

# Chiselling the Bars

## Section 32 of the *Mental Health (Criminal Procedure) Act 1990 (NSW)* and Acting for Clients with an Intellectual Disability in Contact with the Criminal Justice System

### INTRODUCTION

Clients with an intellectual disability have limited cognitive understanding. They tend to read emotionally rather than rationally. They are often incapable of understanding instructions or information given to them on making informed decisions by people such as the police. It is particularly important for people with an intellectual disability to be accompanied and assisted when being questioned by police officers. The Criminal Justice Support Network (CJSN) is a project of the Intellectual Disability Rights Service (IDRS) that provides a 24 hour support service to assist people with an intellectual disability in police stations, at court attendances and during legal appointments. A 24 hour state-wide phone number is the operational key behind CJSN: 1300 665 908.

Currently police in New South Wales receive little, if any, training about people with an intellectual disability. They will often respond to the intellectually disabled person's emotional and sometimes aggressive reactions and lack of compliance (due to non-comprehension) with yet more aggression. This serves to heighten the situation and make it worse. Consequently, charges against clients with an intellectual disability accelerate through interaction with people who do not understand them.

Education of the police about intellectual disability is essential in improving the situation of offenders with an intellectual disability throughout criminal justice processes. The attitude of the police to the accused, and their awareness of the person's disability, govern the exercise by police of their discretion to, for example, give a warning rather than charge the person with a minor offence.

### SOME SIGNIFICANT SECTION 32 CASES INVOLVING PEOPLE WITH AN INTELLECTUAL DISABILITY

#### ***DPP v Darren John Albon [2000] NSWSC 896; BC200005344***

*DPP v Darren John Albon* is a prime example of where society itself has not been adequately prepared to deal with a person with challenging behaviour. This inadequacy on the part of society is evidenced in the lack of appropriate existing legislation, institutions or disability services. In this case, these factors in combination resulted in a person with an intellectual disability being housed in the cheapest and most accessible form of institutional care: gaol.

The case involved a successful appeal by the DPP from a Local Court magistrate's decision to conditionally dismiss a charge of malicious wounding under s32 *Mental Health (Criminal Procedure) Act 1990 (NSW) (MHCPA)*. The defendant had an intellectual disability and had used a knife to cut two fingers of another group home resident. He had already spent ten months in gaol for the matter.

In the s32 application, the head of the Corrective Services, Psychiatry Division, gave oral evidence and recommended that the matter be dismissed under s32. The Supreme Court considered it inappropriate to abandon the defendant to the community generally. The Court stated that a treatment plan was necessary to place the defendant in the care of an appropriate person and ensure that the defendant was not at large. It was essential that the defendant was not left to his own initiative to make contact with such a person.

This case failed due to a lack of services. If adequate services had been available, it would have been possible to put a treatment plan place for Mr Albon, keeping him out of gaol. But no such services could be accessed.

### ***Sami El Mawas v DPP [2005] NSWSC 243***

*Sami El Mawas v DPP* was another s32 case. Mr El Mawas was charged with various offences including assault occasioning actual bodily harm, malicious wounding and entering a building to commit an indictable offence.

When the proceedings came before a magistrate in the Local Court, Mr El Mawas' barrister made an application under s32. A psychologist's report was provided to the magistrate in support of Mr El Mawas's application.

The magistrate declined to apply s32. Her Honour was satisfied that Mr El Mawas was a person suffering from a mental condition but found that it was not appropriate to apply s32 because of the nature of the offences.

In his appeal to the Supreme Court, Mr El Mawas required the Court's leave to appeal. This was because there is no appeal of right from a decision refusing to apply s32: s52(1) *Crimes (Local Courts Appeal and Review) Act 2001 (NSW)*.

Mr El Mawas's argued that the magistrate had incorrectly interpreted s32 and had made an error when she refused to apply that section. This was said to be of importance to the general law of criminal responsibility and amount to a miscarriage of justice.

