

# JUSTICE FOR ALL PROVIDED....

A centuries old ruling takes the law beyond the realms of being an ass – it is downright discriminatory, **Wayne Eckert** writes. In 2006 judges applied the ruling to a young Aboriginal man who could not speak, hear, sign, read or write.

The District Court in Adelaide sits in a grand old building resplendent with a dome and ornate marble staircases that date from its glory days as a retail emporium.

A young Aboriginal man with disabilities found himself amidst this splendour in 2006 after he was charged with a serious crime and taken from his simple life in the country to be tried in the city.

Deaf and mute after a bout of meningitis as a child, the man could not communicate verbally or in sign language; he was also illiterate.

In his book *I See A Voice*, Jonathon Ree traces the history of people who are both deaf and mute. He writes: "Few groups in history have suffered such sustained and uncomprehending cruelty as the so-called 'deaf and dumb'. In most civilizations they have been treated like animals, if not worse: their sensory disadvantages have not only

deprived them of the natural experience of sound, but also shut them out of the human world of language."

Throughout history the deaf and mute have been treated as outcasts. Under Roman law they were barred from marrying, denied the protection of the law, and were not allowed to make a will. The Christian church also rejected them because Paul preached that "faith cometh by hearing" and "with the mouth confession is made unto salvation". And unable to swear an oath, they were excluded by the English civil courts as well.

The man of this story was eventually found not guilty but only after he had gone through two trials and two appeals. At the first trial, the presiding judge was presented with medical reports from a speech pathologist and a psychiatrist that stated the defendant was unfit to plead because his hearing and speech disabilities prevented him from

instructing his lawyers or understanding the testimony against him. The psychiatrist's report noted that the defendant was not mentally ill.

Before the trial started however, the defendant's barrister applied to the judge to have the trial stopped on the grounds that the defendant did not fall within section 269H of the Criminal Law Consolidation Act, which covers mental impairment. (Mental impairment is defined in the Act as "a pathological infirmity of the mind including a temporary one of short duration".)

His client was not fit to stand trial the barrister asserted, as he was unable to communicate, *not* because he was mentally impaired. However, South Australian legislation does not cover disabilities of this sort, and the judge rejected the argument rather than allow the man to walk away free of all charges.

An appeal was then lodged in the Supreme Court and the three presiding justices agreed that if he had been charged before 1995, the defendant would have been deemed unfit to plead. Why? Because for two centuries, British and Australian courts had classified people whose physical disabilities prevented them from communicating or understanding what was being said as insane!

Under this practice, anyone designated "insane" was given an indefinite sentence usually in a psychiatric institution. In contrast, guilty non-disabled defendants, then as now,

“by permitting people with no mental illness to be deemed insane, SA fails to comply with these international standards”

are sentenced to prison for a specific time and allowed to apply for parole after a defined time. The question facing the justices was whether this practice had become obsolete.

Two of the justices decided that it hadn't, although the most recent case they could cite occurred in 1836! The dissenting justice stated that modern society had changed considerably over the past 170 years and "it cannot be presumed that a parliament today would intend to treat a deaf mute who is found to be unfit to plead in the same way as a person who suffers from a mental illness." He decided that the appeal be allowed and the defendant should be released but he was overruled.

The case was sent back to the District Court to decide whether the defendant fitted section 269H. The defendant's lawyers prepared an appeal to the High Court but it was refused.

The trial was presided over by a judge without a jury. After hearing the testimony of prosecution witnesses she ruled

that the defendant was not guilty, as the case had not been proven beyond reasonable doubt. This meant that the vexed problem of whether the defendant came under section 269H did not have to be decided.

## Implications of this decision

Section 269H specifically mentions mental illness and intellectual disabilities, however, it has also been applied to people with physical disabilities such as deafness and mutism, substantial head injuries, hysterical amnesia, paranoid schizophrenia, and coronary artery disease! It has even been applied in cases where an interpreter has not been available for non-English speaking Aboriginal defendants.

## Which courts must apply this case?

SA's thirty-seven magistrates and all its District Criminal Court judges must apply the Court of Criminal Appeal's decision otherwise they risk their judgment being appealed by the prosecution if they don't. Magistrates and judges in other states and territories are not compelled to apply this decision but they can if they wish.

When the Bill containing section 269H was tabled in Parliament, the Attorney General said, "It is highly likely that the current law in this State is contrary to the International Covenant on Civil and Political Rights... (and) the current ...law does not conform to the UN Draft Guidelines and Principles for the Protection of the Mentally Ill."

In my view, by permitting people with no mental illness to be deemed insane, SA fails to comply with these international standards. Looking for ways to justify these practices is fruitless – there are none and judges acknowledge that fact. They provide however, a convenient means for exercising power that would otherwise be denied the courts and police: it is possible the appeal justices, police and prosecution, did not want to release someone charged with a serious crime until he had been tried.

For people with disabilities like me, and those who support us, the decision of the Criminal Court of Appeal is deeply offensive. The three appeal justices chose a legalistic solution rather than examine the vast social and legal changes people with disabilities have gained in the last twenty-five years. I at least can speak up and write. Real danger still exists however, for people who cannot communicate or understand court processes.

It's unlikely the defendant had a chance to take in the dome and imposing staircases as he was probably kept in custody before his appearance in court. The irony of a disabled Aboriginal appearing before a Supreme Court that bases its decision on a case that presaged South Australia's colonial past, is beyond shameful. ☹