Student submission.

Introduction:

Overrepresentation of people with an ID in the criminal justice system.

People with an ID are over represented in the criminal justice system,¹ this is for a multitude of reasons. And it is likely that the estimates of people in the system are underestimated, we know that there are many ID in prison, because they are identified once they are incarcerated. If Correctional services are challenged by identification of prisoners with an ID.² Therefore, many ID prisoners are slipping through the cracks. Some strategies to assist with this are accurate identification of ID’s at initial contact with the justice system (police interview/arrest) alternate policy for bail applications, and mental health courts.

Early and accurate identification of the presence of an ID is vital within the justice system, as many offenders with an ID enter the criminal justice system without having received appropriate services and supports their disability is therefore undiagnosed.

Bail.

Bail is the one of the most crucial stages of pre-trial procedure for accused persons who are presumed to be innocent. ID’s are less likely to receive bail, more likely to serve out their full sentence and less likely to receive parole. We suggest that the same factors hindering an ID persons access to justice is the cause of this.

Main Issues-

* ID’s less likely to receive bail.
* Whether they progress further into the system rather than being diverted from it.
* The effect of bail refusal on the content and severity of sentence.
* The recent reforms of the Bail Act have been insufficient, and I would argue in some cases detrimental to the administration of justice in general.

Reasons for Failing Bail Applications

1. Have not been identified as having an ID.
   * effective identification is necessary.
2. Lack of Guardian.
3. Lack of suitable accommodation/homelessness- 
   * accommodation services need to be improved.
4. Lack of understanding of procedures/ literacy.
   * lack of understanding of bail conditions can lead to unintentional breaches of said bail conditions.
5. Family needs and support.
6. Lack of support services if released on bail.
8. People with ID’s are twice as likely to be remanded as persons without ID’s.³ And they stay longer on remand.⁴
   * being on remand means having limited access to justice, less communication with lawyers or ability to contact witnesses and to prepare a defence. It also effects impressing of the accused at trial. Resulting in a higher likelihood of conviction. ⁵
9. Restriction on number of bail applications.
   * Only Victoria and NSW boast their tough bail conditions, by restricting the number of applications one can make.⁶ The sections relevant to this in both Bail Acts should be repealed, as the arguments supporting these changes were fundamentally flawed and arguably restricting a persons bail applications restricts their right to a fair trial. Special provisions should be made for people with ID’s, just as there are special provisions for children in bail procedures.
10. Public perceptions in people with an ID can lead to denial of bail.
   * “There remains a body of research “seemingly attesting to the criminal propensity of the intellectually disabled”” leading to negative public perceptions and stereotypes about people with ID’s, and as one of the tests for bail is based on public safety (which can be subjective) this can directly impact on a ID persons likelihood of getting bail.
   * The new Bail Act appears to take into account victims feelings. This is unfair, as it undermines the presumption of innocence, but doubly unfair for ID’s.

³ Cochran J, Equal justice? The Experiences and needs of repeat offenders with intellectual disability in Western Australia. (2005) Perth: Active Foundation Inc.
⁶ see- s 18(4) Bail Act 1977 (Vic)
Identification of ID’s after arrest.

There needs to be a system that reduces the reliance on self-reporting of one’s mental health status. “Many people do not wish to be identified as having an ID and fear that, with such a label, they may be treated worse, not better, within the criminal justice system.”8 And as a result fewer than half of ID’s had had any recent contact with community mental health services.

“Identification of intellectual disability is one of the most difficult issues for personnel …[as] disability is not necessarily obvious from a person's appearance and some people with an intellectual disability attempt to conceal their disability or deny its existence” 9

If the police have a basic understanding of the common disabilities that they will encounter, then they will be better prepared to respond to these individuals during the custodial interview process.10 Currently the Victorian Department of Health and Victoria Policy (2010) have a protocol for dealing with people with ID’s which say that if they suspect a person to have an ID then they are to arrange an independent third party to be present during the interview. Unfortunately identification of a person with an ID is not always possible or that effective.