In hearing the application for leave to appeal, Justice Greg James of the Supreme Court of New South Wales set out the elements that should be considered when deciding whether it is appropriate to apply s32. These are:

- whether the person is suffering from a mental condition for which treatment is available, the prospect for treatment, and whether the magistrate can make an order for the treatment;
- the appropriateness of proceeding under one legal regime as opposed to another legal regime: for example, by the usual criminal procedure or by an order for treatment under the *MHCPA*; and
- the purpose of the criminal process and the purpose of sentencing (e.g. deterrence, community protection, rehabilitation), and the purpose of the procedure under s32 (e.g. diverting the offender from the criminal justice system, community protection).

Justice James found that it is not correct to say that the public interest in punishing the defendant increases if the offence is more serious. His Honour commented that the Court should be concerned with the protection of the community, and that the *MHCPA* recognised the notion that the community would be protected by the provision of treatment for the condition from which the defendant suffers.

His Honour criticised the decision of Justice Howie in *Confos v DPP* [2004] NSWSC 1159. He stated that when the Court is considering the seriousness of any offending conduct, the degree to which the defendant is disabled from being able to control that conduct should not be excluded from consideration, by focus only on how serious the offence is.

Justice James agreed with Justice Howie that it is the protection of the community with which the Court is concerned, but he did not agree that this renders it less likely that s32 will apply in more serious cases. He asserted that the provision of treatment recognises the concept of protection of the community, and observed that the weight that is given to the factors which magistrates are required to consider in giving judgement, is a matter for each individual magistrate.

His Honour concluded that the magistrate had made an error at first instance because she:

- considered that s32 could only be applied if the specific features of the mental condition had a causal relationship with the offence;
- considered that it was inappropriate to apply s32 to offences that were serious or that were characterised by a degree of planning; and
- failed to have regard to the purpose of treatment.

Leave to appeal was accordingly granted, and the appeal was upheld.

## SECTION 32 CASE STUDIES HIGHLIGHTING FUNDAMENTAL PROBLEMS FOR PRACTITIONERS REPRESENTING CLIENTS WITH AN INTELLECTUAL DISABILITY

I will illustrate in two case studies some fundamental problems that practitioners are likely to encounter in representing clients with an intellectual disability. The cases are examples that involve bail applications and applications under s32 of the *MHCPA*. In both instances, agencies and disability services were seen to assist offenders with an intellectual disability to achieve the result of a non-custodial sentence by supporting and implementing treatment plans.

Obtaining a psychologist's report may not be enough to achieve a non-custodial sentence in a serious matter. If the client is not known to the Department of Ageing Disability and Home Care (DADHC), practitioners should make a telephone call to a local DADHC intake officer. As Mr Jim Simpson sets out in his paper on services for offenders with an intellectual disability: "DADHC acknowledges a high priority to offenders with an intellectual disability in its service provision".

*The names in the following case examples have been changed to protect the identity of each client.*

### **Celia's Story**

#### Facts

Celia is 36 years of age and has an intellectual disability. She lives with her elderly parents who are both from a non English speaking background. Last year Celia was charged with a string of offences including: use carriage service so as to harass x 21; falsely represent to police x 8; assault police x 4; resist arrest x 2; and refuse to give a breath test upon request by police.

Celia had used a mobile phone to make prank calls to emergency services in July last year. Her local police station charged her with offences relating to prank calls and consequently confiscated her mobile phone. It was a condition of bail that she not possess a mobile phone.

Celia had previously entered into a two year phone contract to purchase the mobile that was confiscated by the police. She was paying approximately 25% of her income towards the phone contract from her employment income. She was anxious that she was paying money for a phone she no longer had. Celia was upset about this and in her mind she felt entitled to phone the local police station to demand the return of her mobile. When she phoned the police she was not able to verbalise herself so she remained silent during these calls. She was charged after police traced the calls to her home phone and new mobile phone. This occurred again and again.

During some of the arrests executed on Celia, she put up a struggle and was charged with assault police and resist arrest. A female police officer had roughly and tightly held Celia's arm during a struggle which caused bruising from her elbow to her shoulder. A CJSN support worker attended the police station and later took photographs of Celia's arm.

