Justice and Intellectual Disability

Lynette Byrnes

People with an intellectual disability in the criminal justice system — key areas for change.

People with an intellectual disability are greatly over-represented as defendants in the criminal justice system. Studies in New South Wales have shown that although they comprise only 2-3% of the population, they comprise approximately 13% of the prison population[1] and account for up to 30% of appearances before the Local Courts.[2] Problems experienced by such people as both victims and defendants in the criminal justice system are numerous and complex.

The NSW Law Reform Commission (LRC) has recently released a report,[3] 'People with an Intellectual Disability and the Criminal Justice System' which is the culmination of six years research into this area. The LRC has comprehensively researched relevant issues and made extensive recommendations outlining necessary legislative and policy reforms. The Intellectual Disability Rights Service (IDRS) had input into the LRC's work and has been conducting a campaign in the area over the last year involving a range of activities such as participation in interagency committees, writing submissions in response to various reports and raising awareness of the issues and their complexity wherever possible. From our work we have identified six key issues which need further exploration and each of these is considered in this article. The issues are:

- the need for early intervention
- resident against resident assault
- use of guardianship
- diversion from the criminal justice system
- whole of government approach
- training.

Other important areas such as police interviewing of suspects with intellectual disability and sentencing issues which have been dealt with comprehensively by the LRC are acknowledged, but have not been addressed in this article.

Although the problems experienced by people with an intellectual disability in the criminal justice system appear to be consistent across State and international boundaries, this article focuses on the issues as they specifically arise in relation to the NSW legislative and service framework because that has generally been the focus of IDRS' work.

The need for early intervention

It is easy for a person with an intellectual disability to come into contact with the criminal justice system as a result of a single dramatic incident where a criminal offence is committed, the police are called and the person is charged. What is often overlooked is the fact that such an incident rarely occurs 'out of the blue', in isolation from other behaviours. Most commonly it is the 'last straw' in a long line of other

Lynette Byrnes is a solicitor with the Intellectual Disability Rights Service, Sydney.

incidents which have been dealt with in a range of ways, from being ignored through to unsuccessful attempts to involve the police.

Hayes, through four in-depth case studies,[4] documented the behaviour which culminated in people with an intellectual disability having contact with the criminal justice system. She found challenging behaviour[5] prior to the precipitation of charges in *every* case. She found a consistent trend where challenging behaviour had been noted for years by families and agencies before police involvement. Families and carers had explored, without success, a wide range of avenues for assistance, such as the help 'of families, carers, voluntary agencies, accommodation resources, educational institutions and informal mechanisms, but none addressed the challenging behaviour consistently and comprehensively until the problem was resolved'.[6] Even when the police had become involved it was frequently the case that charges were not laid immediately while other more appropriate assistance was sought. Hayes concluded:

> Refusal of bail, remand in custody and custodial sentences are used when community based residential services, daily living skills courses and challenging behaviour programs are not available.[7]

The concerns outlined by Hayes are supported by a New Zealand discussion paper which found that:

> Offending by intellectually disabled persons is directly related to the levels of community care and support and the availability of specialist services.[8]

This is a sad indictment on our welfare system which instead of responding appropriately to the need for early intervention allows problems to fester until they become criminal justice issues. It would be more cost effective in economic and social terms for problems to be addressed through early intervention programs as soon as they became apparent.

Resident against resident assault

One of the more complex issues which needs to be addressed is that of resident against resident assault in residential facilities. People with intellectual disabilities are frequently identified as perpetrators of assault against fellow residents. This raises complex issues such as the safety of the victim, the rights of the perpetrator, the duty of care owed to all residents by the funded service and the appropriate action that needs to be taken.

The reasons for such assaults are often either complex or unclear. Frequently, the assaults are the culmination of previous challenging behaviour of the perpetrator which has not been adequately addressed.

Once there is a pattern of assaults or a serious sexual or physical assault, the victim usually feels unsafe and unable to live in the same house as the perpetrator. The solution has often been to move the victim to another, safe house, as it is difficult to find an alternative living situation for a perpetrator who has assaulted others in the past. However, moving the victim sends them an inappropriate message that they are responsible or to blame for the assault.

