

**People with intellectual disabilities as victims of crime –
the police and judicial response**

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Introduction

People with intellectual disabilities are frequently the victims of crimes. Research shows that men and women with an intellectual disability (ID) are twice as likely to be the victim of crime directed against them personally, and one and a half times more likely to suffer property crimes than non-disabled age-matched cohorts (Wilson and Brewer, 1992). In particular, women with ID are at high risk of being sexually assaulted, with some research indicating that the majority will have been sexually exploited by the time they reach adulthood (Keilty and Connelly, 2000). Apart from abuse by strangers, people with ID may also be victimised by family members (Balogh *et al*, 2001), or in group homes or other residential situations; in the latter situations, the abusers are likely to be recently employed male staff members, with a prior history of being the perpetrator of abuse. The high level of vulnerability appears to be related to poor interpersonal competence (Wilson *et al*, 1996), as well as the variables of social isolation, dependency, feelings of helplessness and powerlessness, ignorance about violence and sexuality, and susceptibility to coercion and bribery (Keilty and Connelly, 2000). People with ID suffer negative psychological outcomes as a result of having been victimised (Hayes, 2004).

The criminal justice system in all Australian jurisdictions encounters problems in grappling with issues relevant to this group. Police generally are inexperienced in interviewing victims with intellectual disabilities, and are sometimes reluctant to pursue the allegations. In court, issues arise concerning the competence of the victim to give evidence, their ability to understand the Oath and their comprehension of the obligation to tell the truth. Judges and lawyers may lack knowledge about intellectual disability and have a number of erroneous pre-conceptions, as a result.

In this presentation, I will argue that the lack of knowledge that police and the judiciary have about people with intellectual disabilities is in itself a form of discrimination which has the effect of marginalising this group in the criminal justice system, and leads to secondary victimisation by the criminal justice system itself. There is a danger that lack of information or mis-information about intellectual disability may leave the opportunity open for some criminal justice personnel to develop attitudes akin to those espoused by the philosopher, Peter Singer. Singer espouses “preference utilitarianism”, where “good” is defined by preference. Some categories of people, such as disabled babies, or severely disabled adults, cannot express a preference for life and have no self-awareness; he argues that the more “sentient” a being, that, is the more self-aware that being is, the more we ought to give that being rights (Duckworth, 1999), whereas those beings who are not sentient have no rights. Similarly, the importance attached to IQ in making an assessment of whether to proceed with a case could be described as “a link to the presence of eugenic-based attitudes since the eugenic movement has relied heavily upon measures of IQ to support its position” (Lynn, 1997, cited in Bailey *et al*, 2001).

The two important concepts which must be emphasised by a compassionate society are, first, that each individual has equal rights, irrespective of how sentient that individual is, and secondly, IQ should not be a factor in deciding whether or not to proceed with a

case, any more than the age of a child is considered as relevant to the prosecution in cases of child abuse.

Case History

Kelly is a young woman in her twenties, who has an intellectual disability. She has worked at a cleaning job for about five years. A contract employee who visited the workplace to carry out maintenance on machines obtained her address and telephone number from her. He started to visit her flat, which was close to the workplace, after work whenever he was on the site. He forced her to have sexual intercourse with him and threatened that if she told anyone, no-one would believe her, and she would be sacked. He also told her that her family would be very angry with her if they discovered she had been having sex. Her family were closely involved with Kelly, and assisted her with the complex tasks of daily living, although they did not visit her flat everyday. The family and neighbours noticed that Kelly's behaviour changed. She became withdrawn and reluctant to go out of her flat. Her work deteriorated. After some months, Kelly disclosed the sexual assaults to her mother, who immediately took her to the police station to make a complaint. The officer who interviewed Kelly and her mother suggested to the mother that it would be unwise to "put your daughter through the court case", and the police officer did not proceed with the matter, although Kelly had told them the name of the perpetrator. Kelly's mother did not let the matter rest, and eventually made contact with a Detective Inspector who took up the matter. This senior officer set about collecting evidence that would support Kelly's allegations.

