

# INTELLECTUAL DISABILITY ...LEGAL INABILITY

*The New South Wales Law Reform Commission has recently made us aware that the legal system is unable to accommodate people with intellectual disabilities. The author of the Commission's report, SUSAN HAYES, calls on the legal profession to improve their track record.*

## Introduction

IT IS well established that people with an intellectual disability are over-represented in prisons in Australia and other Western countries. A study of New South Wales prisons has established that approximately 12 percent of the prison population, in regard to both male and female prisoners, suffer from an intellectual disability, compared with two to three percent of the general population. Statistics such as these indicate how important it is for lawyers to be aware of the issues pertinent to people with an intellectual disability who encounter the criminal justice system, in the role of the accused, a victim of crime, or a witness.

There are, of course, other legal issues which pertain to the lives of people with an intellectual disability, of which lawyers need to be aware. These include their ability to give consent to medical procedures, to enter into contracts, to assert their human and civil rights, and to manage their own lives without being exposed to undue risks and exploitation. These issues are explored elsewhere, and will not be covered here.

## Definition

Examination of the implications of the finding that people with an intellectual disability are over-represented in the prison system must start with a definition of intellectual disability. Intellectual disability is defined as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behaviour and manifested dur-

ing the developmental period. In operational terms, this category includes people with an intelligence quotient [IQ] of less than 70 on a standard test of intelligence, or two standard deviations below the mean IQ of 100. Such people also have low levels of functioning in the areas of social and adaptive skills, including the ability to carry out the tasks of daily living (such as taking care of oneself, handling money, undertaking domestic tasks, maintaining relationships and friendships with other people, and appropriately coping with anger and frustration).

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Some clinicians regard people with borderline intellectual functioning (that is, with an IQ between 70 and 80) as being intellectually disabled if they have very serious concomitant limitations in their social and adaptive functioning. There will always be people just above any arbitrary cut-off point who will have the same difficulties as those just below. In the criminal justice system, therefore, the actual number assigned to an individual's level of cognitive functioning is not in itself an absolute criterion establishing their need for

special consideration in the criminal justice system. Controversy exists over whether or not the definition should be limited to people whose intellectual deficit arose during the developmental period, because people who acquire deficits after the age of 18 years as a consequence of a motor vehicle accident, drug and alcohol abuse, a stroke, or some other medical or accidental cause are thereby excluded. Such clients may have an intellectual disability in conjunction with another diagnostic category, and may be described, for example, as having alcohol-related brain damage and accompanying intellectual deficits.

It is important to distinguish intellectual disability from mental illness, because the legal implications and possible sentencing dispositions may differ for the two groups. A mentally ill person suffers from a serious psychological disorder, which seriously affects his or her personality functioning, behaviour, and perception of the environment, and which in legal terms, may involve a threat to themselves or to others. The differential diagnosis is sometimes difficult, and must be made after a meticulous process of history taking, assessment and observation by health professionals experienced in the areas of psychiatric illness and intellectual disability. The situation can be further confused by the fact that intellectually disabled people may also suffer from psychiatric illness or behavioural disturbance, and are thus 'dually diagnosed'.

The term 'people with an intellectual disability' is used in preference to other

terms for a number of reasons. It emphasises that such clients are people first, and disabled second. The term 'mental retardation' has almost been phased out, owing to the fact that it is unacceptable to the people with disabilities and their families and carers. 'Retard' is a word which has the status of schoolyard insult, but is nevertheless heard on occasion in the criminal justice system. A number of other labels may be used, including 'developmental disability' and 'intellectual handicap'.

The great majority of people with an intellectual disability reside in the community, and may not be readily distinguishable from their non-disabled neighbours. Research studies indicate that they are unlikely to be in receipt of a Disability Support Pension, and instead are probably receiving unemployment benefits. They may hold a job, and live fairly independently. Although such clients are likely to be receiving informal assistance with complicated tasks of daily living such as managing their finances, locating accommodation, paying bills, and so forth, it is likely that they will go to great lengths to disguise their deficits.

### Reasons for Over-representation

A number of reasons have been postulated for the over-representation of people with an intellectual disability in prisons, including the following:

1. Over the centuries the view has been expressed that intellectually disabled people are more likely to commit crimes.

In an article titled *The Burden of Feeble-mindedness* published in 1912, Fernald wrote: "Every feeble-minded person, especially the high grade imbecile, is a potential criminal, needing only the proper environment and opportunity for the development and expression of criminal tendencies."

There is no evidence that intellectually disabled people are innately more criminally minded than non-disabled people.

2. Intellectually disabled people may infringe the law more frequently, partly as a consequence of their social and adaptive skills deficits. They may not be aware, for example, that behaviour which is acceptable in private (such as masturbation) is unacceptable in public. In such instances, the criminal act may be a direct result of the deficits in cognitive, social, and adaptive skills, and possibly lack of relevant training. They may also experience difficulty in coping with anger and frustration in an acceptable manner.

3. Police may more frequently apprehend people with an intellectual disability in connection with criminal activities. They may already be known to police, for a variety of reasons including nuisance offences; they may also be victims of peer 'informers'. They may be less adept at covering their tracks or creating alibis. When they are questioned by police, intellectually disabled people have been shown to be more likely to 'confess' although they often have little comprehension of the police official caution, and their right to remain silent.

4. In comparison with their non-disabled counterparts, more intellectually disabled people appear before courts, and therefore may receive a custodial sentence. Research shows that in NSW lower courts, of a sample of persons appearing before the courts 14.2 percent achieved a standard score [SS] (similar in concept to an IQ score) of less than 70 (that is, within the range of intellectual disability) and a further 8.8 percent had a SS between 70 and 79 (that is, in the borderline range in intellectual ability).

