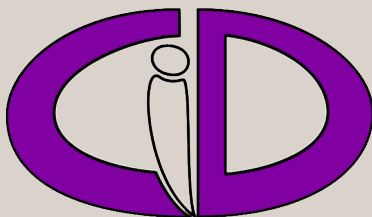


Enabling Justice

A Report on Problems and Solutions
in relation to Diversion of Alleged Offenders
with Intellectual Disability from the
New South Wales Local Courts System

**With particular reference to the practical
operation of s32 of the Mental Health
(Criminal Procedure) Act 1990 (NSW)**



Intellectual Disability
Rights Service



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Produced by the Intellectual Disability Rights Service

in conjunction with the Coalition on Intellectual Disability and Criminal Justice & NSW
Council for Intellectual Disability

Edited by Linda Steele, Intellectual Disability Rights Service

“ Her Majesty’s Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should her Majesty’s judge use their sentencing powers to dispose of those who are socially inconvenient.”

R v Clarke (1975) 61 Cr App R 320 at 323

“ States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”

Convention on the Rights of Persons with Disabilities, Article 13(1)

“ States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.”

Convention on the Rights of Persons with Disabilities, Article 19(b)

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The authors also wish to thank Freehills for its generous assistance in the formatting and printing of the report.

Disclaimer

Enabling justice is not intended as a substitute for legal advice. Independent legal advice should be sought when this is necessary.

Enabling justice

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About The Intellectual Disability Rights Service, Coalition On Intellectual Disability and Criminal Justice & NSW Council For Intellectual Disability

Intellectual Disability Rights Service

The Intellectual Disability Rights Service ('IDRS') is a community legal centre that provides legal services to persons with intellectual disability throughout New South Wales. IDRS's services include the provision of legal advice and legal representation in select matters. IDRS engages in policy and law reform work and community legal education with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN') which provides trained volunteers to people with intellectual disability when they come into contact with the criminal justice system, particularly at the police station and at court.

IDRS has considerable knowledge, derived from its employees' roles as legal representatives and as police/court support persons, of the issues for alleged offenders with intellectual disability appearing before the Local Court, particularly in relation to applications under s 32 of the Mental Health (Criminal Procedure) Act 1990 (NSW).

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NSW Council for Intellectual Disability

The NSW Council for Intellectual Disability ('NSW CID') is a peak body representing the rights and interest of people with intellectual disability in NSW. Roles that NSW CID takes on include policy advice, systemic advocacy, community education and information provision and dissemination.

NSW CID has been active in advocacy for offenders with intellectual disability for many years. In 2001, NSW CID and IDRS produced The Framework Report on the human service needs of offenders with intellectual disability and those at risk of offending.

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Coalition on Intellectual Disability and Criminal Justice

The Coalition on Intellectual Disability and Criminal Justice ('the Coalition') was formed in 2004 to advocate for systemic and legislative change in the service and justice systems so that people with intellectual disability have their rights respected and protected and have access to support services they need if they are to have a fair chance to avoid trouble with the law.

The Coalition is comprised of the following organisations:

- Beyond Bars Alliance
- Disability Advocacy NSW
- Indigenous Social Justice Association
- Intellectual Disability Rights Service
- Justice Action
- Lawyers Reform Association
- Multicultural Disability Advocacy Association
- NSW Council for Intellectual Disability
- Public Interest Advocacy Centre
- The Disability Trust, Wollongong
- Western Sydney Intellectual Disability Support Group
- Youth Justice Coalition

The Coalition is also comprised of various concerned individuals who take an active role in the Coalition. The chairperson of the Coalition is Associate Professor Eileen Baldry.

The Coalition meets on a quarterly basis and discusses a wide range of issues concerning intellectual disability and criminal justice including post-release accommodation and employment, forensic disability services, prison conditions and human rights issues. The Coalition makes submissions to government inquiries and law reform projects and also works on proactive projects, including the project forming the basis of this report. With other groups, the Coalition conducted the Gaol as Community Housing forum in November 2004 and the Chiselling the Bars forum in March 2005. Papers from these forums are available at www.beyond.bars.org.au.

For further information about the Coalition, contact NSW CID.

Contents

Abbreviated Terms

Executive Summary

People with intellectual disability.....	3
The problem	3
The project.....	4
Key findings.....	4
Consistency with NSW Government priorities	5
Recommendations	5
The Legislation	6
Support person.....	6
Police.....	6
Legal representation.....	7
The Magistrate	8
Disposition Procedures	8
Support services.....	9
Training	10

I Introduction

Methodology	11
Approaches to Intellectual Disability.....	12
Diagnostic Definition	12
Overrepresentation of People with Intellectual Disability in the Criminal Justice System.....	13
Medical Model of Disability	13
Interactional Model of Disability	13
Human Rights.....	15
Therapeutic Jurisprudence	18
The Focus of this Report: Local Court Criminal Matters and the Importance of Support Services to Alleged Offenders with Intellectual Disability....	19
Issues of cost	20
Reflecting on Achievements to Date.....	21

II The Legislative Framework for Diversion

The Legislative Context and Section 32	25
“Developmentally disabled” – Definition and Limitations	28
Confusion between Mental Illness and Intellectual Disability	30
The Magistrate’s discretion to invoke s 32.....	32

III Procedure

Issues with psychological reports and case plans	35
Who identifies the intellectual disability?	37
Court liaison services.....	37
Problems with traditional court procedures.....	38
Newcastle Local Court Special List Day	38
The Benefits of Informal Special List Days	38
Advantages of conference style procedures.....	39

IV The Role of DADHC and Other Support Services

Support services are vital	45
The role of DADHC.....	45
What DADHC does	45
Problems with DADHC services	46
DADHC’s limited eligibility criteria.....	48
Problem with other human services.....	50
The need for a court liaison service.....	52

V Enforcement of Section 32 Orders

The breach procedures.....	55
Rationale for breach procedures.....	56
To date, limited use of the procedures.....	57
Objections to breach procedures	57

VI Legal Representation

Legal Aid is vital.....	59
Problems with Legal Aid.....	59
A specialist service	61
The value of continuity in legal representation	64

VII Support persons

The importance of support persons	67
Criminal Justice Support Network.....	68

VIII Police

IX Conclusion

The Legislation	78
Support person.....	78
Police.....	79
Legal representation.....	79
The Magistrate	80
Disposition Procedures	80
Support services.....	81
Training	82

References

Appendix 1

Court Intervention and Diversion Programs in NSW
Youth Justice Conferencing
Community Conference Intervention Program (Adult Conferencing Pilot)
MERIT
Circle Sentencing Intervention Program
Adult Drug Court
Youth Drug and Alcohol Court (YDAC)
Mental Health Court Liaison Service

Abbreviated Terms

ALS	Aboriginal Legal Service
BIS	Behaviour Intervention Service
CCLS	Community Court Liaison Service
CJP	Criminal Justice Program
CJSN	Criminal Justice Support Network
DADHC	Department of Ageing, Disability and Home Care
DJJ	Department of Juvenile Justice
IDRS	Intellectual Disability Rights Service
ISP	Integrated Services Project
Legal Aid	Legal Aid Commission of NSW
s 32	Mental Health (Criminal Procedure) Act 1990 (NSW), Section 32
The Act	Mental Health (Criminal Procedure) Act 1990 (NSW)

Executive Summary

People with intellectual disability

This paper focuses on people with intellectual disability. Intellectual disability is conventionally defined as consisting of three elements: an IQ below 70, deficits in adaptive functioning, and acquirement of the disability before age 18. In the context of offenders, there is a strong argument for including people with borderline intellectual disability, that is, an IQ of up to 80.

Some of the recommendations in this paper could also be valuably applied to people with other cognitive disabilities, in particular adult acquired brain injury, and people with disabilities arising from mental illness.

The problem

1. There is a high proportion of people with intellectual disability coming into contact with the criminal justice system.
2. Often offending conduct is due to a lack of support services, including specialist disability services, drug and alcohol services and general social services such as housing and income support.
3. People may be imprisoned for want of appropriate recognition of their disability and because of a lack of availability of support services.
4. There is the option of diversion from the criminal justice system into support services through s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('s 32'), but this option may not be appropriately used.

The project

1. The project on alleged offenders with intellectual disability in the Local Courts system which forms the basis of this report was carried out by IDRS in association with the Coalition on Intellectual Disability and Criminal Justice and the NSW Council for Intellectual Disability.
2. The project sought to identify the problems faced by alleged offenders with intellectual disability in the Local Courts in order to make recommendations for reform.
3. The project had a particular focus on applications made under s 32.
4. The methodology of the project involved research of secondary sources, consultations with criminal lawyers and other stakeholders, holding a focus group of people with intellectual disabilities who have experience of the criminal justice system and the identification of specific case studies. There was also consultation with key government and legal agencies on a summary of the draft report.

Key findings

1. There is limited awareness about intellectual disability among some police, lawyers, court staff and Magistrates. This can result in:
 - a. some people's intellectual disability not being identified,
 - b. s 32 not being appropriately applied to divert alleged offenders,
 - c. inadequate recognition of the effect of intellectual disability on a person's behaviour and competencies, and
 - d. inadequate recognition of the lack of support services as a contributor to offending conduct.
2. There are difficulties in linking up alleged offenders with intellectual disability with support services because of:
 - a. problems related to the Department of Ageing, Disability and Home Care ('DADHC') including its strict eligibility requirements, difficulty in providing timely and effective responses and isolation from the court process, and
 - b. difficulties in accessing other human services.
3. The formal court process does not provide adequate scope to explore diversionary options which could be determined through discussion between key stakeholders such as the alleged offender, DADHC and the Magistrate, nor does it provide adequate opportunity to explain meaningfully to the alleged offender what was wrong with his or her conduct or the implications of the Court's decision.
4. Legal representation can be problematic because of the under resourced nature of the Legal Aid Commission of NSW ('Legal Aid'), the lack of time available to lawyers to see clients, prepare cases and explain to the client the court process, the lack of consistency of legal representation between court dates, and some lawyers' lack of knowledge about intellectual disability and of how to prepare applications under s 32. These problems often result in multiple unnecessary adjournments and inappropriate outcomes. These problems are

much less likely to arise where the one lawyer, with particular skills in intellectual disability, represents a client throughout his or her case. IDRS has extensive experience representing clients in s 32 applications and, to date, has had very few unsuccessful applications.

5. Alleged offenders with intellectual disability require assistance to negotiate and understand police interviews and the court process. Trained support persons can provide this assistance but the availability of support persons varies across the State. The CJSN currently provides advice and training for support people around the state and has a network of trained volunteer support people in Sydney, Newcastle and the Illawarra.
6. Often, police do not fulfill their obligation to seek a support person for a suspect who may have intellectual disability.
7. Arising from the above factors, there is considerable cost to the justice and human service system from inefficient and ineffective responses to cases involving alleged offenders with intellectual disability. Opportunities to avoid or reduce recidivism are lost.

Consistency with NSW Government priorities

The recommendations contained in the report reflect NSW Government priorities as outlined in the NSW State Plan. In particular, the recommendations reflect the following priorities:

- R1: Reduced rates of crime.
- R2: Reduced re-offending.
- R3: Reduced levels of anti-social behaviour.
- F4: Embedding prevention and early intervention into Government service delivery.

This is on the basis that the recommendations are focused on identifying environmental and behavioural causes of offending in order to provide support and services matched to individuals' needs and thereby assist individuals to lead positive and lawful lifestyles.

The recommendations are also consistent with the work of the Senior Officers Group on People with an Intellectual Disability and the Criminal Justice System which is developing a co-ordinated cross agency response to the needs of this group.

Recommendations

Improvements should be made through a multi-agency approach, rather than attributing responsibility to a single agency. This report suggests both the key features of a possible model for the diversion of alleged offenders from the criminal justice system which builds on the existing s 32 system and the key principles which should inform the development of this framework. The model provides for the stepped, skilled dealing with alleged offenders with intellectual disability from the first point of contact with the justice system until disposition.

Consideration could be given to extending the model proposed by the report to apply to other disadvantaged groups.

The key principles guiding this model are that:

1. The effects of intellectual disability are not just the result of factors internal to the individual but rather are the product of the interaction amongst and between the individual's cognitive impairment and various aspects of psychological and socioeconomic disadvantage. Offending conduct is best understood as a product of or related to this interaction.
2. The impact of socioeconomic disadvantage and limited access to support services is recognised in understanding conduct giving rise to offences.
3. The person's ability to understand and participate in the proceedings is maximised.
4. The person's legal rights and human rights are acknowledged and protected.
5. The person is empowered throughout the court process.
6. The proceedings are an opportunity to explore and engage supports and interventions that the person may need to assist him or her to lead a positive and lawful lifestyle.
7. There is recognition in bail and disposition decisions of the impact of intellectual disability on the alleged offender's understanding of, and culpability for, an offence and on the person's capacity to understand conditions on bail, s 32 dismissals, good behaviour bonds and other non-custodial orders.
8. The diversity of society is recognised, including racial, cultural and linguistic diversity. The needs of rural and remote communities are also recognised.

The key elements of this model are:

The Legislation

1. Clarification of s 32, particularly its application to persons with intellectual disability and other cognitive disabilities.

Support person

2. Ensure that all alleged offenders have a competent support person (whether that is from the person's own network, the CJSN or elsewhere) to assist them throughout the criminal justice process.

Police

3. Ensure that there are sound police systems to take account of the impact of intellectual disability on decisions about arresting a person, laying and withdrawing charges and action for breach of bail.
4. Establish a network of disability liaison officers in the NSW Police Force.
5. Improved training (in the sense of more training and training conducted by external experts) of all police officers (including police prosecutors) about intellectual disability.
6. Enhanced liaison between the NSW Police Force and DADHC.

7. Exploration of the establishment of a formal cautioning system for adults with intellectual disability analogous to that under the *Young Offenders Act 1997* (NSW).

Legal representation

8. Provision of lawyers who:
 - a. are trained and skilled in communicating with persons with intellectual disability and familiar with relevant legal and support service system issues;
 - b. have the time needed to obtain thorough instructions and properly explain to their clients what is happening;
 - c. have the time to prepare their clients' matters for court, including obtaining psychological reports and case plans associated with s 32 applications, and
 - d. can provide continuity of representation throughout the proceedings.

For example, this might be achieved by Legal Aid through:

- Encouraging all lawyers representing clients with intellectual disability to spend more time in consultations with these clients and in arranging any necessary reports and case plans for these clients. In order to facilitate this, lawyers in-house at Legal Aid should have reduced caseloads and private practitioners representing clients pursuant to grants of Legal Aid should be entitled to additional Legal Aid funding to enable longer consultation and preparation times.
- Establishing a panel of lawyers with expertise in representing offenders with intellectual disability. These lawyers could provide continuity of representation for clients with intellectual disability, especially those with more complex needs.
- Ensuring the availability statewide of lawyers who have been trained in intellectual disability and have appropriate expertise.
- Developing a protocol for providing legal services to clients with intellectual disability, including, for example, issues about seeing the client in advance of the court day and spending extra time with the client.
- Utilising the social work department in Legal Aid to provide assistance to lawyers who have clients with intellectual disability in accessing support services.
- Negotiating a mentor relationship between lawyers specialising in intellectual disability (such as those at IDRS) and other Legal Aid lawyers.
- Arranging for IDRS to provide consultancy and training to Legal Aid lawyers and private practitioners in relation to clients with intellectual disability, particularly those with complex needs.
- Seconding Legal Aid lawyers to IDRS.

There should also be enhanced education of lawyers about intellectual disability and social disadvantage issues, including through College of Law and University Practical Legal Training courses (PLT), Mandatory Continuing Education (MCLE) and criminal law specialist courses and seminars, and through the development of resources to assist lawyers in representing clients with intellectual disability.

IDRS, the Aboriginal Legal Service and the Legal Aid Commission should work with CALD and Indigenous disability groups to ensure appropriate representation of alleged offenders with intellectual disability who come from a CALD or Indigenous background.

The Magistrate

9. Ensure that Magistrates:

- a. are able to maximise alleged offenders' understanding of the proceedings; and
- b. are aware of the nature and effects of intellectual disability (including its psychological and socioeconomic dimensions), the relationship between inadequate support services and offending conduct, and the appropriateness of diversion and sentencing options for offenders with intellectual disability.

This might be achieved by measures such as:

- Enhanced training of Magistrates and the development of a resource package for Magistrates about:
 - the nature of intellectual disability and its impact on offending and participation in the criminal justice system, and
 - human services and other supports for people with intellectual disability, including details of supports for Indigenous people and people from CALD backgrounds, and the varying supports available in rural, regional and metropolitan settings.
- Procedures to ensure Magistrates have available to them adequate time and expert input for cases involving persons with intellectual disability, for example by dealing with a number of such cases in the one list or listing s 32 matters at 2pm.

Disposition Procedures

10. Processes used to decide how to dispose of criminal charges against a person with intellectual disability should:

- be conducted by a person with knowledge and skills in intellectual disability;
- be conducted in a way that is meaningful to the alleged offender including in relation to the nexus between any outcome and the events giving rise to the charges;
- provide a forum to bring together people in the alleged offender's life in order to identify the needs of that person and how to meet those needs;
- include attempts to identify the person's support and behaviour intervention needs and engage relevant players in meeting those needs; and
- be conducted in an informal, conference-based manner wherever possible.

11. In the disposition of criminal charges, any conditions placed on the alleged offender with intellectual disability must be related to addressing offending behaviour.

These elements could be achieved through measures including:

- Courts listing s 32 applications at 2pm, rather than 9.30am, so that alleged offenders have less time to wait at Court and become anxious, and so that Magistrates can engage more with clients in a less busy court setting.
- Establishing special lists and procedures for those lists in some locations. This option should be trialled with caution in some locations where there is cross agency interest in it. We do not recommend over-formalising such a system or establishing it statewide as it carries dangers of net widening and stigma.
- In relation to youth justice conferencing, there should be statewide rollout of the strategies already trialled by the Department of Juvenile Justice ('DJJ') to provide support people and adjust the conference process to meet the needs of people with intellectual disabilities and other additional support needs. DJJ should also provide conferencing staff with enhanced training in recognising additional support needs.
- Incorporating the approach developed by DJJ into the statewide rollout of the adult conferencing project.
- Holding a pre-court meeting or conference with the alleged offender, a support person, family and friends and support services for the purpose of devising a case plan.

There needs to be ongoing exploration and reassessment of conferencing and other innovative disposition procedures, including through consideration of their operation in other jurisdictions.

Support services

- 12 A multi-focal system of diversion is required, including ensuring there is a system for appropriate disability professionals to be available to police officers and in Local Courts to assist with issues including identification of people with cognitive disability, linking alleged offenders to services and the preparation of court reports and case plans (which are to be provided to the defence rather than directly to the court) where required.
- 13 Intellectual disability services should:
 - a. have workers skilled in working with offenders and have an understanding of the criminal justice system;
 - b. be available promptly and for as long as they are needed;
 - c. provide a clear access path for the alleged offender, his or her lawyer, and his or her support person;
 - d. provide assessment of intellectual disability and support needs, particularly as they relate to the alleged offending; and
 - e. provide or facilitate provision of the necessary supports and interventions to meet the person's needs, including behaviour intervention and referral to generalist support services such as drug and alcohol services and housing.

- 14 Other human services, such as mental health, drug and alcohol services and housing, which should be similarly skilled in working with people with intellectual disability, should be available and be well coordinated with intellectual disability services.

Achieving all of the recommendations in relation to support services requires:

- Determination of how best to provide the police and court liaison function discussed in recommendation 12 above. In NSW Local Courts, a workable approach could involve co-operation between NSW Health and DADHC. Nurses from the Statewide Community Court Liaison Service of Justice Health could be responsible for initial screening for cognitive disability in the courts in which they operate. A DADHC worker skilled in criminal justice issues could be on call to facilitate formal assessment, link the individual with services and develop a case plan that could be used to support non-custodial disposition options, particularly a section 32 order. The services of this DADHC court liaison worker should not be confined only to people who fit the conventional definition of intellectual disability and are ultimately eligible for DADHC services, but should extend to people who are not eligible for DADHC services but who would benefit from effective referrals to other support services, such as people with a 'borderline' intellectual disability or people who have an acquired brain injury. In Local Courts that do not have the Statewide Community Court Liaison Service, there needs to be capacity for the Magistrate, defence lawyers and alleged offenders with intellectual disability to access a DADHC worker directly.
- Improved policies, procedures and skills within DADHC and other human service agencies.
- Allocation of additional funds by Government.
- The resolution of cooperative arrangements between agencies to facilitate efficient and effective responses to individual cases.
- The resolution by government of how to address the service needs of offenders with cognitive disability who fail to meet all of the DADHC eligibility criteria, such as individuals who have brain injuries acquired after the age of 18 years and individuals with major skill deficits but an IQ between 70 and 80.

Training

- 15 Training (including at a tertiary level) of all professionals involved in every aspect of the criminal justice process in relation to intellectual disability.

