Intellectual Disability Rights Service

Diversion of Alleged Offenders with an Intellectual Disability from the New South Wales Local Courts System: A Review of the Practical Operation of s32 of the *Mental Health (Criminal Procedure) Act 1990*

"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**

"… if judicial proceedings are instituted against [people with disabilities], the legal procedure applied shall take their physical and mental condition fully into account."

United Nations Declaration on the Rights of Disabled Persons

ACKNOWLEDGEMENTS

This report is substantially based on a paper written by Andrew Howell during an internship at the Intellectual Disability Rights Service in 2006. Linda Steele, Solicitor at the Service, took over the project in late 2006 and was responsible for making additions to the paper.

IDRS would like to thank Jim Simpson, Jane Sanders, Eileen Baldry and Peter McGhee for their valued contributions, as well as all of the people who participated in the consultations.

Intellectual Disability Rights Service

ABOUT THE 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. Our services include the provision of telephone legal advice and legal representation in select matters. We also engage in policy and law reform work and community legal education with a view to advancing the rights of people with an intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN') which supports people with intellectual disability when they come into contact with the criminal justice system.

CONTACT: Intellectual Disability Rights Service, Inc
Suite 2c
199 Regent Street
Redfern NSW 2016

info@idrs.org.au

Ph 02 9318 0144
Fax 02 9318 2887

© Intellectual Disability Rights Service, Inc.

TABLE OF CONTENTS

I INTRODUCTION **3**
II THE LEGISLATIVE FRAMEWORK **11**
III ELIGIBILITY FOR DIVERSION **14**
RECOMMENDATION 1 15
RECOMMENDATION 2 18
RECOMMENDATION 3 19
IV REFERRAL TO DIVERSION **20**
RECOMMENDATION 4 21
RECOMMENDATION 5 21
RECOMMENDATION 6 22
V PROCEDURE **23**
RECOMMENDATION 7 23
VI THE ROLE OF DADHC **25**
RECOMMENDATION 8 27
RECOMMENDATION 9 27
VII ENFORCEMENT OF SECTION 32 ORDERS **29**
RECOMMENDATION 10 30
VIII THE AWARENESS OF AND PARTICIPATION OF THE DEFENDANT IN THE COURT PROCESS **31**
RECOMMENDATION 11 35
IX THE ROLE OF LEGAL AID **36**
RECOMMENDATION 12 37
RECOMMENDATION 13 38
X ADDITIONAL ROLE OF POLICE **39**
RECOMMENDATION 14 40
RECOMMENDATION 15 41
RECOMMENDATION 16 41
XI SUPPORT PERSONS **42**
XII CONCLUSION **46**
APPENDIX ONE: COURT INTERVENTION AND DIVERSION PROGRAMS IN NSW **1**
REFERENCES **9**

© Intellectual Disability Rights Service, Inc.

I Introduction

People with intellectual disability are over-represented as defendants in the criminal justice system, a fact which is common knowledge to practitioners and academics alike. One study found that nearly one quarter (23.6%) of persons appearing before six Local Courts in NSW could be diagnosed with having an intellectual disability, with a further 14.1% in the borderline range of ability.[1] These figures have been shown to rise in regional areas.[2] The over-representation suggested by the available statistics was confirmed by the anecdotal evidence of key stakeholders.

Although there are various reasons for this over-representation, two particular reasons underpin the present paper. The first is that 'people with intellectual disabilities have not had the human services that they need to give them a fair chance of avoiding trouble with the law and imprisonment'.[3] Intellectual disability is characterised by deficits in adaptive living skills such that sometimes people with intellectual disability need services to assist them with such aspects of their lives as daily living, socialisation, and communication. When these services are not available, individuals might find other ways to cope which might include resorting to criminal activity, whether intentionally or unintentionally. People with intellectual disability might also have psychological issues or challenging behaviour such that behaviour intervention services are also important to prevent these manifesting in criminal behaviour. The second reason for the over-representation is that s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW), which provides scope for the diversion of persons with 'developmental disabilities' out of the criminal justice system and into services that will address their offending behaviour and their broader support needs, is highly problematic in numerous legal and practical respects.

---

[1] Susan Hayes, 'Prevalence of Intellectual Disability in Local Courts' (1997) 22(2) *Journal of Intellectual and Developmental Disability* 71. See also New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts*, Research Report No 4 (1993) at [4.1]. See generally Susan Hayes and D McIlwain, *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (1998), Susan Hayes and G Craddock, *Simply Criminal* (2nd ed, 1992) at 33-39, cf GP Jones and K Coombes, *The Prevalence of Intellectual Deficit among the Western Australian Prison Population* (1990) at 4.

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

[3] 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) 1.

 © Intellectual Disability Rights Service, Inc.

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*.[4] The Report made a number of recommendations regarding practice, policy and legislation in relation to the treatment of people with an intellectual disability in the criminal justice system,[5] including specifically in relation to s 32.[6] Unfortunately, the response to this Report has been disappointing and highly anti-climatic with few of the recommendations being implemented.

In 1998, the New South Wales Government published its *Disability Policy Framework*.[7] This concerned the broad issue of the provision of human services to people with intellectual disabilities. One of the priority areas identified in the Report 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'.[8]

In July 2001, the NSW Council for Intellectual Disability and IDRS published *The Framework Report.*[9] The project sought to dovetail with the *Disability Policy Framework*[10] and to provide a practical way forward from the issues identified in the NSW Law Reform Commission's Report 80. The Framework Report recognised the importance of specialised services and professional intervention and support to address, and if possible prevent, the offending behaviour of people with intellectual disabilities. The Report focussed on ensuring appropriate community services in New South Wales for offenders with intellectual disabilities and those at risk of offending.

---

[4] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996).
[5] See 'List of Recommendations': ibid, xviii-xxxviii.
[6] Ibid, 197-207.
[7] NSW Government, *Disability Policy Framework* (1998).
[8] NSW Government, *Disability Policy Framework* (1998) 14-15.
[9] Jenny Green, Meredith Martin and Jim Simpson, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending* (2001).
[10] Jenny Green, Meredith Martin and Jim Simpson, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending* (2001) v.

© Intellectual Disability Rights Service, Inc.

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*.[11] These include the following:

- 'In 2002, the Department of Ageing, Disability and Home Care (DADHC) issued policies that made offenders and those at risk of offending a top priority for service provision. DADHC enhanced its Behaviour Intervention Service (BIS) including specialist positions in working with offenders, and provided training around the State for many disability service workers. The DADHC specialist workers established cooperative relationships with the Departments of Corrective Services and Juvenile Justice that have assisted service provision to some individuals.'[12]
- 'A specialist Criminal Justice Program [has been established]. In the 2005 NSW budget, DADHC received a recurrent funding allocation for accommodation and related support for offenders with intellectual disabilities. This started with $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, that is, accommodation/specialist support for 200 people.'[13]
- 'The Criminal Justice Program includes Casework and Clinical Teams that will both 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.'[14]
- 'DADHC has also funded the Criminal Justice Support Network (CJSN) to provide support for people with intellectual disabilities in court and police interviews. This unit of the Intellectual Disability Rights Service provides a statewide consultancy service and a direct service in Sydney, the Illawarra and Hunter regions. The CJSN has a rights based approach and has

[11] 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).
[12] 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) 3.
[13] 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) 3.
[14] 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) 3.

© Intellectual Disability Rights Service, Inc.

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.'[15]

Although there have been some positive developments in the past few years, the NSW Local Court system has largely failed to adequately address the needs of alleged offenders with an intellectual disability. In the court process itself, alleged offenders are often processed without regard to treatment or support needs, both of which underlie their criminal behaviour.[16] Moreover, the judiciary and legal representatives are not necessarily well-versed in intellectual disability and the therapeutic purpose of s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act'). Further, necessary support services are not always readily available to the alleged 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.'[17]

This paper consequently examines what more can be done for alleged offenders with an intellectual disability in the NSW Local Courts system through a focus on the existing dispositional options under s 32 and the relationship between s 32 and access to specialist support and services. This paper makes recommendations to reform the various shortcomings identified.

