require that the impacts of an accused person's disability are identified and considered in the formulation of bail conditions?

70. Should the Bail Act be amended to require that a court be positively satisfied that the accused person understands the nature and extent of any conditions of bail and the consequences of failure to comply with them?

71. Should any of the approaches adopted or under consideration in bail legislation elsewhere be a guide for reform in Western Australia?

Questions about therapeutic courts

72. Should the processes or powers of the IDDP Court and Start Court be modified in any way?

73. Should the operation of the IDDP Court and Start Court be extended by changing the criteria for eligibility for referral to these courts? If so, how should that be achieved?

74. Should the existence and operation of the IDDP Court and/or the Start Court be recognised in legislation?

75. Is there a need to establish other therapeutic courts for accused persons with other kinds of disabilities? If so, what kinds of disabilities?

Questions about restraining order proceedings

76. Should the Restraining Orders Act be amended to expressly require a court to consider whether the applicant for the order, or the person who is proposed to be subject to the order, has a disability which may affect their ability to participate in the proceedings, or to understand and comply with any terms of a restraining order?

77. If yes, what should the court do to address that?

Chapter 8 – Convicted persons

Questions about the sentencing process

78. Should a sentencing court be required to ascertain whether a convicted person has, or may have, a disability? If so, how?

79. If a sentencing court has information to suggest that the convicted person has, or may have, a disability, should the court be expressly required to consider whether that disability is relevant to the sentencing of that person?

Questions about pre-sentence reports

80. If a sentencing court is aware that a convicted person has a disability that may be relevant to their sentencing, should it be required to obtain a pre-sentence report?

81. Apart from ordering a pre-sentence report from the Department of Justice, should a court be required to consider hearing from persons who:

    (a) provide support to a convicted person with disability; and/or

    (b) are appropriately qualified or experienced to provide information?

Questions about the relevance of disability to a sentence

82. Should there be an express requirement for a sentencing court to consider the ability of a convicted person with disability to comply with any particular requirements which form part of a sentence?

83. Should a pre-sentence report be required to alert the sentencing court to whether a convicted person with disability:

(a) is likely to be able to comply with any requirements applicable to the kinds of sentence that may be imposed by the court, such as the requirements that ordinarily attach to CBOs or ISOs?

(b) would need support to assist them to comply with the requirements of any sentence, should they remain in the community (that is, if not sentenced to an immediate term of imprisonment)?

Question about explaining a sentence to a convicted person with disability

84. Should the Sentencing Act be amended to require a court to be satisfied that a convicted person with disability has understood the effect of a sentence and its implications? If so, how?

Questions about appealing a conviction

85. Should the Criminal Procedure Rules and the Court of Appeal Rules be amended to permit a judge to waive the procedural requirements (filing an affidavit and/or an opinion of a legal practitioner) for a person who is or appears to be a person under disability to obtain the Court's approval to discontinue or settle an appeal against conviction or sentence? If so, what should the criterion be for the Court to waive those procedural requirements?

86. Should the Criminal Procedure Rules and the Court of Appeal Rules be amended in some other way to address this issue?

Question about other legislative reforms

87. Are other legislative reforms required to assist convicted persons with disability to better access or engage with courts, in their capacity as convicted persons (rather than in other capacities, such as parties to civil proceedings)?

Chapter 9 - Victims and family of victims of crime

Questions about the Victims of Crime Act

88. Do the needs of persons with disability require specific recognition in the Victims of Crime Guidelines in order to facilitate their access to and participation in courts and tribunals as victims of crime?

89. If so, how should that be achieved?

90. Does section 3(2) of the Victims of Crime Act need to be amended? If so, how?

91. Should the Victims of Crime Guidelines be amended to:

(a) specifically provide that courts and tribunals must enquire whether a victim faces any disability-related barriers to participating in the criminal justice system as a victim?

(b) specifically provide that courts and tribunals must make any reasonable adjustments to overcome any disability-related barriers to participation for a victim with disability?

Questions about victim impact statements

92. What barriers do persons with disability face when making a victim impact statement?

93. Should a sentencing court be required to consider any reasonable adjustments for a victim of crime with disability to provide a victim impact statement to the court, including to provide this in person if they so wish?

94. Should the Sentencing Act be amended to expressly permit a victim of crime with disability to give a victim impact statement in a format other than in writing?

