

Justice for All

The Legal Rights of People with Intellectual Disability in South Australia

June 2004

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1 Introduction

This is the fourth edition of *The Legal Rights of People with Intellectual Disability in South Australia*, which was first written in 1987. Since that first edition there have been many changes to the law, including anti-discrimination legislation to protect people with intellectual disability at both the State and national level, State disability services legislation to mirror federal legislation and revised guardianship legislation.

There is little doubt that there is greater knowledge and awareness of the legal rights of people with disability among carers and service providers. Service providers are particularly interested to know about their duty of care. Community legal centres and advocacy groups are now more involved in representing people with disability than in the past.

There is also recognition that it is one thing to pass laws; it is another to make them work in practice in the way it was intended. Resources and the values of those involved in implementing the laws are important issues.

This edition of the handbook builds on earlier editions by recording recent legislative changes. Hopefully, it will continue to be a useful reference for consumers, carers, service providers and advocates in the disability area.

Particular thanks must go to the following agencies, whose contributions and efforts made this edition possible:

- IDSC
- Legal Services Commission of South Australia
- Equal Opportunity Commission
- Office of the Public Advocate
- Passenger Transport Board
- Magistrates Court Diversion Program
- Family Court of South Australia
- Family and Community Services
- Planning SA
- Attorney-General's Department, Victims of Crime Coordinator

Ian Bidmeade

2 The Meaning of "Rights"

It is important to clarify what we are talking about when we speak of the "rights" of people with disabilities.

Quite often, we are not referring to legal rights, but rather certain principles of morality or social justice, which are regarded as fundamental to a person with disability enjoying a decent life.

The most significant of such statements are probably the United Nations Declarations on the Rights of Mentally Retarded Persons and of Disabled Persons (see Appendices).

In summary, they state that people with disabilities should have the right to a decent life and, wherever possible, equal opportunity with others to enjoy as normal a life as possible. Those declarations urge lawmakers and care providers to ensure that legislation and policies enable and facilitate these aims.

Closer to the ground, a number of organisations have adopted resident or client rights statements to express values that focus on the individuality and potential of people with intellectual disability. They are generally statements of moral principle rather than legal rights.

A legal right is one which is legally enforceable, or as Hayes and Hayes, in *"Mental Retardation: Law, Policy and Administration"* define it, "an interest recognised and protected by the law, respect for which is a duty, and disregard of which is a wrong".

The legal rights that most people enjoy include the right to:

- own property
- contract
- marry
- consent or refuse treatment
- personal freedom
- make a Will
- vote
- sue

Simply because a person is classified or labelled as "intellectually disabled", does not mean that they have lost these legal rights.

Care providers and parents, in their concern, may over-protect the person and thus prevent the enjoyment or fulfilment of rights. However, generally speaking, the question is whether the person has the capacity to exercise their rights. That will depend on the person's individual capacity to understand the nature and consequence of their actions in a specific situation.

A range of substituted decision-makers is also available to exercise many of these rights on behalf of a person with a disability where necessary eg guardians or administrators.

A moral right can become a legal right by being enshrined in legislation and made enforceable, or because the courts recognise its enforceability.

The United Nations Declarations referred to above were adopted as human rights under the Commonwealth *Human Rights Commission Act 1981* and more recently under its successor, the *Human Rights and Equal Opportunity Commission Act 1986*.

The Human Rights and Equal Opportunity Commission is empowered to hold inquiries as to whether laws, Acts or practices are inconsistent with, or contrary to, human rights. Its power is then to make recommendations for change to the Minister - a rather limited remedy. To the extent that a person can complain to the Commission that the Declarations are being breached, have the matter heard formally, and obtain the above remedy, the rights set out in the Declarations come close to being legal rights, or "interests recognised and protected by the law, respect for which is a duty, and disregard of which is a wrong".

The Commonwealth Aged Care Legislation requires proprietors of approved nursing homes to enter agreements with residents that oblige proprietors to comply with a charter of residents' rights. In this way, residents' rights are given enforceability.

The National Standards for Disability Services made under the Commonwealth *Disability Services Act 1986*, also emphasize client rights. They are often included as conditions of funding.

No doubt a concern for the interests of people with disabilities has led to statements of rights. Their effectiveness, whether enshrined in legislation or not, will often depend on a similar commitment (or values) from those involved in implementing them.

3 Funding for Services in South Australia—the Legal Basis

Funding for services in South Australia comes from both Commonwealth and State sources under the Commonwealth/State Disability Agreement.

3.1 Commonwealth Disability Services Act 1986

The Commonwealth *Disability Services Act* 1986 provides for funding of services by the Commonwealth in accordance with the objectives and principles of the Act. Those objectives and principles particularly emphasise the integration of people with disabilities in the community. It replaced the previous *Handicapped Persons Assistance Act* 1974 with its focus on the funding of institutions.

Funding is provided directly to the States or to eligible organisations for eligible services. Eligible services are as approved by the Minister and include:

- accommodation support services
- advocacy services
- competitive employment training and placement services
- independent living training services
- information services
- print disability services
- recreation services
- respite care services and
- business services

Various terms and conditions can be imposed on such financial assistance. Financial assistance can also be given to individuals for research and development activities consistent with the objectives and principles of the Act.

Funding agreements must be entered into by organisations and individuals receiving funding, and there must be a review of the outcomes of financial assistance for eligible services at least every five years.

The Act also provides for funding of services that are in transition but not consistent with the object and principles of the Act, and allows for extra funding to assist in taking the steps to be properly eligible.

3.2 National Standards for Disability Services

The *National Standards for Disability Services* are made by the Minister under the *Commonwealth Disability Services Act 1986*.

Compliance with the Standards is commonly required in Commonwealth/State funding agreements and in funding and service agreement with service agencies. The Standards are set out in the Appendices.

3.3 South Australian Disability Services Act 1993

All States, including South Australia, have now passed legislation in similar terms to the Commonwealth Act. The South Australian Act places particular emphasis on the Minister to consult with people with disabilities and carers regarding major funding or service decisions and to encourage their informed participation in the development, management and evaluation of disability services. Funded services or activities must be reviewed at intervals of not more than three years.

In practice, under the Commonwealth/State Disability Agreement, the Commonwealth is funding employment and advocacy services, national print disability and information services and the States are funding accommodation and community support services (and some advocacy). Some services will remain joint responsibilities via research and development and planning.

3.4 Intellectual Disability Services Council

IDSC is an incorporated health centre within the meaning of the *South Australian Health Commission Act 1976*. Its powers and obligations are set out in the *South Australian Health Commission Act 1976* and in its Constitution. IDSC is governed by a Board of Directors that is made up of people with a wide range of skills and backgrounds, including parents of people with intellectual disability. IDSC's role is:

- to provide a range of services to people with intellectual disability and their families;
- to plan, coordinate and develop services for people with intellectual disability within South Australia;
- to plan and develop services which are purchased from non-government organisations and private providers on behalf of people with intellectual disability;
- to assist people with intellectual disability to have access to quality services;
- to promote community awareness and acceptance of intellectual disability.

4 Direct Benefits

In addition to general Commonwealth and State funding for services, direct cash benefits are available to people with intellectual disability under the Commonwealth *Social Security Act 1991*.

The major benefits include the **Disability Support Pension** and the **Mobility Allowance**

4.1 Disability Support Pension

The Disability Support Pension (DSP) is designed to financially assist people who are unable to work in the long term because of a physical, psychiatric or intellectual impairment.

4.2 Mobility Allowance

The Mobility Allowance is a payment to assist people who are unable to use public transport without substantial assistance.

There are also payments and allowances for carers. Further details are available from Centrelink offices or at www.centrelink.gov.au

5 Anti-Discrimination Measures

Anti-discrimination measures in South Australia are set out in the Equal Opportunity Act (1984).

An amendment to the Act in 1990 made intellectual impairment a ground for unlawful discrimination.

Intellectual impairment is defined in the Act as “permanent or temporary loss or imperfect development of mental faculties (except where attributable to mental illness) resulting in reduced intellectual capacity”. Intellectual impairment joins sex, race, sexuality, marital status, pregnancy, physical impairment and age as grounds for complaints of unlawful discrimination. The Act does not yet cover mental illness.

Discrimination can be alleged in the following specific areas:

- Employment (including job advertisements, job applications, recruitment, promotion, dismissal from full-time, part-time, casual, contract or unpaid work).
- Education (this applies to all levels of education, to course entry, access to facilities and benefits and expulsion).
- Membership of clubs and associations.
- Provision of goods and services. This includes any dealings with:
 - business (eg hotels, nightclubs, banks, insurance companies);
 - professionals (eg doctors, dentists, lawyers, mechanics, electricians);
 - government departments.
- Accommodation (includes renting flats, rooms or houses and hotels, motels and caravan parks).
- Advertising.
- Selling land.
- The conferral of professional qualifications.
- Superannuation schemes and provident funds to some degree.

It is unlawful under section 66(1)(d) of the Act to fail to provide special assistance or equipment to a person in consequence of their impairment when it is unreasonable to do so, or to treat someone unfavourably because that person requires special assistance or equipment.

The Commissioner for Equal Opportunity is the authority to whom complaints of discrimination are made. It costs nothing to make a complaint. Complaints are confidential.

Victimisation is also unlawful. This means treating someone unfairly because they have complained to the Commissioner or because they have supported someone who has complained, or because of anything they have done by reference to the Act.

In the case of intellectual impairment, a complaint may be lodged by the person with the disability or by a person who, in the opinion of the Commissioner, is a suitable person (see Section 93).

The complaint is then considered to see whether it is covered by the law. If it is, the complaint will be investigated, looking at both sides of the problem. Often the complaint can be settled at this stage. If not, the next step is a compulsory confidential conference of all the relevant people. At this stage, settlement can be reached and may involve:

- commitment to cease unlawful behaviour;
- changes to policies and/or procedures;
- apologies—private and/or public;
- agreement to provide what was denied (eg membership of a club, accommodation, access to a venue or service);
- compensation for lost wages or hurt feelings;
- job reinstatement if appropriate;
- disciplinary actions, eg warnings, transfer to another area or, in very serious cases, dismissal.

If the complaint cannot be settled at the conference, the Commissioner may refer the complaint to the Equal Opportunity Tribunal. At this stage, complaints are no longer confidential and can be reported in the media.

If the Tribunal is satisfied that discrimination has occurred, it may order monetary damages, order the person discriminating to refrain in the future or to take steps to redress the damage.

In addition to the handling of complaints the Commissioner for Equal Opportunity also has the responsibility:

- To "foster and encourage amongst members of the public informed and unprejudiced attitudes with a view to eliminating discrimination on the grounds of sex, sexuality, marital status, age, pregnancy, race or impairment" (either physical or intellectual).
- To "institute, promote or assist in research, the collection of data and the dissemination of information relating to discrimination on the grounds of sex, sexuality, marital status, pregnancy, race or impairment" (either physical or intellectual).
- To "make recommendations to the Minister as to reforms, whether of a legislative nature or otherwise, that the Commissioner believes will further the objects of this Act" (see Section 11).

People with intellectual impairment may also suffer sexual harassment and/or unlawful discrimination based on their sex, sexuality, race, marital status, age, pregnancy or physical impairment and a complaint could be pursued on these grounds.

