

4 November 2013

Access to Justice
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Sir/Madam

Inquiry into Access to Justice Arrangements

1. The Australian Centre for Disability Law (**ACDL**) is a specialist community legal centre which practices in disability discrimination and human rights law. It is funded by the Commonwealth and NSW Governments through the National Community Legal Services Partnership Program. It provides legal information, legal advice, and in specific instances, legal representation to people with disability and their associates to enable them to understand and assert their rights under disability discrimination law and in specific human rights matters. ACDL also undertakes policy and law reform activities, community legal education and continuing legal education.
2. It is well established that persons with disability and persons with mental illness have the highest legal need, and the highest unmet demand for legal services even among vulnerable population groups. People with disability are twice as likely as other vulnerable groups to experience legal problems, are significantly more likely to experience substantial legal problems and are almost twice as likely to experience multiple legal problems.¹ This is both a consequence, and a significant determinant, of the social exclusion of persons with disability in Australian society.
3. Persons with disability experience severe and aggravated forms of legal disadvantage on a population group basis for a range of reasons which include discrimination on the basis of disability in all aspects of life, a high level of social surveillance and intervention in their lives (for example, from the child protection, mental health, and guardianship and administration systems), the impact of impairment and disability, poorly skilled and responsive legal systems, and the relative absence of specialist legal services.
4. In this short submission we highlight a number of measures that we believe would substantially contribute to improvements in access to justice arrangements for persons with disability in Australia. These comments arise from our practice in disability discrimination and human rights law. However, in a number of instances these comments have broader implications for other jurisdictions.

¹ As a starting point see: Law and Justice Foundation of NSW, *Legal Australia-Wide Survey, Legal Need in Australia*, August 2012,

Inadequacy of publicly funded specialist legal services

5. In spite of the significantly higher incidence and complexity of legal problems experienced by persons with disability, generally speaking, they have very poor access to publicly funded specialist legal assistance services in Australia. There are very few community legal centres which specialise in the law as it impacts upon persons with disability. Those services which are available are typically limited by jurisdiction (for example, they may only practice in discrimination or mental health law), or by sub-population group (for example, they may only be available to persons with intellectual disability, or persons with HIV/AIDS) or both. All specialist services are significantly under-resourced and operate subject to significant unmet demand.
6. While persons with disability ought to be able to access mainstream legal assistance services on an equal basis with others, and these generalist services ought to be accessible to persons with disability, the complexity of some legal problems experienced specifically or disproportionately by persons with disability will frequently require intensive specialist legal advice and representation to be available. Consequently, there needs to be a major investment in the development of specialist disability legal services across Australia if access to justice for persons with disability is to be improved. These legal services should not be sub-population group specific and they ought to be capable of working across the criminal and a range of civil jurisdictions (perhaps on the basis of specific sub-practices). They must be sufficiently resourced for their work.

Recommendation:

The Productivity Commission ought to recommend that a national program of specialist disability legal services is established across Australia.

Inaccessibility of legal assistance services

7. Persons with disability have variable access to mainstream community legal assistance services around Australia. While some services provide accessible and responsive legal assistance to persons with disability, there are significant barriers to access in many of these services. Barriers include some of these services being located in buildings which are not fully physically accessible, client meeting rooms may lack hearing induction, legal information may not be available in accessible formats, staff may refuse Auslan interpreting, and staff may not be capable of working with people with additional comprehension needs or who utilise unfamiliar communication systems.
8. In our view, all community legal assistance services ought to be capable of providing 'disability competent' legal services. This means that the infrastructure and information and communication systems utilised by these services must be accessible to persons with various types of impairment and disability. Staff ought also to have basic knowledge and skills enabling them to work effectively with persons with disability with alternative comprehension and communication needs. In order to achieve this, we believe there ought to

be a national disability access audit of all community legal assistance services and a parallel training needs analysis for staff working in these services. A specific fund ought to be set aside to enable community legal assistance services to eliminate barriers to access to persons with disability, including by providing appropriate specialist staff training and development. An “accessibility guideline’ ought to be developed and incorporated into funding agreements with community legal assistance services to ensure that the services they provide are accessible to persons with disability on an equal basis with others.

Recommendation:

The Productivity Commission ought to recommend that there is a national disability access audit of community legal assistance services and an associated disability-related training needs analysis for staff working in these services.

The Productivity Commission ought to recommend that a specific fund is made available to assist community legal assistance services eliminate barriers to access to persons with disability in their service delivery, including by providing appropriate specialist staff training and development

The Productivity Commission ought to recommend that an accessibility guideline is developed and incorporated into funding agreements with community legal assistance services requiring these services to ensure that they are and remain accessible to persons with disability.

Accessibility of mainstream/commercial legal services

9. Mainstream commercial legal services are, generally speaking, poorly accessible to persons with disability. Largely this is a question of the cost of these services and the relative poverty within which most persons with disability live. However, even where persons with disability may otherwise be able to afford the cost of commercial legal services, barriers to access remain.
10. Some persons with disability require disability related adjustments to be made in order to obtain legal services on an equal basis with others. For example, a person who is deaf may require the assistance of an Auslan interpreter or stenographer, a person who is deafblind may require the assistance of a deafblind interpreter, and a person who uses another alternative or augmentative communication system may require some other type of communication assistant. Legal information or advice may be required in Braille or in an accessible electronic format.
11. Although legal service providers operate subject to disability discrimination laws, in many instances the costs of providing these adjustments is likely to be viewed as an unjustifiable hardship (relative to the fee charged). Practitioners are likely to view the cost of providing these adjustments as the responsibility of the client with disability, rather than their own responsibility. If

a client with disability is obliged to pay these costs, it significantly increases the cost of their obtaining legal assistance.