95. Should particular formats be prescribed (eg by pre-recorded video, through an Auslan interpreter, or by another person on their behalf)? If so, what should they be?

Questions about participation in mediation with a convicted person

96. What specific barriers, if any, do victims of crime with disability experience in relation to participating in mediations under the Sentencing Act?

97. Should the Sentencing Act be amended to expressly require that a court ordering a mediation report make enquiries as to whether a victim with disability may experience any barriers to participation in a mediation, and to order that any appropriate adjustments be made?

Questions about criminal injuries compensation

98. Should the Criminal Injuries Compensation Act be amended to:

(a) permit applications for compensation to be made other than through the submission of the approved written form (for example, by making an application orally to a staff member of the Office of Criminal Injuries Compensation, who records the details of the application)? If so, what other formats for applications should be permitted?

(b) specifically require that the impact of an applicant's disability be taken into account in determining whether an extension of time to bring an application should be granted?

Chapter 10 – Witnesses

Question about general barriers to participation

99. What legislative amendments, if any, might address the barriers to participation for witnesses in court proceedings?

Questions about the rules on the competence of witnesses

100. Should the competence test in the Evidence Act 2025 be amended to require a court to take into account whether the witness would be competent to give evidence if provided with the support or assistance they require to give their evidence?
101. What information would a court need to make that assessment?
102. Should there be any obligation on the court to provide the required supports to the witness?
103. How should any such obligation be imposed?

Questions about assessments of witness reliability and credibility

104. What legislative amendments, if any, are necessary to respond to barriers experienced by witnesses with disability in relation to assessments of their credibility and reliability as witnesses?
105. Should there be mandatory judicial education in relation to issues affecting witnesses with disability?

Questions about adjustments and supports for witnesses with disability

106. In your experience, are witnesses with disability required to provide detailed medical reports and personal information when an application is made to a court for the provision of adjustments?
107. If yes, what kind of information is requested and how is it used?
108. Who should be responsible for identifying that a witness needs disability-related support (for example, the court, the party calling the witness or the witness themselves)?
109. Should the law impose a positive obligation on courts to enquire whether, as a result of a disability, a witness requires adjustments or support to give evidence effectively?
110. What personal information (including medical reports) should a court be able to request from a witness with disability when considering whether to allow adjustments?
111. What other changes (if any) are required to ensure witnesses with disability receive the adjustments they require?

112. Should the witness intermediary scheme be expanded to assist witnesses with disability in other proceedings in courts and tribunals? If so, which other proceedings?

113. How else, if at all, should the law be changed to enable persons with disability to participate as witnesses in court proceedings?

Chapter 11 – Jurors

Questions about juror eligibility

114. Should the eligibility criteria in the Juries Act for being summoned for jury duty be changed? If so, how?

115. Should the Juries Act be amended to require consideration of whether reasonable adjustments can be provided to a person with disability to enable them to serve as a juror?

116. If yes, what factors should a court or jury officer be required to consider when determining if adjustments can reasonably be given?

Questions about the objects of the Juries Act

117. Should the Juries Act be amended to state the objects and purposes of the Act?

118. If yes, what object would best ensure that persons with disability are able to serve on juries?

119. If yes, should judges and jury officers be expressly required to take the objects of the Juries Act into account in determining whether a person with disability is excused in a particular case?

Questions about interpreters and support persons for jurors with disability

120. Should the Juries Act and the Criminal Procedure Act be amended to allow interpreters and support persons to be present with a juror with disability throughout their jury service, including during jury deliberations, for the purposes of assisting that juror?

121. If yes, should an interpreter or support person be required to give an oath or affirmation stating they will not participate in the jury's deliberations and they will not disclose the jury's deliberations?

Questions about peremptory challenges

122. Are you aware of peremptory challenges being used to prevent a person with disability from serving as a juror?

123. Should the law be changed to reduce the risk that peremptory challenges could be used to exclude persons with disability from serving as a juror?

124. If so, how should the law be changed to achieve that outcome?

Questions about adjustments for jurors with disability

125. What adjustments should be made available to jurors with disability?
126. Should any of these adjustments be specifically established in legislation? If so, why?
127. Should accessibility officers be employed to provide support to jurors with disability?
128. How can the process for requesting reasonable adjustments for jury service be improved? Is an amendment of the Juries Act required to improve that process?
129. Should a court be given the power, under the Juries Act, to direct that supports be provided, whether generally or in a particular case? How would that work?