The following examples may be helpful in indicating when people with intellectual disability can complain:

- (a) Neville was refused a job because the impact of his intellectual disability meant that he would need three months rather than six weeks working under the supervision of another worker. Neville and his support group complained to the Commissioner for Equal Opportunity. The Commissioner discussed with the employer the evidence that, given this extra assistance at the start of his employment, Neville was more likely to remain in the job long term. The employer agreed that this was reasonable and agreed to take Neville on as an employee.
- (b) Dianne applied to do a training program and was refused entry to the course because the educational authority running the program did not think that Dianne would be able to manage the requirements of the program. Dianne complained to the Commissioner for Equal Opportunity. The matter was resolved when the educational authority agreed to offer Dianne a basic work and study skills program before allowing her entry to the program for which she had applied.
- (c) Sue and Eric, who both had intellectual disability, moved into a boarding house. They paid the same rates as other boarders, but were given the worst rooms and were refused the free use of all facilities. With the assistance of a friend, Sue and Eric complained to the Commissioner for Equal Opportunity, who spoke to the manager of the boarding house. The manager apologised to Sue and Eric and agreed to improve their rooms and ensure fair and equal use of all facilities.

Equal Opportunity Commission of South Australia website: www.eoc.sa.gov.au

5.1 Commonwealth Disability Discrimination Act 1992

The Commonwealth passed the *Disability Discrimination Act 1992* to ensure that Australians with disabilities have legal protection against discrimination, no matter where they live.

Unjustifiable hardship is the crucial defence under the Act. It involves a cost/benefit analysis as to what changes should be made to meet the needs of the complainant. It has been described as requiring reasonable accommodation to create a level playing field.

The Act provides for a Disability Discrimination Commissioner to handle complaints. The Commissioner must attempt to solve the complaint by conciliation.

If conciliation fails, a termination notice is issued and the complainant has 28 days from the date of the notice to apply to the Federal Court for a determination of the complaint.

The Commonwealth Act goes beyond the State Act in a number of areas:

- Psychiatric disability, as well as physical and intellectual, is covered.
- Disability also includes infectious and non-infectious disease (eg AIDS) and malformations or disfigurements and learning difficulties.
- It covers disability harassment in similar fashion to laws on sexual harassment.
- It protects associates of people with disabilities from discrimination.
- It would seem to go further on access to buildings, by regarding failure to provide access to public buildings as discriminatory and placing the onus on the defendant to show it would be unjustifiable hardship to do anything about it.

The Commonwealth Act is most significant in going beyond complaint-based remedies in providing for **action plans** and **disability standards**.

Action plans may be prepared and lodged by educational authorities, government departments and other service providers. These plans aim to pursue the objects of the Act and to provide answers to discriminatory practices in a long term and targeted way. They are voluntary but, when lodged, can be used to defend allegations of discrimination. For example, if an authority can indicate a plan to make facilities more available to people with disabilities, the Commission can take this into account in determining what actions should be taken when discrimination is alleged in failing to provide access.

The definition of "service provider" is broad, and includes a person who provides goods or services, or makes facilities available. For example, a large department store would be covered by the definition.

While the plans are voluntary, they have the potential for encouraging service providers throughout the community to take people with disabilities into account in their planning.

The Act also contains power to introduce **disability standards** with the force of law—on issues such as employment, education, accommodation and public transport services and facilities. This follows the "Americans with Disability Legislation" scheme under which standards require access to all railway stations and school facilities by a specific date after the year 2000.

Disability transport standards covering nearly all forms of passenger transport services that are provided for public use are now in operation.

The exceptions are related to dedicated school buses, ferries operating on inland waters and charter bus services. While operators of these services will still need to ensure service provision to people with disabilities, they will not need to comply with the Standards at this time. Full compliance with the standards will be a defence against discrimination.

The standards cover the operation or provision of public transport services and facilities to people with disability by:

- the Commonwealth;
- a State;
- a Territory;
- a public authority of the Commonwealth;
- an agency of a State or Territory;
- a private sector operator or provider;
- any other person.

Detailed education standards have also been developed but are not yet in operation.

The disability standard concept would seem to have considerable potential to make things happen. Once the benchmark of a standard is set, it can be used in various ways. For example, apart from the fact that non-compliance with a standard will be unlawful, funding could be tied to compliance with standards (eg funded programs could be required to use only facilities that meet disability standards).

5.2 Operations of the Two Acts Together

The DDA expressly provides that it is not intended to exclude or limit the operations of a State Act such as the *Equal Opportunity Act 1984* that is capable of operating concurrently.

However, if a complaint is made under the State Act, the person making the complaint cannot bring another complaint about the same matter under the other Act. A DDA complaint can proceed under the State Act, but would generally be outside the six-month time limit of the State Act.

5.3 Exemptions from the Disability Discrimination Act

"Exemption" means that the DDA does not apply to the following sections. These sections can therefore allow discrimination on the grounds of disability without being in breach of the Act.

- **Firearms Act 1977**

S20 allows firearms licenses to be varied or cancelled if, for any reason, a person was considered not to be a fit and proper person to hold the licence. A physical or mental illness, disability or deficiency that is likely to make the possession of a firearm by the person unsafe for that person or any other person, could be used as a reason for exemption under the DDA.

- **Motor Vehicles Act 1959**

S88 allows for suspension of a licence due to a disability that impairs or may impair a person's ability to drive. If such suspension occurs, the person may apply to the court for an order removing the suspension.

- **Education Act 1972**

S75(3) Compulsory Enrolment: the Director-General may direct that it is in the best interests of a child that they be enrolled at a special school. See further, 7.2 Education Act Provisions, below.

- **Industrial Employees Relation Act 1994**

Allows non-application of Awards to workers with disability allowing them to be paid at special rates.

- **Workers Rehabilitation and Compensation Act 1986**

S30A: a disability consisting of an illness or disorder of the mind is compensable only if the person's employment was a substantial cause of the disability and the disability did not arise wholly or predominantly from reasonable action taken by the employer, such as a decision to demote or transfer or dismiss the worker.

Schedule 3: apportions different values for the purpose of assessing compensation for different disabilities.

5.4 Public Education and Assistance

As well as legislation and resources, education is necessary to inform consumers of their rights and to change community attitudes. The Central Community Legal Service provides assistance with disability discrimination issues (website: www.ucwadel.org.au/CCLS/default.htm).

Further information is available from the Human Rights and Equal Opportunity Commission website at www.hreoc.gov.au

The Legal Services Commission also provides assistance and education through its advisory program.

6 Community Living

“Each person with a disability is supported and encouraged to participate and be involved in the life of the community.”

Standard 5, National Standards for Disability Services

6.1 Planning Laws and Community Living

Under the *Development Act 1993*, if an act or activity is included in the definition of "development", it requires development approval. Applications for development approval are assessed by the relevant authority (usually the local Council).

Group homes for people with disabilities are classed as "developments" and require development approval both where new buildings are to be constructed and existing buildings converted to the new use. Local councils will assess the suitability of the application against the development plan for their area.

Most group housing is included in the definition of "multiple dwelling" or "group dwelling" contained in Schedule 1 of the *Development Regulations 1993* made under the *Development Act 1993*. A multiple dwelling comprises a dwelling that is occupied by more than five people who live independently of one another and share common facilities within that dwelling. By contrast, a group dwelling is a group of two or more detached dwellings, each of which is used as a dwelling and one or more of which has a site without a frontage to a road.

The development plan for a council area may list a multiple dwelling or group dwelling as a "complying or non-complying" development in the policies for each zone. If it does not, then an application for group housing will be assessed on its merits against the appropriate development plan.

If the application is refused, the applicant has the right to appeal to the Environment, Resources and Development Court.

If group housing is proposed by the South Australian Housing Trust or another State agency, it is assessed by the Development Assessment Commission. The decision of whether to grant development approval is made by the Minister under section 49 of the *Development Act 1993*.

6.2 Access to Buildings

New public buildings are required to be accessible under the Building Code. The *Disability Discrimination Act 1992* goes further in regarding a failure to provide access to public buildings, whether new or not, as discriminatory. It places the onus on the owner to show it would be unjustifiable hardship to provide access.

More information can be found on the Disability Rights—Access to Premises page of the Human Rights and Equal Opportunity website: www.hreoc.gov.au/disability_rights/buildings/access_to_premises.html.

6.3 Transport Standards

As already mentioned, Disability Transport Standards have been made under the *Disability Discrimination Act 1992*. They set detailed requirements and specifications to assist people with disability in using passenger transport services for public use.

6.4 Supported Residential Facilities Act 1992

This Act aims to ensure that any premises that offer accommodation with some form of personal care are licensed and meet minimum standards of care and accommodation. It covers some boarding houses, hostels and group homes for people with disabilities at least where the landlord provides personal care services.

The Minister may, by notice in the Government Gazette, exempt facilities or persons from provisions of the Act, but would need to be satisfied that the interests of residents were already being protected.

The local council for the area in which a facility is situated is the licensing authority.

Problems in such accommodation are often of a personal nature, such as sexual harassment, inappropriate mixing of people, theft and so on. Less formal safeguards such as advocacy may be needed for these problems.

There is a right of appeal to the Administrative Appeals Court against decisions of licensing authorities.

A Supported Residential Facilities Advisory Committee advises the Minister and councils. It includes three nominees of advocacy organisations.

The Act places a series of requirements on proprietors of facilities to assist residents. The requirements include:

- a prospectus on personal care services offered and other prescribed information;
- a written residents' contract;
- notification requirements before termination of a resident's contract, including 28 days' notice indicating rights of review;
- a service plan for each resident;
- an obligation to offer residents assistance in obtaining needed additional care not provided at the facility and to report the matter to the resident's representative, an immediate family member or, if neither is known, an appropriate government agency;
- minimum standards required under the regulations relating to safety, hygiene, food and privacy.

7 Education

"Every intellectually disabled person has a capacity for physical, emotional, social and intellectual development."

Principle 6.1.1 of the IDSC Constitution

7.1 Education Act Provisions

The 1986 amendments to the *Education Act 1972* provide that:

- children of compulsory school age have a basic entitlement to be enrolled at government schools;
- the Director-General, however, can direct enrolment at a special school or at some other particular school nominated in the direction if satisfied that a child has disability or learning difficulties such that it would be in the best interest of the child to do so;
- such direction can be given, varied or revoked:
 - (a) on a parent's application
 - (b) at the Director-General's initiativebut in either case, only after taking reasonable steps to consult each parent of the child;
- a parent aggrieved by a direction or decision of the Director-General regarding placement has the right to appeal to the District Court against the direction or decision.

Regulation 59 provides that if a child is presented for enrolment at a school and the head teacher is of the opinion that the child has disability or learning difficulties that would render the child incapable of gaining reasonable benefit from instruction at the school or would seriously interfere with the instruction of other children at the school, the head teacher must:

- (a) inform each parent of the child of their opinion and
- (b) enrol the child at the school but excuse them from attendance pending a direction of the Director-General under section 75A(1) of the Act and
- (c) prepare a report and recommendation as to the means by which the educational needs of the child might be best met in relation to school placement and curriculum, and forward the report to the Director-General.

7.2 Education and Discrimination

It is worth noting that both the *Equal Opportunity Act 1984* and the Commonwealth *Disability Discrimination Act 1992* ban discrimination by education authorities on the basis of impairment or disability. However, the power of the Director-General has been granted an exemption from the *Disability Discrimination Act 1992*.

It seems that the decision to exclude a child from a local school can still be the subject of arguments about discrimination but not the direction of the Director-General.

Arguments about exclusion centre around **unjustifiable hardship** and include cost and resource issues and impact on students and teachers. One common argument raised is stress on teachers and Occupational Health, Safety and Welfare issues.

Education Standards have been developed in draft under the Disability Discrimination Act and deal in detail with procedures for schools to meet DDA obligations towards students with disabilities, but they are not yet in operation.

The draft Standards can be viewed at:

<http://members.ozemail.com.au/%7Eddasp/DDAStandards2.htm>

8 Employment

"The mentally retarded [sic] person has a right to economic security and to a decent standard of living. He [sic] has a right to perform productive work or to engage in any other meaningful occupation to the fullest extent of his capabilities."

