

Submissions to the NSW Law Reform Commission
People with Cognitive and Mental Health Impairments in the Criminal Justice System

July 2010

About IDRS

The Intellectual Disability Rights Service (IDRS) is a community legal centre that provides legal services to persons with intellectual disability throughout New South Wales. IDRS's services include the provision of legal advice and legal representation in select matters. IDRS engages in policy and law reform work and community legal education with a view to advancing the rights of people with intellectual disability. IDRS also provides a 24 hour state-wide on-call volunteer solicitors to provide over-the-phone legal advice to people with intellectual disability who have been arrested.

IDRS also operates the Criminal Justice Support Network ("CJSN") which provides trained volunteers to people with intellectual disability when they come into contact with the criminal justice system, particularly at the police station and at court.

IDRS' expertise derives from our extensive experience with people with intellectual disability in the criminal justice system. Accordingly, IDRS' focus in this submission is on the needs and interests of people with intellectual disability.

We have chosen to focus on Consultation Paper 7 which looks at diversion.

IDRS has had the opportunity to read submissions prepared by NSW Council for Intellectual Disability ("CID") in relation to some aspects of Consultation Paper 6 – Criminal Responsibility and Consequences. CID's focus is on questions about where forensic patients and prisoners with intellectual disability should be detained, and, about medical treatment for forensic patients with intellectual disability. We concur with their position on both subjects.

Preliminary Comments

Some lawyers, both private and public, and some prosecutors, remain unaware of the applicability of the diversionary measures under section 32 of the *Mental Health (Forensic Provisions) Act* 1990 to clients with intellectual disability. It is of great concern to IDRS that this misunderstanding continues to persist.

Mental illness and intellectual disability are two very distinct types of disability that affect people very differently. Both the previous and current names of the act collapse at the outset any such distinctions. Intellectual and cognitive disabilities are subsumed under the banner of mental health.

We strongly advocate for a name change to the act, along with other substantive changes, that embodies an acknowledgement of the distinction between mental health and intellectual disability. The ultimate name of the act should reflect the outcome of the broader debate on terminology canvassed by this consultation. Without wishing to be pre-emptive of the outcome, it is suggested that a name along the lines of *Mental Health and Cognitive Impairment (Forensic Provisions) Act* more clearly flags relevance to people with intellectual disability and other cognitive impairments.

We reiterate our previous submissions in *Enabling Justice* at pages 30 - 33.

Another possible approach could be to create an act specifically focused on cognitive impairment.

Issue 7.1

- (1) Should a legislative scheme be established for police to deal with offenders with a cognitive impairment or mental illness by way of a caution or a warning, in certain circumstances?**
- (2) If so, what circumstances should attract the application of a scheme like this?**

Current Situation

Early exercise of discretion is beneficial, not only to the individuals directly involved, but also to the community as a whole. It is neither socially desirable nor useful to see vulnerable community members brought unnecessarily before the courts to be potentially subjected to criminal sanctions. Similarly, it is equally undesirable that vulnerable community members be unjustly burdened by police imposed sanctions such as fines.

Early diversion also goes some way to alleviating the stresses on the already overstretched criminal justice system.

At present, some people with intellectual disability are diverted from the criminal justice system through the positive exercise of police discretion. In IDRS' experience, the exercise of discretion does not necessarily occur in correlation to the seriousness of the alleged offending behaviour. That is, it would be expected that the less serious the offence, the greater the chances of the matter being dealt with by way of caution or warning. We have not found this to be the case.

In a recent example IDRS was recently contacted by the mother of a young adult with a significant intellectual disability. He has had an ongoing fascination with cops and robber type TV shows. On the day in question he went to the local bottle shop armed with a toy pistol and attempted to "rob" the bottle shop. The incident ended when police tracked him to his home. Potentially armed robbery charges could have been laid. A charge of this type is usually finalised in the District Court and carries significant penalties.

The client's mother spoke with police at length on the evening and called IDRS the next day. IDRS also spoke with the arresting officer. He decided to recommend that no charges be laid. His superiors agreed with his recommendation and court proceedings were avoided.