This project involved academic and stakeholder research.[18] All stakeholders have specialised knowledge about existing frameworks, both their impediments and their successes. Research involved informal correspondence, telephone interviews, face-

---

[15] 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) 4.

[16] Alexander Zammut, *Disability and the Courts: An analysis of Problem Solving Courts and Existing Dispositional Options: The Search for Improved Methods of Processing Defendants with a Mental Impairment Through the Criminal Courts* (2004) The Office of the Public Advocate (Vic) <http://www.publicadvocate.vic.gov.au/CA256A8D001AC7A1/Lookup/OPASystemicAdvocacy/$file/Disability%20and%20the%20Courts.pdf> at 6 December 2006.

[17] 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) 4.

[18] Stakeholders included Legal Aid, the Intellectual Disability Rights Service, Legal Practitioners, the Department of Ageing, Disability and Home Care (including the Behaviour Intervention Service), Local Court Staff, the Community and Court Liaison Service, NSW Police, Psychologists and other Community Advocates with an interest in the area.

 © Intellectual Disability Rights Service, Inc.

to-face interviews and small focus groups. An open dialogue with stakeholders confirmed a number of primary deficiencies in the current system including a lack of inter-agency co-operation, the adversarial nature of the courtroom setting, procedural delay, unstructured discretion and an unsound referral process.

It is intended that the recommendations outlined in this paper will prompt greater discussion of the issues facing offenders with an intellectual disability in the NSW Local Court system and provide the impetus for the reform of the present system. Although these recommendations can, on an individual basis, go some way to improving the situation of alleged offenders with an intellectual disability in the Local Court system, IDRS is of the view that something more holistic and systemic than piecemeal reform must be implemented. It is argued that improvements should be made through a multi-departmental approach, rather than attributing responsibility to a single department. Thus, this report concludes by offering 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, specialist dealing with alleged offenders with an intellectual disability from the first point of contact with the Local Court until disposition under s 32.

One of the main features of the recommended reformed system is a special list for the initial mention of all matters concerning defendants with intellectual disability. This special list would operate in an informal, conference-based style and serve as a point at which to identify whether the matter should be adjourned in order to put in place appropriate services prior to entering a plea or making a s 32 application. An intellectual disability court liaison officer would be attached to each court and would serve to identify individuals with intellectual disability and place them on the special list, co-ordinate treatment plans, and facilitate access to treatment, support and case management services. This proposed model would be similar to MERIT insofar as it is pre-plea, is attached to services, and enables access to facilities and clinicians. This would enable alleged offenders to access services in order to address the possible underlying causes of the defendants' 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. After the period during which the matter is

© Intellectual Disability Rights Service, Inc.

adjourned, the matter could be further mentioned and either set down for the hearing of the s 32 application or have a plea entered. The s 32 application and any guilty pleas could be heard in the same conference style court, whereas matters where pleas of not guilty have been entered would be heard in the standard Local Court as a contested hearing. The intellectual disability court liaison officer and the conference system will not work if it is not accompanied by adequate supports such as the provision of DADHC support services, the presence of court support workers at court and access to consistent and well-trained legal representation.

It should be noted at the outset that whilst this report focuses specifically on issues surrounding s 32, it is intended that the findings and recommendations in this report could inform the reform of the criminal justice system vis-à-vis alleged offenders with intellectual disabilities more broadly.

Given that this report argues that the over-representation of alleged offenders with an intellectual disability in the criminal justice system should be seen as an opportunity to ensure access to treatment and support programs designed to effect behavioural change and to recognise the rights of alleged offenders with an intellectual disability, the analysis and recommendations made in this paper are broadly informed by two perspectives – therapeutic jurisprudence and human rights.

Therapeutic jurisprudence[19] is 'the study of the role of law as a therapeutic agent'.[20] It 'focuses on the law's impact on emotional life and on psychological well-being'[21] 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'.[22] The converse of the therapeutic potentials of the law is that the law also has the capacity to have anti-therapeutic effects.[23] 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

---

[19] See generally *International Network on Therapeutic Jurisprudence* <http://www.law.arizona.edu/depts/upr-intj/> at 6 December 2006.

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

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

[22] David Wezler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125, 125.

[23] David Wezler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125, 128-129.

 © Intellectual Disability Rights Service, Inc.

'develop skills that will enable them to act differently in future situations where they may be at risk of committing a crime'.[24]

Whilst therapeutic jurisprudence offers positive ways to address the issues faced by offenders with an intellectual disability in the criminal justice system, it is important to acknowledge the concerns raised by some commentators that therapeutic jurisprudence has the potential to have a 'net widening' effect of drawing people with intellectual disability into and maintaining them in the criminal justice system.[25] 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. Courts are also reactive insofar as they fail to include preventative and early intervention measures. Although these criticisms hold much weight and must be considered in reforming the current system, the reality is that individuals with intellectual disability are being charged and are coming into contact with the criminal justice system. This report is thus of the view that there is a need for a continuum between early intervention services, human services and the criminal justice system. Reform of s 32 and the court system is just part of the solution, but it is the part which occupies the focus of this report.

A human rights perspective involves recognition of the fundamental rights that alleged offenders with an intellectual disability have because they are human beings,[26] as well as those rights that they enjoy specifically by dint of the particular disadvantage that they experience because of their intellectual disability.[27] Of particular relevance is the *United Nations Declaration on the Rights of Disabled Persons* which states that 'if judicial proceedings are instituted against [people with disabilities], the legal procedure applied shall take their physical and mental condition

---

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

[25] See, eg, Alina Perez, Steven Leifman & Ana Estrada, 'Reversing the Criminalization of Mental Illness' (2003) 49 *Crime & Delinquency* 62.

[26] 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).

[27] See, eg, United Nations Declaration on the Rights of Disabled Persons, 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.

© Intellectual Disability Rights Service, Inc.

fully into account'.[28] 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 hence international human rights are still highly relevant. On a domestic level, the human rights approach to disability is most evident in the legislation concerning two areas – discrimination[29] and disability services provision.[30] 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 service provision, the *Disability Services Act 1993* (NSW) provides a list of human rights principles that must be applied by services and programs of services[31] including that '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'. The rights recognised in the domestic legislation are particularly relevant to the actions of service providers in providing treatment plans and other support services for alleged offenders with an intellectual disability.

---

[28] 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. The Convention on the Rights of Persons with Disabilities was opened for signature on 13 March 2007, but it has not yet entered into force. In particular, 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.

Australia signed the Convention on the Rights of Persons with Disabilities on 30 March 2007, but has not yet ratified it.

[29] *Disability Discrimination Act* 1992 (Cth).

[30] *Disability Services Act 1993* (NSW); *Disability Services Act 1986* (Cth).

[31] *Disability Services Act 1993* (NSW) Sch 1.

 © Intellectual Disability Rights Service, Inc.

II THE LEGISLATIVE FRAMEWORK

People with an 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 an intellectual disability. Additionally, the criminal justice legislation applicable to all offenders is supported by legislation designed specifically for offenders with an intellectual disability. This is principally found in the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCP Act'),[32] 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).

In the context of alleged offenders whose charges are being processed through the NSW Local Court system, s 32 of the MHCP Act 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

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

  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.

[32] 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.'

 © Intellectual Disability Rights Service, Inc.

(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.

The section provides for the diversion of alleged offenders from the criminal justice system before a formal plea is entered. The Minister of Justice described the provision in his second reading speech of the Mental Health (Criminal Procedure) Amendment Bill 2005 as follows:

© Intellectual Disability Rights Service, Inc.

> 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.[33]

Although the diversionary potential of s 32 is clear from its terms, there are numerous problems in practice which are limiting the effectiveness of s 32, to which this paper now turns.

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

 © Intellectual Disability Rights Service, Inc.