IDRS was able to utilise the services of the Behaviour Intervention Service (BIS) of DADHC and put Celia in touch with further support services. A s32 application was made on Celia's behalf. Evidence was called during this application from DADHC Forensic Caseworkers on the history of why Celia had offended, and alternatives to gaol were proposed for dealing with Celia. A treatment plan was set up to allow Celia to express her frustration in a more legally and socially acceptable way. Celia also entered into a contract where she could have her phones returned to her.

The charges against Celia were dismissed conditionally under s32 in December 2004.

She was allowed to have her mobile phones returned to her, but due to the injury to her arm she was most upset with the female police officer. She managed to find the officer's home address, and in late December 2004 and early January 2005, she allegedly sent two written death threats to the officer's home. Only two sessions of the proposed treatment plan had been held at that stage for Celia because the Christmas break period had intervened. It was too early to see a marked improvement in Celia's behaviour modification.

In late January 2005 the police took the threats that Celia had made seriously and relocated the officer subjected to the threats from her home into a new security building. Forensic testing was carried out on the letters and a finger print belonging to Celia was found on one of them. A later search of Celia's home found a type writer with the same ink set as the words of the letter. She had allegedly made further 000 calls and was then charged with "send document threatening death, assault police, and false representation causing police investigation".

At the police station she was told that she would have to agree to a buccal swab or it would be necessary for three police officers to hold her down, sit on her, and use force to pull out ten hairs from her head. This left Celia shaking and crying.

As Celia's acting legal representative, I attended the police station and indicated to police that Celia did not have the capacity to understand the enormity of the decision and that she was not in a position to consent to the procedure. The police asked me to put this view in writing, which I did. They said that the Custody Sergeant could order that the procedure occur by force.

I was then called away to assist another client but requested that the police do nothing until a witness was present from CJSN. This witness arrived and police did not ultimately proceed with the taking of hairs.

### The steps taken to secure bail

Celia was refused police bail.

After two failed bail applications before a particularly difficult magistrate, the magistrate was informed it may take about six weeks to obtain the necessary reports for a s32 application. Rather than set it down in six weeks and leave Celia incarcerated, we requested that his Honour set the matter down for mention in two weeks. This was to see how the reports were progressing so that an estimate could be made in light of more accurate information as to when the reports would be finalised. This gave Celia another chance at applying for bail, hopefully before a more lenient magistrate. The matter was listed before a different magistrate for mention a month and a half after Celia had been incarcerated.

A bail application was made which included making submissions on the appropriateness of bail, and involved, amongst other things, addressing the matters outlined below.

#### 1. *The circumstances of the offence*

It was emphasised that Celia's disability was linked to the commission of the offence. She was not motivated by greed or drugs, but was simply acting like a naughty child playing a prank on a teacher.

While it was admitted that Celia wrote the letters, it was essential that care was taken not to lock her into a plea of guilty after the failure of two s32 applications. This is because there may have been a capacity issue that required close examination by a medical expert.

No discussion occurred before the Court concerning Celia's capacity to understand what she was doing. An opinion was put by an observer of the facts that she was venting her frustration at the officer who hurt her arm. She had sent the letter using her limited vocabulary range which included the word "kill", instead of the word "hate". The letter also set a time frame of two days when the officer would be killed. It was put to the magistrate that this time frame had passed and that, in fact, another two weeks had passed and no attempt had been made to carry out the threat. She wanted to make the officer as scared as she had felt when her arm was hurt during her arrest.

#### 2. *The likely penalty on conviction*

Celia had already spent a month and a half in prison and it was her first time in prison, notwithstanding that she had a lengthy record and this charge carried a maximum imprisonment term of ten years. Looking at the mitigating factors and circumstances of the offence, it was likely that her imprisonment term would not be a lengthy one, if she was imprisoned at all.

3. *Celia's risk to the community and the police officer*

What helped was having Celia consent to an AVO for two years and a bail condition that she would not enter the suburb where the police station was situated.

4. *Celia's time in gaol since being arrested*

Evidence was led from a psychologist on the welfare of Celia in gaol. She had slashed her wrists, attempted to hang herself in the back of a police van with a shoe string, and starved herself in gaol. She had also been placed in a protection wing which had her locked in a cell for 23 hours a day. The evidence given questioned what this was achieving: nothing was being achieved in terms of protection of the general community other than assuring that a death threat would not be carried out on a police officer. It was not the answer to house Celia in gaol and, until her treatment plan could commence, Celia was likely to deteriorate even further.