UN Declaration on the Rights of Mentally Retarded Persons (1971)

"Each person with a disability enjoys working conditions comparable to those of the general work-force."

Standard 9 National Standards for Disability Services

8.1 Funding and Standards

The funding of employment services and rehabilitation programs is at present a Commonwealth responsibility and occurs under the Commonwealth *Disability Services Act 1986*.

New standards for these services were introduced by the *Disability Services Amendment (Improved Quality Assurance) Act 2002*.

8.2 Supported Employment

Workers in supported employment are entitled to the Disability Support Pension and may also qualify for a Mobility Allowance, depending on their disability. They can also earn some additional remuneration before these benefits reduce.

8.3 Application of Awards

Section 113 of the *Industrial and Employee Relations Act 1994* provides that Awards do not apply to persons being assisted or trained by an organisation or body that provides employment services to workers with a disability, unless the Award makes specific provision for assisted persons.

Some Awards have such provisions.

Some Awards have been varied to set new working conditions including a probationary period of up to four weeks, special training and development leave of up to five hours a week without loss of pay and additional leave for medical appointments and bereavements.

The application of Awards in this way enables industrial conditions for people in supported employment to be argued in the Industrial Commission, rather than as a matter of management discretion.

8.4 Employee Ombudsman

The *Industrial and Employee Relations Act 1994* also provides for the Employee Ombudsman who can assist employees who have a disability in arguing for comparable working conditions to those enjoyed by the general work-force.

8.5 Open Employment Without Losing Pension Entitlement

A person with disability can move to and from open employment without losing their entitlement to a pension. Such a person can go back on the Disability Support Pension within two years.

8.6 Supported Wages System

Access to open employment is also assisted by the supported wages system at a national level. The major features of the scheme are as follows:

- People with disability seeking open employment are able to earn wages based on their productive capacity, plus superannuation, as well as a disability wage supplement from government to boost their earnings to the equivalent of the award rate.
- The supplement is also payable for twelve months after a person improves their earning capacity from a pro-rata wage to a full award wage.
- There is also an employer support payment to offset some of the initial costs of employing a person with disability, as well as grants for workplace modification.

8.7 Slow Workers Permit

The Slow Workers Permit was an early attempt to provide a bridge between sheltered and open employment.

Section 112 (1) of the *Industrial and Employee Relations Act 1994* enables the Industrial Commission:

“...on application by a slow, inexperienced or infirm employee, grant the employee a licence to work at a wage less than the minimum that would otherwise apply to the employee under this Act, an award or an enterprise agreement.”

if it is satisfied that, by reason of slowness, inexperience, etc, the employee is unable to obtain employment at the full award wage. Employers must obtain the consent of the Industrial Commission if they wish to employ more than one-fifth of their workforce as licensed employees. This avoids abuse by employers who seek cheap labour.

8.8 Industrial Safety

People with intellectual disability both benefit from and can be deprived by industrial safety laws. The *Occupational Health Safety and Welfare Act 1986* has both specific regulations setting out specific requirements, and a general obligation in these terms:

"S.19 (1) An employer shall, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular:

- (a) shall provide and maintain so far as reasonably practicable:
 - i) a safe working environment;
 - ii) safe systems of work;
 - iii) plant and substances in safe conditions;
- (b) shall provide adequate facilities of a prescribed kind for the welfare of employees at any workplace that is under the control and management of the employer;
- (c) shall provide such information, instruction, training and supervision as are reasonably necessary to ensure that each employee is safe from injury and risks to health."

The Department for Administration and Information Services advises that this Act and obligation apply to supported employment.

Industrial safety laws can also preclude people with intellectual disability from employment. In this context, Section 71 (2) of the *Equal Opportunity Act 1984* should be noted. Essentially, it permits discrimination on the ground of impairment in relation to employment if the person with the impairment is not, or would not be able to:

- (a) perform adequately and without endangering himself or other persons, the work genuinely and reasonably required for the employment or position in question; or
- (b) respond adequately to situations of emergency that should reasonably be anticipated in connection with the employment or positions in question.

Care should be taken to ensure industrial safety laws do not provide an unfair barrier to employment. For example, provisions that simply ban a person who is deaf or has epilepsy from doing certain work may overlook the fact that the person has an aid or uses medication, which means the job can be done very safely.

The Manual Handling Code promulgated under the *Occupational Health, Safety and Welfare Act 1986* should also be noted.

It is an important OHS&W measure for workers caring for people with disability.

8.9 Workers' Compensation

An accident at work can leave a person physically or intellectually disabled. Adequate compensation laws are of crucial importance to such a person.

The *Workers Rehabilitation and Compensation Act 1986*, establishes the Workers Rehabilitation and Compensation Corporation (WorkCover).

The Act places great emphasis on rehabilitation and gives WorkCover extensive power aimed to ensure that workers with compensable disabilities "achieve the best practicable levels of physical and mental recovery and are, where possible, restored to the workforce and the community".

The WorkCover scheme provides a combination of weekly payments for inability to work and lump sum payments for non-economic loss based on the degree of disability. Details of benefits are available from WorkCover direct or at their website: www.workcover.com.au

WorkCover's benefits are available to sheltered employees.

8.10 Anti-Discrimination Laws

Both the South Australian *Equal Opportunity Act 1984* and the Commonwealth *Disability Discrimination Act 1992* protect people with disability from unfair discrimination in employment.

The action plan concept of the DDA is also a means by which affirmative action can be taken in the employment area.

8.11 Protections Against Harassment

Both the South Australian *Equal Opportunity Act 1984* and the Commonwealth *Disability Discrimination Act 1992* protect people against sexual harassment. The DDA also protects a person with disability from harassment on the basis of disability.

Acts can be accessed on the Australasian Legal Information Institute's website at: www.austlii.edu.au.

9 Personal Relationships

As in other areas, the law is not an automatic barrier to people with intellectual disability having friendships, sexual intercourse, marrying or having children. Arguably, they should be assisted or enabled to express their sexuality rather than be prevented from doing so.

9.1 Sexual Relationships

Generally speaking, if there is genuine consent in an individual situation, the law does not interfere with the sexual behaviour of a person with intellectual disability. It attempts to provide protection against exploitation by others.

Section 48 of the *Criminal Law Consolidation Act 1935* provides that a person who has sexual intercourse with another person without the consent of that other person:

- (a) knowing that that other person does not consent to sexual intercourse with him; or
- (b) being recklessly indifferent as to whether that other person consents to sexual intercourse with him,

shall (whether or not physical resistance is offered by that other person) be guilty of rape and liable to be imprisoned for life.

Section 49 of the CLCA makes it a felony with a maximum penalty of life imprisonment for a person to have sexual intercourse with any person under the age of 12 years. Sexual intercourse is defined in the CLCA to include anal and oral sex and is defined in non-sexist terms.

A person who has, or has attempted to have, sexual intercourse with a person above 12 years of age and under 17 years of age, is guilty of a misdemeanour and liable to prison for up to seven years.

It is a defence if the victim was aged 16 or more *and* the accused was under 17 years of age at the time, *or* the accused believed on reasonable grounds that the victim was 17 or more years of age. In other words, the age of consent in South Australia is 17, but sexual intercourse with a 16 year old is defensible in the above circumstances.

Section 49(5) provides that:

"A person who, being the guardian, schoolmaster, schoolmistress or teacher of a person under the age of eighteen years, has sexual intercourse with that person shall be guilty of an offence and liable to be imprisoned for a term not exceeding seven years."

Section 49(6) goes on to provide:

"A person who, knowing that another is by reason of intellectual disability unable to understand the nature or consequences of sexual intercourse, has sexual intercourse with that other person is guilty of an indictable offence.

Penalty: Imprisonment for a term not exceeding seven years."

This section is worth debate. It is really a lesser offence alternative to a charge of rape. It aims to cover the situation of defective consent, rather than no consent, although, arguably, consent without understanding is no consent at all. In a sense, it protects the exploiter from a rape charge, if it does anything at all. It would seem not to provide any special protection for the person with disability and it may encourage some to prevent people with intellectual disability from expressing their sexuality. It also tends to assume that such persons are not capable of understanding the sex act.

In the past, there was concern that Section 267 of the CLCA, which makes it an offence to aid, abet, counsel or procure the commission of another offence, could inhibit **sex education** for people with intellectual disability, given Section 49(6). There was a fear that a person who teaches, counsels or helps such people in relation to sexual intercourse, or allows sexual intercourse in institutions, runs the risk of prosecution.

The fear should be allayed. Many of the people being assisted by educators and administrators will have understanding and their understanding will be assisted by counselling. They will not then be caught by Section 49(6). In addition, Section 49(6) aims to prevent exploitation. Section 267 aims to prevent anyone assisting in that exploitation in specific real situations, and not to prevent assistance in expressing sexuality. Apart from the fact that arguments that might link sex education with the criminal law are tenuous, there is always a discretion as to prosecution, and it is difficult to envisage that anyone would ever be prosecuted for providing sex education.

9.2 Use of Sex Workers

A commonly raised issue is whether there are legal problems in people with a disability using sex workers or case workers assisting clients to access such services.

This is an area of uncertainty and legal advice may be required in particular situations.

There are a series of offences aimed at protecting public decency, for example, running a brothel, soliciting for clients in a public place and living off the earnings of a prostitute. (See *Summary Offences Act 1953*).

It is also an offence to receive money paid in a brothel in respect of prostitution.

Exchange of sex for money otherwise does not appear to be an offence, for example, use of a visiting sex worker.

There is an offence for a person who aids, abets, counsels or procures the commission of an offence (*S267 Criminal Law Consolidation Act 1935*).

It is unclear whether this covers people with a disability or people assisting them. It could be argued that it more naturally applies to those directly assisting the sex worker to commit an offence.

In any case, it is unlikely that a person with disability or their carer would ever be prosecuted.

9.3 Marriage

Marriage is regarded in law as similar to other contracts—it is a matter of capacity. A marriage can be declared void if either party is incapable of understanding the nature and effect of the marriage ceremony. (Commonwealth *Marriage Act 1961*).

Very often, there will be no legal reason why a person with intellectual disability may not marry and good personal reasons why they should.

9.4 Care for Children

The assumption is often made that people with intellectual disability are incapable of caring for children. Certainly, this may be true in some cases, and help may be needed. There is, however, no evidence to suggest a direct relationship between IQ and adequacy of childcare.

9.5 Adoption

In some cases, when parents with intellectual disability with a child or children cannot cope, adopting out the child may be an option.

Normally, the consent of every person who is a parent or guardian of the child is required but the consent of the father of a child born outside of marriage is not required unless the father can establish his paternity to the satisfaction of the Court.

In the face of a parent's clear refusal to adoption, it may be difficult for this option to be pursued, even though care providers may have grave doubts as to the capacity of the parents to cope.

The Court can dispense with consent but it must find one of a number of matters, including neglect or ill treatment, or that the person to give consent is in such a physical or mental condition as not to be capable of properly considering the question whether they should be giving their consent. (S18 *Adoption Act* 1988.) The Courts have been reluctant to dispense with consent unless a strong case has been made.

The consent of the child to adoption must be obtained when the child is over 12 years of age but the Court can dispense with this consent where the child is intellectually incapable of giving consent.

9.6 In Need of Care Application

An alternative to adoption is an application to the Children's Court by the Minister under the *Children's Protection Act* 1993. If satisfied that the child is at risk, the Court can place the child under the guardianship of the Minister or other suitable person. Alternatively, the Court can place the child in the custody of a suitable person, including a member of the family, the Chief Executive Officer of an appropriate service, or the Minister. In this case, parents may remain guardians, even though someone else provides day-to-day care.