III ELIGIBILITY FOR DIVERSION

Section 32 is available to, inter alia, a 'developmentally disabled' defendant who is appearing before a Magistrate.[34] 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'.[35] Under the section the Magistrate may:

- Adjourn the proceedings.[36]
- Grant bail in accordance with the *Bail Act 1978*.[37]
- Dismiss the charges and discharge the defendant into the care of a responsible person either on condition that the person attend a specified place for assessment and/or treatment, or unconditionally.[38]
- Make any other order deemed appropriate.[39]

The term 'developmentally disabled' can be equated with current definitions of intellectual disability in NSW.[40] During the process of stakeholder interviews, it was consistently remarked that the use of the term 'developmentally disabled' rather than 'person with an intellectual disability' increased unnecessary confusion about eligibility.[41]

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

---

[34] *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(1)(a)(i).
[35] *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(1)(b)
[36] *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(2)(a)
[37] *Mental Health (Criminal Procedure) Act 1990* (NSW), s 32(2)(b)
[38] *Mental Health (Criminal Procedure) Act 1990* (NSW), ss 32(3)(a)-(c)
[39] *Mental Health (Criminal Procedure) Act 1990* (NSW), s32(2)(c)
[40] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) at [5.77]. See also Mark Ierace, *Intellectual Disability: A Manual for Criminal Lawyers* (1989).
[41] Recommendation 1 in New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) 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

© Intellectual Disability Rights Service, Inc.

a significantly below average intellectual functioning existing concurrently with two or more deficits in adaptive behaviour.[42]

This definition is broad enough to cover acquired brain injuries ('ABIs') and dementia, both of which are not necessarily acquired before 18 years of age. Thus, IDRS prefers the term 'intellectual disability' (and the NSW Law Reform Commission's definition of this term) over the term 'developmental disability'. At the same time, however, it is important to recognise that 'developmental disability' includes such disabilities as cerebral palsy which do not necessarily have an intellectual disability element. Hence, it is preferable to refer to intellectual disability and developmental disability.

It is also important that the term 'disability' be used instead of 'disabled', because the latter effectively constructs the whole person's identity on the basis of their disability, rather than the former which sees disability as only one part of a person's identity.[43] This change in terminology contributes to a more positive perception of people with disabilities that avoids negative stereotypes.

Recommendation 1

The term 'developmentally disabled' throughout the Mental Health (Criminal Procedure) Act 1990 *(NSW) be changed to 'person with a developmental disability' and accompanied by 'person with an intellectual disability' to reflect the NSW Law Reform Commission's recommendation to that effect*

Incidentally, given the distinctions between mental illness and intellectual disability, it may be that the name of the MHCP Act should be changed to reflect its equal application to persons with intellectual disabilities which its present title does not disclose. Similarly, the long title of the MHCP Act might also be changed as it refers only to mental illness: 'An Act with respect to criminal proceedings involving persons affected by mental illness and other mental conditions'.

Diversion under s 32 is also available to alleged offenders with a mental illness, the section applying equally to mental illness and developmental disability.

[42] New South Wales Law Reform Commission, *Report 80: People With an Intellectual Disability and the Criminal Justice System* (1996) 64.

[43] 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'.

© Intellectual Disability Rights Service, Inc.

In fact, it was noted during the consultations with stakeholders that the majority of s 32 applications before the Local Court were cases involving mental illness or dual diagnosis.[44] A number of factors were identified as playing a role in the lack of s 32 applications for 'developmentally disabled' individuals:

- Confusion regarding the distinction between mental illness and developmental disability.
- The success of applications for offenders with mental illness as opposed to developmental disability.
- The ease of obtaining treatment plans from mental health service providers as opposed to disability service providers.
- High recidivism rates in people with an intellectual disability as opposed to people with a mental illness. Recidivism can often be a bar to successful future s 32 applications.
- Magistrates and solicitors are more familiar with the application of s 32 to individuals with mental health issues rather than with intellectual disability.

Confusion between mental illness and intellectual disability was widely acknowledged by stakeholders. Mental illness and intellectual disability are completely different disabilities. A clear point of distinction between the two is that an intellectual disability is not an illness, is not episodic and is not usually treated by medication. This lack of understanding is even inherent in the comments of the 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

[44] Whilst there are definitional arguments, '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.

 © Intellectual Disability Rights Service, Inc.

> though they might have recovered by the time of appearing before a magistrate on criminal charges.[45]

the Minister may be confusing intellectual disability with mental illness, as mental illness may be episodic and might be recovered from as a result of treatment,[46] because, as discussed above, a person with an intellectual disability does not 'recover'. The confusion may be the result of insufficient education regarding the needs of people with an intellectual disability, but also seems to result from a diversion process that combines mental illness and intellectual disability. A recent evaluation of the *Magistrates Court Diversion Program* of South Australia, which also places defendants with an intellectual disability and defendants with a mental illness under the same diversionary scheme,[47] was found to be less effective in relation to offenders with an intellectual disability:

> It was noted that, to be effective, program plans for [people with an intellectual disability] had to be individually tailored, with intervention aimed at linking the behaviour to consequences. This was considered difficult to achieve through the MCDP…[48]

After determining whether a person has a 'developmental disability', there are no statutory guidelines as to what a Magistrate must take into account when considering whether to exercise her or his discretion. The NSW Law Reform Commission

[45] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996).

[46] 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).
>
> 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.'

[47] Grace Skrzypiec, Joy Wundersitz and Helen McRostie *Magistrates Court Diversion Program: An Analysis of Post-Program Offending* (2004) 15. The program is available to persons 'suspected of mental impairment'.

[48] Grace Skrzypiec, Joy Wundersitz and Helen McRostie *Magistrates Court Diversion Program: An Analysis of Post-Program Offending* (2004) at 116.

© Intellectual Disability Rights Service, Inc.

suggests that relevant considerations can be drawn from companion provisions within the Act, in particular ss 10(3) and 10(4):[49]

- The trivial nature of the charge or offence;
- The nature of the person's condition;
- The periods of the person's detention or custody in respect of the offence; or
- Any other matter which the magistrate thinks proper to consider.

A central problem identified by the majority of stakeholders was the variability of outcome depending on the interpretation of the section by different Magistrates. Whilst a degree of variability is to be expected in any exercise of discretion, many practitioners felt as though the section was at times misconceived. In practice, applications have been rejected on the basis that to grant the application would be 'letting an offender off' or would represent a failure to make the offender take responsibility for his or her actions.[50] Many practitioners altered their approach to representing a client after becoming aware of particular Magistrates who would not consider s 32 applications, including by advising clients not to pursue a s 32 application or seeking continued adjournments. Such tactics should not be necessary in order for a person with an intellectual disability to make a successful s 32 application. Although there is some case law on the subject,[51] there are no legislative provisions in the MHCP 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.[52]

Recommendation 2

[49] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) [5.79].

[50] It should be noted that at the time of a section 32 application, usually no plea has been entered. In no way does an application amount to an admission of guilt, as may be inferred from these comments.

[51] *DPP v Sami El Mawas* [2006] NSWCA 154 (19 June 2006). 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); *Sami El Mawas v Director of Public Prosecutions* [2005] NSWSC 243 (15 March 2005); *Mantell v Molyneux* [2006] NSWSC 955 (18 September 2006).

[52] Cf M Spiers, *Commencement of Reforms to Section 32 Mental Health (Criminal Procedure) Act 1990* (2004) 2.

 © Intellectual Disability Rights Service, Inc.

Guidance be provided as to the exercise of the discretion in s 32 either by inserting a section into the Mental Health (Criminal Procedure) Act 1990 (NSW) *itself or by making a Regulation under the Act.*

Recommendation 3

Magistrates be provided with training in relation to intellectual disability and the differences between intellectual disability and mental health.

© Intellectual Disability Rights Service, Inc.

IV REFERRAL TO DIVERSION

Many interstate initiatives involve a process of referral of alleged offenders with intellectual disabilities to diversion which is not the sole responsibility of the solicitor. For example, the South Australian 'Magistrates Court Diversion Program' allows a range of persons involved in the criminal justice process to request that the offender be referred to the co-ordinator of the program.[53] However, in NSW there is no clear answer as to whose responsibility it is to identify that an alleged offender has an intellectual disability and to assist that individual in accessing services. It appears that, arguably, the only stakeholder, if any, under a legal obligation to identify an offender with an intellectual disability is their legal representative.[54] 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.

