

“The Reality of Rights”: People with an Intellectual Disability and the Criminal Justice System

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Introduction

Any discussion of human rights and the criminal justice system would be incomplete without consideration of one of the most vulnerable and disadvantaged groups involved in the system, people with an intellectual disability. Owing to their significantly below average intelligence, their deficits in areas such as communication skills, and their frequent experiences of poverty, discrimination and segregation, people with an intellectual disability are likely to experience difficulties in obtaining a fair trial or, in the case of victims or witnesses, in having their complaint understood and believed. In our adversary system of justice, it is easy to imagine the disparity, and potential unfairness, involved in the cross-examination of a witness with an intellectual disability by an experienced criminal barrister. Defence concerns about placing an accused with an intellectual disability in the witness box are therefore readily understandable. Yet, following the abolition of the dock statement,² such a course is often the only way to introduce the accused's side of the story. As witnesses, people with an intellectual disability are frequently found “not competent” to give evidence or, even before reaching court, their allegations will not be properly pursued because of the expectation that they will not be able to give evidence. One particular area of concern is the fact that in many Australian jurisdictions, a “Governor's pleasure” system of detention exists for people, including people with an intellectual disability, found unfit to be tried or found not guilty on the ground of mental illness.³ Such people can face indeterminate

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2 The dock statement allowed an accused person to make an unsworn statement at his or her trial which was not subject to cross-examination. In New South Wales the right to make a dock statement was abolished in 1994. See *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* (NSW).

3 For example, *Crimes Act 1958* (Vic), s 393 and s 420.

detention, regardless of the seriousness of their crime. Yet few would argue that, despite their disadvantages, people with an intellectual disability should be excluded or diverted from the criminal justice system as there is an important community interest in ensuring that offenders are brought to justice and that all relevant witnesses, including victims, are able to give evidence in court.

The increasing trend towards deinstitutionalisation means that people with an intellectual disability are no longer shut away in institutions and judged by the rules of that institution. Rather, they are living in the community and, it appears, coming into contact more and more frequently with the police, the courts and the corrections system. Studies conducted in this area have generally pointed to the over-representation of people with an intellectual disability, both as offenders and as victims. For example, in New South Wales, research conducted by Associate Professor Susan Hayes of The University of Sydney has revealed significant levels of over-representation of people with an intellectual disability in the prison system and facing charges in the Local Courts.⁴ Additionally, there is evidence of high numbers of people with an intellectual disability as victims of crimes, particularly sexual assault.⁵

The purpose of this article is not to discuss this over-representation in detail or to speculate as to possible reasons. Such issues are considered elsewhere.⁶ Rather, it will focus on the work of the New South Wales Law Reform Commission. It will provide an overview of the Commission's final recommendations from its inquiry into

4 See Hayes SC and McIlwain D *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (Sydney, November 1988); NSW Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* Research Report 4 (Sydney 1993); and NSW Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts* Research Report 5 (Sydney 1996).

5 For example, see NSW Women's Co-ordination Unit *Sexual Assault of People with an Intellectual Disability* Final Report (Sydney 1990) p 11; and Wilson C *The Incidence of Crime Victimisation among Intellectually Disabled Adults* Final Report (National Police Research Unit, South Australia 1990).

6 Over-representation is discussed in greater detail in NSW Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System* Report 80 (Sydney 1996) ("NSWLRC Report 80") Chapter 2 and Appendix B. See also Hayes SC and Craddock G *Simply Criminal* (2nd ed, Federation Press, Sydney 1992) Chapter 2.

people with an intellectual disability and the criminal justice system and consider the wider issue of the principles, particularly human rights principles, which should guide such inquiries and their outcomes.

