C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers

Melbourne — 21 May 2012

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Professor S. Hayes, Head, Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney.

The CHAIR — Welcome! My name is Clem Newton-Brown; I am the chair of the Law Reform Committee. There are only three of us here today. I am sorry for the delay in starting.

Prof. HAYES — I am glad we found blame so quickly.

The CHAIR — We get given references from Parliament to investigate and report back to Parliament on suggested changes to legislation. Once it is reported the government then responds and may or may not pick up our recommendations. They are quite useful in terms of putting new ideas on the agenda. We have just released our first report of this Parliament, which was on donor-conceived children, so we are waiting on the response to that in the next few months.

We are pretty informal here. Could you just take us through your recommendations or submission? We have got the written recommendations, so you could just talk to your submission, and we will jump in and ask questions as we need to. Everything you say is protected by parliamentary privilege in the room, but not outside the room. Hansard records everything, and you will have an opportunity to check the transcript once it is prepared.

Prof. HAYES — Thank you.

The CHAIR — Could you start with your name, professional address and who you represent, and then launch into your submission.

Prof. HAYES — My name is Susan Hayes. I am Professor of Behavioural Sciences in Medicine at Sydney Medical School at the University of Sydney. I am also part of the International Association for the Scientific Study of Intellectual Disabilities, and I am a member of the Australian Psychological Society and the Australasian Society for Intellectual Disability.

I have tried to present a submission which touches briefly on many of the points. I have not included lots and lots of references, but I can easily access those references if you would like the actual originals.

First of all, I think it is important to note that people with intellectual disabilities come into contact with the criminal justice system in many ways. We tend to think of them only as offenders, but they also are victims of crime. They come into contact in family law matters, child protection matters, social security appeals and civil law cases, for example, if they enter into a contract that they do not fully understand. I conduct a private forensic practice in psychology, and I have seen people with intellectual disabilities from all of those groups.

I guess you know by now that people with intellectual disabilities — I think I will just collapse that to people, because we all know who we are talking about — are overrepresented certainly in the criminal justice system in all of the Australian jurisdictions which have done any research. That includes both appearances before courts and in prisons. There is some indication that juvenile offenders fare a little bit better in that they are overrepresented in appearances before courts but not in juvenile detention. Up to 50 per cent of these people have a coexisting psychiatric disorder, and many of those also have substance abuse disorders, so we are looking at a complex group.

A recurring theme of my submission will be that if the presence of intellectual disability is not correctly identified, this group cannot have access to the rights that it should have. In other words, many of them slip through a lot of the filters in court systems and the presence of ID is just not picked up. They also have high rates of some physical conditions, such as hearing and sight impairment, which impinge even more on their ability to understand what is happening in the criminal justice system. Once again, I frequently come across an unacknowledged vision or hearing impairment.

We have also done research that shows that there are higher rates of this group appearing before courts in areas of social and economic disadvantage — up to 10 times in those areas of social disadvantage compared with the higher income groups. Lastly, there is a high proportion of Aboriginal people in the proportion of people with intellectual disabilities in the criminal justice system.

As you would all be aware, the UN Convention on the Rights of Persons with Disabilities was ratified by Australia in July 2008. In particular article 12, 'Equal recognition before the law', and article 13, 'Access to justice', are pertinent.

Taking briefly the key issues and themes, I want to say a short piece about each of these key issues and themes, and then you can come back and question me further if you would like to.

First of all there is participants' knowledge of their rights. In my experience very few people are aware of their rights in the criminal justice system — for example, their right not to participate in a police interview or to have a lawyer present. This is not just in the criminal system; it is also, for example, in interviews with Centrelink staff or child protection agencies where there is an interview conducted and the person is not aware that this is actually going to be used against them in the future. Sometimes police have a third party present during an interview; however, that is really poorly implemented and, secondly, the third party may not have the knowledge or expertise to ensure that the person's legal rights are observed. In some instances on transcripts of interviews and actual DVDs I have observed the police telling the third party that they are not to speak during the interview. In other words, the third person is effectively silenced.

In most instances I would not say that police are acting in this manner for any wrong motives; they simply do not recognise that the interviewee has an intellectual disability. As I said, this is the basic problem which underlines many areas of difficulty. At the point of first contact intellectual disability is not identified. Article 13(2) of the Convention recognises this when it states:

> States parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Secondly there is availability of appropriate services and supports. First of all there is the lack of early intervention for children and young people with ID with challenging behaviour. There is a long-term study in Dunedin in New Zealand which clearly shows that youngsters with intellectual disability and challenging behaviour who are identified at preschool are far more likely to be in contact with the juvenile offending system by the time they reach adolescence compared with their non-disabled counterparts. You have to wonder what has happened in the 10 or 12 years between preschool and adolescence that they have continued to have this challenging behaviour and that early intervention programs are not available or are short-term and ineffective.