Moreover, many stakeholders experienced difficulty in identifying whether a person has an intellectual disability. It was noted that many offenders with an intellectual disability do not wish to disclose that they have a disability. A number of court staff and practitioners felt it was inappropriate to ask an alleged offender whether they have an intellectual disability. There are screening tests available that assist in identifying a person with an intellectual disability.[55] However, these tests are not 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.[56] The Victorian 'Court Integrated Services Program' ('CISP') employs a primary screening mechanism which contemplates 'risk and need assessment' after referral from a wide range of referral sources.[57] The CISP team operates out of the Magistrates Court as an initiative of the Department of Justice and provides comprehensive needs assessment based on

---

[53] Grace Skrzypiec, Joy Wundersitz and Helen McRostie *Magistrates Court Diversion Program: An Analysis of Post-Program Offending* (2004) 15.

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

[55] Susan Hayes, *Hayes Ability Screening Index (HASI) Manual* (2000).

[56] 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) at 5.

[57] Courts and Programs Development Unit of the Department of Justice (Victoria), *Service Delivery Model for the Court Integrated Services Program* (2005) 7.

© Intellectual Disability Rights Service, Inc.

the likelihood of re-offending. The NSW Statewide Community and Court Liaison Service is a similar initiative of Justice Health in response to the NSW Forensic Mental Health Strategy.[58] One of the roles of the service is to provide psychiatric assessment of any client referred to them by 'police, corrective services, legal aid services, and magistrates'.[59] However, there is no corresponding program available to alleged offenders with an intellectual disability in NSW.[60] Although Justice Health do informally screen for intellectual disability, a key stakeholder from Justice Health advised that there is then difficulty in linking up defendants identified as having an 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.

The Department of Ageing, Disability and Home Care has committed to trialling an intellectual disability court liaison officer at the Downing Centre, but this is yet to come to fruition. The absence of an intellectual disability court liaison officer is problematic because it means that alleged offenders are not being identified and diverted in the same way and to the same degree that offenders with mental illness are. Therefore, the introduction of intellectual disability court liaison officers at all Local Courts is essential.

Recommendation 4

A multi-focal system of referral into diversion be developed, as established in many interstate programs, including the introduction of Intellectual Disability Court Liaison Officers at all Local Courts. The Court Liaison Officer will be responsible for screening of alleged offenders, developing treatment plans, accessing service networks and referring individuals onto appropriate services. The Intellectual Disability Court Liaison Officers should be qualified psychologists.

Recommendation 5

[58] NSW Department of Health, *Draft NSW Forensic Mental Health Strategy* (2002).

[59] 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.

[60] 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.

 © Intellectual Disability Rights Service, Inc.

Magistrates, legal representatives, police, prosecuting bodies, the family of the alleged offender, support workers, court staff, the offender themselves or any other interested persons should be able to seek an adjournment to refer an alleged offender to the Intellectual Disability Court Liaison Officer.

Moreover, education of all professionals involved in the criminal justice process is also required. As recommended by Susan Hayes, 'education and training must be ongoing, and be tied to important professional development and promotional aspects, so that these issues are perceived as important'.[61]

Recommendation 6

In order for referral to be effective, all professionals involved in every aspect of the criminal justice process must have sufficient education surrounding intellectual disability and the identifying characteristics of people with intellectual disability.

[61] 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 Rights Service, Inc.

V PROCEDURE

In practice, most successful s 32 applications are accompanied by a treatment plan and the report of a psychologist, although such requirements are not formalised in legislation or policy.[62] These function to demonstrate developmental disability (the first arm of s 32) and show the steps taken to address the alleged offender's behaviour and ensure that they will not re-offend in order to demonstrate that it is more appropriate to deal with the defendant under s 32 otherwise than in accordance with law (the second arm of s 32).

Every stakeholder identified the delay in preparation of treatment plans as a setback to the efficient processing of s 32 applications. Often s 32 applications are punctuated by extended adjournments, which add to the frustration of practitioners, clients and Magistrates. In fact, many offenders decided against making an application under s 32 because of the time it would take. DADHC usually provides these treatment plans, but they can also be provided by other support services. The person must either go through the DADHC intake process, or try to find another organisation willing to provide a treatment plan. This results in delay and costs. If an alleged offender does not have access to community services, either through DADHC or otherwise, a treatment plan becomes difficult to obtain. In Western Australia, by contrast, a special position was created to liaise, facilitate and co-ordinate treatment programs under the 'Intellectual Disability Diversion Program'.[63] Although the program is in its infancy and limited evaluative data is available, anecdotal evidence illustrates that processing times are greatly reduced when compared with the current system in NSW.

Recommendation 7

Intellectual Disability Court Liaison Officers should have the role of the preparation of treatment plans for cases where no support service is available or where preparation may result in undue delay.

[62] Cf M Spiers, *Commencement of Reforms to Section 32 Mental Health (Criminal Procedure) Act 1990* (2004) 2.

[63] Anthea Mellor, Emma White & Rhonda Zappelli, *Evaluation of the IDDP: A Research Report* (2004) 24.

© Intellectual Disability Rights Service, Inc.

A treatment plan for a s 32 application often results in disclosure of information that would not normally be disclosed or admissions that may not normally be conceded in fresh proceedings. The Magistrate then finds himself or herself 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. Whilst the common law obligation on Magistrates to disqualify themselves in the event of bias remains, in practice it is not exercised. An entrenched right to request a new Magistrate after a rejected s 32 application is necessary to protect the guarantee of procedural fairness. '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 s 32 application.

 © Intellectual Disability Rights Service, Inc.

VI THE ROLE OF DADHC

DADHC plays a major role in supporting offenders with an intellectual disability in the criminal justice system. There are currently no official guidelines for preparing treatment plans for s 32 applications, unlike equivalent New South Wales mental health services.[64] Whilst protocols may improve the efficiency of processing, such efficiency must be weighed against the flexibility of management necessary for the individual needs of people with an intellectual disability.[65]

In practice, standard DADHC treatment plans include sections headed 'drug/alcohol problems' and 'recommendations'. This information is not always relevant to a s 32 application, and might also be harmful to the defence of an alleged offender if the application is rejected. The term 'treatment plan' is perhaps inappropriate in terms of application to an offender with an intellectual disability, as it implies improvement oriented goals rather than behaviour management and support goals. As such, making recommendations to the court is not only outside the qualifications of a primary support worker, but is inappropriate. 'Treatment plans' are used as evidence for a s 32 application; the report provides a foundation for services, support and management for the defendant. In this sense it can be distinguished from reports that are ordered by the Court, such as pre-sentence reports. Despite this distinction, many practitioners noted that DADHC staff wrote treatment plans directly to the Court; some were even addressed to a particular Magistrate.

A lack of education among primary community support teams regarding the criminal justice system was identified as a hindrance to the efficiency of the treatment plan process. Support workers often did not know what was appropriate to include or omit from a report, and what would be most advantageous to the client. Moreover, requests to adjust a plan by a representative of the client were often met with reluctance. Delayed court reports or treatment plans were often said to be a result of poor administration (a Manager or Behaviour Support worker must approve all reports) and also high turnover of support worker staff. Under current departmental

[64] Cf M Spiers, *Commencement of Reforms to Section 32 Mental Health (Criminal Procedure) Act 1990* (2004) 2. Although the CCLS does have a guideline for preparing treatment plans for people with a mental illness, there has been no liaison with DADHC to create a uniform procedure for preparing treatment plans for people with a 'developmental disability'.

[65] See generally Astrid Birgden, 'Therapeutic Jurisprudence and "Good Lives": A Rehabilitation Framework for Corrections' (2002) 37(3) *Australian Psychologist* 180.

© Intellectual Disability Rights Service, Inc.

procedure, primary support workers face a difficult challenge in providing an efficient yet accurate treatment plan.

Providing an inadequate or inaccurate treatment plan can result in serious consequences to an offender with an intellectual disability including potential incarceration if the treatment plan is a condition of a s 32 discharge and is breached or if the treatment 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 an intellectual disability is a priority, in practice many stakeholders think service provision is ineffective. Nevertheless, delays were not always attributable to the Department. An inability to find suitable supported accommodation, employment services, as well as a general paucity of services, resulted in further delays to providing treatment plans.[66] All of these factors can lengthen periods of detention in custody.

