

ROUGH JUSTICE: THE COLLISION BETWEEN THE MENTALLY ILL AND THE QUEENSLAND CRIMINAL JUSTICE SYSTEM

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I ABSTRACT

This presentation extrapolates the findings of the award winning evidence-based research of Queensland's Disability Law Project; the first specialist legal service of its kind in Australia. The presentation identifies the efficiencies and deficiencies of the Queensland criminal justice system, particularly the legal face of that system in its treatment of people that suffer from an intellectual disability, an acquired brain injury and/or mental illness. The presentation relies upon quantitative and qualitative data gathered over the past three and half years by The Advocacy and Support Centre's lawyers, and the several hundred disabled and or mentally ill clients whom they defended. The presentation reviews the Queensland experience and reflects on potential directions for reform of mental health law, arguing that Local and Magistrates Courts require restructuring to enable them to enhance access to justice for disabled and mentally ill defendants. It also argues that Brisbane's experimental 'Special Circumstances Court' represents a significant step in the right direction towards a more therapeutically effective jurisprudential forum in this context.

II INTRODUCTION

Good Afternoon

My colleague, Sue Gordon and I, work for a Community Legal Service called TASC, which operates out of the regional town of Toowoomba in the South East Corner of Queensland in Australia. We are going to speak today about the very important relationship that exists between lawyers and mentally disabled persons in criminal justice systems generally, but with a focus on the common law jurisdiction of Queensland.

We know that lawyers commonly come into contact with mentally disabled persons as:

- Victims of crime;
- Involuntary patients in civil commitment proceedings; and
- In a variety of other civil legal contexts.

However, today we are interested in speaking, exclusively about lawyers and their contact with persons who may have a mental disability as *criminal defendants* at the initial stage of contact with their clients.

So - there are a four basic points we wish to emphasise:

1. The nature of Queensland's Magistrates Court system predisposes the mentally ill and the intellectually disabled to injustice;
2. Lawyers in all jurisdictions must possess the communication skills and knowledge to adequately identify the potential presence of a mental disability in their clients;
3. The ability to identify the potential presence of a mental disability is contingent upon the accessibility of targeted and appropriate educative resources for all relevant professionals at all levels of experience within the legal profession; and
4. That we can significantly enhance access to justice in this context by implementing some long-overdue strategies.

III MENTAL DISABILITY IN THE CRIMINAL JUSTICE SYSTEM

I think that it fair to say that there is an overwhelming consensus that those people with a mental disability are, in varying degrees, vulnerable to exploitation, discrimination, and social marginalisation due to their disability. They are disadvantaged by a limited and usually segregated education, and a greater reliance on subsistence welfare on, or just above the poverty line.¹ And it is almost trite to suggest that those persons who suffer from a mental disability have a disproportionate risk of colliding with criminal justice systems. In New South Wales (Australia) 19-20% of the prison population has an intellectual disability,² and in the United States research has identified a rate of 4-10%.³

In respect to actual offences, most mentally disordered defendants are arrested for summary offences or minor crimes. Of the total prison population in New South Wales, approximately 60% of female and 44% of male prisoners convicted

¹ Australian Bureau of Statistics, 'Disability, Ageing and Carers' (1998)

² See Hayes, 2000 and Hayes 2004.

³ See Petersilia, 1997

for a minor crime were diagnosed with a mental disorder, including psychosis, anxiety and affective disorder.⁴

In drawing the inter-relatedness between mental health, homelessness and law infringement, In 2005, Legal Aid Queensland identified a more than significant relationship between mental illness, homelessness and street offences. They identified that more than half of their sample group suffered from a mental health condition.⁵ These are significant numbers.

So it is apparent that the Queensland criminal justice system, and others, predisposes mentally disabled persons to injustice. This cohort is predisposed to apprehension by police by virtue of their visibility and their often-challenging behaviour. It is clear that police often question many persons in the absence of an independent person as is generally required by statute.⁶ Moreover, they are at times excessively compliant to suggestion and therefore may make admissions for reasons that do not always relate to guilt. It is also clear that when appearing in Local Courts, mentally disabled persons, become victim to the velocity of a duty lawyer system; a system that often times has failed to identify the presence of a relevant disability.

Let me give you an example...

A Case Scenario

Meet Melissa, who has a criminal history for various stealing offences in Queensland. She has a diagnosis of mild retardation with significant impairment of behaviour according to the World Health Organisation's ICD.

In all of her past appearances at the Local Court she pleaded guilty to several, relatively minor stealing charges including the theft of small retail items such as greeting cards and stationary.

