

JC: MLM

Access to Justice Arrangements

Productivity Commission

LB2 Collins Street East

MELBOURNE VIC 8003

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P.O Box 3347, Redfern

NSW 2016

t - (02) 9318 0144

f - (02) 9318 2887

e - [info@idrs.org.au](mailto:info@idrs.org.au)

w - [www.idrs.org.au](http://www.idrs.org.au)

ABN- 11 216 371 524

By e-mail: [access.justice@pc.gov.au](mailto:access.justice@pc.gov.au)

Dear Sirs

## **Intellectual Disability Rights Service: Access to Justice Submission**

Intellectual Disability Rights Service (IDRS) is pleased to make a submission in relation to the Productivity Commission's inquiry into access to justice arrangements.

### **A. About Us**

IDRS is a community legal centre and disability advocacy service that provides legal services and related advocacy for people with intellectual disability throughout New South Wales. IDRS advocates for policy and law reform and undertakes a range of community education activities with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN') which supports people with intellectual disability when they come into contact with the criminal justice system.

### **Our Target Group**

Our target group includes people with intellectual disability who may also experience a wide range of additional impairments.

Intellectual disability is a disability that occurs in the developmental period of life (ie before the age of 18) and is characterised by below average intellectual functioning. Most people with intellectual disability are born with the disability.

Clinically, and for the purposes of proving in court that a person has intellectual disability, intellectual disability is best assessed by a psychologist as:

- An IQ of 70 or under, plus
- Deficits in at least 2 areas of adaptive behaviour, ie
  - Communication
  - Self-care
  - Home living
  - Social skills
  - Self direction
  - Leisure and work
  - Learning

Intellectual disability can affect a person in the following ways:

- The person may have difficulty reading and writing
- The person may have difficulty communicating
- The person's understanding will be affected
- The person may have difficulty understanding abstract concepts
- The person's ability to plan and to problem solve may be affected
- The person's ability to adapt to new or unfamiliar situations may be affected

## **Our Funding**

During 2011-2012 IDRS received its core funding from:

- NSW Department of Family and Community Services, Ageing, Disability and Home Care (ADHC)
- Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)
- The Public Purpose Fund, Law Society of NSW, through the Community Legal Centres Funding Program of Legal Aid NSW

## **Staffing of our Civil Dispute Resolution Services**

Our direct legal services in both civil and criminal matters are provided by 3 full-time solicitors. In addition, a legal service dedicated to assisting parents with intellectual disability who are known to child protection authorities or who are

involved in care proceedings in the NSW Children’s Court is provided by a solicitor who works 3 days per week. An associated non-legal support service for these parents is provided by a specialist social worker who works 4 days per week.

IDRS also runs education and training aimed at empowering people with intellectual disability by providing information about their rights and responsibilities, how to stand up for their rights and how to get help when needed. One full-time and one part-time educator are employed to run these courses, in addition to other training run by IDRS. They are assisted by co-educators with intellectual disability who are employed on a casual basis.

These workers, and IDRS’s other client service staff, are managed and supported by IDRS’s executive officer (4 days per week), 2 full-time administrative staff, 2 part-time office assistants, and a small number of volunteer solicitors and graduates-at-law.

### **Our Legal Services Mix**

The following table provides an indication of the mix of problem types in relation to which we provide legal services:

<b>Type of Problem</b>	<b>2012-2013</b>	<b>2011-2012</b>	<b>2010-2011</b>
Civil (including family)	62%	64%	65%
Criminal	38%	36%	35%

## **B. Comment on Questions in the Issues Paper**

We comment below on certain issues in which we have particular expertise and we provide examples relating to those issues. Our focus is on access to justice for people with intellectual disability. For ease of reference, the numbering of our subheadings corresponds to the numbering used in the Commission’s issues paper. Names and other identifying details in case studies have been changed to protect client confidentiality.

### **2 Avenues for dispute resolution and the importance of access to justice**

#### ***Avenues for civil dispute resolution***

There are significant barriers to people with intellectual disability using forums for formal resolution of civil legal disputes. For example, the way in which

evidence has to be given in a court proceeding makes it too hard for many people with intellectual disability to provide the evidence required to prove their case. Also, the potential costs of legal proceedings are often prohibitive.