The Statewide Behaviour Intervention Service ('SBIS'), an initiative of DADHC, provides consultancy, training and other services to staff in DADHC services that work directly with alleged offenders with an intellectual disability. SBIS operates in a tertiary role, with experienced staff providing education aimed at enabling primary support workers to deal appropriately with offenders with an intellectual disability. Whilst unknown to many practitioners and court staff, those who knew of the service suggested there had been no distinct improvement since the introduction of SBIS in the treatment of offenders with an intellectual disability by primary support workers operating from the regional offices of DADHC. Prior to recent organisational and program changes within DADHC during 2007, SBIS included forensic casework specialists who could provide direct services to defendants, including preparing treatment plans. In contrast to the unfavourable feedback in relation to the capacity of DADHC regional 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 an

[66] See particularly Jenny Green, Meredith Martin and Jim Simpson, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending* (2001).

 © Intellectual Disability Rights Service, Inc.

intellectual disability.[67] Concern has been expressed by some stakeholders about the removal of SBIS's forensic role in light of the apparent underskilled nature of some regional offices.

Recommendation 8

Appointment of forensic casework specialists at each DADHC regional office.

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

1. Peter to insert the criteria
2.
3.

The age requirement excludes many individuals with acquired brain injuries which were acquired over the age of 18 years, whereas the IQ requirement can be applied quite strictly with a failure to accept through the intake procedure individuals with IQs of 70-75 (ie 'borderline' intellectual disability). The result is that many people with an intellectual disability are excluded from receiving DADHC services.

Recommendation 9

The age criterion be removed from the DADHC eligibility intake criteria. Clarification of the intake criteria so that individuals with borderline intellectual disability are not rendered ineligible.

There are also problems in accessing generalist services such as drug and alcohol services (eg rehabilitation, counselling and participation in MERIT) because some of these service providers purportedly do not have the capacity to work with people with intellectual disabilities.

One way to remedy the problems for alleged offenders who are not eligible for DADHC services would be for Intellectual Disability Court Liaison Officer's

[67] See generally The Department of Ageing, Disability and Home Care, *Policy Framework: Providing Behaviour Support and Intervention to People with an Intellectual Disability* (2006) < http://www.dadhc.nsw.gov.au/NR/rdonlyres/C21BABCF-6001-400F-9D38-E4042FAD6281/2045/PolicyFrameworkProvidingbehavioursupportandinterve.pdf> at 6 December 2006.

© Intellectual Disability Rights Service, Inc.

recommended by this report to be employed by the Attorney-General's Department rather than by DADHC. The Court Liaison Officer could be a conduit to other services, not only DADHC but also generic services such as anger management and drug and alcohol counselling. Access to the Intellectual Disability Court Liaison Officer's 'conduit' functions would be by reference to a relaxed eligibility criteria which is broader than DADHC's and does not require formal psychological assessment.

 © Intellectual Disability Rights Service, Inc.

VII ENFORCEMENT OF SECTION 32 ORDERS

Before the commencement of the *Crimes Legislation Amendment Act 2002* (NSW), an order under s 32 could not be enforced. However, under the MHCP Act in its present state, a person dealt with under s 32 may be brought back to the court if they breach the order within a period of six months and the charges are dealt with *de novo*.[68] Under s 32A of the MHCP 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) of the MHCP Act.

There is considerable unease with the practice of placing the offender under the care of a 'responsible person'.[69] This provision seems to further confuse the purpose of diversion under the Act. Whilst appointing a single 'responsible person' may be appropriate for an offender with a mental illness, whose offending behaviour may be improved through medication or treatment, an offender with an intellectual disability requires complex needs assessment rather than the simple administration of medical based treatment.[70] Nevertheless, many Magistrates have expressed the need for accountability in the administration of a treatment plan.[71] In practice, where a treatment plan has been provided by DADHC, primary support workers will often appoint 'the Department' as the 'responsible person'. Many practitioners and support workers expressed concern regarding the lack of jurisdiction of the Court to bind third parties. Furthermore, such a procedure is not available to a person who is not in contact with any support services willing to provide a treatment plan.

In practice, even where a 'responsible person' is nominated, failure to comply with a treatment plan is rarely reported to the Court. It is questionable whether the Court is the most appropriate body to assess the failure to comply in any case. Failure to report non-compliance is often due to the nature of a treatment plan. These plans are often broad in nature and do not always specifically relate to the offending behaviour. Despite this, there is no prioritisation of components of the treatment

---

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

[69] *Mental Health (Criminal Procedure) Act 1990* (NSW), s32 (3)(a)

[70] Astrid Birgden, 'Therapeutic Jurisprudence and "Good Lives": A Rehabilitation Framework for Corrections' (2002) 37(3) *Australian Psychologist* 180.

[71] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996).

 © Intellectual Disability Rights Service, Inc.

plan, even though compliance with certain aspects of the program may be more important than others. The consequence of non-compliance with any aspect of the treatment plan appears to be the same. There is no effective post-program follow up prescribed in legislation or policy.

A difficult balancing process must be initiated between the flexibility of the treatment plan required and the need for accountability if a person fails to comply with a treatment plan. All interstate initiatives previously mentioned have some form of post-diversion assessment. For example, the CISP Team in Victoria has an appointed case manager to monitor progress depending on the supervisory needs of the client.[72] There is an ongoing process of judicial case review that can be initiated by the case manager or the client, to alter the plan based on the on-going needs of the client. Furthermore, the CISP Team provides exit planning for transition out of the program. Arguably it is against the interests of alleged offenders with an intellectual disability to place stringent reporting guidelines and follow-up procedures on support workers because this information, particularly any related to their failure to complete a treatment plan, might then be used against them in any future s 32 or bail applications. It is thus recommended that instead of a monitoring-focussed strategy, that a support-focussed post-diversion strategy be implemented. This would concentrate on the periodical assessment both of the diverted person's support needs, particularly their behaviour management and community integration needs which are particularly relevant to the long-term prevention of offending, and of the support service providers' performance in providing those services. A similar system of follow-up support is included in the New South Wales Youth Drug and Alcohol Court.

Recommendation 10

A post-diversion strategy be implemented for the period after the end of the s 32 conditional period which provides periodical assessment of the person's support needs and monitors the performance of service providers. This will not be judicially based nor will it be punitive, but rather ensure effective transition from the intensive case management provided during the s 32 period.

[72] Courts and Programs Development Unit of the Department of Justice (Victoria), *Service Delivery Model for the Court Integrated Services Program* (2005) 12-13.

© Intellectual Disability Rights Service, Inc.

VIII The Awareness of and Participation of the Defendant in the Court Process

The current s 32 diversion process operates within the bounds of the existing Local Court structure. The adversarial nature of the Local Court can be daunting to people with an intellectual disability. Whilst many Magistrates make adjustments in their method of communication for defendants with an intellectual disability, many legal practitioners felt that their clients still had little understanding of what was happening to them. Indeed, many practitioners felt that the process was too complex for their client to understand and did not feel obliged to explain it to them in detail. Such difficulties have been noted in other jurisdictions. Difficulties in communication were seen as an impediment to the success of the *Magistrates Court Diversion Program* in South Australia. It was also noted that these difficulties may be overcome by innovative approaches to communication, for example by:

> [r]educe[d] emphasis on verbal communication in the court – find other ways to provide information clients e.g. provide calendar with hearing dates and appointments marked [and] [u]se of visuals to link offending to consequences.[73]

Another way to maximise the awareness of the defendant of the charges brought against him or her, of the court process and of the need to modify their behaviour in future (if found guilty) is through a conference-style court. Conferencing and inquisitorial 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 very valuable diversion mechanism for young offenders. For present purposes, these 'court' models are an appropriate model for alleged offenders with an intellectual disability because they are informal, inquisitorial, and examine the offending behaviour within a broader social and health 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. It can provide a process which is constructively meaningful to alleged offenders with an intellectual disability.

---

[73] Grace Skrzypiec, Joy Wundersitz and Helen McRostie *Magistrates Court Diversion Program: An Analysis of Post-Program Offending* (2004) 137.

 © Intellectual Disability Rights Service, Inc.

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. After the period during which the matter is adjourned, the matter could be further mentioned and either set down for the hearing of the s 32 application or have a plea entered. The s 32 application and any guilty pleas could be heard in the same conference style court, whereas matters where pleas of not guilty have been entered would be heard in the standard local court for a contested hearing.

