



IHC Submission to the Human Rights Commission

Draft Chapter for Discussion: The Right to Justice

20 October 2010

Trish Grant

Director of Advocacy

IHC New Zealand Inc

PO Box 4155

Wellington

Tel: 04 472 2247

Contents

1. About IHC.....	1
2. Introduction	2
3. Overall Response.....	3
4. Recognising the needs and rights of people with intellectual disabilities.....	6
5. Additions needed	10
6. Conclusion	15
7. Recommendations	16

1. About IHC

Mission Statement:

IHC will advocate for the rights, inclusion and welfare of all people with an intellectual disability and support them to lead satisfying lives in the community.

IHC New Zealand Incorporated (IHC) is a community-based organisation providing support and advocacy for people with an intellectual disability and their families. Through our service arm, IDEA Services, IHC works with approximately 3000 families with children who have an intellectual disability, provides support and training for 4000 adults in work places and helps more than 4000 with disabilities to live in IHC houses and flats. IHC also advocates for the rights of more than 50,000 people with an intellectual disability.

IHC has a long history of political and systemic advocacy and is committed to non-government funded programmes of work related to individual and systemic advocacy, empowerment of individuals and families and inclusion of people with intellectual disability in society. IHC has a particular interest and expertise in human rights and social justice issues affecting people with intellectual and other disabilities.

A member of IHC represented Inclusion International on the United Nations' committee that drafted the UN Convention on the Rights of Persons with Disabilities (UNCRPD), now ratified by New Zealand. IHC endorses the New Zealand Disability Strategy and the UNCRPD as strong frameworks for guiding Government policy, practices and decision-making.

2. Introduction

IHC appreciates the opportunity to comment on the Human Rights Commission's draft for discussion: *The right to justice*. We note that this draft chapter is one of a number of chapters that the Commission is completing for its report on the status of human rights in New Zealand which is due to be released in December 2010. The updated Status Report will provide the basis for the Commission's priorities for action for the next five years.

IHC notes that the Commission has advised that information gathered for the Status Report will also be drawn on to inform the Commission's report to the United Nations on the implementation of the UNCRPD.

3. Overall Response

IHC agrees with the Commission's identification that the law must be accessible, intelligible, clear and predictable, fundamental human rights must be protected by the law and the overarching objective of the rule of law and the right to justice is that fair outcomes are realised by everyone encountering the judicial process. In particular, we endorse the recognition in *The right to justice* of the difference between formal and substantive equality, which is the overall focus of our submission.

It must be an absolute priority for the Human Rights Commission to act as a champion to ensure that those who need support to exercise their legal rights and to access justice are provided with that support. This is not provided at present in our justice system. New Zealand's obligations as a member state of UNCRPD provide a further and necessary framework to measure increasing compliance with human rights standards.

IHC generally agrees with the areas identified at the conclusion of the chapter as being ones where New Zealand does well, and the areas where New Zealand needs to do better. While IHC endorses many of the issues raised and suggestions made in the draft chapter, we warn against any complacency.

IHC endorses the Commission highlighting international criticism for significant discrepancies in the realisation of the right to justice among different New Zealanders, including disabled people. Yet, there is no focus on disabled people in the draft chapter, with few references made. People with intellectual disabilities are one of the most vulnerable and disadvantaged groups in society, including within the disability community. The fact that their rights continue to be overlooked means it is even more important that the Commission commits to actively advancing these rights.

The right to justice goes part of the way in recognising the rights of disadvantaged and vulnerable groups such as children and young people, Māori and Pacific peoples, women, and people who have been abused in state care (which includes many adults with intellectual disabilities today). Absent, however, is a framework for ensuring these rights are embedded in New Zealand's justice system.