I Introduction

Methodology

The findings in this report are centrally based on the experience of a variety of lawyers, disability advocates and disability service providers who have wide-ranging experience with the involvement of alleged offenders with intellectual disability in the NSW Local Court system including:

- The lawyers at IDRS who in recent years have focused heavily on representation of alleged offenders with intellectual disability appearing before the Local Court.
- The staff and volunteers of the CJSN whose main role is supporting alleged offenders with intellectual disability in police interviews and criminal matters in the Local Court.
- Other members of the Coalition on Intellectual Disability and Criminal Justice.

The findings are also based on structured interviews with a variety of the above stakeholders, a group of Legal Aid Commission lawyers and specialist criminal justice staff of the Department of Ageing, Disability and Home Care 'DADHC').

In light of these experiences and a literature review, draft findings and recommendations were refined by a subcommittee of the Coalition on Intellectual Disability and Criminal Justice which included:

- Associate Professor Eileen Baldry, School of Social Sciences and International Studies, Associate Dean (Education), Faculty of Arts & Social Sciences, University of NSW
- James Condren, Advocate
- Peter McGhee, former Principal Solicitor, IDRS
- Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre
- Tamara Sims, former Solicitor, IDRS
- Jim Simpson, Senior Advocate, NSW Council for Intellectual Disability, principal author, *The Framework Report*
- Linda Steele, Solicitor, IDRS

Members of the Coalition on Intellectual Disability and Criminal Justice then consulted with key stakeholders on a summary of draft findings and recommendations. This included meeting with:

- Laurie Glanfield, Director General, Attorney-General's Department
- Chief Magistrate Henson and Deputy Chief Magistrate Syme, NSW Local Court
- The Senior Officers Group on Intellectual Disability and Criminal Justice
- Senior officers, DADHC
- Senior officers, NSW Health
- Professor David Greenberg, Clinical Director, Statewide Community and Court Liaison Service, Justice Health
- Senior members, NSW Police Force
- Brian Sandilands, Director of Criminal Law Division, Legal Aid Commission of NSW
- The Public Interest Advocacy Centre (including its Homeless Persons Legal Service)

A focus group of people with intellectual disabilities who have experience of the criminal justice system was also held.

These consultations revealed very little dissent from the preliminary findings and provided valuable advice in relation to the recommendations.

The Coalition subcommittee then finalised the report findings and recommendations and these were endorsed by IDRS and the Coalition.

Approaches to Intellectual Disability

Diagnostic Definition

Intellectual disability is diagnostically defined as consisting of 3 coexisting criteria:

- an IQ of 70 or below,
- significant limitations in adaptive functioning (such as communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety), and
- the onset of the former two criteria before 18 years of age.¹

¹ The American Psychiatric Association defines 'mental retardation' (ie 'intellectual disability') as consisting of three co-existing elements – 'significantly subaverage general intellectual functioning' (ie an IQ of 70 or below), 'significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety' and onset before 18 years of age: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorder: DSM-IV-TR* (2000) 41.

Overrepresentation of People with Intellectual Disability in the Criminal Justice System

Persons with intellectual disability are disproportionately represented in the criminal justice system. For example, one study found that, whilst persons with intellectual disability constitute approximately 2-3% of the Australian population, nearly one quarter (23.6%) of persons appearing as defendants before six Local Courts in NSW could be diagnosed with having intellectual disability, with a further 14.1% of persons in the borderline range of ability.² These figures were found to rise in regional areas.³

There are numerous explanations given for the over representation of persons with intellectual disability in the criminal justice system.⁴ However, the perceived impact of intellectual disability on an individual so diagnosed, and hence the relationship between intellectual disability and offending, will depend upon the particular approach to intellectual disability that is taken. Two approaches only are contrasted here.

Medical Model of Disability

The traditional and historically common approach to disability is the 'medical model'.⁵ Pursuant to the 'medical model' of disability, the perceived impact of a person's intellectual disability on his or her capacity is purely a product of the internal characteristics of that person (such as cognitive impairment, the person's attitudes towards his or her impairment and his or her personal qualities and abilities). External factors, such as supports available to the individual, the individual's level of income, other people's stereotypes and the legal framework, do not have a determining role to play. The medical model of disability tends to view intellectual disability as permanent and immutable.

Interactional Model of Disability

An alternative model, and the one which is adopted by this paper, is the 'interactional' or 'social relational' model of disability.⁶ Pursuant to the interactional model of disability, the perceived impact of intellectual disability on a person's capacity is produced by the relationship between intrinsic factors (such as cognitive impairment, the person's attitudes towards his or her impairment and his or her personal qualities and abilities) and extrinsic factors such as environments, support systems, attitudes of others, level of income available to the individual, and other social, legal, economic and cultural factors.

2 Susan Hayes, 'Prevalence of Intellectual Disability in Local Courts' (1997) 22 *Journal of Intellectual and Developmental Disability* 71, 73, 81. A study of young offenders on community orders found that between 11-15% had intellectual disability: Diana T Kenny, Paul Nelson, Tony Butler, Chris Lennings, Mark Allerton & Una Champion, *NSW Young People on Community Orders Health Survey 2003-2006* (2006) Justice Health <http://www.justicehealth.nsw.gov.au/pubs/YPCO_Report.pdf> at 23 February 2008, 6. In a study of young persons in custody in juvenile justice facilities 17% were assessed as having intellectual disability: New South Wales Department of Juvenile Justice, *2003 NSW Young People in Custody Health Survey: Key Findings Report*, (2003) Justice Health <<http://www.justicehealth.nsw.gov.au/pubs/YPiCHS.pdf>> at 23 February 2008, 9.

3 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts*, Research Report No 5 (1996) [4.35].

4 Phillip French, *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland* (2007) Queensland Advocacy Incorporated <http://www.qai.org.au/documents/doc_199.pdf> at 2 June 2007, 28-37; New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) 26-32; .

5 For an overview of the medical model, see Tom Shakespeare, *Disability Rights and Wrongs* (2006) 14-19; Colin Barnes, Geof Mercer & Tom Shakespeare, *Exploring Disability: A Sociological Introduction* (1999) 27-31.

6 See generally Shakespeare, above n 5.

The application of these two models in the criminal law context results in strikingly divergent understandings of the appropriate approach to alleged offenders with intellectual disability. Pursuant to the medical model of intellectual disability, the cause of offending conduct tends to be seen as the person's lower cognitive capacity – that is, the cause is the functioning of that individual's brain. Whilst 'treatment' or 'care' might be able to contain the individual's behaviour, his or her offending conduct is likely to remain unchanged.

In comparison, pursuant to the interactional model of disability, the offending conduct of a person with intellectual disability is produced by the complex interaction between his or her lower cognitive capacity and the particular physical, social and economic circumstances in which he or she exists.⁷ Offending conduct can be addressed through support services which are matched to the particular needs of the individual offender, including his or her cognitive capacities and the particular socioeconomic disadvantages he or she is subject to.

For example, the limited educational opportunities for and experiences of many persons with intellectual disability coupled with society's prejudice towards persons with intellectual disability can result in a lack of employment opportunities for persons with intellectual disability which, in turn, can lead to reliance on the State for welfare payments, general social services and specialist disability services. The ability of each individual to participate within the community will therefore be influenced by his or her level of access to such services. However, a person with intellectual disability might not have the communication, problem solving and information processing skills needed to identify and advocate for the support services that he or she needs, and those support services may not be available. This can result in that person committing 'survival crimes' such as stealing food or evading transport fares. The inability of people with intellectual disability to access support services can also reduce access to support and housing necessary for bail and disposition options.

Similarly, a person with intellectual disability might have difficulty understanding a conflict or stressful situation and lack access to support to assist him or her to learn conflict handling skills. This can lead to an argument or misunderstanding escalating into an offence. An example of this is a police officer questioning a person with intellectual disability on the street. The person becomes scared and confused and consequently says something to the police which the police misinterpret and respond disproportionately to such that the situation escalates into an offence. As a further example, people with intellectual disability might be more visible in the community, and hence to law enforcement officials. This can be caused by their perceived socially 'inappropriate behaviour' which is the result of their isolation from the general community and narrow societal stereotypes about acceptable behaviour. This can also be caused by their greater physical presence in public space because of unemployment and homelessness or living in accommodation environments such as boarding houses or group homes in which they do not wish to spend time during the day. This greater visibility can result in higher chances of being randomly stopped by the police and subsequently being found to have breached bail, to be the subject of outstanding warrants or to have committed charges which would otherwise have gone undetected (such as possession charges) or uncommitted (such as 'trifecta' charges, ie offensive language, resisting arrest and assaulting a police officer in the execution of his or her duty). People with intellectual disability can also be seen as a greater 'risk' to the community as they are more present in the community and are seen as abnormal.

⁷ See French, above n 4, 13-14.

Other recent reports on disability and criminal justice have been similarly influenced by the interactional model of intellectual disability through their adoption of the 'psychological and socioeconomic disadvantage hypothesis'.⁸ This approach, which is grounded in the interactional model of disability, explains the over representation of people with intellectual disability as suspects, defendants and offenders 'by understanding impairment as only one of a range of factors that result in greater exposure to law enforcement and criminal justice interventions'.⁹ Intellectual impairment 'is not the causal or determinative factor in bringing the individual into contact with law enforcement criminal justice agencies, although of course, it may interact with other "primary factors" to do so'.¹⁰ A range of psychological and social disadvantages 'operate and interact with impairment ... to increase the likelihood of contact between persons with disability and law enforcement and criminal justice agencies'.¹¹ These psychological and social disadvantages can include mental health issues, levels of family and social supports, drug and alcohol dependency, poverty and homelessness. Moreover, once in the criminal justice system, the outcomes for these individuals are not simply the result of their impairment but rather are 'the result of social institutional systems that have failed to accommodate impairment as an ordinary incident of human diversity, and which consequently, have created and imposed disabling structural barriers to equality before the law for persons with disability'.¹²

Human Rights

Coupled with the interactional approach to disability, this report is informed by a human rights perspective. A human rights perspective involves recognition of the fundamental rights that alleged offenders with intellectual disability have because they are human beings,¹³ as well as those rights that they enjoy specifically by dint of the particular disadvantage that they experience because of their intellectual disability. Of particular relevance to the latter set of rights is the *United Nations Declaration on the Rights of Disabled Persons*¹⁴ which states that:

Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against [people with disabilities], the legal procedure applied shall take their physical and mental condition fully into account.¹⁵

Also of increasing relevance is the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities ('the Disability

8 New South Wales Law Reform Commission, above n 4; French, above n 4.

9 French, above n 4, 31.

10 Ibid, 31.

11 Ibid, 31. See also Shasta Holland, Peter Persson, Megan McClelland & Robyn Berends, *Intellectual Disability in the Victorian Prison System: Characteristics of Prisoners with an Intellectual Disability Released from Prison in 2003-2006* (2007) Department of Justice <http://www.justice.vic.gov.au/vwps/wcm/connect/DOJ+Internet/resources/file/eb938d4ab50261e/Intellectual_Disability_in_the_Victorian_Prison_System.pdf> at 24 February 2008, 10-12.

12 French, above n 4, 14.

13 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 271 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

14 United Nations Declaration on the Rights of Disabled Persons, opened for signature, G.A. res. 3447 (XXX), 30 UN GAOR Supp. (No. 34) at 88, UN Doc A/10034 (1975); Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, 85th Plenary Meeting 20 December 1993.

15 United Nations Declaration on the Rights of Disabled Persons, opened for signature, G.A. res. 3447 (XXX), 30 UN GAOR Supp. (No. 34) at 88, UN Doc A/10034 (1975), Article 11.

Convention').¹⁶ The Disability Convention was opened for signature on 13 March 2007. The Disability Convention was ratified by 20 UN members on 3 April 2008 and came into force 30 days after that date. Australia signed the Disability Convention on 30 March 2007, but has not yet ratified it.

The Disability Convention sets out rights to access to justice, equality before the law and appropriate housing, disability and generic support services.

Article 13 of this Convention provides:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 12 states:

1. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 19 states:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Cocks has suggested that the Disability Convention will have the following impact on criminal justice:

Key focus areas of the Convention are law and justice. The Convention reaffirms that persons with disability have the right to recognition everywhere as persons before the law. However, it goes further, requiring states to ensure effective access to justice for persons with disability. This is a new, positive, obligation on states that recognises that the traditional formal veneer of equality before the law has done little, in fact, to secure the human rights of persons with disability. Among other things, the Convention will require the provision of reasonable accommodation to persons with disability in order to facilitate their effective

¹⁶ Convention on the Rights of Persons with Disabilities, opened for signature 13 March 2007, G.A. res. A/61/611 (not yet entered into force).

participation in the justice system in whatever role they encounter it. It will also require appropriate disability-related training of personnel responsible for the administration of the justice system. Many other aspects of the Convention will also have a direct bearing upon how the justice system interacts with persons with disability, including provisions related to the general accessibility of facilities and services, the recognition of alternative communication systems, the provision of accessible information, and the participation of persons with disability in policy setting and program development.¹⁷

Although international law generally does not become part of Australian domestic law unless it is specifically incorporated by statute, international law can still inform the development of policy and the interpretation of statutes and hence international human rights are still highly relevant to the policies and laws surrounding alleged offenders with intellectual disability in the Local Courts.

On a domestic level, the human rights approach to disability is most evident in the legislation concerning two areas – discrimination¹⁸ and disability service provision.¹⁹

In relation to discrimination, the *Disability Discrimination Act 1992* (Cth) prohibits discrimination on the grounds of disability and renders it unlawful to discriminate on the grounds of disability in relation to, inter alia, the provision of goods, services and facilities, accommodation and education.

In relation to disability service provision, the *Disability Services Act 1993* (NSW) provides a list of human rights principles that must be applied by disability services and programs of services provided and funded by the NSW Government²⁰ including that:

- ‘persons with disabilities have the right to realise their individual capacities for physical, social, emotional and intellectual development’,
- ‘persons with disabilities have the same rights as other members of Australian society to services which will support their attaining a reasonable quality of life’, and
- ‘persons with disabilities receiving services have the same right as other members of Australian society to receive those services in a manner which results in the least restriction of their rights and opportunities’.²¹

The Disability Standards would apply to those disability service providers which are providing services to alleged offenders.²²

All NSW public authorities are also required to prepare and implement plans to encourage its services to further the principles in the *Disability Services Act 1993* (NSW).²³

The rights recognised in the domestic legislation are particularly relevant to the actions of services in providing support to alleged offenders with intellectual disability and courts in providing an accessible forum for the resolution of criminal matters.²⁴

17 French, above n 4, 3-4.

18 *Disability Discrimination Act 1992* (Cth); *Anti-Discrimination Act 1977* (NSW).

19 *Disability Services Act 1993* (NSW); *Disability Services Act 1986* (Cth).

20 *Disability Services Act 1993* (NSW) Sch 1.

21 *Disability Services Act 1993* (NSW) Sch 1, cl1(c), (d), (g).

22 Although the standards do not give rise to a civil cause of action: *Disability Services Act 1993* (NSW), s25(1).

23 *Disability Services Act 1993* (NSW) s 9

24 However, in relation to discrimination vis-à-vis government services, see the discussion of the recent decision of *Rainsford v Victoria* [2007] FCA 1059 (19 July 2007) in Frances Simmons, ‘When is Performing a Government Function a Service?’ *Law Society Journal* (2008) 40.

Therapeutic Jurisprudence

A brief note should be made about therapeutic jurisprudence. In many court settings, particularly specialist diversion courts, the approach called 'therapeutic jurisprudence' is followed. Therapeutic jurisprudence²⁵ is 'the study of the role of law as a therapeutic agent'.²⁶ It 'focuses on the law's impact on emotional life and on psychological well-being'²⁷ and considers how the law 'can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected'.²⁸ The converse of the therapeutic potentials of the law is that the law also has the capacity to have anti-therapeutic effects.²⁹ A therapeutic jurisprudence approach to criminal law broadly involves appreciating an offender's patterns of thoughts, feelings and behaviour prior to committing an offence and, based on this, helping the offender to 'develop skills that will enable them to act differently in future situations where they may be at risk of committing a crime'.³⁰ Therapeutic jurisprudence has been embraced by many 'problem solving' courts (ie courts that identify a particular social issues, such as Indigenous persons or drug and alcohol that seek to solve the perceived underlying problem through altered court processes and disposition options). It is favoured by many policy makers.

Whilst therapeutic jurisprudence offers some positive ways to address the issues faced by offenders with intellectual disability in the criminal justice system, it also has limitations that should be considered carefully before incorporating it into approaches to addressing intellectual disability criminal justice matters. These can be summarised in three points. If not applied carefully it could be inconsistent with the interactional model of disability adopted by this report because in some circumstances 'therapeutic jurisprudence' is focussed on 'therapeutic', that is on health-based, interventions which concentrate on the internal, psychological causes of offending to the detriment of a thorough consideration of the role of environmental factors. Second, therapeutic jurisprudence sees the law as a positive, therapeutic tool and hence can fail to consider how the law itself can be a source of disempowerment. Third, it has the potential to have a 'net widening' effect of drawing people with intellectual disability into and maintaining them in the criminal justice system insofar as it sees court as the moment for addressing an offender's issues. For example, there is a risk that the creation of specialist courts and diversionary mechanisms translates a social issue which should be the responsibility of the community and be addressed through human services into an individualised, legal and criminal issue.

25 See generally *Australasian Therapeutic Jurisprudence Clearinghouse* <<http://www.ajja.org.au/>> at 17 March 2008; *International Network on Therapeutic Jurisprudence* <<http://www.law.arizona.edu/depts/upr-intj/>> at 6 December 2006.

26 David B Wexler & Bruce J Winick, *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) xvii.

27 David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125, 125.

28 *Ibid*, 125.

29 *Ibid*, 128-129.

30 James McGuire, 'Maintaining Change: Converging Legal and Psychological Initiatives in a Therapeutic Jurisprudence Framework' (2003) 4 *Western Criminology Review* 108, 110-111.

The Focus of this Report: Local Court Criminal Matters and the Importance of Support Services to Alleged Offenders with Intellectual Disability

It follows from the interactional model of disability that the justice system should appreciate how cognitive impairment interacts with external factors when understanding the conduct of an alleged offender with intellectual disability and when approaching such issues as cautioning, charging, findings of guilt or innocence, diversion and sentencing. In particular, the justice system should attempt to address the impact of psychological and socioeconomic disadvantage on alleged offenders with intellectual disability through carefully considering diverting those individuals into support services.

The criminal justice process already has the capacity to do this. For example, police have the power to give informal cautions, the prosecution can withdraw charges (particularly following representations made by the defence) and Magistrates consider subjective factors when sentencing. However, the most significant way that the Local Court's criminal justice system appreciates the interaction between cognitive impairment and external factors in relation to offending is through the Magistrate's power to order diversion under s 32.

Section 32 gives a Magistrate a broad discretion to dismiss charges against alleged offenders who have developmental disability, mental illness or a mental condition for which treatment is available in a mental health facility. The dismissal may be conditional or unconditional. In 2006, 973 alleged offenders were discharged under s 32:

- 21 into the care of a responsible person without conditions.
- 570 into the care of a responsible person subject to conditions.
- 225 on condition that the person accept assessment or treatment.
- 157 unconditionally.³¹

It is not known how many of these discharges relate to people with developmental disability.

It is very positive that s 32 provides scope for the diversion of persons with 'developmental disability' out of the criminal justice system and into services that will address their offending behaviour and their broader support needs. This report is focussed on a consideration of the practical operation of the processes surrounding s 32 applications.

The operation of s 32 is problematic in numerous respects. This report identifies problems related to lawyers' understanding of intellectual disability, the limited involvement of the alleged offenders in the court process, the lack of services available to alleged offenders with intellectual disability and the limited knowledge of the criminal justice system held by disability service providers. Although there have been some positive developments in recent years, the NSW Local Court system needs enhancement to better meet the needs of alleged offenders with intellectual disability.

³¹ Judicial Commission of NSW, *Diverting Mentally Disordered Offenders in the NSW Local Court*, Monograph 31 (2008) 4.

This report offers both the key features of a model for the diversion of alleged offenders from the criminal justice system that builds on the existing s 32 system and the key principles which should inform the development of this model. The model provides for the stepped, specialist dealing with alleged offenders with intellectual disability from the first point of contact with the Local Court until disposition under s 32.

It should be noted at the outset that whilst this report focuses specifically on issues surrounding s 32, it is intended that its findings and recommendations could more broadly inform the reform of the criminal justice system in regard to alleged offenders with intellectual disabilities. However, two qualifications must be made. First, although these recommendations can, on an individual basis, go some way to improving the situation of alleged offenders with intellectual disability facing the Local Court, it is necessary to implement a more holistic and systemic reform. It is argued that improvements should be made through a multi-agency approach, rather than attributing responsibility to a single agency, consistent with the approach that is currently being taken by the cross-departmental Senior Officers Group on Intellectual Disability and Criminal Justice. Second, one must look beyond the court system as the only moment for addressing offending conduct. Early intervention, whether in childhood, adolescence or adulthood when an individual is first considered at risk or in closer proximity to offending conduct, is also vitally important. So, whilst this report focuses on the processing of applicants at court and provision of legal services and accessing support services post-diversion – other things are equally as important. The authors of this report are therefore of the view that there is a need for a continuum between early childhood and family intervention services, other human services and the criminal justice system.³²

Issues of cost

As this report explains, the legal and human service systems currently have major deficiencies in how they respond to offenders and alleged offenders with intellectual disability. These deficiencies give rise to serious financial cost:

- The cost to the courts, Legal Aid and prosecution of multiple adjournments of matters and avoidable recidivism.
- Police time both in dealing with avoidable crime and in multiple lengthy attendances at court.
- The cost of ineffective and poorly coordinated responses by human services, and multiple lengthy attendances at court by case workers.
- The cost of avoidable detention in prison and juvenile justice centres.
- The cost of avoidable victim compensation payments.

