

By Dr Dinesh Palipana

TURNING DISABILITY into ABILITY

**How considered legal
representation can reduce
the effects of disability**

As at 2015, 18.3 per cent of Australians reported having a disability.¹ The economic² and personal cost³ of disability is high. However, the impact of even the most severe disabilities can be mitigated through effective advocacy, access to services, technology, and community participation.





Access to mindful legal advocates ensures the best outcomes for people with disability.⁴ Understanding disability is therefore important for all legal practitioners who are likely at some time to represent members of this significant proportion of the Australian population.

PHYSICAL AND PSYCHOLOGICAL EFFECTS OF DISABILITY

The spectrum of disabilities is broad. Similarly, the physical and psychological effects of having a disability vary widely. Effects can be both visible and invisible and range from mild to life-threatening.

As an example, the most visible effect of a spinal cord injury is paralysis. However, one significant but invisible effect is that people with spinal cord injury often cannot regulate their body temperature,⁵ making them vulnerable to critical changes in their body temperature. Another invisible effect of spinal cord injury is cardiovascular dysfunction, which can have fatal consequences. The impact of spinal cord injury as a condition can therefore be very wide-ranging.⁶

People with any disability are at a higher risk of depression.⁷ In people with a traumatic brain injury, for example, the incidence of depression is estimated to be between 17 to 61 per cent.⁸ Depression, in turn, can lead to a further loss of function generally and in some cases, suicide.

Disabilities can also be entirely invisible. People with invisible disabilities, both physical and psychological, may experience significant difficulties in navigating society.⁹

Comprehensive medical and allied health input from experienced specialised professionals can reveal the extent to which a disability can physically affect a person. Regular and ongoing monitoring is important, as disabilities can change over time. However, any external input should be considered by the lawyer in the context of a detailed discussion with the client. This is because of the real possibility of error in external reports relating to a client's state. The client is best equipped to understand and explain the extent and impact of the physical aspect of their disability.

When consulting with a client who has a disability, a number of considerations may facilitate a comfortable and constructive interaction. That is:

- having a detailed preliminary conversation with the client about the nature and specifics of their disability;
- choosing an appropriate environment which is accessible and has ambient features that are comfortable for the client;
- setting meetings at a time that is convenient for the client, which may be later in the day or after hours;
- ensuring that suitable transport arrangements, which may include accessible taxis, are in place;
- providing appropriate, accessible technology (including the means of signing documents, for example); and
- allowing space and input for carers and family.

PERSONAL EFFECTS OF DISABILITY

The evidence on relationship breakdowns for people with disabilities is conflicted. Nonetheless, they are more likely to remain single and face disadvantages in forming families.¹⁰

Additionally, 2.7 million Australians who identify as unpaid carers¹¹ add to the mix of potentially complex interpersonal dynamics. These dynamics can lead to the abuse of people with disability. Abuse of all kinds suffered by people with disability is reported to be between 26 and 90 per cent.¹² Avoidable deaths in institutions due to poor care has also been a concern.¹³

Forty-one to 61 per cent of people with disability rate their health as 'poor' or 'fair' compared with 6.5 per cent of those without a disability.¹⁴ Access to healthcare can be limited for socio-economic and physical reasons. Due to the myriad effects of disability on a person, life expectancy for this group is reduced.¹⁵

These health and social challenges contribute to a high prevalence of psychiatric comorbidity in people with disability. Suicidal ideation is common.¹⁶ In the extreme, there is a risk that people with disabilities can meet the criteria for assisted dying even if they choose not to go down that path.¹⁷ In a person who relies on mechanical ventilation, for example, the removal of a ventilator most often creates a terminal illness.¹⁸ Therefore, the potential for people with disabilities to access voluntary euthanasia locally remains contentious.¹⁹ With little precedent in Australia, there is no current legal basis to prevent people from travelling overseas for voluntary euthanasia based on the UK's case law.²⁰ This environment creates a significant ethical question for the lawyer, both in regards to their client and society.

Considering the numerous personal effects of a disability, the legal service requirements of clients in this group are clearly complex.

