

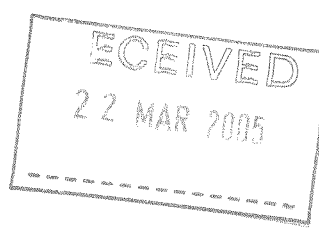
**INQUIRY INTO COMMUNITY BASED SENTENCING  
OPTIONS FOR RURAL AND REMOTE AREAS AND  
DISADVANTAGED POPULATIONS**

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**Theme:**

**Summary:**



**SUBMISSION TO THE LEGISLATIVE COUNCIL STANDING  
COMMITTEE ON LAW AND JUSTICE**

**Inquiry into community based sentencing options for rural and remote  
areas and disadvantaged populations**

"...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 judges use their sentencing powers to dispose of those who are socially inconvenient."

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

**Submission by the Intellectual Disability Rights Service  
21 March 2005**

Standing Committee on Law and Justice  
NSW Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

By facsimile: 9230 3371

Dear Sir/Madam

### **Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations**

Thank you for the opportunity to provide our comments for the purposes of above inquiry. Please accept our apologies for the delay in doing so.

#### **1. The Intellectual Disability Rights Service**

The Intellectual Disability Rights Service (IDRS) is a community legal centre that provides legal services to people with an intellectual disability throughout NSW. We provide telephone legal advice each weekday and legal representation in selected 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.

A substantial proportion of our legal work is in the area of criminal law. For many years IDRS has focused on the issue of the high representation of people with an intellectual disability in the criminal justice system. In 2001 IDRS, together with the NSW Council for Intellectual Disability, published *The Framework Report*, which made a number of recommendations about the services required by offenders with an intellectual disability and those at risk of offending.

Our submission focuses on the issue of community based sentencing options for people with an intellectual disability.

#### **2. Scope of the Parliamentary Inquiry: people with an intellectual disability**

We submit that the inquiry should include offenders with an intellectual disability. We take this view for the following reasons:

### 2.1 High representation in prison

It is a long established fact that people with an intellectual disability are highly represented in prison. It is estimated that between 1 and 3% of the general population has an intellectual disability (not including borderline intellectual disability)<sup>1</sup>, yet approximately 7 to 13% of NSW prisoners have an intellectual disability<sup>2</sup>. The figures are similar for young offenders, with a recent study estimating that 10% of people in juvenile detention have an intellectual disability<sup>3</sup>.

### 2.2 Lack of access to non-custodial sentence options

People with an intellectual disability are more likely to receive a custodial sentence<sup>4</sup>. They are also more likely to be refused parole<sup>5</sup>. This occurs because of a lack of support options in the community. For example, there is a lack of suitable supported accommodation.

### 2.3 Experiences in prison

Incarceration in prison has very serious and negative consequences for any person, but even more so for people with an intellectual disability. The NSW Sentencing Council has accepted that imprisonment leads to particular consequences for people with an intellectual disability, namely:

- becoming increasingly entrenched in a culture of criminality
- finding it very hard to readjust when they leave prison
- being vulnerable and mistreated in the mainstream prison environment<sup>6</sup>,

Prisoners with an intellectual disability can seek the acceptance of their peer group by emulating the negative role models they see in gaol. They are more likely to reoffend than members of the general prison population because of difficulties adjusting on release: they inherently have deficits in adaptive skills. They are also more likely to experience a greater vulnerability to assault and sexual assault.

Other negative impacts of prison on people with an intellectual disability include:

- A loss of living and other skills due to an institutional environment in gaol
- A far greater restriction of liberty for those who have to be kept in protective custody, due to lack of available beds in disability specific units in gaol – with the result that they are kept in their cell nearly all day and night
- A lack of access to the services they need in gaol to address their offending behaviour – these sorts of programs do not exist in gaol and are more likely to be found in the community

There is therefore a special argument for being cautious about sentencing people with an intellectual disability to gaol.

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<sup>1</sup> S.C. Hayes and G. Craddock (1992)(2<sup>nd</sup> edn) *Simply Criminal*, The Federation Press, Sydney and page 30-31.

<sup>2</sup> Refer to Butler and Milner (2003) study at page 93 and S. C. Hayes and D. McIlwain (1988) *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* at page 47.