Unless the perpetrator is capable of understanding their actions and appears to have acted with intent, it is difficult to see the merit of involving police. However, who should decide this issue? Currently it is Department of Community Services (DOCS) policy to involve the police for any serious physical or sexual assaults. Reports to IDRS and our experience suggest that this policy is applied variably, sometimes depending on whether the perpetrator is liked by the staff. Even if the police are involved, a question remains as to the best way to ensure the safety of the victim and other residents.

Such situations require a mechanism to invoke early intervention wherever there are behaviour problems, to minimise the risk of serious assaults occurring. In many cases early behaviour intervention programs could address the challenging behaviour of the perpetrator. This can only be effective if sufficient resources are committed to properly developing such programs, as higher initial staffing levels are often required.

Where there is a question of possible culpability, a court or Tribunal should decide the issue. As the system stands at present, there is a reluctance to recommend a course of action. Any matter going before the local court is likely to attract s.32 of the *Mental Health (Criminal Procedures) Act 1990* (NSW) which provides that if it appears the defendant is 'developmentally disabled', the magistrate has the power to adjourn the proceedings, grant bail, make any other order or dismiss the charge and discharge the defendant either with or without conditions.

Section 32 conditions can only be applied to the defendant and not any other person or organisation. As such, if any conditions attached to a s.32 order are breached, sanctions can only be imposed on the defendant. Because the courts cannot order the provision of an appropriate service, the defendant is usually returned to their former situation with no further resources or programs attached. Alternatively, if the charge involves serious violence, the defendant may be unable to return to their former living situation and effectively becomes homeless.

Where the perpetrator is clearly not culpable and the assaults are serious, IDRS' experience has been that the residential facility has not provided safety for the victim and has allowed the assaults to continue. At best there is some minimal behaviour management intervention program with no resources attached. Any such program will usually be hampered by lack of supervision due to inadequate staffing, lack of support from management, and often an attempt to either cover up the assaults or trivialise them. In such cases, the only option open to victims seems to be a personal injury action against the agency running the facility for a breach of its duty of care. Of course, this does not address the immediate safety of the victim.

Community agencies have been attempting to raise these issues at a policy level with DOCS and the recently established Ageing and Disability Department (ADD) which has taken over the funding of service providers and provides broad policy direction in disability. There has been an apparent reluctance by government agencies to take the lead on the issue and fully appreciate the complexities it raises. Services face personal injury and discrimination actions as well as the prospect that such matters can become industrial issues.

The use of guardianship

Guardianship involves substitute decision making for people who lack the capacity or capability to make their own lifestyle, financial or legal decisions. It is primarily aimed at facilitating the making of decisions to enhance the welfare of the person with a disability. The extent to which guardi-

anship can or should be used in the criminal justice system context has not been completely determined.

In some cases guardians have taken an active role in advocating for access to services to be provided to particular individuals who have an intellectual disability, particularly accommodation for people at risk or involved with the criminal justice system. Guardianship has been used to secure a person a position in a program. Some would argue that as a guardian is basically a substitute decision maker, they cannot act independently as an advocate. Even if it is agreed or accepted that it is appropriate for guardians to take an advocacy role,[9] they cannot ensure an adequate allocation of government resources to provide services for all people with intellectual disability who come into contact with the criminal justice system.

The NSW Guardianship Board has the power to make orders for people to be removed from a particular place under certain circumstances. It can appoint a guardian who can make decisions as to whether and in what manner a person should be confined, restrained or — if they abscond — retrieved, as well as authorising the use of restrictive behaviour management practices. These powers could be used in the context of people being confined to secure accommodation, particularly with a view to preventing harm either to themselves or others. Although the Guardianship Board is clearly already doing this, the question needs to be asked whether it is desirable that a welfare regime be used to determine questions of people's liberty where an offence may have been committed.