Question about education and training

130. Is education and training required to overcome misconceptions about the ability of persons with disability to serve as jurors? Who should receive this education and training? What type of education is required?

Questions about other ways to enable the participation of persons with disability as jurors

131. What else should be done to remove barriers that prevent or limit persons with disability from effectively serving as jurors?
132. Are there any barriers preventing persons with disability from serving as jurors that we have not identified?
133. Apart from the options discussed in this paper, are there any other ways the law should be changed to enable persons with disability to participate as jurors?

Question about safeguards to ensure a fair trial

134. If reforms are made to the Juries Act, what safeguards should be put in place to ensure that an accused's right to a fair trial is not compromised?

Chapter 12 – Parties in civil proceedings

Questions about free legal assistance in civil proceedings

135. Should persons with disability who are unable to afford their own legal representation be entitled to free legal assistance in certain civil proceedings?
136. If yes, should that assistance be available irrespective of the type of disability?

137. As an alternative approach, should that assistance be confined to persons with specific types of disability? If so, what types of disability should qualify a person for free legal assistance?

138. In what types of civil proceedings should free legal assistance for persons with disability be available?

Question about litigation representatives

139. How, if at all, should the laws relating to litigation representatives be changed to enable persons with disability to participate in civil proceedings more effectively?

Questions about procedural requirements and adjustments in civil proceedings

140. What has been your experience, if any, in requesting the provision of adjustments for a person with disability as a party to civil proceedings?

141. Should court processes in civil proceedings be changed to remove procedural barriers for parties with disability? If so, which processes and in which courts?

142. Should the law impose a positive obligation on the courts to enquire whether any of the parties to a civil proceeding require adjustments as a result of a disability to participate effectively?

143. If so, should the law impose a positive obligation on the courts to provide any reasonable and practicable adjustments they determine are required where it is reasonable to do so?

Question about other ways to enable the participation of persons with disability in civil proceedings

144. How else, if at all, should the law be changed to enable persons with disability to participate in civil proceedings in courts?

Chapter 13 – People involved in tribunal matters

Question about the tribunals we should consider in our review

145. Are there any other tribunals in Western Australia that we should specifically consider in our review? If so, why?

Questions about barriers to participating in SAT proceedings

146. Do witnesses with disability in the SAT face the same barriers in giving evidence as are faced by witnesses with disability in courts?

147. If not, what barriers are faced by witnesses with disability in the SAT?

Questions about adjustments and support in SAT proceedings

148. In your experience, does the SAT Act allow reasonable adjustments to be provided to persons with disability to enable their participation in proceedings before the SAT?
149. Are there particular kinds of proceedings in the SAT in which the assistance of a lawyer or an advocate is particularly important for persons with disability?
150. If you have been involved in SAT proceedings, were you made aware of ways in which the SAT could meet the needs of persons with disability to enable them to participate effectively in proceedings?
151. How were you made aware? What was the process?
152. In your experience, have persons with disability faced barriers to participating in proceedings in the SAT because the SAT did not become aware of their need for support before the hearing? What were those barriers? And how did the SAT deal with that situation?
153. Should the SAT Act be amended to entitle persons with disability to free support from a lawyer or advocate in SAT proceedings?
154. If yes, in what proceedings, or in what circumstances, should a person with disability be entitled to receive such support?
155. Should the SAT Act be amended to provide that persons with disability appearing in SAT proceedings be provided with any reasonable adjustments to facilitate their participation?
156. What adjustments for persons with disability should be available in the SAT as a matter of course?

Questions about identifying adjustments needed to participate in proceedings

157. Who should be responsible for identifying that a person with disability requires adjustments to be made to enable them to participate effectively in SAT proceedings (for example, the SAT or the person themselves)?
158. Should the SAT introduce additional or different processes to those which currently exist to identify the adjustments required by persons with disability involved in SAT proceedings?
159. If so, what processes should it adopt?
160. Should the SAT Act be amended to impose a positive obligation on the SAT to enquire of all parties and witnesses whether they require reasonable adjustments as a result of a disability to facilitate their participation in proceedings?
161. Should the SAT Act be amended to impose a positive obligation on the SAT to provide reasonable adjustments to a person with disability?
162. Should the SAT Act be amended to entitle a person with disability involved in SAT proceedings to be assisted by a support person?

Questions about the objects of the SAT Act

163. Should the SAT Act be amended to include accessibility for persons with disability as one of the objectives of the SAT?