Overview of the Commission's reference

The New South Wales Law Reform Commission has recently completed its five year inquiry into the difficulties faced by people with an intellectual disability in the criminal justice system. The final report, *People with an Intellectual Disability and the Criminal Justice System*,⁷ released earlier this year, is the seventh publication in a series containing an issues paper,⁸ two discussion papers⁹ and three research reports,¹⁰ and represents the culmination of one of the Commission's most comprehensive consultation processes. The Commission's project covered the whole spectrum of the criminal justice system, from police investigation to prison and release, and considered the different issues raised by suspects, offenders, victims and witnesses with an intellectual disability. Its multi-disciplinary approach saw discussions with psychologists, psychiatrists and other service providers, as well as with lawyers and criminal justice personnel. Consultation with people with an intellectual disability and their carers was also a priority. This led to consideration of not only the need for legislative reform in this area, but also of wider issues such as definitions of intellectual disability and the need for administrative reform, education and training. The final report recommended a package of reforms, some of which are discussed below.

This breadth of issues is one of the strengths of the report, in allowing the particular legal problems faced by people with an intellectual disability to be considered in

7 NSWLRC Report 80, *opcit.*

8 NSW Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System* Issues Paper 8 (Sydney 1992).

9 NSW Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Policing Issues* Discussion Paper 29 (Sydney 1993); and *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* Discussion Paper 35 (Sydney 1994).

10 NSW Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Consultations* Research Report 3 (Sydney 1993); *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* Research Report 4 (Sydney 1993); and a follow up study to Research Report 4, *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts* Research Report 5 (Sydney 1996).

context. The report did not focus on only one stage of the system nor ignore the need for changes other than legislative reforms. The Commission considered a much broader picture, which included the social background of disadvantage and discrimination faced by people with an intellectual disability, and its relevance to the commission of crimes by them and to their victimisation by other offenders. However, the breadth of issues raised also is one of the report's potential weaknesses. Many issues warrant even greater consideration and the range of complex issues discussed greatly extended the time taken to complete the reference and the necessary consultations.

Guiding Principles

The need for changes in the criminal justice system to accommodate people with an intellectual disability was referred to in consultations with the Commission as a human rights issue. This approach was also taken by the Burdekin Report in relation to people with a mental illness.¹¹ For example, in a submission to the Commission, the Intellectual Disability Rights Service commented that it:

believes that the question of rights for people with an intellectual disability within the criminal justice system is essentially a human rights issue, rather than an intellectual disability rights issue.

We submit that if the situation of people with an intellectual disability within the criminal justice system is approached as a human rights issue, the problems confronting them will be understood better and more meaningfully, and more effectively responded to by government and society.¹²

Placing the focus on human rights in general, rather than just on the needs of a particular group of people, broadens the context of the discussion. The Commission argued that the needs of people with an intellectual disability is not a minority issue, especially considering the evidence of significant over-representation. The criminal justice system must recognise the human rights of *all* people, not just those who are

11 Human Rights and Equal Opportunity Commission *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (AGPS, Canberra 1993) (the "Burdekin Report") Chapter 25.

12 Intellectual Disability Rights Service *Submission to the New South Wales Law Reform Commission* 28 January 1994 p 2.

considered to be “mainstream”, and its effectiveness should be measured by how well it deals with the more disadvantaged people who come within it.

Australia’s international human rights obligations

As the Commission outlined, the rights of people in general, and of people with a disability in particular, have been considered in the international arena by a number of international instruments, including:

Universal Declaration of Human Rights (1948);

International Covenant on Civil and Political Rights (1966) (the “ICCPR”);

International Covenant on Economic, Social and Cultural Rights (1966);

United Nations Declaration on the Rights of Mentally Retarded Persons (1971);

United Nations Declaration on the Rights of Disabled Persons (1975);

Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988); and

Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (1993).

The Commission summarised some of the relevant principles recognised by these international instruments, as they apply to people with an intellectual disability, as follows:¹³

- people with an intellectual disability have the same fundamental rights as all other people;
- people with an intellectual disability have the right to protection from exploitation, abuse and degrading treatment;
- all people are entitled to equal protection of the law without discrimination, but measures designed to protect the rights of people with an intellectual disability are not deemed to be discriminatory (but should be subject to review by a judicial or other authority);

¹³ NSWLRC Report 80, *op cit* para 1.20.