<sup>3</sup> NSW Department of Juvenile Justice 2003 *NSW Young People in Custody Health Survey: Key findings report* at page 9.

<sup>4</sup> NSWLRC Report 80 at page 28.

<sup>5</sup> NSWLRC Report 80 at page 28.

<sup>6</sup> Refer to *Abolishing Prison Sentences of 6 Months or Less: A report of the NSW Sentencing Council* (2004) at page 18.

### 3. The case for tailored community based sentencing

The needs of offenders with an intellectual disability are not being met by the current system. It is not only in the interests of these offenders, but also in the public interest that these needs be met as this is the only way to stop the offending behaviour.

#### 3.1 Reduction of the high recidivism rate

People with an intellectual disability have a much higher rate of recidivism than the general prison population. From 1990 to 1998 68.3% of inmates with an intellectual disability were re-imprisoned within 2 years of release, whereas the figure for the total inmate population was 38%<sup>7</sup>.

These figures show that offenders with an intellectual disability are not receiving the services they need to address the causes of their offending behaviour. There is good evidence to show that if these services are provided, there is a marked reduction in reoffending. Evaluations of specialist programs for offenders with an intellectual disability in the USA have shown rates of recidivism to be as low as 5% as compared to a national average of 62%<sup>8</sup>.

#### 3.2 Avoid negative consequences of imprisonment

As referred to above there are particular negative consequences of imprisonment for people with an intellectual disability: exposure to an entrenched culture of criminality; difficulties in readjusting on release; a special vulnerability in the mainstream prison environment<sup>9</sup>. If better tailored non-custodial options were available, people with an intellectual disability would be less likely to go to gaol.

#### 3.3 Avoid breaches of conditions of court orders

Without appropriate support, many people with an intellectual disability are being set up to breach conditions imposed on them by the court (as part of bail, parole, a bond or an order under s.32 of the *Mental Health (Criminal Procedure) Act 1990*)<sup>10</sup>. These breaches can occur because the person may not understand or lack the capacity or resources to comply with current non-custodial options<sup>11</sup>:

- They may not understand the conditions because of the effect of their disability or because the conditions have not been explained in terms which they can understand
- They may have difficulties in keeping appointments, as they may have difficulty telling or keeping track of the time or travelling independently and therefore unwittingly breach a condition such as to attend a police station
- Unrealistic conditions may have been placed on them, for example: to stay out of a shopping centre when they need to attend a medical centre there; to reside at a particular address when

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<sup>7</sup> Department of Corrective Services, *Recidivism and Other Statistics on a Population of Inmates with Intellectual Disability in NSW Correctional Centres 1.1.1990-31.12.1998*.

<sup>8</sup> Refer to J. Simpson, M. Martin and J. Green (2001) *The Framework Report: appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending*, Intellectual Disability Rights Service and NSW Council for Intellectual Disability at pages 120-121.

<sup>9</sup> The submission of the Council for Intellectual Disability to the NSW Sentencing Council inquiry referred to in *Abolishing Prison Sentences of 6 Months or Less: A report of the NSW Sentencing Council* (2004) at page 18.

<sup>10</sup> 10.1% of inmates identified as having an intellectual disability were in gaol for breach of parole conditions, as compared with 5.7% of the general prison population in the Department of Corrective Services study *Recidivism and Other Statistics on a Population of Inmates with Intellectual Disability in NSW Correctional Centres 1.1.1990 – 31.12.1998*.

<sup>11</sup> Refer to New South Wales Law Reform Commission (1994) *Discussion Paper 35: People with an Intellectual Disability and the Criminal Justice System: Courts and sentencing issues* at page 338 and also the above submission.

they have not control over this, for example: they live in a boarding house and have no security of tenure

#### 4. Services are the key

The heart of the problem is the lack of services to address the needs of offenders with an intellectual disability. According to the NSW Law Reform Commission:

**“There are major gaps in service provision for people with an intellectual disability. If these gaps were filled, many people would not enter the criminal justice system in the first place and many others would not reoffend.”<sup>12</sup>**

Without appropriate services to address the offending behaviour, people with an intellectual disability continue to be caught up in the criminal justice system in alarming numbers.

