

## **MHL Conference March 2012 Wellington**

### **Do the intellectually disabled get a fair trial?**

People with an intellectual disability may have special needs in their daily existence, obviously these needs become greater when they interact with the criminal justice system.<sup>1</sup> Statistics show a failure to identify people with an intellectual disability. Consequently, a disproportionately high percentage of prisoners has an intellectual disability.<sup>2</sup>

Research in Norway shows that approximately a third of people incarcerated suffers from an intellectual disability.<sup>3</sup>

In the USA<sup>4</sup>:

11% of inmates held in maximum security and 'death row' has an intellectual disability. In prisons in the USA 12.9% ID IQ < 70 (2.4%) or borderline IQ 70-80 (10.4%)

In Western Australia:  
3.6% of inmates IQ<80

The estimated percentage of people with an intellectual disability in Australian society is 1.85%, which make it clear that this group is over represented in the prisons.

A 2009 study<sup>5</sup>:  
185 male prisoners between 18 and 21 years old.  
10% IQ<70  
10% 70-74  
14% 75-79

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<sup>1</sup> Cockram and Jackson "People with an intellectual disability and the criminal justice system: the family perspective (1998) *Journal of intellectual & Developmental Disability*" Vol. 23 (1) pp. 41-56.

<sup>2</sup> Cockram and others "Perceptions of the judiciary and intellectual disability (1992) *Australia and New Zealand Journal of Developmental Disabilities*" (1992) Vol. 18 pp. 189-200.

<sup>3</sup> Sondena and others "The prevalence and nature of intellectual disability in Norwegian prisons" *Journal of Intellectually Disability research* (2008) Vol. 52 (12) pp. 1129-1137

<sup>4</sup> Riches and other "Intellectual disability and mental illness in the NSW criminal justice system" (2006) *International Journal of Law and Psychiatry* 29 pp. 386-396.

<sup>5</sup> Herrington "Assessing the prevalence of intellectual disability among young male prisoners" (2009) Vol. 53 (5) pp. 397-410.

A larger percentage of the people imprisoned fall within the group of people with an intellectual disability or are considered to be 'borderline', than one would expect when considering the number of persons with an ID in the general population.

These facts show that a thorough assessment of a suspect's mental capacity is not policy in the current system.

'The way offenders or alleged offenders with an ID are treated depends on the following factors<sup>6</sup>:

1. The country's criminal justice system. The reaction of society is influenced by the social services provided and mental health legislation.
2. Society's attitude to offenders with ID. The definition of ID and ability to stand trial.
3. The way social services are provided within the criminal justice system will be influenced by the way social services are set up and funded.

When we look at the way New Zealand's Criminal Justice system treats alleged offenders with an intellectual disability we see:

1. A failure to recognize people with ID
2. A failure to adequately assist people with ID

Many people with an intellectual disability do not receive the social services support they require before incarceration, and the majority of offenders with ID who are imprisoned, have not been previously assessed as people with ID at least in Norway.<sup>7</sup> Literature in the field advise that people with an intellectual disability, from the moment of arrest, during the trial, when imprisoned or in relapse prevention are very vulnerable.<sup>8</sup>

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<sup>6</sup> Sondenaar and others "The prevalence and nature of intellectual disability in Norwegian prisons" Journal of Intellectually Disability research (2008) Vol. 52 (12) pp. 1129-1137.

<sup>7</sup> Sondenaar and others "The prevalence and nature of intellectual disability in Norwegian prisons" Journal of Intellectually Disability research (2008) Vol. 52 (12) pp. 1129-1137.

<sup>8</sup> Sondenaar and others "The prevalence and nature of intellectual disability in Norwegian prisons" Journal of Intellectually Disability research (2008) Vol. 52 (12) pp. 1129-1137.