5. *Celia's record and antecedents*

Celia had some fifteen previous offences ranging from contravene AVO to assault police and false representation causing police investigation (phone offences). However, she had not started to offend until she was 35 years of age. This posed the question of what was happening to trigger the behaviour in question. BIS looked into the matter, but only a few sessions of a treatment plan had been carried out before she was incarcerated.

BIS also discovered that Celia had become obsessed with an ex-boyfriend and family in the past. This explained the breaches of the AVO's and assaults. In those matters BIS prepared a contract with Celia where she was only making one call per week. She complied with this and her obsessive compulsive behaviour has been managed to this day. This is an example of what a previous treatment plan can achieve.

A second contract with Celia was entered into and prepared by BIS. This contract was a plan to return her mobile phones to her on condition that she not go inside the police station or prank call the police station or 000. The police station had allegedly received up to 1500 calls from Celia in one day. There was a lapse of four calls after only two sessions of a treatment plan, and it could only be proved that one of the calls was made from Celia's phone. No other calls have been reported as made by Celia since her s32 application in December 2004. (Note: while Celia was in custody, a police officer made contact with Corrective Services to determine if calls could be made by Celia while incarcerated. This was done because the police were still receiving prank calls. It was discovered that Celia could not have made these calls, as she was locked in a cell for 23 hours a day and had no access to a phone in the one hour given for recreation. There were clearly other prank callers in the area apart from Celia.)

6. *Previous record and any failures to appear*

Celia had never failed to appear in the past. Many people with an intellectual disability have trouble with forgetfulness. For example, they may not be able to diarise or read letters including court attendance letters. CJSN provides vital court support for people with an intellectual disability who need assistance in dealing with such problems.

If it is necessary to explain failures to appear it is preferable to lead this evidence from an expert, rather than making submissions from the bar table. This evidence could be led from a range of experts, including a BIS worker, member of a DADHC Community Support Team, psychologist or psychiatrist.

CJSN is a necessity for people like Celia. CJSN reminded Celia to come to court, supported her at court and in the police station and made enquiries into her court travel. This helped to reduce her anxiety levels considerably.

7. *Provision of a surety*

A surety is often difficult to find for people with an intellectual disability. People with an intellectual disability are more likely to breach bail conditions either knowingly or unknowingly. In this matter and most that I have come across, no one from the client's family was prepared to be surety for the client as the challenging behaviour of the client is difficult for all involved.

8. *Risk of assault*

A BIS psychologist gave evidence on the issue of risk of assault.

In Celia's bail application emphasis was placed on the fact that there were some positive attributes to bail:

- she was in open employment and a BIS worker had contacted her former employer who agreed to hold her job open for her to return to, as long as she was released in the immediate future;
- a Risk of Assault Assessment had been prepared by a BIS psychologist who gave evidence for the bail application about the treatment that could be commenced upon her release – removal from the locality of the police station was specifically recommended;
- a placement in supported accommodation could be provided upon her release;
- a Forensic Risk Assessment identifying her risk of offending and providing direction on the management of this risk had been prepared;

- a consultation had taken place with her treating psychiatrist who had considerable experience in developmental disability issues;
- fortnightly counselling had been undertaken with a Mental Health Clinic and drop in support for her accommodation placement was available;
- BIS was willing to provide ongoing clinical support;
- specific case management was available;
- it would be open for her to return to the recreational activities that she had participated in prior to incarceration, namely indoor soccer.

