

Improving legal representation for people with intellectual disability

By Ben Fogarty

Australia ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 17 July 2008. Article 13 of the CRPD, entitled 'Access to justice', reads:

1. States Parties 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.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.'

In order to realise equitable access to justice for people with intellectual disability, legal practitioners and the justice system need to modify their practices and adjust their processes. This article provides guidance for legal practitioners to identify, understand and adjust to intellectual disability to help to achieve equitable access to legal representation and justice for people with intellectual disability.

WHAT IS INTELLECTUAL DISABILITY?¹

Intellectual disability is a disability that affects the way a person learns. A person can be born with an intellectual disability or can acquire one. Most people with intellectual disability are born with their disability. A person with an intellectual disability² may:

- take longer to learn things;
- have difficulty reading and writing;
- have difficulty in communicating;
- have difficulty in understanding things and the world around them;
- find it difficult to maintain eye contact;
- have difficulty understanding abstract concepts;
- have difficulty in planning and problem-solving, and
- have difficulty adapting to new or unfamiliar situations.

Intellectual disability is permanent; it is not episodic, nor is it 'treatable' by medication. A person with intellectual disability can improve their social habilitation, independent living skills and adaptive functioning skills through support, training and environmental adjustments.

The clinical (or medical) model of intellectual disability

The clinical (or medical) model is employed by Ageing Disability and Home Care (ADHC), the NSW government department providing disability services, as the foundation for the criteria it uses to determine whether a person is eligible for its services. Under this definition, intellectual disability is a disability that occurs in the developmental period of life (that is, before the age of 18) and is characterised by below-average intellectual functioning.

Specifically, before the age of 18 years a person must have:

- an intelligence quotient (IQ) of 70 or below; and
- deficits in at least two areas of adaptive functioning.³

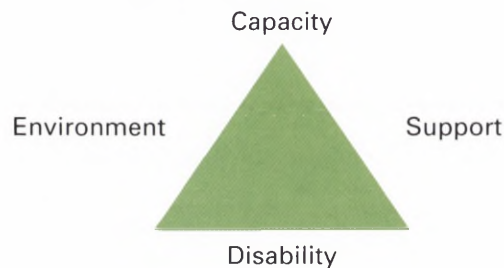
Approximately 2-3 per cent⁴ of the NSW population has an intellectual disability, and studies suggest that between 12-20 per cent⁵ of the NSW prison population has an intellectual disability. In clinical terms, intellectual disability is often defined in terms of the 'severity' of the disability (see table below):

Level of disability	% of people with intellectual disability	IQ
BORDERLINE	-	70-75
MILD	75%	55-70
MODERATE	20%	30-55
SEVERE	5%	under 30

The clinical (or medical) model encourages a focus on the deficits of the person, rather than the abilities of the person. While this model is necessary for clinical assessment by a psychologist, and for establishing that a person has an intellectual disability before the courts, it is regarded by the disability rights movement as outdated and pejorative.

The social model of intellectual disability

A more constructive, pragmatic and realistic model is to define intellectual disability in terms of the support needs of an individual and the environment around them. This approach sees the *effect* of the disability as something that will vary and can be increased or decreased by external factors. It does not view intellectual disability as an unchangeable characteristic of the individual. This definition does not rely on the capacity of the person to be set in stone, but acknowledges the impact on capacity of environmental and support factors.



This model is premised on the concept that people with disability are individually and collectively disadvantaged, owing to a complex form of institutional, attitudinal and environmental discrimination, which is as fundamentally unacceptable in our society as sexism or racism. According to the social model, adjusting the environment and the support to meet the person's needs increases that person's capacity and reduces the negative effects of their disability. The focus is on the people and the environment around the person with intellectual disability making the adjustments – not the person with intellectual disability. The social model sees the 'cure' to the problem of disability in the restructuring of society. Unlike clinical and medical-based 'cures' or 'treatments', which focus on the individual and their 'impairment', the social model realises the full potential of the person with intellectual disability and shifts the responsibility to adjust to a range of people and the environment surrounding the person. Re-moulding, modifying and adjusting the environment benefits everyone, not just people with intellectual disability. >>

Intellectual disability is different from other cognitive disabilities

It is essential that legal practitioners and the courts understand that there are different cognitive disabilities, how they manifest, the different ways they may affect a person and how best to adjust and respond to them. Some of the major cognitive disabilities, other than intellectual disability, are briefly described below.

