

“Gaol as Community Housing?”

**A forum of the
Law Society of NSW
Public Defenders Office NSW
Criminal Defence Lawyers Association of NSW
Lawyers Reform Association
Coalition on Intellectual Disability and Criminal Justice**

Forum Notes

9 November 2004
The Law Society Building

Issues:

- What are the barriers to diversionary and non-custodial options for offenders with intellectual disabilities?
- How can practitioners and advocates for reform best equip themselves in working to overcome these barriers?

Associate Professor Chris Cuneen (Chair)

Introduction

The issues for discussion concern Human Rights – people with an intellectual disability have the same rights as other people in the community.

Two recent reports relating to people with intellectual disability in the criminal justice system have come out. The first is an extensive survey of the health of young people in custody, conducted by the Department of Juvenile Justice and Justice Health. The second is a report by Jim Simpson and Mindi Sotiri on the criminal justice system and indigenous people with cognitive disabilities.

Dr Meredith Martin, Clinician and Member, Mental Health Review Tribunal

What is intellectual disability?

A person with an intellectual disability is someone who scores 70 and below on an IQ test. They also have other deficits such as in communication, social skills and work. The disability must be apparent before age 18.

Workers in the criminal justice system are often dealing with people who are good at hiding their disability. People with an intellectual disability who are in the criminal justice system say "yes" a lot. They say answers to please others. This has huge implications for workers.

Workers are commonly dealing with people with more than an intellectual disability. Over 50% of intellectually disabled people also have mental illness problems, brain injuries and drug and alcohol problems. They are people with complex needs that require a structured and systematic approach.

What implications does an intellectual disability have on a person's propensity to offend?

Someone with an intellectual disability is susceptible to feeling lonely and wanting to be accepted. They can easily get in the wrong crowd and make poor decisions.

What help is needed?

"They need somewhere to live".

People with an intellectual disability need a proper assessment so that the right supports can be worked out. The problem is that assessments are seldom co-ordinated and the person with an intellectual disability is not looked at holistically.

A proper and comprehensive assessment is required. Treatment needs to be specific, co-ordinated and multifaceted. Realistic objectives need to be set. For example, Meredith once had a client where the goal was for them to be alive each day.

Skill development is needed to allow people with an intellectual disability to have a proper chance in a proper environment. The chances for people with an intellectual disability are fairly optimistic provided that they get the right services. We know what services need to be provided to people with an intellectual disability. What we need to do is just "bite the bullet and do it".

Jane Sanders, Principal Solicitor, The Shopfront Youth Legal Centre

Problems for young people with an intellectual disability in the juvenile justice system

Under the *Young Offenders Act*, young offenders may be given police warnings, youth justice conferences or a police caution.

For lawyers this can be a problem as young offenders are required to admit to the offence in the presence of a responsible adult before such penalties can be issued. The advice that lawyers usually give their clients is "don't admit". If the young offender is under 14 most lawyers would seek to run a *doli incapax* defence once they get to court. s 32 of the *Mental Health (Criminal Procedure) Act* also allows charges to be dismissed by the Court.

The best legal outcome is not always what is best for the young person. In many cases a caution or conference is the best outcome if it is adequately supported.

Recognising young people with an intellectual disability

An intellectual disability in a young person often goes unrecognised. Often, when people come across someone with an intellectual disability, they may think that the person is just a little bit slow, a bit behind at school, has ADD, has been "smoking too much pot" or is "just mixed up" because they are in adolescence.

It is a challenge for police and all people involved with the juvenile justice system to recognise a person with an intellectual disability. Failing to recognise intellectual disability prevents intellectually disabled people from getting a fair go.

Bail conditions

Bail conditions allow the police and judges to impose curfews and residential conditions on young people. These are often difficult to meet for someone with an intellectual disability. If they get arrested it is common for them to spend the night in custody.

