



6 October 2017

The Law Council of Australia
The Justice Project
GPO Box 1989
Canberra ACT 2601

By email: justiceproject@lawcouncil.asn.au

Dear Madam/Sir,

Submission to the Justice Project Issues Paper on People with Disability

Kingsford Legal Centre (KLC) welcomes the opportunity to make a submission to the Justice Project regarding people with disability.

About Kingsford Legal Centre

KLC is a community legal centre that has been providing legal advice and advocacy to people in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues. KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. In addition to this work, KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2016, over 71% of clients at KLC had little to no income. 28% of advices and 42% of cases were for clients who identified as having a disability. Discrimination

was our second largest area of advice, with KLC providing 247 advices on discrimination (11% of all advice provided) and running 42 cases on discrimination (10% of all casework). 40% of advices in our specialist discrimination clinic were for disability discrimination. 6% of advices and 11% of cases were for clients who identified as Aboriginal and Torres Strait Islander. 21% of our advice clients and 29% of our casework clients lived in social housing.

All case studies in this submission are based on KLC clients, and have been de-identified to protect their confidentiality.

Summary of recommendations

KLC recommends that:

- The Australian Government fully implement the *Convention on the Rights of Persons with Disabilities* (CRPD) into law;
- Australian laws and policies should provide for supported decision making;
- All law students, legal practitioners and other staff in the legal system should be trained on working with people with disabilities, particularly in strategies to support clients to make decisions for themselves and on the provision of adjustments;
- Courts should be required to fix the maximum detention period and a mandatory periodic review date which is proportionate to the detention period at the time a person is remanded into custody on the basis of unfitness to stand trial;
- The government should increase funding for legal assistance services to provide holistic services to clients with disabilities; and
- The government should increase funding for legal assistance services to provide community legal education.

A human rights approach to working with clients with disability

KLC supports a human rights approach to working with clients with disability to increase access to justice, in line with the CRPD.¹ We adopt the social model of disability, which distinguishes between a person's impairment and the social barriers which restrict their everyday lives. KLC recognises that it is our obligation to address physical, communication, and accessibility barriers to provide clients with a disability equal access to our service.

Legal capacity and decision-making

KLC approaches clients with a presumption of legal capacity. Article 12(2) of the CRPD recognises that all persons with disabilities possess and enjoy legal capacity on an equal basis with others, in all aspects of life. This presumption applies to all persons with disabilities, including those who require more intensive support.²

Article 12(3) obliges States to take all appropriate measures to provide persons with disability the support required to access legal capacity. The UN Committee on the Rights of Persons with Disabilities has recognised that support is a broad term capable of encompassing both informal and formal support arrangements of varying type and intensity.³ Support can take many forms, including peer support, advocacy, and accessibility measures.⁴

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD).

² Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2006) 34 *Syracuse Journal of International Law and Commerce* 429, 442.

³ Committee on the Rights of Persons with Disabilities, *General Comment 1, Article 12 – Equal recognition before the law*, 11th Sess, UN DOC CRPD/C/GC/1, 19 May 2014.

⁴ *Ibid.*

Art 12(4) requires that safeguards be designed to respect the rights, will and preferences of the individual. The CRPD also requires supported decision-making rather than substitute decision-making.⁵ Substitute decision-making involves legal capacity being removed from the individual. It can involve a number of actions, such as appointing a substitute decision-maker (in some circumstances, against the will of the individual) or any decision made by what is believed to be in the 'best interests' of the individual, without proper consultation.⁶ Supported decision-making is a cluster of support options which give primacy to the individual's will and preferences and respect human rights norms.⁷ Supported decision-making may involve communicating an individual's intentions or helping the individual understand the choices at hand.⁸ The move towards supported decision making is in line with international best practice and should be implemented in Australia.

Case study: Alexandra

Alexandra was employed as a dental hygienist. She suffered a miscarriage and took 4 weeks off work. When she attempted to return to work, she was dismissed by the company. Alexandra was very distressed by these events and was diagnosed with adjustment disorder and Post-traumatic Stress Disorder (PTSD). Alexandra came to KLC for advice, and we agreed to represent her at a conciliation conference in her discrimination complaint.

In the week leading up to the conference, we met with Alexandra and were concerned her mental health had deteriorated. Alexandra disclosed that her GP was concerned about her capacity to make decisions. The KLC solicitor met with Alexandra multiple times on different days to see how she felt about her capability to make decisions, and to discuss support options to assist her in making

⁵ Ibid [23].

⁶ Ibid.

⁷ Ibid [25].