12. In our view, in order to improve access to justice for persons with disability, the extra costs of disability related to obtaining legal assistance should be borne either by the legal profession as a whole, or by government. This could be achieved if the Law Societies and Bar Associations of each State and Territory imposed a small levy on the annual renewal costs for practicing certificates for all legal practitioners to establish a central fund for the payment of disability-related adjustments on application by practitioners. This would ensure that these additional costs of legal service delivery are distributed evenly across the profession rather than being a significant impost on a small number of practitioners. Alternatively, the Commonwealth ought to establish a program to meet these costs just as it has done in funding Auslan interpreting for health care appointments (the Health Care Interpreter Service).

Recommendation:

The Productivity Commission ought to recommend that the Law Societies and Bar Associations of each State and Territory impose a (small) levy on the cost of renewing practicing certificates to establish a fund that can be drawn upon by practitioners to meet the cost of providing disability-related adjustments. Alternatively, the Productivity Commission ought to recommend that the Commonwealth establish such a program.

Knowledge and skill of legal professionals

13. Arguably, one of the greatest barriers to justice that persons with disability face is the attitudes of legal professionals, whether judicial officers, barristers, lawyers, court staff or others involved in the legal process. Often these attitudes are based in or reflect negative stereotypes and prejudices about disability in general, or about specific impairment types (for example, intellectual disability or mental illness).
14. The vast majority of legal professionals do not receive any specific disability-related education or training either as part of their initial legal studies or as part of their ongoing professional development. In our submission, if access to justice for persons with disability is to be improved, it is essential that all legal personnel undertake both initial and progressive training that will enable them to develop disability-related competence for their work roles. This training must address not only attitudinal issues, but also specific competencies needed for working effectively with persons with disability (for example, how to work with an Auslan or deafblind interpreter, communicating effectively with a person with intellectual disability).

Recommendation:

The Productivity Commission ought to recommend that in order to improve access to justice for persons with disability, all legal professionals (including judicial officers, solicitors and barristers, court staff etc) undergo initial and

progressive education and training directed towards the attainment of disability competencies (both attitudinal and skills based).

Grants of legal aid to community legal centres for solicitor costs

15. Some community legal centres are entitled to grants of aid for their solicitor costs to undertake civil casework for clients. However, most are not entitled to such grants. They are entitled to disbursements and the costs of instructing counsel, but not solicitor costs. The reason for this anomaly is no longer clear, if it ever was.
16. Due to the severe resource constraints under which many community legal centres operate it is often quite difficult or impossible for them to provide intensive casework assistance to clients, even where there are strong public interest reasons why such assistance should be offered, and even where (as in our case) the centre may be much better placed to provide the specialist assistance the client requires than a private practitioner would be. In fact, this policy tends to further disadvantage clients of community legal centres who require intensive case work assistance.
17. This situation could be dramatically improved if community legal centres could claim solicitor costs for legally aided clients. Enabling community legal centres to claim solicitor costs for clients who are legally aided would provide much needed additional revenue for these services, enable them to provide intensive casework assistance without compromising information and advice services, and significantly improve access to justice for many clients.

Recommendation:

The Productivity Commission ought to recommend that community legal centres be entitled to claim solicitor costs for legally aided clients in addition to disbursements and the costs of instructing counsel.

Reforming Australia's discrimination laws and their administration

18. As we have noted above, ACDL is a specialist legal centre which practices in disability discrimination law. The following comments are observations on access to justice in this jurisdiction.
19. Australia's disability discrimination laws are particularly problematic from an access to justice perspective for a number of reasons, which include:
 - (a) They are limited in scope and particular provisions are poorly conceptualised and drafted. This leads to considerable inefficiency in the litigation and adjudication of claims. This inefficiency is associated with a significant public and private cost;
 - (b) They essentially rely upon a private enforcement model (individual complaints) even though, frequently, the discrimination claimed is structural in nature (for example, access to transport services). The burden of enforcement therefore rests on private individuals rather than,

- as is arguably more appropriate in many instances, a public authority or official;
- (c) In the litigation of disability discrimination claims, the ordinary rule is that costs follow the event; that is, the unsuccessful party must pay the successful party's costs as agreed, or as taxed or assessed. These costs may be significant. The risk of liability for costs severely inhibits the pursuit of claims. Consequently, most discrimination remains without a remedy;
 - (d) In the federal jurisdiction, disability discrimination claims are adjudicated by the Federal Circuit Court or the Federal Court of Australia. These are non-specialist courts in which judicial officers deal infrequently with discrimination claims and consequently may lack of familiarity and expertise in dealing with these claims. This frequently leads to poor outcomes for complainants.

Recommendation

In order to improve access to justice in the Commonwealth disability discrimination jurisdiction, the Productivity Commission ought to recommend:

- (a) That the *Disability Discrimination Act* 1992 is reviewed and redrafted to extend its scope and to clarify and simplify its provisions so as to ensure that in the adjudication of any claim, the focus is on the substantial factual issues, rather than on the scope and meaning of the legislative provisions;
 - (b) That an enforcement agency be established – analogous to the Fair Work Ombudsman – to investigate disability discrimination claims, and, if appropriate, to initiate legal action to enforce obligations;
 - (c) That the ordinary rule in disability discrimination claims be that each party bear its own costs; and
 - (d) That a specialist division of the Administrative Appeals Tribunal be established to hear and determine disability discrimination claims. Members of this division ought to be recruited based upon their specific expertise in this area of law.
20. Thank you for the opportunity to make these submissions. Please don't hesitate to contact us if you would like to discuss further any of the matters we have raised.

Yours sincerely


PHILLIP FRENCH
Director/solicitor