Mental illness⁶

Mental illness is often episodic and can affect any person at any time in their lives. In 2007, the National Survey of Mental Health and Wellbeing found that one in five Australian adults experience mental illness in any year.⁷ Mental illnesses usually affect perception and mood. If properly diagnosed, mental illnesses can be treated or managed with medication, counselling and other support. Examples of mental illness include schizophrenia, depression, bipolar affective disorder and psychosis. Mental illness is also sometimes referred to as psychiatric disability.

Brain injury⁸

A person can be born with a brain injury or they can acquire it from some form of trauma; for example, by a stroke, a seizure, a head injury or by drug or alcohol misuse. Brain injury can affect a person's memory, thinking, perception, attention, emotions and mood. It can also result in disinhibited behaviour or poor impulse control. In some cases, people with brain injury can be rehabilitated over time.

Dementia⁹

Dementia usually corresponds with the ageing process. It tends to affect older persons. It is estimated that around 200,000¹⁰ people in Australia have dementia. As Australia's population ages, more people will be affected by dementia. Dementia causes loss of short-term memory and can deteriorate into chronic confusion and disorientation. Alzheimer's disease is one type of dementia.

Autism¹¹

Autism is a life-long developmental disability. It affects a person's ability to relate to other people and the world around them. It usually impairs social interaction, communication and behaviour (for example, repetitive behaviour or compulsive behaviour). People who have autism may also experience overwhelming anxiety, frustration and confusion, especially with unfamiliar situations or changes to their routine. Most, but not all, people with autism have some degree of intellectual disability. One particular type of autism is Asperger's syndrome. Generally, people with Asperger's syndrome have average to above-average intelligence. Autism is sometimes referred to broadly as developmental disability.

Some people may have more than one type of cognitive disability – for example, intellectual disability and autism. This is sometimes referred to as 'dual diagnosis'.

THE LEGAL REQUIREMENT TO MAKE REASONABLE ADJUSTMENTS

Sometimes people with intellectual disability will adopt a 'cloak of confidence' and not disclose their disability. This is understandable, given the stigma and ostracism they can face when being labelled in this way. Given that manifestations of intellectual disability are largely invisible, this can present real difficulties for police, other regulatory officers, magistrates, court staff and legal practitioners when engaging with people with intellectual disability. The law affords people with intellectual disability special adjustments and protections in particular situations, particularly where they are arrested or questioned by police,¹² or where they are giving evidence in court.¹³ The provisions in these laws and the adjustments they permit acknowledge that people with intellectual disability may need more time to understand and answer questions, or that they may need a support person to explain things to them and ensure that they are not overwhelmed by the stress of a new and confronting situation (like a court or police station). Sometimes, where a person has a mild intellectual disability and does not disclose their disability, they will not be afforded these protections and adjustments. To minimise this risk, police and legal practitioners need to know the indicators that might suggest a person has an intellectual disability (or other cognitive disability) and respond appropriately.

Adjusting and modifying how a legal practitioner provides their services to a client with intellectual disability is not only good practice, but arguably it is required by law.