#### Celia's case as a precedent for s32 applications

Relying on Celia's case as a precedent for a s32 hearing, it can be seen that legal practitioners should obtain from expert witnesses as much information on the following as possible:

- (1) History and background of the client, including family and social history.
- (2) Psychiatric disorder of the client.
- (3) Prognosis of the client, both short and long term, and physical health of the client, before and after incarceration.
- (4) Developmental disability of the client, including expert opinion on whether the client has a developmental disability that is linked to the offence.
- (5) If there is a connection between the disability and the offence, details of the apparent circumstances if there is such a connection. In Celia's case this included the photo of her injured arm, and the bruising which she said she received at the police station by the officer she sent the death threat to. Celia may have been venting her frustrations via the letter veiled with a threat. Did she intend to carry out the death threat? Or did she have no intention, capability or strategy to follow it through?
- (6) Detailed opinion as to whether dealing with the client according to the law will achieve anything. For example, the client may have an impaired ability to participate in a trial process and be subject to high risks and vulnerabilities in gaol. (Practitioners are encouraged to highlight if the client has had major problems in gaol. In Celia's case there was evidence which suggested that she had starved herself while in gaol).
- (7) Expert opinion on whether or not the client is a threat to the victim and whether the client has disclosed an intention of following the threat through.

- (8) Whether the client is minded to or capable of carrying the threat through.
- (9) The welfare of the client before and after incarceration.
- (10) Medication that the client may be on, and any condition or treatment that may have an effect on the client's behaviour.
- (11) The abilities or inabilities of the client for self care, and the abilities of the client to learn not to engage in anti-social behavioural acts.
- (12) Evidence of how many sessions of any existing treatment plan have been implemented following any previous s32 matters. Did any factors influence the implementation or lack of implementation of the treatment plan? How likely is it that the client might benefit from further treatment? If the client has had an opportunity to engage in a treatment plan, how likely is it that they will be able to learn the boundaries of being a law abiding citizen?
- (13) The client's employment situation and their ability to be able to go back into their position of employment if released.

A summary and opinion of the client should be obtained.

It is most important that a treatment plan be included that the practitioner can recommend to the Court. The practitioner should detail how this can be implemented for behaviour modification. This will ensure strategies are developed to reduce the client's challenging behaviour. The Court's attention should respectfully be drawn to any provisions of s32 of the *MHCPA* that are applicable to the case at hand. If there is any mental condition or developmental disability that the client has, such as obsessive-compulsive disorders, impulse control disorder, panic anxiety or acquired brain injury, this should also be put to the Court. While treatment is available for some these conditions in a hospital, it is important to consider whether a hospital is a suitable placement for the client.

Finally, the practitioner should state whether or not the client is or is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990* (NSW).

The chances of obtaining non-custodial options for offenders will be substantially increased if a representative from DADHC (either from BIS, or from a community support team or from Disability Services Australia) can attend court to give evidence on the services and treatment plans suited to the particular client. Such evidence will carry more weight than the mere tender of a report from a treating doctor, support worker, psychologist, psychiatrist, mental health worker or the tender of hospital clinical notes.

Having a Forensic Clinical Caseworker from BIS in court can have a positive effect on the magistrate hearing the application. The Forensic Caseworker is able to explain any recommendation made by a psychologist and explain any treatment plan. BIS are unable

to provide services and treatment in gaol. Having this said, not just from the bar table, but from the witness box by a BIS worker makes a difference in a s32 application, and has a significant impact on where the client will serve any penalty imposed.

The assistance that is available from intensive specialist behaviour intervention units is very important to s32 applications. If these services did not exist, gaol would be the inevitable housing option for many offenders with an intellectual disability.

### **Keith's Case**

The following case summary illustrates the steps involved in making an application under s32 of the *MHCPA*, while using the services of DADHC to achieve a non custodial sentence for a person with an intellectual disability.

#### Facts

Keith has an intellectual disability and an acquired brain injury. He is anxious about lifts, insects, paper clips and loud noises. He resides with his father and is heavily dependent on his father. He has certain obsessive compulsive traits which amongst other things, results in his repeatedly asking his father to check his mouth to ensure that there is nothing causing him to choke. His father also has to help him in the bathroom.

Keith's criminal history is summarised as follows:

1997: Malicious damage, false representation causing police investigation: s32 dismissal.

2001: Assault occasioning abh, common assault: s32 conditional discharge.

2001: Common assault: s32 conditional discharge.

2002: Assault police officer in execution of duty: 3 months gaol.

2002: Aggravated indecent assault: suspended sentence, 12 months bond.

In 2003 Keith spent 3 months in gaol.