9.7 Abortion

Medical termination of pregnancy is permitted in certain circumstances under Section 82a of the *Criminal Law Consolidation Act* 1935.

A woman with intellectual disability may be able to choose this course of action, or she may not have the capacity to make that choice or refuse that option. The *Guardianship and Administration Act* 1993 empowers the Guardianship Board to consent to termination of pregnancy of a person who has a mental impairment and who is, by reason of that impairment, incapable of giving effective consent. Termination is not a procedure to which a parent can consent and the Board cannot delegate its power to anyone else.

As with other issues, the Board must give due consideration to the expressed wishes (if any) of the person and to the object of minimising interference with the rights of the person so far as is consistent with the proper protection and care of the person.

Wherever practicable, the Board must also afford parents the right to be heard, unless it is satisfied that it would not be in the best interests of the person involved (see Section 5, 61).

A doctor who proceeds without effective consent from the person involved, or the Board when that person cannot give such consent, commits an offence (see Section 61), although a doctor may act in an emergency when they are of the opinion that the procedure is necessary to meet imminent risk to the person's life or health (see Section 62).

9.8 Sterilisation

The law is similar with respect to sterilisation. The Guardianship Board can give consent if the person cannot. It must have regard to the wishes of the person involved and, if appropriate, hear the views of parents (see Section 61 *Guardianship and Administration Act 1993*).

The Board may consent to a sterilisation procedure if satisfied that it is therapeutically necessary or that:

- there is no likelihood of the person acquiring at any time the capacity to give effective consent;
- the person is physically capable of procreation;
- the person is, or is likely to be, sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or
- in the case of a woman, cessation of her menstrual cycle would be in her best interests and would be the only reasonably practicable way of dealing with the social, sanitary or other problems associated with her menstruation.

The Family Court can also make decisions about sterilisation under the Family Law Act.

10 Consent to Treatment

"Informed consent represents a recurrent feature of our civilisation; the respect for the autonomy of the individual human being with inherent dignity and value."

Justice Kirby

10.1 A Question of Capacity

Once again, a person consenting must understand the nature and consequences of the procedure to which they are consenting to give effective consent. To achieve this understanding, some information will need to be given to the patient. The Courts have held that if a patient has been informed in broad terms as to the nature and implications of the procedure, then, provided that the patient has the capacity to understand this explanation and consents, consent will be effective to withstand arguments of assault. Such a broad explanation, however, may not be sufficient to discount arguments of negligence if something goes wrong. The Courts have recognised that an action in negligence can be based on a failure to disclose risks of a procedure (see, for example, *FvR* (1983) 33 SASR (89) and *Rogers v Whitaker* (1992) 67 ALJR 47).

However, the major point to make is that many people with intellectual disability have the capacity to consent to treatment. It will be a matter of assessing the capacity of the person to understand the particular procedure. Obviously, the more complex the procedure, the more likely there will be capacity problems.

What happens, then, if the individual person does not have the capacity to consent? The answer is to be found in the *Consent to Medical Treatment and Palliative Care Act 1995* and the *Guardianship and Administration Act 1993*.

10.2 Consent to Medical Treatment and Palliative Care Act 1995

This Act clarifies the ability of a minor who is of or above the age of 16 to consent to medical or dental procedures. It also confirms the right of parents to give effective consent for children under 16, while recognising that in individual cases, such children may themselves be able to give effective consent.

Except in situations of imminent risk, consent by a child under 16 must be supported by the opinion of a doctor or dentist and further supported by another opinion (in writing) of a doctor or dentist, as the case may be that:

- (a) the child is capable of understanding the nature and consequence of the procedure and
- (b) the procedure is in the best interests of the health and well being of the minor (see Section 16).

The Act clarifies the right of doctors to act in emergencies without consent. Consent in such cases is deemed to have occurred (see Section 13). It also provides protection from criminal or civil liability in such cases, provided the procedure is carried out in good faith and without negligence (see Section 16).

10.3 Consent Provisions of the Guardianship and Administration Act 1993

The *Guardianship and Administration Act 1993* now provides for a guardian, if appointed, or a relative, to consent to treatment where the person involved cannot do so by reason of intellectual disability or mental illness (see Section 59). In other words, it recognises natural family systems ahead of concerns about due process.

A relative includes a spouse, parent, a person in loco parentis, a brother or sister over 18, or a son or daughter over 18 years of age.

Application can also be made to the Board for its consent, for example, where there is no relative or guardian, or there are concerns about their appropriateness to give consent.

As with the previous legislation, only the Board can consent to termination of pregnancy or sterilisation.

10.4 End of Life Decisions

The Consent to Treatment and Palliative Care Act provides for a person over 18 to appoint a medical agent with a medical power of attorney. This is particularly important when a person is no longer able to make decisions about treatment or withdrawal of treatment.

The Act also enables doctors to withdraw artificial life supports where the patient is in the terminal stage of a terminal illness with no prospect of recovery.

Many people with intellectual disability will not be able to utilise a medical power of attorney.

What is important is that they have carers or advocates to ensure that their rights are protected when end of life decisions are being made.

11 Contracts and Consumer Protection

If people with intellectual disability are to lead as normal lives as possible, they must, wherever possible, be free to manage their own affairs and enter their own legal transactions. At the same time, consumer protection legislation may be particularly relevant to a person with diminished capacity.

11.1 Capacity—the General Principle

The concept of capacity means that a person can make a legally enforceable decision if they understand the nature and consequences of their actions. It depends on the circumstances in each case and the nature of the transaction.

"The law does not prescribe any fixed standard...as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation."

Gibbons vs Wright
(1954) 91 CLR 437

11.2 Contracts

A contract is an agreement that is binding at law. A wide range of day-to-day activities involves the creation of a legal contract. The purchase of even the most trivial item from a shop, for example, involves the purchaser and the shop in a legal contract of sale. When a person with intellectual disability travels on a bus, they are also entering a contract and acquiring legal rights and liabilities no different from those of other members of the community.

Not all contracts are so simple, thus, the legal capacity to enter a contract varies with the type of transaction. A person may readily understand the nature of a sale of goods such as groceries, but may not be capable of comprehending a more complex transaction such as a mortgage or a lease.

A Court may set aside a contract if one party did not understand its nature and effect but only if the other party to the contract was aware, or should have been aware of the person's incapacity. The Courts try to protect both parties. If the other party, at the time of entering the contract, could not reasonably have known that the person with intellectual disability did not understand the nature and effect of the contract, then the contract remains valid and cannot be cancelled.

A person who lacks contractual capacity must pay a reasonable price for "necessaries" (ie goods and services suitable to the condition in life and needs of the person). These will include food, clothing, lodging and schooling.

Courts may grant remedies to a person with disability who has entered a transaction if there has been a misrepresentation or undue influence. The law, in fact, presumes that undue influence has occurred when the transaction benefits the dominant person in some relationships (eg doctor/patient, guardian/child, solicitor/client). Whilst such a presumption may not necessarily arise in the relationship between a care provider and a client, care providers should clearly be wary of entering beneficial transactions or taking monetary gifts from a client, in case allegations of undue influence arise.

11.3 Power of Administrator to Set Aside Contracts

A person with intellectual disability may well need an administrator to assist with their financial affairs. At the same time, the protection provided in this way should not inhibit the person from entering some transactions.

Section 42 of the *Guardianship and Administration Act 1993* reflects this balance.

Section 42 provides that:

- “(1) Subject to this section:
- (a) a disposition of property made by a person while his or her estate is subject to administration under this Division; or
 - (b) a contract entered into by a person while his or her estate is subject to administration under this Division,
- is voidable at the option of the administrator.
- (2) A transaction cannot be avoided by an administrator under subsection (1) if the other party to the transaction did not know and could not reasonably be expected to have known that the person with whom he or she dealt had a mental incapacity.
- (3) The Board may, by order, exempt a disposition of property or contract from the operation of this section if the Board is satisfied that to do so would be for the benefit of the protected person and that he or she has an adequate understanding of the nature of the transaction.”

11.4 Fair Trading

In the last 25 years, there have been many legislative initiatives in South Australia designed to protect consumers, including people with intellectual disability. They include legislation to:

- protect consumers in credit transactions;
- prevent unfair advertising;
- limit unordered goods and services;
- regulate door-to-door sales;
- protect against misrepresentation.

Many of these initiatives have been consolidated in the *Fair Trading Act 1987*. This Act provides that a number of consumer protection requirements must be satisfied in most contracts for goods or services. These requirements include a ten-day cooling off period. The Act regulates door-to-door trading practices and penalises the harassment or coercion of a consumer to enter a contract.

It also extends the protections of the Commonwealth *Trade Practices Act 1974*. For example, that Act already prevents corporations in trade or commerce from engaging in conduct that is unconscionable when supplying goods or services (see Section 52A).

The Court, in determining whether the conduct is unconscionable, is directed to factors including:

- the relative strengths of the bargaining positions of the corporation and consumer;
- whether the consumer was able to understand the contract documents;
- whether undue influence or pressure, or unfair tactics have occurred.

Clearly, such a provision has major significance for people with intellectual disability.

The South Australian *Fair Trading Act 1987* has an identical provision, but with application to individuals and not just corporations (see Section 57).

Like the *Trade Practices Act 1974*, the *Fair Trading Act 1987* prohibits the sending of unsolicited credit and debit cards (see Section 71).

11.5 Electronic Funds Transfer Systems

The impact of technological change and innovation on people with intellectual disability is a matter of particular concern.

To illustrate the kinds of problems that can arise, an IDSC client with mild intellectual disability, but without numeracy skills in dealing with large figures (he could subtract) and limited literacy skills, had a passbook savings account. With the passbook, the financial institution was able to monitor deposits and withdrawals.

However, the client was also given a card that accessed an automatic teller machine (ATM). He used this card to make a series of withdrawals, which left his account heavily overdrawn. The ATM did not prevent this overdraft.

Arguably, the financial institutions should have some responsibility to ascertain the level of skills of consumers, and there should be safeguards to protect individuals with limited understanding from financial ruin.

At the same time, it is difficult for banks. Applications for cards are often in writing. Banks need to avoid allegations of discrimination.

So far, the response has been the development at a Commonwealth level of guideline procedures to govern the relationship between the users and providers of electronic funds transfer systems. These guidelines include clear and unambiguous terms and conditions of use. They call for the clauses that deal with cardholders' liabilities and responsibilities to be clearly and simply stated and highlighted in the text.

11.6 Consumer Credit

The South Australian *Consumer Credit (South Australia) Act* 1995 is one of the major consumer protection initiatives. It adopts the Consumer Credit Code made initially in Queensland. Other States have also adopted this code. It sets out requirements for the terms and conditions of credit contracts, including the obligation that the terms and conditions upon which the credit is, or is to be provided should be set out in a clear and concise manner so that the obligations of the consumer are explicitly stated and readily ascertainable.

The Act also enables excessive credit charges or other terms that are harsh or unconscionable to be set aside. This may be particularly useful for people with disabilities who have been taken in by in-home selling techniques (usually via television) and then have obtained credit at the point of sale at exorbitant rates of interest.

The Act gives the Courts power to vary contracts on the grounds of hardship or because they are unjust.

