



***Access to justice in the criminal justice system for people
with a disability***

June 2013

The National Council on Intellectual Disability (NCID) was established over 50 years ago by parents and friends, in an endeavour to improve the quality of life of people with intellectual disability and to fill the need for national unity and information.

The Council is the recognised national peak body with the single focus on intellectual disability, ie, our actions and priorities centre on issues that affect the lives of people with intellectual disability and their families. Our mission is to work to make the Australian community one in which people with intellectual disability are involved and accepted as equal participating members.

NCID has over 5,000 members representing all 8 States and Territories. In addition to having people with disability on its Board, NCID receives policy advice from Our Voice. Our Voice is a committee the membership of which is exclusively people with intellectual disability representing all States and Territories.

National Council on Intellectual Disability

PO Box 771 Mawson ACT 2607

T: 61 2 6296 4400

e: ncid@ncid.org.au

w: ncid.org.au

Judy Willock

President

Mark Pattison

Executive Director



Statement of Principles

- ☼ All people have inherent dignity and worth and equal and inalienable rights.
- ☼ All people are valued members of the Australian Community.
- ☼ People with intellectual disability as equal participating members of the Australian Community have the same rights:
 - ☼ to respect for their individual autonomy and independence
 - ☼ to make their own choices
 - ☼ to participate in decisions which affect their lives
 - ☼ to pursue any grievance which affects their lives
 - ☼ to diversity of choice for housing, education, work, recreation and leisure
 - ☼ to equity and justice
 - ☼ to be empowered to take their full place in the Australian Community
 - ☼ to dignity and privacy in all aspects of their lives

National Council on Intellectual Disability will:

- ✓ work to make the Australian Community one in which people with intellectual disability have full and equal enjoyment of all human rights and fundamental freedoms and are involved and accepted as equal participating members.
- ✓ promote and protect the human rights of all persons with intellectual disability, including those who require more intensive support.

Consultation Statement

National Council on Intellectual Disability consults people with intellectual disability and family members through our State and Territory Agency Members. In particular we:

- conduct an annual survey of members and stakeholders
- hold two meetings a year, rotating through all States and Territories
- present at the Having a Say Conference each year, attended by over a 1,000 delegates the majority of whom have a disability
- hold forums on specific issues
- sponsor actions and representations on issues of importance to people with disability



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Introduction

Over the past two decades there has been an increased focus on people with a disability in the criminal justice system and we are pleased to see that the Human Rights Commission has taken this up as a national and systemic issue. In responding to this inquiry, NCID is addressing the needs and issues of people with an intellectual disability. As stated by Prof Susan Hayes (2009) people with an intellectual disability engage in ALL legal systems around Australia, also in Family Law courts where they also experience systemic discrimination. From the time a person enters in to any legal system there is a plethora of barriers that inhibit their access to achieving justice. While states around Australia have made some progress to access issues, there continues to be a vast number of changes which could benefit a person with an intellectual disability, who enters the criminal justice system. In addressing the barriers for people with an intellectual disability we believe that first and foremost must come professional development for professionals in the legal system, who do not understand, typically, what it means to live with an intellectual disability in Australia. Nor fully, do some understand the levels of vulnerability and the extent of exploitation of people with an intellectual disability, which lead them into contact with criminal justice system; both as victims and offenders.

As promoted in the position paper - Barrier One, the lack of access to disability supports, accommodation, education, employment and activities that provide a person access to a full and meaningful life, is often central to a person coming into contact with the criminal justice system. Chenoweth (1995 in French 2007)¹ provides detailed examples of this vulnerability; homelessness, no access to disability support services, housing in poor areas with high levels of violence, living in close contact with people who experience mental health disorders, drug and alcohol addictions in public housing. Barrier Two – Five refer to the adjustments needed by people with a disability to access justice and NCID agrees that these are considerable barriers to people with an intellectual disability. In this document we outline the individual difference that presents a barrier which requires a reasonable adjustment for a person with an intellectual disability in the criminal justice system. We would also advocate that Family Law requires an equivalent inquiry to remove the systemic barriers within this system for parents with an intellectual disability.

While there are systemic issues that need to be addressed, people with an intellectual have a number of material differences that need to be adjusted for, within all social systems including the criminal justice system. This paper will examine these issues and make recommendations on ways to improve a person's interaction with the legal system. Perske (1991)² was the first to document how these individual differences, lead to negative outcomes in the legal system for people with an intellectual disability. It is important to note that people with an intellectual disability are each a unique individual, as with any other person and there is difference and diversity between people. When social systems have progressed to the state that they make adjustments for the diverse populations who engage in them, the need for social reforms will be no longer necessary.

