

WEST HEIDELBERG COMMUNITY LEGAL SERVICE

155 Oriel Road West Heidelberg 3081
Phone 9450 2002 Fax 9458 1067
ABN 48 964 511 645 (Reg No A0013686G)

BACKGROUND PAPER

INTELLECTUAL DISABILITY (ID), COMMUNICATION AND THE LAW

Authored by Michelle Armstrong,
a La Trobe Law Student, as part of her clinical placement
at the West Heidelberg Community Legal Service.

Edited and supervised by Liz Curran,
Lecturer in Law and
Student Clinical Legal Education Supervising Solicitor
La Trobe Law/West Heidelberg Community Legal Service.

Introduction

The Fitzroy Legal Service Handbook states, “everyone has a right to be heard and responded to in a language they understand.”¹ Communication encompasses many elements, one of which is language. It has been estimated that nearly 50% of people with an intellectual disability (ID) will have difficulty with one or more of these elements. These difficulties vary between people and may be obvious or so subtle that they remain unnoticed.

This paper will discuss the definition of ID. It will illustrate the rights of people with an ID, and then discuss the incidences of ID in the criminal offending population. This report will then focus communication difficulties associated with ID and the implications of these difficulties when people come into contact with the law and legal practitioners. Specifically it will discuss:

1. The significant lack of resources, support and training for lawyers to enable them to identify someone with an ID, and communicate with their client effectively.
2. The implications of this include increased time, stress, frustration and costs which may ultimately lead to miscarriages of justice

It is important to note that communication is one of many problems faced by people with an ID, when they come into contact with the different facets of the legal system. For the purposes of this report, communication between people with an ID and lawyers will be the focus.

Methodology

This paper is based primarily on a review of the literature in Victoria, New South Wales and some international sources. The discussion is supplemented by anonymous examples, observations and discussions with practitioners and fellow student lawyers participating in Clinical Legal Education at the West Heidelberg Legal Service.

What is Intellectual Disability (ID)?

Section 3 of the *Intellectually Disabled Person's Services (IDPS) Act 1986* (Vic) and section 3 of the *Disability Bill 2005* (Vic) define ID as follows:

In relation to a person over the age of 5 years [...] the concurrent existence of –

- (a) *significant sub-average general intellectual functioning; and*
- (b) *significant deficits in adaptive behaviour –*

each of which became manifest before the age of 18 years.

This definition is interpreted as follows:

¹ Harper, K. *The Law Handbook*. The Fitzroy Legal Service, 2006.

- ‘Significant sub-average intellectual functioning’ is indicated by an intelligence quotient (IQ) of 70 or less². IQ is obtained from a standardised intelligence test administered and interpreted by a qualified professional, usually a psychologist.
- ‘Significant deficits in adaptive behaviour’ can be defined as difficulties with everyday life skills.³ Communication is an example of an everyday life skill.

Research estimates approximately one percent of Victorians have an ID. 75% of this one percent has a mild ID and 25% range from moderate to profound.⁴

What ID is not.

Literature, often incorrectly, considers ID and Mental Illness as the same disability. The two diagnoses have different aetiology, symptomatology, prognosis, treatment and management. For example:

- Psychiatric illness is often temporary or episodic and the symptoms may be controlled by pharmacotherapy.
- ID cannot be ‘treated’ or ‘cured’. With appropriate support and training however, people can develop their functional skills.⁵

Legislative provisions in Victoria also distinguish ID and mental illness. For example the para.8(2)(j) of the *Mental Health Act 1986* (Vic), states that a person is not to be considered to be mentally ill by reason that the person is intellectually disabled.

People with a mental illness may present with difficulties in communication. However, in this paper the focus will be on communication difficulties and the implications associated when a person with ID comes into contact with the legal system.

Legal rights of people with an ID.

Section 3 of schedule 4 to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)⁶, in adopting schedules from the *United Nations Declaration of the Rights of Mentally Retarded Persons (1971)*, states that:

“(1)The mentally retarded person has the same rights as other human beings[....]

²World Health Organization. *Mental Retardation: Facts and Figures*.

http://w3.whosea.org/en/Section1174/Section1199/Section1567/Section1825_8084.htm (website accessed 13/5/2006)

³Disability Services. *Intellectual Disability – Some questions and answers* Department of Human Services, Vic, 2005. <http://hnb.dhs.vic.gov.au/ds/disabilitypub.nsf/pages/IntellectualDisabilityQuestionsandAnswers?open> (website accessed 13/5/2006)

⁴ ibid.

⁵ ibid.

⁶*Human Rights and Equal Opportunity Commission Act 1986* (Cth)

http://www.austlii.edu.au/au/legis/cth/consol_act/hraeoca1986512/sch4.html (accessed 13/5/06)

(5) If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.”

