

Article 13 of the Convention on the Rights of Persons with Disabilities — a right to legal aid?

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The Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008. Article 13 of the convention requires states to ensure effective access to justice for persons with disabilities on an equal basis with others. This article examines the parameters of this right, in particular in relation to a right to legal aid; examines the international position in respect of rights to legal aid; and, using Australia as a case study, canvasses the extent to which this right to access to justice is upheld by current arrangements for access to legal representation for people with disabilities.

Introduction

Human rights instruments are not only guidelines for states, but they also create obligations that require governments to reform their policies and practices to realize human rights for all citizens.

— Rioux and Carbert 2003, 3

The Convention on the Rights of Persons with Disabilities (CRPD), which entered into force on 3 May 2008, offers the opportunity for people with a disability to press governments for real change on the basis of rights accorded to them under the treaty. Australia ratified the treaty on 17 July 2008.¹ The treaty involved a high level of participation by representatives of those directly concerned with the subject matter of the convention — persons with disability and disabled persons' organisations — and was the most rapidly negotiated treaty ever (Kayess and French 2008).

The CRPD is a paradigm shift in the treatment of persons with disabilities, from a medical or charity perspective to a rights-based approach, ensuring that persons with disabilities have access and can participate in decisions that affect their lives and to

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1 United Nations Enable 2008a. The treaty has an optional protocol that sets up a communication procedure. This allows individuals, groups of individuals, or people acting on their behalf to submit a communication to the Committee on the Rights of Persons with Disabilities alleging violations of the substantive rights protected under the CRPD. The inquiry procedure under the protocol allows the committee to initiate inquiries into information indicating grave or systematic violations of the CRPD by a state. Parties to the convention must separately sign and ratify the optional protocol and they must be parties to the convention in order to become parties to the optional protocol. The optional protocol came into effect in Australia on 20 September 2009.

seek redress for violations of their rights (Electronic Mine Information Network 2008). It has been said that 'many disabled people view their rights movement as the last in a long series of movements for rights' (Driedger 1989, 1). Since the 1960s, people with disabilities have questioned society's definition of them as odd or abnormal and rejected 'the tendency of sociologists, social workers and doctors to label them as deviants, clients and patients' (Driedger 1989, 2). The convention is the product of work done by activists with a disability and reflects the changing attitude of society and the law towards people with a disability.

The convention does not specifically define the word 'disability'; in fact, the preamble to the convention acknowledges that 'disability' is an evolving concept. The treaty does state that the term includes persons who have long-term physical, mental, intellectual or sensory impairments that, in the face of various negative attitudes or physical obstacles, may prevent those persons from participating fully in society. The convention lays down broad guidelines and each state has to determine how its provisions will be implemented. Each country that ratifies the convention has to submit a comprehensive report on progress to an international monitoring body within two years.

Right to access to justice

Part 1 of Art 13 of the CRPD says that states:

... shall ensure effective access to justice for persons with disabilities 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 investigative and other preliminary stages.

In order to ensure that people are accorded their rights under this international treaty, we need to examine what obligations this Article places on countries which are signatories to the convention. Can a right to access to justice give rise to a 'right' to legal aid for people with disabilities? This question will be examined with reference to the interpretation of international conventions and case law on this point. The situation in Australia is then examined as a case study in relation to this Article. If there is a right to legal aid, how does Australia measure up in terms of compliance?

Defining access to justice in relation to legal aid — interpreting the treaty

It has been said that 'the interpretation of documents is to some extent an art, not an exact science' (Watts 1999, 609). There are, though, some general principles and rules

which can be applied. Article 31 of the Vienna Convention on the Law of Treaties, signed on 23 May 1969, states that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This Article also makes it clear that the preamble and annexes to the treaty are to be taken into account.

Article 32 of the Vienna Convention states that:

- ... recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.

Those interpreting the treaty are required to give effect to the expressed intention of the parties drafting the document (Aust 2007, 234). The primary source for interpretation purposes must, of course, be the text of the treaty itself. The term 'access to justice' is obviously a broad term but, as has been pointed out by Sir Kenneth Keith, international instruments and Bill of Rights instruments often have broad wording which needs to be interpreted (Keith 2001, 437).

The preamble to the CRPD (Preamble k) gives it context in its reference to the fact that, despite all the various existing international instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world. Article 1 of the CRPD states that the purpose of the convention is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. It follows, then, that when the text of the convention refers to 'effective access to justice', it necessarily refers to the drafters' intentions to mandate access to the mechanisms to obtain enforcement of human rights and particularly those rights referred to in the CRPD itself. These include rights relating to education, health, employment, independent living, living in the community, rights to life, privacy, inhuman treatment, and so on.