Melissa's sentences included substantial monetary fines, community service and restitution orders. It is quite clear that these kinds of sentences are not constructive to the rehabilitation of a person living with an intellectual disability, and it is no surprise that Melissa constantly breached those orders, effectively entrenching her within our criminal justice system.

At Melissa's latest appearance before the Local Court she faced the very real risk of serving a custodial sentence due to the repetitive nature of her offending, and

⁴ Corrections Health Service, 2002). NSW Corrections Health Service (1997) *Inmate Health Survey*. NSW Health Department publication.

⁵ See Legal Aid Queensland, 'Homelessness and Street Offences Project' (2005)

⁶ See Police Powers and Responsibilities Act

due to the Court's inevitable view, that some-how this offending behaviour must stop.

Now thankfully, prior to this appearance, Melissa's defence lawyer referred her to TASC, due to his concerns regarding her mental 'capacity'; it being quite clear to him that she had an intellectual disability. TASC then referred her to an Authorised Mental Health Unit for a Legally Aided psychiatric assessment.

Melissa was subsequently diagnosed with a personality disorder with a psychometric IQ assessment of 50 – 69. This effectively places her within the lowest one percent of the community in terms of her intellectual capacity. The psychiatrist also considered that Melissa was also permanently unfit for trial. Queensland's Mental Health Court eventually agreed and the criminal charge against her, in this instance, was dropped.

Now although Melissa need not now face this charge, there remain significant ethical issues relating to her case and the many others so similar to hers:

For a start, Melissa's criminal history, which is unrelated to the dropped charge remains on her record. In addition to living with her disability, she will continue to experience difficulties in obtaining:

- Casual employment;
- Private rental accommodation; or even
- A visa to accompany her parents on an overseas vacation.

A critical issue here is: why did Melissa's clear intellectual disability not put her previous lawyers on notice that the issue of her capacity should be put into issue in relation to those charges that remain on her record? Let's contemplate the reasons for this:

Clients in Melissa's situation, like many other defendants, often plead guilty and accept the wrap with a discount for the early plea. Of course, all lawyers should understand their duty to their client. Where instructed to plead guilty the lawyer's duty to their client directs that they should act according to those instructions.

An adversarial system dictates that lawyers be zealous partisans for their clients.⁷ However, lawyers should not instruct their clients. Lawyers are officers of the court giving rise to other duties, the most prominent being that their duty to

⁷ See Law Council of Australia, 'Model Rules of Professional Conduct and Practice' (2003) r 1.1: A practitioner has a duty to act honestly and fairly, and with competence and diligence, in the service of a client; r 12.1: A practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these rules.

the court and the administration of justice. Where there is conflict between loyalties the duty to the court must prevail.⁸

A practitioner must not knowingly make a misleading statement to a court. This cardinal rule is not limited to making oral submissions to the court but extends to a practitioner's performance in all undertakings of his or her role as a legal practitioner.⁹

Accordingly, while acknowledging that circumstances such as Melissa's raise complex ethical issues, these are occasions where practitioners should consider it necessary to inform the Court of his or her concerns in relation to the defendant's capacity. Where put on notice that capacity could be an issue, practitioners should air their concerns, and the basis for those concerns with the Director of Public Prosecutions and consider appearing as a 'friend of the court' to discuss the issues with the Magistrate.

However, TASC commonly observes that many lawyers, particularly duty lawyers, are simply either too busy, and/or lack the basic knowledge to identify if the concept of capacity is going to be an issue for their client. Of even greater concern is the apparent practice of lawyers instructing – or greatly influencing their clients to plead guilty where an issue of capacity is clearly a potential issue.

B *Queensland's Local Court System discriminates Against the Mentally Disabled*

What we know, is that the duty lawyer system, as it stands today in Queensland, continues to marginalise mentally disabled persons. We observe that in the Toowoomba Local Court, time and again, defendants with at times profound disabilities who have acquired criminal histories have been found 'permanently unfit for trial' upon our intervention. In other words, sadly and of course unjustly, lawyers, particularly duty lawyers, have pleaded out clients in circumstances where they simply should not have. Clients who should not receive punitive responses from courts end up compiling criminal histories in circumstances that the law, were it applied accurately, would not have allowed. Mentally disabled persons then are met with the sheer velocity that the Local Court System and at times they are simply encouraged by lawyers to enter pleas of guilty. Quite simply, the velocity of the Local Court jurisdiction is not conducive to expending sufficient amounts of time with defendants to elicit the important and relevant information.

In response to this problem we have implemented what we call the "Disability Law Project".