- all people are entitled to a fair trial and people with an intellectual disability have the right to have their disability taken into account in legal procedures, including the determination of criminal responsibility;
- whenever people with an intellectual disability are unable, because of the severity of their disability, to exercise all their rights in a meaningful way, or if it should become necessary to restrict or deny some or all of their rights, the procedure used must contain proper legal safeguards against every form of abuse; and
- governments should ensure the development of legislation, policy-making, personnel training and support services to assist people with an intellectual disability to exercise their rights.

Other sources of principle

However, the Commission did not seek to rely on international human rights principles alone in developing its recommendations. It also examined other issues and guiding principles relevant to both disability and criminal justice issues to expand these statements of principle. In particular, the Commission recognised the need for more than formal equality. Additionally, there needs to be active intervention to ensure that people are aware of, and have the opportunity to exercise, their rights. For people with an intellectual disability, more intervention may be required than for other people.

The Commission recognised the impact of disability services, mental health and anti-discrimination legislation¹⁴ for the rights of people with an intellectual disability and that the principles set out therein, which often reflect international human rights concerns, are also important. For example, the New South Wales disability services legislation contains a set of principles for the provision of services, based upon the premise that people with disabilities have the same basic human rights as other members of Australian society.¹⁵ These principles recognise the desirability of decision-making autonomy and of the least restrictive alternative for people with an intellectual disability: for example, stating that people with an intellectual disability have the right "to participate in decisions which affect their lives" and "to receive

14 See, in particular: *Disability Services Act 1986* (Cth); *Human Rights and Equal Opportunity Commission Act 1986* (Cth); *Disability Discrimination Act 1992* (Cth) (at the federal level); and *Disability Services Act 1993* (NSW); *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW); *Mental Health Act 1990* (NSW); and *Anti-Discrimination Act 1977* (NSW) (at the New South Wales level).

15 *Disability Services Act 1993* (NSW), Schedule 1.

services in a manner which results in the least restriction of their rights and opportunities".¹⁶ It was considered that these principles can be applied to the criminal justice system.

The Commission set out the underlying principles for its inquiry in an attempt to provide a coherent basis for its recommendations. It commented:

Our principles are a mixture of general human rights principles, disability/service provision principles and criminal justice system principles. Recommendations affecting people with an intellectual disability involved in the criminal justice system should have the following characteristics:

- consistency with international human rights principles, including respect for individual civil liberties;
- consistency with standard criminal justice system principles and "rights" — in particular, the right to equality before the law; the right to due process and a fair trial; retention of the distinction between sentenced and non-sentenced people within the criminal justice system; and the recognition of the need to provide information about these principles and rights in terms people, including people with an intellectual disability, can understand;
- consistency with the New South Wales Charter of Victims' Rights;
- consistency with accepted principles of service provision as outlined in Schedule 1 of the *Disability Services Act 1993* (NSW), including recognition of the need for involvement of people with an intellectual disability in the formulation and implementation of procedures which affect them;
- avoidance of discrimination on the grounds of intellectual disability but recognition of the disadvantages of people with an intellectual disability — including their vulnerability to exploitation; their likely difficulty in understanding the criminal justice process; their likely lack of financial or other support — while allowing for special measures or different treatment on the ground of these disadvantages; and
- efficient use of resources.¹⁷

16 *Disability Services Act 1993* (NSW), Schedule 1, Principles (f) and (g).

17 NSWLRC Report 80, *op cit* para 1.27 (footnote references omitted).

So what does the recognition of such rights and principles mean in practice? Again, in the persuasive words of the Intellectual Disability Rights Service:

Human rights are concerned with the reality of rights rather than their appearance. Wherever possible, people must have access to mainstream services, with appropriate support so that they can utilise those services. In the context of the criminal justice system it means people with an intellectual disability have the right to communicate with, and be questioned by, police in a language they understand; the right to be at liberty and not be held in custody simply because there is nowhere else for them to go.¹⁸

Thus the Commission's recommendations were designed to ensure the "reality of rights" for people with an intellectual disability in the criminal justice system.