There is little guidance in the preparatory papers relating to the convention in relation to the term 'access to justice'. It seems that by January /February 2005, many

states were voicing support for access to justice/courts and the right to an effective remedy for people with disabilities (National Council on Disability 2005). It can be seen that during the discussion of what was then draft Art 9 in early 2005 (United Nations Enable 2006), 'considerable support was expressed for the inclusion in the convention of language that would guarantee persons with disabilities access to justice'. It was regarded as so important that '[m]ost delegations supported the inclusion of the language in a separate article'. The term is not defined or discussed in detail, though.

There are many definitions of the term 'access to justice'. The 'access to justice' movement began in the United States in the 1960s and led to a 'worldwide shift to the idea of legal aid as a right' (Noone and Tomsen 2006). The concept arose in the era of the welfare state and growing rights consciousness, and was usually identified with committing the state to increasing social services. Cappelletti and Garth agree that the term is not easily defined. They suggested that it serves 'two basic purposes of the legal system — the system by which people vindicate their rights and/or resolve their disputes under the auspices of the state' (Cappelletti and Garth 1978). Definitions can be very specific, such as that adopted by Washington State Supreme Court in a paper on access to technology:

... the meaningful opportunity, directly or through other persons: (1) to assert a claim or defense and to create, enforce, modify, or discharge a legal obligation in any forum; (2) to acquire the procedural or other information necessary (a) to assert a claim or defense, or (b) to create, enforce, modify, or discharge an obligation in any forum, or (c) to otherwise improve the likelihood of a just result; (3) to participate in the conduct of proceedings as witness or juror; and (4) to acquire information about the activities of courts or other dispute resolution bodies. [Washington State Supreme Court, 2003.]

An Australian Government Access to Justice Advisory Committee stated in 2002 that the concept of 'access to justice' involves the following three key elements.

- Equality of access to legal services — ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.
- National equity — ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy.
- Equality before the law — ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in such fields as education, employment, use of community facilities and access to services (Schetzer, Mullins, and Buonamano, 2002).

The term 'access to justice' does not appear in either the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR). The term is not contained in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (which is specifically recognised in the preamble of the CRPD).

Article 13 provides a right to effective access to justice, including through the provision of procedural and age-appropriate accommodations. This could arguably require a rethinking of many aspects of the current justice system. Procedural accommodations might include the manner in which court cases are organised, with the many built-in adjournments and delays causing significant inconvenience and difficulty for everyone but particularly for people with a disability. It could include courtroom adaptations, such as mandated interpreters, signers, the videotaping of evidence and the use of closed-circuit television and individualised approaches to the manner in which evidence may be given (Jones and Bassor Marks 1999, 13). Courts and dispute resolution services could incorporate 'appropriate technology touch screens; automatic electronic gates; hearing amplification devices; flat-panel monitors; adjustable podiums; multi-lingual software speech synthesizer and translator and other features specially designed for people with reduced vision, limited hearing or other physical disabilities' (Stetson Law 2005).

To have access to justice, people with a disability must obtain legal knowledge to be able to identify the issues they face as ones with a legal solution; they need to have remedies available; and they need to be able to physically access lawyers, courts and dispute resolution venues. They need to have the financial ability to pay for services, or to be able to access free services. Issues relating to various disabilities need to be considered.

Legal awareness and education, legal aid, and representation are vital links in providing access to justice for people with disabilities. There are common problems people face when they need legal assistance. The complexity of the legal system is intimidating. Free legal advice to avoid legal problems is often not available. Lawyers are very expensive and beyond reach for most people. There is insufficient funding for legal aid services. Legal aid services include community legal education, law reform work and general advice services, but provision of legal aid representation services is generally obligatory only for criminal cases and strict eligibility criteria rule most people out anyway. Roulstone points out the significantly higher rate of success in disability discrimination cases where legal representation is provided, as well as the barriers to such assistance, such as quotas, fees and so on (Roulstone 2003, 125). Legal aid provision in countries such as the United States or Australia may depend on whether the matter falls under federal or state law.

