

Access to Justice Arrangements (Draft Report)

Productivity Commission

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Prepared by the Physical Disability Council of NSW

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Who is the Physical Disability Council of NSW?

The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disabilities across New South Wales. This includes people with a range of physical disability issues, from young children and their representatives to aged people, who are from a wide range of socio-economic circumstances and live in metropolitan, rural and regional areas of NSW

The objectives of PDCN are:

- To educate, inform and assist people with physical disabilities in NSW about the range of services, structure and programs available that enable their full participation, equality of opportunity and equality of citizenship
- To develop the capacity of people with physical disability in NSW to identify their own goals, and the confidence to develop a pathway to achieving their goals (ie self advocate).
- To educate and inform stakeholders (ie about the needs of people with a physical disability) so they are able to achieve and maintain full participation, equality of opportunity and equality of citizenship.

PDCN would like to thank the Productivity Commission for the opportunity to make comment on the Access to Justice Draft Report 2014, and would like to support implementing strategies that facilitate greater access for people with disability to the legal justice system.

In 2011 the Australian government adopted the National Disability Strategy (NDS) 2010-2020 as part of endorsing the Convention on the Rights of Persons with Disabilities (CRPD). As part of being a signatory to the CRPD the Australian government is committed to the implementation of Article 13 – Access to Justice ¹ and the further implementation of six significant areas of reform outlined in the NDS. The review of access to justice arrangements is an essential component of the second major area needing reform, and this area of reform identifies the need to investigate, review and reform access to rights, justice and legislation. Policy Direction – People with disability have access to justice of the NDS outlines the following commitment:

‘Effective access to justice for people with disability on an equal basis with others requires appropriate strategies, including aids and equipment, to facilitate their effective participation in all legal proceedings. Greater awareness is needed by the judiciary, legal professionals and court staff of disability issues’. ²

As part of implementing the NDS the strategy identifies the following actions to be completed:

The Commonwealth, States and Territories have assessed the extent to which the legislation, policies and programs comply with the obligations in the Convention. At a national level implementation of the NDS identified the following policies and programs

¹ United Nations Convention on the Rights of Persons with Disabilities (2006) Article 13

² Australian Council of Governments (2011) National Disability Strategy 2010- 2020

needing to be reviewed: government disability action plans, disability advisory councils, public advocates, disability services standards, community or disability legal centres, funding of disability organisations and compliance with website accessibility guidelines.³

The Physical Disability Council of NSW (PDCN) understands that the difficulties faced by people with disabilities trying to access justice due to the physical and financial barriers preventing access. The draft report also identifies concerns with the implementation of the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS) and this is reflected in the following statement:

For some problems, however, the Commission was unable to identify an informal avenue to seek a resolution. These disputes included:

- Those involving disability care, aid and equipment (although there may be some recourse through the disabilities commissioner, or the Administrative Appeals Tribunal (AAT), in the case of NDIS decisions)
- Access to health services and disputes around health care costs and entitlements
- There are few avenues, besides courts, through which to dispute matters around wills and powers of attorney
- There is no informal avenue to pursue matters around accidents — which mainly comprise motor vehicle accidents without injuries — especially in cases where the other party is unknown. Nor are there formal avenues to pursue matters relating to personal injury outside the courts'.⁴

It is understood that the AAT will review decisions made under section 99 NDIS decisions between the applicant and the National Disability Insurance Agency (NDIA) if an internal review has already taken place but a resolution has not been met. The following matters can be investigated by the AAT: eligibility to the scheme, supports provided under the scheme and the registration of providers of supports. The AAT uses a variety of Alternative Dispute Resolution (ADR) processes including Case Conference, Conciliation, and more formal Hearings.

PDCN understands that when utilising ADR processes legal precedents are not established in a similar manner to that in case-law, but is guided by what decisions have been made as part of court hearings. PDCN believes that with the NDIS launch sites issues such as eligibility, the inclusion of what services and the level of service provision meets the 'necessary and reasonable' criteria, what accommodation supports and models, will become clearer and these will provide guidance to the AAT.

The draft report focuses entirely on financial access and fails to consider accessibility to the premise providing the legal service. Without physical accessibility people with physical disability are unable to initially seek advice from the solicitor, followed by further advice from the barrister. A continuous accessible path of travel needs to be provided at all community-based facilities providing legal assistance. ADR processes and court hearings need to be provided in accessible premises so that all paths of travel comply with Disability (Access to

³ Australian Council of Governments (2011) National Disability Strategy 2010- 2020

⁴ Australian Government Productivity Commission (2014) Draft Report – Access to Justice Arrangements, P.819

Premises-Buildings) Standards 2010. This will enable a juror, witnesses, the defendant, members of a jury and staff members to participate in court hearings.

