



People with an Intellectual Disability



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Introduction

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At the Conference in 1990 on “Questions of Balance: people with an intellectual disability and the criminal justice system” concern was expressed that the court system did not adequately identify and recognise people with an intellectual disability. As a consequence, a committee was convened from people representing institutions with an interest in the relationship between the court system and people with an intellectual disability.

One of the themes emerging from the Conference was that there was insufficient recognition by the law of the distinction between mental illness and intellectual disability. Since the committee commenced its work, that distinction has been drawn by way of amendment to a number of Western Australian statutes.

The committee considered that issues relating to people with an intellectual disability in the justice system could best be addressed by the preparation of two booklets. The first related to issues arising for consideration of courts. The second was directed to informing court staff on the distinction between intellectual disability and mental illness and the characteristics of people with an intellectual disability. These booklets were issued with the approval of the Supreme Court. They subsequently formed the basis for education sessions for the judiciary and court officers in the Supreme Court, the District Court and the Magistracy.

The committee completed its work with the publication of the two booklets. However, the committee's work led to the formation of the Access to Justice Working Party established jointly by the Ministry of Justice, the Disability Services Commission, the Police Service, the Health Department and the Legal Aid Commission. The Working Party has examined the inter-agency issues relating to people with an intellectual disability.

It is now desirable that each of the original publications be up-dated. This booklet contains current references and knowledge relating to issues concerning people with an intellectual disability in the justice system. It is hoped it will be of assistance to judicial officers and all those called upon to administer the court system.

It is intended that, with the support of the Disability Services Commission and the Ministry of Justice, this booklet and its companion booklet for court officers will be the subject of on-going education sessions from year to year.

Justice R D Nicholson
Chair
Access to Justice Working Party

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A: Defining Intellectual Disability

Overview

These guidelines raise issues concerning the procedural and practical problems experienced by people with an intellectual disability when they come into contact with the court system. Many of the issues discussed are common to people with an intellectual disability as victims, witnesses, alleged offenders and parties to civil actions.

Endicott (1992) noted in a technical report to the Canadian Department of Justice, "...the law has traditionally concentrated on ways to establish formally the things that a person with disability *cannot* do. All too often a person's perceived inability to do *some* things is translated by legal processes into a finding of inability to do *anything*. The law has not demonstrated much capacity to find ways in which the person's special needs can be accommodated so that he or she can participate inthe activity of doing justice in society" (p5).

Characteristics of people with an intellectual disability

People with an intellectual disability have low intellectual ability and difficulties in social and adaptive functioning.

"Intellectual disability refers to substantial limitations in present functioning. It is characterised by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work.

Intellectual disability manifests before age 18." [American Association of Mental Retardation (AAMR) definition]

There are many forms and degrees of intellectual disability. Someone with a severe disability may be unable to learn basic social skills such as speech, walking and personal care and may require specialised care in an accommodation facility. Most people with an intellectual disability, however, have only a mild disability and are generally able to overcome some of the restrictions imposed by their disability. In some areas they may function within the community as well as other people. This is especially the case when adequate support is provided, including specialised services and training.

Increased support from government for inclusion programs and independent living means that people with an intellectual disability are now a more visible and active part of the community. As a consequence, the incidence of people with an intellectual disability being involved in the court system is increasing. (Hayes & Craddock, 1992)

People with an intellectual disability may not always inform their legal representative about their disability. They may disguise their disability through keeping silent, agreeing to what is asked, answering briefly, or becoming hostile if they feel confused or cannot answer. They may have a borderline or mild intellectual disability that has not been officially recognised or diagnosed. It is often difficult to tell whether someone has an intellectual disability, even though congenital conditions, such as Down syndrome, are widely recognised.

People with an intellectual disability may experience particular difficulties when they are in a stressful situation such as the court system. The characteristics of people with

an intellectual disability determine the way in which they participate in the criminal and civil process. The following characteristics are common.

Communication difficulties

- ◆ difficulty understanding complex information and processes, including directions, procedures and forms;
- ◆ a restricted vocabulary;
- ◆ a short attention span and easily distracted;
- ◆ difficulty understanding questions;
- ◆ responds to questions either inappropriately or with inconsistent answers;
- ◆ memory difficulties, especially for details; and
- ◆ difficulty with abstract thinking, including moral reasoning.

