**AHRC Inquiry into Access to Justice in the Criminal Justice System for People with Disability**

<http://www.humanrights.gov.au/publications/access-justice-criminal-justice-system-people-disability-issues-paper-april-2013>

**Page 4 of the issues paper talks about the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention):**

In relation to the justice system, the Disability Convention states that people with disability:

• are entitled to equal protection and equal benefit of the law

• have the same legal rights and obligations as people without disability

• have an equal right to use the law to protect and pursue their interests

• should enjoy equal and effective access to justice

• must be provided with the adjustments and support they need to enjoy their other human rights if they have had their personal freedom taken away

• should only have their personal freedom taken away if there is a lawful and proper reason to do so and not just because a person has a disability.

**NSW fails to comply with the terms of the Convention because:**

* Insufficiently funded Legal Aid services – no longer representing people with ‘special circumstances’ in AVO matters
* Do not have equal access to justice. CJSN clients may have more access when they have a support person but CJSN support persons not available in every area of the state due to insufficient funding
* AVO defendants who are unable to understand AVO conditions or are unable to adjust their behaviour may have their freedom taken away when they are jailed for AVO or bail condition breaches
* If a person has even a low-paid job, they are likely to be seen as having an income above the means test. People in low-paid employment are unlikely to be eligible for Legal Aid

**Barriers to justice reported in the issues paper (pages 4-5)**

**BARRIER 1**. Community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disability. This means that people with disability are left without protection and face ongoing violence, or have repeated contact with the criminal justice system because appropriate programs and community support are not available.

**Comment from Alex**

MERIT and other drug and alcohol treatment programs are often seen as unsuited to PWID due to the cognitive-behavioural and written aspects of the program. It is very rare for us to successfully refer a client to MERIT.

PWID often excluded from community service sentencing options as they are seen as (and may actually be) unable to perform the required work.

PWID in residential facilities are at risk of assault/sexual assault by other clients or staff

***CASE STUDY: Jane***

***Illustrating: a******poor response to a group home client disclosing a sexual assault***

*Jane disclosed one morning to the morning staff at her group home that she had been sexually assaulted the previous night by a member of the night staff. The morning staff were not sure what to do and luckily called CJSN straight away. However, by then, Jane had been showered, which could have potentially destroyed forensic evidence. Jane had also been sent as usual to her day program. CJSN suggested that Jane come home from her day program and provided with appropriate support, care and counselling as well as attending a sexual assault unit to see a doctor. This was arranged and a CJSN support person assisted Jane in giving a statement to the police. The group home had no clear policy or procedure in place to deal with such situations and did not take good legal or emotional care of Jane.*

***CASE STUDY: John***

***Illustrating: victim of crime with intellectual disability who uses an electronic communication board and not receiving the support he needed from police when making a complaint in a sexual assault matter***

*John has severe intellectual disability and is non-verbal, relying on using an electronic communication board. Due to John’s anxiety, he is only able to use the board when his mother is present. John disclosed to his mother that he had been sexually assaulted by a disability worker in his group home. John’s mother asked CJSN to assist him when he was interviewed by detectives. As John’s mother was the first person he disclosed the alleged sexual assault to, she was a police witness. As such, she was not permitted to sit in the room when John was interviewed, which resulted in him being unable to use his communication board. This meant that detectives were unable to obtain a statement from John about the alleged assault and the investigation went no further.*

*While it is understandable that the police would not allow a witness in an investigation hear the statement of another witness being given, the end result was that the case was not investigated and the alleged perpetrator was not held to account.*

ADHC has complex and difficult intake procedures, requiring proof that the person’s ID manifested during the developmental period, which can be difficult or impossible to obtain. ADHC doesn’t help people to prove their eligibility for services. They sometimes require potential clients to bring their own psychological assessments with them instead of having an ADHC psychologist assess them.

ADHC funding can ‘run out’ and services withdrawn from people who need them

***CASE STUDY: Kate***

***Illustrating inconsistent disability service provision for clients at risk of entering the criminal justice system***

*Kate has had ADHC support services for some years until she was informed that her ‘funding had run out’. All support service were withdrawn, leaving Kim with nobody to assist her with her day to day problems, including education, violence and AVOs. Kim was told she could reapply for services the following year.*

***CASE STUDY: Paul***

***Illustrating: victim of crime with intellectual disability not receiving the support he needed from police when making a complaint in a criminal matter***

*Paul is in his mid-30s and has moderate intellectual disability. He lives in a group home. He had a minor verbal altercation with a fellow resident. 2 members of the group home staff intervened. Paul got angry and threw things, but did not hurt anyone. One of the staff members told Paul to pack his bags and leave the house. The staff member then hit Paul on the back of the head and kicked him in the back. The second staff member grabbed Paul by the collar and told him to ‘be a good boy’.*

*Paul was angry about being assaulted and, accompanied by a different support worker, went to the police station to report the assaults. The officer at the station initially ignored Paul and spoke only to his support worker, who had to repeatedly request that the officer direct his questions to Paul. The officer was reluctant to make notes about Paul’s complaint, and only did so at the insistence of the support worker. The officer told Paul there was no point pursuing the matter because it would involve Paul having to stand up in court and tell everyone his version of events. Also, the officer said the organisation that ran the group home would sort things out by transferring the relevant staff members to another group home. The officer declined to apply for an apprehended violence order to protect Paul, but told Paul he could go to the courthouse and apply for one himself. However, the courthouse was closed for Christmas.*