Note that the term ‘mentally retarded’ is synonymous with ID in this instance.

The objectives section in the *Disability Bill 2005* (Vic) states that people with disabilities have the right to “participate actively in decisions that affect their lives and have information and be supported[...]to enable this to occur[...] and to] access information[...]in a manner appropriate to their communication needs”⁷

ID in the offender population

Hayes in *Simply Criminal* describes the ‘typical’ prisoner with an intellectual disability in Australia as someone with “severe deficits in social and adaptive skills[...]particularly in the area of communication and social interactive skills.”⁸

NSW has completed a significant amount of research into the incidence of people with ID in the criminal justice system. Comparatively, there is a lack of empirical data for Victoria. In view of this, the paper will concentrate on the situation in NSW.

In NSW people with an ID are over-represented in the criminal justice system.⁹ Research has highlighted that prisoners with an ID have a 78% higher rate of reimprisonment than the general prisoner population.¹⁰ More than one third of people appearing before local courts on criminal charges may have a significant ID¹¹. Whilst representing one percent of the population, people with ID comprise 12-13% of the prison population.¹² The NSW Law Reform Commission suggested that a person with an intellectual disability is more likely to admit to an offence, even if they have not committed it, because they may not want to acknowledge that they did not understand the questions.¹³

Difficulties faced by people with an ID:

Difficulties include:

- Understanding the roles of, and communicating with police, lawyers, courts and other professionals.

⁷ *Disability Bill 2005* (Vic).

<http://hmb.dhs.vic.gov.au/ds/disabilitypub.nsf/pages/ExposureDraftDisabilityBill2005?open>
(accessed 13/5/06)

⁸ Hayes, S. *Simply Criminal*, 2nd ed. Annandale, N.S.W Federation Press, 1992.

⁹ The NSW Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System* (Report 80), 1996.

¹⁰ Legal Information Access Centre. *The role of Human Services* (Hot Topic 4) 2002
http://beta.austlii.edu.au/au/other/liac/hot_topic/hottopic/2002/4/3.html (accessed 13/5/06)

¹¹ NSW Law Reform Commission. *People with and Intellectual Disability and the criminal justice system: appearances before local courts* (Research Report 4) Sydney, 1993.
<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/RR4TOC> (accessed 13/5/06)

¹² Hayes, S. & McIlwain, D. *The prevalence of Intellectual Disability in the NSW prison population: an empirical study* Report to the Criminology Research Council Canberra, 1988, p47

¹³ NSW Law Reform Commission. *People with and Intellectual Disability and the criminal justice system: appearances before local courts* (Research Report 4) Sydney, 1993.
<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/RR4TOC> (accessed 13/5/06)

- Understanding the legal situation, relevant facts, issues, charges, procedures, impact of likely penalties, and adversarial atmosphere of the court room.
- The ability to comprehend the complex language associated with the law. “Very little is in plain language”.¹⁴

It has been estimated that the incidence of communication difficulties amongst people with ID is between 40-50%.¹⁵ This highlights that communication is a key consideration for all those who come into contact with people with ID.

The most common difficulties are as follows:

1. Comprehension. It cannot be assumed that a person’s expression and understanding are at the same level. Social speech and learnt phrases are common. Environment, peer behaviour and routine may also disguise comprehension. Comprehension may also include the speed at which information is processed.
2. Vocabulary. Difficulties may arise because:
 - a. Different words are used to describe the same thing;
 - b. Difficulties comprehending the meaning of less common words; and
 - c. Metaphors may be taken literally.
3. Sentence construction and length. For example: difficulties may arise when more than one instruction is given in a single sentence.
4. Expression. Difficulties may arise because of limited vocabulary; articulation (ie clarity of speech); dysfluency (eg stuttering); appropriate volume, rate, intonation and pitch.
5. Social skills. For example: distance; being overly friendly with strangers; and reading body language.
6. Sensory difficulties. For example: vision; hearing and sensory processing (eg finding noise distracting)
7. Communication style (written or verbal).
8. Attention, memory and distractibility ¹⁶.

Difficulties faced by lawyers:

The following two examples illustrate the difficulties and frustrations lawyers face when working with a person who has an ID.

Mrs. A has an ID. When she attended her appointment at the Community Legal Centre she was too embarrassed to admit that she had an ID. The lawyer allowed 30 minutes to interview her, during which time she did not suspect that her client had a disability. The lawyer provided advice, but due to her difficulties with comprehension, Mrs. A did not understand.¹⁷

¹⁴Legal Information Access Centre. *Setting the Scene*. (Hot Topic 4) 2002.

http://beta.austlii.edu.au/au/other/liac/hot_topic/hottopic/2002/4/1.html (accessed 13/5/06)

¹⁵ Kelly, A. *Working with Adults with a Learning Disability*. A Winslow Practical Therapy Training Manual. UK, 2000.