Without the proper assistance, this vulnerability could lead to inequality and an unfair outcome. A result of the failure to recognize people with ID is that they might not receive a fair trial: 'they may confess to a crime they have not committed and may not have their rights explained in a manner they can understand.'<sup>9</sup>

Studies show that with people with an Intellectual disability<sup>10</sup>:

- Make more frequent guilty pleas than other persons;
- Make less frequent appeals
- Fail to deal with the issue of competency via pre-trial evaluations
- Make less use of pre-trial diversions, probation and other non-incarcerative programs because of unsupported assumptions that people with ID are not suitable for non-custodial programs

Members of this group may go through the criminal justice system without a clue what is happening in court or what their lawyers tell them, let alone the judge (and do not understand the functions of the jury in any meaningful way).

People with an intellectual disability can fall through the cracks, and end up incarcerated as a result of the failure to recognise their disability s when they first come in contact with the authorities.

Since there are no real appropriate alternatives, or options offered them members of this group are likely to end up being 'incarcerated by default'. Due to their potential vulnerability, they will often end up in maximum-security prisons, regardless of the seriousness of their crime.<sup>11</sup> They are the victim of a system that fails to recognise them, and the assistance they require.

The failure to recognize people with an intellectual disability can be explained by that fact that recognition may require a trained eye. The characteristics of offenders with ID are found to be the same as among offenders in general, i.e. youth, male gender, psychosocial disadvantage, familial offending, history of behavioural problems, unemployment and co-morbid mental health problems.<sup>12</sup> This makes it difficult to recognize when a person needs to be assessed for someone unfamiliar with the disabilities.

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<sup>9</sup> Cockram and others "Perceptions of the judiciary and intellectual disability (1992) Australia and New Zealand Journal of Developmental Disabilities" (1992) Vol. 18 pp. 189-200.

<sup>10</sup> Cockram and others "Perceptions of the judiciary and intellectual disability (1992) Australia and New Zealand Journal of Developmental Disabilities" (1992) Vol. 18 pp. 189-200.

<sup>11</sup> Riches and other "Intellectual disability and mental illness in the NSW criminal justice system" (2006) International Journal of Law and Psychiatry 29 pp. 386-396.

<sup>12</sup> Sondena and others "The prevalence and nature of intellectual disability in Norwegian prisons" Journal of Intellectually Disability research (2008) Vol. 52 (12) pp. 1129-1137.

The lack of training for lawyers and judges to recognise these problems is a major impediment to improvement.

In Finland the number of offenders with ID is small, but the group does exist. If the offender has ID the treatment is less structured than the treatment of forensic psychiatric patients with traditional mental illness.

The important question is: how do you prevent the young adults in this complex, poorly served and under-recognized group from slipping through the cracks?<sup>13</sup>

In my opinion the solution has to be legal advocacy and support for people with ID from the moment they first come in contact with the police. An early assessment as to what the extent and nature of the intellectual disability is, and how much the accused is able to understand. On that basis provide the care they need. The families of the offenders unanimously support this concept.<sup>14</sup> People with ID require special care, the objective goes beyond protecting legal rights; the procedure could be completely legal and correct under the law, and still prove to be a disadvantage for this special group. Someone with an understanding of intellectual disabilities should be strongly advocating for them, be on their side, in order to counterbalance the disadvantage.<sup>15</sup>

'There is a lack of competence in the identification of ID in the criminal justice system. Implementing the HASI (Hayes 2000) as a screening checklist is one way of solving this problem, but there needs to be more radical thinking in addressing the costs and benefits from identifying offenders with ID.'<sup>16</sup>

The advantage of a checklist is that it may address further examinations and assistance before entering police questioning.

The Court and the prisons should direct resources to meet the needs of people who have intellectual problems, both with supporting agencies in courts and with adapted prison rehabilitation programs.

The criminal justice system should take into consideration the profound learning difficulties in ID and remove some of the barriers that make changes impossible.

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<sup>13</sup> Mannysalo and others "Forensic psychiatric perspective on criminality associated with intellectual disability: a nationwide register-based study (2008) *Journal of Intellectual Disability research*" Vol. 53 (3) pp. 279-288.

