

REPRESENTING CLIENTS WITH intellectual disability

By Linda Steele



People with intellectual disability constitute approximately 2-3% of the Australian population.¹ They are disproportionately represented in the legal system due to their vulnerability to factors such as poverty, violence, social isolation, discrimination and exploitation.² Nearly one-quarter (23.6%) of those appearing before six Local Courts in NSW in relation to criminal charges could be diagnosed as having an intellectual disability, with a further 14.1% of persons in the borderline range of ability.³ Given the likelihood of encountering clients with an intellectual disability, both an awareness of what this means and the necessary skills to represent them effectively are highly relevant to plaintiff lawyers.

Equipped with these vital skills and awareness, lawyers can play an important role in upholding the human rights of those clients with an intellectual disability. Lawyers are generally central to helping their clients to access justice. But their role is more significant in relation clients with intellectual disability – their cognitive difficulties mean that any access to justice is *meaningful* access. The lawyer must provide information and advice that the client can understand and take appropriate account of the intellectual disability with respect to the conduct of any court hearing, the nature of the submissions made to the court, and the court orders sought.

Secondly, a lawyer who is sufficiently skilled in providing legal services in a non-discriminatory manner to clients with an intellectual disability can help to realise their right to non-discrimination on the basis of disability.⁴

Thirdly, a lawyer for a client with an intellectual disability has an important role in ensuring that the client can enjoy his or her socio-economic rights. People with intellectual disability can experience high levels of social and economic disadvantage. Their limited educational experiences, coupled with society's prejudice towards those with intellectual disability, can result in a lack of employment opportunities which, in turn, can lead to reliance on the state for welfare payments, general social services and specialist disability services.⁵ A client with an intellectual disability might not have the communication and information-processing skills needed to identify and push for the support services that s/he needs. By making effective referrals to government and


non-government organisations and providing legal advice and representation in internal review, administrative review, or discrimination proceedings, lawyers can assist such clients in accessing the services that they need and hence in enhancing their socioeconomic rights.

WHAT IS INTELLECTUAL DISABILITY?

Society's marginalisation and stereotyping of people with intellectual disability has contributed to a general lack of knowledge of, and confusion surrounding, intellectual disability. The lawyer must be aware of overlooking or misunderstanding a client's disability.

In simple terms, intellectual disability affects the way that a person learns. It can affect a person in a variety of ways and to different degrees. An individual is diagnosed with an intellectual disability, usually by a psychologist, where there is the presence of three co-existing criteria – an IQ of 70 or below; significant limitations in adaptive functioning; and the onset of both criteria before the age of 18.⁶

One cannot tell whether a person has an intellectual disability simply by his or her appearance. Indications of intellectual disability may emerge during interaction with the client, and may include the client's difficulty with understanding or communicating, difficulty in reading, or a tendency to agree too readily to the lawyer's advice without question. If you suspect that a client might >>



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have an intellectual disability, you could ask them. If the client does not know, is not sure, or does not identify as having an intellectual disability, you could ask some of the following questions (although they are neither exhaustive or conclusive):

- Did the client go to a special school or was the client placed in a special class in mainstream schooling?
- Does the client receive services from a state or territory disability agency, or from a non-government disability organisation?
- Does the client live in a group home or in supported accommodation?
- Does the client have a case or key worker?
- Does the client have a guardian or financial manager?
- Does the client receive the Disability Support Pension?
- Does the client work in supported employment (formerly referred to as 'sheltered workshops')?

Clients may not want their lawyers to know that they have an intellectual disability, or may try to hide its effect (such as an inability to read or write). This is often because of the stigma associated with having an intellectual disability.

It is important to note that intellectual disability is different from mental illness (although the two are frequently confused). A mental illness usually arises in early adulthood and affects a person's perception, mood and behaviour. It is often episodic. By comparison, an intellectual disability arises either at birth or when the person is a child or young person. It is fairly constant throughout the person's life, although its effect will depend on what support and opportunities for development are available. Some people with intellectual disability might have a 'dual diagnosis' of intellectual disability and mental illness.

The impact of intellectual disability on a person's access to the legal system could be measured by the extent of their disability ('internal' factors). But a more constructive approach to assessing the impact of intellectual disability is to examine whether the person's environment, support needs and support received ('external' factors) improve or reduce their access to justice. This approach shows that the impact of disability depends on how it is managed and accommodated – it can therefore change over time and according to different circumstances.⁷ Lawyers should consider how external factors have contributed to their clients' legal problems and to their capacity to instruct the lawyer. Lawyers should modify communication practices, information resources and stereotyped views in order to improve the communication and understanding they have with their clients.