Further discussion addresses the relationship between unmet legal need identified by the Law and Justice Foundation of NSW survey: Legal needs of people with a disability in Australia (2012) and feedback from the Access to Justice Arrangements Draft Report. The most recent LAW Survey completed in 2012 included 20, 716 surveys across Australia. This survey has been used to examine the ability of disadvantaged people to:

- Obtain legal assistance
- Participate effectively in the legal system
- Obtain assistance from non-legal advocacy and support
- Participate effectively in law reform processes.

Additional to the national LAW Survey a thorough survey was conducted nationally with 10,289 participants with a disability. Both surveys conducted by the Law and Justice Foundation of NSW included a broad set of questions about the following issues;

- Accidents
- Consumer
- Credit/ debt
- Crime
- Employment
- Family
- Government
- Health
- Housing
- Money
- Personal Injury
- Rights

The findings firmly verify the substantial connections between a variety of illnesses/disabilities and a broad range of everyday legal and social problems reflecting socioeconomic disadvantage. Findings from these surveys also show that many social problems increase in magnitude with severity of illness/disability.

Findings from the LAW Survey identify differences between the following population groups;

- People with physical disability
- People with disability and the
- General public

Table 1: Number of survey respondents by type of legal problem ^{5, 6}

⁵ NSW Law and Justice Foundation (2012) Law study Australia

⁶ NSW Law and Justice Foundation (2013) Law Study- Law and disorders: illness/disability and the experience of everyday problems involving the law

Legal problem	% of people with disability	% of people with physical disability	% of general public
Accidents	3.0	3.0	7.7
Consumer	27.8	2.3	20.6
Credit/ debt	6.5	2.0	4.6
Crime	9.8	2.0	14.3
Discrimination		4.0	2.4
Education		1.9	2.4
Employment	8.3	1.8	6.2
Family	7.5		
Government payments and services	12.8	3.7	11.4
Health	2.5	39.6	3.7
Housing	8.4	1.7	12.8
Money	4.0		
Personal injury	2.0	7.2	7.0
Relationship breakdown		1.8	4.5
Rights	7.3		

Note: Different LAW Studies classify the categories of legal problems differently, but PDCN assumes that there is a correlation for the legal problem 'Rights' used in the Australia wide LAW Study, and 'Discrimination' used in the LAW Study- Law and disorders: illness/disability and the experience of everyday problems involving the law.

Findings reinforce a correlation between the following;

- An increase in the severity of disability with an increase in the number and intensity of social and legal problems
- An increase in the severity of disability with an increased need for legal access

Additional findings include the following;

- That no two people with physical disability share a commonality when considering legal problems
- A common cluster of legal problems including health, personal injury and employment
- Findings address people with disability as a socioeconomically disadvantaged group, but it needs to be stressed that people with disability often are included in the other socioeconomically disadvantaged groups by being unemployed, being on low incomes, receiving government benefits and live in public housing.

In the categories consumer, education, employment and housing the relevance of unmet legal need is reported as less for people with physical disability than that of the general

public. Respondents with a severe physical disability were 93 times more likely than those with no disability to report problems in the health services category. PDCN believes that with the introduction of the National Disability Insurance Scheme and greater community participation that there will be increased likelihood of people with disability reporting consumer, education, employment as unmet legal need.

Whilst the incidence of crime as a legal problem is significantly less among people with physical disability it is reported that family violence tends to be more frequent and more severe where a resident has a physical disability.⁷

PDCN understands that there is an increasing trend to align, co-ordinate and integrate health and legal services for people with disability due to the complexity and interaction of health issues and unmet legal need. PDCN believes that this could have negative implications by increasing dependence on the medico- legal disciplines, and at the same time not enhance self- determinism.

The following not- for- profit legal services are available to NSW residents, with Legal Aid NSW being used most widely:

- Community Legal Centres,
- Court services,
- LawAccess NSW and
- Legal Aid NSW.

The draft report on Access to Justice Arrangements provides the following information regarding the powers of the Ombudsman and Tribunals:

Powers of the Ombudsman

- Have the ability to investigate whether an organisation within jurisdiction has acted fairly and reasonably
- Have the right to deal with systemic issues or commence an own motion investigation
- Have power to obtain information or to inspect the records of an organisation relevant to a complaint; and must have the discretion to choose the procedure for dealing with a complaint.

Accessibility of the Ombudsman

Complaints are generally investigated in private with no charge to a complainant for the Ombudsman's investigation.

Examples of Ombudsman and complaint bodies

- National Fair Work Ombudsman
- National Law Enforcement Ombudsman
- NSW Health Care Complaints Commission

⁷ Law and Justice Foundation of NSW (Paper 17 September 2013) LAW Study- Law and disorders: illness/disability and the experience of everyday problems involving the law.