5. Intellectually disabled people may be more likely to receive custodial sentences than non-disabled clients, for a variety of reasons including lack of legal representation; the appearance of being uncooperative, dangerous, or prone to re-offending; lack of family, community, residential and employment stability, and other factors which the judiciary take into account in the sentencing process. Another factor is the non-existence of suitable secure community-based accommodation units where the person can receive appro-

priate behaviour management and living skills programmes, so that the judge has little alternative but to decide upon a custodial sentence. No research evidence has been located which bears on this hypothesis.

It can be seen that people with an intellectual disability are exposed to difficulties and potentially differential treatment at every stage of the criminal justice process. The question for lawyers is how to do the best for their client.

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### Defending the client with intellectual disability

An important first step in the effective defence of clients with intellectual disability is identification of the presence of disability. Referral of a client for comprehensive psychometric assessment is undertaken only when an aware professional, usually the lawyer, suspects the presence of disability and requests expert assessment. The significance of training criminal justice personnel in the field of intellectual disability cannot be emphasised enough. Russell and Bryant stated:

"Members of the criminal justice system who have not received training should receive it through in-service and/or pre-service training. For those who have not yet become professionals, training needs to be incorporated into the curriculum ... Few law schools teach anything that would help a fledgling lawyer confronted with such a client."

Once the presence of intellectual disability has been established and evaluated, the lawyer, the client and the client's citizen advocate or family or carer must then make decisions about the conduct of the case. The first issue which may arise is whether the client is fit to be tried. This involves consideration of whether the client understands the charge, and is able to plead; whether they can exercise the right to challenge the jury panel; whether they can understand the nature of the proceedings, and follow the course of the proceedings so as to understand what is going on in court in a general sense; whether they can understand the substance of any evidence that may be given against them, and make a defence or answer to the charge; give instructions to counsel, and relate their version of the facts to counsel and if necessary to the court; and have sufficient capacity to be able to decide what defence to rely upon.

In NSW, if the accused is unfit to be tried, it must be established whether or not he or she will become fit within 12 months. The condition of intellectual disability is relatively stable in most cases, and so if a person is unfit on the grounds of intellectual disability alone, it is likely that they will remain unfit. It may be the case, however, that the clinical assessment of fitness is clouded by the presence of a psychiatric condition which may respond to treatment, and then the accused might become fit. For example, if an accused suffers from a psychosis which causes them to have bizarre thoughts and beliefs, after a period on appropriate medication these symptoms may improve, and even though they are intellectually disabled, that disability may not render them unfit to be tried. Where an accused continues to be unfit, there must be a trial of the facts, in a special hearing. If the accused is found not guilty, then they cannot be detained in custody, and must be dealt with under civil or mental health legislation, not the criminal law. If found guilty, then they must be sentenced to a limiting term under the *Mental Health (Criminal Proceedings) Act 1990* (NSW). This system means that the spectre of indeterminate detention without trial disappears almost entirely.

If the accused with an intellectual disability is fit to be tried, there are a number of strategies which the defence will need to consider. Some questions which will have to be addressed include:

- Are defences such as insanity, diminished responsibility, intoxication, automatism, mistake, or provocation appropriate?
- Was the confession voluntary? Did the accused understand his or her right to remain silent? Did they understand the police caution?
- If required to give evidence, does the accused understand the import of the oath?
- Is it appropriate to consider special legislative provisions which take into account the mental condition of the client, such as s.32 of the *Mental Health (Criminal Proceedings) Act* which allows a number of options to a Magistrate (including dismissing the charge) if it appears to the Magistrate:

(a) that the defendant is developmentally disabled, is suffering from mental illness or is suffering from a mental condition for which treatment is available in a hospital, but is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*; and

(b) that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with the law.

### Conclusion

It is the purpose of this brief outline to alert lawyers to the very real possibility that they may encounter clients with an intellectual disability who pose special challenges in terms of representation. The full extent of the legal strategies which may be appropriate have been explored in some of the references cited above. The seriousness and magnitude of the problem of intellectually disabled people in the criminal justice system can be assessed by the fact that the NSW Law Reform Commission has before it a reference on this topic. Be-

cause there is such a high prevalence of intellectually disabled clients coming before the courts, it is impracticable to propose that there be a specialist group of legal practitioners to represent them. The establishment of a specialist subgroup of the legal profession would render it even less likely that the presence of disability would be identified and the clients referred for psychometric assessment.

It is highly probable that lawyers will encounter clients, victims, or witnesses with an intellectual disability in all but the most esoteric branches of the law. Such clients are involved in the making and challenging of wills, and establishment of trusts; they enter into contracts, and they bank, and purchase; they are injured and receive compensation; they bring actions to establish their civil and human rights to education, family life, medical care, access to buildings and community services, voting, safe work places, recreation, and freedom from discrimination; they are involved in the break down of marriages, as the children of a marriage or as a spouse; they are sacked, retrenched, assaulted, and knocked down by motor vehicles; they and their carers may have disputes over social security payments, or challenge administrative decisions made by government agencies. The more that society recognises their abilities rather than emphasising the disabilities, the more likely it is that people with an intellectual disability will draw upon the resources of lawyers.

As Shriver reminds us: "It is the obligation of each of us to value and nurture above all the moral principles which teach us that all human beings are equal in law, that those who have the most gifts have the greatest responsibility, that indeed those with the least must be entitled to the most in a compassionate society, and that every human being must count as one whole person."

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