

RUNNING AHEAD – DEDIFFERENTIATION?

Dr Nick Collyer

If legal capacity is universal, should support be specific and particular?

When India's Amita Dhanda¹ came to Australia to talk about the development of the *Convention on the Rights of Persons with Disabilities's* Article 12 she explained that some delegates objected to the idea that everyone should be able to exercise legal capacity. Some people, they said, are just too impaired, and they must be protected and segregated, whether physically, or culturally or legally. Someone else must make decisions for them:

There is always someone, they said, with extreme impairment who can never make decisions, and we need to protect them. You can't really be saying that they should have legal capacity?

Protection is nearly always the justification for differentiation. Offenders with intellectual disability should be diverted into the forensic system, or placed into protective custody in jails. Children get better results and experience less bullying in special schools. We need special criminal provisions that protect people from sexual assault by making it unlawful for all people with intellectual impairments to have sex. In the end, the ad hoc committee took a universalist and inclusive view, deciding that everyone should be supported to make their own decisions.

At Queensland Advocacy Incorporated(QAI), some of our work may appear to be differentiationist because we focus on the needs of the most vulnerable people with disability. We do that, however, for good reason: most people with disability can advocate for themselves, so they don't need us.

QAI's Systemic Work

At QAI, our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland. Vulnerability, like disability, is not a state but a relationship between people and the world around them. Vulnerability depends on circumstances, and all sorts of people can be vulnerable: children, women; anyone unable for whatever reason to speak out and protect themselves against harm or exploitation by reason of age, poverty, illness, trauma, disability, or any other reason.

We focus on any system that exposes persons with disabilities to harm, abuse and exploitation. In individual advocacy we provide expert support and advocacy for people who are vulnerable to harm in the mental health system, the criminal justice system, the forensic system and now in their dealings with

the NDIA and registered service providers. We have no individual services for people with intellectual disability per se.

There are patterns of disadvantage associated with specific ‘diagnoses’ or ‘conditions’ that motivate systemic advocacy, but at QAI we are most concerned with disabling public systems that generate vulnerability. We target systems, laws, policies or programs that cause harm or stand in the way of a good life for adults who have impairments, whether physical, intellectual, sensory, psycho-social, that predispose people to harm.

De-differentiation

It is better to support people to exercise legal capacity and on a person’s general support needs as they move through the system. Article 12 of the Convention on the Rights of Persons with Disabilities states that ‘Everyone is entitled to and must be provided with the supports they need to exercise their legal capacity on an equal basis with others, and to enforce their legal rights as effectively as any other’.²

The possibility that a person who has an intellectual disability may need decision-support in court is no reason to deny them a fair trial, including the determination of facts. Better to go to trial than have the court divert to a forensic system that will almost certainly infringe a person’s liberty more. If they suspect a defendant has an intellectual disability it is a reason for police to use caution in their interview technique. The court can rule evidence inadmissible if the police come by it unfairly.³

The access principle applies across the board.

We support ‘flexible service delivery’ + shift the focus from trying to help police officers and magistrates identify intellectual disability and mental illness to helping them to:

- Develop knowledge of the likelihood they will encounter people with intellectual impairments.
- Understand the way this may affect responses to questioning.
- Provide increased support to all vulnerable, disempowered people that come into contact with the system.

Conclusion

If we want to be creating sustainable rights and support regime it needs to be premised on universal human neediness. Not exclusively and only planned for people with disabilities. Support should not be just seen as something people with disabilities need. It’s something that all of humanity needs. Only people with disabilities ask for it more.



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1. Professor of Law of Hyderabad University and part of the UN ad hoc committee that drafted the Convention on the Rights of Persons with Disabilities.
2. Article 12 Convention on the Rights of Persons with Disabilities.
3. Tipler v The Queen [2009] QDC 240; Foster (1993) 67 ALJR 550.