¹ Chenoweth L 995 in French P, 2007. Disabled Justice: The Barriers to Justice for persons with a disability in Queensland QAI Inc

² Perske R 1991 Unequal Justice, Brookes Publishing USA.

The first point of entry into the criminal justice systems is to be either the victim or perpetrator of a crime and initial contact is made with a policing system, which is charged with the role of collecting evidence and statements. It is when making a statement that police may initially suspect that a person has an intellectual disability, and if this is detected at this point, most state legislations makes accommodations for vulnerable witnesses. While these are important areas of progress there is still more that can be done to assist with the nuanced individual difference of people.

Identification

Many people with an intellectual disability do not identify themselves with this individual difference, and therefore when first entering the criminal justice system they, are hard to identify. Over years people will have developed a range of strategies to enhance their competence and obtain the assistance they need, to live. There continues to be a high social stigma in being identified as having an intellectual disability and people develop a '*cloak of competence*'³ to hide effects of the disability and aim be seen as an ordinary competent person. People will have strategies to ask for help and reduce a focus on their individual difference. "*I need help with reading things, I left my glasses at home*" is a common example, when being asked to read or sign a document.

⁴Professor Susan Hayes an expert in this field has developed a tool called the HASI which is a short isometric test that can signify to police that a person needs to be fully assessed to see if they do have an intellectual disability. This test has been adopted by many international justice agencies, and can lead to a more ethical and just process through the legal system. It is one small practical strategies in a complex system and there are other tools which can be explored to meet this need. The negative effect of this identification is that a person can be reduce to a childlike age or identity, in the testing and it is important to remember that while a person may have the cognitive processing of a 2 year old say, they also have the social and emotional skills of a 44 year old (their lived age), and therefore need to not be treated as a child but provided with the adjustments so that they understand, can give direction and consent in the legal system.

Vanny, Levy, Greenburg and Hayes (2009)⁵ conducted isometric testing on people waiting in magistrates courts in urban and metropolitan courts in New South Wales and found that people with Mental Illness and Intellectual Disability were over represented in this court system. If a person is not identified on entry to the criminal justice system they will fall outside of any and all adjustments which can be implemented to enhance them achieving justice before they law.

Communication

People will also aim to please a person in authority - *acquiescence*, and this is a problem for the person, throughout the whole legal system as a person may admit to a crime that they have not committed to please a

³ Edgerton R 1974, *Cloak of Competence*, Revised 1993 University of California Press; Rev Upd edition (October 16, 1993)

⁴ Hayes S 2009 People with intellectual disability in the criminal justice system, Presentation at Wwild Inc

⁵ Vanny, K., Levy, M., Greenberg, D., Hayes, S. (2009), Mental illness and intellectual disability in Magistrates Courts in New South Wales, Australia. *Journal of Intellectual Disability Research*. 53(3), 289-297.



person in authority, or say yes or no if they think that this is what the interviewer is seeking (Perske, 1991). This means that when a person with an intellectual disability is involved in the legal systems that all support people and professionals need a comprehensive understanding on how acquiescence impacts on their communication and need to learn how to take a statement and interview a person. Today it is advocated that narrative techniques are used when working with a person (Hayes, 2010)⁶. This means collecting evidence in a 'storying way' and letting the person tell the whole of their story before they are interrupted; because when they are interrupted, they may forget, omit or embellish elements of the narrative. It is best to keep a list of the questions that the interviewer wishes to ask during the narrative interview and when the story is finished, go back to ask for the additional information that is sought. Acquiescence is a difficulty that needs to be accommodated through all stages of the legal process, but often has its most powerful effect when a person engages with the police and makes a statement. Intellectual Disability Rights Inc (IDRS) Making a Statement and Women working alongside Women with intellectual and Learning Disabilities Inc (WWILD)⁷ Going to the Police provide information for people with an intellectual disability.

Concrete thinking

People with an intellectual disability often have concrete thinking, meaning that they do not understand abstract terms and the legal system is full of complex and abstract terms like rights, evidence, justice, victim, accused or guilty. Ericson and Perlman (2001)⁸ found that people with intellectual and disability had a poor understanding of the terms and court processes in Canada and this is also experienced in Australian systems. To overcome this difficulty, professionals need assistance in using plain English or concrete terms that a person is able to comprehend. It is an important role for a support person in the criminal justice system to act as the interpreter and translate documents and questions into plain English for the person with an intellectual disability.