Disability discrimination law

In 2009, the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) amended the *Disability Discrimination Act 1992* (Cth) (the DDA) to introduce a new positive duty, namely 'to make reasonable adjustments for a person with disability'. Now, under the DDA, a service-provider, like a legal practitioner, can be acting unlawfully by directly¹⁴ or indirectly¹⁵ discriminating against a person with disability or by failing to make a reasonable adjustment¹⁶ for the person. The touchstone of the new ground for contravening the DDA is still reasonableness, objectively assessed. Whether an adjustment is reasonable will be determined by taking *all* of the circumstances into account. One thing is clear, though: an outright refusal or failure to make any adjustment at all for a person with disability is likely to be impugned under the new ground.

The Convention on the Rights of Persons with Disabilities (CRPD)

While ratification of the CRPD by the Australian government does not mean that the CRPD and its articles are binding law in Australian courts, it does add weight to systemic advocacy and lobbying work to improve the lives of people with disability, and it has also required the Australian government to analyse its laws to ensure that none are directly inconsistent with the CRPD. A corollary to this is that new laws will need to be reviewed in light of the CRPD, and cannot be inconsistent with it.

The CRPD (and other international conventions that Australia has ratified) – albeit indirect and limited – currently has legal application in two situations:

1. Where the High Court has a case before it, requiring it to interpret an Australian statute whose terms are unclear, it can look at the articles of any relevant international convention on the topic to help shed light on the Australian statute and remove the ambiguity; and
2. When government administrators make (administrative) decisions, a 'legitimate expectation' is that, where relevant, Australia's obligations with regard to ratified conventions, covenants and treaties will be taken into account.

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all people with disability, and to promote respect for their inherent dignity. It seeks to redress the physical and social barriers, discrimination and disadvantage confronting people with disability throughout the world, and to promote their full participation and recognition in civil, political, economic, social and cultural life. The CRPD's articles that bear on equitable access to justice for people with intellectual disability include:

- non-discrimination (Art 4);
- equal protection before the law (Art 5);
- the right to equal recognition before the law (Art 12);
- access to justice on an equal basis with others (Art 13); and

- protecting the integrity of the person (Art 17).

The CRPD and its Optional Protocol were adopted at the UN Headquarters in New York on 13 December 2006, and entered into force internationally on 3 May 2008. Australia ratified the CRPD on 17 July 2008, making it one of the first countries to do so, and on 30 July 2009 Australia acceded to the Optional Protocol on the CRPD.

The Optional Protocol provides a mechanism for Australians to make complaints to the United Nations Disabilities Committee for breaches of the CRPD (where domestic remedies have been exhausted).

On 20 April 2009, the federal attorney-general declared the CRPD to be a 'relevant international instrument' for the purposes of the *Australian Human Rights Commission Act 1986* (Cth). The effect of this is to extend the Australian Human Rights Commission's (Commission's) human rights functions to the rights contained in the CRPD. As a result, a person with disability can now bring a complaint to the Commission about an act done by the Australian government (or one of its agencies or contracted service providers) that is alleged to breach their rights under the CRPD.

By ratifying the CRPD and adopting the Optional Protocol, Australia has signalled its intent to join other countries around the world in a global effort to promote the equal and active participation of all people with disability in all aspects of society.

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Defining intellectual disability in terms of the impact on a person's capacity of environmental and support factors is more constructive, pragmatic and realistic.

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PEOPLE WITH INTELLECTUAL DISABILITY AND LEGAL CAPACITY

People with intellectual disability are autonomous and independent human beings with wishes, hopes, likes and dislikes. Just because a person has an intellectual disability does not mean that they cannot make decisions for themselves and cannot provide instructions to legal practitioners. It is important that legal practitioners do not jump to conclusions about the capacity of a client with intellectual disability to give instructions, or confuse deficits in communication techniques or shyness with a lack of legal capacity to give instructions. The NSW attorney-general's *Capacity Toolkit*¹⁷ provides a best practice guide on assessing legal capacity. All legal practitioners should be familiar with its contents, and adopt its steps if they are concerned about a client's legal capacity.