Case Study: Peter

"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 enable 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.

Conference outcomes:

- 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.

Case Study: Glenda

© Intellectual Disability Rights Service, Inc.

"Glenda" was a 16 year old Aboriginal young person with an 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.

Outcome:

- 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.

Outcome:

- 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.

Case Study: John

John was a young man with an intellectual disability who was charged with assault and malicious damage.

John had had an acrimonious relationship with another young man for some time and he had been getting phone calls and text messages from this man threatening both

 © Intellectual Disability Rights Service, Inc.

him and his family. He had reported some of this harassment to the police but no follow up had occurred and he felt the police did not want to respond to his complaint because it created too much paperwork.

On the night of the offence John had received some abusive calls and by chance met this other man at the local McDonalds. John hit him and damaged the car he was driving.

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.

His case was referred to the new adult conferencing pilot by the magistrate at Liverpool court. At the conference John was able to give his side of the story and he felt listened to. The police officer said to him that he did not realise that there was another side to the story.

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

Two weeks after the conference the magistrate accepted the plan and gave John a section 10 bond. John met with the conferencing coordinator afterwards who sat down with him and his support person and went through the plan and discussed how John was going to comply. She suggested that they go through the plan slowly and asked John to contact a person about an anger management course. She would contact TAFE and an organisation regarding a work ready assessment. She suggested that John meet with her every 2 weeks to check his progress to ensure compliance.

In this way 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 some more meaningful activities.

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 DADHC support services, the

© Intellectual Disability Rights Service, Inc.

presence of support persons at the conference and access to consistent and well-trained legal representation. 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 an intellectual disability. Incidentally, in relation to the present trialling of adult conferencing, if this is developed into a statewide scheme, it must pay particular regard to what is needed to make the process particularly accessible to people with intellectual disability and incorporate the use of support persons.

Recommendation 11

The introduction of a conference based model for the hearing of s 32 applications and for sentencing.

© Intellectual Disability Rights Service, Inc.

IX The Role of Legal Aid

Due to the socio-economic disadvantage of persons with intellectual disability, many clients with an intellectual disability are represented by Legal Aid solicitors. Although the legal representation that Legal Aid provides is central to ensuring access to justice for these alleged offenders, there are numerous issues in relation to Legal Aid which were identified as unfavourably impacting on the s 32 process.

Legal Aid solicitors might be unfamiliar with representing and communicating with persons with an intellectual disability. They might see them as being 'too hard'. Legal Aid solicitors might also not even be aware that a client has an intellectual disability and hence fail to make a s 32 application. Alternatively, the Legal Aid solicitor 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 services.

Time limitations, both in relation to client interviewing and case preparation, were recognised as a hindrance to representing the client and receiving adequate instructions. These limitations were often due to high caseloads and the strictness of Legal Aid funding. Current fee scales for interviews are fixed and provide no additional funding for clients with an intellectual disability.[74] Similarly there is a limit on disbursements for court reports in all matters, even though s 32 applications may require both a report from a psychologist and a treatment plan.[75] This is exacerbated where further reports are required after a rejected s 32 application.

Stakeholders also acknowledged the importance of consistency in legal representation throughout the legal process and expressed concern about the lack of continuity of solicitor appointed to the alleged offender's matter, which could result in a failure to follow up with obtaining treatment plans and generally hinder the preparation of s 32 applications. Some stakeholders suggested current funding guidelines (in relation to private solicitors) encourage litigation rather than an early resolution of the matter. Section 32 applications can sometimes be avoided through

[74] Fee Scales are available at *Fee Scales from 1 August 2006* (2006) Legal Aid New South Wales < http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=724> at 6 December 2006. No *additional* funding is provided for interviews or disbursements if a client has an intellectual disability.

[75] Fee Scales are available at *Fee Scales from 1 August 2006* (2006) Legal Aid New South Wales < http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=724> at 6 December 2006.

 © Intellectual Disability Rights Service, Inc.

written representations to the Police Prosecutor though, where a matter is resolved before hearing, less funding may be claimed.

Case Study: Kevin

CJSN supported a young man, Kevin, in court for breach of AVO and intimidation charges.

At the first court date an adjournment was granted as his DADHC case worker was unable to be at court on that date.

At the second court date a different lawyer spoke to Kevin for a very short period of time and asked him whether the previous lawyer had recommended he plead guilty or not guilty. Unfortunately Kevin couldn't remember and the support person was not at the last court date. The support person brought up the possibility of a s 32 application but the lawyer decided he should plead not guilty and another adjournment was granted.

At the next court date a different lawyer decided that a s 32 application would in fact be the best way to go and another adjournment was granted.

It was at this time, 2 months after Kevin's first court appearance, that reports were requested from DADHC to do this application.

A further month later a different lawyer again was successful in getting a s 32 application granted for Kevin and the charges were dismissed.

Before the end of the six month review period DADHC pulled out from providing services to Kevin due to his being "non-compliant". It was not felt that DADHC tried very hard with Kevin nor did they seem to understand the possible consequences of him breaching the s32 orders.

Recommendation 12

Additional Legal Aid funding be allocated for legal practitioners when representing an offender with an intellectual disability – this includes the provision of additional funding taking into account longer interviewing periods and additional disbursements where required for reports and treatment plans.

© Intellectual Disability Rights Service, Inc.

Recommendation 13

Training be provided to Legal Aid on intellectual disability, communicating with clients with intellectual disability and the preparation of s 32 applications (including how to obtain treatment plans).

© Intellectual Disability Rights Service, Inc.

X ADDITIONAL ROLE OF POLICE

The NSW Police Service was identified as playing an important role for offenders with an intellectual disability in the criminal justice process. The NSW Police Service currently has brief guidelines on how to identify a person with 'impaired intellectual functioning' which allow the police to refer the person to the appropriate human services.[76] Whilst police should not be expected to be a sole source of referral, it would be difficult to ascertain the appropriate service without understanding the type of 'impaired intellectual functioning'. The current education of officers is limited: in general, specialised training is only offered to officers in specific taskforces.[77] Such training should be aimed at general officers and could be achieved through early education provided during training at the NSW Police Academy and tertiary policing courses, although already qualified police officers should also receive appropriate education on intellectual disability.

Police specifically need education on the purpose and operation of s 32. Police expressed a number of concerns about the diversion of offenders with an intellectual disability. Firstly, many police who were consulted were of the view that offenders were faking an intellectual disability in order to become eligible for diversion. Many of the officers' concerns about faking intellectual disability were the result of a lack of understanding of the distinction between people with an intellectual disability and people with a mental illness.

There was a common perception among officers that the operation of s 32 was preventing offenders from having to take responsibility for their actions and was simply letting them off. Many officers confused fitness to plead with a s 32 application. Concern was expressed regarding the number of successful s 32 applications that a single offender may receive despite clear recidivism. In practice, successful applications are the result of linking the criminal behaviour to the intellectual disability. Section 32 seeks to address the offending behaviour by apportioning responsibility to community services as well as to the alleged offender. Sometimes community service providers need more than one attempt to assess the

---

[76] NSW Police Service, *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)* (1998) 93.

[77] Currently 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.

© Intellectual Disability Rights Service, Inc.

appropriate treatment given the complex needs of the offender and this means a number of s 32 applications may be required. At times, an alleged offender who may not be found guilty at law nevertheless has obligations imposed on them as a result of s 32 – this is different to 'letting an offender off'. All of these concerns are a result of a misunderstanding of both intellectual disability in general and the purpose of the legislation itself.

Recommendation 14

Education regarding the needs of offenders (and witnesses) with an intellectual disability, particularly vis-à-vis s 32, be provided to police officers and prospective police officers, in particular at the NSW Police Academy and tertiary policing courses.