An incident occurred that triggered off a series of challenging behavioural problems. Police charged Keith in December 2004 with an offence that he had allegedly carried out in April 2003, prior to his incarceration. He was alleged to have assaulted a fire brigade officer after calling 000 in April 2003. At the time that this occurred, Keith was interviewed and cooperated with the police. He and his father were told the matter would be dealt with by way of a caution only. Keith was incarcerated for other charges after the interview, and this charge should have been dealt with at the time.

From Keith's perspective, the police were breaching their promise to deal with the matter by way of a caution only. This caused him to become angry and very upset with the police.

A week after he was charged, Keith started demonstrating additional forms of challenging behaviour. This included sitting in the middle of the road and holding up

traffic. On one occasion when this happened, the police arrived and Keith did not cooperate. He was forcibly removed and sprayed. A struggle took place, for which Keith was then also charged with assault police (x 4).

Two weeks later Keith's father decided to take his entire family, excluding Keith, overseas for a family wedding. The father foresaw that there would be behaviour problems with Keith and was reluctant to go, but a carer was arranged to supervise Keith while the family was away.

The carer was an elderly gentleman with a hearing aid. He used the family home phone and left it unlocked. Keith played up. He phoned an airline and made a bomb threat to ground the aeroplane that his family was on. He did not want his family to go overseas. He then called 000 and said that a person was trapped in a car out the front of his house and that it was on fire. A day that would otherwise have been uneventful for Keith turned into a circus of fire brigades, police and bomb squad cars. Keith was the centre of attention.

That afternoon, I attended the police station, where Keith had already been interviewed. No CJSN support had been provided at the police station and full admissions had been made to the terrorist charges. I had discussions with the police in charge and requested that he be brought before a magistrate that day, as it was still before midday. The next day was a public holiday and, as the police would be opposing bail, a Registrar in the typical Saturday bail court (Parramatta has sittings on some public holidays) would have no power to grant bail.

By 3:00 pm the matter was listed before a magistrate. I made a bail application for Keith and the magistrate accepted that Keith did not have the capacity to carry out the threat, although Keith had been charged with a serious crime on the face of the matter. Keith was granted bail.

Unfortunately, two days later, Keith put a knife to his newly replaced carer. This followed an incident that led Keith to become highly stressed and anxious. No briefing had taken place to put the new carer on notice of the need to avoid placing Keith in situations with the potential to cause him high levels of anxiety. Keith stabbed his carer in the arm. It was later discovered that the carer only required three stitches.

The police took several photos of the crime scene and Keith was charged with malicious wounding. No bail application was made, as until his father returned from overseas, there were no suitable accommodation services that could facilitate Keith, and bail would not be granted unless there were exceptional circumstances to justify the granting of bail.

After Keith's father returned to Australia, a bail application was made. Keith had been in gaol for a week at this stage and part of the bail application evidence was led from a Behaviour Intervention Specialist from DADHC, who was able to detail the support and treatment that could be provided to Keith if he was to be released into his father's

responsibility. It was put to the Court that support and a treatment program could be provided to Keith while he was in gaol.

Other submissions were made in accordance with the seven points detailed below to demonstrate exceptional circumstances. Keith was granted conditional bail and released into the care of his father. His Honour also made acceptance and compliance with directions from DADHC a condition of bail.

### The steps taken for the s32 hearing

The steps that were taken in making Keith's s32 application are outlined below.

#### 1. *Discussions with the prosecutor*

As the malicious wounding charge was a Table 1 offence it could be dealt with summarily unless someone made a positive election to take it to the District Court. It was up to the prosecutor and his superiors to elect if they were going to have the matter dealt with in the District Court. This would have been devastating for Keith. By holding discussions with the prosecutor, I emphasised that Keith would be subjected to ongoing stress and anxiety if the matter dragged on. The matter was retained in the Local Court.

#### 2. *Tendering of reports and clinical notes*

Reports from Keith's treating psychiatrist and psychologist, along with clinical notes and a report from a DADHC Community Support Team worker on risk assessment and treatment were tendered. I had served these previously.