There is no presumption that a person with intellectual disability does not have legal capacity to make decisions about their lives, to look after their own affairs or to provide legal instructions. Sometimes some people with intellectual disability need help and support, on an informal or formal basis, to make some decisions in their lives – for example, about where they will live or about investing money for the future. Decision-making needs to be regarded as a spectrum, with complete autonomy on one end (the default) and, at the other, substitute decision-making. In between is a scale of informal, supported decision-making that varies from time to time and from decision to decision.

WHAT LEGAL PROBLEMS DO PEOPLE WITH INTELLECTUAL DISABILITY FACE?

As with any client, people with intellectual disability are confronted by all manner of legal problems. The Intellectual Disability Rights Service (IDRS) assists and represents clients with legal issues covering housing, employment, consumer rights, victims' compensation, motor vehicle accidents,

social security and welfare rights, fines, wills and future planning, the criminal justice system and apprehended violence orders. Other legal issues peculiar to people with intellectual disability (and other cognitive disabilities), include issues about decision-making, guardianship and financial management.

WHAT ADJUSTMENTS SHOULD YOU MAKE?

IDRS employs people with intellectual disability as co-educators. They support our education officers with input into training resources and material, and they participate in and deliver training and education to a host of organisations and audiences.¹⁸ Based on IDRS's co-educators' input and IDRS's experience in working with people with intellectual disability, this section provides a list of practical adjustments that legal practitioners should consider and, where necessary, employ when interacting with and providing legal services to a client with intellectual disability.

- Respect the person as a human being and treat them as you would like to be treated. The person comes first, not the 'disability'.
- Do not make assumptions about the abilities of a person with intellectual disability. Some people hide their abilities (and also their disability). You need to assess these things for yourself. To help, you should talk with the person, their support network and family, and read any reports, assessments and other background information about the person.
- Sometimes you may offer assistance to a person with intellectual disability if you feel it is appropriate, but wait for their answer before you provide the assistance. Remember it is their right to say no. Do not assume you know the best way of helping. Be patient and listen to the instructions you are given by the person.
- Treat adults like adults. Do not use gestures more suitable for children or use demeaning terminology. You don't need to raise your voice when speaking with a person with intellectual disability, unless the person asks you.
- Make appropriate physical contact with people with intellectual disability according to the situation, just as you would with any other client (for example, handshake on introduction). Some people with intellectual disability may, for various reasons, have inappropriate social responses (for example, hugging new people they meet). It is important to establish appropriate boundaries and remind the person of them. Conversely, a person with autism may be uncomfortable with any form of physical contact, but it is important to offer it.
- Talk directly with the person. Maintain eye contact with them. Do not talk about them to a support worker or companion who is with them.
- Just because a person does not communicate verbally, doesn't mean they do not understand you or cannot communicate with you in some other way. Some people with intellectual disability use augmentive devices and tap-boards to communicate.
- In the same way, just because a person nods, says very little in response or doesn't ask questions of you, don't assume

that they have understood what you have said. You should ask questions to check that the person understands. A good technique is to ask the person to repeat back to you in their own words what you have said.

- Facial expressions and appropriate gestures can help people with intellectual disability to understand you. Do not obscure your face or look away when you are speaking with a person with intellectual disability.
- If a person with intellectual disability is slow in responding, be patient. Avoid the urge to correct or speak for the person.
- If you have difficulty understanding, don't pretend. Repeat

what you do understand and let the person's reaction guide you.

- Be conscious of your body language when you are talking with a person with intellectual disability. Many people with intellectual disability are very visual and will pick up on signs in your body language.
- Avoid loud or busy environments that have distractions when you are meeting and talking with a client with intellectual disability.
- Allow sufficient time to meet with a client with intellectual disability. Do not rush the meeting or cut corners.