*After Christmas Paul and another support worker went to the courthouse. By that stage, the organisation that ran the group home had transferred the relevant staff members from Paul’s group home to another one. The court staff told Paul there was no point applying for an apprehended violence order. Paul still wanted his former carers held to account for the assaults. However, he was discouraged by his mother from insisting the police investigate further, because she was worried about antagonising the organisation that ran Paul’s group home.*

***CASE STUDY: AVOs***

***Illustrating: the difficulty that people with intellectual disability have in obtaining protection against harassment from neighbours***

*Legal Aid stopped representing Persons in Need of Protection (PINOPs) who wish to apply for an Apprehended Personal Violence Order a few years ago. Before this, Legal Aid made an exception for people with special circumstances (which including intellectual disability).*

***CASE STUDY: Legal Aid failing to follow its’ own Disability Action Plan***

***Illustrating that the NSW Legal Aid fails to provide a consistent solicitor for defendants with intellectual disability***

*Legal Aid have a policy whereby they aim to provide defendants with intellectual disability consistent legal representation. CJSN has numerous examples of clients whose court matters have been run by a different solicitor on each court date and that the CJSN support person is often the most consistent person at court with the client. This means that clients are unable to develop any rapport with their solicitor, the solicitors does not get to know the client and how to best communicate with them.*

**BARRIER 2.** People with disability do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.

**Comment from Alex**

Lack of Legal Aid representation for PINOPs in Apprehended Personal Violence Orders (APVOs) means that people with ID find it difficult to seek protect from violence or harassment from neighbours and other non-relatives.

CJSN support persons not available in all areas of NSW due to insufficient funding. CJSN has extended its’ services as far across NSW as possible. In the financial year 2005-06, CJSN provided 440 court supports. In 2011-12, we provided 913 court supports. This has been done with NO extra funding.

Police are very poor at identifying intellectual disability and calling for a support person when necessary for defendants or victims. This is despite the training we provide to Custody Managers and the police’s own guidelines outlined the Police Crime Manual. In contract to the hundreds of court supports we provide each year, we are only given the opportunity to provide few very clients (114 in 2011-12) with support at police stations

**BARRIER 3**. Negative attitudes and assumptions about people with disability often result in people with disability being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.

**Comment from Alex**

Particular problem for victims of crime, especially sexual assault. Stereotypes persist among police and lawyers about whether a person with intellectual disability can give accurate statements or evidence. There are still sometimes paternalistic concerns about ‘putting a person with intellectual disability through the stress’ of a sexual assault trial.

People with intellectual disability are sometimes seen as being inherently less honest than other people. Perhaps this is due to communication being slower – a person with intellectual disability may need to take longer to answer questions, which may be misattributed to dishonesty rather than communication difficulties requiring adjustment.

**BARRIER 4**. Specialist support, accommodation and programs may not be provided to people with disability when they are considered unable to understand or respond to criminal charges made against them (‘unfit to plead’). Instead, they are often indefinitely detained in prisons or psychiatric facilities without being convicted of a crime. This situation mainly happens to people with intellectual disability, cognitive impairment and people with psychosocial disability.

**Comment from Alex**

Putting a person with intellectual disability through the Mental Health Review Tribunal (MHRT) system when found unfit to plead is nonsensical because intellectual disability is a lifelong condition that cannot be treated or cured. Involvement with MHRT stretches matters out by an extra year, for no benefit to the client.

***CASE STUDY: A Sydney local court***

***Illustrating how magistrates adjust procedures without considering the effect on defendants with intellectual disability***

*Section 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW) is a way of diverting defendants with intellectual disability away from the criminal justice system and into community treatment and services that may help them to avoid reoffending. IDRS produced the ‘s32 kit’ to assist lawyers in making effective s32 applications. Defendants do not have to enter a plea of guilty or not guilty to be dealt with by way of s32, but present a management plan to the court instead. We know that a person does not have to enter a plea prior to section 32 application (Mackie v Hunt)*

*A particular Sydney local court will not hear a section 32 application unless a plea is entered. If the plea is not guilty a hearing must be run first before a section 32 application can be heard. The court will also hear the 32 after a plea of guilty. It seems strange that the court would deal with the person at law and then divert them afterwards and it would seem that this practice would remove a lot of the flexibility in the legislation.*

Related to this is the fact that in the past, CJSN has experienced two regional local court Magistrates who flatly refused to hear any s32 applications at all, saying they ‘didn’t believe in s32’. We have not seen this happen in the past 4 or 5 years and hope that it is no longer happening. It appears strange that Magistrates can pick and choose which pieces of law they do and do not like and run their court accordingly.

**BARRIER 5.** Support, adjustments and aids may not be provided to prisoners with disability so that they can meet basic human needs and participate in prison life. They often face inhuman and degrading treatment, torture and harmful prison management practices.

**Comment from Alex**

NSW prisons have insufficient beds in additional support (disability) units so some people with intellectual disability remain in mainstream custody and are at high risk of bullying, standing-over, manipulation or intimidation by other inmates.

There are insufficient welfare officers in most jails (Long Bay is a possible exception). CJSN staff find it very difficult to access welfare staff in jails such as MRRC at Silverwater.

People with intellectual disability may not understand explicit or unspoken jail rules, regulations and culture due to difficulties in learning, reading and retaining information, and get into further trouble in custody because of this.