¹⁶ Compiled from the following references:

- *ibid.*
- Office of the Public Advocate. The Independent Third Person Program. 2001. <http://www.publicadvocate.vic.gov.au/CA256A76007E8265/OrigDoc/~06E7A429AF2522CACA256ACC0007153E?OpenDocument> (accessed 13/5/06).
- Intellectual Disability Rights Service. Acting for clients with an Intellectual Disability. IDRS fact sheet for Lawyers. <http://www.idrs.org.au/pubs/acting.html> (accessed 13/5/06)

¹⁷ Discussion on 31/5/06 with solicitor as part of Clinical Legal Education.

Mrs. B met with a duty lawyer at the Magistrates Court. The duty lawyer was busy and had many clients to see. The duty lawyer did not notice that her client had an ID. This information was therefore not presented to the Magistrate and the client was sentenced to jail.¹⁸

Working with a person who has an ID requires comprehensive and specific training. As highlighted above people with an ID have varying degrees of difficulty with communication. Lawyers need to appreciate and advocate for increased time in all elements of their client work to accommodate for these difficulties.

People with an ID often do not look 'disabled'. Lawyers are not health professionals, and cannot be expected to diagnose a person who has an ID. With training, lawyers will be given the tools to assess if someone is having difficulty communicating or understanding a legal situation. They will then be able to tailor their communication strategies to meet the client's needs.

What initiatives are in place?

Independent Third Person (ITP) Program

An initiative of the Office of the Public Advocate, the ITP is a trained volunteer responsible for assisting a person with an ID during an interview or when making a formal statement to Victorian Police. The role of the ITP is to: "facilitate communication; assist the person to understand their rights; and support the person throughout the process"¹⁹.

Victoria Police Operating Procedures require Police members to contact an ITP when interviewing a person with an ID.

Disability Coordinator

In 1997, the Magistrates Court of Victoria established this position to respond to the needs of people with disabilities who come into contact with the court. The Disability Coordinator is responsible for providing information to the Court on relevant matters about the individuals medical history, social background and supports and how their disability might impact on the court process.²⁰

NSW Initiatives

- "Cleartalk" is a resource manual for Police Officers developed in response to concerns expressed by members of the Police about communicating with people with an ID. The aim of the manual is to provide support and training for Police Officers in this area.
- Intellectual Disability Rights Service's (IDRS) Criminal Justice Support Network has produced a "Lawyers Information Kit". This covers the topics such as 'What is ID' and 'Communication tips'.

¹⁸ *ibid.*

¹⁹ Office of the Public Advocate. The Independent Third Person Program. 2001.
<http://www.publicadvocate.vic.gov.au/CA256A76007E8265/OrigDoc/~06E7A429AF2522CACA256ACC0007153E?OpenDocument> (accessed 13/5/06).

²⁰ Magistrates Court Victoria. *Disability Coordinator*.
<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Court+Support+and+Diversion+Services-Disability+Coordinator?OpenDocument&l=45-Court+Support+and+Diversion+Services~&2=60-Disability+Coordinator~&3=~> (accessed 13/5/06)

- The NSW Police Service in 1997 developed a *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)*²¹ in response to their research conducted with police officers. Following this code of practice, when interviewing people, police officers are to consider a range of factors including: their ability to understand the caution; their social and educational history and current situation (eg if on a support pension) and their ability to understand and respond to questions and instructions.

Police officers in Victoria, through the ITP and NSW, through the “Clear talk” and “CRIME” initiatives, have access to support when they are working with people with an ID. The courts in Victoria have access to the Disability Coordinator to assist them to manage the issues involved when a person with an ID comes into contact with the court.

This report has highlighted that there is a critical need for lawyers to: identify someone with an ID; identify their communication needs; and tailor their interactions to meet these needs. There is insufficient training and resources to enable lawyers to effectively work with a client who has an ID.

²¹Legal Information Access Centre. *Accused of a Crime*. Hot Topic 4. 2002.
http://beta.austlii.edu.au/au/other/liac/hot_topic/hottopic/2002/4/2.html (accessed 13/5/06)

Recommendations:

1. That training providers such as the Leo Cussen Institute, Victorian Legal Aid and the Law Institute of Victoria include education programs aimed at providing legal practitioners with the skills to communicate with people with ID. Such training programs exist through non legal organisations such as Communication Aid Users Society Inc (CAUS). It is essential however, that these be tailored to the specific needs of lawyers.

2. That the Law Institute of Victoria introduce a requirement that practitioners complete at least one Continuous Professional Development point on training relevant to communication with people with ID.