11.7 Other Methods of Consumer Protection

Finally, the law is not always the easiest remedy for a consumer. A complaint to the Office of Consumer and Business Affairs will lead to an investigation of fraudulent or unfair commercial dealings. The gentle art of persuasion, not to mention the possibility of adverse publicity by the Commissioner for Consumer and Business Affairs, may lead to an informal solution to a consumer's problem. (Fair Trading Advisory Service, Office of Consumer and Business Affairs, phone: 8204 9777 and www.ocba.sa.gov.au)

12 Guardianship

12.1 Introduction

Guardianship is a term used to describe various forms of protection. It is a legal relationship that authorises one individual to become a substitute decision-maker for another. Its most common form is the natural guardianship relationship between parents and their children. A legally appointed guardian may be given authority to determine whether a person will live in the community or in an institution and what type of medical, dental, health and other services that person will receive. The most obvious example is a guardian appointed by the Guardianship Board.

Someone may also have the power to manage and control another's property and income. Such a person is called an "administrator" and is generally appointed under the *Guardianship and Administration Act 1993*. Such authorities can affect the lives of those whom they are protecting in significant ways.

12.2 Guardianship of Children

One of the most significant concerns of parents of children with intellectual disability is what will happen to the child after their (the parents') death.

It is possible for them to appoint a guardian or guardians of their children under the *Guardianship of Infants Act 1940* either by deed or Will (see Section 13 of the Act). This is an important way of ensuring that a person who cares for one's child can be given the formal authority to make decisions on the child's behalf.

If any problems arise with such an appointment, the Court may remove the guardian(s) so appointed and appoint another in place of the guardian(s) so removed if satisfied that it is for the welfare of the child (see Section 16).

In the absence of such an appointment, a relative, for example, could apply under the *Adoption Act 1988* to adopt the child. If this is not an option, the Minister, or some other appropriate person could be appointed guardian by the Youth Court pursuant to the *Children's Protection Act 1993*, if the Court is satisfied that the child is in need of care for any one of a number of reasons, including the fact that the guardian(s) of the child are dead, have abandoned the child, or cannot, after reasonable enquiries, be found.

12.3 Guardianship Board

The guardian of a child has no legal authority to act as such once the child turns 18 years of age, even though an adult with intellectual disability may need someone to make decision on their behalf.

The Guardianship Board has the important role of appointing guardians in relation to adults who need this assistance.

12.4 Mental Incapacity

The Guardianship Board can make orders in relation to a person with mental incapacity. "Mental incapacity" is defined in the *Guardianship and Administration Act 1993* as:

"the inability of a person to look after their own health, safety or welfare, or to manage their own affairs, as a result of:

- (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind; or
- (b) any physical illness or condition that renders the person unable to communicate their intentions to wishes."

12.5 Who can Apply to Board

Those who can apply to the Board for an order the *Guardianship and Administration Act 1993* include:

- the person involved;
- the Public Advocate;
- a relative or guardian;
- an administrator of the person's estate;
- any other person who satisfies the Board that they have a proper interest in the welfare of the person (social workers, doctors, friends, etc).

12.6 Guardianship Orders

The Board may place a person with mental incapacity under the limited or full guardianship of another person. For example, the guardian may be empowered to make decisions about medical treatment but not about where the person lives. Under the previous legislation, it was the Board itself that was the guardian.

The Public Advocate may be appointed as guardian or one of the guardians, but only if the Board considers that there is "no other suitable person who is willing or able".

The Board also has special powers (called "Section 32 Powers") to place and detain a protected person in a place other than an approved treatment centre (eg Strathmont Centre, nursing homes, etc) or to enforce medical treatment.

Any decision or order made by the Board must adhere to the principles of the Act (refer to 12.10 of this document).

12.7 The Public Advocate

The *Guardianship and Administration Act 1993* established the Office of Public Advocate. It has a number of functions including:

- "guardian of last resort";
- investigations, either on matters before the Board or on other matters where a situation may infringe on the rights of a person with a mental incapacity;
- the reviewing of services;
- identification of unmet needs;
- promotion of the rights and interests of persons with mental incapacity and their carers;
- advocacy (generally at a systems level);
- provision of advice on the Act and the powers under it in relation to people with mental incapacity;
- monitoring the administration of the Act and making recommendations to the Minister for legislative change.

12.8 Administration Orders

As discussed in more detail in the next chapter, the Act gives to the Board powers to make both limited and full administration orders to protect a person's financial interests.

12.9 Consent to Medical and Dental Treatment

As already indicated, the *Guardianship and Administration Act 1993* recognises the rights of relatives or guardians to consent to medical and dental treatment for a person who, by reason of their mental incapacity, is incapable of giving effective consent.

Only the Board can consent to sterilisation or termination of pregnancy (known as "prescribed treatment" under *the Guardianship and Administration Act 1993*) if the person themselves cannot consent to these because of their mental incapacity.

The Board can provide consent to routine treatments if necessary where conflict, dispute or disagreement arise concerning proposed treatment. Consent to treatment is not necessary in an emergency. The *Consent to Medical Treatment and Palliative Care Act 1995*, (Section 13) states:

"a medical practitioner may lawfully administer medical treatment to a person if:

- (a) the patient is incapable of consenting; and
- (b) the medical practitioner who administers the treatment is of the opinion that the treatment is necessary to meet an imminent risk to life or health and that opinion is supported by the written opinion of another medical practitioner who has personally examined the patient; and
- (c) the patient (if of or over 16 years of age) has not, to the best of the medical practitioner's knowledge, refused to consent to the treatment."

12.10 Principles of the Guardianship and Administration Act

Section 5 of the *Guardianship and Administration Act 1993* states:

"Where a guardian appointed under this Act, an administrator, the Public Advocate, the Board or any court or other person, body or authority makes any decision or order in relation to a person or a person's estate pursuant to his Act or pursuant to powers conferred by or under this Act:

- (a) consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; and
- (b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and

- (c) consideration must, in the case of the making or affirming of a guardianship or administration order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements; and
- (d) the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.”

12.11 Review of the Board's Orders

The Board must review the circumstances of people under guardianship or administration at intervals of not more than three years and, if they are detained pursuant to an order of the Board (Section 32), within six months of the making of the order and thereafter at intervals of not more than one year.

12.12 Appeals

The Guardianship and Administration Act (1993) establishes a right of appeal to the Administrative and Disciplinary Division of the District Court. An appeal lies to this Court from orders of the Guardianship Board for, or affirming the detention of, a person or relating to the giving of consent to sterilisation or termination.

Any appeals against other orders must be with the leave of the Board or the Court.

In some circumstances, there are further rights of appeal to the Supreme Court (see Section 70).

There are no rights of appeal against a refusal to grant leave.

12.13 Examples of Interventions by the Guardianship Board

- (a) A middle-aged woman with intellectual disability living in a hostel was taken out of the hostel by a relative and ill treated at home. The Board, on application, made a guardianship order to the Public Advocate for accommodation and health care.

The guardian placed the woman in the care of the hostel director and clarified the authority of the care providers to prevent her being taken and mistreated in the same fashion.

- (b) Allegations were made to the Board that a young woman with intellectual disability was being mistreated by her father. The Board appointed the young woman's cousin as guardian, who was able to intervene if necessary.
- (c) A young woman with intellectual disability was entitled to a legacy under her father's Will, but the executor was not willing to pay the money to her because of her inability to handle the funds. The woman was living with her mother, and the Board, being convinced of a caring relationship between the two, appointed the mother as administrator of her financial affairs so that she could apply the money to her daughter's needs.
- (d) A similar problem was considered by the Board in relation to a young man in a hostel. On this occasion, the Board appointed the Public Trustee as administrator, but directed that regular payments be made to the person to ensure that his needs were met.
- (e) A young woman, regarded as having mild intellectual disability and schizophrenia, had been cared for by her mother for many years. The mother could no longer cope and the Board appointed the woman's sister as her guardian to make alternative accommodation arrangements.
- (f) The Board heard a matter where it became clear that better coordinated support services would enable an couple with intellectual disability to keep their children and, with agreement from the services present, the case was dismissed as informal arrangements were adequate.

12.14 Enduring Guardian

The *Guardianship and Administration Act 1993* introduces the concept of an enduring guardian. Just as a person can appoint a person as their attorney to handle their financial affairs when necessary, it is now possible for a person who has the mental capacity to appoint another as their guardian to make decisions of a personal and medical nature when they are unable to do so (eg consent to medical treatment, where the person lives, and so on).

The Guardianship Board can revoke the appointment of enduring guardian if necessary.

A person appointing a guardian must have the capacity to do so at the time of the appointment. If not, then the Guardianship Board should be used to appoint a guardian.

For further information see the publications of the Office of the Public Advocate at www.opa.sa.gov.au

13 Administration of Financial Affairs

13.1 Introduction

Various schemes exist to protect people who lack the capacity to manage their own property or financial affairs. The Disability Support Pension can be paid to a nominee on behalf of the pensioner under the provisions of the Commonwealth *Social Security Act* 1991. A similar scheme exists through the Department of Veterans' Affairs for pensions handled by that department. Under the South Australian *Aged and Infirm Persons' Property Act* 1940, the Supreme Court can appoint a manager of the estate if a person is unable to do so. Most significantly, the Guardianship Board, as well as being concerned with personal welfare, has power to appoint an administrator to handle the financial affairs of a person who is unable to do so.

13.2 Guardianship Board's Powers

The Board can appoint an administrator to manage the estate of a person who is incapable of managing his or her own affairs. A person appointed administrator other than the Public Trustee must file statements of accounts relating to the administration of the estate with the Public Trustee.

The Guardianship Board can give administrators limited or full powers. This enables the administration to be more flexible and personally appropriate to the individual being protected. For example, a person may be left to manage their own pension, with the Public Trustee looking after investments and other property.

13.3 Powers of the Administrator

An administrator appointed by the Board has the powers set out in Section 39 of the *Guardianship and Administration Act* 1993. These include the power to:

- buy and sell property of the person protected;
- pay for proper accommodation;
- pay rates and taxes;
- institute and defend proceedings for the person protected;
- perform contracts entered into by the person protected.

When real estate is being bought or sold, the administrator must obtain the consent of the Guardianship Board.

An administrator also has power to set aside dispositions of property and contracts made by a person while their estate is subject to administration (see Section 42). This power obviously can be used to protect the person, while beneficial arrangements entered into by the person can be left standing.

13.4 Aged and Infirm Persons' Property Act 1940

As already mentioned, the Supreme Court can appoint a manager when a person is unable wholly or partially to manage his/her affairs by reason of age, disease or illness, physical or mental infirmity.

The Court's powers under this Act are particularly useful when it is considering damages claims involving someone who is brain damaged in an accident. It can, at the same time as it awards damages, make orders appointing a manager of the plaintiff's estate.

However, the procedure under the *Aged and Infirm Persons' Property Act 1940* involves more formality and the expense of legal assistance. It is not as appropriate as the Board procedure when decisions regarding personal restrictions because of mental illness or intellectual disability are also necessary. The Board can look at both personal and property issues at the same time.

13.5 Power of Attorney

Often, a person with intellectual disability will need assistance with their financial affairs. Where a person's finances cannot be managed informally, an application can be made to the Guardianship Board for an administrator to be appointed.

However, a Power of Attorney may be a possibility for some people with intellectual disability who understand what is involved. Where there is doubt as to whether someone can execute a Power of Attorney a specialist's opinion, such as a psychologist's, may be helpful. In essence, a Power of Attorney is an authority to one person to act in the place of another in financial decisions. A Power of Attorney can be given generally, or for specific purposes or transactions. For example, a person could authorise another to do banking or to sell a house.

If the person who grants the Power of Attorney later becomes incapable of understanding what has been granted, it used to be the case that the Power of Attorney became ineffective.

The *Powers of Attorney and Agency Act 1984* enables a donor to grant what is called an Enduring Power of Attorney - in other words, an authority that is exercisable notwithstanding the donor's subsequent legal capacity, or in the event of such incapacity.