Behaviour

- ◆ difficulty managing themselves and their stress levels in a formal environment;
- ◆ hiding their disability by appearing to understand;
- ◆ behaving in a way that is inappropriate such as laughing in court; and
- ◆ impulsivity or acting without thinking (*Ierace, 1989*).

Task performance

Difficulty with tasks such as:

- ◆ reading and writing;
- ◆ keeping appointments;
- ◆ understanding the varied roles of the different courts;

- ◆ following long, complex sentences;
- ◆ giving directions to a place they would be expected to know; and
- ◆ organising, structuring and expressing information in an orderly way, for example, they may start their story at the end (Ierace, 1989).

Distinctions between an intellectual disability and a mental illness

A mental illness may be thought of as a thinking or mood disorder whereas intellectual disability is a learning deficit. A mental illness is often episodic, temporary or cyclical whereas an intellectual disability may be permanent, although functioning can be improved. While people with a mental illness may display extreme irrationality, people with an intellectual disability are usually rational within their limited range of ability. Symptoms and behaviours, however, can be typical of both.

Mark Ierace (1989, p.4) draws a distinction between the two conditions, which may be summarised as follows.

Intellectual disability is often associated with other physical and/or sensory conditions. For example, approximately 20 per cent of people with an intellectual disability have cerebral palsy, 13 per cent have epilepsy (Wellesley, Hockey, Montgomery and Stanley, 1991) and over 35 per cent have a hearing impairment (Monley, 1992). Ninety per cent of people with an intellectual disability are mildly affected, and only a small number have either a moderate, severe or profound disability.

There is not always a simple distinction between intellectual disability and mental illness. People with an

	Intellectual Disability	Mental Illness
Causation	Physical damage or under-development of part of the brain	Malfunctioning of mental or emotional processes
Time of Onset	Manifests during developmental period	Any time
Duration	Life-long, subject to improvement	Episodic
Intellectual Functioning	Sub-average	Anywhere on the scale
Behaviour	Rational	Vacillating between rational and irrational
Propensity to Violence	No particular propensity	Some diagnoses have possibility of episodic violent behaviour
Treatment	No medical cure. Functioning can be improved with support and training	May be effectively treated with psychotropic medication
Social Adaptation	Likelihood of some degree of maladaptation	May or may not be incompetent

intellectual disability may also have a mental illness. Because the two conditions are different, they require different considerations by the Justice system.

Ierace (as previously quoted) recommends the use of a clinical psychologist to prepare an expert opinion of someone with an intellectual disability, and a psychiatrist if the client is mentally ill. “While each of these health care professionals treats persons with either condition, and a psychiatrist’s opinion of a patient with an intellectual disability is quite acceptable for court purposes, the testing which a clinical psychologist carries out on persons with an intellectual disability often is not done by psychiatrists and may be especially useful.”

Statutory recognition of an intellectual disability

The *Disability Services Act* 1993 (WA) does not provide a statutory definition of intellectual disability. In the

administration of the Act, however, the Disability Services Commission has adopted the internationally recognised and respected definition from the American Association on Mental Retardation, quoted in Section 1 of this document. There are three elements to this definition: the existence of a general intellectual functioning which is significantly below average; concurrent deficits in the person's adaptive skills; and the manifestation of such conditions during the developmental period, that is, before age 18.

The *Mental Health Act 1996* (WA) Section 4(2) determines that "a person does not have a mental illness by reason only...that the person (d) has an intellectual disability."

The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) Section 8 contains the following definitions:

"mental illness" means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli;

"mental impairment" means intellectual disability, mental illness, brain damage or senility.

It follows that there is now a distinction at law in Western Australia between mental illness and intellectual disability.

Section 330 of *The Criminal Code* (WA) provides the following definition of **"incapable person"**:

"330 (1) In this section a reference to an incapable person is a reference to a person who is so mentally disabled or intellectually handicapped as to be incapable:

- (a) of understanding the nature of the act the subject of the charge against the accused person; or
- (b) of guarding himself or herself against sexual exploitation.”