There must be recognition at the law making and policy levels and in practice in the courts and other parts of the justice system that New Zealand is now under an obligation under UNCRPD to uphold the rights of people with intellectual disability to legal capacity and put supported decision-making in place. IHC calls for the Office for Disability Issues, the Principal Family Court Judge and the Ministry of Justice to provide more guidance and discussion. Significant work needs to be done along with independent agencies and other key stakeholders on supported decision-making models, the nature of legal capacity and what it means to act in a person's best interests, in terms of best practice.

IHC therefore considers there are key omissions in the paper or areas where further specific action is required, which should be reflected in the Status Report. Omissions occur both in the discussion and in the areas identified at the conclusion as priorities for action. These issues need to be addressed in order to enable people with intellectual and other disabilities to fully exercise their legal rights and to enjoy access to justice, by putting in place measures to implement the UNCRPD.

IHC strongly supports the first priority to advance the right to justice, to develop a comprehensive mechanism outside the court system to address historic cases of abuse whilst under the care of the state. We also endorse the three other priorities set out in the conclusion. We put forward additions to the discussion and priorities for action as well as proposing an overall framework to ensure that people have the support they need to fully exercise their legal rights and capacity and to access justice.

Specific issues

IHC focuses on the following issues which need highlighting and further elaboration. These can overall be described as relating to people who need support to fully exercise their legal capacity and right to justice. The key issue of support needed is complemented by a number of the other suggested measures set out in the draft chapter. These relate to the combined responsibilities of all those in the justice system, including legal practitioners.

Highlighting that people with intellectual and other disabilities are more vulnerable generally to becoming victims and have greater barriers to reporting offences against them and being able to participate in the justice system, IHC:

- Strongly supports developing a comprehensive mechanism outside the court system to address historic cases of abuse in state care.
- Believes that beyond the focus on children as victims and witnesses as a priority, attention is needed regarding other vulnerable victims and witnesses, including people with intellectual disabilities.
- Points out that in addition to the high proportion cited of Māori people in prison, recognition is needed that there is a disproportionate number of people with intellectual disabilities in prison – seven percent, when they form one percent of the population
- Wants Disability Law set up in Auckland in 2008 recognised as a key initiative as a community law centre, which service needs to be expanded to other places.
- Endorses the recognition of competency issues regarding legal aid lawyers, duty solicitors and barristers generally. Court-appointed counsel need to be added to

this list, in particular under the Protection of Personal and Property Rights Act 1988 (PPPRA). There must be specific training in and awareness of the communication and support needs of clients with intellectual disabilities.

- Supports the need for training of judicial officers and administrative staff in the justice system on human rights, including those relating to the most disadvantaged segments of the population.
- Points out that the much-needed reform of the New Zealand tribunals system by the Law Commission and the Ministry of Justice has been shelved by the Government as not being a current priority.
- Shares concerns about the use of urgency in passing legislation, the overriding of the Attorney-General's identification of inconsistencies with the New Zealand Bill of Rights Act (BORA) in proposed legislation, and the use of what is generally perceived to be delaying tactics by a well-resourced Government in opposing claims of breaches of Part 1A of the Human Rights Act and BORA by citizens and non-governmental organisations (NGOs).

4. Recognising the needs and rights of people with intellectual disabilities

The Law Commission specifically addressed the needs of people with intellectual disabilities in its 2003 report *Dispute Resolution in the Family Court* at pages 180-181:

Those with intellectual disabilities are often disadvantaged by being unaware of their rights, and may have difficulty communicating needs and concerns. It is well documented that people with intellectual disabilities are more likely to appear in court as both defendants and victims of crime. This is a worldwide pattern, often resulting from a combination of vulnerability and lack of community support.

Historically, people with intellectual disabilities have been subjected to Court processes to place them under the Court's jurisdiction so they can be sterilised without their consent, and to extinguish their rights as parents so that their children can be adopted. This has raised concerns about how well the functional capacity of people with intellectual disabilities is understood and how well their rights are protected during the Court process.

Attending court can be traumatic for people with intellectual disabilities. Unfamiliar people and locations, delays (such as waiting several hours for a court appearance) and last-minute case rescheduling can exacerbate disorientation.