People with a disability may face additional problems in that they may not be able to physically access legal institutions such as courts or legal aid/lawyers offices. Members of the legal profession may have no understanding or may lack the skills to communicate with people who have particular disabilities. Lawyers receive no training in law schools in issues relating to disability. It can be very difficult for people with a disability to get into law schools, complete studies and get jobs as lawyers, and the profession is, as a result, unrepresentative of the disability community with the concurrent ignorance about disability issues. People with intellectual or psychiatric disabilities may have their capacity to give instructions doubted. There is a lack of access to AUSLAN interpreters, and legal information websites are often inaccessible (Schetzer and Henderson 2003, xvi).

It may be argued that the term 'access to justice' does not inherently incorporate a right to legal aid in any of its forms of legal education, law reform or legal representation. The term, though, is in the convention and must have a definable meaning in various circumstances. When a person with a disability needs to resort to the law to enforce their basic rights as a citizen, the convention must give people with a disability a right to legal aid. It has been noted that an access-to-justice approach by governments 'has absorbed legal aid, access to legal services becoming part of wider strategies aimed at legal and institutional reform, and achieving equal and equally effective access to law' (Fleming 2007, 19), but government services must focus on and include a right to state-funded legal representation as well as the related rights to community legal education, test case assistance and advocacy on policy issues.

The term is not in the 1975 Declaration on the Rights of Disabled Persons, but a right to legal aid is clearly identified as indispensable:

Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account. [Art 11.]

Legal aid in criminal matters

Under the ICCPR, there are rights directly relevant to the notion of 'access to justice', although the term is not used. At international law there is a right to legal aid in criminal matters in certain situations. Article 14 of the ICCPR states:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; *and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it* ... [Emphasis added.]

The qualification on this right is that it is only exercisable where ‘the interests of justice so require’, which clearly leaves considerable room for argument, but it does provide a firm base for arguing a right for paid legal assistance in criminal matters. Complaints about violations of this right may be dealt with by the Human Rights Committee, which reviews individual cases in order to determine if there is a requirement to provide legal assistance in that particular case. The committee does not see its role as an evaluator of whether or not a state’s comprehensive legal aid scheme is in compliance with the ICCPR (Skinnider 1999, 8).

Legal aid in civil matters

The position with regard to civil matters is not so clear. In the case of *Currie v Jamaica*, 1994, the absence of legal aid for the purpose of filing a constitutional motion was claimed to be itself a violation of the ICCPR. The Human Rights Committee noted that the covenant does not contain an express obligation for a state to provide legal aid for individuals in all cases but only, in accordance with Art 14(3)(d), in the determination of a criminal charge where the interests of justice so require.

The Human Rights Committee in this case decided that the determination of rights in proceedings in the Constitutional Court must conform to the requirements of a fair hearing in accordance with Art 14, para 1 of the ICCPR, which states that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The committee decided that where a convicted person seeking constitutional review of irregularities in a criminal trial does not have funds to meet the costs of legal assistance to pursue his or her constitutional remedy, and where the interests of justice so require, legal assistance should be provided by the state (*Currie* at 13.4). While this determination related to a civil matter, it was clearly a corollary of a criminal matter and cannot be read as a determination of a general right to legal aid in civil matters.

There is no guarantee of legal aid in civil matters under the European Convention on Human Rights. The European Court on Human Rights, in *Airey v Ireland*, 1979, has interpreted the right to a fair trial in civil cases to mean effective access to the courts. This requires the state to provide publicly funded counsel in civil matters when it is in the interests of justice. The court has determined that the interests of justice criteria can be met if it is shown that the assistance of a lawyer is indispensable for the effective access to court, either because legal representation is rendered compulsory or by reason of the complexity of the procedure or the case. Therefore, the right to legal aid has been extended to civil cases through judicial interpretation. The court pointed out that the European Convention's guarantee of a right to a fair hearing in civil cases does not require governments to provide free counsel to poor people in all forums. Governments can satisfy the convention by establishing, or continuing, forums which are simple enough in both procedure and substantive law to allow citizens to have a fair hearing without the assistance of a lawyer. This view was supported by the case of *Andronicou and Constantinou v Cyprus*, 1997. The applicants argued that Cyprus had no legal aid scheme and they were unable to sue for damages, therefore that they had been denied access to a court in breach of Art 6(1) of the European Convention on Human Rights. The court decided:

... that whilst Article 6(1) guarantees to litigants an effective right of access to the courts for the determination of their 'civil rights and obligations', it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme constitutes one of those means but there are others. It is not the Court's function to indicate, let alone stipulate, which measures should be taken. All that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6(1). [*Andronicou*.]