The Power of Attorney is a dignified, one-to-one method by which a person can arrange for their affairs to be handled in whole or in part, and may be relevant to some people with intellectual disability.

For further information see the publications of the Office of the Public Advocate at www.opa.sa.gov.au

14 Wills

14.1 Will by a Person with Disability

It is often assumed that simply because a person has intellectual disability, they lack testamentary capacity. As with other issues, it is a matter of assessing capacity to understand the nature and consequences of what the person is doing in the particular situation.

Many people with intellectual disability can make a valid Will, especially a simple Will.

The person must:

- know what a Will is;
- realise in general terms the amount and type of property they are disposing of;
- be aware of their moral obligation to provide for certain people such as a spouse or any children;
- know and approve of the basic contents of the Will.

Preferably the Will should be simple and in plain language. However, it is not necessary that the person be able to read and write or understand the language of the Will.

The person drawing up the Will may need the opinion of a psychologist or other expert if there are doubts about the Will maker's capacity.

14.2 Precautions

Other precautions may also be directed by the Supreme Court or the Guardianship Board.

Both the Supreme Court and the Guardianship board, on appointing an administrator of a person's financial affairs, can direct that a Will by the person shall be made only after such precautions as the Court or Board thinks fit and a Will not made in accordance with those directions is ineffectual.

One such common direction is that the Will be made in the presence of and with the consent of the Public Trustee. It is important therefore to check whether such precautions have been directed. The person drawing up the Will should also keep comprehensive notes.

Where the Court or the Board has directed precautions, the Public Trustee should be used. Where there are no such directions, there is nothing to prevent a person, if capable, of making a Will through someone else, even where the Public Trustee administers a person's finances. That could include a solicitor or another trustee company. The Legal Services Commission and community legal centres do not prepare Wills. Preferably, the Will should be drawn up by someone experienced in both Will making and dealing with people with intellectual disability.

Where there is some doubt about whether a person can make a valid Will, they should be given the benefit of the doubt if at all possible, especially if the affairs of the person are simple and the chance of family dispute remote.

14.3 Will for Person Lacking Testamentary Capacity

Section 7(1) of the *Wills Act* 1936 states:

"The Court may, on application by any person made with the leave of the Court, make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of a will, on behalf of a person who lacks testamentary capacity."

This is an important provision that allows a Will to be made on behalf of a person who lacks testamentary capacity. It is particularly useful where there are undeserving relatives who may otherwise benefit, or where the person with the disability has a particular interest, for example, in animal welfare, and it makes sense to benefit an organisation of that nature.

14.4 Advantages of a Will

There are considerable advantages in having a Will.

Without a Will, the person's property will go to the person's next of kin, basically in the following order:

- spouse
- children
- parents
- brothers and sisters
- grandparents
- uncles and aunts.

Some of those family members may have provided little support to the person during their life.

If there are no relatives, the property goes to the State Government.

A Will also assists in the efficient administration of a person's estate after death.

Importantly, making a Will can be a matter of considerable dignity and satisfaction for a person with intellectual disability.

14.5 Will to Benefit a Person with Disability

Parents are often concerned about how to provide for their child with intellectual disability after their (the parents') death. This will often depend on a number of factors, including the general family situation, the complexity of the estate and the capacity of the child with disability. Expert advice will be important.

However, some general points can be made:

- Parents can appoint a guardian of their child by Will (see Section 13 *Guardianship of Infants Act 1940*). Guardianship under this Act will be effective only up to the age of 18.
- Property could be left directly to the child with disability and the executor of the Will could be left to apply to the Guardianship Board after the death of the Will maker if it is felt that an administrator of the child's property may be needed.
- Alternatively, if the Will maker wishes to benefit a child with disability but not leave assets directly to that child, the Will could create a trust. Under the trust, the trustee appointed would be obliged to use the property and its income for the benefit of the child with disability during his/her lifetime.

14.6 Trust Arrangement

Ideally, at least one trustee should have the following qualifications:

- Youth—the trustee may have to act for many years and should be considered likely to outlive the beneficiary.
- Business sense—some knowledge of investments, income tax and Social Security benefits.
- Independence from the family situation.
- Awareness of the needs of the person with intellectual disability and the support services that are available.

If no suitable person is available, then consideration would need to be made to appointing either the Public Trustee or a private trustee company. These organisations have the advantages of continuing existence and investment expertise. However, the possible problem with them is that they may be inflexible and out of touch with the needs of the individual beneficiaries. This may be overcome by including a direction in the Will for the trustees to consult with the person with intellectual disability, their advocate or some other person providing care or support for them.

It is also worth noting that any beneficiary has the right to take the executor/trustee to court if they fail to comply with the Will (see *Administration and Probate Act 1919*). They can ask the Court to reimburse monies, remove the trustees and order the trustees to provide information about the management of the estate.

15 Voting

Any person whose name is on either the State or Commonwealth electoral roll is entitled to vote in the respective elections.

The *Commonwealth Electoral Act 1918* Section 93(8) provides:

"A person who by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting...is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election."

The South Australian *Electoral Act 1985* has a similar provision, that no person who is of unsound mind shall be entitled to vote at any election of members of the House of Assembly (see Section 29).

Again, it is a matter of individual capacity. There may be people with intellectual disability who are capable of voting.

16 Intellectual Disability and the Criminal Law

16.1 Introduction

A person with intellectual disability is obliged to comply with the law like other citizens. No doubt that is how it should be, since participation in community life carries with it not only rights, but responsibilities. Nevertheless, people with intellectual disability are particularly vulnerable in the criminal legal system.

"Finding the Way", a study of the Criminal Justice System and persons with intellectual disability by the Victorian Office of the Public Advocate, quotes a number of ways in which intellectual disability may be associated with crime:

- A person with intellectual disability may be more easily caught in the act or left "holding the bag".
- A person with intellectual disability may be susceptible to being exploited as an accomplice by others.
- Intellectual disability may be associated with other organic disorders that result in impulsive and unpredictable behaviour.
- The harmless intentions of a person with intellectual disability may be misunderstood (eg in apparent loitering/voyeurism).
- A person with intellectual disability may express sexuality in a naive and socially unacceptable way.

In addition, a person with intellectual disability:

- may be vulnerable to "confessing" to a suspected offence;
- may be less able to explain apparently incriminating circumstances satisfactorily.

16.2 Recognising Intellectual Disability

It is not always easy to recognise that a person does not understand an issue. Often, it is a person with mild intellectual disability who comes into contact with the law. Many such people have no obvious characteristics that indicate diminished understanding.

There is a very real need for judges, police and lawyers to be able to recognise when a person lacks understanding and to act appropriately.

The following South Australian case studies indicate something of the dilemma.

- (1) A young man with no obvious signs of his impairment was apprehended by the police in relation to a break and enter

charge. It appeared that he was coerced by others to keep watch but may not have understood what they were doing. He did not run from the police and was apprehended while the real offenders escaped. He was charged with the offence, went through the court system and was fined. It was not until he advised the sheltered workshop where he was employed that he had to leave in order to earn sufficient money to pay his fine, that anyone was aware of the offence and its consequences. When questioned, his solicitor advised that he found him to be uncooperative, which the solicitor took to be a sign of guilt.

- (2) A long-term resident of an institution was, on several occasions, charged with shoplifting or petty theft. Being only mildly disabled, he understood what he was doing and was counselled against his action by institution staff. However, when he appeared in court, his performance as a person with a significant intellectual disability was so convincing that the magistrate dismissed the matter. The young man then returned home and was greeted by other residents as a hero, thereby undermining staff efforts.

16.3 Police and Intellectual Disability

The first contact an accused person has with the criminal legal system is usually with the police. With minor offences, and provided they are aware of the person's incapacity, the police may use their discretion and give a warning rather than charging the person, and take the person home.

The police can also arrange for voluntary admission to an appropriate institution or home.

A police officer can also apply to the Guardianship Board, which could, for example, appoint a guardian and place the person under detention.

Alternatively, the police may proceed to investigate the matter further. The problem then arises of ensuring that the person does not make an inappropriate confession. It seems from studies elsewhere that a person with diminished understanding of the issues is more likely to confess than other persons.

The police have responded to this problem by directing in their General Orders that if there is any doubt as to the level of comprehension of a person being interviewed, action should be taken to have a relative, friend or some other appropriate person present at the interview (General Order 3580).

16.4 Bail Agreements

Bail essentially involves an agreement entered into by a person charged with an offence under which conditions are set upon release from custody.

The South Australian *Bail Act* 1985 allows for a less formal application in view of an applicant's illiteracy, imperfect command of the English language, intellectual limitations or for any other proper reason.

Strictly speaking, however, a person with little or no understanding of the conditions of bail cannot enter a bail agreement.

People with intellectual disability may be disadvantaged by bail arrangements because they cannot enter them in the first place, or because they fail to comply with a particular condition through a lack of understanding. Financial limitations can also be a problem, as well as the unavailability of support services and accommodation.

The Bail (Mentally and Intellectually Impaired Offenders) Amendment Bill 2004 will, if passed, allow the release or bail of a person with intellectual disability into the care and custody of another person or organisation, even though the defendant does not understand the conditions of bail, where another person is responsible for ensuring the conditions of bail are met.

16.5 Magistrates Court Diversion Program

This program is designed to meet the needs of those individuals appearing on charges before the Magistrate Court who may have mental impairment. Mental impairment may include mental illness, intellectual disability, dementia, personality disorder, or acquired brain injury.

16.5.1 Key Features of the Magistrates Court Diversion Program

Generally, individuals will be referred to the diversion program at the time charges are laid. Referral to the program is flexible. Individuals may refer themselves or be referred by the police, solicitors, case managers, guardians, Magistrates, police prosecutors, Mental Health Services, etc.

Only summary or certain minor indictable offences are considered by the program and the Magistrate specifically assigned to the program. The Magistrate can refuse any person entry to the program.

Participation in the program is voluntary. The person or the person's guardian will be required to consent to participation in the court program and the release of information by treatment and service providers. If consent is not given to participate in the program, the person is referred to the normal court process where any defence may, of course, include the provisions of *Criminal Law Consolidation Act 1935* (S269 Part 8A).

The Diversion Program avoids prejudicing any future trial as:

- the program is voluntary;
- no admission of guilt is required;
- the objective evidence is not considered; and
- there is no investigation of whether or not mental impairment was present at the time of the alleged offence, or whether, as a consequence of the impairment, the person was mentally incompetent to commit the offence.

A statutory basis for this program will be provided by the Statute Amendment (Intervention Programs and Sentencing Procedures) Bill.

16.6 Mental Impairment

Until March 1996, the law of insanity in South Australia as it related to criminal responsibility was derived from the McNaughten Rules. These rules provided that to establish the defence of insanity, the accused must prove that, at the relevant time, they suffered from a disease of the mind, and as a result of that disease:

- (a) did not know the nature and quality of the act they were doing; or
- (b) did not know they were doing what was wrong.

The law changed in March 1996, when Part 8A (Mental Impairment) of the *Criminal Law Consolidation Act 1935* commenced. Under Part 8A, the McNaughten Rules have been broadened by making the defence of "mental incompetence" available to classes of people who previously had no defence under the McNaughten Rules.

This is achieved by Section 269C, which provides that:

"A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment:

- (a) does not know the nature and quality of the conduct; or

- (b) does not know that the conduct is wrong; or
- (c) is unable to control the conduct."

Previously, those persons found to be not guilty by reason of insanity were detained at the Governor's pleasure. They could apply for release on licence, but a person who was found not guilty of committing quite a minor offence by reason of insanity could be detained for years longer than if they had been convicted of the crime.