In addition to the factors involved in a standard personal injury situation, for example, a responsible legal advocate may need to consider estate planning, family planning, and other means of protecting and advocating for their client. This is particularly the case when a client may have a significant financial claim as a result of an injury, as the risk of their financial exploitation is magnified.²¹

In the medical profession, for example, parts of a child's history should be revisited alone with an independent chaperone and no one else present. This is because important details such as recreational drug use may be withheld when parents are present. While it is important to involve a client's support network, where possible, conversations alone may reveal otherwise hidden, critical information. It is important to highlight the confidentiality of any such discussions.

EMPLOYMENT AND EDUCATION

Employment discrimination against people with disability is high. A report by PwC estimates that \$50 billion in gross domestic product could be added to Australia's economy by 2050 if the employment of people with disability is improved.²²

As at 2017, the Australian Human Rights Commission (AHRC) had received more complaints of disability discrimination than any other form of discrimination. Most

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of these complaints related to employment discrimination. In 2017, 33 per cent of the total complaints lodged under the *Disability Discrimination Act 1992* (Cth) concerned employment.²³

Low participation in the labour force results in reduced income and disadvantage.²⁴ As a result, 45 per cent of people with disability live near the poverty line. This is 2.5 times the poverty rate experienced by the general population.²⁵ In addition to the extra financial burden caused by a disability, access to financial services is limited.²⁶

Legal protection for people with disabilities seeking employment remains ambiguous. In *Chivers v State of Queensland (Queensland Health)*,²⁷ a registered nurse was unable to perform night shifts due to the effects of a traumatic brain injury. The Queensland Court of Appeal held that Queensland Health was allowed to discriminate against the nurse on the basis that working night shifts is a genuine occupational requirement. In this case, the nurse was an appellant who was ordered to pay costs.

Accessing education is also problematic for people with disability.²⁸ For example, the participation of people with disability in medicine has been restricted since 2015, when the Medical Deans of Australia and New Zealand issued guidelines with strict physical and psychological requirements for medical education applicants.²⁹

By contrast, the USA³⁰ and the UK³¹ have taken steps to include people with disability in medical education. The different approaches may be a result of stronger legal frameworks protecting the rights of people with disabilities in these countries. In the USA, the *Americans with Disabilities Act* affords strong protection to its citizens.³² In the UK, the *Human Rights Act*³³ and the European Convention on Human Rights and Fundamental Freedoms³⁴ offer protection.

In considering the legal needs of a person with a disability, education and employment should be considered from two perspectives.

Firstly, taking into account past trends and more recent evidence, the prospects of future education and employment for people with disability may be dire.³⁵ When considering

the value of a claim, these factors will need to be taken into account.

Secondly, there is a real need for effective advocacy to protect the rights to employment and education of those with disabilities. Advocacy may need to extend outside of the legal arena. Organisations such as JobAccess and the National Disability Insurance Scheme (NDIS) offer various solutions to improve employment and education prospects for those with disabilities. For example, JobAccess will make workplace modifications and fund accessible technology where required. Often this not only benefits the individual concerned, but also the organisation as a whole. The NDIS has a number of means of facilitating employment and education. As general awareness of these services is not always high, the lawyer may be able to guide a client in accessing them.

For some employers and educators, a broad external community voice may be necessary to encourage an inclusive approach. This is because Australian legal frameworks still need to be strengthened to ensure that people with disability can participate in their communities.³⁶ Therefore, the role of lawyers is not limited to advocating for the individual, but includes working towards reforming the law.

NAVIGATING THE COMMUNITY

Between 2014 and 2015, the AHRC received 323 complaints about disability discrimination in relation to the provision of goods, services, and facilities.³⁷ A number of these complaints related to the physical access to premises.

Challenges in navigating the community can include accessing the requirements of daily living. For example, a person with a visual impairment complained to the AHRC that their utility company did not provide a bill in an accessible format.³⁸

In *Mulligan v Virgin Australia Airlines*,³⁹ the Federal Court of Australia found that Virgin Australia had breached discrimination legislation when it declined the availability of a personally trained assistance dog to a passenger.