The NSW Police Force emphasises the amount of police time that goes into ineffective responses to people with disabilities and “at risk” behaviour. For example, police may spend ten hours with a person while they unsuccessfully seek assistance from human services, and this situation may repeat itself “again and again”; this may leave a town with only one police car available for an entire shift.³³

³² See, eg, French, above n 4, 52.

³³ Police Service Comments on Frameworks Project quoted in Jim Simpson, Meredith Martin & Jenny Green, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending* (2001), 4.

Fundamentally, there are also the human costs to the victims and the perpetrators with intellectual disability. As the NSW Law Reform Commission pointed out, if there was a better service system, community safety would be considerably enhanced, as would the quality of life of many people with intellectual disability and their families.³⁴

In *People with an Intellectual Disability and the Criminal Justice System*,³⁵ the NSW Law Reform Commission concluded that the cost to government of properly meeting the needs of offenders with intellectual disability would be recovered in the long term because:

- There would be a reduction of recidivism and therefore in expenditure on prisons and on processing people through the legal system.
- There would be less wasteful duplication of services.
- Less money and time would be spent on trying to find services for members of the target group.³⁶

Reflecting on Achievements to Date

Historically, people with intellectual disability tended to be segregated from the community and there was little interaction between them and the legal system. Intellectual disability was viewed as a kind of mental illness. Over recent decades, this has all changed and there has been a developing awareness in society of the nature and effect of intellectual disability and of the rights of people with intellectual disability. Many sections of society have had to develop their knowledge bases and adapt their practices to appropriately respond to people with intellectual disability. The legal system is one such section of society.

It is important to acknowledge the valuable work that has already been done in the area of intellectual disability and the criminal justice system.

Concern regarding the over-representation of people with intellectual disability in the criminal justice system led to the 1996 New South Wales Law Reform Commission Report – *People with an Intellectual Disability and the Criminal Justice System*.³⁷ The Report made a number of recommendations regarding practice, policy and legislation in relation to the treatment of people with intellectual disability in the criminal justice system,³⁸ including specifically in relation to s 32.³⁹ In 1998, the New South Wales Government published its *Disability Policy Framework*.⁴⁰ This concerned the broad issue of the provision of human services to people with intellectual disabilities. One of the priority areas identified in the Framework was: 'Ensuring that people with disabilities have access to the NSW justice system fairly and easily while their legal rights and individual needs are respected and addressed'.⁴¹

In July 2001, the NSW Council for Intellectual Disability and IDRS published *The Framework Report*.⁴² This project sought to dovetail with the *Disability Policy Framework*⁴³ and to provide a practical way forward from the issues identified in the NSW Law Reform Commission's report. *The Framework Report* recognised

³⁴ New South Wales Law Reform Commission, above n 4, para 11.42.

³⁵ Ibid.

³⁶ Ibid, para 10.19

³⁷ Ibid.

³⁸ See 'List of Recommendations': Ibid, xviii-xxxviii.

³⁹ Ibid, 197-207.

⁴⁰ NSW Government, *Disability Policy Framework* (1998).

⁴¹ Ibid, 14-15.

⁴² Simpson, above n 33.

⁴³ Ibid, v.

the importance of specialised services and professional intervention and support to address, and if possible prevent, the offending behaviour of people with intellectual disability. *The Framework Report* focussed on ensuring appropriate community services in New South Wales for offenders with intellectual disability and those at risk of offending.

Since *The Framework Report*, there have been some positive advancements as identified by the NSW Council for Intellectual Disability in its follow-up report, *Framework Plus 5*.⁴⁴ These include the following:

- In 2002 DADHC issued policies that made offenders and those at risk of offending a top priority for service provision. DADHC also enhanced its Behaviour Intervention Service (BIS) including introducing specialist positions in working with offenders, and provided training around the State for many disability service workers. DADHC specialist workers established cooperative relationships with the Department of Corrective Services and DJJ in the aim of assisting service provision.
- DADHC has established a specialist Criminal Justice Program ('CJP'). In the 2005 NSW budget, DADHC received a recurrent funding allocation for accommodation and related support for offenders with intellectual disability. This consisted of \$2.5m in 2005-6 and then \$5.6m in 2006-7. The Government's Stronger Together package has now further enhanced this commitment to steadily rise to \$27.9m in 2010-11. This funding will enable the CJP to provide accommodation/specialist support for 200 people who are exiting prison or juvenile detention. The CJP includes Casework and Clinical Teams that will work with clients of the program and provide support to DADHC staff throughout the state who are working with offenders and those at risk of offending.
- DADHC has also funded the CJSN to provide support for people with intellectual disability in court and police interviews. CJSN provides a statewide consultancy service and a direct service in Sydney, the Illawarra and Hunter regions. The CJSN has produced educational resources and provides training to police and others. The CJSN won the 2005 Law and Justice Volunteer Award of the Law and Justice Foundation NSW.⁴⁵
- The Department of Corrective Services has substantially expanded its multidisciplinary Disability Services Unit, though there have also been major problems in making and keeping operational three additional support units that were opened at Long Bay Gaol in 2004.

The cross-departmental Senior Officer's Group on Intellectual Disability and Criminal Justice is currently finalising its cross agency principles and protocols to enable greater uniformity and flexibility in service provision to alleged offenders with intellectual disability.

Most recently, the NSW Law Reform Commission was given terms of reference to undertake a review of people with cognitive and mental health impairments in the criminal justice system. This review extends to s 32 and sentencing.

44 NSW Council for Intellectual Disability, *Framework Plus 5: Human Services in NSW for Offenders with Intellectual Disabilities – Five Years on From the Framework Report* (2007).

45 Ibid, 3-4.

The Magistracy has had an ongoing focus on the workability of the s 32 system, including seeking better links between the courts and disability services provided by DADHC. Deputy Chief Magistrate Syme has emphasised the problems faced by the courts in accessing similar diversion opportunities for alleged offenders with intellectual disability as are available for those with a mental illness.⁴⁶

The Judicial Commission of NSW has just completed a study on the workings of s 32.⁴⁷

46 Deputy Chief Magistrate Helen Syme, 'Local Court Procedure and Sentencing of Offenders with Mental Illness' (Paper presented at The Mental Health Act – Issues and Consequences Professional Development Course, University of Technology Sydney, 28 March 2008) 18.

47 Judicial Commission of NSW, above n 31.

II The Legislative Framework for Diversion

The Legislative Context and Section 32

Persons with intellectual disability charged with an offence in the Local Court have the same rights in the criminal justice system and are subject to the same criminal procedures as offenders without intellectual disability. Additionally, the criminal justice legislation applicable to all offenders is supported by legislation designed specifically for offenders with intellectual disability. This is principally found in the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('the Act'),⁴⁸ as well as in specific provisions in other Acts such as the *Evidence Act 1995* (NSW) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).⁴⁹

In the context of alleged offenders whose charges are being processed through the NSW Local Court system, s 32 is of particular significance. It provides that:

- (1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:
 - (a) that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):
 - (i) developmentally disabled, or
 - (ii) suffering from mental illness, or

⁴⁸ As stated by Smart J in *Perry v Forbes* (unreported, Supreme Court of New South Wales, 21 May 1993), the *Mental Health (Criminal Procedure) Act 1990* 'endeavours to introduce a more flexible scheme which recognises the variety of mental states which may exist and to overcome some of the rigidity which had previously existed'.

⁴⁹ See, eg, *Criminal Procedure Act 1986* (NSW) Part 6, *Evidence Act 1995* (NSW) s 41, *Law Enforcement (Powers and Responsibilities) Act 2005* (NSW), Pt 3, Div 3.

(iii) suffering from a mental condition for which treatment is available in a mental health facility,

but is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, and

(b) that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law,

the Magistrate may take the action set out in subsection (2) or (3).

- (2) The Magistrate may do any one or more of the following:
- (a) adjourn the proceedings,
 - (b) grant the defendant bail in accordance with the *Bail Act 1978*,
 - (c) make any other order that the Magistrate considers appropriate.
- (3) The Magistrate may make an order dismissing the charge and discharge the defendant:
- (a) into the care of a responsible person, unconditionally or subject to conditions, or
 - (b) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment of the defendant's mental condition or treatment or both, or
 - (c) unconditionally.
- (3A) If a Magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the Magistrate may, within 6 months of the order being made, call on the defendant to appear before the Magistrate.
- (3B) If the defendant fails to appear, the Magistrate may:
- (a) issue a warrant for the defendant's arrest, or
 - (b) authorise an authorised justice within the meaning of the *Search Warrants Act 1985* to issue a warrant for the defendant's arrest.
- (3C) If, however, at the time the Magistrate proposes to call on a defendant referred to in subsection (3A) to appear before the Magistrate, the Magistrate is satisfied that the location of the defendant is unknown, the Magistrate may immediately:
- (a) issue a warrant for the defendant's arrest, or
 - (b) authorise an authorised justice within the meaning of the *Search Warrants Act 1985* to issue a warrant for the defendant's arrest.
- (3D) If a Magistrate discharges a defendant subject to a condition under subsection (3), and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.

(4) A decision under this section to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise.

(4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with under subsection (2) or (3).

(4B) A failure to comply with subsection (4A) does not invalidate any decision of a Magistrate under this section.

(5) The regulations may prescribe the form of an order under this section.

Section 32 is available to a 'developmentally disabled' defendant who is appearing before a Magistrate.⁵⁰ The provision is discretionary and can operate where the Magistrate considers it 'more appropriate to deal with the defendant in accordance with the provisions of [section 32] than otherwise in accordance with law'.⁵¹ Under s 32(2) the Magistrate may:

- Adjourn the proceedings.⁵²
- Grant bail in accordance with the *Bail Act 1978*.⁵³
- Make any other order deemed appropriate.⁵⁴

These powers are used to make interlocutory orders.

Section 32(3) allows the Magistrate to dismiss the charges and discharge the defendant into the care of a responsible person, subject to conditions, subject to the condition that the person attend a specified place for assessment and/or treatment, or unconditionally.⁵⁵

Section 32 provides for the diversion of alleged offenders from the criminal justice system at any time through the course of the proceedings, including before a formal plea is entered, and anyone involved in the court proceedings can bring the possibility of diversion under s 32 to the Magistrate's attention.

The Minister of Justice described the provision in his second reading speech of the Mental Health (Criminal Procedure) Amendment Bill 2005 as follows:

" In summary proceedings before a Magistrate, the Magistrate has the power to divert the defendant away from being dealt with at law and being subject to a punishment".

The purpose of section 32 of the Act is to allow defendants with a mental condition, a mental illness or a developmental disability to be dealt with in an appropriate treatment and rehabilitative context enforced by the court.⁵⁶

Certainly, the diversionary potential of s 32 is clear from its terms. However, there are problems with the wording and application of s 32 which are evident in its practical operation.

50 *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(1)(a)(i). Section 32 also applies to children: *Children (Criminal Proceedings) Act 1987* (NSW), s 27. In the context of Commonwealth offences, see *Crimes Act 1914* (Cth), s 20BQ.

51 *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(1)(b)

52 *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(2)(a)

53 *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(2)(b)

54 *Mental Health (Criminal Procedure) Act 1990* (NSW), s32(2)(c)

55 *Mental Health (Criminal Procedure) Act 1990* (NSW), ss 32(3)(a)-(c)

56 Second Reading Speech, Mental Health (Criminal Procedure) Amendment Bill 2005 (NSW) *NSW Legislative Council Hansard* 29 November 2005 at 20085.

“Developmentally disabled” – Definition and Limitations

People with intellectual disability are generally accepted to fall within the category of ‘developmentally disabled’ under s 32(1)(a) of the Act. However, the use of the term ‘developmentally disabled’ in s 32 does cause some confusion. The Judicial Commission’s recent monograph on s 32 expresses uncertainty about the definition of developmental disability and about whether it encompasses intellectual disability.⁵⁷

Clinical definitions in fact show that developmental disability is a somewhat broader condition, including intellectual disability, cerebral palsy and autism.

The usual definition includes very broad statements of cause (ie a mental and/or physical impairment) and then focuses on functional limitations rather than symptoms (eg self-care, receptive and expressive language, learning, mobility, self-direction, capacity and independent living, and economic self-sufficiency). Developmental disability is seen as characterised by a delay in development and hence as manifesting during the developmental phase, ie before the person attains the age of 18 or 22.⁵⁸

Developmental disability was defined along these lines by the NSW Department of Health at the time s 32, or rather its predecessor s 428W of the *Crimes Act 1900* (NSW), was enacted in 1986.⁵⁹ This was soon after the Department had separated its Developmental Disability Services from Mental Health Services in response to the recognition of the distinction between mental illness and developmental disability and the differing service needs of the two groups. Subsequently, these services were transferred to the Department of Family and Community Services in 1989 and ultimately to the Department of Ageing, Disability and Home Care and the main target group for service provision was changed from people with developmental disability to people with intellectual disability.

In 1994, the NSW Law Reform Commission said that, while developmental disability is sometimes used as a synonym for intellectual disability, it is in fact a broader term also including conditions such as cerebral palsy.⁶⁰

The clinical definition of ‘intellectual disability’ is:

- an IQ of 70 or below,
- Significant limitations in adaptive functioning, and
- The onset of both of these criteria before the age of 18.⁶¹

Another expression broader than intellectual disability is ‘cognitive disability’. This expression refers to an inability to access, process or remember information, irrespective of the age at which the disability was acquired. People with cognitive disability include people with intellectual disability, as well as people with traumatic brain injuries (eg from a car accident or serious blow to the head), drug or alcohol induced brain injuries and people with dementia.

⁵⁷ Judicial Commission of NSW, above n 31, 26-27.

⁵⁸ Errol Cocks, *An Introduction to Intellectual Disability in Australia* (1998, 3rd ed) 47.

⁵⁹ Mark Ierace, *Intellectual Disability: A Manual for Criminal Lawyers* (1989), 49.

⁶⁰ NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues*, Discussion Paper 35 (1994) 16.

⁶¹ See the American Psychiatric definition of ‘mental retardation’: American Psychiatric Association, above n 1, 41.

In light of the definitions (and scope) of 'developmental disability', 'intellectual disability' and 'cognitive disability' as discussed above, there are various problems with the use of the term 'developmental disability' in s 32:

- The term 'developmental disability' is less widely known than 'intellectual disability' and, compounding this, 'developmental disability' is not defined in the Act. During the process of stakeholder interviews, it was consistently remarked that the use of the term 'developmental disability' rather than 'intellectual disability' caused confusion about eligibility.⁶²
- The upper age restrictions contained in the usual definitions of 'developmental disability' and 'intellectual disability' indicate that these terms do not include cognitive disabilities which are acquired after the age of about 18. Although there might be some differences between the particular effects of cognitive disability and the effects of developmental disability, it is clear that people with cognitive disability experience similar serious disadvantages within the criminal justice system and can benefit from being diverted into support services. There is no policy reason why the scope of s 32 should not include people with cognitive disability.

The NSW Law Reform Commission, in its report, *People with an Intellectual Disability and the Criminal Justice System*, considered clinical and legislative definitions of 'intellectual disability' and concluded by recommending the replacement of 'developmental disability' with the term 'intellectual disability' and a definition consisting of two elements:

a significantly below average intellectual functioning existing concurrently with two or more deficits in adaptive behaviour.⁶³

The Commission's approach is positive as it does not have any limitation on the age at which a disability is acquired. It covers acquired brain injuries and dementia. However, the Commission's recommendation is not supported by this report for two reasons. First, it would exclude people with certain developmental disabilities (eg cerebral palsy and epilepsy) which are not necessarily covered by 'intellectual disability'. Secondly, the suggested definition of 'intellectual disability' would be confusing because it is different to the standard clinical definition of that term discussed above.

Thus, this report suggests that 'developmental disability' should remain and that an additional disability – 'cognitive disability' – should be inserted into s 32(1)(a). Careful consideration would be needed of an appropriate definition of cognitive disability.

A second problem with the wording of s 32 is the use of the term 'disabled' as opposed to 'with a disability'. The existing terminology effectively constructs the whole person's identity on the basis of his or her disability, rather than the former which sees disability as only one part of a person's identity.⁶⁴ This suggested change in terminology contributes to a more positive perception of people with disabilities. It avoids negative stereotypes which can in turn result in discrimination or perceptions that criminality is the product of an internal characteristic. This is particularly important if a human rights based approach to s 32 is to be taken.

62 Recommendation 1 in New South Wales Law Reform Commission, above n 4, xviii. See also L Crowley-Smith 'Intellectual Disability and Mental Illness: A Call for Unambiguous and Uniform Statutory Definitions' (1995) 3(2) *Journal of Law and Medicine* 192

63 New South Wales Law Reform Commission, above n 4, 64.

64 This would also be in conformity with the reference to mental illness in terms of defendant 'suffering from a mental illness' or a 'mental condition'.

In light of the amendments recommended above, s 32(1)(a) would consequently read as:

- (1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:
 - (a) that the defendant has (or had at the time of the alleged commission of the offence to which the proceedings relate):
 - (i) a developmental disability, or
 - (ii) a mental illness, or
 - (iii) a mental condition for which treatment is available in a mental health facility, or
 - (iv) a cognitive disability,
- but is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, and

Confusion between Mental Illness and Intellectual Disability

A third problem is the confusion between mental illness and intellectual disability in the operation of s 32. Diversion under s 32 is also available to alleged offenders with a mental illness, with the section applying equally to mental illness and developmental disability. Mental illness and intellectual disability are completely different disabilities. A clear point of distinction between the two is that intellectual disability is not an illness, is not episodic and is not usually treated by medication. For over 25 years, the distinction between mental illness and intellectual disability has been well accepted in law⁶⁵ and in the separation of service systems for people with intellectual disability from those for people with mental illnesses. However, in 1996, the Law Reform Commission noted ongoing confusion amongst criminal justice personnel about the distinction between intellectual disability and mental illness.⁶⁶ Consultations in the current project indicated that this problem still exists. Stakeholders reported that some lawyers and Magistrates believed that intellectual disability was a form of mental illness. This is problematic because it then can place expectations on the defendant to undergo medicinal or hospital based treatment through which he or she is expected to 'recover' or be 'cured'.

Stakeholders also noted during the consultations that s 32 applications before the Local Court were more often made for people with mental illness or dual diagnosis than for people who only had intellectual disability.⁶⁷ A number of factors related to the confusion between mental illness and intellectual disability were identified as playing a role in this lack of s 32 applications for 'developmentally disabled' defendants:

- Confusion regarding the distinction between mental illness and developmental disability.
- The greater familiarity of lawyers and Magistrates with the application of s 32 to individuals with mental health disorders rather than with intellectual disability.

⁶⁵ *DW v JMW* [1983] 1 NSWLR 61.

⁶⁶ New South Wales Law Reform Commission, above n 4, 62.

⁶⁷ 'Dual diagnosis' in this instance refers to the co-existence of two conditions (for example mental illness and intellectual disability). See generally N Edwards, N Lennox, G Holt, N Bouras, 'Mental Health in Adult Developmental Disability Dual Diagnosis Education and Training Kit' (2004) 48 *Journal of Intellectual Disability Research* 343 at 343.

- The success of applications for offenders with mental illness as opposed to developmental disability.
- The ease of obtaining case plans from mental health service providers as opposed to disability service providers.
- Perceived higher recidivism rates in people with intellectual disability as opposed to people with a mental illness. Recidivism can often be a bar to successful future s 32 applications.

Joe

Police Prosecutor's confusion about mental illness and developmental disability

Joe was a young man with a moderate intellectual disability. He was making a s 32 application in relation to a property offence. The police prosecutor read the court report which identified him as having a 'developmental disability'. He then pointed out to Joe's lawyer that because of his diagnosis of developmental disability, he might not be eligible under the first limb of section 32 (s 32(1)). He referred to s 16 of the Mental Health Act 2007 which states that certain words or conduct may not indicate mental illness or disorder, including developmental disability of mind. The police prosecutor thought that the lawyer was trying to rely on mental illness under the first limb of s 32 and was not aware that developmental disability was another disability that could satisfy the first limb.

It is suggested that this confusion between mental illness and intellectual disability could be attributed partly to the Act itself. Although 'developmental disability' is listed in s 32(1)(a) as a disability distinct from mental illness, the Act is mainly focused on mental illness. For example, the very name of the Act only mentions 'mental health' and the long title of the Act refers specifically only to mental illness: 'An Act with respect to criminal proceedings involving persons affected by mental illness and other mental conditions'. A lack of clear distinction between mental illness and intellectual disability is also inherent in the comments of the then Minister for Justice in his explanation of item [17] of the *Mental Health (Criminal Procedure) Amendment Bill 2005* which amended s 32 to insert 'or was at the time of the alleged commission of the offence to which the proceedings relate)' after 'defendant is' in section 32 (1) (a):

...**item [17]** amends section 32 to allow diversion for a person who suffers a ... developmental disability at the time of the commission of the offence, even though they might have recovered by the time of appearing before a magistrate on criminal charges.⁶⁸

The then Minister may have been confusing intellectual disability with mental illness, because, whereas mental illness may be episodic and might be recovered from as a result of treatment,⁶⁹ a person with intellectual disability does not 'recover' as intellectual disability is fairly constant throughout the individual's life.