Now a person charged with a minor offence can be confident they will not be detained any longer than if they had been convicted of the offence. Section 269O(2) of the CLCA, provides that:

"If a court makes a supervision order, the court must fix a term (a "limiting term") equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment and supervision) that would, in the court's opinion, have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established."

Under the Act mental impairment includes:

- (a) a mental illness; or
- (b) an intellectual disability; or
- (c) a disability or impairment of the mind resulting from senility."

Orders can be custodial or non-custodial—again more flexible than the previous legislation. Many people with intellectual disability are ill equipped to deal with prisons or other custodial situations.

16.7 Behaviour Disorder and the "Revolving Door" Problem

It would be inappropriate to have a discussion on intellectual disability and the criminal law without mentioning the problems of people with behavioural disorders.

There is a small population of people for whom existing services or approaches have no answers. Commonly, they have a mild disability, are victims of institutionalisation and frequent offenders. They oscillate between the police, courts, Guardianship Board, psychiatric services, prison and services for people with intellectual disability.

They may also come under the scrutiny of an assessment panel that can advise on appropriate action.

There is clearly a need for various professionals, including the judiciary and health professionals, to know the options available for these people. There is a need for existing services and the criminal justice system to be flexible and adaptable to these individuals.

16.8 Use of Experts by Courts

It can be said in general that the judiciary remains unfamiliar with the distinction between psychiatric illness and intellectual disability. In determining sentencing options, judges or magistrates have traditionally relied upon reports from psychiatrists. In a case dealing with a person with intellectual disability, a psychological report is likely to provide the court with more appropriate information on the person's level of functioning and habilitation prospects.

Legislation regarding competence, fitness to stand trial or sentence options should steer the Courts in this direction as should disability services. IDSC, for example, has provided the Courts with lists of psychologists who can assist them.

16.9 A Person with Intellectual Disability as a Witness

It is not only as an offender that a person with intellectual disability may come into contact with the criminal justice system. It may be as a witness too. Intellectual disability is not a bar to a person being a witness in South Australia. If a person does not understand the obligation of an Oath, a judge may permit the person to give evidence without an Oath and without formality. Before the judge receives such evidence, it must be explained to the witness that they are required to be truthful (see Section 9 *Evidence Act 1929*).

The judge can also direct a jury as to the weight to be attached to such evidence.

16.10 As a Vulnerable Witness

Several States (including South Australia) have now legislated to provide Courts with a series of options for taking evidence from children or vulnerable witnesses. A vulnerable witness includes a person with intellectual disability.

The South Australian *Evidence (Vulnerable Witnesses) Amendment Act 1993* enables the court to order:

- evidence to be given outside the courtroom and transmitted to the courtroom by closed circuit television;
- a screen, partition or one-way glass to be placed to obscure the witness' view of a party to whom the evidence relates;
- that the witness be accompanied by a relative or friend to provide emotional support.

16.11 As a Juror

If a person's name is on the electoral roll then they are *prima facie* eligible for jury service. However, Section 13 of the *Juries Act 1927* also provides that a person is ineligible for service if they are mentally or physically unfit to carry out the duties of a juror.

Thus, a person with intellectual disability could be called upon for jury service but may face a challenge as to suitability.

16.12 A Person with Intellectual Disability as a Victim

A person with intellectual disability may come into contact with the criminal justice system as a victim and may be able to claim compensation for injury or loss under the *Criminal Injuries Compensation Act 1978*.

The Court may make an order for compensation at the time of sentencing if the offender has enough income or assets to pay.

The victim also has the right to sue the offender in the Civil Court. The victim would then require legal assistance.

There are some circumstances in which a victim of crime, or the near relative of someone who dies as a result of a crime, can claim money from the Government to go some way towards compensating for injury. The victim does not need to know who the offender was or wait for the offender to be convicted for the crime to apply for compensation. The claim must be made within three years of the offence or, in the case of a child victim, within three years of that person turning 18 years old. The claim must be made within one year if the victim of the offence died.

The Victim Support Service or the Law Society of South Australia can refer you to a lawyer practising in this area. Enquiries may also be directed to the Attorney General's Department, Criminal Injuries compensation (phone: 8207 1694), or the Courts Administration Authority, Criminal Injuries Applications (phone: 8204 0287).

Victim of Crime website: www.voc.sa.gov.au

16.13 Representing a Person with Intellectual Disability

There are some particular points that lawyers representing a person with intellectual disability need to address.

- Recognise they have a greater responsibility than with clients who do not have a disability.
- Not be legalistic about receiving instructions from the client.

- Be sure the client understands what is happening to the greatest extent possible.
- Avoid leading questions that put answers in the client's mouth;
- Be thorough in obtaining information about what actually happened, especially where the client has communication problems.
- Find out whether a confession is voluntary.
- Determine the extent of the disability with the service agency assisting the client or through psychological assessment.
- Be aware of the options of pleading mental incompetence to stand trial.
- Be aware of the Magistrates Court Diversion Program.
- Seek advice from the relevant service agency as to services that may be able to assist the client.
- Be aware of the powers of the Guardianship Board and its role as an alternative to the criminal justice system.

17 Duty of Care

Care providers should be aware of their legal duties to people with intellectual disability. Legal action against care providers is not frequent, although as the awareness of the legal rights of people with disabilities increases, those actions may also increase. It is, however, really more a question of respecting the individual dignity of those for whom care is being provided.

The fundamental duty owed by a care provider to a client is the duty of care. The law itself is not that complex, but its interpretation and application in particular situations can be. Just as the law reflects the values and ethics of society, its interpretation and application will reflect the values of care providers trying to apply it. Industry guidelines, protocols, standards, etc developed to reflect those practice values can in turn influence decisions by courts in individual cases and therefore the development of the law itself.

17.1 Elements of the Law

Duty of care is part of the law of negligence, developed by the Courts as a means of compensating someone injured by another. For a person (plaintiff) to sue another (defendant) successfully in negligence, they must show that:

- the defendant owes a duty of care to the plaintiff;
- the defendant has breached that duty by failing to take reasonable care;
- the plaintiff has suffered loss or damage;
- the breach of duty was the direct or proximate cause of the damage.

17.2 Some General Points

A duty of care of one to another arises when it is reasonably foreseeable that the negligence of one will affect the other. Clearly, a care provider owes a duty of care to those being cared for.

If the care provider fails in that duty and a client suffers injury or loss as a reasonably foreseeable consequence, the care provider may be sued in negligence and found liable for monetary compensation.

That duty is not an absolute one; it is a duty to take reasonable care. A care provider would be expected to show the skill proficiency of a competent worker in the situation.

The *Civil Liability Act 1936* (formerly the Wrongs Act 1936) now provides that a person will only be negligent for failing to take precautions against a risk of harm if the risk is not insignificant. In determining whether precautions should have been taken, the Court must take into account a number of factors, including the burden of taking precautions and the social utility of the activity that creates the risk of harm.

Professional standards and protocols will be important guides to the Courts as to whether negligence has occurred. although it is important to realise that the Courts reserve the right to say whether or not negligence has occurred.

Someone working with a person with intellectual disability would be expected to take into account the vulnerabilities and idiosyncrasies of that person. Such a person may well require more care than a person without a disability.

17.3 Examples of Negligence

Some examples are easy to imagine:

- Failing to supervise children with intellectual disability on an outing—one gets lost and breaks a leg in a creek.
- Careless administration of the wrong medicine, causing illness.
- Failing to check the temperature of a bath which scalds a resident being bathed.

17.4 Protection and Dignity of Risk

People with intellectual disability may to some degree be vulnerable to risks to their personal safety and need protection. At the same time, they need the opportunity for self-determination, to develop skills, enjoy valued social roles and be included in the life of the community. They will need the least restrictive alternatives and the dignity of some risk wherever possible.

Fulfilling a duty of care to clients with intellectual disability can involve getting the balance right.

17.5 Short-Term and Long-Term Restrictions

It seems clear that the Courts will respect the actions of a care provider in preventing a client coming to harm or harming someone else. Indeed, it is clearly part of a care provider's duty of care to do so.

For example:

- preventing a person from running across a busy road without taking care;
- breaking up a fight and restraining a person while they calm down;
- persuading a client not to leave their home.

However, a duty of care does not permit actions that are otherwise unlawful.

It is doubtful whether by itself it permits, for example:

- restraining a person involved in a fight by using excessive force;
- preventing someone from leaving their home on a long-term basis;
- using chemical restraint except in an emergency;
- confining someone to a chair;
- long-term behaviour modification by use of seclusion;
- restraint to give oral hygiene.

These actions could constitute assault or false imprisonment.

17.6 Assault and False Imprisonment

The Courts define assault as intentionally creating in another person an apprehension of imminent harmful or offensive contact. A care provider who threatens to hit a resident who is refusing to eat their lunch is technically committing an assault. If the care provider then hits the resident, both assault and battery occur.

Assault is the term generally used to describe both assault and battery. Assault is not only a civil wrong for which a person can be sued; it is also an offence.

The action for false imprisonment protects a person against total restraint of movement that is intentional and without lawful justification and which involves either actual confinement or preventing the person from leaving.

17.7 Clarifications by the Guardianship Board

The Guardianship Board can clarify the authority of care providers to some extent. In particular, under Section 32 *Guardianship and Administration Act 1993*, the Board can make a detention order (formerly custody order) which entitles a care provider to use reasonable force to ensure proper medical treatment, day-to-day care and wellbeing and detention.

17.8 Dignity of Risk can Involve More Care not Less

The duty of care of a care provider is sometimes seen as being in conflict with giving someone the dignity of risk. In fact, promoting dignity of risk can involve more care, not less. It is not simply a matter of allowing a person being cared for to "go free". For example, in order for a person with intellectual disability to travel to the city by public transport without supervision, a care provider may have to provide a great deal of initial planning and training. Group home living may involve careful procedures for the provision of medication, and so on.

In planning activities, care providers may find it helpful to consider:

- the wishes of the person and their carer(s);
- the likelihood and extent of foreseeable benefits;
- any special considerations in relation to the risks of the proposed activity and in relation to the people undertaking the activity (eg protective helmets, the need for one-to-one supervision);
- the level of physical and mental capacity of those participating in the proposed activity;
- the provision of adequate information to the potential participant(s) about the nature, including the risks, of the proposed activity;
- standard safety practices;
- any advice or directives issued by the employer and/or any relevant government body.

Precautions taken should be documented.

Legal consequences are not common and people with intellectual disability should not be denied the adventures of life. Taking steps like these will ensure they have proper care as well.

17.9 Keep Good Records

Good records are part of a reasonable standard of care. A number of points can be made:

- Records and reports should be contemporaneous.
- They should be objective.
- They should be legible and clear.
- Errors should not be obliterated.
- Reports should not be re-written.
- Reports should not be written or signed on behalf of another person.
- Good records can be a defence to claims of negligence.

17.10 Risk Forms and Liability

Organisations sometimes use risk assessment forms to cover themselves when clients go to activities. Essentially, they ask parents or carers to promise not to make a legal claim if their son or daughter, whether adult or not, is injured in any way and to indemnify the agency against any claim arising.

The Court has tended to construe these forms narrowly against the agency relying upon them. Ideally parents and carers should also know the risks involved in the activities for the forms to be effective.

17.11 Expressions of Regret

Section 39 of the *Civil Liability Act 1936* now provides that no admission of liability or fault can be inferred from the fact that the person or agency being sued expressed regret for the incident out of which the legal action arose.

This is an important provision that allows agencies and clients or carers to deal with the trauma of client injury in a conciliatory manner.