### **Case Study: Fred**

*Fred has mild intellectual disability. He bought a house for \$250,000. A licensed conveyancer acted for Fred in the transaction. The conveyancer also acted for the vendor. Fred's mother was his support person during the course of the conveyancing process. A pest report done for Fred indicated that further investigations should be done about possible pest damage. Fred did not understand that the report raised uncertainties, or that proceeding without further investigations being done would involve significant risk. The conveyancer did not properly advise Fred. Because of this, Fred completed the purchase without having further investigations done. He subsequently needed to spend \$60,000 on repairs of termite damage that he discovered on moving into the house.*

*The conveyancer had not kept proper records of the transaction. There were legal issues about the nature and extent of the duties of the conveyancer to Fred that should have been argued in a court. Fred had an arguable case but it involved the word of Fred and his mother against that of the conveyancer. Fred's intellectual disability made it too difficult for him to provide the nature and standard of evidence required to prove in court that the conveyancer had been negligent.*

*Fred has no assets other than the house and his only income is the disability support pension. It is not clear that Fred would have been granted legal aid to run his case. If he had run the case and lost, in addition to paying for his own lawyer he could have been ordered to pay the other party's reasonable costs. These could each have been as much as \$20,000 to \$40,000, which Fred could not afford.*

Even less formal methods of civil dispute resolution, such as conciliation, may prove too daunting for a person with intellectual disability to pursue.

### **Case Study: Hilda**

*Hilda is 52 years old. She was employed on a permanent full-time basis by ABC Group for 20 years as an office assistant. Her employer gave her a letter stating that because of the employer's concerns about Hilda's back and knees and its inability to find alternate duties for her, it had to let her go. She was given 5 weeks' notice.*

*No medical assessments of Hilda had been done, she had not taken any sick days and she had been able to complete all tasks assigned to her. She felt able to continue with her work. She had not been given any warning of the possibility of losing her employment. However, her employer had previously suggested that she might like to think about retirement.*

*Hilda did not receive any redundancy or other special payments.*

*Hilda received advice about making complaints to the Fair Work Commission or one of the statutory anti-discrimination bodies. However, when she learned that she might have to take part in a conciliation conference with her former employer to sort out the dispute, she felt it was too much to face, even with legal and other support. She decided to focus instead on trying to get a new job.*

### **Why is access to justice important?**

A failure to provide adequate access to justice for people with intellectual disability means that those who treat them poorly are not held to account and may feel that they can repeat the poor treatment with relative impunity. This makes for a less humane community. Further, if people with intellectual disability are effectively denied the opportunity to engage in civil justice processes, they are denied human rights recognised in the Convention on the Rights of Persons with Disabilities, particularly:

- The right to equality before and under the law and entitlement without discrimination to the equal protection and equal benefit of the law (Article 5)
- Effective access to justice on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at ... preliminary stages (Article 13)

## **3 Exploring legal needs**

### **What is legal need?**

Legal need means a need for:

- information about how to get legal advice
- advice about whether a problem is a legal problem

- advice about possible courses of action for addressing a legal problem
- help with implementing a course of action to address a legal problem
- education about legal rights and responsibilities
- help with getting laws put in place or changed to prevent or correct injustices.

Unmet legal need can have significant social and economic impacts.

### **Case study: Sarah**

*Sarah lives in a small, remote rural town. She is a child diagnosed with autism and developmental delay. As a result of her disabilities she has difficulties with language and other communication, and is impaired in her social interactions. She requires additional support compared to the other children in her year at school.*

*Sarah experienced problems with her local public high school from the time she applied to attend. The school initially said she should attend a special school for people with disability, despite the children there not being of her age. Sarah nevertheless started at the public high school but was made to feel unwelcome. She was sent home for minor reasons. Her local doctor wrote to the school to point out the unfairness and support her. Things did not improve. For 3 years Sarah was only able to attend school on a part-time basis because of inadequate support. Plans for increasing her hours of attendance were never followed through. Sarah was clearly not allowed to participate in school activities on the same basis as a student without a disability.*

*Finally, when Sarah was in year 12, she and her family got legal help from IDRS. IDRS assisted them to make an application to the Australian Human Rights Commission (AHRC) claiming that the school had unlawfully discriminated against Sarah on the ground of her disability.*

*Sarah had faced barriers in gaining access to justice because of her disabilities and her age. During the period of discrimination she suffered from panic attacks, heart palpitations, depression and anxiety. Her ability to understand her situation and get help was extremely limited.*

*Sarah did have the help of her mother, who on numerous occasions over 4 years sought help from the school to resolve the issues, again supported by the family doctor. However, Sarah's mother also suffered from significant stress and anxiety and was hospitalised for these conditions.*

*She lacked the ability to formalise a complaint of unlawful discrimination. Support services in the locality were extremely limited.*

*After IDRS helped Sarah and her mother make a complaint to the AHRC, IDRS represented Sarah at a conciliation conference and in subsequent negotiations with the school. An agreement was reached. One outcome was that the school agreed to give Sarah extra funding to have an aide with her in class so she could finally attend school on a full-time basis. Sadly, by this time Sarah was in year 12 and her time at school was almost over. Earlier access to legal assistance and formal dispute resolution channels would very likely have significantly improved Sarah's education, learning outcomes and preparation for life after school. Now she just wants to leave school and feels sad that she was treated so unfairly. The ongoing tension between Sarah and the school impacted adversely on the wellbeing of Sarah and her mother, and incidentally resulted in increased burdens on the health care system.*

### **How many Australians experience legal need?**

2-3% of the NSW population has intellectual disability.