However, in our experience, frequently police are not so well disposed to exercising their discretion in a positive fashion in much less serious matters. One recent example is of a young woman with intellectual disability and an ongoing physical disability that causes her considerable pain. To maintain her mobility and to distract her from the pain, she carries and uses craft materials on her daily commute on the train. She also carried a pair of scissors to cut her craft materials. She was searched and charged by police on the railway station while waiting for her train. Her intellectual disability meant that she had difficulties communicating with police and was unable to explain her situation. The woman produced a disability support pension card to police when they requested identification.

IDRS assisted her at court and initially proceeded by way of defended hearing. Ultimately the matter was dealt with by way of section 32 with no conditions. IDRS appeared on four occasions for the client before the matter was resolved. It is a clear example of a matter that could have been fruitfully diverted earlier by police by a positive exercise of their discretion.

Discussion

The cases above illustrate the inconsistent exercise of police discretion. In IDRS' experience, many minor matters that should have been diverted by police are not diverted. It is our experience that it is unlikely that minor matters will be withdrawn by police by way of written representations. A potential legislative scheme for cautions and warnings is likely to base eligibility for such diversionary measures on offence type as is the case of the *Young Offender's Act* 1997. Such a scheme has the potential to stop many minor matters coming before the courts. It would assist more inexperienced police officers by spelling out what sorts of matters should be diverted from the system rather than leaving it up to the discretion, or perhaps experience of, the individual officers involved.

However, it is likely that a case like the bottle shop matter cited above would most likely be excluded from consideration of early diversion under any such scheme because of the nature and seriousness of the offence. In IDRS' view, to exclude cases such as these from early exercise of discretion would be mistake.

While we would welcome any potential legislative scheme that meant earlier diversion of minor matters by police, we would be hesitant to see any curtailment of police discretion on more serious matters. Clearly, as in the case above, it was not the nature of the offence but the subjective characteristics of the individual involved that lead to the positive exercise of discretion on the part of police.

We reiterate our call for improved training of all police officers, including police prosecutors, about intellectual disability.

It should be noted that there are significant economic savings to the community, in terms of court resources, prosecution resources and defence resources, by early diversion, in appropriate cases, of not only minor matters but also matters of a more serious nature.

Issue 7.2

Could a formalised scheme for cautions and warning to deal with offenders with a cognitive impairment operate effectively in practice?

In many instances, a person's intellectual disability will not be apparent to police. In some cases, a person with intellectual disability may appear to police to be affected by drugs and alcohol because of their manner of speaking. We see part of the problem of a formalised scheme of cautions and warnings for people with intellectual disability to be police being unable to correctly identify people as having an intellectual disability. In other words, the current problem of lack of trigger to consider the exercise of early diversion would continue to exist under a statutory regime just as it does under the current discretionary one.

We have canvassed the idea of some form of alert on the police computer system to assist police to identify with intellectual disability. We are hesitant to recommend this course without a variety of safeguards.

We are of the view that better training for police to help them correctly identify people with intellectual disability is a key to both formal and informal early diversionary mechanisms. The frequency with which people with intellectual disability come into contact with the criminal justice system is so high as to mean that dealings with people with intellectual disability by police is part of the core business of policing. As such, the devotion of significant resources to better training is warranted.

7.4

Should the police have an express, legislative power to take a person to a hospital and /or an appropriate social service if that person appears to have a cognitive impairment, just as they can refer a mentally ill or mentally disturbed person to a mental health facility according to s22 of the MHA?

While IDRS strongly supports the need for the police to be able to obtain assistance for a person with intellectual disability in order to effectively use their discretion to divert the person from being charged and entering the criminal justice system, we do not believe that a legislative power similar to s22 of the MHA is the appropriate way to achieve this.

The use of s22 MHA for people who may be mentally ill or mentally disturbed leads to a system of assessment and if necessary detention of the person based on criteria satisfied under the Mental Health Act. There is no similar system which can be applied to people with intellectual disability.

In IDRS experience, which includes providing support persons for people with intellectual disability who are in police custody through the Criminal Justice Support Network, people with intellectual disability who find themselves in police custody are usually not in need of detention but are in need of support and services.

Where there is a perceived need to restrict the freedom of movement of a person with intellectual disability, IDRS believes that the NSW Guardianship Act is the appropriate legal mechanism under which decisions about such restrictions of a person should be made. The Guardianship Act is focused on the rights and interest of the person with disability and so only allows for restrictions that are judged to be in the best interest of the person. Urgent hearings can be conducted if necessary.