- NSW Energy & Water Ombudsman

Powers of the Tribunal

Tribunals across Australia are responsible for resolving a wide range of disputes, including administrative matters (such as veteran's entitlements, refugee applications, and planning decisions), civil disputes (such as claims related to the supply of goods and services), and human rights cases (such as guardianship, antidiscrimination and the care of children).

Accessibility of Tribunals

Tribunals aim to provide informal, low cost and timely avenues for resolving disputes through: active case management; using ADR; limiting legal representation and assisting self-represented litigants.

Examples of Tribunals

- Social Security Appeals Tribunal
- Commonwealth Superannuation Complaints Tribunal
- NSW Consumer, Trader and Tenancy Tribunal
- NSW Administrative Decisions Tribunal

The benefits of seeking resolution of a legal problem through ADR processes is that it is a lot less costly and resolution is a lot quicker than seeking remedies through a more formal court processes. Though utilising this process assumes that both parties are from relatively similar financial and operational backgrounds, and are willing to meet a compromise and common understanding.

The Productivity Commission draft report on Access to Justice Arrangements identifies the following circumstances where the use of ADR may not be considered appropriate:

- Where there is an imbalance of power between parties (such as between consumers and corporations) because of socioeconomic disadvantage, or a history of violence between the parties
- In circumstances where there is an unwillingness of parties to engage in constructive ADR, or to acknowledge that there is a problem
- Where there is little or no prospect of a successful outcome, such as when claims are unreasonable and inflexible or when disputes are vexatious
- In circumstances where it is in the public interest to set a precedent that can guide future dispute resolution, particularly if a dispute type is common and recurring
- Where one party wants to send a public message to deter future action (such as advocating for universal access to private bus operators) or
- In circumstances where time is a crucial factor and a party wants to stop a disputed action immediately.

Even with the advantages of accessibility to ombudsman and complaint bodies, commissions and tribunals, people with physical disability have tended not to utilise these facilities due to the imbalance in power between parties, lack of ability to set a precedent that can guide future dispute resolution, concerns about needing to pay court costs if the issue is heard in a court or a lack of awareness concerning bodies that provide ADR processes.

PDCN supports strategies to increase the awareness of ADR processes for the different legal problems identified in the Appendix B of the draft report.

Table 2: Suggested ADR processes for the different legal problems

Legal problem	Issue	Alternative Dispute Resolution	Appeals or secondary options
Consumer problems	Telecommunications and TV appliances	Telecommunications Industry Ombudsman	
	Insurance and Banking	Financial Ombudsman Service (FOS) Credit Ombudsman Service	
	Purchase of faulty goods	Office of Fair Trading- complaints mechanism	Relevant State or territory tribunal
	Utilities	Energy Ombudsman	
Government problems	Local Government (services and amenities, planning approvals)	State- based Ombudsman	If not within the scope of the Ombudsman, a tribunal may be an option
	Receiving Government payments	Commonwealth Department of Human Services able to review payments	Social Security Appeals Tribunal Commonwealth Ombudsman Administrative Appeals Tribunal Federal Court
	Tax assessments and tax debts	Australian Taxation Office provides the opportunity to review decisions	Administrative Appeals Tribunal
	Payment of fines	No advice provided due to limited information	
	Wide range of issues including; Citizen, residency and immigration Construction by home owners Construction by investors Freedom of information	Migration Tribunal Refugee Review Tribunal Commonwealth Ombudsman Information Commissioner	
Housing problems	Neighbourhood disputes	Community based legal facility	Tribunal
	Rented housing		State or territory based tribunal for issues regarding payment of rent State or territory based housing departments for issues regarding payment of

			rent
	Owned housing including; Mortgage payments Strata titles Retirement villages	Options include; Financial Ombudsman Service Office of Fair Trading Aged Care Complaints Scheme	
Employment problems	Conditions of employment Harassment or victimisation Discrimination Work performance	Employees Enterprise Agreement	Fair Work Ombudsman Fair Work Australia State or territory Industrial Commission Human Rights and Equal Opportunity Commission or state anti-discrimination board
Family problems	Including issues relevant to Child support, Divorce and separation, Guardianship, care and protection, custody and contact, division of assets	Department of Family Services Family Dispute Resolution Practitioner	Commonwealth Ombudsman For issues relating to guardianship, action through tribunals may be necessary
Rights problems	Education Unfair treatment of police Other civil matters	State Department of Education	Human Rights and Equal Opportunity Commission or state anti-discrimination board
Credit/debt problems	Unpaid bills or debts Repayment of money Credit ratings or refusal of credit Other financial activities	Credit Ombudsman Service	
Money, Accidents, Health and Personal injury		State based financial tribunal Aged Care Complaints Scheme State based Health Complaints Commission	