There is ample evidence, particularly from the RAND Institute in the US, that early intervention programs are cost-effective, yet the funding is poured into the end point of the criminal justice system — juvenile offender institutions and prisons — rather than into early childhood intervention. I would probably say that is a publicity issue. You do not get headlines saying, 'We saved somebody from a career in offending behaviour by early intervention'. You do get headlines saying, 'This person is a violent offender and should be locked up'.

Another point of intervention can occur in the offender's career. If an offender starts engaging in criminal behaviour early, they are much more likely to have future offending. The young offenders who are both Indigenous and who have an intellectual disability are the youngest subgroups of adolescent offenders. We have this standout group of Indigenous young people with intellectual disabilities and of course early intervention for them is particularly difficult, especially in rural or remote areas. Early treatment of the young person who offends is also essential.

Ironically, some offenders with ID are often excluded from some intervention programs in the community and in custody. Often the intervention programs, particularly for people with mental illness, specifically exclude people with intellectual disabilities, and similarly substance abuse programs often say, 'We can't cater for this group'.

But the RAND study has shown that some simple, cost-effective interventions are extremely important — for example, reducing homelessness among young people with ID and making sure they stay at school, including various forms of assistance or even monetary incentives to the young person's family and certainly ongoing family support caseworkers. Too many times I hear the words 'pilot program'. We have so many pilot programs that end and then the family and the young person is left.

Specifically in dealing with police in my observations over some decades there has been no consistent improvement for this group and, once again, I have to emphasise the lack of recognition of the presence of ID and the lack of mandating that an independent third party presence during an interview is not a family member or a well-meaning volunteer but actually someone who has some expertise and training. The Appropriate Adult scheme in the UK actually trains appropriate adults in what their role is in a police interview. Poor interviewing techniques by police, particularly if the intellectual disability is not picked up early on, include where the police

just tend to interview in their normal fashion with lengthy questions answered by 'Yes' or 'No', which only tells you how good the person is at guessing; it does not actually tell you if they have understood the question.

Also, a really difficult form of interviewing by police is where they change topic all of the time rather than letting people narrate. This is both for victims and offenders. A spontaneous narration is the most accurate of the information that the police are going to get. If they are interrupted, they lose that thread of story and they often find it very difficult to go back to it. There is also a dearth of police training in intellectual disabilities and, lastly, sometimes police persist in arresting the person because there are no alternative systems which can take care of this person. I would put forward the recommendation that there needs to be a system of community treatment orders, secure units and so forth which actually parallel how a person with a mental illness can be dealt with by police, so the police actually have somewhere, some responses, to take the person to.

Moving onto the operation of the courts, courts are quite good at taking a humanitarian approach to a defendant with an intellectual disability and very poor at identifying the presence of an intellectual disability, especially in courts where there is a high turnover. Mostly the presence of intellectual disability tends to get recognised by lawyers, possibly in District or Supreme Court matters. Magistrates' courts which see 80-plus people a day do not have a very good identification process.

There are some court diversion programs which are documented and which I will not go into. There are humanitarian and financial arguments for court diversion programs but there are a number of major difficulties. Once again I get back to the point that you cannot divert somebody into a program if you do not know they have an intellectual disability or another cognitive impairment, and therefore the relevant options might simply not be considered. Secondly, the diversionary options are not effective unless they are available to everybody. You have to have enough resources for assessment, accommodation if needed and treatment options to which the person can be referred. Some diversionary programs, as I have already mentioned, specifically exclude this group and deal only with defendants with substance abuse or mental health diagnoses. If the person receives a short sentence, there might not even be an opportunity to participate in the program if the program is actually longer than the sentence.

Lastly, some diversionary programs possibly do not observe the legal and human rights of the person, for example, if the person has to enter a guilty plea in order to enter the program. They actually might be unfit to be tried and yet they have to enter a guilty plea, which is ironic to say the least, in order to enter this program. I am aware of the Court Integrated Service Program in the Magistrates' Court of Victoria, and this is very useful in providing a coordinated, team-based approach to the assessment and treatment of defendants.