People with intellectual disability often need more time and help to absorb information, and ask and answer questions, and will have particular trouble following the sometimes complex language lawyers and judges use in court. Plain language pamphlets and videos can be useful, if others are there to read, explain, and answer questions.

It is important to create a structured environment with which people with intellectual disabilities can become familiar. This might include court visits before any appearances. They should be entitled to have someone present to support them throughout the conciliation or Court process.

The Commission made a range of recommendations to address the needs of people with disabilities in the Family Court.

In 2004 the Law Commission identified and discussed the need for support persons in the context of two of the guiding principles set out in *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals – Accessibility and Respect*. At pages 53-62 the Commission identified people with disabilities as one of the groups with particular issues and interests, specifically referring to people with an intellectual disability. It stated:

Issues include the physical inaccessibility of some court facilities, inaccessible information materials, difficulties understanding what is happening in court due to physical or intellectual disabilities, and attitudinal barriers. The court system, as a guarantor of justice, must take responsibility for reducing rather than exacerbating these barriers.

The Commission recognised that the majority of disabled New Zealanders will have more than one disability and that for many there will be compound barriers to effective participation in courts.

However, this and other recent work by the Law Commission and others on supporting people with intellectual disabilities in the justice system has not been put into practice in New Zealand's justice system.

While great progress has been made in addressing physical barriers and providing for New Zealand Sign Language as well as interpretation of other languages, the justice system has not yet addressed the support needed for people with other communication difficulties, including for social interpretation.

Beyond the right to representation referred to at page 6 of the draft chapter, is therefore the right to support.

The United Nations Convention on the Rights of Persons with Disabilities: implementing the right to support

In addition to the International Covenant of Civil and Political Rights (ICCPR), the UNCPRD provides specifically for the rights to Equal recognition before the law and to Access to justice for disabled people. These provisions recognise that people with disabilities are entitled to support and accommodations to enable them to fully exercise these rights.

New Zealand is to make its first report to the United Nations in March 2011 on progress in implementing the UNCRPD. The Human Rights Commission has a key role in promoting, protecting and monitoring New Zealand's implementation of the UNCRPD along with people with disabilities and their organisations.

As we set out in our submission to the Commission on *The rights of disabled people* draft chapter, IHC believes that the issue of supported decision-making warrants a new and specific focus in the plan of action. New Zealand's obligations under Article 12 of the UNCPRD create positive opportunities for disabled people and their advocates to consider and develop new models which reflect the philosophy and intent of this article.

It is therefore crucial that specific reference to the right to be supported is recognised and incorporated in the chapter on *The right to justice*, as well as the right to access justice in Article 13. This goes to the heart of ensuring substantive as well as formal equality recognised at page 8 of the draft chapter.

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13 - Access to justice

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.

Thus the Convention's wording emphasises the shift in thinking and practice from substitute decision making to supported decision-making.

Support needed in exercising legal rights and access to justice

Access to the support they may require in exercising their legal capacity and provision of procedural accommodations are therefore central to people with intellectual disabilities being able to exercise their full legal rights and capacity on an equal basis to others, have their rights, will and preferences respected and facilitate their effective role in participating in all legal proceedings.

People with an intellectual disability are likely to need greater levels of support than people with other types of disability to enable them to access these rights.

Necessary elements include:

- The ability to have a support person of the person's choice who can play whatever role the person needs
- Communication assistance.

Support and communication assistance are both provided for under the Evidence Act 2006 for all participants. They are necessary beyond legal representation, including to assist with communicating with a legal representative.

The support needed by people with intellectual disabilities is often called 'social interpretation'. This means one or more trusted family members, friends or support workers chosen by the disabled person. This can mean putting information in plain language and explaining any matters the person does not understand. They will also help them to provide information and views, to participate in discussion and to make decisions. They may help with filling in forms. A support person will not speak or act on behalf of the person without their permission.