IDRS acknowledges the lack of practical assistance available to police in seeking help with diverting persons with intellectual disability from the criminal justice system by using their discretion not to charge.

IDRS believes there is a desperate need for:

- emergency community based accommodation options to be available for adults with intellectual disability who may require such short term accommodation support for a wide range of reasons
- specialist disability advice and information about services to be available for police on a 24 hour basis provided by or funded by ADHC
- police and ADHC to work on policies and effective procedures which will enable police to effectively divert people with intellectual disability from the criminal justice system

A typical situation which IDRS encounters regularly arises where a person with significant intellectual disability who has challenging behaviour comes to the attention of police due to aggressive behaviour in their family home. The family needs assistance for their own safety. The police will generally apply an Apprehended Domestic Violence Order and the person may also be charged with assault. The person with the disability is unable to remain in their family home. Such a person will often be denied bail by the

police and by the court because there is nowhere for them to be temporarily accommodated or no emergency assistance available to assist the family to manage the person at home. The same issue arises regularly in group homes.

7.5

Do the existing practices and policies of the Police and the DPP give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender?

In our experience, the greater problem is with the application of guidelines. In other words the practice is problematic, rather than the guidelines themselves.

7.6

Do provisions in the *Bail Act* 1978 setting out the conditions for the grant of bail make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders?

We agree with the assertion that it is often difficult for people with intellectual disability to comply with bail conditions, particularly in situations where the conditions are too onerous, or where there has been inadequate support to explain the conditions and to assist with compliance. This difficulty in compliance directly impacts upon future bail applications.

The nature of a person's intellectual disability should be taken into account when looking at factors such as previous breaches of bail and failure to appears.

7.7

Should the *Bail Act* 1978 include an express provision requiring the police or the court to take account of a person's mental illness or cognitive impairment when deciding whether or not to grant bail?

Yes. The *Bail Act* should not only expressly take into consideration that a person has an intellectual disability in terms of granting bail but also in terms of the conditions set. Police and the court should carry a positive onus to seek out an appropriate support person to assist in the understanding of bail conditions. The effect of a person's disability on their ability to comply with particular bail conditions should be considered

when setting bail conditions. Conditions should be set that are realistic and have regard to a person's cognitive impairment.

7.8

What education and training would assist the police in using their powers to divert offenders with a mental illness or cognitive impairment away from the criminal justice system?

IDRS believes that there is a need for increased and improved training for police in understanding intellectual disability, its effects and the adjustments that need to be made by police when dealing with a person who has intellectual disability. This training should be provided by trainers who have an understanding themselves of intellectual disability. IDRS currently provides training to police in the Safe Custody courses for officers undertaking the duties of custody manager and to officers training for duties in Joint Investigative Review Teams.

The experience of IDRS is that there continues to be confusion between mental illness, intellectual disability and other cognitive impairments and appropriate responses to people with these impairments. IDRS finds that police are much more familiar with the implications of mental illness than cognitive impairments in general.

IDRS also recommends that as part of their training police spend some time at a service for people with intellectual disability in order to become familiar with people who have intellectual disability.

7.9

(1) Should the term, “developmental disabled”, in s32(1)(a)(i) of the MHFPA be defined?

(2) Should “developmentally disabled” include people with an intellectual disability, as well as people with a cognitive impairment acquired in adulthood and people with disabilities affecting behaviour, such as autism and ADHD? Should the legislation use distinct terms to refer to these groups separately?

Developmental disability is not a useful term as it excludes conditions that arise after 18 years. Its use should be discontinued. In IDRS' view, the focus should be on the disability and its effects rather than on the cause. We advocate for the adoption of either the term mental impairment or cognitive impairment.

We suggest the definition of cognitive impairment as listed under section 61H(1A) of the *Crimes Act 1900* is a useful starting point.

(1A) For the purposes of this Division, a [person](#) has a "cognitive impairment" if the [person](#) has:

- (a) an intellectual disability, or
- (b) a developmental disorder (including an autistic spectrum disorder), or
- (c) a neurological disorder, or
- (d) dementia, or
- (e) a severe mental illness, or
- (f) a brain injury,

that results in the [person](#) requiring supervision or social habilitation in connection with daily life activities.