Jane once acted in a case that involved a young woman who had breached her bail conditions and was in the cells. "I don't understand. I haven't done anything wrong", she said to Jane. When they went to court, the magistrate asked how bail could again be awarded if the young woman did not understand the conditions. Jane had to argue that bail should be dispensed with or that it should be imposed on conditions that the young woman was capable of understanding.

Tania Evers, Barrister

Representing adults in the Local Court

Although Pt 10A of the *Crimes Act* has been changed to protect "vulnerable persons", the police frequently do not recognise people with an intellectual disability. They present people with an intellectual disability with incomprehensible cautions and do not provide them with a support person. Often the more serious the offence, the less the chances are of a person being identified as someone with an intellectual disability.

It is common that the community does not know what the options for people with an intellectual disability are. Many lawyers also do not have the knowledge and experience that is required. For these reasons people with an intellectual disability go through the system in prejudicial ways.

ss 32 and 33 of the *Mental Health (Criminal Procedure) Act* allow people with an intellectual disability to be diverted out of the mainstream criminal justice system, but sometimes lawyers do not know that this option exists.

It is rare that admissions are challenged. s 85 of the *Evidence Act* allows unreliable admissions to be challenged. The s 90 exclusion applies where it is unfair because a person does not understand the caution. The s 138 exclusion applies in circumstances of impropriety, where the proper procedures have not been followed, for example where no support person has been provided or where the police have not made sure that the person has understood the caution.

For the s 32 diversionary process to apply, a treatment plan needs to be in place. The Chief Magistrate Guidelines say that in the case of people with an intellectual disability, conditions or treatment plans do not need to be limited to treatment. Sometimes what is required is structure, support and stability for the person. The problem is that there are few alternatives available. Often there are no placements or structures, especially in country areas. You cannot present a treatment plan if there is nothing to present.

Tania once acted in a case in the country for a man with a fairly severe intellectual disability who was charged with sexual assault. There were no programs available in the community for people with an intellectual disability. The Crown was prepared to allow the man to remain in the community provided that a treatment plan was presented. After the case was adjourned 15 times to allow a treatment plan to be found, Tania presented the Court with a program which was for people *without* an intellectual disability, but which the Court was willing to accept as a "treatment plan".

Apart from the problems of identification, there is an enormous ignorance that still exists amongst the profession, the judiciary, the police and practitioners as to what options are available. The most glaring option that is not available is appropriate community care, support and placement.

James Condren, NSW Council for Intellectual Disability

What is it like in gaol?

It is scary in gaol.

When James went to gaol he was advised by the Department of Corrective Services to go on protection because he might "be harmed by the other prisoners". At the MRRC James was given half an hour out of the cells each day to access welfare and the phone. At Goulburn Intellectual Disability Unit more freedoms were given with access to the yard. At Long Bay half an hour was allowed in the yard each day. The yard was shared by two disability wings.

People with an intellectual disability are vulnerable to being attacked in gaol. They are often stood over and bashed if they are exposed to other prisoners, or else the other prisoners "try to get you to do something to get you into more trouble". In protection you are mixing with people like child molesters and police informers.

It is only at Long Bay that people with an intellectual disability cannot get a lower security classification.

What help do people with an intellectual disability need to stay out of trouble?

People with an intellectual disability have trouble accessing services. This is why there are barriers for people with an intellectual disability in gaol.

People with an intellectual disability need somewhere to live. This should be organised when they are on parole and coming up for release. Often people get sent from department to department. Another problem is that there is limited employment available. This is something that Centrelink should help with.

James has found that things are much better since he became involved with the New South Wales Council for Intellectual Disability and the Intellectual Disability Rights Service (IDRS) in 2000. He has more support people around in his life. His story is in the Framework Report. He has become a Justice Action (JA) mentor.

James is able to use his experience to assist other people with intellectual disability through his role as educator in training sessions organised by IDRS in Wollongong, Kiama, Sydney and Newcastle.

Jim Simpson, Lawyer and Disability Advocate

Changes to human services

The services just have not been there to give people a fair chance to keep out of trouble. For some people to have a fair chance to get bail, such as the high numbers of people with an intellectual disability on remand in juvenile detention centres, what is needed is supported accommodation. They need somewhere to live with the support that they need.