68 Second Reading Speech, Mental Health (Criminal Procedure) Amendment Bill 2005 (NSW) NSW Legislative Council Hansard 29 November 2005 at 20087.

69 This is certainly suggested by the examples the Minister provides immediately prior to explaining the purpose and effect of Item [17]:

'As currently drafted, under section 32, a magistrate is required to consider the state of mind of the accused only at the time that he or she appears before the Court, not at the time that the offence was committed. This is inconsistent with principles that apply in mental health criminal proceedings under Part 4 of the Act (concerning the defence of mental illness).

It is thus recommended that the name of the Act should be changed to reflect its equal application to persons with intellectual disability and that the long title of the Act should also be similarly changed. It is also recommended that there be greater education of all stakeholders, particularly lawyers and Magistrates, about mental illness and intellectual disability, including the differences between the two disabilities and dual diagnosis: some people with intellectual disability also have a mental illness.

The Magistrate's discretion to invoke s 32

A fourth problem is the ambiguity associated with the Magistrate's discretion in relation to what is 'most appropriate' in s 32(1)(b). There are no legislative provisions in the Act itself guiding the exercise of this discretion, nor were stakeholders aware of any practice notes released by the Chief Magistrate providing clear principles and guidelines on the operation of s 32.⁷⁰

There is some case law on the exercise of this discretion.⁷¹ In the decision of *Director of Public Prosecutions v El-Mawas* the NSW Court of Appeal emphasised the breadth of the discretion and held that:

Part 3 of the Act requires a Magistrate to balance the public interest in those charged with a criminal offence facing the full weight of the law against the public interest in treating, or regulating to the greatest extent practical, the conduct of individuals suffering from any of the mental conditions referred to in s 32(1) or mental illness (s 33) with the object of ensuring that the community is protected from the conduct of such persons.⁷²

The case law has said that relevant considerations in exercising the discretion under s 32 include:

- The seriousness and circumstances of the alleged offence.
- The defendant's criminal history.
- The existence and content of a treatment plan.
- The limited period of six months for which conditional orders are enforceable.
- Available sentencing options.⁷³

Stakeholders in this report felt there was a problematic variability in how different Magistrates interpreted and applied s 32. Practitioners also felt that the section was at times misconceived. Applications are reported to have been rejected on the basis that the alleged offender has had previous s 32 orders or that to grant the application

For example, a person may have committed a minor offence such as shoplifting during a manic stage of a manic depressive illness. By the time he or she appears in Court (even one or two weeks later), his or her illness may be under control, the person having recommenced medication after arrest. As currently drafted, section 32 can only be invoked if the person is suffering from a mental condition or illness at the time of the hearing.'

Second Reading Speech, Mental Health (Criminal Procedure) Amendment Bill 2005 (NSW) *NSW Legislative Council Hansard* 29 November 2005 at 20087.

70 cf Spiers who stated in 2004 that the Chief Magistrate was 'preparing a practice note that will set out clear principles and guidelines for the use of s 32 orders': Mary Spiers, *Commencement of Reforms to Section 32 Mental Health (Criminal Procedure) Act 1990* (2004) Lawlink New South Wales, 2 <[www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/s32%20paper.doc/\\$file/s32%20paper.doc](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/s32%20paper.doc/$file/s32%20paper.doc)> at 9 April 2008.

71 *Director of Public Prosecutions v Sami El Mawas* (2006) 66 NSWCA 93. For case law on s 32 generally, see also *Perry v Forbes* (unreported, Supreme Court of New South Wales, 21 May 1993); *Confos v Director of Public Prosecutions* [2004] NSWSC 1159 (3 December 2004); *Director of Public Prosecutions v El Mawas* (2006) 66 NSWLR 93; *Mantell v Molyneux* (2006) 165 A Crim R 83.

72 *Director of Public Prosecutions v El Mawas* (2006) 66 NSWLR 93, [71] per McColl JA (Spigelman CJ & Handley JA agreeing).

73 *Director of Public Prosecutions v El Mawas* (2006) 66 NSWLR 93; *Mantell v Molyneux* (2006) 68 NSWLR 46.

would be 'letting an offender off' or would represent a failure to make the offender take responsibility for his or her actions. It should be noted that at the time of a s 32 application, usually no plea has been entered. An application does not amount to an admission of guilt, as may be inferred from these comments. Some Magistrates also do not appear to give appropriate recognition to the effect of intellectual disability or a lack of support services on the alleged offender's behaviour.

Some lawyers also reported that they altered their approach to representing a client after becoming aware of particular Magistrates who were perceived as unduly reluctant to grant s 32 applications, including by advising clients not to pursue a s 32 application or seeking continued adjournments.

It is important to put into context comments in this report on limitations in some Magistrates' understanding of intellectual disability and its implications for s 32 applications. Over the years, Magistrates have developed their understanding of changing knowledge about intellectual disability and its application in s 32 applications. Most Magistrates are keen to use s 32 in appropriate cases. This is reflected in the experience of IDRS that Magistrates seldom refuse a well prepared s 32 applications. However, as with other sections of the community, some Magistrates do not appear to have an adequate understanding of intellectual disability and this impedes their application of s 32.

The leadership of the Magistracy has been supportive of s 32 and ensuring Magistrates are equipped to properly apply it. The Local Court is currently developing a resource package for Magistrates in relation to therapeutic jurisprudence, including issues for persons with intellectual disability. The Chief Magistrate has also expressed interest in further coverage of intellectual disability at the annual Magistrates' conference. It is suggested that the issues raised above about the exercise of the discretion in s 32 could be addressed through further education of Magistrates about intellectual disability and its relationship with criminal conduct and through enhanced availability of appropriate support services.⁷⁴

Greater consistency by Magistrates in the application of s 32 might also be promoted by ensuring Magistrates have available adequate time and expert input for cases involving persons with intellectual disability, for example by dealing with a number of such cases in the one list.

In the consultation on this report with the Chief Magistrate and Deputy Chief Magistrate Syme, they suggested that lawyers and support services write to Magistrates to feed back successful s 32 outcomes. Magistrates typically only see the 'failed' s 32s when alleged offenders breach s 32 orders or reoffend and are brought back to Court.

This report does not recommend greater legislative articulation of how Magistrates should exercise their discretion in s 32 as to what is 'more appropriate'. That approach might unduly constrict the discretion.

Section 32 also envisages alleged offenders being diverted to 'treatment' via treatment plans. This report does not support the use of the term 'treatment' as it is a medical expression inconsistent with contemporary approaches to people with

⁷⁴ Associate Professor Susan Hayes suggests that 'education and training must be ongoing, and be tied to important professional development and promotional aspects, so that these issues are perceived as important' Susan Hayes, *People with an Intellectual Disability and the Justice System – When is Disability a Crime?* (Keynote address presented at the "Lock 'Them' Up? Disability and Mental Illness Aren't Crimes" Conference, Brisbane, 17-19 May 2006).

intellectual disability. Support and behaviour intervention are more appropriate labels than treatment to refer to the assistance that offenders with an intellectual disability need to help them to avoid recidivism. If a person has a coexisting mental illness, he or she may also need support and treatment for that. The report uses the expression 'case plan' to encompass the various kinds of assistance a person may need to avoid or minimise recidivism.

Pursuant to s 32(3)(a), charges can be dismissed on the condition that the alleged offender be discharged into the care of a responsible person. There is considerable unease with the practice of placing the offender under the care of a 'responsible person'. Nevertheless, many Magistrates have expressed the need for accountability in the administration of a case plan.⁷⁵ In practice, where a case plan has been provided by DADHC, the Court will often nominate DADHC as the 'responsible person'. Such a procedure is not available to a person who is not in contact with any support services willing to provide a case plan.

The Law Reform Commission is currently undertaking a review covering s 32. Some of the above issues will be considered further there.

Recommendation 1

Clarification of s 32, particularly its application to persons with intellectual disability and other cognitive disabilities.

Recommendation 9

Ensure that Magistrates:

- a. are able to maximise alleged offenders' understanding of the proceedings; and
- b. are aware of the nature and effects of intellectual disability (including its psychological and socioeconomic dimensions), the relationship between inadequate support services and offending conduct, and the appropriateness of diversion and sentencing options for offenders with intellectual disability.

This might be achieved by measures such as:

- Enhanced training of Magistrates and the development of a resource package for Magistrates about:
 - the nature of intellectual disability and its impact on offending and participation in the criminal justice system, and
 - human services and other supports for people with intellectual disability, including details of supports for Indigenous people and people from CALD backgrounds, and the varying supports available in rural, regional and metropolitan settings.
- Procedures to ensure Magistrates have available to them adequate time and expert input for cases involving persons with intellectual disability, for example by dealing with a number of such cases in the one list or listing s 32 matters at 2pm.

Recommendation 15

Training (including at a tertiary level) of all professionals involved in every aspect of the criminal justice process in relation to intellectual disability.

⁷⁵ New South Wales Law Reform Commission, above n 4.

III Procedure

Issues with psychological reports and case plans

Making a s 32 application involves satisfying two limbs, as set out in the text of s 32. The first limb is that the defendant has one of the specified disabilities. In relation to an alleged offender with intellectual disability, a psychological report is typically used to establish the developmental disability. The second limb of s 32 is that it is more appropriate that the defendant be dealt with under s 32 rather than at law, ie that the defendant be diverted from the criminal justice system. One key document in relation to the second limb is a 'case plan' (also referred to as a 'treatment plan') which aids in demonstrating what steps the alleged offender could take to address his or her behaviour and ensure that he or she will not re-offend. The psychological report itself might include a list of suggested services that the alleged offender could access or the report may be accompanied by a letter or table from a caseworker or service provider with further details of the services the individual will access. The case plan usually forms the basis of the conditions upon which a person's charges are dismissed under s 32. In practice, most successful s 32 applications are accompanied by a psychological report and a case plan, although such requirements are not formalised in legislation or policy.⁷⁶

The term, 'treatment plan', which is the term commonly used by prosecution and the Court to describe the diversion plan that the alleged offender's s 32 order will be conditioned on, is inappropriate, in the context of people with intellectual disability. It wrongly implies medical goals rather than behaviour intervention and support goals.

One problem is obtaining psychological reports and case plans. With some alleged offenders, these can be obtained from disability or other service providers that the

⁷⁶ Cf Spiers who states that 'a service provider should provide to the court a treatment plan (or some other similar document) before an order under s 32 is made': Spiers, above n 70, 2.

person already has. Where a person is already receiving DADHC services or meets DADHC eligibility requirements, DADHC will provide case plans. To obtain a case plan, an alleged offender often needs to go through the DADHC intake process, or try to find another organisation willing to provide a case plan. Both options can result in cost or delay – DADHC intake procedures can be lengthy, but on the other hand it might be difficult to locate non-government disability services that are willing to provide support services to an individual involved in the criminal justice process. If an alleged offender does not have access to community services, a case plan is difficult to obtain.

Another problem associated with psychological reports is the cost involved. If an alleged offender is eligible for Legal Aid, the report will usually be covered by the Legal Aid funding. If a person is eligible for DADHC services, a DADHC worker might prepare a court report and case plan. However, if Legal Aid is unwilling to pay and the person is not eligible for DADHC services, the person must pay for the report themselves. This can be very expensive as psychologists generally only charge a reduced rate to Legal Aid funded clients.

Many stakeholders identified the delay in obtaining psychological reports and case plans as a setback to the efficient processing of s 32 applications. This is a difficult and time consuming process for lawyers. Delays can be prolonged if the client's lawyer has little knowledge of where to go to access such reports and case plans or there are changeovers in lawyers breaking the continuity required to organise psychologist appointments and chase up reports. Often s 32 applications are punctuated by extended adjournments, which add to the frustration of lawyers, clients and Magistrates. In fact, some offenders have decided against making an application under s 32 because of the time it would take. Moreover, long delays between the charges and the ultimate hearing of the s 32 application which results from the delay in obtaining these documents allows time for possible breaches of bail and more charges which can be compounded by the delay in the accessing of services needed to assist the individual.

DADHC has a clear procedure on how to write court reports and case plans which has been in place for approximately 3 years and has recently been reviewed and updated. New South Wales mental health services also have such guidelines. The benefit of such guidelines is that they direct psychologists to the key information that Magistrates will be interested in, particularly addressing the relationship between deficits in adaptive functioning and the general nature of the alleged offending conduct (although ensuring not to disclose any admissions) and identifying what particular services will assist the alleged offender, particularly in relation to the alleged offending conduct. However, guidelines should not be so prescriptive as to inhibit the flexibility of content necessary to address the individual support needs of people with intellectual disability.

People preparing case plans and associated reports should send them to the defence lawyer rather than the prosecution or the Court. These reports form the basis of the evidence that the defence submits to satisfy the Court in relation to the making of a s 32 application and are not in the nature of reports that are ordered by and given directly to the Court (such as pre-sentence reports). Some disability service providers are reported to have sent 'case plans' and reports directly to the Magistrate. This is particularly problematic if a report includes admissions in relation to the charges or information concerning old charges or previously uncharged criminal activity.

A s 32 application often results in disclosure of information to the Magistrate that would not normally be disclosed or admissions that may not normally be conceded in fresh proceedings. If the Magistrate refuses the s 32 application and proceeds to hear the charges, he or she is in the difficult position of having to disregard information he or she has previously heard. Prior to the recent *Mental Health (Criminal Procedure) Amendment Act 2005*, a defendant was entitled to request a new Magistrate after a rejected s 32 application. Now that this provision (formerly s 34) has been omitted, defendants must rely on the common law obligation on Magistrates to disqualify themselves in the event of apprehended bias. What amounts to a reasonable apprehension of bias is very much a matter of judgment on which opinions can vary. It would be preferable to reinstate the right of a defendant to a new Magistrate after a rejected s 32 application. 'Magistrate shopping' will not occur if the provision can only be used where a s 32 application has been rejected and can only be used in relation to the Magistrate who heard the previous s 32 application.

Who identifies the intellectual disability?

In NSW it is not clear who is responsible both for identifying that an alleged offender has intellectual disability and to assist that individual to access services. It appears that, arguably, the only stakeholder, if any, under a legal obligation to do this is the person's legal representative.⁷⁷ This raises a substantial problem where an alleged offender is unrepresented. In practice, many offenders who should be afforded the protection of s 32 are not identified as potential applicants under the provision.

Many stakeholders experienced difficulty in identifying whether a person has intellectual disability. It was noted that many offenders with intellectual disability do not disclose that they have a disability. The short time that Legal Aid lawyers usually have for each client is a major impediment to identification. A number of court staff and practitioners felt it was inappropriate to ask an alleged offender whether they have intellectual disability. There are screening tests available that assist in identifying a person with intellectual disability.⁷⁸ However, these tests are not commonly used and questions remain as to who should administer them. The only way to determine with any degree of accuracy whether a person has a 'developmental disability' is with the assistance of a psychologist.⁷⁹

Court liaison services

The NSW Statewide Community and Court Liaison Service is an initiative of Justice Health in response to the NSW Forensic Mental Health Strategy.⁸⁰ One of the roles of the service is to provide psychiatric assessment of any client referred to it by 'police, corrective services, legal aid services, and magistrates'.⁸¹ However, there is no corresponding program available to alleged offenders with intellectual disability in NSW.⁸² This means that alleged offenders with intellectual disability might not be identified and diverted in the same way and to the same degree that offenders with

77 NSW Solicitors rule 1.1 provides '[a] practitioner must act ... with competence and diligence in the service of a client'.

78 Susan Hayes, *Hayes Ability Screening Index (HASI) Manual* (2000).

79 Hayes, above n 4, 5.

80 New South Wales Department of Health, *Draft NSW Forensic Mental Health Strategy* (2002).

81 David Greenberg & Ben Nielsen, *Moving Toward a Statewide Approach to Court Diversion Services in NSW* (2003) 14 (11-12) *NSW Public Health Bulletin* 227, 228.

82 A stakeholder from NSW Justice Health stated that the mental health court liaison officers currently screen individuals for intellectual disability. However, this is of limited usefulness because once an individual has been identified as having an intellectual disability there is limited capacity for the liaison officer to link the individual up to services as these are the departmental responsibility of DADHC rather than NSW Health.

mental illness are. Although Justice Health informally screens for intellectual disability, a key stakeholder from Justice Health advised that there is then difficulty in linking up defendants identified as having intellectual disability with DADHC services, notably because of the slow intake process, strict intake criteria and DADHC's physical and organisational separation from the Local Courts.

DADHC has committed to trialling an intellectual disability court liaison officer at a major court, but this is yet to eventuate. It should be noted that there are potential advantages and disadvantages with such a centralised system. On the one hand, a centralised system might increase the range and accessibility of services available to an alleged offender with intellectual disability. On the other hand, there is a risk that the independence of disability professionals from the Court will be reduced.

Problems with traditional court procedures

The current s 32 diversion process operates within the bounds of the existing Local Court structure. The adversarial and formal nature of the Local Court can be daunting to people with intellectual disability. Stakeholders reported that alleged offenders with intellectual disability appearing before the Local Court in criminal matters were mystified and confused by the technical legal language used in Court. Whilst many Magistrates make adjustments in their method of communication for defendants with intellectual disability, many lawyers felt that their clients still had little understanding of what was happening to them. Indeed, many lawyers felt that the process was too complex for their clients to understand. Such difficulties have been noted in other jurisdictions. Moreover, the time pressures in the Local Court, which can be due to busy court lists, coupled with the lack of availability of DADHC workers at Court, prevented s 32 applications being dealt with promptly and resulted in long adjournments.

Newcastle Local Court Special List Day

The Benefits of Informal Special List Days

A 'special list day' for the hearing of s 32 applications has been operating informally at Newcastle Local Court since mid 2007. The special list day has occurred approximately one day per month. It was the result of a lawyer from the Intellectual Disability Rights Service travelling from Sydney to appear in numerous matters at Newcastle, in response to demand in that area. (In 2008, a more collaborative model has been arranged, as discussed below.)

In 2007 Magistrate Morahan responded by setting one day per month for the hearing of s 32 applications such that there is now the structure for an informal process where matters concerning people with intellectual disability or mental illness who are applying for s 32s are set on the special list day. On the list day, a spare court room is allocated to solicitors and CJSN support workers to consult with their clients. Local workers from DADHC are available to do preliminary assessments of alleged offenders, start the intake procedure, advise the client and solicitor on appropriate services, prepare case plans and make effective referrals to other services.

The benefits of this have been:

- Disability services and CJSN are present at Court and available to lawyers and alleged offenders.
- Specialist legal services that do not operate within the local area, such as IDRS, are able to appear.
- Local solicitors can be mentored by solicitors who specialise in such matters.
- All lawyers and defendants can have on-hand access to support services and disability expertise.
- The Magistrate gains enhanced familiarity with people with intellectual disability and the support services.

In 2008, IDRS has met with Legal Aid, the Aboriginal Legal Service, DADHC, interested local private lawyers and Magistrate Morahan to establish a more structured and collaborative approach to the special list day and assisting alleged offenders with intellectual disability. The approach for 2008 and beyond will involve collaboration and distribution of matters between all of these groups and more education, resource provision and mentoring from IDRS. This approach has the advantage of allowing more time to consult locally with clients and service providers to develop effective case plans. This approach will lead to more realistic, achievable and long lasting outcomes for the client. IDRS aims to build up the skills of local lawyers in Newcastle to proficiently represent people with intellectual disability and to replicate this model out in other regional areas.

Advantages of conference style procedures

A way to maximise the awareness of the defendant of the court process, of the charges brought against him or her, and of the need to modify their behaviour is through a conference-style court. Conferencing and non-adversarial models are already operating in the NSW criminal law context in the form of Youth Justice Conferencing, the Youth Drug and Alcohol Court, Adult Drug Court Pilot, Adult Conferencing Pilot, Magistrates' Early Referral Into Treatment program (MERIT), and Circle Sentencing (see Appendix 1 below). In particular, conferencing has proved itself to be a valuable diversion mechanism for young offenders. For present purposes, these 'court' models are an appropriate model for alleged offenders with intellectual disability because they are informal, non-adversarial, and examine the offending behaviour within a broader social and disability context. The conferencing system seems to be open to responding flexibly to the needs of people with disabilities. Conferences can bring together a range of relevant people and agencies and lead to a plan that reduces the likelihood of recidivism.

Deputy Chief Magistrate Syme has written that experience with circle sentencing and adult conferencing shows that disability issues are identified and addressed by professionals as part of an agreed sentence.⁸³

⁸³ Syme, above n 46, 6.

One very positive initiative of DJJ has been a recent trial project focused on enhancing the role of youth justice conferencing with young offenders with intellectual disability and other additional support needs. In this project, conferencing personnel have been given training and resource material so that they can better identify and meet additional support needs of conference participants. Support people from CJSN have been available.