Specialist courts sound like a good idea and provide an opportunity for a hub of knowledge pertaining to the law about people with an intellectual disability. So if you have a special cognitive impairment court or a special mental health court, they can link into services and expertise and they know what is available. But a specialised court is not the end of the road — the solution — for all defendants with intellectual disability, firstly, because you are not going to capture every defendant with an intellectual disability in the system. They can only be referred to a specialised court if their intellectual disability is identified. Secondly, many defendants with intellectual disabilities live in rural and remote areas and the specialised courts tend to be in large population centres. So a specialised court might be useful and appropriate in a large centre but all court personnel and all judiciary will still need training in the area of intellectual disability because of those people who will not actually go to specialised courts and will still be seen in regular courts.

Moving on to measures within Australia and internationally to improve access to and interaction with the justice system, there is no gold standard either in Australia or internationally for people with intellectual disabilities in the criminal justice system. There are some initiatives which are promising, but they are not implemented in a cohesive or comprehensive manner. So, for example, good practices include screening for intellectual disability upon reception to prison or to a young offenders institution or in legal aid offices or in police stations. This has been tried in Queensland with some legal aid offices, in the UK in some prisons and some police stations, in Japan in some situations in police stations, and in Singapore in young offenders institutions.

Secondly, court liaison services staffed by specialist nurses will have an immediate impact. The New South Wales Bureau of Crime Statistics and Research did a study of the effect of court liaison nurses who interviewed and assessed people with mental illnesses in the court. These people could be referred to the nurse by the magistrate, a lawyer or corrective services staff who brought them to the court from the prison or police who

had seen them in cells. Basically this one-off intervention was assessed by recidivism — what happened in their recidivism before this intervention and afterwards. Before, the graph goes up and up. With an intervention mental health nurse in the court liaison system recidivism falls away. It is absolutely the most amazing graph you will ever see. This is not because the mental health nurse is a particularly magical person or casts a spell; it is because they are actually plugging the people into appropriate mental health services and getting them recognised by the court as having mental health problems so that that is taken into account in any sentence which might be forthcoming.

The court liaison service in New South Wales does not specifically identify people with intellectual disabilities, although some of the court liaison nurses certainly know their local catchment area and know which people have an intellectual disability, but I would predict that if you had specialist ID nurses who could plug people into appropriate services, recognise the intellectual disability and therefore convey that information immediately to the court — because a short report is immediately written for the magistrates and handed up that same day — much the same impact would occur and you can access — —

Mr NORTHE — Sorry, Susan, just to interrupt if I may on that point. How will that differ from, say, the CISP program? Would you have any understanding of how those two might differ or are they similar?

Prof. HAYES — They are similar, but in this case there is no previous knowledge of the person having a mental health issue or intellectual disability. In the other program that you are talking about usually there is a pre-existing knowledge that the person is known to services or something like that, but in this case somebody just gets a feeling, and that somebody could be the police officer or corrective services staff, and they say to the nurse, 'Can you assess this person?'. Also, it is immediate; it is that same day so the magistrate is not hanging around or having to adjourn matters to get a proper report. Obviously sometimes they adjourn to get a more lengthy assessment, but right that day that information is fed back. It also involves very specific local knowledge on the part of the nursing staff.

Another good initiative is special units in prisons providing appropriate services to prisoners with ID. I would say that in Victoria you would probably be leading the way with that and also doing probably the best research in Australia among prisoners with intellectual disabilities. You do not need me to explain how important it is that people in prison who have an ID are not in the mainstream and being picked on by prisoners or breaking the rules or extending their non-parole period because they are breaching the rules.

The CHAIR — Susan, if I could just interrupt? I know we started late but we are about 5 minutes over now. Perhaps we could give it another 5 minutes or so?

Prof. HAYES — Absolutely, yes.

Mr NORTHE — And room to ask questions.

Prof. HAYES — The next thing is the establishment of community-based programs, and one of the most important things is that there is accommodation and intensive staffing, not just warehousing in boarding houses, and specialist interventions such as sex offender programs. Once again there are some models for this in the UK. I have already mentioned the issue of training for all criminal justice personnel and better practices for exchanging information between agencies and services. However, I have to emphasise that in my cases most people are not in contact with specialist ID agencies or services. They might have been assessed as having an ID or been in a specialist class at school, but that is long forgotten — everybody has forgotten that — and they do not have any ongoing support; they do not even have a disability support pension or any other identifying marker which could help.

Just lastly about the broader application for people with a disability other than ID, I think that is absolutely essential. You cannot often make a differential diagnosis. I get people with an ID who have been glue sniffing since the age of seven, who have been in traffic accidents, who have acquired brain injury from all of these insults to their brain. They might even have epilepsy. How can you possibly say they do or do not have only an intellectual disability? I think to exclude an individual from legal benefits or an intervention service because they do not have a closely diagnosed intellectual disability would actually perpetuate the system of 'some in, some out'.