⁸ United Nations Enable, *Handbook for Parliamentarians: Legal Capacity and Supported Decision Making*, 2007, 90 < <http://www.un.org/disabilities/default.asp?id=212>>.

decisions. Alexandra told us that she didn't think she was capable of deciding whether to accept or reject settlement offers, even with legal advice and a support person. Alexandra couldn't tell us what outcome she wanted.

As a result, we requested an adjournment. When Alexandra recovered sufficiently so as to be able to know what outcomes she wanted and give instructions, we had the conciliation relisted and represented Alexandra successfully within it.

Recommendation:

KLC recommends that the Australian Government fully implement the CRPD into Australian law.

Australian laws and policies should provide for supported decision making.

Question 4: TRAINING FOR LEGAL PROFESSIONALS

Training for law students and lawyers

At KLC, we implement tailored strategies to empower clients with disabilities to make decisions for themselves. These strategies include using regular breaks during client interviews, maintaining contact between appointments, offering flexible services, having an accessible office, and providing training for our staff and student volunteers. Proactive client interaction allows us to tailor our service to each client.

Free legal advice at an early stage is a positive step towards a supported decision-making model because it allows clients to make informed decisions about their case. It is critical that legal practitioners receive training which promotes a supported decision-making model over a substituted one.

KLC runs a clinical legal education program for law students at the University of New South Wales. As part of the course, students spend one or two days per

week at the centre working in our legal practice, taking instructions from clients, preparing documents, and undertaking legal research. Students also participate in our community legal education and law reform work. Students take part in weekly seminars, tutorials and constant consultation with the clinical supervisors who are practising lawyers, providing an opportunity for students to analyse both their role as lawyers and the role of law in society. One of the seminars focuses on working with clients with disability. Through the course, law students work on advice and cases for clients with disability, and gain an understanding of the legal issues they face and how lawyers can work with clients with disability to assist them to exercise their rights. We aim to ensure the next generation of lawyers is well-trained in working with and empowering clients with disability.

Survey – Clinical legal education for law students at Kingsford Legal Centre and the impact this has on students’ approach to working with clients with disability

We surveyed KLC clinical students on their experience and knowledge of working with clients at KLC. We received the following responses:

1. Before completing a clinical placement at KLC, did you have any knowledge of or experience in working with clients with disabilities?

- *Before KLC, I didn’t have any experience providing services to clients with disabilities.*
- *I had never asked a client whether they had a disability before working at KLC.*
- *No*
- *Not really, it’s not something that is as commonplace or salient in other jobs.*

2. What, if anything, have you learnt at KLC about working with clients with disabilities? Will this have any impact on your legal career?

- *While students may have had assumptions that clients with disability are*

incapable, KLC has made clear to me that clients with a disability should be empowered, they are capable and that we need to make our legal service accessible to all clients with a disability.

- *Working at KLC has broken my negative assumptions about clients with disabilities. I've learnt and seen how capable clients with disability are. I think it's sad that some clients are reluctant to disclose their disability for fear of the reaction they might get.*
- *It's been really confronting to see how society treats people with disabilities, particularly in the discrimination appointments I've done with clients. I've learnt how the law can fail to respond to clients with disability.*
- *It was really useful to learn about the different models of disability (the medical and social models) in the seminar. It's changing my way of thinking about how to work with clients with disability.*
- *My experience at KLC has taught me not to assume. Clients with disabilities are often more capable than we thought.*
- *I learnt about the social model which has changed the way I view clients with disabilities.*
- *I think the main thing is to be more empathetic...it's easy to dismiss people as troublesome or difficult, but as a lawyer I need to understand just how difficult day-to-day activities can be.*

Training for other professionals working in the legal system

KLC submits that all staff at complaint-handling organisations, Tribunals and Courts should be trained in working with clients with disabilities. We note that Article 13 of the CRPD requires that: "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.”

Case Study – Matthew

Matthew has a hearing impairment and has an intellectual disability. Matthew was working in a stockroom and was fired for failure to follow directions. The directions consisted of a manager yelling at Matthew to perform a task, with Matthew being unable to hear and thus follow the directions.

Matthew’s mother made a disability discrimination claim on his behalf to an anti-discrimination body. KLC sought permission from the body to represent Matthew in conciliation, which was denied, as the respondent did not have a lawyer.

Matthew’s preferred method of communication is to lip read, but the conciliator wore a face mask because she had a cold. The matter was settled at conciliation for a statement of service, but Matthew and his mother were confused about what had happened, and KLC had to seek this information from the conciliator on their behalf.