There are also people whose functioning is impaired by substance abuse or head injury, after the developmental period. Someone whose functioning was impaired after the developmental period, that is, after 18 years of age, would not be regarded as having an intellectual disability as defined by the AAMR (1992). These people are commonly seen in the courts and it is often difficult to distinguish between this group, people with mental illness and people with an intellectual disability. The presentation of all three groups can be similar and the conditions can coexist in individuals.

B: Criminal Proceedings

The accused with an intellectual disability

Impact of characteristics

“Finding the Way: the criminal justice system and the person with intellectual disability” by the Victorian Office of the Public Advocate, (1987) cites a number of ways in which intellectual disability may be associated with crime:

- ◆ a person with an intellectual disability may be more easily caught in the act or left “holding the bag”;
- ◆ a person with an intellectual disability may be susceptible to be exploited by others as an accomplice;
- ◆ intellectual disability may be associated with other organic disorders which result in impulsive and unpredictable behaviour;
- ◆ the intentions of a person with an intellectual disability may be misunderstood; and
- ◆ a person with an intellectual disability may express sexuality in a naive and socially unacceptable way.

In addition, a person with an intellectual disability:

- ◆ may not understand what it means if the police “caution” them and will need their responsibilities explained in simple terms;
- ◆ may be vulnerable to influence and likely to “confess” to a suspected offence; and
- ◆ may find it difficult to explain about apparently incriminating circumstances.

Bail

People with an intellectual disability may not understand the procedure to obtain bail and may find it difficult to adequately put a case for bail. It is therefore important that they have immediate access to legal counsel so that their bail application can be put in its best light. If they are eligible for services from the Disability Services Commission and give consent for this, a referral to the Commission may assist this process.

If the defendant with an intellectual disability has been charged with a serious offence and there is doubt about whether bail will be granted, it may be preferable to adjourn the application for bail until counsel has obtained all the relevant information to put to the court. Section 9 of the *Bail Act 1982 (WA)* allows for consideration of an application for bail to be deferred for a period of up to 30 days so that information can be obtained. The kind of information that is requested does not necessarily need to be put before the court according to the strict law of evidence (see Section 22 of the *Bail Act 1982 (WA)*).

The following aspects of Part C of the *Bail Act 1982 (WA)* may need to be considered in relation to people with an intellectual disability.

- (a)(i) **“Failure to appear in court in accordance with his bail undertaking”**. There is a danger that people with an intellectual disability will fail to appear because of their impaired powers of comprehension and memory. It is therefore important that those who work with people with disabilities and their lawyers ensure that the defendants understand their obligations to appear

and are aware of the date, place and time of their appearances.

- (a)(ii) **“Endanger the safety, welfare or property of any person”**. This could be relevant where defendants with an intellectual disability have been convicted previously of similar or identical offences. Depending upon the time and frequency of the alleged offences, special bail conditions may need to be worked out to alleviate the risk of further offending. This could mean very close supervision of the defendants, including strict control of their movements and contacts.
- (b) **“Whether the defendant needs to be held in custody for his own protection”**. In unusual circumstances, it may be suggested to the court that some defendants may be vulnerable because of their disability and require protection.

There are alternatives to remand in custody and it is appropriate that these be considered. Part D of the *Bail Act 1982 (WA)* allows for conditions to be imposed on a grant of bail in respect of where the defendant shall reside while on bail.

Section 24 of the *Bail Act 1982 (WA)* makes provision for the court to call for a report from a Community Corrections Officer when considering a case for bail. This could assist the court where defendants have an intellectual disability.

Information requested in this report may include:

- ◆ accommodation options and available support services;
- ◆ information or reports from Disability Services Commission if the defendant is known to the Commission;

- ◆ psychologists' reports and/or risk assessment;
- ◆ appropriate conditions for release, which may include suitability for home-detention, training programs or a curfew; and
- ◆ previous response to supervision.

The legislation does not prevent the court from granting bail on condition that the defendant undergoes appropriate assessment, training or intervention.