IHC sees the role of a support person as to assist the person with intellectual disability, as needed, to:

- put in plain language information put to them
- express their opinion, tell what happened or say what they would like to happen
- clarify any matters that the person does not understand
- gain the confidence to have their say – this may include reassurance that they will be listened to and what they say is important
- participate in discussion and understand what is being said
- support physical needs due to disability.

As well as recognising the role of such social interpreters, agencies need to take their own steps to be accessible, such as providing plain language information and explanations.

It is also essential judges and tribunal members and administrative staff are trained in addressing the needs of people with disabilities and relating to power imbalances between parties.

We elaborate on these matters in responding to specific matters outlined in the draft chapter next.

5. Additions needed

IHC puts forward the following areas as omissions in the draft chapter.

A comprehensive mechanism outside the court system to address historic cases of abuse in state care

IHC strongly supports developing a comprehensive mechanism outside the court system to address historic cases of abuse in state care as set out at page 21 in the conclusion. Many adults with intellectual disabilities today were abused as children or adults in state care, noting that the last institution was closed as recently as 2006.

IHC would like added to the discussion at page 16 that in its 2009 report, the UN Committee against Torture also expressed concern about New Zealand's inaction on behalf of victims of historic abuse in state care. This includes children and adults with intellectual disability

www.hrc.co.nz/home/hrc/newsandissues/unreportsonnewzealandscompliance.php.

The UN Committee recommended that New Zealand should take appropriate measures to ensure that historic allegations of cruel, inhuman or degrading treatment, inflicted by persons acting in an official capacity against children in state institutions, and against patients in psychiatric hospitals are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation. IHC considers that the comprehensive mechanism mooted must be inquisitorial rather than adversarial, with provision for appropriate support, as outlined above.

IHC would also like recognised in the draft chapter that the Government's current Confidential Listening and Assistance Service does not provide the mechanism called for. IHC points out that it does not provide for any redress or even an apology for the many people with intellectual disability who experienced institutional abuse. While the panel will listen and suggest ways of getting help, it will not decide the truth of what it hears, or acknowledge liability for what happened, or try to resolve differences. It cannot pay compensation.

Vulnerable victims and witnesses

Beyond the focus on children as victims and witnesses at page 20 and as a priority in the conclusion at page 21, attention is needed regarding other vulnerable victims and witnesses. Following the Law Commission's work on children and other vulnerable witnesses, changes in the Evidence Act 2006 that provide for interpreters by way of "communication assistance" for anyone with a communication disability, that is, social interpretation, have not been put into place in New Zealand's justice system.

Section 79(2) of the Evidence Act 2006 provides that any witness when giving evidence may with the permission of the Judge have one or more support persons near him or her to give support. The role of the support person is left open, s.79(5) providing that the Judge may give directions regulating the conduct of a person providing or receiving support.

The Evidence Act goes further in providing for “communication assistance”, which is defined in s.4(1)(b) as including “any other assistance that enables or facilitates communication with a person who ... – (b) has a communication disability”. An “interpreter” is defined as including “a person who provides communication assistance to a defendant or a witness.” Section 80(3) & (4) states that a witness in civil proceedings is entitled to communication assistance to enable them to give evidence, which may be provided on the application of the witness or any party to the proceedings, or on the initiative of the Judge. The Judge may direct what kind of communication assistance is to be provided in s.81(3).

Disproportionate numbers of people with intellectual disabilities in prison

A prominent human rights lawyer has recently identified that seven percent of those in the prison system have an intellectual disability. This compares with people with intellectual disabilities comprising about one percent of the population (Statistics New Zealand Disability Survey 2006). This means that in addition to the disproportionate number of Māori people in prison cited at page 13 (60 percent compared with comprising 14 percent of the New Zealand population), people with intellectual disabilities are over-represented in prison seven times more than their proportion in the population.

It is also likely that there are people with intellectual disability in prison who have never been formally identified as such, who need support during the court processes and in prison. While provision has been made in recent years for screening people with mental health issues early in the process, none has been put in place to identify and support people with intellectual disability, who have similar needs.