The Commission's recommendations

Using these guiding principles, the report recommends a package of 60 major reforms, covering both legislative change and administrative change. The recommendations cover the particular needs of, and disadvantages faced by, people with an intellectual disability at each stage of the criminal justice system. Some specific areas in which the report made recommendations are summarised below.

Definitions of intellectual disability

The Commission recommended that there should be a new and uniform statutory definition of intellectual disability for use in criminal legislation. The definition proposed by the Commission is " 'Intellectual disability' means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour".¹⁹ It was designed to be consistent with clinical definitions of this term but, taking into account the purposes of the definition, did not include a requirement that the disability manifested before the age of 18 years.

Police procedures

The Commission identified the crucial nature of the role of the police in this area, and the difficulties faced by both people with an intellectual disability and the police. The key recommendation was for a statutory Code of Practice regulating police investigations, with specific provision for suspects and witnesses with an intellectual disability. The Code has been designed to cover a range of issues, including

18 Intellectual Disability Rights Service, *op cit* p 5.

19 NSWLRC Report 80, *op cit* Recommendation 1.

identification of intellectual disability, questioning a person with an intellectual disability, and the need for greater care in using a variety of standard police procedures such as the caution, identification parades and bail.²⁰

Fitness to be tried and the defence of mental illness

Several legislative changes were recommended by the Commission, to adapt procedures primarily designed for people with a mental illness to meet the specific needs of people with an intellectual disability. In particular, the Commission recommended that whenever the Mental Health Review Tribunal is required to determine whether a person has a mental illness, it should also determine whether the person has an intellectual disability, so that this could be taken into account in formulating appropriate detention and release conditions.²¹

More controversially, and more significantly for the issue of human rights, the Commission recommended the removal of executive government discretion in decisions about the release of people found unfit to be tried or found not guilty on the ground of mental illness. This would give greater power to the New South Wales Mental Health Review Tribunal and introduce a new appeal system,²² and was designed to abolish the remnants of the Governor's pleasure system of detention in New South Wales. That system had already been significantly changed in the area of fitness to be tried, but remained in effect, if not name, for people found not guilty on the ground of mental illness.²³ Consequently the Commission also recommended that a person found not guilty on the ground of mental illness (renamed by the Commission as the defence of mental impairment) should not be sentenced to indeterminate detention but rather should receive a finite term set by the court.²⁴ One of the arguments against executive discretion was that a refusal by the executive government to approve a recommendation for release by the Mental Health Review Tribunal may be in breach of the ICCPR, to which Australia is a signatory, as such a decision is not reviewable by a court.²⁵ Article 9.4 of the ICCPR is as follows:

20 *Ibid* Recommendations 5-6.

21 *Ibid* Recommendation 11.

22 *Ibid* Recommendations 19-22.

23 *Mental Health (Criminal Procedure) Act 1990* (NSW), ss 38-39; and *Mental Health Act 1990* (NSW), ss 81-84.

24 NSWLRC Report 80, *op cit* Recommendation 26. There would still be scope for the Mental Health Review Tribunal to release the person before the end of the term in appropriate circumstances.

25 *Ibid* para 5.45.

9.4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Though recognising the limited effect of such human rights instruments for Australian law,²⁶ the Commission considered that its recommendations should, as far as possible, be consistent with those international standards recognised by the Australian government. The Commission's Report is the latest in a long line of Australian inquiries recommending the end of executive discretion.²⁷ Additionally, the Model Criminal Code Officers Committee's²⁸ Model *Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995*, which is currently under consideration by federal, State and Territory governments, included the removal of executive discretion in its provisions.