164. How should that objective best be expressed?

Question about other ways to enable the participation of persons with disability in SAT proceedings

165. How else, if at all, should the law be changed to enable persons with disability to participate effectively in SAT proceedings?

Questions about barriers to participating in MHT proceedings

166. Do witnesses with disability in the MHT face the same barriers in giving evidence as are faced by witnesses with disability in courts?

167. If not, what barriers are faced by witnesses with disability in the MHT?

Questions about adjustments and support in MHT proceedings

168. In your experience, does the MH Act allow reasonable adjustments to be provided to persons with disability to enable their participation in proceedings before the MHT?

169. Should the MH Act be amended to require that all involuntary patients appearing before the MHT are represented by a lawyer?

170. Should the MH Act be amended to require a health service to provide an involuntary patient's medical records to the patient's representative well in advance of a MHT hearing?

Question about other ways to enable the participation of persons with disability in MHT proceedings

171. How else, if at all, should the law be changed to enable persons with disability to participate effectively in MHT proceedings?

Questions asked in Part D – Options for fundamental reform

Chapter 14 – Options for fundamental reform

Questions about an overarching legislative statement of principles

172. Should there be a general legislative statement of principles for facilitating access and participation by persons with disability in courts and tribunals in Western Australia? Why or why not?

173. If a general legislative statement of principles for access and participation were to be enacted, what principles should the legislation include?

174. If a general legislative statement of principles for access and participation were to be enacted, what, if any, limitations should there be on the application of those principles to courts and tribunals?

175. If a general legislative statement of principles for access and participation were to be enacted, what consequences, if any, should flow from non-compliance with the legislation?

Questions about court liaison officers

176. Should legislation be enacted to establish a specific office to assist persons with disability to access and participate in all courts and tribunals?
177. If so, what functions should be given to the holder of that office?
178. Should the holder of that office be given the function of identifying and assessing a person's needs for adjustments?
179. What powers, if any, should legislation confer on the office to enable the performance of their functions?
180. What duties, if any, should legislation impose on the office?
181. Would it be preferable, instead, to enact a legislative requirement that each court or tribunal appoint a staff member to facilitate adjustments to assist persons with disability to access and participate in proceedings in that court or tribunal?

Questions about an independent advocacy service

182. Should legislation establish a free and independent advocacy service for persons with disability who are involved in proceedings in all courts and tribunals in Western Australia?
183. If so, to whom should the independent advocacy service be available? For example, should it be available to all persons with disability who access or participate in courts and tribunals?
184. Should an independent advocacy service be available only to persons involved in proceedings in specific capacities? If so, which capacities (eg accused persons, convicted persons, victims or their families, witnesses, jurors, parties in civil proceedings in courts or tribunals)?
185. What functions do you think an independent advocacy service should perform?

Questions about a monitoring and oversight mechanism

186. Should legislation establish an independent office to monitor, research and report on systemic issues related to access and participation by persons with disability in the court and tribunal system?
187. If so, what functions should the office perform?
188. What powers, if any, should legislation confer on the office to enable the performance of its functions?

Appendix A – Defined terms

Defined terms	
AAC	Augmentative and alternative communication
ABI	Acquired brain injury
Accused person	A person who is alleged to have committed a criminal offence.
ACT Juries Act	*Juries Act 1967* (ACT)
Adjustment	Any reasonable modification of a court's or tribunal's environment, processes or practices (including a modification to ensure the provision of support) that is needed by an individual in a particular case, to access or participate in the court and tribunal system.
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
Assessor	A criminal injuries compensation assessor
Assistive technology	Equipment or devices that increase or maintain the physical and cognitive ability of persons with disability to do certain things. Examples include screen readers and refreshable Braille devices, alternative keyboards and mice, screen magnification, and voice recognition.[874]
Auslan	Australian sign language
AVL	Audio or video link
Bail Act	*Bail Act 1982* (WA)
CALD	Culturally and linguistically diverse
CBO	Community-based order
CIC Act	*Criminal Injuries Compensation Act 2003* (WA)

[874] Australian Human Rights Commission, *Guidelines on equal access to digital goods and services* (April 2025) 12 <https://humanrights.gov.au/__data/assets/file/0027/47358/Guidelines-equal-access-digital-goods-services.pdf>.