As previously mentioned, many matters are resolved as a result of the exercise of discretion by Police Prosecutors after written representations from practitioners. A number of practitioners believed that an arresting officer, through a formalised scheme of warnings and cautioning, could exercise this discretion. Cautioning schemes have proved vastly effective in combating the prevalence of both youth offences[78] and minor cannabis offences[79]. 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. In any event, any adjustment in discretion must be accompanied by a dramatic increase in education standards regarding offenders with an intellectual disability as previously mentioned in this report. In addition, the recommendation of the NSW Law Reform Commission to appoint an Intellectual Disability Liaison Officer to the NSW Police Force is imperative.[80] Consideration should also be given to whether cautioning should be linked to referral to DADHC services in order to assist in preventing offenders from re-offending.

[78] The 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.

[79] For 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).

[80] See Recommendation 53 in New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) xxxvii.

© Intellectual Disability Rights Service, Inc.

Recommendation 15

Intellectual Disability Liaison Officers be introduced into the NSW Police Service. The role of such officers would be to provide support to investigating officers in terms of both direct support to alleged offenders with an intellectual disability and providing suitable referrals.

Recommendation 16

A formalised cautioning scheme similar to the program under the Young Offenders Act 1997 be introduced. The Intellectual Disability Liaison Officer could oversee and facilitate a cautioning process.

© Intellectual Disability Rights Service, Inc.

XI 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 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 lawyers in their 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 practitioners also have very little time to devote to any individual client. Support people therefore act in an interpreter role to translate and explain what was said during the legal interview including any advice given. Often the support person is the only consistent person throughout court process. They will often tell lawyers what happened on previous court dates.

Similarly, magistrates have not had training specific to people with intellectual disability and differ in their experiences. They may not even know that a defendant does have an intellectual disability. They might mumble, speak in legal jargon or speak very quietly such that it can be difficult to hear and understand what is happening. In the Local Court, cases are dealt with so quickly that generally people with intellectual disability do not manage to follow proceedings. People generally walk out of court and ask their support person what happened.

Understanding bail and bond conditions is vital to ensure people stay out of trouble. People with intellectual disability often have difficulty understanding these conditions and how they relate to their lives. Ensuring people fully understand any conditions and how they are going to adhere to them is an important role for support persons.

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 are other important functions of the support person role.

The Criminal Justice Support Network (CJSN) is a service of the Intellectual Disability Rights Service Inc. that provides volunteer support workers for people with an

© Intellectual Disability Rights Service, Inc.

intellectual disability who are in contact with the criminal justice system. A support worker is allocated to a person with an intellectual disability seeking assistance at police interviews, courts and related legal appointments whether they are victims, witnesses, suspects or defendants. Trained support workers are available in targeted areas: Sydney, Southern NSW and the Hunter region. In addition to targeted one on one support, the CJSN also provides a 24 hour phone service. This phone service is also for people with an intellectual Disability and their carers in regions outside of the target areas. The CJSN provides education and training to staff in the criminal justice system, including police and court workers, lawyers and service agency workers, carers and people with an intellectual disability. The CJSN also has the capacity to prepare resources and publications for people with an intellectual disability and those who support them, including family and carers, 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.[81]

Some common problems support persons have encountered during supports include:

- Difficulty with some lawyers reluctant to allow support persons to be present while they conduct interviews or provide legal advice, especially in cases where people are charged with serious offences. This concern relates to the waiver of privilege and the possibility of clients making admissions.
- The reliance on lawyers to apply to magistrates to request that support persons sit with either defendants or witnesses has also sometimes been problematic.
- Inconsistency by lawyers in applying for s 32 dismissals. Support persons can find themselves asking lawyers whether a s 32 application may be appropriate in their particular matter as a way of drawing this option to the legal practitioner's attention.
- Difficulty with corrections staff in attempting to visit defendants who are in custody and are in the holding cells prior to their court appearance. Support persons rely on lawyers to take them down and on corrections to allow them to go.

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

 © Intellectual Disability Rights Service, Inc.

- People with intellectual disability are particularly disadvantaged when applying for or defending AVOs in non-domestic violence disputes. Legal Aid will only represent defendants in this situation where there are exceptional circumstances, such as their intellectual disability. This, however, can be discretionary and victims cannot be represented at all. This is particularly problematic as people with intellectual disability are very vulnerable to being taken advantage of by others. In these situations, a support person will often stand up in court and talk on behalf of the defendant with the intellectual disability. Without a support person someone in this situation would be less likely to be able to successfully put their case.

Case Study: Salvo

Salvo was charged with assault and malicious damage.

After 2 court appearances, he was referred to CJSN for court support. Salvo had a hearing impairment as well as intellectual disability 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 5 different solicitors (some Legal Aid solicitors and some private solicitors on behalf of Legal Aid). A psychiatrist's report, which gave little information about Salvo's intellectual disability, was obtained for the court and a s 32 application was made. After several hearings, the magistrate was reluctant to consider the matter under s 32. After further assessment the magistrate agreed to consider the possibility of granting a s 32, but wanted a more thorough "treatment plan".

Many adjournments occurred where nothing had happened between court dates.

The delay and continual change of solicitor was extremely frustrating for Salvo and the support person needed to calm him down repeatedly as his frustration led him to react angrily to each new solicitor who rarely knew what had happened previously. On one occasion, a new solicitor was about to launch a new Section 32 application not realising this was already well underway. On another occasion the solicitor 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 solicitor on what

© Intellectual Disability Rights Service, Inc.

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 treatment 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 on the part of several services in commencing their service led to further adjournments. Ultimately, the s 32 application was refused and Salvo received a 12 month good behaviour bond.

Salvo was charged with breaching this bond sometime later and received a custodial sentence.

CJSN TO PROVIDE SOME RECOMMENDATIONS

© Intellectual Disability Rights Service, Inc.

XII Conclusion

Although in the past 10 years there has been some progress in relation to the diversion of alleged offenders from the criminal justice system, the current diversion process in the NSW Local Court system remains problematic. Although s 32 of the *Mental Health (Criminal Procedure) Act 1990* provides a mechanism for the diversion of alleged offenders with an intellectual disability from the criminal justice system, and hence acknowledges the distinctive needs of people with an intellectual disability, in practice there has been a failure to find an innovative strategy catered to offenders' individual needs. This lack of innovation is coupled with the inadequate provision of support services and a discontinuity between the legal process and the provision of human services. There is no shortage of policy reform suggestions, merely a lack of will and funding to actually implement these suggestions.[82] This is unusual given the size of the problem and the domestic and international human rights that people with intellectual disabilities are entitled to enjoy. 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.[83]

Meanwhile, states, including Western Australia, South Australia and Victoria, have attempted to develop innovative and distinct responses to the needs of people with an intellectual disability within their equivalent Local Court systems, and New South Wales has developed inquisitorial and therapeutic court models in relation to other target groups such as young persons and persons with drug and alcohol problems. New South Wales remains in a unique political quagmire. The minimal amount of protection actually afforded to alleged offenders with an intellectual disability remains unstructured and unaccountable. It is hoped that this report will stimulate discussion concerning alleged offenders and the NSW Local Court system and that steps will be made to remedy the present problems. A minimum standard of improvement would involve implementing the recommendations within this report. Ideally, IDRS hopes

[82] See particularly New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996); Jenny Green, Meredith Martin and Jim Simpson, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending* (2001).

[83] Joan 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.

 © Intellectual Disability Rights Service, Inc.

that the New South Wales Government will see this as an opportunity to develop a unique approach to alleged offenders with an 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, IDRS has proposed to integrate these reforms into a holistic proposal of an alternative model.

The key principles guiding this model are:

1. The person's ability to understand and participate in the proceedings are maximised.
2. The person's legal rights and human rights are protected.
3. There is recognition in bail and disposition decisions of the impact of an intellectual disability on the alleged offender's understanding of, and culpability for an offence and capacity to understand s 32 conditions and bail conditions.
4. 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.

The key elements of this model are:

- The Legislation

1. Clarification of s 32, particularly its application to persons with intellectual disabilities rather than the 'developmentally disabled';
2. Development of guidelines to aid the exercise of the Magistrate's discretion;

- Support person

3. 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.

Legal representation

4. Provision of lawyers who are:

 © Intellectual Disability Rights Service, Inc.

a. skilled in communicating with a person with an intellectual disability and in relevant legal and support service system issues;

b. have the time needed to obtain thorough instructions and properly explain what is happening; and

c. can provide continuity of representation through the proceedings;

5. allocation of additional Legal Aid funds where the client is an alleged offender with an intellectual disability.