17.12 Vicarious Liability and the Civil Liability Act 1936

It is important to appreciate that an employer is liable for the negligence of his or her employee when committed in the course of the employment. It used to be the case that the courts, given the circumstances, would permit an employer to seek an indemnity or contribution from the employee who had caused the vicarious liability.

Section 27C of the *Civil Liability Act 1936* is an important South Australian provision that now forbids that practice. It also provides that while an employer must indemnify the employee for any liability, the employer can do so by making use of any policy of indemnity, which the employee has.

Because an employer can do this, it is probably now more important from an employer's point of view that an employee has insurance than it is for the employee.

Of course, if an employee also does private work outside of their employment, their employer will not be vicariously liable for mistakes during that private work, and the employee will need their own professional indemnity insurance.

The concept of vicarious liability and the *Civil Liability Act 1936* certainly provides considerable reassurance to the employed care provider, although negligence can lead to other consequences including disciplinary action by an employer or professional registration board.

In addition, the *Civil Liability Act 1936* also provides that the employee is not protected from the employer seeking contribution in the case of serious or wilful misconduct (eg an attack by a staff member on a resident).

17.13 Volunteers' Protection from Liability

The *Volunteers Protection Act 2001* now gives similar protection for volunteers. It protects a volunteer community worker for a community organisation from liability for acts or omissions committed in good faith and without recklessness. The community organisation carries the liability in such cases.

There are a number of exceptions where the volunteer is not protected including:

- being drug impaired;
- defamation;
- acting outside the scope of activities authorised;
- acting contrary to instructions.

17.14 Duty of Care and Occupational Health and Safety

Employers owe a duty of care to their workers as well as their clients. The *Occupational Health, Safety and Welfare Act 1996* gives statutory force and detail to this duty.

17.15 Ill Treatment or Wilful Neglect

A care provider can be sued for negligence. It is also an offence under the *Guardianship and Administration Act 1993* if the conduct of a person with the oversight, care and control of a person with mental incapacity amounts to ill treatment or wilful neglect.

Such conduct is punishable by a penalty not exceeding \$2,000 or imprisonment up to one year.

18 Confidentiality and Privacy

18.1 Introduction

Care providers owe a duty of confidentiality to their clients in addition to their duty of care.

At the same time, people with disabilities increasingly are receiving assistance from a range of agencies and care providers who are able to share information very readily using today's technology.

The courts have established some relatively clear rules as to when disclosure of confidential information is permitted. The difficulty is in interpreting their application.

Privacy laws have been passed by the Commonwealth and some States to protect the privacy of personal information.

18.2 Proper Disclosure

A person who has received information in confidence shall not disclose it unless:

- The disclosure is made with the consent of the person or his/her guardian;
- The disclosure is made under compulsion of law (eg subpoena or mandatory reporting of child abuse);
- The public interest requires it (eg assisting police in the investigation of a serious crime);
- A duty of care arises to warn someone of a risk posed by the person;
- The interests of the person require disclosure. The scope of this exception is not entirely clear but as a practical matter recognises that sharing of information within an agency and with other agencies in a person's life is necessary.

18.3 Remedies for Breach of Confidentiality

If there is a breach of the common law duty of confidentiality, the person affected or someone on their behalf can sue for damages for any loss or damage suffered because of the breach, or seek an injunction to prevent further disclosures.

18.4 Offences Relating to Confidentiality

Section 64 of the *South Australian Health Commission Act 1976* makes it an offence for an employee of the Commission, an incorporated hospital or health centre to divulge confidential information relating to clients except as authorised by their employer or by law. The Intellectual Disability Services Council Inc (IDSC) is an organisation incorporated under this Act.

18.5 National Privacy Principles

The Commonwealth *Privacy Act 1988* also establishes a number of rules to protect the privacy of personal information held by the Commonwealth Government.

The Act established National Privacy Principles that apply to the non-government sector. This includes non-government disability organisations operating in South Australia.

The principles essentially build on the confidentiality rules developed by the Courts.

They allow sharing of information between organisations for directly related purposes where the individual would reasonably expect the organisation to disclose. In addition, disclosure can occur:

- with the consent of the individual;
- when required or authorised by law;
- to carers responsible for the individual who is unable to give consent, where necessary for care or treatment or for compassionate reasons;
- to prevent a serious threat to an individual, public health or safety.

The principles are also important in establishing the right of individuals to have access to information held about them to correct errors.

The Principles do not apply to State agencies. The Department of Human Services has developed a Code of Fair Information Practice that reflects the Principles and applies to the Disability Services Office and IDSC.

For further information on the National Privacy Principles: www.privacy.gov.au/publications.

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Information for victims of crime: www.voc.sa.gov.au

20 Acts Referred to in Handbook

Many Acts of Parliament touch upon the lives of people with intellectual disability as the following list shows:

- *Administration and Probate Act 1919*
- *Adoption Act 1988*
- *Aged and Infirm Persons' Property Act 1940*
- *Bail Act 1985*
- *Children's Protection Act 1993*
- *Civil Liability Act 1936*
- *Commonwealth Electoral Act 1918*
- *Consent to Medical Treatment and Palliative Care Act 1995*
- *Constitution Act 1934*
- *Consumer Credit Act 1995 (South Australia)*
- *Criminal Law Consolidation Act 1935*
- *Development Act 1993*
- *Disability Discrimination Act 1992 (Commonwealth)*
- *Disability Services Act 1986 (Commonwealth)*
- *Disability Services Act 1993*
- *Education Act 1972*
- *Environment, Resources and Development Court Act 1993*
- *Equal Opportunity Act 1984*
- *Evidence Act 1929*
- *Fair Trading Act 1987*
- *Firearms Act 1977*
- *Guardianship and Administration Act 1993*
- *Guardianship of Infants Act 1940*
- *Human Rights and Equal Opportunity Commission Act 1986 (Commonwealth)*
- *Industrial and Employee Relations Act 1994*
- *Juries Act 1927*
- *Marriage Act 1961 (Commonwealth)*
- *Mental Health Act 1993*
- *Motor Vehicles Act 1959*
- *National Health Act 1953 (Commonwealth)*

- *Occupational Health, Safety and Welfare Act 1986*
- *Powers of Attorney and Agency Act 1984*
- *Privacy Act 1988 (Commonwealth)*
- *Social Security Act 1991 (Commonwealth)*
- *South Australian Health Commission Act 1976*
- *Supported Residential Facilities Act 1992*
- *Trade Practices Act 1974 (Commonwealth)*
- *Volunteers Protection Act 2001*
- *Wills Act 1936*
- *Workers Rehabilitation and Compensation Act 1986*

Appendix A

Declaration on the Rights of Mentally Retarded Persons

The General Assembly,

Mindful of the pledge of the States Members of the United Nations under the Charter to take joint and separate action in cooperation with the Organisation to promote higher standards of living, full employment and conditions of economic and social progress and development.

Re-affirming faith in human rights and fundamental freedoms and in the principles of peace, of the dignity and worth of human persons and of social justice proclaimed in the Charter.

Recalling the principles of the Universal Declaration of Human Rights, the International Covenants of Human Rights, the Declaration of the Rights of the Child and the standards already set for social progress in the constitutions, conventions, recommendations and resolutions of the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organisation, the World Health Organisation, the United Nations Children's Fund and other organisations concerned.

Emphasising that the Declaration of Social Progress and Development has proclaimed the necessity of protecting the rights and assuring the welfare and rehabilitation of the physically and mentally disadvantaged.

Bearing in mind the necessity of assisting mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life.

Aware that certain countries, at their present stage of development, can devote only limited efforts to this end.

Proclaims this Declaration on the Rights of Mentally Retarded Persons and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights:

1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.

4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well being and interests.
6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the rights of appeal to higher authorities.

2027 Plenary Meeting
20 December 1971

Appendix B

Declaration of the Rights of Disabled Persons

The General Assembly,

Mindful of the pledge made by Member States, under the Charter of the United Nations, to take joint and separate action in cooperation with the Organisation to promote higher standards of living, full employment and conditions of economic and social progress and development.

Re-affirming its faith in human rights and fundamental freedoms and in the principles of peace, of the dignity and worth of human persons and of social justice proclaimed in the Charter.

Recalling the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Declaration of the Rights of the Child and the Declaration on the Rights of Mentally Retarded Persons, as well as the standards already set for social progress in the constitutions, conventions, recommendations and resolutions of the International Labour Organisation, the United National Educational, Scientific and Cultural Organisation, the World Health Organisation, the United Nations Children's Fund and other organisations concerned.

Recalling also Economic and Social Council Resolution 1921 (LVIII) of 6th May 1975 on the prevention of disability and the rehabilitation of disabled persons.

Emphasising that the Declaration on Social Progress and Development has proclaimed the necessity of protecting the rights and assuring the welfare and rehabilitation of the physically and mentally disadvantaged.

Bearing in mind the necessity of preventing physical and mental disabilities and of assisting disabled persons to develop their abilities in the most varied fields of activities and of promoting their integration as far as possible in normal life.

Aware that certain countries, at their present state of development, can devote only limited efforts to this end.

Proclaims this Declaration on the Rights of Disabled Persons and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights:

1. The term "disabled person" means any person unable to ensure by himself or herself, wholly or partly, the necessities of normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities.
2. Disabled persons shall enjoy all the rights set forth in the Declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family.

3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.
4. Disabled persons have the same civil and political rights as other human beings; Paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of those rights for mentally disabled persons.
5. Disabled persons are entitled to the measures designed to enable them to become as self reliant as possible.
6. Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances, to medical social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration.
7. Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.
8. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.
9. Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreation activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom.

Appendix C

The National Standards for Disability Services

The *National Standards for Disability Services* are made by the Minister under the Commonwealth *Disability Services Act 1986*. As with regulations, they must be tabled in the Commonwealth Parliament and can be disallowed by either House of Parliament.

Compliance with them is commonly required in Commonwealth/State funding agreements and in funding and service agreements with service agencies.

The Standards were first developed in 1993. Standards 1-12 below reflect changes introduced by the Disability Services (Disability Employment and Rehabilitation Program) Standards, 2002.

Standard 1 Service Access

Each consumer seeking a service has access to a service on the basis of relative need and available resources.

Standard 2 Individual Needs

Each person with a disability receives a service which is designed to meet, in the least restrictive way, his or her individual needs and personal goals.

Standard 3 Decision Making and Choice

Each person with a disability has the opportunity to participate as fully as possible in making decisions about the events and activities of his or her daily life in relation to the services he or she receives.

Standard 4 Privacy, Dignity and Confidentiality

Each consumer's right to privacy, dignity and confidentiality in all aspects of his or her life is recognised and respected.

Standard 5 Participation and Integration

Each person with a disability is supported and encouraged to participate and be involved in the life of the community.

Standard 6 Valued Status

Each person with a disability has the opportunity to develop and maintain skills and to participate in activities that enable him or her to achieve valued roles in the community.

Standard 7 Complaints and Disputes

Each consumer is free to raise and have resolved any complaints or disputes he or she may have regarding the agency or the service.

Standard 8 Service Management

Each agency adopts sound management practices which maximise outcomes for consumers.

Standard 9 Employment Conditions

Each person with a disability enjoys working conditions comparable to those of the general workforce.

Standard 10 Service Recipient Training and support

The employment opportunities of each person with a disability are optimised by effective and relevant training and support.

Standard 11 Staff Recruitment, Employment and Training Development

Each person employed to deliver services to a person with a disability has relevant skills and competencies.

Standard 12 Protection of Human Rights and Freedom from Abuse

Each agency acts to prevent abuse and neglect and to uphold the legal and human rights of service recipients.

The website for the Australian National Disability Services Abuse and Neglect Hotline is: www.disabilityhotline.org