Peter

A successful youth justice conference

“Peter” was 15 years old with a mild intellectual disability and limited communication skills. His family situation was difficult with conflict escalating between Peter and his mother and her boyfriend. Peter damaged property belonging to the boyfriend. He admitted the offence and a youth justice conference was called.

The Criminal Justice Support Network provided a support person to assist Peter to participate in the conference. Peter found the conference harder than court because he had to directly participate rather than just leave it to a lawyer. However, with the assistance of his support person, he was able to explain the anger and upset he felt about his family situation.

The conference outcomes were that:

- Peter agreed to pay for the damage by doing lawn mowing for the victim.
- Family members got an appreciation of what Peter had been angry about. The boyfriend went from hostility towards Peter to understanding. Family counselling was organised.
- Peter’s support needs were better identified and understood and appropriate services engaged.

All of these outcomes were implemented.

Glenda

Two successful conferences

“Glenda” was a 16 year old Aboriginal young person with intellectual disability. She was lonely and keen to fit into a local group of young people. They all did a lot of graffiti around the town. Only Glenda got caught. She abused police officers who tried to help her. Her family had been trying unsuccessfully to get assistance from community and disability services for her.

There were two juvenile conferences over two lots of charges. Glenda had a support person from CJSN. At the first conference, Glenda was very quiet, ashamed and overwhelmed. The support person had to speak for her. The police gained a greater understanding of Glenda’s disability and how to respond to her.

The outcomes of the conference were that:

- Glenda had to write a letter of apology to the police.
- Arrangements were made for her to participate in a Police Citizens Youth Club art program.

These outcomes were implemented and the PCYC led Glenda into other constructive programs. Her self esteem seemed greater.

The second conference (about charges that preceded the first conference) then occurred. Glenda was much more confident and spoke for herself this time. She was very positive about the help she was getting via the PCYC.

The outcomes of this conference were that:

- Glenda agreed to spend six afternoons cleaning the building she had graffitied.
- She agreed to do a TAFE course.
- Glenda also bought flowers and gave them to the police who had helped her.

John

A positive adult conference

John had had an acrimonious relationship with another young man for some time and the man had been threatening John and his family. He had reported some of this harassment to the police but he said that no follow up had occurred.

One night John received some abusive calls from the other man and by chance then ran into him at a local cafe. John hit him and damaged the car he was driving. John was charged with assault and malicious damage.

John realised that what he did was wrong but thought that it was a bit unfair that he was the only one in trouble as he felt he had been provoked and that his complaints to police had not been followed up.

The Magistrate referred the case to the new adult conferencing pilot. At the conference John gave his version of events and he felt listened to. The police officer said that he did not realise that there was another side to the story.

John agreed that he had problems with anger management and that he had too much time on his hands. He said he would like a job. He apologised to the victim and agreed to an intervention plan including undertaking community service, investigating anger management courses, having a work capacity assessment and investigating TAFE courses to help with employment options.

The Magistrate accepted the plan and put John on a bond. John met with the conferencing coordinator afterwards who sat down with him and his support person and went through the plan slowly and discussed how John was going to comply. The coordinator suggested that John meet with her every 2 weeks to check his progress.

John was able to comply with the plan as well as implement some positive changes in his life to help him to stay out of trouble and to engage in more meaningful activities.

In the Local Courts, conferencing would enable defendants to access services in order to address their alleged offending behaviour and the conference style court environment might help to demonstrate to the defendants what is wrong with their alleged conduct and enable discussion of how they can manage their behaviour in future.

It is important to note that the conference system will not work if it is not surrounded by adequate supports such as the provision of disability and other services, the presence of support persons at the conference and access to consistent and well-trained legal advice. Moreover, legal advice about admitting to the charge is vital and this advice needs to be available in a way that is responsive to the needs arising from intellectual disability.

The Government has committed to developing adult conferencing into a statewide scheme. This development should pay particular regard to what is needed to make the process accessible to people with intellectual disability and incorporate the use of support persons

There are at least four possible options in relation to conferencing that should be further explored:

- Keeping the formal court process, but adjourning matters so that an informal meeting can be held between the alleged offender, support services and other relevant people in the person's life.
- Use of a model similar to adult conferencing where the Magistrate refers a matter to a conference in order to explore issues surrounding the alleged offence and support needs, with the matter then coming back to Court for the hearing of the s 32 application or to have a plea entered.
- The hearing of s 32 applications and guilty pleas in a conference style court.
- Use of the youth justice conferencing model as a substitute to Court.

It is recognised that these proposals will require further consideration, development and piloting. This needs to proceed cautiously. There are potential disadvantages of establishing formalised special court systems for people with intellectual disabilities, in particular dangers of net widening and stigma. The Public Interest Advocacy Centre has recently been researching special circumstances court models around Australia and internationally.

However, in lieu of formal systemic changes, smaller, informal differences could be made by Magistrates by such measures as listing s 32 applications in the afternoon when the list is less busy and the Courtroom is less crowded, in order to lessen the alleged offender's anxiety, allow more time for the consideration of the s 32 application and allow more meaningful interaction between the Magistrate and the alleged offender.

Another small change which could be made is listing s 32 matters on a particular day, as is the case at Newcastle Local Court. Deputy Chief Magistrate Syme has suggested that this approach would be possible in other busy courts and may assist to better focus the resources that are available for alleged offenders with intellectual disabilities.⁸⁴

Recommendation 10

Processes used to decide how to dispose of criminal charges against a person with intellectual disability should:

- be conducted by a person with knowledge and skills in intellectual disability;
- be conducted in a way that is meaningful to the alleged offender including in relation to the nexus between any outcome and the events giving rise to the charges;
- provide a forum to bring together people in the alleged offender's life in order to identify the needs of that person and how to meet those needs;
- include attempts to identify the person's support and behaviour intervention needs and engage relevant players in meeting those needs; and
- be conducted in an informal, conference-based manner wherever possible.

⁸⁴ Ibid 18.

Recommendation 11

In the disposition of criminal charges, any conditions placed on the alleged offender with intellectual disability must be related to addressing offending behaviour.

These elements could be achieved through measures including:

- Courts listing s 32 applications at 2pm, rather than 9.30am, so that alleged offenders have less time to wait at Court and become anxious, and so that Magistrates can engage more with clients in a less busy court setting.
- Establishing special lists and procedures for those lists in some locations. This option should be trialled with caution in some locations where there is cross agency interest in it. We do not recommend over-formalising such a system or establishing it statewide as it carries dangers of net widening and stigma.
- In relation to youth justice conferencing, there should be statewide rollout of the strategies already trialled by the Department of Juvenile Justice ('DJJ') to provide support people and adjust the conference process to meet the needs of people with intellectual disabilities and other additional support needs. DJJ should also provide conferencing staff with enhanced training in recognising additional support needs.
- Incorporating the approach developed by DJJ into the statewide rollout of the adult conferencing project.
- Holding a pre-court meeting or conference with the alleged offender, a support person, family and friends and support services for the purpose of devising a case plan.

There needs to be ongoing exploration and reassessment of conferencing and other innovative disposition procedures, including through consideration of their operation in other jurisdictions.

IV The Role of DADHC and Other Support Services

Support services are vital

The success of s 32 applications is heavily reliant upon access to appropriate support services. For some alleged offenders, a s 32 order might be the first time that an alleged offender with intellectual disability has had access to particular support services. Participants in the focus group of people with intellectual disability who have had involvement with the criminal justice system noted that a s 32 order can be an opportunity to be linked up with support services and gain contacts within the community. However, the members noted the importance of the support services committing to actively engaging with them in order to ensure the ultimate success of the services.

The role of DADHC

What DADHC does

DADHC plays a major role in supporting offenders with intellectual disability in the criminal justice system because it is the government department responsible for providing and funding specialist disability services in New South Wales.

DADHC provides general disability services such as assessment, case management, respite care, accommodation, therapy, skills development, behaviour intervention and day programs.

DADHC also provides specialist forensic services which are particularly relevant to alleged offenders with intellectual disability such as:

- Criminal Justice Program – The Criminal Justice Program ('CJP') is targeted to providing accommodation and related support to offenders with intellectual disability who have complex needs which cannot be addressed by the other services that DADHC provides. The CJP also has a role in providing consultancy to other disability services. A major limitation of the CJP's direct accommodation and support services are that they are only provided to people who have been in gaol or juvenile detention. The services are not available as a preventive or diversionary measure.
- Integrated Services Project (joint project with Department of Housing and Department of Health) – A few offenders with intellectual disability have been assisted by the Integrated Services Project ('ISP'), a three year pilot project which is providing intensive support to up to 75 people with a range of disabilities and complex challenging behaviour. This project is very important as an attempt to find innovative ways to meet the needs of people who tend not to be the clear responsibility of any agency but whose needs have challenged the justice and human service systems. The pilot finishes in 2009 and it is unclear whether the project will continue after that.
- Statewide Behaviour Intervention Service - The Statewide Behaviour Intervention Service ('Statewide BIS') provides consultancy, training and other services to staff in DADHC services that work directly with people with challenging behaviour including some alleged offenders with intellectual disability. The Statewide BIS operates in a tertiary role, with experienced staff providing education aimed at enabling primary support workers to deal appropriately with offenders with intellectual disability.
- Until the CJP was established, Statewide BIS had a team of forensic casework specialists who worked with community-based support agencies and DADHC services that supported people with intellectual disability who had offended or were at risk of breaking the law. The forensic casework specialists responded to crisis situations, worked with service providers in the client's local area to develop and implement systems that would improve the support for the client, and acted as a coordinator of case plans in some complex cases. They also helped with preventative measures such as accommodation planning and environmental risk assessment. When the CJP was established, its casework team absorbed the forensic casework specialists. The CJP continues to provide some support to other services but the CJP's central focus on its own clients means that this role is more restricted than that formerly taken by the forensic casework specialists.

Problems with DADHC services

People with intellectual disability appearing in Local Courts remain largely dependant on local generalist DADHC services. Whilst DADHC's Prioritisation and Allocation Policy makes offenders a top priority for service provision, this priority does not translate into consistently skilled and prompt services on the ground. There are some DADHC workers around the state who are highly skilled in working with offenders and a network of Regional Behaviour Intervention Teams has been established. Some people who come before the Local Courts receive a high quality service from DADHC. However, overall, there are major deficiencies in skills, aptitude and interest in working with offenders.

The NSW Council of Intellectual Disability has noted that '[t]here are particular problems with DADHC's response to the needs of people who have charges in the Local Courts. Patterns of offending and imprisonment too often escalate because of slow, unskilled or inadequate responses by disability services.'⁸⁵

A lack of understanding of the criminal justice system among many primary DADHC community support staff was identified by stakeholders as a hindrance to the efficiency of the case plan process. Support workers often did not know what was appropriate to include or omit from a report, and what would be in the interests of the client. Moreover, requests by a representative of the client to adjust a plan were often met with reluctance. Delayed court reports or case plans were often said to be a result of poor administration and high turnover of support worker staff.

Providing an inadequate or inaccurate case plan can result in serious consequences to an offender with intellectual disability including potential incarceration if the case plan is a condition of a s 32 order and is breached or if the case plan fails to adequately address offending behaviour in the future. A number of interviewees felt that support workers were not held accountable for their work. Despite assurances in policy that the provision of services for offenders with intellectual disability is a priority, in practice many stakeholders think service provision is ineffective.

Preparing an appropriate case plan can also be very challenging. Caseworkers often struggle to find suitable supported accommodation, employment, counselling and other services.⁸⁶

In contrast to the unfavourable feedback in relation to the capacity of DADHC local offices to provide casework and develop treatment plans, significant positive feedback was provided where forensic casework specialists had directly assisted primary support workers in their dealings with offenders with intellectual disability.⁸⁷ Concern has been expressed by some stakeholders about the removal of the Statewide BIS's forensic casework role in light of the apparent underskilled nature of local offices.

There are also problems with the limited awareness in the legal profession of disability and other human services and how to best advocate for these, as well as limitations on publicly-available policies on eligibility and intake procedures. This lack of transparency can result in difficulties accessing services for clients.

There is also no detailed policy or guidance for local DADHC workers on their role with offenders, though such a policy is currently being developed.

Alleged offenders with intellectual disability in regional, rural and remote areas encounter particular problems accessing DADHC generalist and forensic support services. Supported accommodation and intensive case management are particularly wanting in these areas which can result in alleged offenders being displaced from their family and community networks in order to access these.

There are also questions as to the extent to which caseworkers involve the alleged offender in the development of case plans. Sometimes a situation can result where the solicitor and the DADHC workers liaise about the preparation of the case plan

⁸⁵ NSW Council for Intellectual Disability, above n 44, 4.

⁸⁶ See particularly Simpson, above n 33.

⁸⁷ See generally Department of Ageing, Disability and Home Care, *Policy Framework: Providing Behaviour Support and Intervention to People with an Intellectual Disability* (2006) NSW Department of Ageing, Disability and Home Care <<http://www.dadhc.nsw.gov.au/NR/rdonlyres/C21BABC6-6001-400F-9D38-E4042FAD6281/2045/PolicyFrameworkProvidingbehavioursupportandinterve.pdf>> at 6 December 2006.

and the s 32 application with the alleged offender having little knowledge or giving no consent to what is occurring. Whilst it is commendable that the support workers are responsive, this can be disempowering to the alleged offender and can mean that the alleged offender has no sense of ownership over or understanding of the process which can result in non-compliance with case plans and re-offending.

Celia

The importance of the inclusion of the alleged offender

Celia attended Court with her DADHC caseworker and CJSN court support worker. They had a pre-court interview with the duty solicitor. The CJSN support person reported that Celia appeared to be highly medicated and was unresponsive in the interview. She referred all questions to her case worker. It appeared that a decision was made to plead guilty without Celia having any real understanding of the effect of this. Moreover, this decision was made on the basis that it would enable the matter to be finalised within a week rather than applying for a six weeks adjournment and preparing a s 32 application.

DADHC's limited eligibility criteria

Further to the problems with alleged offenders who have already been accepted as eligible for DADHC services, there are also problems with alleged offenders with intellectual disability or other cognitive disability being eligible for services in the first place. The DADHC eligibility criteria for services consist of three elements:

1. Intellectual functioning measured at two or more standard deviations below the mean for the Full-Scale score on a recognised test of intelligence; and
2. Significant deficits in adaptive functioning in two or more areas (significant is defined as two or more standard deviations below the mean or equivalent. The areas of functioning must be factors or domains, not subscales); and
3. These deficits in cognitive and adaptive functioning are manifest prior to 18 years of age.

(or)

1. Specific diagnosis of a syndrome strongly associated with significant intellectual disability made in a written report by a health professional or Diagnostic and Assessment Service.

The age requirement excludes individuals with acquired brain injuries which were acquired over the age of 18 years. The cognitive IQ requirement basically excludes individuals with IQs of 71-80 (ie 'borderline' intellectual disability) even though they have pronounced deficits in adaptive behaviour. The result is that many people with a cognitive disability are excluded from receiving DADHC services.

DADHC does acknowledge that clients should have the benefit of error factors in IQ assessment tools, so that if a tool has an error factor of 5, a person with an assessed IQ of 74 is eligible for services.⁸⁸ However, this ruling is not consistently applied around the state.

⁸⁸ Circular from Ethel McAlpine, Deputy Director General DADHC, October 2002.

Jack

Problems with DADHC's eligibility criteria

Jack is 21 and has a mild intellectual disability. He grew up in a dysfunctional family environment where he was physically and sexually abused. Jack had behavioural problems at school and was diagnosed with ADD. DOCS became involved with Jack and eventually he became homeless. With the involvement of some good youth services, Jack managed to attain a degree of stability, including having stable housing.

Jack still has unresolved issues which need to be addressed through counselling and cognitive behavioural therapy. One of his most pressing issues is "anger management", in particular, learning to manage his responses to stressful situations such as police contact.

The Shopfront Youth Legal Centre has recently tried to refer Jack to DADHC so that he can access its behaviour intervention services. DADHC has been reluctant to accept the referral. Because Shopfront has been unable to provide any cognitive assessments conducted before Jack was 18, DADHC is not satisfied that he meets the age criterion for 'intellectual disability'. DADHC also is reluctant to accept the assessments of Jack's IQ by experienced clinical psychologists. DADHC suggests that stress factors are masking a higher IQ.

Simon

A positive outcome with services

Simon is 19 years old and has a moderate intellectual disability. His parents refused to accept that he had a disability and their relationship with him broke down. Simon went to a refuge when he was about 16.

Since then, Simon has come to the attention of the police a few times, mainly for being involved in fights, once for being a passenger in a stolen car and once for being in possession of a weapon. On most of these occasions it appears that he was "led astray" by older and more sophisticated friends.

Fortunately Simon has received excellent support from both government and non-government services. He has stable, semi-independent accommodation through a youth housing service. He has received case management from an intensive case management and support service run by a non-government organisation; this is not a specialist disability service but its case workers have the skills to work with Simon. DADHC has also provided a case worker and assistance from the Behaviour Intervention Service.

Simon's case workers were able to work with the Shopfront Youth Legal Centre to put together a solid case plan, which resulted in his criminal charges being dismissed under s 32.

Problem with other human services

There are ongoing difficulties accessing mainstream human services including mental health services (for people with both an intellectual disability and mental illness) and drug and alcohol services. (eg rehabilitation, counselling and participation in MERIT). In the case of drug and alcohol services, service providers tend to see their programs as ill-equipped to address the needs of people with intellectual disability. Many services do not accept offenders with intellectual disability. Some do but their programs rarely meet the person's needs.

Amy

No drug and alcohol service will assist

Amy is very vulnerable to those around her and this results in drug and alcohol misuse. Various drug and alcohol services have refused to assist her because they do not feel able to accommodate her intellectual disability.

Amy has had considerable contact with the police because of very inappropriate behaviour such as being naked and abusive in public. The police have generally been reluctant to charge her as they understand her situation. They basically put her in custody for the weekend to detox.

However, Amy is currently facing charges. She was assessed for the Magistrates Early Referral into Treatment (MERIT) program for drug and alcohol treatment. She was determined to be unsuitable because of her intellectual disability and a past offence of assaulting police when she was being arrested. Her CJSN support person had offered to arrange support to assist her participation. She was assessed whilst she was in custody in quite a distressed state.

Amy's solicitor is seeking a s32 order but faces a major challenge in obtaining support services. The charges are still coming before the court after nine months.

It is necessary for drug and alcohol services to ensure that they have skills in providing an equitable service to a person with intellectual disability. Cooperation between drug and alcohol services and disability services is also necessary so that individualised drug and alcohol programs are part of holistic planning to meet a person's needs and that the messages from drug programs are reinforced in the person's day to day life.

The problems with accessing services can be compounded by extreme socioeconomic disadvantage, such as homelessness, as this can place high levels of stress and instability on the individual. There can also be problems for people in custody accessing services, including difficulties for lawyers making contact with their clients and difficulties liaising with the welfare officers in order to arrange assessments for the purposes of s 32 applications or sentencing.

Ahmed

Difficulties Accessing DADHC and Health Services

Ahmed has lived with his father all his life. He is now 23. Ahmed's father is elderly and has learning difficulties. He has not had any apparent support to care for Ahmed who has very challenging behaviour. By the time IDRS became involved, the father was experiencing extreme difficulty sustaining the high level of support and supervision that Ahmed required. The father said that he could no longer live with or care for Ahmed.

In the last year, Ahmed has been charged on six separate occasions with a total of 14 offences. Almost all of the charges have resulted from altercations with his father.

Ahmed has local "friends" who have encouraged him to become involved in serious property damage and arson to his father's house.

Ahmed has a range of disabilities and social problems, including mental illness, drug and alcohol abuse, deficits in learning and living skills and extremely challenging behaviour. He needs an intense level of ongoing, multiple agency support. At the time of the offences, he was not receiving any support services.

Psychological assessments state that Ahmed has symptoms that are consistent with schizophrenia, schizoaffective disorder and depression. He has attempted suicide on multiple occasions. Recently, he has been hospitalised on a number of occasions due to his mental health issues. However, no ongoing mental health services are in place.

DADHC initially refused services on the basis that Ahmed had only a borderline intellectual disability and, in any case, his problems were related to his drug use and mental health instability. Drug and alcohol rehabilitation facilities denied that Ahmed had a drug dependency and so he was ineligible for their services.

A recent assessment by a private clinical psychologist stated that Ahmed has a mild intellectual disability, ie, functioning higher than only 1% of the population. The psychologist pointed to deficiencies in the DADHC assessments.

DADHC then agreed that Ahmed was eligible for services, but said that he should be assisted by a DADHC funded service rather than DADHC itself. However, this service had not yet assessed Ahmed, nor did it think that he would be eligible for its services. DADHC stated that, even if Ahmed could access DADHC services, there would be a two year wait.

IDRS then made a second application to DADHC's specialist Criminal Justice Program. Despite Ahmed's crisis situation, there was a significant delay in assessing his suitability for the CJP. He was ultimately ruled ineligible because he was not exiting gaol.

IDRS has been representing Ahmed on his criminal charges and wanted to pursue a s 32 application for the charges to be dismissed. However, the lawyers have been unable to proceed with the s 32 application as the denial of services means that there is no treatment plan for Ahmed. To date, the matter has been adjourned a total of 14 times.