Giving evidence in court

The right to a fair trial recognises the need of the accused to be able to answer the case against him or her, and, by implication, for key witnesses to be able to present their version of the relevant events. As noted in the introduction above, people with an intellectual disability have often been excluded from the court process, either being found not competent to give evidence, or their evidence being not presented in court for fear that they would not be able to stand up to the rigours of cross-examination. Accordingly, the Commission has made a number of recommendations to permit special arrangements for giving evidence, including provision for people

26 See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-8 per Mason CJ and Deane J. Note that *Teoh* extended the effect of international human rights instruments ratified by Australia, in stating that the ratification of a convention gave rise to a legitimate expectation that officers of the executive government would act in conformity with it pending implementation.

27 For example, see: the Mental Health Act Implementation Monitoring Committee (NSW) *Report to the Honourable R A Phillips Minister for Health on the NSW Mental Health Act 1990* (New South Wales Parliamentary Paper 275, August 1992); the Burdekin Report, *op cit*; and the Victorian Parliament Community Development Committee *Inquiry into Persons Detained at the Governor's Pleasure* (Victorian Government Printer, October 1995).

28 The Model Criminal Code Officers Committee consists of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters and was established in 1991 by the Standing Committee of Attorneys-General to assist in the development of a national model criminal code.

with an intellectual disability to give evidence with the assistance of support persons, or by way of closed circuit television, should this be necessary. More controversially, it has also recommended that an accused with an intellectual disability should have the right to make a statement at the trial that is not subject to cross-examination, subject to the court's direction about the length, subject matter and scope of the statement.²⁹

Sexual offences and other legislative amendments

The Commission also made a number of other recommendations for legislative amendments in such varied areas as sexual offences, victims compensation, apprehended violence orders and sentencing, some of which raised difficult human rights issues.³⁰ For example, it recommended that the offence of sexual intercourse between a carer and a person with an intellectual disability should be retained, despite the potential infringement on the sexual freedom of a person with an intellectual disability. It considered that this restriction was necessary in light of the vulnerability of people with an intellectual disability to sexual exploitation in certain care situations. To ensure that the denial of rights involved contained appropriate safeguards, as required by human rights principles, it recommended that changes in this area should be made in consultation with disability groups.³¹

Education and services

The Commission considered that its legislative recommendations would not be effective to safeguard the rights of people with an intellectual disability without complementary administrative measures in the areas of education, information and training for people with an intellectual disability, their carers and government agencies as well as the provision of certain much needed services for offenders within the criminal justice system.³² Services recommended included additional special units both within and outside prisons, and a Special Offenders Service to provide specialist supervision of people with an intellectual disability on parole or serving non-custodial sentences.

A co-ordinated strategy

Additionally, the Commission recognised the need for a high level strategy for

29 NSWLRC Report 80, *op cit* Recommendations 29-30.

30 *Ibid* Recommendations 32-37.

31 *Ibid* Recommendation 33(d).

32 *Ibid* Recommendations 38-47 (information, education and training) and 55-60 (services for offenders with an intellectual disability).

the co-ordination of the needs of people with an intellectual disability in contact with the criminal justice system. It therefore recommended a comprehensive plan, to be developed under the auspices of the New South Wales Ageing and Disability Department, to address the existing lack of co-ordination between the numerous agencies with responsibility for people with an intellectual disability.³³ The nature of intellectual disability means that such varied agencies as the Departments of Health and Community Services, the Guardianship Board and the Community Services Commission, as well as legal agencies, have a role to play in guarding the rights of people with an intellectual disability in contact with the criminal justice system.

Conclusion

It is generally acknowledged that the criminal justice system does breach the human rights of people with an intellectual disability. The Commission's recommendations in its final report in this area have been designed to ensure that basic human rights become a reality for people with an intellectual disability in their contact with the system. It recognised that for this to occur, changes, both legislative and administrative, will need to be made at every level of the criminal justice system. ●

33 *Ibid* Recommendations 48-54.