At first the perpetrator stated that he had never visited her flat. Neighbours provided statements that they had seen the perpetrator going into and leaving Kelly's unit. She said the perpetrator phoned her as he was about to leave work, and if she was at home he came to her flat and sexually assaulted her. He then changed his story, alleging that Kelly repeatedly telephoned him, inviting him to come to her place. Telephone records showed that Kelly never made a call to the perpetrator, whereas he made many calls to her, between the hours of 4.30 and 6 pm. Little by little, evidence against him was collected. Eventually, the case went to court, and Kelly gave her evidence, stating that she was sexually assaulted against her will. Kelly's intellectual disability had been assessed prior to the case, and the Court was aware that she had an intellectual disability and the implications of this for her testimony, examination and cross-examination. The defence barrister subjected Kelly and her mother to blistering cross-examination, but ironically, his hostility appeared to make her evidence more credible to the jury. A pervasive theme of the cross-examination was the notion that it was ludicrous to suggest that a "normal" married man would want to have sex with a woman with ID. The judge barely intervened at all during cross-examination. The perpetrator was found guilty by the jury of one charge, the serious charge of having sexual intercourse without consent with a person with ID, knowing that the person had a disability. Without the intervention and ongoing support that the family received from the senior police officer, this prosecution would never have taken place, let alone have been successful. This case illustrates the difficulties that victims of crime with intellectual disabilities encounter in the criminal justice system.

Getting to court

Under-reporting of crime

Not only are people with ID more likely to be the victim of crime than their non-disabled counterparts, but there tends to be under-reporting of crime by this group. Johnson *et al* (1988) indicated that under-reporting occurs as a result of a number of factors:

- (1) crimes involving physical and sexual assaults tend to be under-reported in the community in general,
- (2) service providers may not bother to report crime especially if no action has been taken by police and courts in the respect to past reports of assaults,
- (3) the victim may not know what constitutes a crime, or to whom they can report the offence, and
- (4) the victim may be too fearful to report the crime.

To this list of reasons can be added the fact that victims may not have verbal skills that enable them to describe the offence against them. In at least one jurisdiction, the rate of reporting of crime involving victims with ID was comparable with the rate in the general population, but the reports were made by service providers rather than the individual with ID (NSW Law Reform Commission, 1993).

Commencing a prosecution

In one of the few studies of the progress through the criminal justice system of cases involving people with ID as victims, Brown *et al* (1995) reported that only 14% of recent cases of sexual abuse in their study, cases which were rated as definite or highly likely to have occurred by carers, resulted in prosecution.

One reason why prosecutions do not proceed is uncertainty about the abilities of the individual with ID to understand the oath and give evidence. Gudjonsson *et al* (2000) found that people with ID can be interviewed by police and potentially be witnesses, although many would be excluded from giving their evidence if they were asked to explain the meaning of the oath. These authors suggest a simplified oath, to maximise access to justice for victims of crime with ID.

Knowledge and attitudes of police

Levels of knowledge about intellectual disability tend to be low amongst criminal justice professionals. This is a grave situation, given the importance that the criminal justice system has in the implementation of public policy towards people with ID

Attitudes of police are highly relevant, given that this profession occupies a gate-keeping position in the criminal justice system. A study of police in Northern Ireland, using the Attitudes towards Mental Retardation and Eugenics (AMRE) questionnaire, found some endorsement of eugenic attitudes amongst police officers (Bailey *et al*,

2001). The study found that such attitudes were in conflict with the Royal Ulster Constabulary's code of ethics, which emphasises performance of duty based on impartiality and with respect for human dignity. Training of police officers brought about significant positive changes in attitudes towards people with ID, the authors claiming that "eugenic attitudes are accessible and amenable to change as a consequence of awareness exercises...based on citizenship and the rights of people with ID". Other research on minority youths confirms the possibility of effecting change in police attitudes (Rabois and Haaga, 2002), although the researchers comment on the negative impact of the high attrition rate of police from the programmes, and the unknown effect of the fact that police volunteered to participate, implying that the non-volunteers may have different attitudes or not be as amenable to change.