IMPROVING YOUR COMMUNICATION WITH PEOPLE WITH INTELLECTUAL DISABILITY

Do's	Don'ts
Allow plenty of time.	Rush through things.
Build rapport with the person, start with something easy and of interest to them.	Fail to take enough time to put the person at ease.
Invite the person to say if they aren't sure what you mean.	Assume the person will tell you if they don't understand.
Let the person tell the story in their own words and in their own time first. Then clarify.	Do all the talking. Fire question after question.
Ask open questions. Encourage the person to tell their own story at their own pace.	Ask closed questions or leading questions that suggest an answer.
Deal with one piece of information or one question at a time.	Put too much information to the person or ask double-barrelled questions.
Check that the person understands, but make sure they know that this is intended to make sure you've explained things well enough.	Give more information without making sure that the person has understood.
Use diagrams, writing, pictures and photographs to help explain something.	Give information in one mode only (namely, verbal).
Allow time for a response even if there is a long pause. Wait as long as is necessary. Listen.	Rush or not wait for the answer. Break in and fill the pause with suggestions. Come in with more information when the person is still thinking about what is being asked.
Use plain, everyday language.	Use jargon, technical language, long sentences and double negatives.
Use relaxed body language.	Be impatient or use stressed body language.

MAKE THE WRITTEN WORD ACCESSIBLE

Accessibility and making adjustments to how a legal practitioner communicates with a client with intellectual disability should not be confined to oral communication and information. Written information should also be accessible to people with intellectual disability. Having an accessible environment is about being proactive, not reactive. This means thinking about how written information is presented. For example, are the letters that a legal practitioner writes to a client with intellectual disability accessible to that person?

To make written information more accessible for people with intellectual disability, take the following steps:

- Use font size 14 or 16 point;
- The font style should be easy to read;
- Use no more than one or two fonts;
- Use 1.5 or double line-spacing;
- Use headings when you change subject, or if there is a lot of text;

- Use short sentences and try to have one idea only per sentence;
- Try to avoid abstract concepts;
- Use concrete real-life examples to help get your point across;
- Insert pictures, diagrams or cartoons to help describe things;
- Consider using alternative formats, like audio or interactive web-based media; and
- Consult a person with intellectual disability to get feedback about how accessible your material is.

USE APPROPRIATE LANGUAGE

The use of appropriate language is not just an exercise in political correctness. It is a means of acknowledging the dignity, inherent worth and respect of the person or group of persons that you are speaking with or about. Language is not fixed, but changes with time to reflect changes in >>

community views, government policy, the media and human rights movements.

Up until the 1980s in Australia, government and social policies of institutionalisation for 'handicapped' people were the norm. People with intellectual disability lived in isolated and cramped wards and institutions where little more than their basic needs (food, shelter and clothing) were met. These people were seen as numbers and not human beings. They were hidden away and regarded as of little value to society. People with intellectual disability were not allowed or encouraged to be educated, go to work or contribute to society in any way. Words like 'mongoloid', 'retard', 'spastic' and 'handicapped' were used with no hint of official or social opprobrium.

Today, due to the growth of the human rights and disability rights movements, a shift to the social model of disability and government policies of

de-institutionalisation and social integration for people with intellectual disability, society has properly come to realise that people with intellectual disability are valuable members and contributors to society. People with intellectual disability work, have families, get married, get divorced, and have good times and bad times, just like everyone else.

Disability is not an illness. It is part of a person's identity but it is not all that a person is. The person comes first, the disability later. The focus should be on a person's ability, not their disability. People with intellectual disability do not 'suffer', are not 'afflicted with' and are not 'victims' of their disability.

Below is a helpful guide to what is and what is not appropriate to say when you are engaging with a client with disability, or when you are referring to a person with disability.