Time is abstract and is also problematic for people with an intellectual disability. They may have difficulty linking a crime that occurred a long time previous to a court case, that happens in some cases years after the event, they will remember the crime. The difficulty of time is also evident in the process of attending courts. If you lead a life that is not signified by activity (5 days work a week and a weekend) and each day is the same you do not need to know what day it is or what time it is as it rolls on the same. Therefore it is difficult for some people to understand days, times for meeting and appointments, which they may regularly fail to attend. When working to support a person through the criminal justice system strategies need to be in place to ensure that the individual is reminded when to attend and given the required support to get there.

When discussing date people may not identify and recall events on a date so it is useful to day things like 'at the BBQ on your birthday' or 'after Christmas' to signify the event.

⁶ Hayes S. 2010 People with intellectual disability in the criminal justice system, Presentation at wwild Inc

⁷ Intellectual Disability Rights Service INC www.idrs.org.au / Women working alongside Women with Intellectual and Learning Disabilities INC www.wwild.org

⁸ Ericson, K. and Perlman, P. (2001). Knowledge of Legal Terminology and Court Proceedings in Adults with Developmental Disabilities. *Law and Human Behaviour*(25) 5. Pp 529-545.



Memory gaps/ Memory retrieval

People often have gaps in memory and need time to retrieve information that they have stored to long term memory. It is widely acknowledged that memory decays in all witnesses in the legal system, and people with an intellectual disability will need to be given extra time to provide evidence. This means that you can wait with a person for a long time while they retrieve a memory. It is helpful to think about it like a computer looking where it has stored data and when it is running slowly it takes a longer time to find and process this information before it can be communicated. In legal settings where people are rushed for time, it is difficult to have the patience to wait, and most people are not comfortable with silence and will step in and ask another question. This then adds a layer of anxiety distress and confusion for the person with an intellectual disability. Many times a lawyer will ask another question thinking that person has not understood / doesn't know / doesn't want to answer the questions. For the 'client' they then do not know which question to answer first, and will become overwhelmed in situations when a questioner keeps firing one question after another with the common result that they are unable to answer any question.

Slow comprehension and ability to process and retain information sessions

During the legal process there are meeting with lawyers where instructions are given and recommended in a case. At a case meeting a large volume of information can be provided with a request of directions. This is difficult for most people going through the legal system but is additionally so when a person has the difference of intellectual disability. When a lawyer is meeting with a person it is important to check in along the conversation to see that a person has got the information.

Q. Do you understand what we have spoken about – A. yes

Q. Ok great could you please just tell me what we have just discussed before I move on to the next issue. Often you will get the answer – *I can't remember or I don't know;* which means that the process has failed not that the person has failed.

Wills (2001) advocates that the professional must be the person, seen to fail and take the mistake. This is part of relationship building for the client/ lawyer. People with intellectual disability have not often, experienced success as a learner and therefore are reluctant learners. When the professional takes the fall – I didn't not explain that very well, let me explain that again, they do not experience another failure rather may see learning success. This is a very effect way to build for the team working in a legal case and establish good communication strategies.

Where there is a support person they are able to discuss these session as a means of ensuring that the person remembers details of meeting (this does not mean coaching the witness) it is to act as an interpreter and relate the facts and details of meetings with lawyers or court sessions.



Understanding the process

It is important to explain the court process and many states have done well at providing kits to children and vulnerable witnesses which show the setup of the court and role of workers in the courtroom. This helps overcome some of the anxiety that a person may have in attending the court. It is important to remember that you cannot show this information to a person once and expect them to remember and retain all this, that is why it is critical that there is a support person who is present to engage with the person all the way through the case. People need to view and discuss this information many times before going to the court. This assist them to understand who will be in the court and what their role is, knowing this information can help to reduce anxiety about going to court.

Dress is one of the markers of poverty in our society and often there are the associated stigma and stereotypes that are applied to a person with a disability around competency, image and class. This is not coaching a witness but providing equity by reducing the stigma attached to negative images about people with an intellectual disability.

Language used in court is complex and convoluted and most people struggle to understand the theatrical language by legal professionals. Cross examination can be very confusing for people and the use of complex abstract terms is a barrier to justice. A statement like 'I put it to you' is totally confusing for a person who wonders who the question is being put to. The use of double negatives also confusing and to address this barrier, the used of plain English should be required as a reasonable adjustment for people with an intellectual disability.

Managing anxiety

Attending the criminal justice system is stressful for anyone. A person who has an intellectual disability may also have a mental or anxiety disorder, depression and PTSD this is increased. There are many legislatures that have introduced special measures for vulnerable witnesses and this are important factors in reaching a just process. It is important that a person with an intellectual disability is provided with Plain English information that explains these adjustments to them. Which are usually, that they can

- Ask for a break
- Say I don't understand
- Can you ask that again
- I don't remember

Support staff should be mandatory for a person with an intellectual disability.