3. That a streamlined system is implemented to ensure that lawyers can access documents proving that a person has been registered with an ID without delays.

4. That a short, simple resource be developed to assist lawyers in identifying and working with a person with an ID. See Appendix 1 for an example of what may be included in such a resource.

APPENDIX 1:

Items that may be included in a resource to assist lawyers when working with a person with an ID. (Note that this is just a sample of what may be included)

1. How to identify if your client has an ID:
 - i. Communication difficulties. Refer to those discussed in the body of this report.
 - ii. Behaviour that displays, for example, an over reliance on the lawyer as the authority figure.
 - iii. Social situation. For example receives a pension, lives in a group home, receives community services such as therapy.
 - iv. Task performance. For example has difficulty reading and writing.²²
2. What steps to take if you believe your client has an ID:
 - i. Find out if they are registered
 - ii. Liaise with their GP or other health professional to confirm your suspicions.
3. How to effectively conduct your initial interview: eg how to appropriately set up the environment to minimise distractions, use simple language, use short sentences, ask one question or provide one instruction at a time and ensure that each is understood.
4. The key to ensuring that all interactions during the client-lawyer relationship are as effective as possible is to allow, and take plenty of time.
5. When providing written material ensure that your client can read it. It may be useful to use simple diagrams or pictures.

Essay word count 2218.

²² Ierace, M. *Intellectual Disability. A Manual for Criminal Lawyers*. Sydney, Redfern Regal Center 1989

References:

Books:

Harper, K. *The Law Handbook*. The Fitzroy Legal Service, 2006.

Hayes, S. *Simply Criminal*, 2nd ed. Annandale, N.S.W Federation Press, 1992.

Ierace, M. *Intellectual Disability. A Manual for Criminal Lawyers*. Sydney, Redfern Regal Center 1989

Kelly, A. *Working with Adults with a Learning Disability*. A Winslow Practical Therapy Training Manual. UK, 2000.

Reports:

Hayes, S. & McIlwain, D. *The prevalence of Intellectual Disability in the NSW prison population: an empirical study* Report to the Criminology Research Council Canberra, 1988, p47

The NSW Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System* (Report 80), 1996.

Legislation:

Disability Bill 2005 (Vic).

<http://hnb.dhs.vic.gov.au/ds/disabilitypub.nsf/pages/ExposureDraftDisabilityBill2005?open> (accessed 13/5/06)

Human Rights and Equal Opportunity Commission Act 1986 (Cth)

http://www.austlii.edu.au/au/legis/cth/consol_act/hraeoca1986512/sch4.html (accessed 13/5/06)

Web Resources:

Disability Services. *Intellectual Disability – Some questions and answers* Department of Human Services, Vic, 2005.

<http://hnb.dhs.vic.gov.au/ds/disabilitypub.nsf/pages/IntellectualDisabilityQuestionsandAnswers?open> (website accessed 13/5/2006)

Intellectual Disability Rights Service. Acting for clients with an Intellectual Disability. IDRS fact sheet for Lawyers. <http://www.idrs.org.au/pubs/acting.html> (accessed 13/5/06)

Legal Information Access Centre. *Accused of a Crime*. Hot Topic 4. 2002. http://beta.austlii.edu.au/au/other/liac/hot_topic/hottopic/2002/4/2.html (accessed 13/5/06)

Legal Information Access Centre. *The role of Human Services* (Hot Topic 4) 2002 http://beta.austlii.edu.au/au/other/liac/hot_topic/hottopic/2002/4/3.html (accessed 13/5/06)

Legal Information Access Centre. *Setting the Scene*. (Hot Topic 4) 2002. http://beta.austlii.edu.au/au/other/liac/hot_topic/hottopic/2002/4/1.html (accessed 13/5/06)

Magistrates Court Victoria. *Disability Coordinator*.

<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Court+Support+and+Diversion+Services-Disability+Coordinator?OpenDocument&1=45-Court+Support+and+Diversion+Services~&2=60-Disability+Coordinator~&3=~> (accessed 13/5/06)

NSW Law Reform Commission. *People with and Intellectual Disability and the criminal justice system: appearances before local courts* (Research Report 4) Sydney, 1993.

<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/RR4TOC> (accessed 13/5/06)

Office of the Public Advocate. The Independent Third Person Program. 2001.
<http://www.publicadvocate.vic.gov.au/CA256A76007E8265/OrigDoc/~06E7A429AF2522CACA256ACC0007153E?OpenDocument> (accessed 13/5/06).

World Health Organization. *Mental Retardation: Facts and Figures*.
http://w3.whosea.org/en/Section1174/Section1199/Section1567/Section1825_8084.htm (website accessed 13/5/2006)