KLC lodged two complaints on Matthew’s behalf with the body about the way the conciliation had been conducted, but did not receive a satisfactory response. Both Matthew and his mother told KLC that they no longer have any faith in the legal system.

Recommendation:

KLC recommends that all law students, legal practitioners and other staff in the legal system should be trained on working with people with disabilities, particularly in strategies to support clients to make decisions for themselves and on the provision of adjustments.

QUESTIONS 7 & 8: UNFITNESS TO STAND TRIAL

In Victoria, Western Australia and the Northern Territory, Courts can order a defendant to be detained indefinitely on the ground that they are unfit to stand trial.⁹ In other jurisdictions, detention is limited to the maximum duration for which the person could be jailed for the offence they were charged with.¹⁰ In all jurisdictions, review mechanisms require an independent Court or Tribunal to consider whether the person is fit to be released.¹¹ Indefinite detention is inconsistent with other Australian jurisdictions and violates human rights, even if it is subject to periodic review.¹²

Moreover, review is not always required on a periodic basis.¹³ This makes review optional rather than mandatory. In Victoria, the Judge who orders detention can decide how regularly review should occur.¹⁴ Mandatory periodic review is an essential condition of humane detention where the person is detained on the basis of unfitness to stand trial.

Recommendation:

KLC recommends that Courts should be required to fix the maximum detention period and a mandatory periodic review date which is proportionate to the detention period at the time a person is remanded into custody on the basis of unfitness to stand trial.

QUESTION 10: ADDITIONAL FUNDING TO PROVIDE ADVICE FOR PEOPLE WITH DISABILITIES

⁹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19; *Criminal Code 1983* (NT) sch 1, s 432C.

¹⁰ See, eg, *Crimes Act 1914* (Cth) s 20BC(2).

¹¹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC report 124 (August 2014) , 209 [7.84].

¹² ICCPR, art. 9.

¹³ Australian Law Reform Commission, above n. 11, [7.85-7.86].

¹⁴ *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27.

KLC aims to provide an accessible and appropriate service to clients with disabilities, tailored to their needs. Providing a holistic service can be very resource-intensive, as it often involves multiple meetings between the KLC solicitor and client to ensure they understand their legal options and can provide instructions. Further, a holistic service may require allowing time for clients to have breaks, for referrals to non-legal services to be made, home visits, telephone calls, and follow up advice.

Case study: Brian

Brian came to KLC for advice after he was dismissed from his job. Brian had taken one week of sick leave after suffering from severe anxiety and had recently been diagnosed with Bipolar type 2 and was on new medication. Brian had disclosed these details to his employer and was dismissed shortly after. KLC assisted Brian through advice and representation in a disability discrimination matter. Throughout the appointments, Brian sometimes presented as distressed or hyper. KLC talked to Brian about what the best time of day for appointments was, and also suggested Brian bring a support person to his appointments to make him feel more comfortable. We followed up appointments with letters detailing what we discussed, phone calls to give Brian clarification on his options, and roleplayed what would happen at the conciliation. In spending extra time with Brian, we ensured he felt comfortable with the process and achieved a good outcome.

Recommendation:

KLC recommends that the Australian government increase funding for legal assistance services to provide holistic services to clients with disabilities.

QUESTION 12: INVEST IN COMMUNITY LEGAL EDUCATION

KLC understands the importance of community legal education in all areas of the law. We run community legal education seminars for community workers and

members of the public which specifically address disability and discrimination. We rely on funding from the government and the private sector to run our community legal education programs.

Funding constraints limit the frequency, scope and reach of our community legal education programs. A two hour seminar requires approximately fifteen hours of volunteer and paid solicitor work. Our preparation involves legal research, marketing and a practice seminar to identify areas for improvement. We often travel to outreach centres to run seminars in areas which are more accessible for our target audience. Additional funding for community legal education would allow us to advertise our seminars more widely, run more seminars and cover more diverse content.

KLC's Community Legal Education Program

Once a month, KLC conducts legal information workshops for community workers. Topics cover a wide range of legal issues. KLC has delivered workshops aimed at community workers in frequent contact with people with disability, on topics including:

- Discrimination
- Power of attorney and guardianship
- Social security and eligibility for disability support pension

The workshops empower community workers to identify their clients' legal issues, assist their clients and refer them for legal advice at an early stage, before their problems escalate.

Recommendation:

KLC recommends that the Australian government increase funding for legal assistance services to provide community legal education.

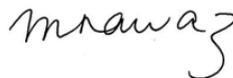
Please contact us on (02) 9385 9566 if you would like to discuss our submission further.

Yours faithfully,

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