IDRS's experience is that clients with intellectual disability who lack strong support networks (which may comprise family members, friends, social groups, disability advocacy and support agencies, social and welfare agencies, and/or health care providers) frequently experience multiple problems. Often such clients do not have all the skills necessary to cope effectively with day-to-day living and dispute resolution unassisted. As a consequence, they become involved in both civil disputes – about such matters as debt, consumer issues and housing problems – and the criminal justice system, either as victims of crime or alleged perpetrators. This appears to be particularly the case when the client has mental health issues in addition to intellectual disability.

### **Case study: Keith**

*Keith is a middle-aged man with mild intellectual disability. Whilst his language skills initially appear good, it subsequently becomes clear that his information and emotional processing can be impaired. He copes poorly with stress. When his anxiety escalates, he sometimes relates stories that are untrue and can become aggressive.*

*Keith experienced abuse as a child when he was in institutional care. He exited institutional care at the age of 19. He has no contact with any of*

*his family. He has lived in boarding houses and more recently in public housing. From time to time when experiencing mental health issues he has been admitted to hospitals. In his early 30s, Keith was referred to the state government disability services agency and was allocated case managers. He receives a variety of support services but can tend to limit or manipulate service provision. In addition, his behaviour is sometimes challenging. Services can in turn feel obliged to place boundaries around their contact with Keith, or in some cases withdraw their support.*

*Since first approaching IDRS 15 years ago, Keith has been involved in civil disputes about contracts, debts, employment, social security, consumer issues, disability discrimination, tenancy and privacy.*

*Keith has also recurrently been involved in criminal court cases. As well as being charged with summary offences, he has faced prison sentences for making hoax bomb threats and unjustified calls to emergency services. In the course of criminal proceedings he has breached bail. He has also been a victim of violent crime.*

*Expert psychiatric opinion is that some of these legal problems result from Keith's attempts to get care and help for himself when he feels overwhelmed. Medication, counselling and close support from dedicated carers can reduce Keith's problems.*

#### **4 The costs of accessing civil justice**

##### ***Financial costs***

Most of the clients of IDRS are on the disability support pension. They do not have the money, and never will have the money, to afford legal assistance at the guideline rate of \$280.00-290.00 per hour contained in the NSW Local Court Practice Notes.<sup>1</sup> Community legal centres do not have the capacity, nor the expertise, to satisfy all the legal needs of people who approach them for help. Many people with intellectual disability who have justifiable claims are dissuaded from pursuing them because the potential costs of obtaining a resolution through litigation are too high. The case study of Fred in section 2 above is an example of this.

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<sup>1</sup> Local Court of NSW Practice Note Civ 1 commenced 23 March 2011, reissued 7 January 2013 Part F para 35.3



The costs burden operates unfairly in practice. Businesses and companies can often claim legal costs as tax deductions, whereas individuals are usually not able to do so.

## 5 Is unmet need concentrated among particular groups?

People with illness/disability have an increased experience of legal problems.<sup>2</sup>

*... (T)hose who have an illness/disability that limits capability to resolve legal problems also face an increased need for help to deal with these problems.*

...

*Not only do people with an illness/disability have high legal and health needs, but it is well documented that they can face a range of obstacles in accessing services...<sup>3</sup>*

A UK study found that impaired groups seeking health services were more likely to report

*... difficulties securing appointments, difficulties with transport and the physical environment of service locations, anxiety or lack of confidence in seeking help, communication problems and problems with inexperienced or unhelpful staff.<sup>4</sup>*

It concluded that adults with impairments in cognition, communication and mental health 'appeared to be particularly disadvantaged'.<sup>5</sup>

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<sup>2</sup> Pleasence, P, Wei, Z and Coumarelos, C, 'Law and disorders: illness/disability and the response to everyday problems involving the law', Updating justice: No. 30, September 2013, Law and Justice Foundation of New South Wales at 1

<sup>3</sup> Pleasence, P, Wei, Z and Coumarelos, C, 'Law and disorders: illness/disability and the response to everyday problems involving the law', Updating justice: No. 30, September 2013, Law and Justice Foundation of New South Wales at 1