In general it is not appropriate for people with an intellectual disability to be remanded under Section 5 of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) to an authorised psychiatric hospital. This may be appropriate where the person has a psychiatric illness as well as an intellectual disability and the provisions of that section are otherwise applicable.

Committal proceedings

Part V of the *Justices Act 1902* (WA) sets out the procedures relating to committal proceedings. These are unlikely to be understood by people with an intellectual disability. The ninth schedule will also pose difficulties. The procedure should be explained slowly and simply with either counsel or “a friend” present. If the defendant is not represented, it may be preferable for the Duty Counsel to be called to the court or an adjournment granted to enable representation to be obtained.

Any counsel representing defendants with an intellectual disability must be certain of their fitness to give instructions. Solicitors may not be skilled in taking or eliciting instructions from people with an intellectual disability nor in assessing mental competency to give

instructions. It is important to consider the capacity to instruct and where appropriate to involve the Disability Services Commission to assess this capacity or to assist with any instructions being given. Should a defendant be considered unable to give instructions, then “fitness to stand trial” should be considered.

Mental fitness to stand trial

Defendants must be fit to stand trial before they can be dealt with in any court. Part 3 of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) deals with mental unfitness to stand trial. It sets out the criteria to be applied by the court in the determination of fitness to plead and the presumption that the defendant is mentally fit unless otherwise shown. Mental fitness is determined by the presiding judicial officer on the balance of probabilities and for this purpose, the judicial officer may order appropriate reports, Section 12(2)(b).

Competency to stand trial is a legal standard against which defendants need to be assessed. The fact that a person has an intellectual disability does not necessarily mean he/she is unfit to stand trial. Intellectual deficits alone do not automatically signify incompetence. Winick (1993) emphasises that the inquiry of the court is not upon whether the accused has an intellectual disability, *per se*, but upon whether any deficits will adversely impact upon the person’s ability to function in the court. A key construct is the capacity for rational-versus-irrational understanding and decision making. To be able to stand trial, people with an intellectual disability need information in a form they can understand, together with adequate time, support and teaching to assimilate and to understand the information.

The ultimate finding of a court is dichotomous - an individual is either competent or not competent. The variable nature of intellectual disability does not lend itself to such succinct categorisation. People with an intellectual disability may be fit to stand trial for a simple offence in a lower court but not for a long complex trial in a higher court. They may be fit to stand trial if given training in court skills and if their extreme anxiety is managed. They may be fit if lawyers and others taking part in the trial adjust their language to their cognitive level.

Freedman (1991) rejects the traditional belief that the ascertainment of competence is an issue to be decided prior to the giving of relevant information. The tasks of analysing the relevant functional skills and of teaching and informing people with an intellectual disability require specialist skills. These tasks are a fundamental necessity to assist people with an intellectual disability prior to their participation in any judicial process. When interviewed by Cockram, Jackson, and Underwood (1993), members of the Western Australian judiciary clearly subscribed to the notion that people with an intellectual disability require more education about the criminal justice system. The Victorian Intellectual Disability Review Panel 1992, reported in Freckleton (1995), raised concerns about the criteria for competence due to “the possible danger of too readily dismissing the person’s capacity to comprehend, . . . it also fails to consider that the person may benefit from assistance or tutoring in order to better understand the proceedings.”

People with an intellectual disability are likely to be at their most distressed and least competent within the justice system because the environment is unfamiliar, highly

formalised, requires high levels of communication and an understanding of complex rules. Unlike most intellectually competent individuals, people with intellectual disabilities have not developed a “lay” understanding of the legal process by inferential thinking through reading about or watching court and justice issues on television. Many are assessed by using informal, semi-structured interviews and found to be unfit on the basis of their ignorance of the judicial system, not on their rational behaviour or thought processes. The court should distinguish between uninformed and impaired, and people who are uninformed should have the right to access the necessary skills to stand trial. If it is shown that, even given support, education and training, a person still cannot meet this standard, then an “unfit to stand trial” decision should be considered. For people with an intellectual disability, this requires a psycho-socio-educational intervention, not a psychiatric one.