⁸ See *Giannarelli v Wraith* (1988) 165 CLR 543 per Mason J, 555-556; see also the Queensland Solicitors Handbook, para 4.07.1(2); and r 30.1: A practitioner must not engage in conduct... which is dishonest, or likely to prejudice the administration of justice.

⁹ G Dal Pont, 'Professional Responsibility' *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd Ed 2001), 443.

IV THE DISABILITY LAW PROJECT

A few years ago, Dan Toombs, the CEO of TASC, set up the 'Disability Law Project' to address the issue's Andrew identified. Dan's project evolved because, first there was and still remains a relative deficiency of contemporary research in Queensland that investigates these issues. However, it evolved most crucially because of the conspicuous nature of the inequities faced by mentally disabled defendants as understood by community legal practitioners in their everyday engagement with the Local Court in Toowoomba.

So, in 2005 Dan and I initiated a dialogue with Legal Aid Queensland by canvassing potential methods that could address the problem. We subsequently received funding and implemented a specialised legal and advocacy service that would provide legal information, advice and representation for mentally disabled persons. The specific objectives of this service are:

- To ensure the service be available to all clients with a relevant disability who face a criminal charge and who must appear in the Toowoomba Magistrates court;
- To provide competent legal advice, support and representation to such clients;
- To refer those clients to appropriate social services in order to address their underlying social and/or psychological issues; and
- Ultimately, to enhance access to justice to this marginalised cohort.

We have now provided assistance to well in excess of 400 defendants through our direct screening, and from referrals from the Local Court itself and number of other service providers. We focus initially on legal representation but critically, we ensure that our clients receive the social support services they need to prevent further collisions with the criminal justice system. I am happy to report that we have great success in this objective – approximately 90% of our clients have not as yet re-offended.

C *Multi-Disciplinary Professional Relationships*

The success of this service is clearly dependent upon a multi-disciplinary focus. Our lawyers and social workers engage co-operatively as a team. It is hard to overestimate the value in lawyers engaging with social workers in these matters. This is because it is the social worker who has the skills and knowledge to implement various social services and programmes that address some of the underlying issues faced by the client.

This is very important in relation to bail and sentencing in mitigation where the defendant may be deemed to be fit for trial despite their mental disability. Of course the sentencing Magistrate or Judge is more likely to be sympathetic to submissions where they can see that the defendant has at least somewhere to live, and, some social services or programmes in place that are addressing their underlying offending behaviours. This demonstrates that the defendant is making some effort to progress toward rehabilitation, and, this is so often exactly what a Magistrate needs to know.

D *Strategies*

We started the presentation by emphasising that we can significantly enhance access to justice for the mentally disabled in our region by implementing some long-overdue strategies; strategies that have already seen extensive development in other parts of the developed world. So in addition to the Disability Law Project, TASC is now making other significant contributions to enhancing access to justice for mentally disabled persons. For example:

1. We are writing and delivering a Post-Graduate Masters Unit in Mental Health Law to run at the Queensland University of Technology Faculty of Law to commence in September this year and a similar unit geared specifically for undergraduate students at Griffith University in January 2010. These are the very first tertiary level units to be provided for law students in Queensland.
2. We also recently launched the Queensland Criminal Justice Centre: a web based initiative intended to provide assistance to lawyers and other professionals across Queensland in dealing adequately with clients who have a mental disability. One of the features of the site is that it unpacks some of the more important provisions of Queensland's mental health legislation, particularly as it relates to forensic procedures. I am pleased to say that Legal Aid Queensland has endorsed the site and has agreed to use it as an adjunct to the Duty Lawyer Handbook for its duty lawyers who, as we have identified, have such a heavy workload in our Local Courts. I invite you all to take ten minutes to look at the site and leave your feedback on the appropriate form at www.qcjc.com.au.
3. We are in the process of re-aligning one of our local courts with a more therapeutically effective forum more in keeping with the innovative initiatives undertaken by the Centre for Court Innovation in New York, which we will be visiting shortly. The purpose is to engage the community in solving social problems before they have the chance to escalate.

Although the Australian experience with problem solving approaches, such as drug courts; indigenous courts and special circumstances lists, is evolving, it is clear that on a theoretical level, these kinds of forums operationalise “therapeutic jurisprudence” by implementing restorative protocols and procedures that attempt to address varying underlying issues faced by defendants. It is within the specialised diversionary schemes that therapeutic jurisprudence demonstrates its evolving practical relevance to contemporary legal issues in Australia.

It is to these therapeutic principles that our service is geared. Our strategy is to put them into practice through the provision of educational resources for professionals, and, by conducting research that informs the continued restructuring of local and mainstream courts in our region.

Thank you