Well qualified support staff are an integral part of creating a system that accommodates the needs of people with an intellectual disability. There are organisations who have developed exceptional training materials around Australia and could be consulted on their training packages⁹ on a national strategy.

⁹ www.idrs.org.au



Documents and orders

There are very high rates of illiteracy for people with an intellectual disability, not because they cannot be taught but because in the past they were not taught in education systems. This means that when documents and court orders are given to them, in often large volumes, they will have difficulty understanding and complying with them. And this again puts them at risk in the legal system. If the order says they are not allowed to see a person – if this is not explained in a way that they understand to them, there is a very high probability that they will breach the order by going to see a person that they have a relationship with for example.

The prison system

The individual difference of a person with an intellectual disability continue to be problematic in the prison system. Hayes (2010) estimates that about 20% of a prison population has an intellectual disability. Ellem (2010)¹⁰ argues that people fall into the prison system when social systems, housing, health or disability fail to address the support needs of the individual. Ironically when in the prison system these supports are often in place, a place to sleep, regular health assessments and supports with daily living needs. Programs like Sisters Inside are important programs in maintaining contact with a person during their imprisonment and advocating for the supports and adjustments needed by the individual.

Conclusion

The current evidence is clear that people with an intellectual disability are over represented in criminal justice system and commonly it is their exposure to situations that put them under the surveillance of justice systems ; combined with social disadvantage that propel a person into the criminal justice systems. There is a large body of evidence on the adjustments that are needed to create a justice system that accommodates people with a disability. In the hearings around Australia you will be gain valuable insights into the experiences of people that will be at the heart of these reforms. We congratulate you on this inquiry.

¹⁰ Ellem K. 2010 Prisoners with Intellectual Disabilities presentation WWILD INC
National Council on Intellectual Disability | Access to Justice

Recommendations

- *That police around Australia receive training in how to identify a person with an intellectual disability and be trained in applying the identification tools like the HASI ® (Prof Susan Hayes) which enable a police officer to engage the help of relevant services and professionals. The HASI is a short questionnaire that anyone can apply and highlights when there is a potential intellectual disability.*
- *That there is plain English information produced which can be given to a person with a disability and their support system which explains what will happen when they come into contact with the legal system.¹¹*
- *That people have an independent third person (support person) who acts as an interpreter of communication needs, is critical for a person with an intellectual disability throughout the whole legal process. The support person needs to undergo a formal training process to develop the skills and strategies to provide competent support.*
- *Legal professionals need to be educated in how to undertake narrative interviews when collecting a statement from a person with an intellectual disability.*
 - *Firstly this means, the first telling of the story by a person needs to listen to it in its entirety because this be will be the best recollection of the event.*
 - *All questions need to be answered at the completion of the full narrative.*
 - *When asking questions a good interviewer will not assume that they hold the same meaning to the response as the person telling the story.*
 - *People make meaning from their own life experience and what may be a simple question with a simple answer – we think may be constructed as lying in a court case. Hayes¹² describes this as asking the deeper question –*
 - *Do you manage your money - Yes*
 - *How do you get paid - I get 50 dollars on Mondays and Fridays from the public trustee*
 - *Knowing this information changes how you understand the life of the person and their capacity to manage their money. A court would assume that managing your own money is very different to managing the 50 dollar you are allocated twice a week but for the person who is living this life this IS managing their own money. So it is critical to assume nothing and ALWAYS ask the deeper question.*
- *That there is a toolbox of professional training developed for people working in the criminal justice system that explains the social construction of intellectual disability and the effective ways to communication with a person taking into account*
 - *Concrete thinking*

¹¹ www.idrs.org.au www.wwild.org

¹² Hayes S 2009 People with intellectual disability in the criminal justice system, Presentation at Wwild Inc



- *Memory gaps and memory retrieval*
- *Conducting short meeting more often when working with a person with an intellectual disability.*
- *Checking what a person has comprehended before moving on to the next issue.*
- *Using Plain English to communicate information.*
- *Develop a national clearing house for research on people with intellectual disability in the criminal justice system which is accessible by professionals to enable them to have current evidence based practice knowledge on supporting a client with an intellectual disability who is engaged in the system.*
- *Develop a Plain English information package that shows the legal process to a person with an intellectual disability that contains information about the adjustments that are available to them in the system.*
- *Information needs to be developed in a range of communications styles – compics, plain English and short videos that detail elements and processes in the legal systems – these could become available as apps for people who come into contact with the legal system.*
- *Speech Therapists need to be employed in the criminal justice system to disseminate the information in court documents to a person with an intellectual disability and ensure they understand them. Scope is an example of an organisation which has provide a vast range of information for people with an intellectual disability¹³*

¹³ www.scopevic.org.au