The prosecution or a defendant may appeal against a judicial officer’s decision that the defendant is not mentally fit to stand trial (Section 12).

Defences

People with an intellectual disability require special consideration in relation to the capacity to form any intention, as well as defences such as those of unsoundness of mind, automatism, mistake of fact and provocation.

For the relevance of psychological evidence to intention, see *Schultz v R* [1982] WAR 171.

Unsoundness of mind is incorporated in Section 27 of *The Criminal Code* (WA). This section was amended when the

Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) became operative. A person can be acquitted on account of unsoundness of mind if at the time of the offence he/she was in “such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission” (Section 27).

If acquitted on account of unsoundness of mind, a defendant is dealt with under the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA).

Confessional statements

Nicholson (1994, p89) states, “There is a general test applicable to statements to police by all persons. In the case of an accused person with an intellectual disability, his or her disability may be a basis for exclusion of material depending on how the evidence establishes the disability affected the circumstances in which the statement was taken.”

Vincent J, quoted in Nicholson (1994, p89) commented “... in situations where a police officer becomes aware of the reasonable possibility that a person who he desires to interview may be suffering under some such disadvantage or disability, it is to be expected that particular care will be taken in relation to any such questioning. In circumstances where doubt exists as to the suspect’s knowledge of his rights under the law, or as to his ability to respond adequately to questions asked of him or as to his capacity to choose freely to speak or remain silent, a failure to take reasonable steps to ensure that such knowledge or capacity exists may provide part of the basis

or finding of unfairness and result in the discretionary exclusion of any statement made.”

Sentencing

A pre-sentence report may confirm the presence of a disability and the suitability of the offender for a community-based penalty. People with an intellectual disability may not understand what is happening if the matter is remanded to a future date to enable a pre-sentence report to be obtained. They may experience trauma if they are held in custody and require a special explanation about what is happening.

The Ministry of Justice provides guidelines for liaison between the Ministry and the Disability Services Commission. These recommend contact with the Disability Services Unit Manager, Ministry of Justice (telephone 9229 6570) who will contact the Justice Coordinator, Disability Services Commission (telephone 9426 9300). These officers will be able to:

- ◆ determine whether the person is a current client of the Commission;
- ◆ assist in contacting the relevant case manager;
- ◆ assist in making a referral to the Commission and/or to contact other community supports; and
- ◆ provide consultation regarding the conditions in which remand pending sentencing should take place.

Sentencing options may be affected by considerations such as whether the offender has the ability to comply with conditions placed on any orders for community-based penalties, the need to link the offender with appropriate disability services and the offender’s ability to cope with

imprisonment. The objectives of treatment and rehabilitation may be given greater weight than would otherwise be the case.

Where a person with an intellectual disability receives a Custody Order under the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) and does not require hospitalisation for treatment, in the absence of a 'declared place' this will be custody within the prison system. The Disability Services Commission does not provide secure accommodation and currently there is no "declared place" for people with an intellectual disability.

Juveniles

A juvenile with an intellectual disability requires additional consideration. There is an increased need to involve any supportive family. Where suitable family or other supportive accommodation is not available, contact with relevant staff from the Family and Children's Services Department or the Disability Services Commission should be made. Young people with an intellectual disability may be particularly vulnerable. Considerations arising in relation to imprisonment are also pertinent in relation to juvenile detention centres.

It should also be noted that the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) applies in respect to juveniles found unfit to stand trial or of unsound mind.

The witness with an intellectual disability

Evidence

Counsel and the court should keep in mind the characteristics of people with an intellectual disability in

the course of evidence and particularly in matters dealing with confessional statements (see page 1).

The court should consider the following issues:

- ◆ whether questions of counsel are short and contain one proposition;
- ◆ whether the use of leading questions is appropriate given recognition of the dangers of eliciting affirming evidence;
- ◆ whether frequent adjournments should take place to preserve concentration; and
- ◆ the control of behaviour which may be seen as intimidatory towards the witness.

Special witness

The Acts Amendment (Evidence of Children and Others) Act 1992 (WA) sets out the circumstances under which a person may be declared a special witness (Section 8, 106) and provides for people to be declared a special witness by reason of intellectual disability.