The mis-perception that ID equates with mental illness, or on the other hand, confusion in the face of a dual diagnosis (where the victim suffers from both ID and mental illness), may result in further stigmatisation by police, especially as police do not demonstrate a good understanding of mental illness (Kimhi *et al*, 1998). Not only do police attitudes affect the course of the investigation, but there may be a direct impact on the quality of the information that is obtained from the victim when those attitudes are reflected in interviewing techniques. A friendly interviewer obtains a more accurate picture of the events, compared with an abrupt interviewer, particularly with victims who have low self-esteem (Bain *et al*, 2004).

Police officers tend to rely on well-worn, but not necessarily accurate cues, to determine whether an interviewee is lying or telling the truth. Unfortunately for the interviewees with ID, many such cues are likely to co-exist with the condition of ID, and can result in police rejecting the victim's version of events. For example, while gaze behaviour has been convincingly demonstrated to be an inaccurate measure of whether the interviewee is lying, police tend to believe that an interviewee who averts their gaze is being deceitful. This and other inaccurate cues are reproduced in many police manuals (Mann *et al*, 2004). Fidgeting, changing posture, and placing the hand over the mouth or eyes when speaking are all unreliable indicators of lying, and yet are often mentioned by police (and the judiciary) as being accurate indicators of lies. Therefore, a person with ID, whose gaze, posture and fidgeting behaviour may include all of these so-called indicators, is unlikely to be believed.

The NSW Law Reform Commission (1993) found contact with police by victims with ID was often frustrating and unsatisfactory. Fisher (1995) states that three factors that contribute to inadequate police interviewing, which are part of the police system itself, are

- (1) inadequacy of police training,
- (2) the value placed on aggressive interpersonal style, and
- (3) the nature of the police system; interviews conducted by novice "on the street" police officers in the aggressive manner that they think is appropriate can dictate a mental set about how police interviews should be conducted for the remainder of their career.

The New South Wales Law Reform Commission found that people with an intellectual disability were unaware of their legal rights, and more than three-quarters said they would sign anything the police requested (NSW Law Reform Commission, 1993). Many people with ID over-estimated police powers; for example, many believed that police could place them in an institution against their will. Given this level of ignorance and misunderstanding, victims with ID are at a disadvantage during police interviews.

Police react differently to crimes which involve people with ID as victims or offenders, compared with their non-disabled counterparts, but in inconsistent patterns (McAfee *et al*, 2001), a finding that has been corroborated in two Western nations. Sometimes the officers were more tolerant of the disability and sometimes less tolerant, indicating uncertainty about how to react, and thereby implying a need for further training.

Interactions between police, lawyers and victims of crime with ID are not merely legal transactions, but also human interactions, subject to the same social influences that occur in any human interplay. Compliance (a concept similar to obedience: Gudjonsson and Sigurdsson, 2003) on the part of the victim correlates with low self-esteem and the coping strategies of Denial and Behavioural Disengagement. The authors explain denial as an attempt on the part of the individual to reject the reality of the stressful event, pretending that everything is all right, and behavioural disengagement as withdrawing effort from trying to achieve their own goals – they do not care what happens. Persons with low self-esteem, a condition which occurs frequently amongst people with ID, are vulnerable to giving in to pressure from others because they are eager to please and reluctant to engage in confrontation (Gudjonsson and Sigurdsson, 2003). Put all these factors together in a police interview with a distressed victim, and the result is an unreliable and ineffective interview.

Knowledge and attitudes of lawyers

A study of lawyers' knowledge about offenders with an intellectual disability (McGillivray and Waterman, 2003) found that one in five lawyers thought that identification of the presence of intellectual disability was relatively straightforward. A significant minority were not aware that people with ID tend to try to disguise their disability, have a desire to please, and may not be aware of their right to remain silent. In relation to other significant ethical issues, including the taking of instructions from the client, rather than their family or guardian, the lawyers in this study indicated a substantial ignorance about the important issues regarding clients with ID, despite, as the authors state, the pivotal role that lawyers play. The authors suggest the need for further training and vigorous debate about best practice for clients with ID. In my experience, some lawyers express concern about ethical issues relevant to representing the client with ID, including the issues such as whether to put their client on the stand, or whether to proceed with the case at all, when the witness does not know what might be in store for them under cross examination. There is no easily accessible information service for lawyers facing such ethical dilemmas, since their professional body may be as ignorant about intellectual disability issues as they themselves are.