#### 3. *Calling of evidence from DADHC Community Support Team worker*

The Community Support Team worker from DADHC was called to give evidence. Before I made any submissions to the Court I asked the worker to explain some of the notes he had made in his report concerning supervision and asked him to explain what the psychologist's report meant when it recommended in its conclusion that the matter be dealt with under s32. I then repeated the same process with the psychiatrist, asking him what the treatment plan involved and what role he played in its supervision. This, in addition to the other submissions, convinced the magistrate to dismiss the matters conditionally under s32.

#### 4. *Addressing the circumstances surrounding the seriousness of the offence*

This involved detailing: the history of the matter; what happened to lead Keith to believe that there was a breach of promise by the police; the call to the airlines in his attempt to stop his father from leaving him behind; and the fact that the carer had left the phone unlocked, which was against a planned protocol to prevent prank calls.

The magistrate was reluctant to deal with the matter of malicious wounding under s32 as she was of the view that it was too serious a matter to proceed under this section.

In response to the magistrate's views, evidence was provided as to why it was appropriate for the magistrate to exercise her discretion to deal with the matter under s32. This included:

- the fact that the witness had only received three stiches;
- the attitude of the victim; and
- that in the event of her Honour refusing to deal with the charge under s32, the matter would most likely be dealt with by the making of representations to the Police Commissioner, and that by making these representations it would be requested that the charge be reduced to assault occasioning actual bodily harm, and that following this, instructions would be sought regarding the entering of a plea.

The magistrate suggested that the matter be adjourned until representations were made on the malicious wounding charge. But I indicated to her Honour that because the matter would then be ongoing, the stress and anxiety that Keith was experiencing would not be able to settle while the case was pending. This would be heightened by the fact that in Keith's eyes, the police had breached their word regarding the initial caution, which would cause his challenging behaviour to escalate. Furthermore, it was likely that representations would result in the Police Commissioner leaving it for a magistrate to determine the matter in any event.

#### 5. *Addressing the criminal history of Keith*

Evidence was given of the link between previous offending and Keith's developmental disability and condition, and of the fact that he has learned boundaries since being involved in behavioural modification programs.

#### 6. *Raising the time Keith spent in gaol for the offence in question*

Keith's time in gaol for this offence (one week) was raised. Submissions were made on:

- his inability to cope in gaol;
- the extent to which detention in gaol could potentially have an adverse effect on his progress with treatment;
- how ineffective gaol was likely to be in Keith's punishment or rehabilitation, and that the community was able to provide supports for Keith to have treatment; and

- why it is preferable and more responsible not to house people like Keith behind bars, but offer them supports that allows them to deal with their developmental disability and challenging behaviours.

7. *Demonstrating that the treatment plan could not be implemented if Keith was in gaol*

It was demonstrated that none of the recommendations suggested in the treatment plan could be put in place while Keith was in gaol. Detail of the treatment plan was provided which indicated that dealing with Keith at law would be ineffective as he would have no capacity to comply with a bond or perform community services. It was submitted that he would be very vulnerable in gaol as an easy target, and that his father was an appropriate responsible person to discharge Keith into the care of, together with the support of DADHC.

Her Honour dealt with the application and dismissed the matter under s32.

## CONCLUSION

People with an intellectual disability, are often held in prison on remand or given a gaol sentence because they are considered less able to meet bail conditions. There is no accommodation available for them, or the place in which they have been living will no longer accept them.

Failure to arrange ongoing assistance and support, and even supervision, will almost inevitably result in the person's reappearance in the criminal justice system.

Whether your occupation involves acting, case managing behaviour intervention, respite care, or supported accommodation, for, or providing assistance to, offenders with an intellectual disability, I truly hope that the above case studies assist you by giving some insight into a lawyer's perspective of acting for offenders with an intellectual disability.

If you are a legal practitioner acting for a client with an intellectual disability and need to make contact with disability services, feel free to contact IDRS. We can and will assist you by providing a referral to the appropriate agencies.

The term "chiselling the bars" is so descriptive of what offenders with intellectual disabilities face when caught up in the criminal justice system. A combined effort from all involved in disability services will dramatically help to avoid housing our client's with special needs in a gaol system that is so brutal to and unaccommodating of their disability and specific needs.

Peter McGhee

Principal Solicitor  
Intellectual Disability Rights Service