<sup>14</sup> Cockram and Jackson "People with an intellectual disability and the criminal justice system: the family perspective (1998) *Journal of intellectual & Developmental Disability*" Vol. 23 (1) pp. 41-56.

<sup>15</sup> Cockram and others "Perceptions of the judiciary and intellectual disability (1992) *Australia and New Zealand Journal of Developmental Disabilities*" (1992) Vol. 18 pp. 189-200.

<sup>16</sup> Sondena and others "The prevalence and nature of intellectual disability in Norwegian prisons" *Journal of Intellectually Disability research* (2008) Vol. 52 (12) pp. 1129-1137.

It is important to identify the members of a specific group, and make certain they receive the care they need. The small subgroup of criminal offenders with so-called triple diagnosis, substance abuse, mental illness and ID', for instance, has their specific complex needs. For this group studies show 'close, long-term cooperation among specialist in the field of ID, addiction service, mental health services and forensic psychiatry' is of the highest importance.<sup>17</sup>

It is also important that there is a better understanding of people with an intellectual disability. Wolfensberger (1991) argues that the negative stereotyping by society of people with ID as an eternal child, sick, a menace, sick, or an object of pity, has the effect of segregating the group from mainstream society.

If this group is better understood, at least by the authorities, the possibility of an intellectual disability is more easily recognised and a professional could be called in to assist further and make sure proper care is facilitated.

The position of a suspect with a possible intellectual disorder during trial also leaves much to be desired. Section 9 of the Criminal Procedure (Mentally Impaired Persons) Act 2004 (CPMIPA) requires a Court to determine on the *balance of probabilities* (a standard applying to civil not criminal cases) whether a person charged has committed the physical acts of the offence (absent most of the mental element). Persons not having an ID, and not suspected of having an ID, receive a trial on a beyond reasonable doubt standard, which those with ID do not receive. The English have a somewhat similar system but the determination of whether the acts were committed is on a *beyond reasonable doubt* test: we appear to be the only country to so discriminate. The position is made worse as the s 9 *did you commit the acts* hearing is determined before the Court determines whether you have an intellectual disability.

The Ruka case<sup>18</sup> provides us with a perfect example of how someone with an intellectual disability can be disadvantaged in the current system. It was decided on the basis s 9 that Mr. Ruka in all probability did commit the crime of which he was accused, without the opportunity to cross-examine the witnesses. Mr. Ruka can apparently be detained whilst suffering from an Intellectual Disability without any opportunity to confront his accusers, because a Judge determined he "did it" and he is unable because of his disability to present a defence. The outcome of such a hearing, although not a conviction, still has a great impact on the accused life. Following his appeal all 20 sexual violation charges were dismissed at a s 347 applications.

It seems rather strange then, not to first determine the existence of a disability, as the accused may not be able to present a full defence at the s 9 hearing

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<sup>17</sup> Mannysalo and others "Forensic psychiatric perspective on criminality associated with intellectual disability: a nationwide register-based study (2008) Journal of Intellectual Disability research" Vol. 53 (3) pp. 279-288.

<sup>18</sup> *R v Ruka* [2011] NZCA 404

because of his or her unconfirmed disability.

The entire process is described by Professor Brookbanks of Auckland University as “complex”:

The question of when the issue of fitness to plead may be raised and the conditions necessary before the issue can be addressed by a court has proven to be surprisingly complex. The straightforward common law rule that the issue could be raised at any stage of a criminal trial, up to and including execution of judgment, has had to yield to the express language of the statute which, as it seems, has not conveyed great certainty.

It is obvious that people with an intellectual disability do not receive a fair trial until a system is created that supports their specific needs.

There is a necessity for a more thorough understanding of intellectual disorders amongst the authorities, and the intellectually disabled need professionals to guide them through the complicated path that is the criminal justice system.

A change in the current NZ system should be the objective since this system fails to provide people with ID suffice consideration.

Proper Care, like for example from a caregiver, an interpreter, or a professional with a proper understanding of intellectual disabilities, need to be provided from the earliest possible pre-trial stage up to an actual trial, it is the only way to guarantee a fair trial.

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