CLMI Act	*Criminal Law (Mental Impairment) Act 2023* (WA)
Cognitive impairment	A broad umbrella term to mean an impairment in a person's cognitive functions, including comprehension, reasoning, adaptive functioning, judgment, learning or memory. A person may experience cognitive impairment because of an intellectual impairment (**see below**), acquired brain injury, or a neurological condition (such as dementia).
Commission	Law Reform Commission of Western Australia
Community Legal	Community Legal Western Australia
Competence test	The provision in the *Evidence Act 2025* that a person will not be competent to give evidence about a fact if, for any reason, including a disability: • the person 'does not have capacity' to understand a question about the fact or to give an answer that can be understood to a question about the fact; and • the person's incapacity cannot be 'overcome'.
Convention Committee	United Nations Committee on the Rights of Persons with Disabilities
Convicted person	A convicted person is a person for whom a court has recorded a criminal conviction. A person may be convicted if they enter a plea of guilty to a charge of a criminal offence, or if they are found guilty of a criminal offence by a judge or a jury, or a magistrate, following a trial of a charge.
Court and tribunal	• the Body established by law to hear and determine proceedings; • the individual decision-makers who are appointed to exercise decision-making functions and powers (judges, magistrates and tribunal members); and • the processes, systems and services underlying the operation of courts and tribunals. Many of these are provided or administered by

	the Department of Justice's Court and Tribunal Services division.[875]
Court and tribunal system	All of the State courts and tribunals in Western Australia.
Court of Appeal Rules	*Supreme Court (Court of Appeal) Rules 2005* (WA)
Criminal Procedure Act	*Criminal Procedure Act 2004* (WA)
Criminal Procedure Regulations	*Criminal Procedure Regulations 2005* (WA)
Criminal Procedure Rules	*Criminal Procedure Rules 2005* (WA)
CRPD	United Nations Convention on the Rights of Persons with Disabilities
Disability	The experience arising from a person's long-term impairment (including physical, psychiatric, intellectual, sensory, neurological, and/or learning impairments) in interaction with barriers (including environmental, social and attitudinal barriers). This experience can include, but is not limited to, exclusion and restrictions on accessing and fully participating in the community.
Disability Royal Commission	The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
DLO	Disability liaison officer
eCourts	The State of Western Australia's online digital case management and electronic lodgment system
Enabling laws	Laws which give the State Administrative Tribunal the authority to make decisions about certain matters
Evidence Act 1906	*Evidence Act 1906* (WA)
Evidence Act 2025	*Evidence Act 2025* (WA)
FCWA	Family Court of Western Australia
IDDP	Intellectual Disability Diversion Program

[875] 'Court and Tribunal Services', *WA Government* (Web Page, 3 August 2026) <https://www.wa.gov.au/organisation/department-of-justice/court-and-tribunal-services>.

IDDP Court	Intellectual Disability Diversion Program Court
Inspector of Custodial Services Act	*Inspector of Custodial Services Act 2003* (WA)
Intellectual impairment	An impairment in a person's intellectual functioning (including their ability to reason, learn and problem solve) and adaptive behaviour (including their conceptual, social and practical skills), arising during the developmental period.
International Principles and Guidelines	International Principles and Guidelines on Access to Justice for Persons with Disabilities
Intersectionality	The ways in which different aspects of a person's identity (for example, their gender, race and age) and circumstances (for example, their geographic location and economic conditions) interact with each other and with social structures, to shape a person's experience. These interactions can produce compounded and unique forms of disadvantage, which cannot be understood by looking at any one aspect of a person's identity in isolation.
ISO	Intensive supervision order
Juries Act	*Juries Act 1957* (WA)
Juror	A person selected to sit on a jury to hear the evidence and decide questions of fact in a trial.
Jury pool	A list of potential jurors who are selected randomly from the people on the electoral roll in the geographical area where the trial will be held.
Justice DAIP	Department of Justice's Disability Access and Inclusion Plan 2024-2029
Learning impairment	An impairment in a person's learning or information-processing functions, including acquiring, organising, retaining or understanding information. Examples of learning impairment include dyslexia and dysgraphia.
Legal Aid	Legal Aid Western Australia
MHT	Mental Health Tribunal

