

---

## INTELLECTUALLY IMPAIRED CANNOT GET A s475

This commentary is about a group of people who cannot get the benefit of a s475 Investigation because they are intellectually impaired. Under s475 of the *Crimes Act* an inquiry can be ordered if doubt arises as to the guilt of a person after conviction.

An intellectually impaired person who is unfit to plead and who is accused of a crime can be brought to trial under the *Mental Health (Criminal Procedures) Act* 1990. This allows such a person to be tried in the normal way except that it seems accepted that “not fit to plead” means also “no challenges” to the jury array.

The jury brings in a verdict in the usual way — guilty or not guilty. This is said to be “on the limited evidence available” since the ability of an intellectually impaired person to give evidence and instructions is obviously limited.

The Act, in what one assumes to be attempted benevolence, specifically states that the result of the trial, if adverse to the accused, is not a conviction.

Similarly the judge does not impose a “sentence”. The judge is required to order a penalty equal to that which would have been given if the person was being sentenced. But this is not a “sentence”, it is called a “limiting term”.

An intellectually impaired person is not mentally ill. There is no suggestion that such a person could be “not guilty due to mental illness” but a further result is that, not being mentally ill, the person is not held in a psychiatric institution.

As a matter of practicality an intellectually impaired person confined for a “limiting term” will do it in the normal gaol system. This poses the spectre of a person, by years an adult but with a mental age of, say, six years being held in Long Bay. But, so what? We know horrible things happen in gaol and not only to the mentally afflicted.

The problem is that this person might sometimes be innocent, and perhaps a doubt arises as to the guilt. Normally this would lead one to think of a s475 Inquiry as one of the possible recourses in our system of justice. But not so. The wording of s475 commences “when at any time after *conviction* ...” and this person has not been convicted.

This anomaly has been brought to the attention of the Attorney General. There is just a case on foot now with sufficient to go to the Chief Justice if a s475 was possible. The case is that of Michael John Parker who was imprisoned for 7 years over the killing of a girl in Albury in 1981. He made a confession. His mental age is about six. Evidence which was available but not presented at his trial indicates his innocence. The Attorney says “it is a difficult question of law ... Section 475 is not available to a person who has been the subject of a finding under either paragraph (c) or (d) or Section 21(1) of the *Mental Health (Criminal Procedure) Act* 1990”.

It is worth noting that the drafting of this Act has caused the Attorney concern in another area affecting the mentally retarded. “Some doubt has been expressed by the Crown Solicitor’s office as to whether the prerogative of mercy will extend to findings under section 22(1)(c) or (d).”

---

No doubt this will be fixed in time. The Attorney has ordered a review of this legislation. Hopefully it will be soon. The case which has precipitated the disclosure of the defects, that of Michael John Parker, is meanwhile in limbo as far as a s475 is concerned.

Another restriction on the intellectually impaired is in appeals to the Court of Criminal Appeal. In Michael Parker's case he has been there once and while the verdict was not overturned (the fresh evidence was not available then) the date of release was altered in his favour. Can he go back to the Court of Criminal Appeal? Again he is caught, the second time to the Court of Criminal Appeal requires the Attorney to act, and he can only do so in matters of "conviction" or "sentence".

Time moves on and the Attorney has been urged to order a Judicial Inquiry into the Michael Parker matter but has not done so. Meanwhile Michael Parker and perhaps others are prevented by the law from getting justice.

*RAY BURN*  
RFD, ED, BE, MB, BS, LLB  
Barrister-at-law and medical practitioner