The Human Rights Commission current action plan states as an area where New Zealand needs to do better in the chapter on *The rights of people who are detained*:

- **People with disabilities:** The lack of reliable data on the numbers of prisoners who have a disability (whether physical or intellectual) must be addressed. This will allow more accurate assessment of the adequacy of current levels of service provision to disabled people, and will identify specific areas for improvement.

IHC questions what progress has in fact been made in regard to people with intellectual disabilities. We therefore agree with the draft chapter at page 13 that “the criminal justice system continues to fail to ensure substantive equality before the law”, and wish to have the needs of people with intellectual disabilities recognised as needing attention in all parts of the justice system.

Expand Disability Law community law centres

IHC therefore supports Disability Law in Auckland set up in 2008 as a community law centre, which should be recognised as a key initiative at page 14 of the draft chapter, and which needs expanding to other areas in New Zealand. Auckland Disability Law has specialised knowledge of the issues and law that particularly affect disabled people, as well as being able to address the barriers, including support needs and communication assistance, to enable disabled people to exercise their legal rights and to access justice. This includes educating lawyers who advise and represent disabled people.

IHC also supports the Public Defender scheme as long as these lawyers are trained in and aware of the needs of people with intellectual and other disabilities.

Lawyer competence – concerns with court-appointed lawyers under PPPRA

The need for Disability Law's role is the more so given the draft chapter's recognition of competency issues regarding legal aid lawyers, duty solicitors and barristers generally (pages 14 & 15).

IHC wants added similar concerns about the competency, training needed for and accountability of court-appointed lawyers, in particular under the Protection of Personal and Property Rights Act 1988 (PPRA). IHC calls for more work to be done by government and independent organisations on the nature of legal capacity and the support needed for people with intellectual disability to be active participants in the decisions made about them in the Courts.

A recent Family Court case IHC was involved in illustrates the issues.

In 2009 IHC had to oppose a court-appointed, government-funded lawyer who was supposed to be representing the interests of one of our disability support services clients. Without IHC's intervention, this person would have led a court-ordered life instead of being able to make choices about his circumstances supported by significant people in his life. The Family Court Judge agreed entirely with what IHC proposed.

As well as making the least possible restrictive intervention possible in a person's life, the other primary objective expressed in the PPPRA is to enable or encourage that person to extend and develop such capacity as they have to the greatest extent possible.

Yet the court-appointed lawyer:

- did not consult, let alone meet, with his client with intellectual disability
- opposed his wishes

- would not give him copies of information he requested, namely the application to the court and his medical report
- had a mistaken interpretation of what can and cannot be done under the PPPRA.

This raises serious and urgent questions about what is happening around the country right now, such as:

- What qualifies a lawyer to be court-appointed?
- What oversight is there?
- What are the safeguards for the very vulnerable people in this situation?
- Where is the accountability?

Not only did the court-appointed lawyer not fulfil his responsibilities under the PPPRA, his approach and actions were entirely outside the right to supported decision-making in the UNCRPD.

IHC also endorses that law enforcement officials and the judiciary should receive human rights training, in particular on the principle of equality and non-discrimination (page 13). We wish to make sure that such training extends to cover the needs for support in the justice system of disadvantaged groups such as people with intellectual disabilities.

Inaccessible and inconsistent tribunal system

In regard to New Zealand's system of tribunals (page 9), the draft chapter needs to acknowledge that the reform project to make much-needed changes to the tribunals system proposed by the Law Commission and the Ministry of Justice has now been shelved as not being a current Government priority.

IHC supported the approach of the Law Commission in its 2007 issues paper *Tribunals in New Zealand* that tribunals have developed in an ad hoc and unprincipled manner without overall coherence, and are difficult for the average citizen to access and navigate. IHC emphasises that for those who are disadvantaged, and those who attempt to support them, it is even more difficult.