In summary the weak point in implementing any change for people with intellectual disabilities is the lack of identification early in their contact with the justice system.

Mr NORTHE — I think that has been well and truly documented, Susan, by people who have tendered evidence to this inquiry thus far. They would say that. I am interested from a timing perspective as to when people come before the justice system or before the police, what is the timing to have a person assessed, and what is the best methodology to assess somebody with an intellectual disability, noting, from what I understand, that you have had a little bit to do with the Hayes Ability Screening Index?

Prof. HAYES — Yes, I have, and also I am in the process of developing a non-verbal version of that which could be used with people who do not have English as a first language or who might come from an Indigenous background. Also part of the original HASI was related to some literacy ability, and the HASI non-verbal should wipe out that literacy component.

The HASI test is not the only one — she modestly said it is probably the best one! It is probably the best researched. There is another one which is available in the UK, for example. It takes 5 minutes, and it is designed to be administered by a non-psychologist, so if police thought that the person had an intellectual disability, there could be an officer, rather like a custody officer at the moment, who asks a series of questions about suicide, mental illness and so forth.

A custody officer could be trained to do a brief screening test if there were an issue. I would not recommend it be done on everybody, because it would be time consuming, tedious and perhaps unnecessary, but if somebody has an inkling at the first few questions of an interview — this also relates to better police training when they give the caution — ask the person to explain it back rather than just saying, 'Do you understand?'. If the person cannot explain it back, then there is a good argument for administering a screening test or just getting a third party there to be present during the interview.

Mr NORTHE — Have we got a copy of the questions associated with that? It might be worth the committee — —

Prof. HAYES — Certainly if you email my office, we will send you a sample copy of it.

Mr NORTHE — Yes, that would be good. Just further to that, obviously we have heard a little about the role of the independent third person who may be involved in the discussions with police at the time. I know you touched on it briefly, but there has been some evidence put before us about having a familiar person running side-by-side with the offender or the defendant — it does not matter — who is a person with an intellectual disability, when they are having these conversations with police. What are your thoughts there? Personally I think the role of the independent third person is a positive one, but maybe it needs to be the right person with the right training.

Prof. HAYES — I agree with that. It varies from the sublime to the ridiculous. I have seen where the so-called independent third person is grandma, and grandma has no knowledge of the person's rights in a police interview and says to her grandson, 'Answer the nice policeman's questions, and we can all get out of here and go home'. That is completely useless in terms of protecting a person's rights. There does need to be some training so that there is not a conflict of interest. For example, sometimes the independent third party is someone from the service where the person lives. That is not appropriate, for privacy reasons apart from anything else, but particularly if there has been an altercation between, say, two residents in a group home, it is definitely a conflict of interest.

The UK model — and there was a model in Wollongong as well where they trained volunteers to be there really not to interfere but just to say to police, 'Can we just stop there, and can I just ask the interviewee whether he or she understood that question?'. So it is really just that explain-back mechanism happening again. But there does need to be some formal training.

Mr CARBINES — You touched on places like Centrelink and their involvement with particular people they would perhaps interview or question. What sort of examples have you found where that has been the case? That is not something we have probably heard a lot about in terms of giving consideration to that as a committee. Often we are talking about police or other parties who are conducting that sort of discussion or questioning of individuals. What are the examples around Centrelink people, for example?

Prof. HAYES — It is quite common for a Centrelink officer to have an interview with a person who has been denied a disability support pension, for example, or who may have been accused of defrauding the Commonwealth. It is quite common before police get involved for a Centrelink officer to interview the person. Usually this is done in the Centrelink offices and without any of the normal warning that this may be used in evidence against the person, but it is a formal interview which is then tendered in court later on on many occasions. I think there are two issues here. One is that the person feels that this is just Centrelink staff, so they are going to cooperate, particularly if they feel that they have not done anything wrong. Secondly, Centrelink staff themselves need to be aware of the formality of this interview and take into account that it may be used in legal proceedings.

Mr CARBINES — So there is almost an obligation, then, for an independent third person to be present?

Prof. HAYES — No, and if a third person is present, it is usually another Centrelink officer.

The CHAIR — Thank you very much for that; it was very helpful.

Prof. HAYES — Once again I apologise for croaking my way through it. It is so cold outside! I hope I did not drive you all crazy. I am very honoured that you asked me to come. Thank you, and please do not hesitate to contact me for any references or further information.

Witness withdrew.