MH Act	*Mental Health Act 2014* (WA)
MIRT	Mental Impairment Review Tribunal
NDIS	National Disability Insurance Scheme
Neurological impairment	An impairment in the functioning of a person's brain and central nervous system.
NSWLRC	New South Wales Law Reform Commission
OCIC	Office of Criminal Injuries Compensation
OICS	Office of the Inspector of Custodial Services
Party in civil proceedings	A person who is involved in the proceedings either as an applicant/plaintiff (the person who started the proceedings to seek a remedy) or a defendant/respondent (the person who responds to the proceedings, generally by opposing the remedy sought).
Physical impairment	An impairment in a person's body structure or physiological function. It can affect a person's mobility, dexterity and/ or stamina.[876]
Psychiatric impairment	An impairment in a person's mental functioning arising from a mental health condition. A psychiatric impairment may affect a person's mental functions in a variety of ways, such as that it may restrict a person's ability to concentrate, to cope with multiple tasks, to interact with others, to accept constructive feedback, and/or to manage stress. While this term has been used in our Terms of Reference, we recognise it is not commonly used. In this paper, we prefer to use the term psychosocial disability (**see below**).
Psychosocial disability	The experience arising from a person's psychiatric impairment in interaction with various barriers.[877]
Project 114 Final Report	The Commission's final report on Project 114 – *Guardianship and Administration Act 1990* (WA)

876 'What is disability?', *Australian Disability Network* (Web Page, 2024) <https://australiandisabilitynetwork.org.au/resources/disability-statistics/what-is-disability/>.

877 'Language Guide', *Australian Federation of Disability Organisations* (Web Page) <https://afdo.org.au/news/language-guide/>.

Project 115	Our current project, which is the subject of this consultation paper, and in which we are considering recommendations on legislative reforms to improve access to Western Australia's court and tribunal system for persons with disability.
Restraining Orders Act	*Restraining Orders Act 1997* (WA)
SAT	State Administrative Tribunal
SAT Act	*State Administrative Tribunal Act 2004* (WA)
SCP	Start Court Program
Sensory impairment	An impairment in the functioning of one or more of a person's senses, including their hearing or vision, as well as other senses like touch, taste or smell.[878]
Sentencing Act	*Sentencing Act 1995* (WA)
Social model	The social model of disability, which is a way of thinking about disability that views a person as experiencing disability when they are excluded from society because its institutions and processes are not designed to include people with impairments and their functional needs.[879]
Support	Formal or informal assistance provided to an individual to facilitate their access to, or participation in, the court and tribunal system. Examples include a trained person appointed by a court to provide communication assistance to an individual in proceedings, an Auslan interpreter and technology to support communication, such as assistive listening systems and devices.[880]
Victim impact statement	A statement made by a victim of crime outlining the impact on the victim of the offence committed by the offender.

878 'Sensory impairments', *healthdirect* (Web Page, 2026) <https://www.healthdirect.gov.au/sensory-impairments>.

879 Shane Clifton, *Hierarchies of Power: Disability Theories and Models and Their Implications for Violence Against, and Abuse, Neglect, and Exploitation of, People With Disability* (October 2020) 11.

880 Committee on the Rights of Persons with Disabilities, General Comment No. 1, 11 sess, UN Doc 14-03120 (19 May 2014) [17].

Victim of crime	A person who has suffered injury, loss or damage as a direct result of an offence.
Victims of Crime Act	*Victims of Crime Act 1994* (WA)
Victims of Crime Guidelines	*Victims of Crime Act 1994* (WA), Schedule 1
VLRC	Victorian Law Reform Commission
Victorian Juries Act	*Juries Act 2000* (Vic)
Witness	A person who gives information (known as evidence) to a court or tribunal about something they saw, heard, experienced or know about.

Appendix B – Terms of Reference

1 Pursuant to section 11(2)(b) of the *Law Reform Commission Act 1972* (WA), the Law Reform Commission of Western Australia is to review, provide advice and make recommendations for consideration by the Western Australian Government on legislative reforms to improve access to Western Australia's courts and tribunals system for persons with disability in Western Australia.

