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The Clerk
Justice and Electoral Committee
New Zealand House of Representatives
Wellington

Criminal Procedure (Reform and Modernisation) Bill

1. I make a brief submission on the Criminal Procedure (Reform and Modernisation) Bill on a single topic, which is unlikely to receive a great deal (if any) attention in mainstream submissions. It is neverthess an important and (as in the Bill) a much overlooked area of criminal law with few advocates for the very necessary reforms that are needed.

2. I wish to be heard orally in support of my submission.

3. My concern is about those members of the public who interface with the criminal justice system who are intellectually impaired.

4. It is difficult to be precise about the numbers, but international studies in like countries show that the range is likely to be as high as 12% and as low as 2% of those imprisoned. Taking a mid point of 7%, that is significant number. Of course large numbers of people with intellectual disabilities are dealt with by the criminal justice system in ways short of being sent to jail.

5. Put simply, a person is defined as having an intellectual disability ("ID") if having, from the before the age of 18, an IQ of 70 or less, and having at least two adaptive function deficits (e.g. have major difficulties in looking after themselves, or are functionally illiterate).

6. Those for whom this is the case as a result of a brain injury after age 18 have an intellectual impairment but not an intellectual disability.

7. It is unlawful according to the Human Rights Act to discriminate on the ground of an intellectual disability.

8. Yet the criminal justice system plainly does discriminate.

9. 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. A process criticised by the Court of Appeal. See *R v Te Moni*,[1] where I was counsel:

> [96] Our discussion in relation to s 9 reveals areas of concern (as did the earlier discussion in *McKay*). We raise for consideration whether the s 9 requirement ought to come after the fitness to stand trial assessment has been made, so that a s 9 hearing would occur only where there is to be no trial. It seems to us that the current provisions require an accused person whose fitness to stand trial is in doubt to undergo a form of trial as part of a process to determine whether he or she is fit to do so. If the s 9 hearing happened after the assessment of fitness to stand trial, the process could be tailored to deal with the reality that the accused person could not properly participate. And the possibility that a complainant in a sex case would be required to give evidence twice would be avoided.

10. And also see the earlier case of *R v McKay*:[2]

> [92] We think this is a plain case where the courts are required to fill in gaps in the statute so as to make the legislation work: see generally Burrows and Carter Statute Law in New Zealand (4ed 2009) at 212-213. The classic authority is *Northland Milk Vendors Association Inc v Northern Milk Limited* [1988] 1 NZLR 530, where Cooke P, for this court, said at 537-538:
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> > Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended… The present case is in our opinion another illustration of a hiatus which the Court can legitimately and should bridge.

11. What this may mean in practice is that a client such as Mr Ruka[3] can be

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1 [2009] NZCA 560

2 CA391/2008 26 August 2009 (CA).

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. (He maintains his accusers lied and had previously made another false complaint as the real perpetrator – if there was any sexual abuse – was a family member).

12. With respect, it is nonsense 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 because of his or her unconfirmed disability.

13. 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.

14. Regrettably, the Bill does little to tackle one of the most complex areas of the criminal law in need of reform and modernisation. Schedule 4 addresses a number of minor changes, primarily to bring the terminology in line with the new law. One welcome change is the repeal of s 13(3) of CPMIPA, which effectively states that a person with ID can never be acquitted, even if provably innocent.

15. A specialist Court or Judges and lawyers are required to effectively give adequate representation and fair trials to persons with an ID.

16. Unlike some Australian and Canadian states, we have no specialist Mental Health Courts,[4] albeit a pilot study is being undertaken, as I understand it in Auckland.

17. The problem is systemic. A lack of education at law schools, and of the legal profession, and a lack of training or understanding through all aspects of the criminal justice system from the police station, through the Courts and to the prison.

18. For example, the literature establishes the suggestibility phenomenon were persons with ID are highly suggestible and are taken advantage of (accidentally or deliberately) at police stations into making false

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[3] Appeal in Court of Appeal pending on 6 and 7 June 2011, and currently on bail granted by the Court of Appeal.

[4] Mental Health (where mental problems are usually not permanent) and ID are usually bundled together internationally. There are sometimes overlaps as a person with ID could (like other sectors of the population) have occasional mental health problems, only also suffering from an ID may make matters worse.

confessions, and then go thought the criminal justice system without a clue want is happening in court or what there lawyers tell them, let alone the judge.

19. Professor Perlin, a leading US commentator in the field, says in respect of counsel operating:[5]

> And so it remains today. The quality of counsel assigned to represent individuals facing involuntary civil commitment to psychiatric hospitals is, in most American jurisdictions mediocre or worse. Legal challenges to the status quo have been rare. (Perhaps) startlingly, this reality goes almost unmentioned in the legal literature. Also, those of us who identify with the clinical legal education movement cannot pat ourselves on the back too vigorously; in a recent survey, I identified only *ten* domestic law schools that offered courses that, broadly, could be called "mental disability law clinics." Internationally, there are far fewer.

20. Given the Legal Services Agency requirement that a year's experience in the family Court is needed to be put on the ID list, this is a further disincentive which means few lawyers are involved in the field. One wonders how, for example, one year's experience of child custody or matrimonial property cases is more important than human rights cases. But for that reason, persons such as myself could not be placed on the list.

21. This is not a personal moan, as I rarely appear in the District or Family Courts but generally work in the higher courts. However younger or less experienced lawyers are disadvantaged.

22. Equally the Legal Services Agency has no "standards" applying to this field of work, which they do for other practice areas such as mental health law.

23. Sadly, the standard of representation could be better – whilst there are some very able lawyers in this field, the absence of any meaningful training does not help. The Legal Service Agency which until now will have provided assignments for most persons with ID (who one suspects are, because of their disabilities, more likely than not unable to afford privet counsel), and presumably now also the Public Defender will represent most of the persons with ID.

24. Whilst I understand there is to be a review of the CPMIPA this year more is needed than that: a full-scale committee inquiry is needed into the rights of the Intellectually Disabled.

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[5] "*I Might Need a Good Lawyer, Could Be Your Funeral, My Trial*': Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases", New York Law School Clinical Research Institute, Research Paper Series No. 07/08 # 22. http://ssrn.com/abstract = 1090997.

25. New Zealand chaired the working group on the UN Convention on the Rights of Persons with Disabilities, but has yet to recognise he right to make individual complaints to the UN Committee responsible, or change the laws in respect of persons of ID to ensure that there is no discrimination in the field. For example, you cannot be tried by a juror with an intellectual disability but could be tried by 12 psychopaths who are deaf, dumb and blind.

26. The interface of mental impairment and criminal procedure is an area ripe for reconsideration. The current process for determining fitness to stand trial is unwieldy, complex and discriminatory. The failure of the criminal procedure simplification process to get to grips with this area of criminal procedure is a glaring omission. Reform in this area should be progressed at the earliest opportunity.

Tony Ellis
18 February 2011