However, we would advocate for a non exhaustive list. The proviso that the disability results in the person **“requiring supervision or social habilitation in connection with daily life activities”** is not an appropriate rider to include in any definition for the purposes of section 32. The words can be variously interpreted and subjective and are not well defined in the literature. We believe these words are likely to be interpreted as requiring a higher level of disability and dependence than the current eligibility criteria for application of S32

We note that autistic spectrum disorder is correctly listed as a developmental disorder but suggest it may be appropriate to include it separately on any list in order to avoid any confusion.

IDRS does not have a firm view in relation to ADHD and suggest that experts in this area may be better placed to comment.

7.10

Is it preferable for s 32 of the MHFPA to refer to a defendant “with an intellectual disability” rather than to a defendant who is “developmentally disabled”?

Yes. In our view and in keeping with respect for the person and current accepted terminology, the term “with an intellectual disability” should be used.

7.13

(2) Should the legislation make it clear that treatment is not limited to services aimed at curing a condition, but can include social services programs aimed at providing various life skills and support?

Yes, the legislation should clarify this point. Often the nature of intellectual disability is misunderstood. It is clearly not a “condition” to be “treated” with a view to obtaining a “cure”. Such a focus is inappropriate in a scheme designed to divert people with intellectual disability and other cognitive impairments.

7.14

Should the existing categories of developmental disability, mental condition, and mental illness in s32(1)(a) of the MHFPA be removed and replaced by a general term used to determine a defendant’s eligibility for a s32 order?

It is difficult to envisage a term that would encompass both mental illness and cognitive impairment. Considerable confusion currently exists about the applicability of the act to people with cognitive impairment. We believe that people with cognitive impairment and people with mental illness should be separately defined.

7.16

Are there specific conditions that should be expressly excluded from the definition of “mental impairment”, or any other term that is preferred as a general term to determine eligibility under s32 of the MHFPA?

It is the nature of the condition that should be taken into account, rather than the causes of the condition. We are strongly against the exclusion of specific conditions. For example, if a person has brain injury they should be eligible for section 32 irrespective of the cause.

7.17

Should a magistrate take account of the seriousness of the offence when deciding whether or not to divert a defendant according to s 32 of the MHFPA? Why or why not?

It is common for magistrates to take into account the seriousness of the offence when deciding whether or not to divert a defendant according to s 32. It is submitted that in cases where a person with limited capacity comes before the courts, the seriousness of the offence should not be taken into account in deciding whether or not to apply the

section. While particular offences may be objectively serious, the offending behaviour itself may not necessarily be so when the defendant has an intellectual disability. Rather, it is a factor more appropriate to determining what sort of orders should be made.

For example, people with intellectual disability regularly come before the courts in relation to hoax 000 calls. This behaviour may be occurring for a complex range of reasons, including as a response to anxiety and stress. While the offense is objectively serious, the offending behaviour is often an understandable response to anxiety resulting from the need for greater support. One recent case the “treatment plan” ultimately accepted by the court included 24 hour telephone access to on call staff to provide an alternative to call emergency services, along with other, longer term strategies to assist the client.

7.18

Should the decision to divert a defendant according to s 32 of the MHFPA depend upon a direct causal connection between the offence and the defendant’s developmental disability?

No. We agree with the assertion that it is overly simplistic to identify a direct cause for criminal conduct in cases of people with developmental disability. If any link is to be made between the conduct and the nature of the offence, then it is imperative that the focus be on larger issues of causation rather than on narrow, direct causes. The focus should be on the effect of the condition on a person’s judgement and behaviour.

We also note that there is no assumption of guilt on granting of s32 application.

7.19

Should the decision whether or not to divert a defendant according to s 32 of the MHFPA take into account the sentence that is likely to be imposed on the defendant if he or she is convicted?

We are of the view that a potential lengthy sentence should not dissuade the Magistrate from applying the section.

7.20

(1) Should s32(1) of the MHFPA include a list of factors that the court must or can take into account when deciding whether it is appropriate to make a diversionary order?

(2) If s 32(1)(b) were to include a list of factors to guide the exercise of the court's discretion, are there any factors other than those discussed . . . that should be included in the list? Are there any factors that should be expressly identified as irrelevant to the exercise of the discretion?