REPRESENTING A CLIENT WITH AN INTELLECTUAL DISABILITY

A lawyer should view a client with an intellectual disability – as a lawyer should view any client – as *prima facie* having the capacity to provide instructions. It is important to avoid assuming that a client's lower cognitive ability renders them incapable of providing adequate legal instructions. Such a view can be arbitrary and discriminatory, especially since the ability of a client with an intellectual disability to instruct a

solicitor is related not only to their abilities. It also strongly depends upon external factors such as their social support and the approach of the lawyer, including the lawyer's willingness to listen, openness to difference, available time, knowledge of people with disabilities, and communication skills.

Where there are concerns about a client's capacity to instruct, the lawyer should not automatically and arbitrarily refuse to represent the client or seek to have a representative appointed to give instructions. Rather, the lawyer should go through a systematic process to determine a client's capacity, including whether it can be enhanced by additional support or modifications to the lawyer's own communication style. For example, the Law Society of NSW has developed 'Client Capacity Guidelines' for civil and family law matters,⁸ which suggest the following steps:

1. Adults are presumed to be competent to give instructions.
2. If there is a reason to doubt a client's competence, consider whether proper instructions can be obtained after further explanation to or education of the client.
3. If step 2 does not yield proper instructions, consider whether the lawyer can act in the best interests of the client without full formal instructions, such as if a support person, relative or friend can assist with instructions.
4. If step 3 is not appropriate, then consider obtaining a formal assessment of capacity by a relevant professional, such as a psychologist, either by way of the client's consent or a court or tribunal order.
5. If such an assessment cannot be obtained, then consider ceasing to act for the client.
6. If an assessment is carried out and demonstrates capacity, then act on the instructions of the client.
7. If an assessment is carried out and does not establish capacity, then consider taking action to have a substitute instruction-giver appointed.

Communication

Lawyers can enhance the capacity of a client with an intellectual disability to understand his or her case, provide instructions and understand and participate in court proceedings, by adjusting their communication style to suit the client's needs.

In communicating with a client with an intellectual disability, lawyers should consider the following:

- It is preferable to interview the client in person.
- Allow additional time for the interview.
- Hold the interview in a quiet, private area, which is free from distractions and interruptions.
- The client may not have absorbed the information you discussed with them at the last appointment, and you might have to carefully go over this information again.
- Ask the client directly if there is anything you can do to enhance communication and comprehension.
- The client may have a short attention span and have difficulty remaining on the same subject.
- Tell the client to let you know if they do not understand.

Check whether the client understands by asking him or her to repeat important information in his or her own words, or ask follow-up questions.

- Treat the client with respect and build his or her confidence.
- Do not criticise the client.
- Allow the client to tell their story – save your questions for the end.
- Provide the client with information in small blocks, with enough time between each block for the client to process the information and ask any questions if necessary.
- Do not interrupt or finish the client's sentences – although they might take longer to respond to questions, avoid jumping in to clarify or ask another question.
- Use open, rather than leading, questions.
- Use simple words and sentences – one idea at a time.
- Avoid abstract concepts and jargon.
- Be aware that the client may need more breaks than other clients.
- Signpost and reinforce the important questions.
- Consider the use of visual aids such as pictures or simple flowcharts.
- The client might not read or write, so ensure that they understand any written material relating to the legal matter, and communicate any information contained in any letter to the client in person or on the phone.
- When writing to the client, use a clear and easy-to-read font like Arial or Comic Sans Serif of at least 14 point in size, with 1.5 spacing. Do not make the wording dense, use short sentences and paragraphs, and plain English.
- Consider changing any pro forma client agreement to a format that assists the client to understand it.

Support persons

A client with an intellectual disability might benefit from having a support person. A support person works in co-operation with a solicitor to support a client through the legal process, including at police interviews, client conferences and court appearances. A support person helps the client to feel calm and relaxed, to understand what is happening, and to raise important issues with the lawyer.

A support person is particularly helpful at court appearances. Going to court can be difficult for a person with an intellectual disability because their disability can affect their ability to understand, communicate and adjust to new situations. A support person can help clients with intellectual disability to exercise their legal rights by assisting them to communicate with their lawyer and to understand and participate in the proceedings. The support worker can support the client at client conferences by ensuring that s/he understands the legal advice and reinforcing it at a later stage. A support person can also help to prepare the client for court – for example, by assisting the client to understand the basic nature of the matter, what happens at court, and by reminding the client of the court date and how to get there. At court, the support person can help clients to find the relevant court room and their solicitor, sit with them and help them to stay calm while waiting, sit near them in court

(if appropriate and agreed), and indicate to the lawyer if they think that they do not understand something, are distressed or need a break, and ensure that they understand the court outcome.