The Act sets out the arrangements that may be made to provide support and protection to the person on whom special witness status has been conferred. These include:

- ◆ having near to them a person, approved by the court, who may provide them with support;
- ◆ the use of closed circuit television and the isolation of the witness from the defendant; and
- ◆ where closed circuit television is not available, the use of a one-way screen, or other screening devices, to isolate the witness from the defendant.

That Act further provides that the party who intends to call a witness with an intellectual disability should apply for a special pre-trial hearing to determine any matters affecting the person's ability to give evidence. It is mandatory for the special pre-trial hearing to be held, but the court retains discretion in the type of order it may make.

Video room

Where facilities exist for vulnerable witnesses to give evidence by video from outside the courtroom, it may be appropriate for such facilities to be used by witnesses with an intellectual disability. However, some people with an intellectual disability may find communication by video difficult and may require pre-trial training in its use.

C: Civil Proceedings

Representation in legal proceedings

Supreme Court Rules

Order 70 of the *Supreme Court Rules* provides for the conduct of litigation on behalf of “person under disability”. The general rule is that a “person under disability” may not bring civil proceedings except by his next friend and may not defend or take part in any proceedings except by a guardian ad litem. [Order 70 rule 2(1)] A next friend or guardian must act through a solicitor.

The rules define a “person under disability” as:

- (1) a person declared by the court to be incapable of managing his affairs, by reason of illness, defect or infirmity; or
- (2) a “represented person” under the *Guardianship and Administration Act 1990* (WA), that is, a person for whom a guardianship or administration order is in force under the Act.

Since the 1992 proclamation of the *Guardianship and Administration Act 1990* (WA), the appointment of people to act on behalf of adults who lack capacity to handle their affairs has largely been the province of the Guardianship and Administration Board. The Supreme Court retains its inherent jurisdiction with respect to people with mental disability.

Guardianship and Administration

The Guardianship and Administration Board may appoint a guardian for people who lack the capacity to make

personal and lifestyle decisions, such as where they are to live, where they are to work or to make health care decisions on their behalf (see Part 5 of the Act). The Board may appoint an administrator for people who lack the capacity to deal with their financial affairs (see Part 6 of the Act). The appointment may be plenary or may be limited to specific functions. If the appointment is limited, the authorised functions are specified in the order. Generally speaking, the authority to conduct litigation is vested in an administrator rather than a guardian.

Where the Guardianship and Administration Board has appointed a plenary guardian or plenary administrator with specific authority to conduct legal proceedings, no application to the court is necessary for the appointment of a next friend or guardian ad litem. In these cases, the *Supreme Court Rules* provide that the person appointed by the Board *shall act* as next friend or guardian ad litem in legal proceedings unless the court appoints someone else. (Order 70, rule 3(3)). If the Board has made a limited order, the terms of the order need to be carefully checked to ensure that it contains specific authority to conduct legal proceedings.

An order of the court is required for the appointment of a next friend or guardian in the following circumstances:

- ◆ to appoint a substitute for someone who is acting or has acted in proceedings as a next friend or guardian (Order 70, rule 3(5));
- ◆ to appoint a next friend or guardian ad litem where a person becomes a “person under disability” after proceedings have commenced (Order 70, rule 3(3)); and

- ◆ to appoint a guardian ad litem for a person under disability who has not entered an appearance (Order 70, rule 5).

An order of the court is required to remove a next friend or guardian (Order 70, rule 6), an order removing a guardian may be made upon application or by the court of its own motion.

A person who proposes to be the next friend or guardian ad litem of a person who is a represented person under the Guardianship and Administration Act, must be authorised by the Board to conduct proceedings on behalf of the represented person. The following documents must be filed with the court:

- ◆ a written consent to act; and
- ◆ an affidavit by the solicitor of the represented person that the proposed next friend or guardian ad litem does not have an interest in the proceedings that is adverse to the interest of the represented person. (Order 70; rule 3(7) and (8)(c)).

Where a person is not a represented person under the Guardianship and Administration Act but there is a serious question about the person's capacity to instruct solicitors, it is desirable for an application to be made to the Board to determine whether an order should be made.