A further issue relates to the possibility that people for whom guardians are appointed may not, strictly speaking, have an 'incapacity' or 'incapability'. If guardianship were ordered too readily, this would involve people being 'deemed' to have an incapacity. It would also raise the likelihood of guardianship being used in this way for other groups of people such as those with a mental illness or brain injury. This could result in guardianship becoming a form of de facto civil detention.

Guardianship cannot currently be used to protect the community. Some jurisdictions (notably New Zealand) have or are considering the use of a form of civil detention similar to what is available where a person has a mental illness. Even with stringent safeguards, civil detention of this type could become a convenient solution to people with challenging behaviour.

An alternative would be to have such guardianship issues determined by courts. This would require making the court system more flexible. Arguments in favour of this are that people will be more likely to receive 'due process' and that courts are a more appropriate forum for deciding questions of liberty. Further, almost all custodial sentences which are imposed by courts will be of a definite duration. With guardianship orders, although there can be regular review, the period of guardianship can continue to be extended. Although there is some place for guardianship in obtaining services for people with an intellectual disability who are in contact with the criminal justice system, it is important that this is not overused to compensate for the current inflexibility of the court system in dealing with these matters.

Diversion from the criminal justice system

One of the key questions discussed by the LRC report was that of diversion of people with intellectual disability from the criminal justice system. As the report highlights,[10] diversion already occurs at various stages:

- police may use their discretionary powers not to proceed;
- offences can be dismissed under s.32 of the *Mental Health (Criminal Procedures) Act;*
- people can be unfit to be tried or found not guilty on the grounds of mental illness and diverted to the Mental Health Review Tribunal (MHRT);
- diversion of people into special units in prisons.

A further diversionary stage could be added where allegedly criminal behaviour is ignored by a family/group home/institution and police do not become involved. While this may appear to be a case of inaction, it involves a conscious decision made without the sanction of the courts.

Where a person is not capable of understanding the nature and effect of the alleged crime or proceedings (such as those with severe or profound intellectual disability) it is not appropriate for their actions to be judged according to the criminal law. There should be no place for such people in the criminal justice system. These people need assistance in the area of behaviour management. This is clearly the responsibility of DOCS or the ADD. What is lacking is a mechanism to instigate such intervention and resources to facilitate it. Those people who are capable of understanding their actions and the court process should be dealt with by a criminal justice system which is more responsive to their needs. There will of course be instances where it is not clear what their level of understanding is and, in the interests of justice, they should have this determined by the courts in a formal manner rather than arbitrarily by a range of people.

Caution needs to be exercised in any such determination. The interests of people with intellectual disability are not served by assuming they have no responsibility for their actions, but equally the principle of normalisation should not require that they be treated the same as anyone else. An example of this is where people with intellectual disability commit sex offences. Many offenders have been victims themselves, learning behaviours over a long time living in institutions. While some of these people may be capable of understanding their actions, in most cases rehabilitation rather than retribution should be the guiding objective of sentencing.

While s.32 of the *Mental Health (Criminal Procedure) Act* remains a useful diversionary tool, other such tools are needed to deal with instances where dismissal of charges is not appropriate. Limited results can be achieved by the law alone, particularly in preventing recidivism.[11]

It is also concerning that due to a lack of sentencing options, magistrates are often forced to send people with an intellectual disability to gaol because of a lack of appropriate services and support in the community. This has been referred to as 'incarceration by default'.[12] Where there are good options, magistrates readily use them. The pre-sentence review panels in the Illawarra area, established by the Illawarra Disability Trust, appear to be a particularly strong example of this.[13]

The LRC report discussed forensic patients in detail[14] and generally IDRS agrees with the recommendations, which preserve the current regime while suggesting a number of welcome reforms, such as giving the MHRT greater powers to determine a person's place and conditions of detention. If the MHRT is to continue to deal with people with intellectual disability who are unfit to be tried, IDRS believes that there

needs to be expertise amongst Tribunal members in the area of intellectual disability. Most importantly there must be suitable accommodation and support facilities for people with intellectual disability found unfit to be tried. Such facilities do not currently exist in NSW.