Ahmed is at risk of homelessness because his father cannot cope with him. The Magistrate has said that he will not give any further adjournments.

The need for a court liaison service

The physical absence of DADHC workers from the Local Courts is also problematic. This means that alleged offenders, Magistrates and solicitors cannot readily access assessments or information in the same way that these can be accessed for people with mental health issues through the Statewide CCLS. This is particularly problematic if such information or assessment is immediately needed for bail applications or section 32 conditions. This often results in adjournment.

Deputy Chief Magistrate Syme has written on the difficulties facing courts in accessing services to identify and assist with diversion of alleged offenders with intellectual disability. Mental health liaison nurses now provide this function for offenders who are mentally ill. People with intellectual disability need similar assistance.⁸⁹

One approach would be for a court liaison function for people with intellectual disability to be fully carried out by the Statewide Community Court Liaison Service. However, a number of factors make it preferable for the SCCLS role to be confined to initial screening with a DADHC officer then to be on call to facilitate assessment, linking with services and development of a case plan:

- Statewide CCLS staff members are mental health professionals and so have limited skills in intellectual disability.
- A DADHC officer is much more likely to be able to engage DADHC and other disability services due to that officer belonging to DADHC and having knowledge of its culture.
- Statewide CCLS staff are used to being able to organise a case plan on the day they meet a client and are focused on requirements related to the person accepting medication and other services from a community mental health team. A lengthier and more detailed process is required to develop an appropriate case plan for a person with intellectual disability. Psychotropic medication is much less likely to be needed and the plan needs to be based on a holistic needs assessment.

DADHC is shortly to trial placing a liaison or service access officer in a major court.

⁸⁹ Syme, above n 46, 18.

Recommendations 12

A multi-focal system of diversion is required, including ensuring there is a system for appropriate disability professionals to be available to police officers and in Local Courts to assist with issues including identification of people with cognitive disability, linking alleged offenders to services and the preparation of court reports and case plans (which are to be provided to the defence rather than directly to the court) where required.

Recommendation 13

Intellectual disability services should:

- a. have workers skilled in working with offenders and have an understanding of the criminal justice system;
- b. be available promptly and for as long as they are needed;
- c. provide a clear access path for the alleged offender, his or her lawyer, and his or her support person;
- d. provide assessment of intellectual disability and support needs, particularly as they relate to the alleged offending; and
- e. provide or facilitate provision of the necessary supports and interventions to meet the person's needs, including behaviour intervention and referral to generalist support services such as drug and alcohol services and housing.

Recommendation 14

Other human services, such as mental health, drug and alcohol services and housing, which should be similarly skilled in working with people with intellectual disability, should be available and be well coordinated with intellectual disability services.

Achieving all of the recommendations in relation to support services requires:

- Determination of how best to provide the police and court liaison function discussed in recommendation 12 above. In NSW Local Courts, a workable approach could involve co-operation between NSW Health and DADHC. Nurses from the Statewide Community Court Liaison Service of Justice Health could be responsible for initial screening for cognitive disability in the courts in which they operate. A DADHC worker skilled in criminal justice issues could be on call to facilitate formal assessment, link the individual with services and develop a case plan that could be used to support non-custodial disposition options, particularly a section 32 order. The services of this DADHC court liaison worker should not be confined only to people who fit the conventional definition of intellectual disability and are ultimately eligible for DADHC services, but should extend to people who are not eligible for DADHC services but who would benefit from effective referrals to other support services, such as people with a 'borderline' intellectual disability or people who have an acquired brain injury. In Local Courts that do not have the Statewide Community Court Liaison Service, there needs to be capacity for the

Magistrate, defence lawyers and alleged offenders with intellectual disability to access a DADHC worker directly.

- Improved policies, procedures and skills within DADHC and other human service agencies.
- Allocation of additional funds by Government.
- The resolution of cooperative arrangements between agencies to facilitate efficient and effective responses to individual cases.
- The resolution by government of how to address the service needs of offenders with cognitive disability who fail to meet all of the DADHC eligibility criteria, such as individuals who have brain injuries acquired after the age of 18 years and individuals with major skill deficits but an IQ between 70 and 80.

V Enforcement of Section 32 Orders

The breach procedures

Before the commencement of the *Crimes Legislation Amendment Act 2002* (NSW), the breach of an order under s 32 could not be enforced. However, under the Act in its present state, s 32A provides that a person dealt with under s 32 may be brought back to the court if they breach their s 32 order within a period of six months and their charges are then dealt with *de novo*.⁹⁰ Under s 32A of the Act a treatment provider may report back to the Probation and Parole Service or Department of Juvenile Justice if a person does not comply with their treatment plan or other conditions contained in an order made under s 32(3). The service provider is then expected to provide details concerning the nature of the breaches, as well as make recommendations as to what action should be taken, as is demonstrated by this excerpt from the Local Court Form which a service provider uses in reporting a breach:

Order by virtue of failure to comply with conditions of order as described below:

DETAILS OF ALLEGED BREACH OF ORDER

(Breach details need to be exact and directly contravene the conditions of the order. For example, if the person has failed to attend for treatment, the instructions provided to the person must be detailed including when the instructions were provided to the person and the instructions given. Then details of any (or no) response to the instruction.

(The nature of breaches will depend on the conditions of the Section 32 order).

⁹⁰ *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(3D).

RESPONSE TO TREATMENT

(This section allows the treatment agency to detail the offender's response generally to the mental health order. Details may include previous dates when the person failed to attend for treatment which leads to a conclusion, for example "Mr appears to have made little effort to comply with the conditions of his Section 32Mental Health Order").

RECOMMENDATION

(This section allows the treatment agency to make a recommendation to the court. Such recommendations may include:

It is recommended that Mr be brought before the Court, or

It is recommended that the conditions relating to treatment by (name of treating agency) be deleted, or

*It is recommended that no action be taken).*⁹¹

The Probation and Parole Service or Department of Juvenile Justice will then exercise its discretion in deciding whether to notify the Court and Police about the breach.⁹² Where a Magistrate is alerted to a breach, the Magistrate then has discretion as to whether a warrant is issued in relation to the charges the subject of the s 32 order. Alternatively, the Magistrate can direct that no action be taken and delete treatment conditions or direct that no action be taken but that the treatment will continue.⁹³

Rationale for breach procedures

The reasons underlying s 32A are explained by Spiers of the NSW Attorney General's Department's Criminal Law Review Division:

This reform was recommended by the Interdepartmental Committee on the Mental Health (Criminal Procedure) Act 1990 and Cognate Legislation, a committee comprised of senior and experienced government agency representatives, barristers and psychiatrists. It was advocated mainly by magistrates and practitioners who could see that many did not comply with conditions of orders for which there was no ramification for non-compliance. This would lead to their offending behaviour escalating, something which was not detected until the person was brought before the court again on fresh - and often more serious - charges. Ultimately, courts were forced to impose severe criminal penalties, including custodial sentences. As a result, the opportunity for positive, effective intervention and diversion at the earliest stage was being lost. Many magistrates had become reluctant to make orders under s 32. Consequently, the rehabilitative opportunities the section presents were not being used.

91 See the Local Court form 'Report of Breach of Order, Section 32A Mental Health (Criminal Procedure) Act 1990' which can be accessed at Lawlink New South Wales <[http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/vwFiles/Forms_Mental_ReportOfBreachOfOrder.doc/\\$file/Forms_Mental_ReportOfBreachOfOrder.doc](http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/vwFiles/Forms_Mental_ReportOfBreachOfOrder.doc/$file/Forms_Mental_ReportOfBreachOfOrder.doc)>.

92 Spiers, above n 70, 2.

93 See the Local Court form 'Report of Breach of Order, Section 32A Mental Health (Criminal Procedure) Act 1990' which can be accessed at Lawlink New South Wales <[http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/vwFiles/Forms_Mental_ReportOfBreachOfOrder.doc/\\$file/Forms_Mental_ReportOfBreachOfOrder.doc](http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/vwFiles/Forms_Mental_ReportOfBreachOfOrder.doc/$file/Forms_Mental_ReportOfBreachOfOrder.doc)>.

*The amendment is intended to augment the section and emphasise to persons subject to s 32 orders that there will be consequences for failure to comply with conditions. The underlying aim is to allow courts to intervene at the earliest possible stage, when compliance with treatment orders first breaks down.*⁹⁴

One very experienced solicitor reported that Magistrates have said that the purpose of bringing people back to Court for failure to comply with s 32 conditions is not to 'breach' or punish the defendant, but rather to find out what is not working with the case plan and amend it if necessary.

To date, limited use of the procedures

According to the figures contained in the Judicial Commission's recent monograph on s 32, the number of breaches of s 32 orders is a very small proportion both of the total number of persons discharged by way of an order under s 32(3) and the number of persons discharged conditionally by way of an order under s 32(3)(a) or s 32(3)(b)⁹⁵

	Persons discharged by way of s 32(3) order	Persons discharged conditionally by way of s 32(3) order	Breaches of s 32 orders
2005	1020	829	15
2006	973	795	16

It is unknown what disability the people subject to the breached s 32 orders have and what the actual outcome was following the matters being brought back to Court following breach.

Magistrates are concerned that the number of breaches being brought to their attention is so low. The Judicial Commission suggests that the low number of breaches indicates that:

- There needs to be detailed guidelines on what constitutes a breach.
- Service providers may be reluctant to report breaches.
- Probation and Parole and Juvenile Justice may be reluctant to report breaches.
- An efficient and reliable breach reporting process needs to be established and monitored.⁹⁶

Objections to breach procedures

The breach procedure in s 32A has a number of problems. First, it is wrong in principle to impose sanctions on a dismissal of charges where there has been no plea or finding of guilt. This was the view of the Law Reform Commission.⁹⁷

⁹⁴ Spiers, above n 70, 1.

⁹⁵ Judicial Commission of NSW, above n 31, Tables 1 & 4

⁹⁶ Ibid, 21.

⁹⁷ New South Wales Law Reform Commission, above n 4, para 5.820.

Secondly, it cannot be assumed that a breach of s 32 conditions is a wilful act by the alleged offender.

The success of s 32 orders typically relies upon both the alleged offender and the service provider. Section 32 orders create an unequal service recipient/service provider relationship because, whilst it is the service provider that has control over the provision of the services, the Court can only impose enforceable obligations in relation to services on the alleged offender. Many practitioners and support workers expressed concern regarding the lack of jurisdiction of the Court to bind service providers. Breakdown in service provision can result in s 32 breaches which can in turn result in the alleged offender being penalised for something which is outside of his or her control and is more the result of inappropriate or ineffective service provision. Such deficiencies in service provision may well not be apparent to Probation and Parole or the Magistrate who will often be reliant on the information provided by service providers.

Members of the focus group of people with intellectual disability who have been involved in the criminal justice system said that s 32 is not helpful when support workers do not keep their side of the deal and that they felt s 32 could only work if their support services remained committed to them.

The rushed nature of the Local Court makes assessment of breaches of s 32 orders particularly difficult. Such an assessment is often complex. Non-compliance can be due to the nature of a case plan. These plans can be broad in nature and do not always specifically relate to the offending behaviour. Or, non-compliance could be due to poor quality service provision, funding cuts in an organisation or a clash between a particular worker and the alleged offender. A breach does not necessarily mean failure of the case plan and hence ineffectiveness or inappropriateness of a s 32 order – it could just need finetuning or addressing broader issues impacting on compliance eg homelessness or problems with the service provider. Breaches also need to be seen within the context that behavioural change is often a slow and gradual process for a person with intellectual disability. One breach may in fact amount to considerable progress for an individual who is gradually learning more positive behaviours.

Magistrates may be open to considering these sorts of factors. However, they may be faced with situations where service providers describe wilful breaches and the person with intellectual disability finds it difficult to identify or enunciate problems with the case plan or service provision that are in fact causes of the breach. Solicitors will often not have the time or the expertise to identify the problems that their clients cannot enunciate. Magistrates' decisions could depend on the extent to which they have an understanding of the complex dynamics of and challenges facing the relationship between the service providers and alleged offenders with intellectual disability.

Magistrates state that they endeavour to use the breach procedures in a positive rather than punitive way. However, this is a major challenge.

It is beyond the scope of this report to reach any definitive position on the breach provisions in s 32. However, it is hoped that this issue will be further considered in the pending Law Reform Commission inquiry.

VI Legal Representation

Legal Aid is vital

Due to the socio-economic disadvantage of persons with intellectual disability, virtually all alleged offenders with intellectual disability do not have the financial resources to engage a fee paying solicitor and hence are represented by Legal Aid solicitors, the Aboriginal Legal Service ('ALS') or community legal centres.

Legal Aid provides an extremely important and valuable service to disadvantaged people including people with intellectual disability. Legal Aid solicitors tend to be sorely stretched as they seek to provide quality legal representation to a very large number of people.

However, there are numerous issues in relation to Legal Aid which were identified in the current project as unfavourably impacting on the s 32 process.

Problems with Legal Aid

First, even accessing good quality free legal services can be difficult for people with intellectual disability primarily because there is limited knowledge amongst solicitors about intellectual disability and about how to communicate with people with intellectual disability.

Secondly, lawyers might fail to adapt their communication techniques or provide long enough consultations such that they fail to provide legal advice and obtain legal instructions in a manner that the individual can understand. Members of the focus group of people with intellectual disability who have been involved in the criminal justice system said they felt they were pressured at times to plead guilty and were not given a choice. The experience of CJSN in supporting people with intellectual disability at court is that lawyers do not always raise the option of a s 32 application; sometimes, support people find themselves having to raise s 32 with lawyers.

In the course of the stakeholder consultations, time and funding limitations were recognised as a fundamental hindrance to representing the client and receiving adequate instructions. These limitations were often due to high caseloads and/or the restrictions on Legal Aid funding. Current fee scales for interviews are fixed and provide no additional funding for clients with intellectual disability.⁹⁸ Similarly there is a limit on disbursements for court reports in all matters,⁹⁹ even though s 32 applications may require both a report from a psychologist and a case plan prepared by another expert. This is exacerbated where further reports are required after a s 32 application is rejected for want of adequate psychological evidence. Solicitors might consider that the time and effort involved in preparing a s 32 application is not financially viable and choose an easier option such as pleading guilty and making submissions on sentence.

Thirdly, lawyers might be unaware of how to prepare an effective s 32 application, such as obtaining a treatment plan and linking the client up with DADHC or other disability support services. As well as a possible lack of knowledge of s 32, one stakeholder reported that some lawyers do not know of the special laws and protections applicable to people with intellectual disabilities, such as the 'vulnerable persons' provisions in Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the 'incapable person' provisions in the *Crimes (Forensic Procedure) Act 2000* (NSW). For example, the stakeholder noted one criminal lawyer who had advised an alleged offender with intellectual disability to consent to a forensic procedure such that the police obtained his DNA. He was clearly an 'incapable person' and unable to consent.

Fourthly, lawyers might even fail to identify their clients' cognitive impairment and hence fail to avail the client of the diversionary mechanisms available under s 32 as well as the evidentiary and procedural safeguards available to people with intellectual disability.

Fifthly, some lawyers might 'conflict' themselves out of representing a person due to the perceived challenging behaviours of the individual.

Sixthly, lawyers who are unfamiliar with representing and communicating with persons with intellectual disability might see these clients as being 'too hard'.

Seventhly, stakeholders acknowledged the central importance of consistency in legal representation throughout the legal process and expressed concern about the lack of continuity in the lawyer appointed to an alleged offender's matter. Legal Aid commonly does not provide continuity of representation. This impedes a person with intellectual disability forming a trusting relationship with their lawyer and being confident to communicate and be open with the lawyer. Lack of continuity can also result in a failure to follow up with obtaining case plans and generally hinders the preparation of s 32 applications.

98 Fee Scales are available at *Fees for State law matters for approvals made on or after 1 July 2007: Criminal Matters, Solicitors* (2007) Legal Aid New South Wales <http://lacextra.legalaid.nsw.gov.au/feescales/State_Criminal_Matters_Solicitors_20070701.pdf> at 10 April 2008. No additional funding is provided for interviews or disbursements if a client has an intellectual disability.

99 Fee Scales are available *Fees Payable to Psychiatrists and Psychologists Criminal Law Matters – State and Commonwealth, Commencement Date – 1 December 2007* (2007) Legal Aid New South Wales <http://lacextra.legalaid.nsw.gov.au/feescales/Criminal_Law_Matters_Psychiatrists_Psychologists.pdf> at 10 April 2008.

A variety of these problems tend to be particularly prevalent in country areas where Legal Aid relies on private lawyers to act as duty solicitors. The remuneration provided by Legal Aid does not reflect the time needed to properly represent a client with intellectual disability.

People with intellectual disability are particularly disadvantaged when applying for or defending AVOs in non-domestic disputes. Legal Aid sometimes represents defendants in these cases where there are exceptional circumstances, such as an intellectual disability. However, this is discretionary. In these cases, a CJSN support person often has to stand up in court and talk on behalf of the defendant with the intellectual disability.

A specialist service

All of the problems with legal representation in s 32 applications are much less likely to arise where the one lawyer, with particular skills in representing clients with intellectual disability, represents a client throughout the case. IDRS has extensive experience representing clients with intellectual disability in s 32 applications. It has had very few unsuccessful applications. IDRS lawyers have more time available for each case than solicitors at Legal Aid. They have a good knowledge of disability and related service systems and actively advocate for the assessments, services and case plans that their clients need.

Kevin

Lack of continuity in legal representation

Kevin was charged with breach of an apprehended violence order and intimidation.

On the first court date, the lawyer obtained an adjournment as Kevin's DADHC case worker could not be there.

On the second court date, a CJSN support worker attended. A different lawyer briefly spoke to Kevin and asked him whether the first lawyer had recommended he plead guilty or not guilty. Unfortunately Kevin could not remember. The support person raised the possibility of a s 32 application but the lawyer decided Kevin should plead not guilty and another adjournment was granted.

On the third court date, a third lawyer decided that a s 32 application would be the best way to go and another adjournment was granted. Reports were requested from DADHC.

On the fourth court date, a fourth lawyer was successful in the s 32 application and the charges were dismissed.

Salvo

Lack of consistent or informed representation

Salvo was charged with assault and malicious damage. After two court appearances, he was referred to CJSN for court support. Salvo had intellectual disability as well as hearing impairment and alleged drug and alcohol problems.

Salvo's case took 12 months to be concluded. During that time, he appeared in court each month and was represented by five different lawyers (some Legal Aid solicitors and some private lawyers on behalf of Legal Aid). A s 32 application was made which was supported by a psychiatrist's report which gave little information about Salvo's intellectual disability. The Magistrate was reluctant to consider the matter under s 32. After a further assessment was obtained, the Magistrate agreed to consider a s 32 order, but wanted a more thorough case plan.

Many adjournments occurred where nothing had happened between court dates. The delay and continual change of lawyers was extremely frustrating for Salvo and he reacted angrily to each new solicitor. The support person repeatedly had to calm him down.

Each new lawyer rarely knew what had happened previously. One new lawyer was about to make a new s 32 application not realising this was already well underway. Another lawyer was unaware that a treatment plan had been developed and the support person had to bring this to his attention. Salvo himself was unable to update the lawyers on what had previously occurred. Had a consistent support person not been present, Salvo's frustration may well have resulted in aggression (possibly resulting in further charges) and the case would have been even more drawn out.

Eventually, at the instigation of CJSN, Salvo was appointed a case manager and a case plan was developed. The Magistrate wanted to be satisfied that all of the elements of the plan were actually taking place before dismissing the matter under s 32. Delays by service providers led to further adjournments. Ultimately, the s 32 application was refused and Salvo received a 12 month good behaviour bond.

Later, Salvo was charged with breaching this bond and received a custodial sentence.

Thomas

Further problems with representation

Thomas was represented at Court by a duty lawyer who applied for an adjournment so that a psychological report could be obtained for a s 32 application. On the next court date, a different lawyer felt that the report was too old and obtained a further adjournment to seek a new psychological report. On the advice of the lawyer, CJSN tried to contact the Legal Aid office to confirm that the report had been applied for. Despite many phone calls, leaving many messages and writing a letter to Legal Aid, CJSN was not able to speak to anyone who could advise what had been done in the case. At the third court appearance, there was a third duty lawyer. There was no new report and it was unclear when the report had been requested. The lawyer asked for a further adjournment. The Magistrate reluctantly agreed, but advised that this was the last adjournment that would be allowed.

Ultimately, CJSN was advised that Thomas was released on conditional bail pursuant to s 32 – with the matter adjourned for 6 months.

Evie

A good response from the ALS and DADHC

Evie is a young Aboriginal woman with intellectual disability. She has a long history of imprisonment that began as a juvenile. Evie was convicted of fourteen counts of break, enter and steal. Evie steals to pay for the drugs to which she is addicted. The District Court Judge indicated that a suitable sentence may be five years in gaol.

Evie was represented by the Aboriginal Legal Service. On each of her court appearances, she had a different lawyer. This was problematic for Evie because she had to repeatedly grapple with a new client/solicitor relationship. Also, the solicitors were taking instructions from her in a hurried environment and without knowledge of her level of comprehension. In these circumstances, Evie was less likely to converse easily with a lawyer and provide clear and consistent instructions. Moreover, as she became frustrated by the length of time the case was taking, she was more likely just to want to get the whole thing over with irrespective of the consequences.