The reasoning of the Committee on Economic, Social and Cultural Rights, the treaty body that monitors government compliance with the ICESCR, is that since the covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognised in the covenant. This reasoning must also apply to the ICCPR and to regional agreements (Rioux and Carbert 2003, 3). We can assume, therefore, that people with disabilities who are charged with a criminal matter have the right to paid legal assistance where they cannot afford legal representation and where the interests of justice require it (arguably, in just about every case).

Under the International Bill of Rights, there is no right to legal aid for other matters, though. A right to legal aid in criminal matters is important, but it is not enough. Access to legal aid for civil matters might be vitally important for people with a disability. They may need a lawyer to assist in cases involving custody or access to

children; disability discrimination cases relating to employment or education; child protection proceedings; sterilisation proceedings; consumer credit proceedings; wills and estate matters; and so on.

It could be argued that many people with a disability are in a position in society where legal assistance is necessary in order to be able to exercise their basic rights as citizens — rights which other people take for granted. This is no doubt the basis for the inclusion in the CRPD of Art 13. As a report put out by the World Bank notes, 'Article 13 seeks to respond to the historic exclusion, in many societies, of persons with disabilities from the justice system' (Guernsey, Nicoli, and Ninio 2007, 13).

It has been noted that 'little attention has been given to the connections between legal aid and human rights' (Fleming 2007, 1). If Art 13 of the CRPD is to have any meaning, then it follows that — in the absence of forums which are simple enough in both procedure and substantive law to allow disabled citizens to have a fair hearing without the assistance of a lawyer — the convention requires states to provide legal aid to people with disabilities who cannot access private legal assistance and that, at a minimum, legal aid should be available for cases involving breaches of the human rights referred to in the treaty.²

Equality

Article 13 states that countries 'shall ensure effective access to justice for persons with disabilities on an equal basis with others'. Governments may argue that, as most of the general population cannot access legal aid in civil matters, their responsibilities in this area under the CRPD are limited. It is clear that 'treating two people alike where one comes to the situation already burdened with disadvantage will do no more than perpetuate the disadvantage' (Fredman 2005). There is, of course, considerable debate about what type of approach to justice can achieve equality. Equal treatment (treating like cases alike) and equality of opportunity approaches (where certain conditions of inequality are taken into account and allowances made) have in the past been the most common approaches in relation to access to justice issues. The most persuasive approach to the notion of equality in this area is that resources should be allocated 'based on entitlement to citizenship rights and equal outcome for people with disabilities' (Rioux 2003, 307). 'Substantive equality requires a positive duty to provide equality resulting in proactive structural change' (Fredman 2005, 214). In the case of *Eldridge v British Columbia*, 1997, in a claim that

2 See Kyiv Declaration on Legal Aid, Art 6: 'Recognising the right to redress for violations of human rights — Legal aid should be available to all people without discrimination who seek legal redress for violation of their human rights, including for violations by any organ of state'. Also see Rice 2007b.

lack of sign-language interpreters in hospitals infringed the rights of deaf people, the court stressed two key principles. The court stated that first, 'this was not a claim for special treatment, but only for equal access to services that are available to all'; and second, 'the equality right included a duty to take positive steps to ensure that disadvantaged groups benefited equally from services offered to the general public' (Fredman 2005, 216). For people with a disability to have access to, and benefit from, legal services such as alternative dispute resolution and courts, they will require legal representation. If governments are to work towards equal outcomes in the access to justice area for people with disabilities, it is necessary for the provision of legal aid to be available on a much broader basis to people with disabilities than is generally the case.

A minimum standard for the provision of legal aid in this sense by governments would be for cases/policies aimed at addressing injustice/inequality in the areas dealt with by the convention, including accessibility, right to life, freedom from inhuman treatment, living independently and in the community, privacy, education, health and employment

The terms of Art 13 of the CRPD should be interpreted to provide that people with disabilities have a general right to legal aid, including to access and utilise legal assistance for general community legal education, early advice on potential legal issues, assistance in individual cases, legal challenges to effect systemic change to laws and government policies which are detrimental to individuals or communities of people with disabilities. Real access to justice, which may be covered by a broad reading of the convention, would include right to entry and completion of law school; entry into and advancement in the legal profession; physical entry into courts; and resources to assist people to be able to see, hear and participate fully in legal proceedings, including dispute resolution mechanisms outside court.