It is completely unacceptable to divert people from the courts to the MHRT system if this simply results in them being placed in prison indefinitely once they have been found unfit to be tried. Such people need to be placed in a rehabilitative setting and this unacceptable situation has to be addressed as a matter of priority. IDRS is hopeful that the model currently being investigated by DOCS will be funded so as to provide a suitable alternative to prison. This model considers the provision of secure accommodation and support by DOCS in a way which encompasses the least restrictive living situation without compromising the civil liberties of the person with intellectual disability. The Victorian Department of Health and Community Services is to be commended for its willingness to provide accommodation and support services to people with an intellectual disability involved in the criminal justice system. However, IDRS is concerned that the Victorian model, which involves housing people in high security, locked facilities usually within the grounds of prisons and institutions, should not be adopted in NSW.[15] An accommodation option which provides a secure environment without being a quasi prison must be funded for this small number of people (currently about nine in NSW).

People with intellectual disability are clearly not offered access to the full range of available non-custodial alternatives at sentencing. They are more likely to be sent to prison and less likely to be able to comply with the requirements of current alternatives such as community service orders. The Special Offenders Services Model used in Lancaster County, Pennsylvania[16] is one option which could be funded as a pilot. It provides an inter-departmental unit for people on community service orders, probation or parole, with extensive supervision and individual programs aimed at preventing behaviours which contribute to reoffending. As discussed previously, secure accommodation needs to be provided for people so that they can access non-custodial sentences. Such a system needs to provide for people to be bailed if they can no longer stay at their current accommodation because their family or the group home in which they are living refuses to accept them back. This is a particular problem where the person with intellectual disability has been involved in an offence of personal violence.

The use of special units in prisons is essential, as many people with intellectual disability become targets of violence in custodial settings. It is a point of contention as to whether people with intellectual disability should be sentenced to prison, and who should provide secure accommodation. Is this a role which is completely incompatible with the primarily welfare role of DOCS ?

Whole of government approach

The LRC identified the need for co-ordination and co-operation amongst agencies. An interagency committee in ADD which has been looking at the area has identified clear gaps and confusion amongst agencies about their responsibilities.

ADD has been charged with implementing the whole of government approach and seems the most appropriate body to fulfill this by facilitating the development of interagency protocols (LRC rec. 48). Section 9 of the *Disability Services Act 1993* (NSW) requires that government agencies will develop a disability plan to address the issues of accessibility.

The recently released Green Paper on the NSW Government Disability Policy Framework[17] envisages that it will be the framework for agencies to plan and allocate resources to meet the needs of people with disabilities and that planning will be detailed in s.9 — Disability Plans.

While the Paper provides a philosophical approach incorporating principles and objectives this is not taken beyond the suggestion that agencies plan and co-operate around a particular issue with some examples being provided as to how this might occur. The Paper states that 'Each agency will work out for itself the indicators of success that are relevant to its area'[18] in formulating a s.9 plan. It is doubtful whether this is sufficient guidance to agencies which have no experience in developing plans and certainly no track record of good service provision to people with intellectual disability.

A more detailed framework with a monitoring process as suggested in recommendation 25 of the Green Paper would be more desirable. The Green Paper suggests that the Ministers for Health and Disability Services could report annually to Parliament on the achievements of the s.9 Plans.[19]

One of the strategies, the use of local committees,[20] is currently being piloted in the Illawarra area with its pre-sentence review committee. This is a good example of the co-operation envisaged by the Green Paper. Other criminal justice initiatives also need to be piloted. Consideration should be given to the development of a case management approach[21] and funding for advocacy to assist people in their contact with the system.

Training

Education is essential to ensure that those mechanisms adopted to address problems in this area succeed. Education is probably the most critical element of any strategy designed to overcome the disadvantages suffered by people with an intellectual disability within the criminal justice system. Of course, education will not be enough by itself. The importance of a co-ordinated training strategy across departments suggests the need for co-operation and a mechanism for ensuring that this occurs. It is important to have well-trained police and other criminal justice personnel particularly with sensitivity to Aborigines and NESB people with intellectual disability.

