



**‘Disabled Justice’: People with Disability in the Criminal  
Justice System – Report Launch  
Tuesday 22 May 2007, 5:30pm  
Chair**

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**The Hon Paul de Jersey AC  
Chief Justice of Queensland**

I am very pleased to welcome you all to the Banco Court. I thank Queensland Advocacy Incorporated for inviting me to chair this launch of the Disabled Justice report, investigating issues for people with a disability within the Queensland criminal justice system. With your indulgence, I will make some introductory observations.

The issues raised by this topic are important, not only for people with a disability who come into contact with the criminal justice system, but for many other players also: the Courts, the Judges, the legal profession, law enforcement agencies, social support organisations, extending to the community generally. Fair and equitable access to justice, and the effective administration of justice, are cornerstones of our legal system, and the criminal justice system in particular. It must be a given that those involved in the administration of justice play their part so as to ensure that all participants in the process are treated fairly and with due respect.

Social justice is an important goal of legal practice. When legal practitioners are admitted to practice in Queensland, in this Banco Court, I invariably remind them, both those newly admitted and those more senior, of the honourable and significant public role lawyers play. The practice of the law has an essential public orientation, especially in the realm of the criminal law, and practitioners should be mindful of the importance of service to the public and maintaining a real concern for those without privilege in our community.

The launch of this report this evening is timely, in that it complements current discussions, both international and local, about the treatment of people with disabilities, and their rights. I note that the Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly late last year, and signed by Australia in March. The report by former Justice Bill Carter QC, investigating options for providing support and care for adults with an intellectual disability, has also been in the news recently. Last week, the



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Department of Justice and Attorney-General launched a "vulnerable persons policy". These events, and indeed the report to be launched tonight, give an indication of the public importance of this issue. It reflects public concern to address issues faced by people with disability.

Thinking about tonight's topic, I realised how many different and challenging issues arise. May I touch upon a few of those issues?

A person with disability may encounter the justice system under a wide range of roles: as offender, as accused, a prisoner, a victim, a witness, a plaintiff, perhaps a legal representative or as a member of the Court staff. In some cases, a person may acquire a permanent disability as a result of a crime. I mention a recent case before me: the victim of an attack, formerly fit and healthy, will now spend the rest of his life in a wheelchair. Disabilities may present in a variety of forms: physical, intellectual, mental. Some may be visible, some not; they may or may not be acknowledged or identified by the person. All present important challenges for the legal system.

Criminal justice is premised on qualities and competencies we may, too often, take for granted. In the case of an accused, for example, the very physical ability to hear the charges during an arraignment is usually assumed, as is the mental ability to understand and make an informed choice about consequent rights, and the physical and cognitive capacity to instruct counsel about relevant matters of defence. Try to imagine a criminal trial without oral communication. Our tradition relies heavily on oral communication; victims and witnesses able to remember, understand and recount their experience, and give a coherent and comprehensible account of the offence or related circumstances. Where a victim or witness is a person with disability, for example an intellectual disability, special allowances may be warranted in Court, and in some cases, special warnings to the jury will be appropriate. There is however this caveat: it should not be assumed that people with a disability are therefore any the less capable of giving compelling evidence.



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People with disabilities are often especially vulnerable to crime, and some of the most objectionable of cases involve exploitation and abuse of those who have not been able to understand or assert their rights. I recall a case before me in the Court of Appeal a few years ago<sup>1</sup> where the accused had pleaded guilty to offences including torture, grievous bodily harm and deprivation of liberty, arising from his treatment of a young autistic man, who was beaten daily, for more than a fortnight, with a steel pipe. Psychiatric evidence suggested the offender himself suffered from an emotional disturbance.

There are studies showing that a person with an intellectual disability is twice as likely as others to become the victim of a personal crime, such as an assault, and one and half times more likely to be the victim of a property offence, such as theft.<sup>2</sup> (These studies are of some vintage now. I have no reason to doubt their accuracy. Perhaps someone here tonight will correct me if these figures overstate the issue.) People with disability can be especially vulnerable, and targeted by offenders. This problem is compounded in the case of intellectual disability, as the person “is likely to be unaware of many of the subtle and sometimes even gross cues that guide our everyday behaviour and keep us out of situations in which we may be the victim of a crime. Furthermore, when a crime has been committed, an intellectually disabled person will have less knowledge of the range of actions available to him or her. He may have difficulty realising a crime has been committed against him, or of conveying the fact, or in providing proof of the event”.<sup>3</sup> This in turn, the study reported, means that in the case of intellectual disability, a report of the crime is less likely, and, by extension, the matter is less likely to come before the Court.

Unfortunately, in the obverse, it is also not uncommon for an accused person to have a disability of some kind, most commonly intellectual impairment or mental illness. In some circumstances, it is necessary for an assessment of capacity to be made, a decision whether an offender is fit for trial, that is, fit to plead, instruct counsel, and endure the trial itself. When a person with a mental disability is fit for trial, certain allowances may be

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<sup>1</sup> *R v Mah* [2004] QCA 198

<sup>2</sup> Wilson, Carlene (1990) *The Incidence of Crime Victimisation Among Intellectually Disabled Adults*. Australasian Centre for Policing Research.