People with a disability should be able to participate equally in the justice system, as plaintiffs and defendants in civil actions and as victims and defendants in criminal matters. They should be empowered to take active roles in formal and informal dispute resolution processes. Most human rights commissions require participants to attempt to resolve disputes through mediation prior to any litigation commencing.

A case study: If, then, there is a right to legal aid for people with a disability under the CRPD, how do current arrangements in Australia for government-funded legal aid meet this right?

In Australia, as in other countries with a dualist system, international and domestic laws are viewed as two distinct systems of law and the treaty provisions do not

have immediate effect in domestic law, nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part of national law:

... incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, in order for a state to fulfil its obligations under a treaty, it is not necessary to incorporate the treaty directly into its own laws. A violation occurs only when a standard of the treaty is contravened and not when a state party fails to incorporate the provisions of the treaty into its own laws. [Skinnider 1999, 6.]

Also note the comments of the High Court in *Minister of State for Immigration and Ethnic Affairs v Teoh*, 1995, holding that:

... ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the convention ... [Mason CJ, Deane and Toohey JJ at 291.]

In Australia, though, there is no right to legal aid. The High Court case of *Dietrich v R*, 1992 is authority for the proposition that, although there is no right for an accused person to have representation in a criminal matter at public expense, the courts possess power to stay criminal proceedings that will result in an unfair trial. Lack of representation may lead to an unfair trial. The High Court has said in the case of *New South Wales v Canellis*, 1994: 'There is no suggestion in the majority judgments that a court could exercise a similar jurisdiction in civil proceedings' (Mason CJ, Dawson, Toohey and McHugh JJ at [32]).

As a result of the *Dietrich* case and the policy priorities of legal aid bodies (Gibson 2003, 52), it is fairly safe to say that any person with a disability who is charged with a serious criminal offence and does not have the funds to pay lawyers is likely to be granted legal aid in all jurisdictions in Australia — though this is not necessarily a guarantee that they will get the necessary assistance. See the comments of barrister Dan Toombs about the current system, which, he says, disadvantages many people with a disability from the start:

They're usually represented by duty lawyers who don't have time in the pre-court briefing or experience to investigate the particular needs or circumstances of their client, particularly those matters relating to fitness for trial or a possible defence under relevant sections of the Criminal Code (QLD). The other significant factor, is that on most occasions, there is no financial inducement of continued legal aid funding if cases are unlikely to lead to imprisonment. In these circumstances, it has been my experience, that clients are encouraged to plead guilty. It's expedient. But what it also results in is an accumulated history of convictions which close up the options for subsequent sentencing options and essentially fast-tracks a person with a disability towards custodial sentences at a far greater rate, without proper consideration of the legal redress that may be available to them. [Toombs 2010.]

This is not the case for civil matters.

Grants of legal aid for litigation are provided by state government legal aid bodies for a range of civil and criminal matters. Funds are derived from both state and federal governments, depending on the nature of the matter. Legal aid bodies generally provide legal aid to people according to guidelines limited by the type of matter, the means of the applicant, and the perceived merits of the case. People with a disability are, of course, eligible to apply for these grants of aid. In particular, legal aid is available to people with a disability in disability discrimination and in mental health proceedings relating to involuntary detention in hospitals.

Aid is generally available to people with a disability in a wider range of matters than is available to other people. A typical arrangement is contained in the New South Wales Legal Aid civil law guidelines, where applicants at special disadvantage may be granted assistance in a wider range of matters. Applicants are at special disadvantage when the applicant is a child or acting on behalf of a child, or when they are a person who has substantial difficulty in dealing with the legal system because of a substantial psychiatric condition, developmental disability, intellectual disability, or physical disability (Legal Aid (New South Wales) 2008, 6.26).

And in Victorian Legal Aid Guidelines, which state:

Special Circumstances

If an applicant qualifies on the means test, but the matter is not otherwise one for which [Victorian Legal Aid] would provide assistance, a grant of assistance may be offered if:

- the applicant is under the age of 18 years;
- the applicant has a language or literacy problem;
- the applicant has an intellectual or psychiatric disability. [Legal Aid Victoria 2009, 20.]

Although legal aid may be available under legal aid policy guidelines, claims have been made that people with a disability who apply in person for legal aid are systemically routinely disadvantaged because they have no-one to advocate for them on the merit of their case before they can receive assistance (Queensland Advocacy Limited 2001). Also, it is quite possible that many people with a disability would have little knowledge of the legal aid system and find it difficult to access lawyers familiar with it. Most community/welfare workers are unlikely to be aware of the range of possibilities for legal action on behalf of people with a disability. The limited rights to legal aid that exist are illusory if no one knows about them, or if they do know but cannot access them.