It is appropriate to say	It is NOT appropriate to say
Person who has/ person with/ person who has experienced	Victim of/ crippled/ suffering from/ afflicted by. Do not use words that invite pity or reinforce impressions of frailty or dependence.
Wheelchair-user/ person who uses a wheelchair	Wheelchair-bound or confined to a wheelchair. Remember that a wheelchair represents freedom and access to the world for its user.
Person with disability	Invalid. Don't equate disability with illness.
Person with epilepsy	Epileptic. Remember the person comes first, not their medical condition.
Person with intellectual disability	Spastic or retard or idiot. These are offensive terms and their use may amount to harassment under disability discrimination laws.
People with disability/ with autism	The disabled/autistics. This makes people with disability seem like a group who are separate from the rest of society.

CONCLUSION

The adjustments and modifications to legal service delivery required to meet the needs of people with intellectual disability are really just an extension of good service-delivery principles that apply to all clients. Adopting these principles for all clients will serve to enhance the transparency, integrity and reputation of the legal profession within the community. ■

Notes: **1** This section is an adapted version from training materials used by the Intellectual Disability Rights Service. **2** There is no stereotypical person with intellectual disability. Each person is an individual, with different strengths and support needs. **3** Adaptive functioning includes: communication, self-care, independent travel, home living, social skills, self-direction, leisure and work, and learning. **4** L Rogers and J Simpson, *Intellectual Disability and Criminal Law*, Sydney, 2002. **5** S Hayes and D McIlwain, *The Prevalence of Intellectual Disability in the NSW Prison Population: An Empirical Study*, Report to the Criminology Research Council, Canberra, 1988. Alarming, from 1990 to 1998, 68.3% of inmates identified as having an intellectual disability were re-imprisoned within two years of release, compared with 38% of the total inmate population. (Department of Corrective Services, Recidivism and Other Statistics on a Population of Inmates with Intellectual Disability in NSW Correctional Centres 1.1.1990 - 31.12.1998). **6** For further information, see the Mental Health Association NSW website at www.mentalhealth.asn.au. **7** Australian Bureau of Statistics (2007), *National Survey of Mental Health and Wellbeing: Summary of Results*, ABS Cat No. 4326.0. Canberra: ABS. **8** For further information, see the Brain Injury Association of NSW website at www.biansw.org.au. **9** For further information, see the Alzheimers Australia website at www.alzheimers.org.au.

10 Access Economics (2005), *Dementia Estimates and Projections: Australian States and Territories*, Alzheimer's Australia, Canberra. **11** For further information, see the Autism Spectrum Australia (Aspect) website at www.autismnsw.com.au. **12** Section 112 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (entitled 'Modification of application of Part to certain persons') requires police (most notably, the custody manager) to adjust processing and investigation of a person with intellectual disability when that person is arrested and comes into custody. See also the 'incapable persons' provisions in the *Crimes (Forensic Procedures) Act 2000* (NSW). **13** See the *Criminal Procedure Act 1986* (NSW) Chapter 6, Part 6, 'Giving of evidence by vulnerable persons'. **14** Section 5(1) of the DDA. In NSW, there are also unlawful direct disability discrimination provisions in sub-section 49B(1)(a) of the *Anti-Discrimination Act 1977* (NSW). **15** Section 6(1) of the DDA. In NSW, there are also unlawful indirect disability discrimination provisions in sub-section 49B(1)(b) of the *Anti-Discrimination Act 1977* (NSW). **16** Sub-sections 5(2) and 6(2) of the DDA. **17** *Capacity Toolkit - Information for Government and Community Workers, Professionals, Families and Carers in NSW*, NSW AGD, 2008. **18** IDRS provides training and education to NSW police, transit officers, ADHC, psychologists, TAFE, magistrates and court staff, disability advocates, people with intellectual disability and families of people with intellectual disability.

Ben Fogarty is the Acting Director of the Pro Bono Group of Gilbert+Tobin in Sydney. He was formerly the principal solicitor of the Intellectual Disability Rights Service in NSW, the outreach solicitor for Darwin Community Legal Service and principal solicitor at the NSW Disability Discrimination Legal Centre.
PHONE (02) 9263 4000 **EMAIL** BFogarty@gtlaw.com.au.