<sup>3</sup> Note 2, at p 1.



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made to ensure the accused is able to participate properly in the trial, such as use of simpler language, allowing frequent adjournments and extra time for matters to be explained to the accused and for the accused to instruct counsel. Contemporary courts try to be sensitive to the varying needs of those who come before them.

Issues of capacity and fitness for trial aside, undiagnosed or untreated mental health problems are possibly the most prevalent of disabilities confronting the Courts. Mental health problems are often under-identified and over-represented in the criminal justice system.<sup>4</sup> A person with a mental illness may be arrested by a police officer for a relatively minor offence. Perhaps the person's behaviour is a result of disability. The person may have committed the offence, or he or she may not, and mental illness, or perhaps communication difficulties, may be such that the person is unable sufficiently to explain his or her actions so as to be extricated from the situation. The person may not fully understand available rights and options, or be able to properly instruct the defence representative, if there is one. The person may be represented by a duty lawyer, who may not have the time or resources to identify or properly investigate the person's circumstances. The person may be convicted, perhaps sent to prison, with the mental health problem not identified or addressed at any stage. Police resourcing bears on all of this.

The experience of imprisonment is unlikely to improve that person's mental health. In some cases, imprisonment may not be the most appropriate sentencing option, and diversion into appropriate health and support services may produce a better outcome, not only for the accused, but also for the general community. To address the over-representation of mental disabilities in the criminal justice system, it is important for all of us to be alert to recognising a situation involving mental health problems, or intellectual impairment, and diversionary and alternative options.

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<sup>4</sup> Zavez, Maryann. (2000) "Kids and the Criminal Justice System: Questions of Capacity and Competence. How Do Youth and Disability Fit into the Equation at the Turn of the Century?" 20(1) *Children's Legal Rights Journal* 2



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Access to justice is a critically important human right. In the courts, we deliver justice according to law. That means judicial officers must work within the prescriptions of parliament and precedent. In the field of disability, those prescriptions to the extent they exist, are very broadly cast. There is, accordingly, more play for individual discretion. That being so, it is helpful we be reminded of the geography of this issue so that we may optimally accommodate it.

I express my thanks again to Queensland Advocacy Incorporated for convening this launch and seminar. I also congratulate QAI on its capacity to attract the highly qualified and placed speakers you will hear tonight, and I at once thank those speakers for their participation.

Our first speaker is Justice Roslyn Atkinson. Her Honour is well known, and needs no introduction. Of particular relevance to the topic tonight, Her Honour was the first member, and then the first President, of the Queensland Anti-Discrimination Tribunal, member, then Deputy Chair, and now Chair of the Queensland Law Reform Commission, and Hearing Commissioner for the Human Rights and Equal Opportunity Commission. Her Honour also, with Justice Philip McMurdo, edited the Equal Treatment Benchbook published by the Supreme and District Courts a couple of years ago. This Benchbook aims to provide guidance, so that "where possible Judges can manage matters before them in a way that is fair to all litigants and other participants irrespective of their circumstances".<sup>5</sup>

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Chief Judge Wolfe was appointed as a Judge of the District Court in 1995, and as Chief Judge in 1999. Before coming to the Courts, Her Honour was a Deputy Commissioner of the Fitzgerald Inquiry, now as we are reminded of two decades' vintage, but producing a report still of blue-print significance. Her Honour has a strong interest in human rights law and social justice.

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<sup>5</sup> Supreme Court of Queensland (2005) *Equal Treatment Benchbook*, p 13



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Chief Magistrate Marshall Irwin was appointed to his current role in 2003. Most of the people who come into contact with the criminal justice system will have dealings with the Magistrates Court in particular. It has the most members, and deals with the greatest amount of matters, and the Magistrates Court will, through sheer force of numbers if nothing else, deal with the greatest proportion of people with disabilities who come into contact with the criminal justice system. I am sure the Chief Magistrate will provide a valuable contribution to the launch tonight.

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Mr Phillip French is the author of the report to be launched tonight. Mr French is the CEO of the Disability Studies and Research Institute, which undertakes research into disability issues from a social perspective, and promotes community debate associated with the rights of disabled people. He graduated from the University of Sydney with honours in Arts and Law, and is currently undertaking doctoral studies in international law and disability rights. Mr French has more than twenty years experience working in disability rights, and has been closely involved in the development of a number of major initiatives including the establishment of People with Disability Australia, the Pacific Disability Forum, the Disability Studies and Research Institute, as well as the development by the United Nations of the Convention on the Rights of Persons with Disabilities. In 2000 Mr French was awarded the NSW Justice Medal in recognition of his services to access to justice for persons with disability in NSW.

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Mr Kevin Cocks is the director of Queensland Advocacy Incorporated, which works to promote, protect and defend, through advocacy, the fundamental needs and right of the



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most vulnerable people with disability in Queensland. Mr Cocks has a Diploma in Social Science – Residential Care from the Queensland University of Technology and a Masters of Social Policy & Administration & Planning from the University of Queensland. In 2003, he was awarded a Centenary Medal for distinguished service to disability services in Queensland. Mr Cocks was also the 2005 Australian Human Rights & Equal Opportunity Commission Human Rights Medal recipient