People with intellectual disability also need education about their rights in the criminal justice system. It would be difficult to develop a co-ordinated education strategy to target all people with intellectual disability, unless it was introduced at school level. Another way of reaching people would be through education in funded accommodation services. This is an issue that needs to be taken up by the funding body, ADD in co-operation with funded services.

ADD should also explore the use of funding agreements to ensure that training of residential and service staff as well as education of clients of the services occurs. Training needs to be extensive, regular and meaningful with competencies for staff development and training policies which are updated regularly.

Addressing the over-representation of people with an intellectual disability in the criminal justice system is a complex issue. To be effective, strategies must be directed at each point of entry. The NSW Government faces a major

challenge in co-ordinating services and ensuring that the needs of people with intellectual disability are addressed at each stage.

References

1. Hayes, S.C. and McIlwain, D., 'The Prevelence of Intellectual Disability in the NSW Prison Population: An Empirical Study', 1988, p.47.
2. NSW Law Reform Commission, 'Appearances Before the Local Courts', Report 4, 1993, p.ix.
3. NSW Law Reform Commission, 'People with an Intellectual Disability in the Criminal Justice System', Report 80, 1997.
4. Hayes, S., 'Reducing Recidivism Amongst Offenders with an Intellectual Disability', 1994, p.9.
5. defined as '...where behaviour of a person with a disability is of such intensity, frequency or duration that the physical safety of the person or those nearby is put at risk ...' in Ageing and Disability Dept policy, 'The Positive Approach to Challenging Behaviour', 1997, p.13.
6. Hayes, above. p. 9.
7. Hayes, above. p. 9.
8. Ministry of Health, 'The Development of Legislation to Meet the Needs of Individuals with Intellectual Disability who because of their Disability Are Considered to Present a Serious Risk to Others', A Discussion Paper, Wellington, 1995, p.2.
9. See Simpson, J., 'The Public Guardian as an Advocate — A Discussion Paper', unpublished, 1990; and Searle, J., 'Guardianship or Advocacy — Practices in Guardianship in NSW in relation to Accommodation and Services Functions', paper at National Conference on Guardianship and Administration, Brisbane 1996.
10. NSW Law Reform Commission, 'People with an Intellectual Disability in the Criminal Justice System', Report 80, 1997, p.41.
11. NSW LRC Report 80, above, p.198.
12. Tang, A. and Scully, S., 'Rehabilitation or Rejection', paper at First National Conference on Intellectual Disability and the Law, Wollongong, 1996, p.1.
13. Cleur, J. and Cope, D., 'Behaviour, Crime and Life', paper at the Third National Interjurisdictional Conference on Guardianship and Administration, WA, 1994, p.9.
14. Those who have been found unfit to be tried, but in the special hearing conducted by the MHRT have been found guilty on the limited evidence available and are sentenced to a limiting term. Such a term is based on the sentence which the MHRT believes would have been imposed if the matter had been heard by a court. However, culpability is not determined and the forensic patient cannot receive the benefit they would have received if they had pleaded guilty to the charges before a court.
15. See 'Statewide Forensic Program: A Specialist Service Model for Intellectually Disabled Offenders', Department of Human Services, Victoria, 1996.
16. Wood, H.R. and White, D.L., 'A Model for Rehabilitation and Prevention of Offenders with Mental Retardation in Lancaster County (PA) Office of Special Offenders Services', in R. Lickasson and G.N. Borthilet (eds), *The Criminal Justice System and Mental Retardation: Defendants and Victims*, Brookes, Baltimore, 1992, pp.153-65.
17. NSW Government, NSW Government Disability Policy Framework, 1997, pp.2, 3.
18. NSW Government Disability Policy Framework, p.69.
19. NSW Government Disability Policy Framework, p.71.
20. NSW Government Disability Policy Framework, p.47.
21. Case management is a direct relationship between persons with disabilities, their families and carers to ensure that services are accessible and co-ordinated to meet the individual's needs, including planning and linking the person with services and monitoring the ongoing appropriateness of the service plan (ADD 1997 Case Management Feasibility Study, Phase 2 Report)

Brown article continued from p.242

In theory at least, the DPP operates as an independent check on the propriety of the police investigation and accusation. In practice, such scrutiny tends to focus on the evidentiary products of police pre-trial conduct, rather than the assumptions and processes productive of such evidence. In the Chidiac case the complaint goes beyond the structural difficulty of adequately scrutinising police conduct given its largely hidden nature, to encompass active DPP involvement in the taking of Oti's statement in prison, the statement in which he implicated Chidiac, the statement he now says was false.