#### 5. Access to current sentencing options

Many of the current non-custodial sentencing options do not suit the needs of offenders with an intellectual disability with the result that they either do not receive a non-custodial sentence or if they do they find that they are in breach of any conditions. The following is a discussion of each sentencing option.

##### 5.1 *Dismissal under s.10 Crimes (Sentencing Procedure) Act 1999*

This provision allows the Magistrate to deal with the matter without proceeding to conviction, either by dismissing the charge or ordering that the person enters into a good behaviour bond. The court must have regard to the “mental condition” of the accused when determining whether to make the order<sup>13</sup>. This provision should be retained.

##### 5.2 *Fines*

Difficulties can arise for people with an intellectual disability in paying any fine imposed. Some people with an intellectual disability have difficulty in managing their financial affairs and may not understand the value of money or have money skills. A number are financially exploited by others. Others may not understand the process for payment. We understand that recent changes to the *Fines Act 1996* (NSW) provides for a review of the decision of the State Debt Recovery Office to refuse an application for time to pay or to write off an unpaid fine by the Hardship Review Board. We reserve our judgment as to whether this mechanism will be adequate to deal with these problems.

##### 5.3 *Bonds*

A lack of support services can expose people with an intellectual disability to the possibility of a breach of a good behaviour bond (or bonds imposed pursuant to a suspended sentence). Refer to the above discussion about breaches of conditions of court orders at 3.3.

A tailored option to suit the needs of offenders with an intellectual disability might include the supervision and support of disability services and possibly specialist officers within Community Offender Services (previously Probation and Parole) to enable them to comply with the conditions of the bond (refer to 6. below).

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<sup>12</sup> NSWLRC Report 80: (1996) *People with an Intellectual Disability and the Criminal Justice System* at page 413.

<sup>13</sup> Section 10(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

#### 5.4 Community service orders

People with an intellectual disability may require a higher level of support and supervision to be able to successfully carry out a community service order. The officers of Community Offender Services are too stretched to provide the support required and do not have the skills to work with someone with an intellectual disability. There also may be real problems in finding suitable work for a person with an intellectual disability. These deficiencies are likely to result in many people with an intellectual disability being assessed as not suitable for a community service order.

#### 5.5 Periodic detention and home detention

The NSW Law Society suggested that sentences of periodic detention would be better served at a community-based centre<sup>14</sup>. Again, issues arise about the lack of appropriate work and skills and available time of Corrective Services staff.

Home detention is a problematic option for some people with intellectual disability. They may not have the skills to comply with the monitoring requirements and would need support to do so. They may not be accepted by an accommodation service<sup>15</sup>. Some may not have a home or a phone. The offending behaviour of some people can relate to the use of the phone, for example making prank calls to 000 and they may have difficulty using the telephone without further incident. Home detention may have the effect of isolating the person with the disability from the community and result in reduced access to programs they require.

#### 5.6 Diversion under s.32 of the Mental Health (Criminal Procedure) Act 1990

Recent amendments to section 32 mean that a person with an intellectual disability who has been diverted out of the criminal justice system can be returned to it if there is a breach of conditions. As discussed at 3.3, there are many reasons why a person with an intellectual disability may fail to comply with conditions. If the services and support that is needed to assist the person to keep out of trouble with the police are not provided, the person is placed in a situation where he or she may breach the conditions imposed.

There is a real question about whether the court should be empowered to require these services to be provided. Refer to the discussion at 7.5 below.

### **6. Community Offender Services (previously Probation and Parole)**

#### 6.1 Specific expertise and capacity to work with people with an intellectual disability

Officers of Community Offender Services do not have the specialist knowledge and skills to work with offenders with an intellectual disability or to link them with disability services. There should be one officer in each Community Offender Services office (and analogous Juvenile Justice Community Service office) with this training<sup>16</sup>.

Additional funds should be given to Community Offender Services to enable officers have appropriate amounts of time to spend with offenders with an intellectual disability.

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<sup>14</sup> Refer to NSWLRC Discussion Paper 35 (1994) *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* at p 336.

<sup>15</sup> These concerns were raised at page 337 of NSWLRC Discussion Paper 35.

<sup>16</sup> As per recommendation 110 in J. Simpson, M. Martin and J. Green (2001) *The Framework Report: appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending*, Intellectual Disability Rights Service and NSW Council for Intellectual Disability at page 68.