We oppose any statutory list for factors that the court can or must take into account in deciding whether to exercise its discretion in relation to s32.

However, if there is to be a list then it should include factors relevant to people with intellectual disability, such as the nature and seriousness of the person's disability and the effect of their disability on their ability to make decisions.

In our submission, previous section 32s on a person's record should not be a negative factor in the exercise of the discretion in cases for people with intellectual disability.

IDRS has considerable expertise in the preparation and presentation of section 32 applications. In the vast majority of cases (around 90%) where IDRS has appeared, magistrates have been persuaded to exercise their discretion and apply the section. This includes many matters where clients have had both previous section 32 orders and, in some cases, extensive criminal histories.

In IDRS' experience the success of a section 32 application is often dependant on the quality of the information placed before the magistrate. The preparation of a good section 32 application requires not only a significant amount of planning, but also a good knowledge of appropriate services.

7.21 (2)

Is it necessary or desirable to retain a separate provision spelling out the Court's interlocutory powers in respect of s 32 even if the Court already has a general power to make such interlocutory orders?

Yes. It is desirable to retain the separate provision under the Act, particularly for people with intellectual disability. We approve of the notion of a widening of the more general powers of the Magistrate through reaching an interim decision before deciding on whether or not to make a final order. In practise this period is often used and is necessary to source relevant service providers and to develop a comprehensive support plan.

7.22

Are the interlocutory powers in s32(2) of the MHFPA adequate or should they be widened to include additional powers?

No, we do not consider it necessary to widen the scope of interlocutory powers.

Responsible Persons

The role of a “responsible person” in the legislation is confusing and ill defined. In the experience of IDRS most s32 orders do not nominate a “responsible person”. We find this is not usually used by magistrates.

It can be very difficult to identify someone who is willing and suitable to take on the role of “responsible person”. Service providers are generally reluctant to nominate for this role. Many people with intellectual disability who come before the courts are isolated and have little or no family or other support.

IDRS would be opposed to a requirement that a “responsible person” be identified for all s32 orders. This would place some eligible people with intellectual disability at a distinct disadvantage.

7.26

Should s 32 of the MHFPA specify a maximum time limit for the duration of a final order under s32(3) and/or an interlocutory order made under s32(2)? If so, what should these maximum time limits be?

The total duration of orders is frequently extended by use of interlocutory orders. This is to allow the setting up of appropriate supports and services for a client. We consider the length of final orders, given this use of interlocutory orders, to be appropriate.

7.27

Should the Mental Health Review Tribunal have power to consider breaches of orders made under s32(3) of the MHFPA, either instead of or in addition to the Local Court?

In our submission, the Mental Health Review Tribunal is an inappropriate body for dealing with breaches of s32 by people with intellectual disability.

7.28

Should there be provision in s 32 of the MHFPA for the Local Court or MHRT to adjust the conditions attached to a s 32 (3) order if a defendant has failed to comply with the order?

It is *important and appropriate* for the court to have the power to adjust conditions in such circumstances. We do not consider the Mental Health Review Tribunal to be an appropriate body to deal with amendments to these orders for people with intellectual disability.

7.29

Should s 32 of the MHFPA authorise action to be taken against a defendant to enforce compliance with a s32 (3) order, without requiring the defendant to be brought back before the Local Court?

No. It is the view of IDRS that there is no justification for powers to authorise action for to be taken against a defendant to enforce compliance with a s 32 order.

The *Guardianship Act* is the appropriate legal mechanism to consider questions of whether authority should be given to anyone (a guardian) to impose restrictions on the freedom of movement of a person with disability. We note that a section 32 order is not a finding of guilt but rather a diversionary measure.

The Guardianship Act is focused on the rights and interests of people with disability (see its principles in section 4) and so only allows for restrictions that are in the interests of a person with a decision making disability. The purpose of any such restriction must be protection of the interests of the individual. The Tribunal and guardians have to be satisfied that there is a benefit to the person from being restricted and this commonly calls for any restriction to be complemented by positive approaches to minimising and addressing inappropriate behaviour.

An order made by the Guardianship Tribunal can, if it is considered justified in the best interest of the person, give a guardian the legal authority to return a person to a place of residence even though this may be against the person's wishes. A guardianship order

can authorize police, if necessary, to assist in returning a person to a place of residence at the request of a guardian.