If there is no support person, a lawyer could suggest that the client obtain one. If the client does not have a suitable friend, family member or case worker, the lawyer could try contacting a specialist court support service, such as the Criminal Justice Support Network in NSW, or a local citizen advocacy organisation.

It is important for a lawyer to remember the following points when working with a support person:

- Establish what the role of the support person will be.
- Talk directly to the client rather than through the support person.
- Ensure that the support person is appropriate and has a helpful attitude towards the client.
- Check for any conflict of interest.
- Seek to avoid the client making any admissions in the presence of the support person.
- The lawyer may wish to consider asking the support person to sign a confidentiality agreement.

Special assistance in court

Lawyers might wish to consider if any client with intellectual disability needs special assistance in court. In the NSW >>



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context, the attorney-general's department has a 'diversity services' unit, which liaises between individuals with disability and the court to ensure that any special assistance required by people with disability is provided. A client with an intellectual disability, or his or her lawyer, can submit a form to Diversity Services outlining the client's disability and the assistance required. It might be appropriate to request regular breaks during questioning, that questions asked of the client be broken down and explained in simple language, and that the person should have a support person present at court. It should be noted that some legislation also allows for people with intellectual disability to have support persons present at court and for adjustments to be made to questioning.⁹

Helping to access support services

Sometimes, resolving a client's legal problem might also require accessing support services such as counselling, drug and alcohol services, welfare assistance, disability services, parenting services or housing. A lawyer should be sensitive to these needs and, at a minimum, refer the client on to government or non-government support services that can provide these services, or otherwise assist the client in accessing them. If possible, the lawyer should follow up these referrals to ensure that they have been followed through. As clients with intellectual disability might have

difficulty advocating on their own behalf, it might be beneficial to refer them to a citizen advocacy organisation, which can assist them in requesting the relevant services.

Ask for help

Finally, specialist disability community legal centres¹⁰ and disability advocacy organisations¹¹ can help lawyers whose clients have intellectual disability. ■

Notes: **1** NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearances before Local Courts*, Research Report No. 4 (1993), [2.5]. **2** See, for example, NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No. 80 (1996), 23-39; P French, *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland (2007)*, 28-37. **3** S Hayes, 'Prevalence of Intellectual Disability in Local Courts' (1997) 22(2) *Journal of Intellectual and Developmental Disability* 71. See also NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearances before Local Courts*, Research Report No. 4 (1993), [4.1]; S Hayes and D McIlwain, *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (1998); P French, *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland (2007)*, 26-8. In relation to the over-representation of parents with intellectual disability in the care jurisdiction of the NSW Children's Court, see D McConnell et al, *Parents with a Disability and the NSW Children's Court* (2000), iii. In the Victorian context, see P Swain et al, *Pride and Prejudice: A Snapshot of Parents with Disabilities' Experience of the Child Protection System in Victoria* (2002), 1. **4** See, for example, *Anti-Discrimination Act 1977* (NSW) ss49B and 49M; *Disability Discrimination Act 1992* (Cth) ss5 and 24. **5** P French, *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland (2007)*, 31-7. **6** The American Psychiatric Association defines 'mental retardation' (that is, intellectual disability) as consisting of three co-existing elements - 'significantly subaverage general intellectual functioning' (an IQ of 70 or below), 'significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety' and onset before 18 years of age: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorder: DSM-IV-TR*, American Psychiatric Association, Washington DC (2000), 41. **7** For a discussion of these two models, see T Shakespeare, *Disability Rights and Wrongs* (2006). **8** T Evers et al, 'Client Capacity Guidelines: Civil and Family Law Matters' (2003) 41 *Law Society Journal*, 50. **9** *Criminal Procedure Act 1986* (NSW) Part 6; *Evidence Act 1985*, s41; *Children and Young Persons (Care and Protection) Act 1998*, ss 93, 102 and 107. **10** Contact the National Association of Community Legal Centres for relevant centres. Such centres include Intellectual Disability Rights Service (NSW), Villamanta Disability Rights Legal Service (Victoria), Disability Discrimination Legal Service (Victoria), Disability Discrimination Legal Service (ACT), Disability Discrimination Service (South Australia), Disability Discrimination Legal Service (Queensland) and Disability Discrimination Legal Centre (NSW). Factsheets on representing clients with intellectual disability can be obtained from the Intellectual Disability Rights Service (NSW) at www.idrs.org.au. **11** Contact People with Disability Australia or the National Council on Intellectual Disability for local organisations.

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