2 In carrying out its review, the Law Reform Commission should:

a. utilise a broad definition of disability, encompassing long-term physical, psychiatric, intellectual, sensory, neurological, and/or learning impairments that, in interaction with barriers, hinder full participation in the community;

b. specifically consider the experiences of persons with disability within the Western Australian court and tribunal system as:

- accused persons;
- convicted persons;
- victims or family of victims of crime;
- witnesses;
- jurors;
- applicants in civil matters;
- defendants in civil matters; and
- other persons appearing in civil matters, including before tribunals.

c. consider the need for reform, and the best approach to implementing that reform in the Western Australian context, following on from or in the context of the:

i Australian Human Rights Commission Report - Equal Before the Law: Towards Disability Justice Strategies (2014); Australian Law Reform Commission Report 124 - Equality, Capacity and Disability in Commonwealth Laws (2014);

ii iii. Law Council of Australia - The Justice Project Final Report (2018);

iii iv. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, particularly Final Report: Volume 8 – Criminal Justice and People with Disability (2023);

iv v. the Western Australian *State Disability Strategy 2020-2030*;

v vi. The Western Australian Department of Justice's *Disability Access and Inclusion Plan 2024-2029*; and

vi vii. Western Australian Law Reform Commission Report on Project 114 Guardianship and Administration (2024).

d. consider the need to legislate supports for persons with disability across the statute book, including the provision of communication partners, interpreters, technology, and other necessary supports to enable effective participation in court and tribunal processes;

e. have regard to the United Nations Convention on the Rights of Persons with Disabilities, to which Australia is a party and which sets out:

   - rights for people with disability to recognition before the law, to legal capacity and to access to justice on an equal basis with others; and
   - a general principle of respect for inherent dignity, individual autonomy, including freedom to make one's own choices, and independence of persons.

f. consider relevant state and federal reforms, policies and frameworks that impact the participation of persons with disability in the Western Australian court and tribunal system;

g. have regard to the *Criminal Law (Mental Impairment) Act 2023*, which commenced operation on 1 September 2024, but not undertake specific review of this legislation as it will be subject to a statutory review five years post-commencement; and

h. have regard to any other matter the Commission considers relevant.

Appendix C - Preliminary responses

Preliminary Responses 1A and 1B (Equal Opportunity Commission)

Preliminary Response 2 (Magistrates Court of Western Australia)

Preliminary Response 3 (Law Access)

Preliminary Response 4 (Mental Impairment Review Tribunal)

Preliminary Response 5 (John Curtin Law Clinic, Curtin University)

Preliminary Response 6 (Chief Psychiatrist)

Preliminary Response 7 (District Court of Western Australia)

Preliminary Response 8 (Centre for Human Rights Education, Curtin University)

Preliminary Response 9 (Commissioner for Children and Young People)

Preliminary Response 10 (Ever Ability Group)

Preliminary Response 11 (Advocacy WA)

Preliminary Responses 12A and 12B (Developmental Disability WA)

Preliminary Response 13 (Youth Disability Advocacy Network)

Preliminary Response 14 (Kin Disability Advocacy)

Preliminary Response 15 (Deafness Council Western Australia Inc)

Preliminary Response 16 (Autism Association of Western Australia)

Preliminary Response 17 (Public Advocate)

Preliminary Response 18 (Russell Family Fetal Alcohol Disorders Association)

Preliminary Response 19 (Law Society of Western Australia)

Preliminary Responses 20A and 20B (Mental Health Tribunal)

Preliminary Response 21 (State Administrative Tribunal)

Preliminary Response 22 (Coroner's Court of Western Australia)

Preliminary Response 23 (Ms Samantha Jenkinson)

Preliminary Response 24 (South West Autism Network Inc)

Preliminary Response 25 (Sussex Street)

Preliminary Response 26 (Deaf Indigenous Community Consultancy)

Preliminary Response 27 (Public Trustee)

Preliminary Response 28 (Consumers of Mental Health WA)

Preliminary Response 29 (Ruah Legal Services)

Preliminary Response 30 (Disabled Australian Lawyers Association)

Preliminary Response 31 (Name withheld on request)

Preliminary Response 32 (Supreme Court of Western Australia)

Preliminary Response 33 (Dr David Cox)

Preliminary Responses 34A, 34B and 34C (Ms Cátia Malaquias OAM)

Preliminary Response 35 (WA Bar Association)

Preliminary Response 36 (Legal Aid Western Australia)

Preliminary Response 37 (Community Legal Western Australia)

Preliminary Response 38 (Community and Public Sector Union/ Civil Service Association of WA)

Preliminary Response 39 (Ms Marion Buchanan)[881]

Preliminary Response 40 (Department of Justice)

Preliminary Response 41 (Women's Legal Service WA)

[881] Submission made in her personal capacity, rather than in her capacity as a member of the WA Mental Impairment Review Tribunal.



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