- The Magistrate

6. Ensure all Magistrates are:

a. able to maximise the alleged offender's understanding of the proceedings; and

b. ensure all Magistrates are aware of the nature and effects of an intellectual disability and relevant legal and service system issues;

- Disposition Procedures

7. Informal, conference based court hearings;

8. Conducted by a person with knowledge and skills in intellectual disability;

9. 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;

10. Include in these meetings attempts to identify the person's support and behaviour intervention needs and engaging relevant players in meeting those;

11. Confine any conditions placed on the person to issues relevant to addressing offending behaviour.

- Support services

12. A multi-focal system of diversion, including the introduction of 'Intellectual Disability Court Liaison Officers' in all Local Courts who will be responsible for, inter alia, the preparation of treatment plans where required;

© Intellectual Disability Rights Service, Inc.

13. Intellectual disability services

    a. Skilled in working with offenders;

    b. Promptly available;

    c. Clear access path for person, lawyer, support person;

    d. Provide assessment of intellectual disability and support needs; and

    e. Provide or facilitate provision of the supports and interventions needed to meet the person's needs.

14. The capacity for DADHC to provide direct behaviour intervention support to alleged offenders where required;

15. Training, in relation to intellectual disability, of all professionals involved in every aspect of the criminal justice process;

16. Implementation of long-term post-diversion support services scheme for alleged offenders;

17. Allocation of additional funds to DADHC.

© Intellectual Disability Rights Service, Inc.

Intellectual Disability Rights Service

APPENDIX ONE: COURT INTERVENTION AND DIVERSION PROGRAMS IN NSW

Program	Aims	Locations	Auspiced under/ staffed by	Criteria	Referral process	Description, duration and outcome of program	Role of Magistrate
Youth Justice Conferencing **See *Young Offenders Act 1997* (YO Act)**	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. 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. To apply the least restrictive sanction against a young person who is alleged	All over NSW.	Department of Juvenile Justice – there is a conference administrator in each DJJ Community Services office; conference convenors are appointed on contract basis by DJJ).	Under 18 years old. Charged with committing an eligible offence (eg a summary offence or indictable offence that can be dealt with summarily, the offence does not involve serious violence, the offence is not a drug offence or a traffic offence: see s 8 of YO Act for the range of eligible offences). Admit s to the offence. Consents to a conference. The young person is not eligible to be dealt with by conferencing if the investigating official considers that it is in the	Can be referred directly by the police upon admission of the offence, without the need for a court appearance. Can also be referred by Children's Court or DPP after appearance at court.	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. 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. The conference arrives at outcome plan which may involve apology, payment of compensation, performance of voluntary community work, participation in course or program, etc. If the matter was referred to conference by police, satisfactory completion of outcome plan means no court proceedings are taken. If matter was referred by court, the	If matter referred by police, no role at all. If matter referred by court, Magistrate is responsible for approving outcome plan and dismissing matter on satisfactory completion. Magistrate does not attend conference but receives a report summarising the conference and its outcome.

© Intellectual Disability Rights Service, Inc.

	to have committed an offence. To apply principles of restorative justice. To facilitate offenders making amends for the harm caused to their victims. See Part 5 of the YO Act which sets out purposes and principles of conferencing.			interests of justice to deal with the young person by way of conference.		young person will have to go back to court for approval of outcome plan. Satisfactory completion of the outcome plan means that the matter is dismissed under the YO Act.	
Adult Conferencing Pilot	To provide the court with more alternatives to imprisonment for young adult offenders	Currently being piloted at Liverpool and Tweed Heads.	Attorney General's Department. Conference organisers employed by AG's Department.	Offender must be aged between 18-25 years. Must plead guilty to offence and be at risk of imprisonment. Eligible offences are set out in clause19A of *Criminal Procedure Regulation* 2005.	Unlike youth conferencing, there is no referral directly from police. Defendant pleads guilty and, if magistrate is of the view that defendant is eligible and a conference is appropriate, makes referral for assessment.	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	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 (if conference successfully completed, defendant would usually expect to receive a bond or a non-custodial sentence such as

© Intellectual Disability Rights Service, Inc.

						sentencing option itself.	a bond or suspended sentence.
MERIT (Magistrates' Early Referral Into Treatment)	To reduce crime associated with illicit drug use by engaging defendants with drug problems in intensive drug treatment.	58 Local Courts around NSW.	Local Courts. Staffed by clinicians employed by Department of Health	Aged 18 years or over. Have charges before the Local Court which are capable of being dealt with summarily. Be on bail or eligible for bail. Have an illicit drug problem (excluding alcohol). Reside where they are able to participate in treatment programs. Give informed consent to a drug treatment program. Deemed suitable for drug treatment and have a treatable drug problem. Unlike the Adult Drug Court, there is no need to enter a plea before being accepted	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,	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. 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. Bail conditions will generally be along the lines of "to participate in	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.

© Intellectual Disability Rights Service, Inc.

				onto MERIT.	Magistrate will usually give the go-ahead for commencement of program.	MERIT program and obey reasonable directions of MERIT team". If the client disobeys the conditions of their bail 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 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. MERIT is entirely voluntarily and a person cannot be punished for withdrawal or non-completion.	
Circle Sentencing	To make the sentencing	Piloted at rural and	Originally developed and	Aged 18 and over, Aboriginal,	Magistrate makes referral to the	Circle Sentencing is an alternative sentencing	The Magistrate acts as a gate

© Intellectual Disability Rights Service, Inc.

	process more meaningful and appropriate to Aboriginal offenders. 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.	regional locations. 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.)	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.	pleading guilty or been found guilty of summary offences or indictable offences that can be dealt with summarily. After the Magistrate's assessment, the elders decide if the offender is suitable for the Circle Court.	Circle Court after assessing the eligibility of the offender.	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.	keeper for referrals to Circle Sentencing; As convenor of Sentencing Circle, the Magistrate actively participates in the program (unlike many other intervention programs).
Adult Drug Court Pilot	To achieve successful rehabilitation of drug dependent offenders, to reduce drug related offending and associated harm.	Parramatta Drug Court	Attorney General's Department, District Court and Local Court. Drug Court team is made up or Legal Aid solicitors, police prosecutors, and staff employed by Department of Health, Department of Education,	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	Referred by court and assessed by Drug Court team.	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	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.

© Intellectual Disability Rights Service, Inc.

			Probation and Parole Service.	in) Western Sydney area.		programs. Participants can be terminated from program if breach is significant. At conclusion of program, the participant will be sentenced and may possibly receive a non-custodial sentence instead of full time custody.	
Youth Drug and Alcohol Court (YDAC) **See *Children's (Criminal Proceedings) Act 1987*, s 33(1)(c2), The Children's Court of New South Wales, Practice Direction 23: Practice Direction for the Youth and Drug Alcohol Court.**	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. 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	Children's Courts in metropolitan Sydney (Bidura, Campbell-town, Cobham)	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. 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	Aged between 14 and 18 years. 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). Not charged with a sexual offence. Young person pleads guilty to the majority of outstanding charges. Has a significant problem with prohibited drugs or alcohol.	Referred by court to JART for initial assessment to determine the young person's clinical suitability to participate in the Program.	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. 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	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.

© Intellectual Disability Rights Service, Inc.

	familial relations, and psychosocial problems.		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.	Young person consents to participate in the YDAC program while on bail. Unlike Adult Drug Court, violent offences and alcohol dependency are included as eligible offences.		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. Participants are offered 'aftercare' after their court involvement is completed so that their treatment is gradually reduced.	
Mental Health Court Liaison Service	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. Assist the courts in identifying the mentally ill or disordered charged with minor offences and diverting	Various Local Courts around NSW	Local Courts. Mental Health Court Liaison workers are psychiatric nurses employed by Justice Health	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	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	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.	Magistrate may make referral to court liaison service and may also take report into account when deciding how to deal with the matter.

© Intellectual Disability Rights Service, Inc.

	them to treatment in lieu of incarceration. Enhance the linkage between community based mental health services, the courts and correctional based mental health services.						

© Intellectual Disability Rights Service, Inc.

© Intellectual Disability Rights Service, Inc.