A Western Australian study of attitudes of the judiciary found that they expressed all the right concerns – they considered that people with ID would be disadvantaged in their contact with the criminal justice system, would be susceptible to leading questions,

may not understand their right to remain silent. The judiciary thought this group differed from other marginalised groups and lacked knowledge about the criminal justice system (Cockram *et al*, 1993). The judges endorsed the idea that this group needed support in their contacts with the criminal justice system. Translating these kind and perhaps paternalistic attitudes into action in courtrooms, however, has not made striking progress. The diagnosis of intellectual disability does not always elicit a knowledgeable or sympathetic response, and indeed other marginalised groups such as mentally ill individuals, or indigenous Australians would be groups about whom judges have more awareness.

Conclusions

The NSW Law Reform Commission (1993) states that

The preliminary issue must be the recognition that people with an intellectual disability have the same rights as other members of the community to report crimes and to have their complaint listened to and taken seriously”.

Non-disabled victims of crime or child victims do not have more rights than victims with ID to have their cases investigated and prosecuted. Of course, public prosecutors and police will take into account the likelihood of the case being successful, and will pay regard to the evidence that is available. Indeed, accused persons have the right to avoid being the victims of frivolous or malicious complaints. However, if Kelly had been five years of age, and had complained about a man coming to the family home and sexually abusing her, the police officer of first contact would not have sent her mother away with platitudes about not putting her daughter through the stress of a court case. Police and public prosecutors are not always making decision about pursuing the case on the basis of the evidence, but rather on the basis of the IQ of the victim. In some cases, no attempt is made to collect corroborative evidence, such as was eventually collected in Kelly’s case.

The time has come to face squarely these discriminatory attitudes on the part of police, prosecutors, defence lawyers and the judiciary. Many of us have listened for years to polite suggestions that there needs to be more training for criminal justice personnel. Nothing has been done. Courts still hear arguments from defence lawyers, as occurred in Kelly’s case, that the case is ridiculous because a normal married man would not want to have sexual intercourse with a woman with an intellectual disability, accompanied by the second preposterous suggestion, that Kelly’s mother wanted to persevere with the case because she had a strong religious faith and could not come to terms with her daughter having consensual sex. The implication was that she forced her daughter to concoct the story and falsely accuse her sexual partner. This kind of defence strategy, embedded in ignorance about intellectual disability, cannot be permitted to continue.

Our society does not evaluate the merits of a case on the basis of the gender, age or race of the victim, and yet there is no public outcry when a person’s intellectual disability is the primary factor in deciding whether to proceed with a prosecution. Most judges would not allow a defence lawyer to imply that the case against his or her client was nonsensical because the victim was ugly, or old, or black – and yet the assumption that

no “normal” person would want to have sex with a person with a disability can be openly canvassed in court. When did the personal characteristics of the victim become part of the defence?

Eugenics is a hard and confronting term. The idea that an individual with ID is “not worthy of having rights” is a controversial and uncomfortable notion. We must confront the reality, however, that some members of our police forces, our cohort of prosecutors and defenders, and our judiciary, appear to endorse eugenic and discriminatory attitudes towards people with ID and may not even recognise that they do so.

As professionals, carers, advocates and people with intellectual disabilities, it is time that we insisted that appropriate education for these professions be implemented. Just as members of the judiciary have been ridiculed and castigated for suggesting that women were “asking to be raped” if they wore short skirts or stayed out late at night, we should be publicly pillorying those who abuse the rights of victims with ID to be heard and respected in court rooms.

I come again to a quote from Eunice Kennedy Shriver (1976):

It is the obligation of each of us to value and nurture above all the moral principles which teach us that all human beings are equal in law, that those who have the most gifts have the greatest responsibility, that indeed those with the least must be entitled to the most in a compassionate society, and that every human being must count as one whole person (p. xxi).

Nearly thirty years on, Eunice, not much has been gained.

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