If people with an ID could be identified at their first contact with the criminal justice system, arrest, or questioning, it would enable them to be diverted, and have the support services that they require.

Recommendation:

“[F]or a decade of more, the need for a screening test for ID in the justice system has been highlighted”11 Luckily researchers at the University of Sydney noticed this problem and done the hard work for everyone developing the Hayes Ability Screening Test (HASI), a unique and effective test for screening ID’s. The best part about it is that it takes 5-10 minutes and can be administered by a non-psychologist, saving time and resources of the police, and Human Services.12

It was developed primarily to provide a short and effective instrument to indicate the possible presence of intellectual disability amongst persons in contact with the criminal justice system and to determine those who need to be referred for further full-scale diagnostic assessment.

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9 NSW Law Reform Commission, Report No. 80, 1996
10 Rome 2009 p 132
In police settings, the Index is designed to identify those accused persons who may be vulnerable during detention or police interviews, so that appropriate provisions for vulnerable suspects may be implemented.

**Police Training and policy:**

Article 13 of the *Convention of the Rights of Persons with Disabilities* requires Australia to ‘promote appropriate training for those working in the field of administration of justice, including police and prison staff.’

The *Victorian Disability Act 2006* requires public sector bodies such as Victoria Police to develop, implement and report annually on a Disability Action Plan. It is now 2011, and apparently the ‘action plan’ will be published soon. Things are not improving for vulnerable groups in society, so it seems that 5 years is a long time to have their ‘action plan’ still pending.

‘The importance of adequate training in the identification of vulnerable witnesses cannot be overstated’.

Testing needs to be conducted into just how effective current methods of identifying people with ID’s actually are to ensure that the appropriate systems are in place and that vulnerable persons are having their needs met.

Police in NSW have special procedures for dealing with ID’s that were established after the introduction of the Crimes amendment (detention after arrest) Act 1997. Victoria police also need a better code of practice in identifying and then dealing with people with ID’s.

**The court system and structure being inaccessible, intimidating, and incomprehensible for persons with ID’s and mental illness.**

Appropriate services are needed with customised access.

“the system fails these individuals, and thus the public, usually because it ignores them…..” (Rand 1997)

**Recommendations:**

**Mental Health Courts.**

A special “Mental Health Court” could be established, not unlike already existing specialised courts in Australia like the Drug, Koori and Children’s courts. The public, the government and

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other groups in these cases have seen a special need to have separate courts to better serve justice to these groups in society.

The mental health courts could be modelled on those that are already functioning in the United States\textsuperscript{15}, and be adapted to better suit our justice system. Some suggestions (but not exhaustive) for differences might be:

(a.) No wigs or gowns for judges or barristers.
(b.) Judges and other court staff specially trained and equip to accommodate the needs of an ID.
(c.) Support staff and social workers.
(d.) Support animals where necessary.
(e.) Legal aid lawyers/other lawyers specially trained with ID’s.
(f.) Differing range of sentence options.
(g.) If a person does not have a guardian, to give them an opportunity to have one appointed. Such appointments avoid legal issues arising as a consequence of the person being unable to observe the usual requirements of the law where that occurs as a consequence of ID.”\textsuperscript{16}
(h.) If a person only needs a temporary guardian for the duration of their legal proceedings then that can be arranged.
(i.) Specialised diversion programmes.
(j.) Simplified language and procedures.
(k.) Rehabilitation programs.

\textbf{Final Words:}

Early identification of disability can be a great preventative measure because it highlights the challenges in meeting the needs of these people while preventing some of the more vulnerable from slipping through the cracks. The sooner people with a an ID have better access to justice the sooner we will see their number reducing in the prison population.

The law cannot be looked at in a vacuum, as every Act that effects and non-ID will possibly have a different and possibly adverse affect on the ID population, more care needs to be taken with legislation in many areas, especially those of education, health and crime. The most important idea is education of the public and ID persons regarding their rights, as well as better community

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support, and intervention programs for young people so that they do not enter the criminal justice system in the first place.