IHC notes that in relation to tribunals where the state is a party, the need for independence and tenure for tribunal adjudicators, such as in the Human Rights Review Tribunal, is pressing.

Excessive use of urgency in passing legislation and inconsistencies with BORA

IHC supports the draft chapter identifying the need to review the excessive use of urgency in the passage of legislation as a priority in the conclusion at page 21. We also endorse that a key element in the oversight of law-making is the active participation of civil society (page 7). IHC wishes to have added to the discussion on page 11, that allowing insufficient time for submissions to select committees prevents NGOs having time to consult their members properly to inform submissions from their own knowledge and experience in communities around New Zealand, thus impairing the quality of this vital input and the resultant legislation.

IHC shares the Human Rights Commission's concern that legislation is being enacted that the Attorney-General has identified as being inconsistent with BORA (page 11).

IHC is currently involved in taking a complaint on behalf of all disabled students against the Government under Part 1A of the Humans Rights Act and BORA. We are very concerned that more than two years after IHC lodged our complaint with the Human Rights Commission, there are ongoing delays by the Government in resolving the issues.

IHC is also concerned at the Government opposing the right of representative NGO groups to take cases for a declaration of inconsistency against the Government on behalf of particularly vulnerable groups in society, as it did unsuccessfully regarding the Child Poverty Action Group claim. This resulted in delays of several years to that case being heard and additional costs incurred.

6. Conclusion

IHC applauds the Human Rights Commission for reviewing the Action Plan for Human Rights and appreciates the opportunity to give feedback on omissions, identify incorrect information and make suggestions for additions.

New Zealand's ratification of the United Nations Convention on the Rights of Disabled Persons has provided a wider lens to reconsider the rights previously prioritised. IHC is keen to see the new rights related to legal capacity, supported decision making and access to justice reflected in the revised Action Plan for Human Rights.

IHC as a rights based advocacy organisation is pleased to note the improvements achieved over recent years in the recognition and realisation of the human rights of people with intellectual disability.

We believe that there is some distance to go in responding to the human rights of one of the most vulnerable population groups in New Zealand society, those with intellectual disability. It is clear from our consultation with people with intellectual disability that there are persistent and enduring barriers to people with intellectual disability being able to exercise and enjoy their human rights in most spheres of their everyday life.

We believe that New Zealand's human rights organisation, the Human Rights Commission has a responsibility to ensure that the progress established is now expanded to reflect New Zealand's compliance with the UNCRDP. We look forward to ongoing dialogue with the Commission to ensure that the points raised within the IHC submission are considered and taken account of.

7. Recommendations

IHC's overall recommendation is that the Human Rights Commission's plan of action commits to advancing the right to justice of disadvantaged and vulnerable groups who need support to fully exercise their legal rights and to access justice, including people with intellectual disabilities in accordance with Articles 12 and 13 of the UNCRPD. The onus is on Government or government-funded human rights organisations to do the work needed regarding New Zealand's obligations in terms of Article 12 of the UNCRPD.

IHC also:

- Strongly supports developing a comprehensive mechanism outside the court system to address historic cases of abuse in state care.
- Recommends attention to the needs of other vulnerable victims and witnesses beyond children, including to ensure that the right to support and communication assistance set out in the Evidence Act is provided by the justice system.
- Recommends attention to and action on the disproportionate number of people with intellectual disabilities in prison at all stages of the justice system.
- Wants Disability Law recognised as a key community law centre initiative, with this service expanded to other areas in New Zealand.
- Endorses the recognition of competency issues regarding legal aid lawyers, duty solicitors and barristers generally. Court-appointed counsel need to be added to this list. There must be specific training and awareness in the communication and support needs of clients with intellectual disabilities.
- Supports the need for training of judicial officers and administrative staff in the justice system on human rights, including those relating to the most disadvantaged segments of the population and their support needs.

We are happy to provide any further information or clarification about these matters.

Trish Grant
Director of Advocacy