Finally, the case illustrates once again the narrow and limited nature of the appellate process. There is a striking absence of judicial scepticism and sensitivity to miscarriage on the part of the NSW CCA and the High Court, a scepticism and a sensitivity that one might have thought even more than usually appropriate in a case in which the trial judge had made such forthright and unusual comment. The lack of adequate mechanisms for reviewing cases alleging wrongful conviction at Commonwealth level, and the dilatory, technical, and private responses of the Federal Office of Attorney-General to Oti's retraction and Chidiac's request for an inquiry, further compound the deeply unsatisfactory nature of this case.

References

1. Anderson, T., 'Federal Attorney-General offers "Star Chamber" to frame-up victim', (1977) 33 *Framed* 11.
2. Brook, R, 'The Conviction of Neil Chidiac: Verdict Unsatisfactory', Unpublished paper for CEFTAA, 1992.
3. On Brook's analysis Oti admitted lying at the trial on 15 occasions, admitted suppressing evidence on 11, could not recall on 59 and did not know on 28. Kwalu admitted lying on 12 occasions.
4. Kirby, M., 'Miscarriages of Justice — Our Lamentable Failure?', *Commonwealth Law Bulletin* July 1991, 1037 at 1049.
5 See Hogg, R., 'Identifying and Reforming the Problems of the Criminal Justice System', in Carrington, K. and others (eds), *Travesty! Miscarriages of Justice*, Pluto Press, 1991, pp.232-70, esp. 243-54.
6. See for example, Brown, D. and others, *Criminal Laws,* 1996, Vol. 1, pp.182-6; Hunter J. and Cronin, K., *Evidence, Advocacy and Ethical Practice*, The Federation Press, 1995 chapter 4.
7. ICAC, 'Report on the Investigation Into the Use of Informers', Vols 1 and 2, 1993; ICAC, 'A Discussion Paper on the Nature and Management of the Relationship between Police and their Informants', 1993; ICAC, Investigation into the Relationship Between Police and Criminals, *First Report,* February 1994, *Second Report,* April 1994; Brown, D. and Duffy, B., 'Privatising Police Verbals: The Growth Industry in Prison Informants' in K. Carrington and others (eds) *Travesty! Miscarriages of Justice,* 1991 pp.181-223; Settle, R., *Police Informers*, The Federation Press, 1995.
8. See generally Brown, D. and others, *Criminal Laws,* Vol. 1, 1996, pp.294-315.
9. See Justice (The British Section of the International Commission of Jurists), *Remedying Miscarriages of Justice,* 1994; Mansfield M. and Taylor, N., 'Post Conviction Procedures' in C. Walker and K. Starmer (eds), *Justice in Error*, Blackstone Press, 1993; Malleson, K., 'The Criminal Cases Review Commission: How Will it Work?' (1995) *Criminal Law Review* 929.
10. For example, O'Gorman, T., 'Remedying Miscarriages of Justice — A New Approach is Overdue', paper delivered to the Criminal Law Conference of South Australia, 1996 and submitted to the Wood Commission on behalf of the Australian Council for Civil Liberties.
11. Royal Commission into the NSW Police Force, 'Final Report', Vol II, 488.
12. Devlin, P., *The Criminal Prosecution in Englan*d, OUP, 1960, p.26 quoted in Hogg, above, ref. 5.
13. Hogg, above, p.244; on the 'case theory' see McConville, M., 'Weaknesses in the British Justice System', in *Times Higher Education Supplement*, 3 November 1989.