Order 70 also contains special provisions requiring court approval for the compromise of any proceedings involving a person under disability, for the control of any money recovered on his/her behalf, and for personal service on persons under disability.

Local Court Rules

Order 3 rules 10 to 17 govern the conduct of proceedings in the Local Court on behalf of persons under disability. They refer to the *Lunacy Act 1903 (WA)* and to the *Mental Health Act 1962 (WA)*, both of which have been superseded by the *Mental Health Act 1996 (WA)*, and by the *Guardianship and Administration Act 1990 (WA)*.

Rule 10 governs the appointment of a guardian ad litem for “persons of unsound mind not being an insane person or patient with the meaning of the *Lunacy Act 1903 (WA)*.” Rule 16 provides that an incapable person within the meaning of that Act may sue or defend by the committee of his estate or the person having the powers of such a committee. It is suggested that an administrator appointed by the Guardianship and Administration Board is a person having the powers of such a “committee”.

D: Contacting Disability Services

If you need further help when dealing with victims or alleged offenders with an intellectual disability or you believe a person may have an intellectual disability, the following procedure should be followed.

- ◆ When interviewing them, ask if they have ever been seen by or received services from the Disability Services Commission (previously known as the Authority for Intellectually Handicapped Persons or “Irrabeena”). Obtain informed consent from them to contact the Commission. If informed consent cannot be obtained, contact the next of kin or guardian. Written consent from the person, their next-of-kin or guardian is required by the Commission before information can be released.
- ◆ You should first contact the Records Clerk, Records Section at the Commission. Give the Records Clerk the name, date of birth, surname and any change of surname. Leave your name, position and phone number or that of another appropriate contact person, for example, a supervisor or manager. The appropriate staff member in the Commission will then phone back with the information.
- ◆ Phone enquiries should usually be directed to the Commission's central office:
Tel: 9426 9200 Fax: 9426 9380
TTY: 9426 9315 Free Call: 1800 998 214
- ◆ If a person is known to the Commission but has not received services for over five years, you will be referred to one of the following officers:

Senior Referrals Coordinator;
Director, Medical & Specialist Services;
Principal Clinical Psychologist; or
Principal Social Worker.

- ◆ If a report is required, you need to state clearly what information is needed, the proposed function/use of the report, for example, a pre-sentence report, and for whom the report is intended, for example, for a judge, magistrate or defence lawyer.

Not all people with an intellectual disability are known to the Disability Services Commission.

E: Requesting services from the Disability Services

The Commission has guidelines for all agencies requesting services for people with an intellectual disability. They include criteria for eligibility. The following issues need to be considered when services are requested.

- ◆ The relationship between the Commission and people with an intellectual disability is entirely voluntary. There are many people who have been assessed as eligible for services who choose not to receive services.
- ◆ While a magistrate or judge may include such services as part of an offender's sentence conditions, the Commission cannot provide services if informed consent and eligibility criteria are not met or if the services are not available.
- ◆ In some cases, it may take up to six months from the point of referral to a decision about eligibility. This is because the Commission asks for information and assessments from other agencies as well as completing its own eligibility assessments. This needs to be considered by the referring person and agencies.
- ◆ Residential care will not be offered during the period of assessment. Commission staff do not have statutory powers over clients. Consequently, people cannot be remanded to the care of the Commission.
- ◆ An assessment to determine if a person is eligible for Disability Services Commission services is different from assessments for the criminal justice system. The

eligibility assessment is about whether someone has an intellectual disability or not. Legal assessments are usually specific assessments to do with issues such as compliance, suggestibility, fitness to stand trial, intent and pre-sentence recommendations.

F: Diversion of people with decision-making disabilities

In Western Australia, a model diversion program for people with decision-making disabilities who had committed a petty or nuisance offence was trialed in the Fremantle Police District from 1996 to 1999. The project was jointly funded and managed by the Ministry of Justice, the Disability Services Commission, and the Western Australian Police Service. This program is no longer operating.

An interdepartmental committee is presently examining alternative models of diversion.

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