A CJSN support person raised these problems with the ALS which responded by appointing their senior solicitor to fully handle Evie's case.

DADHC assessed Evie in prison and found her suitable for CJP. Evie's solicitor then successfully applied for twelve months bail under s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). This section allows a court to grant bail to a convicted person so that he or she can participate in an intervention program that will reduce the likelihood of further offences. CJSN arranged for a CJP officer to attend court to give evidence. The Judge was impressed by the CJP and said that he had never seen such an intensive program offered in prison.

One Legal Aid Office

The value of continuity in legal representation

One Legal Aid office has a policy of aiming to ensure that a client is represented by the same lawyer throughout court proceedings. This continuity is particularly important for alleged offenders with intellectual disability who tend to be adversely affected by lack of continuity of representation.

In one case handled by this office, the lawyer held back a s 32 application so that it was the last matter on the day. This ensured that the Magistrate was not feeling pressured by the other cases that had to be dealt with and was able to spend more time reading the reports and making a decision. The s 32 application was granted.

Recommendation 8

Provision of lawyers who:

- a. are trained and skilled in communicating with persons with intellectual disability and familiar with relevant legal and support service system issues;
- b. have the time needed to obtain thorough instructions and properly explain to their clients what is happening;
- c. have the time to prepare their clients' matters for court, including obtaining psychological reports and case plans associated with s 32 applications, and
- d. can provide continuity of representation throughout the proceedings.

For example, this might be achieved by Legal Aid through:

- Encouraging all lawyers representing clients with intellectual disability to spend more time in consultations with these clients and in arranging any necessary reports and case plans for these clients. In order to facilitate this, lawyers in-house at Legal Aid should have reduced caseloads and private practitioners representing clients pursuant to grants of Legal Aid should be entitled to additional Legal Aid funding to enable longer consultation and preparation times.
- Establishing a panel of lawyers with expertise in representing offenders with intellectual disability. These lawyers could provide continuity of representation for clients with intellectual disability, especially those with more complex needs.
- Ensuring the availability statewide of lawyers who have been trained in intellectual disability and have appropriate expertise.
- Developing a protocol for providing legal services to clients with intellectual disability, including, for example, issues about seeing the client in advance of the court day and spending extra time with the client.
- Utilising the social work department in Legal Aid to provide assistance to lawyers who have clients with intellectual disability in accessing support services.
- Negotiating a mentor relationship between lawyers specialising in intellectual disability (such as those at IDRS) and other Legal Aid lawyers.

- Arranging for IDRS to provide consultancy and training to Legal Aid lawyers and private practitioners in relation to clients with intellectual disability, particularly those with complex needs.
- Seconding Legal Aid lawyers to IDRS.

There should also be enhanced education of lawyers about intellectual disability and social disadvantage issues, including through College of Law and University Practical Legal Training courses (PLT), Mandatory Continuing Education (MCLE) and criminal law specialist courses and seminars, and through the development of resources to assist lawyers in representing clients with intellectual disability.

IDRS, the Aboriginal Legal Service and the Legal Aid Commission should work with CALD and Indigenous disability groups to ensure appropriate representation of alleged offenders with intellectual disability who come from a CALD or Indigenous background.

VII Support persons

The importance of support persons

It is generally agreed that people with intellectual disability are particularly vulnerable in the criminal justice system and that they require additional assistance to negotiate the system. They need assistance to understand their legal advice as well as what happens in court and then what is required of them afterwards, including adhering to any s 32, bail or bond conditions. Support persons fulfil this role.

In general, lawyers are not provided with training in how to communicate effectively with people with intellectual disability and there is a wide disparity across the legal profession in relation to lawyers' effectiveness to do so. As the law in general is full of jargon and big words people with intellectual disability will often have a great deal of difficulty understanding the legal advice given to them. Legal Aid lawyers also have very little time to devote to any individual client. Support persons can work with the solicitor to explain and remind the person of what is said during the legal interview including any advice given. Often the support person is the only consistent person throughout the court process. They sometimes need to tell lawyers what happened on previous court dates.

Support persons can also be vital in assisting lawyers advocate for services for their clients as they know about intellectual disability and available support services.

In the Local Court, cases are dealt with so quickly that people with intellectual disability usually do not manage to follow proceedings. Alleged offenders generally walk out of court and ask their support person what happened.

Understanding bail, s 32 and bond conditions is vital to ensure people do not find themselves in greater trouble. People with intellectual disability often do not understand these conditions or what they need to change in order to be able to adhere to the conditions. Ensuring people fully understand any conditions and their practical implications is an important role for support persons.

Other important functions of the support person role include encouraging people to go to court, making sure they know how to get there, ensuring they do not leave the court before their matter is heard and keeping them calm while they are there.

Julie

No assistance to understand bail conditions

Julie has moderate intellectual disability. She was apprehended by police with stolen goods in her possession. She was charged and granted bail by police. Julie said that she repeatedly asked the police to call CJSN or IDRS to assist her with the charges and bail conditions but they ignored her requests. One of the bail conditions was a place restriction – not to come within a 2km radius of a portion of the CBD.

The very next day police arrested Julie in the park (which was within the prohibited area) for breach of bail. Julie had no idea that she was doing anything wrong.

Salvo

The importance of court support persons

See Salvo's case study in Section VI on legal representation.

Criminal Justice Support Network

CJSN is a service of IDRS that provides volunteer support persons for people with intellectual disability who are in contact with the criminal justice system. A support person is allocated to a person with intellectual disability seeking assistance at police interviews, courts and related legal appointments whether they are victims, witnesses, suspects or defendants. Trained support persons are available in Sydney, the Illawarra and the Hunter region. CJSN's outreach service has been able to train people in other regions to support people with intellectual disability at court and with notice CJSN is often able to locate a suitable support person in regional areas.

Some local community groups have achieved small one off funding grants to establish a local support network. Lack of on-going funding has resulted in at least one of these groups closing. There are other groups that can sometimes provide support such as disability advocacy organisations.

In addition to targeted one on one support, CJSN also provides a 24 hour phone service. This phone service is also for people with intellectual disability and their support networks in regions outside of the target areas. CJSN provides education and training to staff in the criminal justice system, including police and court workers,

lawyers and service agency workers, families and people with intellectual disability. CJSN also has the capacity to prepare resources and publications for people with intellectual disability and those who support them, including family and support workers, lawyers, agencies and criminal justice system staff, such as court staff and police. IDRS has a useful list of resources on a range of topics.¹⁰⁰

Recommendation 2

Ensure that all alleged offenders have a competent support person (whether that is from the person's own network, the CJSN or elsewhere) to assist them throughout the criminal justice process.

¹⁰⁰ *Criminal Justice Support Network*, Intellectual Disability Rights Service <<http://www.idrs.org.au/cjsn/index.html>> at 26 March 2007.

VIII Police

The NSW Police Force plays an important role in relation to the involvement and experiences of alleged offenders with intellectual disability in the criminal justice system. This report does not, however, seek to canvas issues in relation to the NSW Police Force in any detail.

People with intellectual disability can have a greater presence in public space which means that they can be particularly susceptible to being charged by police with offences such as public nuisance and possession. Frequently charges such as offensive language, resisting arrest and assaulting a police officer in the execution of his or her duty arise from the interaction with the police. Members of the focus group of people with intellectual disability said they had often been pulled up by police for simply walking down the street and felt they were harassed by police.

Jack

Policing

[Note that background to Jack is provided in another case study about him in Chapter IV – DADHC and Other Support Services]

Like many homeless young people, Jack has been involved in low-level criminal activity. His intellectual disability, ADD and the fact that he has been a victim of serious abuse make him ill-equipped to handle police interaction. As a result, much of Jack's contact with the police has resulted in additional charges including resisting, assaulting and intimidating police.

One day, two police officers approached Jack to talk to him because he was riding his pushbike without a helmet. They decided to search him (because he was outside a methadone clinic and looked nervous, so they suspected he might have drugs on him) and found nothing of interest. Although Jack was compliant with the search, he was verbally abusive and swore at the police. The police told him, "You will be getting a fine in the mail for riding your bike without a helmet, and we're giving you a warning now about your language".

Jack walked away from the police, still swearing loudly. One of the police officers followed him, grabbed him and told him he was under arrest for offensive language. Predictable consequences ensued, and Jack was also charged with resisting and intimidating police.

The actions of the police escalated the situation. While Jack was not entirely blameless, things would have turned out very differently had the police officers been less confrontational and more experienced in working with people with disabilities.

A few weeks later, Jack was involved in a similar confrontation with different police officers. They approached Jack and told him that he met the description of a suspect in an assault matter, and they needed to see his identification. Jack tried to explain that he did not have any identification on him and, when they continued to demand identification, he started swearing. The police, apparently lacking reasonable grounds to suspect that he was the “wanted” person, did not arrest him but told him he could not leave until he produced his identification. They continued to detain him (something they did not have the power to do).

Eventually Jack’s language became more and more heated, and the police then arrested him for offensive language, provoking a physical response from Jack. He was charged with offensive language, resisting arrest and assaulting a police officer in the execution of his or her duty.

Both these incidents were the subject of a complaint to the Ombudsman, made by Jack’s lawyers on his behalf. In the course of the investigation of the complaint, the police appeared unwilling to consider how the incidents could have been better handled and to explore ways of improving their interactions with people in similar situations to Jack. However, the Local Area Commander did agree to put a notation on the COPS system about Jack’s disability and vulnerability.

More recently, Jack’s interactions with police have been less problematic. It is hard to tell whether this is because police are now aware of his disability, or because Jack has learnt how to better control his anxiety when approached by police.

The NSW Police Force currently has brief guidelines on how to identify a person with ‘impaired intellectual functioning’ for the purposes of providing them with additional safeguards. These guidelines also may incidentally allow the police to refer the person to the appropriate human services. However, stakeholders stated that police were still routinely failing to identify people falling within these guidelines.

People with “intellectual impairment” are defined in Part 9 of the Law Enforcement (Powers and Responsibilities) Act 2002 as “vulnerable people”. As such they are entitled to have a support person present at the police station. The NSW Police Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME) is clear in its instructions to custody managers:

“If you suspect the person is a vulnerable person take immediate steps to contact a support person.”¹⁰¹

¹⁰¹ NSW Police Service, *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)* (2007) 20.

The experience of the Criminal Justice Support Network is that the large majority of defendants with intellectual disability for whom CJSN have provided a support person at court have not had a support person when in police custody. This is despite CJSN being available 24 hours, 7 days a week in the areas where these people had been arrested and in some cases despite having had family members available at the police station when they were in custody. Less than half the requests to CJSN to send a support person to a police station come from the police. CJSN is often called in by a family member, disability or other welfare worker or the person themselves.

The current education of police officers on intellectual disability is limited: in general, specialised training is only offered to officers in specific roles.¹⁰² Effective training about intellectual disability should be aimed at new recruits and all officers who are in the field

The NSW Police Force is to be commended for including training on both intellectual disability and acquired brain injury in its "Safe Custody" training course since 2006. It would seem that there is a continuing problem with the ability of the police to identify that a person in custody may have an "intellectual impairment".

Some stakeholders have raised concern that police are not committed to ensuring that a person with "intellectual impairment" has a support person in the same way that there is commitment to providing this support to other vulnerable groups such as youth.

A particular issue which emerged during the consultations and from the focus group was some police ignoring the requests made by alleged offenders for a support person.

Bill

Denial of support person by Police

Bill is homeless and lives in the inner city. He feels persecuted and harassed by police. He is often in public places because of his homelessness and is regularly apprehended by police for questioning and searching. He has an awkward gait because of his acquired brain injury and police see him and immediately consider him to be intoxicated. This, they say, then gives them reasonable grounds to stop, question and search him.

Recently, Bill was stopped by police. He was upset at being stopped when he did not think he had been doing anything wrong, and refused their request for him to empty his bag. The police said they were arresting him. He told them that he wanted CJSN to be with him at the station as he had an intellectual disability and a brain injury. He handed his CJSN card with CJSN's 24 hour phone number on it to an officer. The officer ripped it up and he was put in a paddy wagon. He was driven to the station and charged without CJSN or any support person being called by the police.

¹⁰²Currently the Intellectual Disability Rights Service only provides training to officers in training as Adult Sexual Assault Teams and the Joint Investigative Review Teams and custody managers in the NSW Police Service.

Ramesh

Charged while his mother waited to be support person

Ramesh became friends with a group who were involved in criminal activities and exploited his naivety. Ultimately he was arrested. His mother attended the police station. She told the desk officer that Ramesh had an intellectual disability and would need a support person and waited at the station. The desk officer said he would pass on the message. Ramesh told his mother later that the police just wanted to have a talk. It turned out that Ramesh had participated in an interview without a support person or legal advice. He simply answered “yes” to all questions and was charged.

Police sometimes interview a person with intellectual disability without having effectively (ie in a way that the person can understand in light of their cognitive impairments) advised that person of his or her rights to silence, a lawyer and a support person. Persons with intellectual disability ‘have limited receptive and expressive language. They also tend to have poor concentration skills, poor memory, are easily confused and become stressed and tired in relatively short periods of time’. They ‘may have great difficulty understanding and following what is being put to them in the police interview, and in explaining their version of events in response’ which might in turn ‘appear to police as evasive and suspicious, and as indicative of guilt’.¹⁰³

Persons with intellectual disability can be ‘highly suggestible and compliant with authority figures’ and ‘tend to say what they believe the authority figure wants to hear’ such that they are ‘likely to agree to propositions put to them by police, confess to crimes, and may even elaborate on a fact scenario because they believe this will please police’ without there being any ‘underlying reality to such accounts’.¹⁰⁴

There also needs to be greater understanding by police officers of the relevance of intellectual disability in relation to decisions about arrest, laying and withdrawing of charges and action for breach of bail. A number of lawyers consulted believed that a formalised scheme of warnings and cautioning should be established to enable arresting officers to exercise discretion. Cautioning schemes have proved very effective in combating the prevalence of both youth offences¹⁰⁵ and minor cannabis offences¹⁰⁶. The increased use of discretion was identified as a potential method of alleviating the burden on NSW Local Courts. Whilst difficulties arise in relation to the scope of the discretion that may be exercised by an arresting officer, these are beyond the scope of this paper. Consideration should also be given to whether cautioning should be linked to referral to support services in order to assist in preventing offenders from re-offending. The introduction of a formal cautioning scheme might require legislative change and requires further consultation.

¹⁰³French, above n 4, 64-65.

¹⁰⁴Ibid, 64-65.

¹⁰⁵The Bureau of Crime Statistics and Research conducted a review of the *Young Offenders Act* (1997) (NSW) in L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (2000). However, due to a lack of Police co-operation, statistics on cautioning could not be established. Anecdotally, the cautioning scheme seems a success.

¹⁰⁶For a review of the Cannabis Cautioning Scheme see J Baker and G Goh, *The Cannabis Cautioning Scheme Three Years On: An Implementation and Outcome Evaluation* (2004).

In addition, the recommendation of the NSW Law Reform Commission to appoint an Intellectual Disability Liaison Officer to the NSW Police Force is imperative.¹⁰⁷ The location of Mental Health Liaison Officers and Youth Liaison Officers in many police stations has facilitated better police management of these “vulnerable” groups. A position whose function is “Intellectual Impairment” Liaison Officer” should be created at least in every Local Area Command.

Recommendations 3-7

- Ensure that there are sound police systems to take account of the impact of intellectual disability on decisions about arresting a person, laying and withdrawing charges and action for breach of bail.
- Establish a network of disability liaison officers in the NSW Police Force.
- Improved training (in the sense of more training and training conducted by external experts) of all police officers (including police prosecutors) about intellectual disability.
- Enhanced liaison between the NSW Police Force and DADHC.
- Exploration of the establishment of a formal cautioning system for adults with intellectual disability analogous to that under the *Young Offenders Act 1997* (NSW).

¹⁰⁷See Recommendation 53 in New South Wales Law Reform Commission, above n 4, xxxvii.

IX Conclusion

During the past 10 years there has been some progress in relation to the diversion of alleged offenders with intellectual disability from the criminal justice system. However, the current diversion process in the NSW Local Court system remains problematic. Although s 32 provides a mechanism for the diversion of alleged offenders with intellectual disability from the criminal justice system, and hence acknowledges the distinctive needs of people with intellectual disability, there are major deficiencies in the application of s32 and other diversion options. These deficiencies include inadequate provision of support services, problems with legal representation, ineffective court processes and a discontinuity between the legal process and the provision of human services. This is disappointing given the size and cost of the problem and the domestic and international human rights to which people with intellectual disability are entitled.

Meanwhile, New South Wales has developed non-adversarial diversionary models in relation to other target groups such as young persons and persons with drug and alcohol problems.

It is hoped that this report will stimulate discussion concerning alleged offenders and the NSW Local Court system and that the NSW Government and relevant agencies will promptly take steps to remedy the present problems. The recommendations within this report aim to provide a practical and balanced range of solutions. Despite the need for some primary spending on service provision, the recommendations are also economically justified given the consequence of reduced crime rates and reduced imprisonment.¹⁰⁸

¹⁰⁸Joan R Petersilia, *Criminal Justice Policies Toward the Mentally Retarded are Unjust and Waste Money* (1997) Rand Research Brief < http://www.rand.org/pubs/research_briefs/RB4011/index1.html > at 6 December 2006.

IDRS and its collaborating authors hope that the New South Wales Government will see this as an opportunity to develop a unique approach to alleged offenders with intellectual disability – an approach that wholeheartedly addresses a major deficiency in the criminal justice system in NSW.

The recommendations made in this report could, on an individual basis, be of some assistance. However, to avoid piecemeal reform, where the success of any reforms might be negated by the failure to reform other areas, a holistic model is proposed.

The key principles guiding this model are that:

- The effects of intellectual disability are not just the result of factors internal to the individual but rather are the product of the interaction amongst and between the individual's cognitive impairment and various aspects of psychological and socioeconomic disadvantage. Offending conduct is best understood as a product of or related to this interaction.
- The impact of socioeconomic disadvantage and limited access to support services is recognised in understanding conduct giving rise to offences.
- The person's ability to understand and participate in the proceedings is maximised.
- The person's legal rights and human rights are acknowledged and protected.
- The person is empowered throughout the court process.
- The proceedings are an opportunity to explore and engage supports and interventions that the person may need to assist him or her to lead a positive and lawful lifestyle.
- There is recognition in bail and disposition decisions of the impact of intellectual disability on the alleged offender's understanding of, and culpability for, an offence and on the person's capacity to understand conditions on bail, s 32 dismissals, good behaviour bonds and other non-custodial orders.
- The diversity of society is recognised, including racial, cultural and linguistic diversity. The needs of rural and remote communities are also recognised.

The key elements of this model are:

The Legislation

1. Clarification of s 32, particularly its application to persons with intellectual disability and other cognitive disabilities.

Support person

2. Ensure that all alleged offenders have a competent support person (whether that is from the person's own network, the CJSN or elsewhere) to assist them throughout the criminal justice process.

Police

3. Ensure that there are sound police systems to take account of the impact of intellectual disability on decisions about arresting a person, laying and withdrawing charges and action for breach of bail.
4. Establish a network of disability liaison officers in the NSW Police Force.
5. Improved training (in the sense of more training and training conducted by external experts) of all police officers (including police prosecutors) about intellectual disability.
6. Enhanced liaison between the NSW Police Force and DADHC.
7. Exploration of the establishment of a formal cautioning system for adults with intellectual disability analogous to that under the *Young Offenders Act 1997* (NSW).

Legal representation

8. Provision of lawyers who:
 - a. are trained and skilled in communicating with persons with intellectual disability and familiar with relevant legal and support service system issues;
 - b. have the time needed to obtain thorough instructions and properly explain to their clients what is happening;
 - c. have the time to prepare their clients' matters for court, including obtaining psychological reports and case plans associated with s 32 applications, and
 - d. can provide continuity of representation throughout the proceedings.

For example, this might be achieved by Legal Aid through:

- Encouraging all lawyers representing clients with intellectual disability to spend more time in consultations with these clients and in arranging any necessary reports and case plans for these clients. In order to facilitate this, lawyers in-house at Legal Aid should have reduced caseloads and private practitioners representing clients pursuant to grants of Legal Aid should be entitled to additional Legal Aid funding to enable longer consultation and preparation times.
- Establishing a panel of lawyers with expertise in representing offenders with intellectual disability. These lawyers could provide continuity of representation for clients with intellectual disability, especially those with more complex needs.
- Ensuring the availability statewide of lawyers who have been trained in intellectual disability and have appropriate expertise.
- Developing a protocol for providing legal services to clients with intellectual disability, including, for example, issues about seeing the client in advance of the court day and spending extra time with the client.
- Utilising the social work department in Legal Aid to provide assistance to lawyers who have clients with intellectual disability in accessing support services.

- Negotiating a mentor relationship between lawyers specialising in intellectual disability (such as those at IDRS) and other Legal Aid lawyers.
- Arranging for IDRS to provide consultancy and training to Legal Aid lawyers and private practitioners in relation to clients with intellectual disability, particularly those with complex needs.
- Seconding Legal Aid lawyers to IDRS.