Legal needs studies have shown that there are significant barriers to people with a disability obtaining legal aid services. In a study of selected areas in Sydney, the Law and Justice Foundation of New South Wales found that:

... people with a chronic illness or disability had a higher incidence of a wide range of civil, criminal and family legal events, reporting higher rates for nine of the 10 most frequent types of events ... [and] had lower rates of resolution when compared with other survey participants. This finding, coupled with their increased vulnerability to a wide range of legal problems, emphasises the importance of ensuring that legal services tailored to the needs of this group become a top priority. [Coumarelos, Wei and Zhou 2006.]

The Justice Foundation has also found that 'while people with a mental illness experience a number of legal issues with potentially serious personal and financial consequences, they can also face many barriers in having these legal issues addressed' (Karras, McCarron, Gray and Ardasinski 2006). Phillip French and others have adverted to the 'problems faced by all sorts of groups in getting access to legal aid' (Schetzer and Henderson 2003).

It has been pointed out also that '[n]o generic assistance program, such as Legal Aid or an in-house program run by the Commission, will remedy the need for specialist support' (Blind Citizens Australia 2008). National Legal Aid's policy for legal aid in Australia identifies funding for legal representation of vulnerable Australians in all matters, specifically including people with a physical, intellectual or psychiatric disability as a priority (National Legal Aid 2007, 7). This in itself indicates a recognised need in this area.

There is a number of specialist community legal centres providing assistance for people with a disability, including disability discrimination legal centres in New South Wales, Victoria, the Australian Capital Territory, South Australia and Queensland; Mental Health Legal Centres in Victoria and Western Australia; an HIV /

AIDS Legal Centre in New South Wales; the Intellectual Disability Rights Service and Criminal Justice Support Network in New South Wales; Queensland Advocacy Inc; the Villamanta Disability Rights Legal Service Inc in Victoria; and People With Disabilities (WA) Inc in Western Australia. These organisations, while providing high quality services, have only a small number of staff, are underfunded and — in many cases — rely on the services of volunteers.

French makes the point that although these specialist services for people with a disability exist, they are mostly limited to disability discrimination law and services that assist people with particular disabilities, such as mental health legal centres. The organisation People With Disabilities has called for the establishment of a network of specialist services for people with a disability that would be able to increase the effectiveness of the mainstream justice system; provide legal advice and services for people with a disability; develop materials and conduct training for the community, including the legal profession; provide advice to government on law reform; and conduct strategic casework (French 2004, 3). This idea has merit, and one can envisage a network of services operating in a similar manner to the women's legal services which have been very effective in identifying and addressing policy education and casework issues. This type of service provision would be particularly important in rural and regional areas, and there is in Australia 'an ongoing need for innovative ways to achieve substantial equality before the law to be devised' (Noone and Tomsen 2001). This is particularly true for people with disabilities.

There are significant gaps in legal services in Australia. People with disabilities are not likely to have access to justice in the sense of accessing legal aid to enforce their rights under the convention. To move towards 'effective access to justice for persons with disabilities on an equal basis with others' and compliance with the CRPD, governments could adopt the following measures.

- Incorporate an express right to legal aid for people with a disability in relation to convention rights in any human rights charters existing or to be introduced.
- Ensure generalist legal aid advisers and providers are trained in issues relating to disability, and that legal aid guidelines reflect the positive right to legal aid contained in the convention.
- Establish disability-specific sections of legal aid commissions. These could promote access to legal aid services for people with a disability and could specialise in test cases relating to disability, in addition to the disability discrimination cases being conducted already.
- Run advertising/promotion campaigns about the convention and how people can access assistance to enforce the rights contained in it.

- Conduct community legal education on the convention and associated legal aid rights for people with a disability in metropolitan and rural and regional areas.
- Establish a network of specialist community legal services for people with a disability.

A rights approach presumes ‘that society is obliged to provide whatever mechanisms are necessary for individuals to realize their rights’ (Rioux and Carbert 2003, 2).

As we have seen, there is in Australia the barebones of a legal aid system offering access to justice for people with a disability. It is not enough to meet the requirements of the CRPD in terms of ‘effective access to justice’. If Australia is to meet its international obligations under the convention which it has ratified, further action should be taken immediately. ●

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