<sup>4</sup> Allerton, I & Emerson, E 2012, 'British adults with chronic health conditions or impairments face significant barriers to accessing health services', *Public Health*, vol. 126, pp920-927, cited in Pleasence, P, Wei, Z and Coumarelos, C, 'Law and disorders: illness/disability and the response to everyday problems involving the law', Updating justice: No. 30, September 2013, Law and Justice Foundation of New South Wales at 1-2

<sup>5</sup> Allerton, I & Emerson, E 2012, 'British adults with chronic health conditions or impairments face significant barriers to accessing health services', *Public Health*, vol. 126, p924, cited in Pleasence, P, Wei, Z and Coumarelos, C, 'Law and disorders: illness/disability and the response to everyday problems involving the law', Updating justice: No. 30, September 2013, Law and Justice Foundation of New South Wales at 2

It is the experience of IDRS that people with intellectual disability are similarly disadvantaged in accessing civil justice. The case study of Sarah in section 3 above is typical of client experiences confirming this.

## **6 Avenues for improving access to civil justice**

Article 12 of the Convention on the Rights of Persons with Disabilities provides in part:

12.3 States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

The accessibility of the civil justice system, including processes of mediation, conciliation, and court or tribunal hearings, could be improved by greater availability of independent support persons for parties with intellectual disability (and other cognitive impairments). People with intellectual disability who are in contact with the criminal justice system in NSW can get help from the Criminal Justice Support Network (CJSN). CJSN provides support persons for people with intellectual disability who are defendants, witnesses or victims. Many people with intellectual disability are living in the community with little or no support. Many do not have family or friends to assist when they encounter civil justice problems. The experience of our clients and CJSN is that whilst family and friends can offer significant support for people involved in legal matters, an independent support person trained in both legal processes and communicating with people with intellectual disability can assist in an objective manner without any conflict of interest and:

- Help a person understand what is being said and assist the person in communicating with others
- Help legal representatives to communicate with the person in plain language to ensure the person understands what is happening
- Help a person read documents
- Help a party to a legal matter understand what his/her choices are
- Encourage and assist a person to appropriately contribute to proceedings
- Provide emotional support during and after proceedings
- Ensure a person understands outcomes

The significant improvement in communication that often results from the involvement of a trained support person can facilitate greater participation by a person with intellectual disability in the justice system, and can improve outcomes for that person.

People with intellectual disability are limited in being able to access information often required to enable successful action in civil matters without assistance. Similarly, they will often have difficulty understanding and following up on action required to progress a civil matter. In the experience of IDRS this will often result in civil matters not being followed through due to lack of support and the limited time available for solicitors to compensate for the limitations of the client in progressing his/her own matter. IDRS believes that the availability of a support person for people with intellectual disability pursuing justice in civil matters would greatly improve access to justice.

It is also essential that the need for solicitors to spend additional time on matters involving clients who have intellectual or other cognitive disabilities is acknowledged in funding civil matters for these clients.

## **7 Preventing issues from evolving into bigger problems**

IDRS education and training aims to empower people with intellectual disability by providing information about their rights and responsibilities, how to stand up for their rights and how to get help when needed. Our 'Rights Leadership' courses involve 6 group sessions for 6-10 participants. Each session runs for 2 hours. Sessions are presented by an educator trained in working with people with intellectual disability, and by a co-educator with intellectual disability. A refresher/reunion session takes place 6 weeks after the training is completed. Participants learn about their rights as disability service users, consumer rights, rights in employment, rights in housing, and interpersonal rights and responsibilities. Participants also practice standing up for themselves and learn what to do if a legal problem or rights problem arises. There is no cost for this training. In 2011-2012, 87 people with intellectual disability participated in the 10 Rights Leadership Courses we ran. Courses were held at Redfern, Bankstown, Wyong, Randwick, Lambton, Gosford, Merrylands and Mudgee.

Course completion helps participants resolve their own disputes. For example, one former participant reported that he used the knowledge and skills gained in the course to help sort out a dispute in his group home.

Course completion also helps participants go on to educate others in the community about preventing and addressing legal problems. One of our course co-educators with intellectual disability is a previous course participant.

## **12 Effective and responsive legal services**

Legal practitioners who assist clients with intellectual disability should undertake training in the nature of the disability and its effects. They should learn about strategies for effective communication with people with intellectual disability, and the types of problems people with intellectual disability can encounter when trying to engage with legal services and the civil justice system. Significantly, legal practitioners and others involved in the civil justice system must be able to make adequate time available to allow a person with intellectual disability to understand what is being said and what is happening, and to participate to the best of that person's ability.

Yours faithfully

**Janene Cootes**

Executive Officer

**Margot Morris**

Principal Solicitor