There should also be enhanced education of lawyers about intellectual disability and social disadvantage issues, including through College of Law and University Practical Legal Training courses (PLT), Mandatory Continuing Education (MCLE) and criminal law specialist courses and seminars, and through the development of resources to assist lawyers in representing clients with intellectual disability.

IDRS, the Aboriginal Legal Service and the Legal Aid Commission should work with CALD and Indigenous disability groups to ensure appropriate representation of alleged offenders with intellectual disability who come from a CALD or Indigenous background.

The Magistrate

9. Ensure that Magistrates:

- a. are able to maximise alleged offenders' understanding of the proceedings; and
- b. are aware of the nature and effects of intellectual disability (including its psychological and socioeconomic dimensions), the relationship between inadequate support services and offending conduct, and the appropriateness of diversion and sentencing options for offenders with intellectual disability.

This might be achieved by measures such as:

- Enhanced training of Magistrates and the development of a resource package for Magistrates about:
 - the nature of intellectual disability and its impact on offending and participation in the criminal justice system, and
 - human services and other supports for people with intellectual disability, including details of supports for Indigenous people and people from CALD backgrounds, and the varying supports available in rural, regional and metropolitan settings.
- Procedures to ensure Magistrates have available to them adequate time and expert input for cases involving persons with intellectual disability, for example by dealing with a number of such cases in the one list or listing s 32 matters at 2pm.

Disposition Procedures

10. Processes used to decide how to dispose of criminal charges against a person with intellectual disability should:

- be conducted by a person with knowledge and skills in intellectual disability;
- be conducted in a way that is meaningful to the alleged offender including in relation to the nexus between any outcome and the events giving rise to the charges;

- provide a forum to bring together people in the alleged offender's life in order to identify the needs of that person and how to meet those needs;
- include attempts to identify the person's support and behaviour intervention needs and engage relevant players in meeting those needs; and
- be conducted in an informal, conference-based manner wherever possible.

11 In the disposition of criminal charges, any conditions placed on the alleged offender with intellectual disability must be related to addressing offending behaviour.

These elements could be achieved through measures including:

- Courts listing s 32 applications at 2pm, rather than 9.30am, so that alleged offenders have less time to wait at Court and become anxious, and so that Magistrates can engage more with clients in a less busy court setting.
- Establishing special lists and procedures for those lists in some locations. This option should be trialled with caution in some locations where there is cross agency interest in it. We do not recommend over-formalising such a system or establishing it statewide as it carries dangers of net widening and stigma.
- In relation to youth justice conferencing, there should be statewide rollout of the strategies already trialled by the Department of Juvenile Justice ('DJJ') to provide support people and adjust the conference process to meet the needs of people with intellectual disabilities and other additional support needs. DJJ should also provide conferencing staff with enhanced training in recognising additional support needs.
- Incorporating the approach developed by DJJ into the statewide rollout of the adult conferencing project.
- Holding a pre-court meeting or conference with the alleged offender, a support person, family and friends and support services for the purpose of devising a case plan.

There needs to be ongoing exploration and reassessment of conferencing and other innovative disposition procedures, including through consideration of their operation in other jurisdictions.

Support services

12 A multi-focal system of diversion is required, including ensuring there is a system for appropriate disability professionals to be available to police officers and in Local Courts to assist with issues including identification of people with cognitive disability, linking alleged offenders to services and the preparation of court reports and case plans (which are to be provided to the defence rather than directly to the court) where required.

13 Intellectual disability services should:

- a. have workers skilled in working with offenders and have an understanding of the criminal justice system;
- b. be available promptly and for as long as they are needed;

- c. provide a clear access path for the alleged offender, his or her lawyer, and his or her support person;
 - d. provide assessment of intellectual disability and support needs, particularly as they relate to the alleged offending; and
 - e. provide or facilitate provision of the necessary supports and interventions to meet the person's needs, including behaviour intervention and referral to generalist support services such as drug and alcohol services and housing.
- 14 Other human services, such as mental health, drug and alcohol services and housing, which should be similarly skilled in working with people with intellectual disability, should be available and be well coordinated with intellectual disability services.

Achieving all of the recommendations in relation to support services requires:

- Determination of how best to provide the police and court liaison function discussed in recommendation 12 above. In NSW Local Courts, a workable approach could involve co-operation between NSW Health and DADHC. Nurses from the Statewide Community Court Liaison Service of Justice Health could be responsible for initial screening for cognitive disability in the courts in which they operate. A DADHC worker skilled in criminal justice issues could be on call to facilitate formal assessment, link the individual with services and develop a case plan that could be used to support non-custodial disposition options, particularly a section 32 order. The services of this DADHC court liaison worker should not be confined only to people who fit the conventional definition of intellectual disability and are ultimately eligible for DADHC services, but should extend to people who are not eligible for DADHC services but who would benefit from effective referrals to other support services, such as people with a 'borderline' intellectual disability or people who have an acquired brain injury. In Local Courts that do not have the Statewide Community Court Liaison Service, there needs to be capacity for the Magistrate, defence lawyers and alleged offenders with intellectual disability to access a DADHC worker directly.
- Improved policies, procedures and skills within DADHC and other human service agencies.
- Allocation of additional funds by Government.
- The resolution of cooperative arrangements between agencies to facilitate efficient and effective responses to individual cases.
- The resolution by government of how to address the service needs of offenders with cognitive disability who fail to meet all of the DADHC eligibility criteria, such as individuals who have brain injuries acquired after the age of 18 years and individuals with major skill deficits but an IQ between 70 and 80.

Training

- 15 Training (including at a tertiary level) of all professionals involved in every aspect of the criminal justice process in relation to intellectual disability.

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Appendix 1

Court Intervention and Diversion Programs in NSW

Youth Justice Conferencing

See Young Offenders Act 1997 (NSW) ('YO Act')

Aims	Locations	Auspiced under/ staffed by	Criteria	Referral process	Description, duration and outcome of program	Role of Magistrate
<p>To divert juvenile offenders away from the court system in appropriate cases in the hope that they will not become entrenched in the criminal justice system.</p> <p>To provide the young person with developmental and support services that will enable the child to overcome the offending behaviour and become a fully autonomous individual.</p> <p>To apply the least restrictive sanction against a young person who is alleged to have committed an offence.</p> <p>To apply principles of restorative justice.</p> <p>To facilitate offenders making amends for the harm caused to their victims.</p> <p>See s 34 of the YO Act which sets out purposes and principles of conferencing.</p>	<p>All over NSW.</p>	<p>Auspiced under Department of Juvenile Justice through its Youth Justice Conferencing Directorate.</p> <p>There is a conference administrator in each DJJ Community Services office. They have the power under the YO Act to question police decisions to refer children to conferencing. They can question the validity of admissions made by children in police interviews.</p> <p>Conferencing convenors are appointed on contract basis by DJJ. They live and work in the local community.</p>	<p>Under 18 years old.</p> <p>Charged with committing a summary offence or indictable offence that can be dealt with summarily.</p> <p>The offence does not involve serious violence, is not a drug offence (except for some small quantity offences) or a traffic offence.</p> <p>Admits to the offence.</p> <p>Consents to a conference.</p> <p>Not eligible to be dealt with by conferencing if the investigating official considers that it is in the interests of justice to deal with the young person by way of conference.</p> <p>See s 8 of the YO Act for the range of eligible offences.</p>	<p>Can be referred directly by the police upon admission of the offence, without the need for a court appearance.</p> <p>Can also be referred by Children's Court or DPP after appearance at court.</p>	<p>The conference will take place within a few weeks of referral. Convenor organises and facilitates conference involving offender, victim (if the victim wishes to attend), support people, police, etc.</p> <p>The young person tells their story of what happened and other participants are given an opportunity to contribute their thoughts on the event and its impact.</p> <p>The conference arrives at an outcome plan which may involve an apology, payment of compensation, performance of voluntary community work, participation in course or program, etc.</p> <p>If the matter was referred to conferencing by police, satisfactory completion of outcome plan means no court proceedings are taken. If matter was referred by court, the young person will have to go back to court for approval of outcome plan.</p> <p>Satisfactory completion of the outcome plan means that the matter is dismissed under the YO Act.</p>	<p>If matter referred by police, the Magistrate has no role at all.</p> <p>If matter referred by court, Magistrate is responsible for approving outcome plan and dismissing matter on satisfactory completion.</p> <p>Magistrate does not attend conference but receives a report summarising the conference and its outcome.</p>

Community Conference Intervention Program (Adult Conferencing Pilot)

See Criminal Procedure Regulation 2005 (NSW), Sch 5 ('CP Reg')

Aims	Locations	Auspiced under/ staffed by	Criteria	Referral process	Description, duration and outcome of program	Role of Magistrate
<p>To provide the court with more alternatives to imprisonment for young adult offenders.</p> <p>To facilitate the greater participation in the justice process of offenders, victims and their support persons and families.</p> <p>Promote reintegration into the community, increase young adult offenders' awareness of consequences of offending on victims and the community.</p> <p>See cl 5 of Sch 5 of the CP Reg for objectives.</p>	<p>Piloting of the program began in 2005 at Liverpool Local Court and Tweed Heads Local Court Circuit. Program was evaluated in 2007.</p>	<p>Auspiced by the Attorney General's Department. Conference organisers employed by Attorney General's Department.</p>	<p>Offender must be aged between 18-25 years.</p> <p>Must plead guilty to offence and be at risk of imprisonment.</p> <p>Summary or indictable offence dealt with summarily.</p> <p>The subject offence is not an offence of serious violence, sexual assault offence, child pornography offence, offence involving firearms, a drug offence (subject to some exceptions), riot or affray offence or assault police offence.</p> <p>Not convicted of certain offences including murder, manslaughter, serious violent offences, some drug offences, and serious firearms or weapons offences.</p> <p>Likely person will agree to participate.</p> <p>Eligible offences are set out in clause 19A of CP Reg and s 348 of the Criminal Procedure Act 1986 (NSW).</p>	<p>Unlike youth conferencing, there is no referral directly from police.</p> <p>Defendant pleads guilty or is found guilty. Prior to sentence, if the Magistrate is of the view that defendant is eligible and a conference is appropriate, the Magistrate makes referral for assessment.</p>	<p>Conference proceeds in similar way to a Youth Justice Conference. Parties aim to arrive at an intervention plan (which is similar to a Youth Justice Conference outcome plan). Matter is then referred back to Magistrate, who takes it into account and decides upon a sentence. Unlike Youth Justice Conferencing, which is diversionary, an adult conference is only one step along the road to sentencing and is not a sentencing option itself. Successful completion of an intervention plan is considered in determining a sentence.</p>	<p>Magistrate is the gate keeper for referrals and, after conference is held, decides whether to approve intervention plans, and then decides what sentence to impose..</p>

MERIT

(Magistrates' Early Referral Into Treatment)

Aims	Locations	Auspiced under/ staffed by	Criteria	Referral process	Description, duration and outcome of program	Role of Magistrate
To reduce crime associated with illicit drug use by engaging defendants with drug problems in intensive drug treatment.	60 Local Courts around NSW.	Local Courts. Staffed by clinicians employed by Department of Health	<p>Aged 18 years or over.</p> <p>Have charges before the Local Court which are capable of being dealt with summarily.</p> <p>Be on bail or eligible for bail.</p> <p>Have an illicit drug problem (excluding alcohol).</p> <p>Reside where they are able to participate in treatment programs.</p> <p>Give informed consent to a drug treatment program.</p> <p>Deemed suitable for drug treatment and have a treatable drug problem.</p> <p>Unlike the Adult Drug Court, there is no need to enter a plea before being accepted into MERIT.</p>	<p>It can be referred by the police, solicitor, self, etc. if criteria are met and the offender passes the eligibility assessment at any stage (even before 1st court appearance). Usually referred by Magistrate at 1st court appearance, if defendant appears to be eligible and seeks or agrees to referral. Eligibility assessment is very quick and will usually be completed the same day. If eligible, the matter is usually adjourned for about two weeks for more details on suitability assessment. If assessed as suitable, Magistrate will usually give the go-ahead for commencement of program.</p>	<p>Program lasts 3 months and is tailored by MERIT team to meet the needs of defendant. Generally, there are regular one on one appointments with MERIT clinicians; there may also be group sessions. MERIT clinicians will refer the client to residential rehab if appropriate (and MERIT clients usually have priority over general public seeking admission). Referrals also made to methadone programs, buprenorphine programs, etc. MERIT team also provides practical support such as accommodation referrals if necessary.</p> <p>While on MERIT program, defendant generally does not need to enter a plea or do anything in relation to their legal matter – the idea is that they focus on their treatment.</p> <p>If the defendant disobeys the conditions of their bail related to the MERIT program during the bail period, the situation will first be considered by the Case Worker. However, the Court will be notified if the participant fails to attend any two consecutive scheduled appointments within a two week period or commits further offences.</p> <p>There is usually a mention date 6 weeks into the program, where a progress report will be presented, and another mention date on completion of the program, where a completion report will be presented. Court case will then proceed; if defendant pleads, or is found, guilty, successful completion of MERIT will be favourably considered in sentencing.</p> <p>MERIT is entirely voluntarily and a person cannot be punished for withdrawal or non-completion.</p>	Magistrate is gate keeper for entry to program and has a role in monitoring. Magistrate can terminate participant from program if progress reported to be unsatisfactory and will finalise the offences.

Circle Sentencing Intervention Program

See Criminal Procedure Regulation 2005 (NSW), Sch 4 ('CP Reg')

Aims	Locations	Auspiced under/ staffed by	Criteria	Referral process	Description, duration and outcome of program	Role of Magistrate
<p>To make the sentencing process more meaningful and appropriate to Aboriginal offenders.</p> <p>To involve the Aboriginal community in the sentencing process of young Aborigines in order to reduce Aboriginal incarceration rates and improve Aboriginal community's confidence in the criminal justice system.</p> <p>See cl 7 of Sch 4 of the CP Reg.</p>	<p>Piloted at rural and regional locations.</p> <p>As at May 2006, the program operates at Local Courts in Nowra, Dubbo, Walgett, Brewarrina, Bourke, Lismore, Armidale and Kempsey, with the program to expand into Western Sydney (Mt Druitt.)</p>	<p>Originally developed and implemented by the Aboriginal Justice Advisory Council, Circle Sentencing is now managed by the Crime Prevention Division of the Attorney General's Department of New South Wales.</p>	<p>Aged 18 or over.</p> <p>Aboriginal, pleading guilty or been found guilty of summary offences or indictable offences that can be dealt with summarily.</p> <p>The subject offence is not an offence of serious violence, sexual assault offence, child pornography offence, or offence involving firearms.</p> <p>Assessed by the Magistrate and then the Aboriginal Community Justice Group as suitable for the Circle Court.</p>	<p>Magistrate makes program participation order after the Magistrate and then the Aboriginal Community Justice Group assesses the defendant as suitable for the Circle Court and they are otherwise eligible.</p>	<p>Circle Sentencing is an alternative sentencing court. A circle involves Aboriginal elders, the Magistrate, prosecutor, defendant, legal representative, victim and various support people as well as Aboriginal Circle Sentencing Project Officer sitting down together to discuss the harm caused by the offence and develop appropriate sentence to address the underlying factors of the offending behaviour. The program targets those offenders who are potentially facing a custodial sentence and the full range of sentencing options are available to the circle. However, the sentence is ultimately decided by the Magistrate.</p>	<p>The Magistrate acts as a gate keeper for referrals to Circle Sentencing. As convener of Sentencing Circle, the Magistrate actively participates in the program (unlike many other intervention programs).</p>

Adult Drug Court

See Drug Court Act 1998 (NSW)

Aims	Locations	Auspiced under/ staffed by	Criteria	Referral process	Description, duration and outcome of program	Role of Magistrate
<p>To achieve successful rehabilitation of drug dependent offenders, to reduce drug related offending and associated harm.</p> <p>Promote community reintegration.</p>	<p>Parramatta Drug Court</p>	<p>Attorney General's Department, District Court and Local Court. Drug Court team is made up of Legal Aid solicitors, DPP/police prosecutors, staff employed by Department of Health, staff employed by Probation and Parole Service, the Court Registrar and the Judge.</p>	<p>18 or over. Pleading guilty to eligible offence (violent offences and serious drug offences are generally excluded) and likely to receive a custodial sentence. Must live in (or have committed offence in) Western Sydney area. Dependent on use of prohibited drugs. Willing to participate.</p>	<p>Referred by court and assessed by Drug Court team.</p>	<p>Program is very intensive and is of several months duration. May include residential detox/rehab, methadone program, counselling, etc. There are frequent court appearances in which progress updates are provided. There are incentives for good performance and punishment for breach of programs. Participants can be terminated from program if breach is significant. At conclusion of program, the defendant's participation in the program is taken into account in sentencing.</p>	<p>Magistrate is very actively involved, not only as a gate keeper for referrals and as the ultimate sentencer, but presides over regular report back sessions and often develops a very strong rapport with the participants.</p>

Youth Drug and Alcohol Court (YDAC)

See Children (Criminal Proceedings) Act 1987 (NSW), s 33(1)(c2), The Children's Court of New South Wales, Practice Direction 23: Practice Direction for the Youth and Drug Alcohol Court

Aims	Locations	Auspiced under/ staffed by	Criteria	Referral process	Description, duration and outcome of program	Role of Magistrate
<p>Similar to the Adult Drug Court. The Youth Drug and Alcohol Court offers an opportunity to participate in an intensive program of rehabilitation before being sentenced.</p> <p>The YDAC attempts to address, in a holistic way, young offenders' needs and problems, which extend beyond the ongoing substance misuse, to poor education, dysfunctional familial relations, and psychosocial problems.</p>	<p>Children's Courts in metropolitan Sydney (Bidura, Campbell-town, Parramatta)</p>	<p>Children's Court. Youth Drug Court team consists of employees from Legal Aid, police prosecutors, Department of Juvenile Justice, Department of Health, Department of Education, Department of Community Services.</p> <p>The YDAC program consists of two interdependent teams – the Youth Drug and Alcohol Court Team and the Joint Assessment and Review Team. The Court Team is judicially driven and comprises the sitting Children's Magistrate, Police Prosecutor, Legal Aid Solicitor, YDAC Registrar and a representative of JART. The JART is intervention oriented and is responsible for the behaviour intervention and rehabilitation strategies.</p>	<p>Aged between 14 and 18 years.</p> <p>Charged with an offence falling within the jurisdiction of the Children's Court (eg the offence is not a serious children's indictable or traffic offence that is dealt with by other courts).</p> <p>Not charged with a sexual offence.</p> <p>Young person pleads guilty to the majority of outstanding charges.</p> <p>Has a significant problem with prohibited drugs or alcohol.</p> <p>Young person consents to participate in the YDAC program while on bail.</p> <p>Unlike Adult Drug Court, violent offences and alcohol dependency are included as eligible offences.</p>	<p>Referred by court to JART for initial assessment to determine the young person's clinical suitability to participate in the Program.</p>	<p>In a six month program formulated by JART participants undergo detoxification and rehabilitation, attend educational and vocational courses, and appear regularly throughout that period before the Youth Drug and Alcohol Court while participating in health related assessments or intervention, individual, group and/or family counselling, recreational/leisure programs and submitting to random urinalysis.</p> <p>When sentencing a young person in accordance with s 33(1) of the Children (Criminal Proceedings) Act 1987, the YDAC Magistrate is to take into account the young person's participation in the Program and, where appropriate, the child's successful completion of the Program. However, a young person who does not complete their YDAC program will not face a higher penalty.</p> <p>Participants are offered 'aftercare' after their court involvement is completed so that their treatment is gradually reduced.</p>	<p>Magistrate is actively involved. Youth Drug and Alcohol Court sessions are usually quite informal and involve all the participants, including the Magistrate, being casually dressed and sitting around the bar table.</p>

Mental Health Court Liaison Service

Aims	Locations	Auspiced under/ staffed by	Criteria	Referral process	Description, duration and outcome of program	Role of Magistrate
<p>Provide specialist mental health advice to NSW Local Courts including psychiatric expertise and advice to magistrates when people with mental illness first appear in court.</p> <p>Assist the courts in identifying the mentally ill or disordered charged with minor offences and diverting them to treatment in lieu of incarceration.</p> <p>Enhance the linkage between community based mental health services, the courts and correctional based mental health services.</p>	<p>Various Local Courts around NSW</p>	<p>Local Courts. Mental Health Court Liaison workers are psychiatric nurses employed by Justice Health</p>	<p>Defendant must be appearing before the Local Court on matters capable of being dealt with summarily and must appear to have a mental health problem</p>	<p>Magistrate may make referral to Mental Health Court Liaison service if defendant appears to have a mental health problem; defendant or solicitor may also make referral</p>	<p>This is not a program as such, but a service that is provided in order to assist the court and the defendant. Mental Health Court Liaison nurse will do an assessment and prepare a brief report to the court; the nurse may also seek an assessment from a Justice Health psychiatrist, and may also make referrals to mental health services in custody or in the community.</p>	<p>Magistrate may make referral to court liaison service and may also take report into account when deciding how to deal with the matter.</p>