Consciousness of the rights of people with disabilities in Australia is generally low.⁴⁰ It is important for lawyers to

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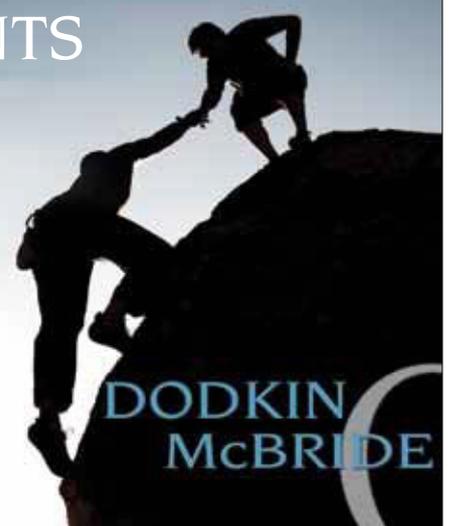
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ensure that their clients' rights are adequately protected in all situations, even those that may seem trivial. Many matters may be promptly settled, but building the body of Australian case law has the potential to further shape the local environment and cultural norms as it has in the US.⁴¹

ADAPTIVE TECHNOLOGY

There is a vast range of constantly changing technology that enables people with disability to become more functional.⁴²

For people with mobility problems, standing wheelchairs and exoskeletons are becoming available; albeit at a high cost. People with speech impediments can access muscle-controlled communication devices that enable them to express themselves.

The cost of these devices is often offset by the productivity generated by enabling the person to participate in the community. More importantly, accessing adaptive technologies can help people to experience personal satisfaction from the increase in their functions.⁴³

Today's available technologies are advancing quickly. Provisions to access future technologies by people with disabilities can assist in extending their function beyond what is possible today.

However, given that not all of these technologies are covered by existing funding mechanisms, a person may not be able to access life-changing adaptive technology without meaningful advocacy. A comprehensive suite of assistive technology should be considered when considering the needs of a client with disability, particularly in relation to personal injury claims.

MEDICAL RESEARCH

An increasing amount of medical research has the potential to improve function in various disabilities.

Participating in research may have ethical implications. For example, gaining consent for participation in clinical trials by people with disabilities involving cognitive deficits is challenging.⁴⁴ These situations can create a risk that people with disabilities may be exploited for medical research. There are concerns surrounding vulnerable population groups disregarding risks; accepting monetary benefits to offset risks; and participating in high-risk trials because there are no alternatives available.⁴⁵

At the same time, there is evidence that people with disability are marginalised from accessing potentially beneficial medical research.⁴⁶

When advocating for a client who is considering participation in medical research, a palpable tension between paternalism, beneficence, non-maleficence, justice and autonomy exists. Enabling meaningful participation in medical research, however, can lead to improvements in



health and emotional well-being, as well as adding to a valuable body of scientific evidence.⁴⁷

CONCLUSIONS

People with disabilities face complex challenges when navigating life. Whether dealing with an acquired injury or one from birth, their lawyers can play a critical role in enabling them to navigate these challenges successfully.

Achieving a successful outcome for a client requires a multidisciplinary team of legal, medical, allied health, and other service professionals.

Most importantly, given the diversity of people with disability, the lawyer must take a person-centred approach. Person-centred care is a concept that is accepted within the healthcare professions, and is expanding into disability services.⁴⁸ It is also important and relevant in the legal profession, particularly due to the vast variability even within the types of disability.

The lawyer's role, however, does not stop at the individual. The lawyer has a responsibility to advocate broadly for structural changes for people with disability. Enabling the participation of people with disability in the community has significant benefits for Australia as a whole. ■

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Dr Dinesh Palipana is a senior resident medical officer in the emergency department at the Gold Coast University Hospital. He is a lecturer at the Griffith University's school of medicine, an adjunct research fellow at the Menzies Health Institute of Queensland and a member of the Ambassador Council at the Hopkins Centre for Resilience and Rehabilitation. EMAIL d.palipana@griffith.edu.au.

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