The range of help a person needs varies from very minimal to very great. This is not just a disability services issue. It is an issue that reaches across a range of services including schools, Families First, child protection, justice agencies, health, housing and so on. Most of these services have acknowledged that they need to lift their capacity to help, but actually achieving change for individuals is another quantum leap.

Specific changes

Specialist disability services generally have not been available to people who get into trouble with the law. Such services are needed. For some people intense supported accommodation is required through disability services such as 24 hour a day staffed group homes.

At the other end of the continuum specialist disability services may only be needed as a resource. Somewhere for generic services to ring up and get advice about how to work with an individual.

Over the past three years or so changes have occurred so that the Department of Ageing, Disability and Home Care (DADHC) now considers offenders with an intellectual disability and people at risk as atop priority for service provision. This includes the development of support plans to underpin bonds as an alternative to gaol. It also includes the development of support plans so that s 32 dismissals can be sought. In addition to this, some non-government disability services have also been building their capacities.

Jim knows a man who has been in and out of gaol many times due to a combination of his intellectual disability and his drug and alcohol problems. On his latest release from gaol he moved into a hostel run by a drug and alcohol agency and was given the support of an active and flexible caseworker from

DADHC. These supports appear to be working really well for him. This is a positive example which illustrates that things can be and are being done to help some individuals.

However, there are many individuals who are not getting the help that they need, and there have been limitations so far in terms of the resources and skills DADHC has been able to provide.

The Community and Court Liaison Service and the Disability Resource Team

The Community and Court Liaison Service is a project of Justice Health, which provides psychiatric services at local courts. The service is taking a flexible view of its role, and works to try to find diversion options for people with intellectual disabilities as well as people with mental illnesses.

The Disability Resource Team in the Department of Corrective Services is a very valuable team who should be contacted by lawyers who have a client with an intellectual disability who goes to gaol. This will alert the team to the needs of the client. Where appropriate, the client may be able to go to a specialist disability unit in gaol.

Because of the shortage of services, ensuring that offenders with an intellectual disability are provided with the support that they need is hard work. Often the big difference is fierce advocacy by a lawyer or a disability advocacy agency.

Andrew Haesler SC, Public Defender

Barriers that arise in relation to defending people with intellectual disabilities

The types of cases involving people with an intellectual disability that are taken on by the Public Defenders' Office are usually cases where of crimes that have caused considerable harm to people in the community. Because these cases involve the commission of fairly serious crimes, and because there is a general movement towards a law and order society, people with intellectual disability are spending longer and longer in gaol.

Once a person with an intellectual disability is in gaol, it is becoming increasingly difficulty for them to get out of gaol.

Courts are increasingly succumbing to the temptation to send people with an intellectual disability to gaol. The bottom line is that it is often easier to send someone to gaol than to prepare a constructive alternative. Most magistrates can

be convinced to set a modest minimum time in gaol, and many lawyers will sit down at that stage thinking that this is a good result particularly where a client, for example, may be out of gaol in three months when they might have expected a sentence of twelve months or three years.

The problem then comes in getting parole. For more serious offenders a hurdle presents itself as they will be required to convince the Parole Board that it will be safe for the community if the offender is released. Despite the availability of some programs in Corrective Services, the vast majority of people with intellectual disability and other problems such as drug and alcohol and mental illness, spend time on protection where they sometimes get as little as one hour a day to access services. They will be lucky if they get into programs while in gaol. The Parole Board will usually consider them a “risk to the community” because it will often say that the person has gotten worse while they are in gaol and were a risk before they came in. The Board will then decide to wash its hands of the person and leave them to serve their entire sentence in gaol. This means that the person gets out of gaol without any supervision or any assistance from the Parole Board, and funnily enough often ends up back in gaol.

Politicians and people of all persuasions like to say that people need to be responsible for their actions, but government and service providers need to be responsible too. It is in the interests of all of us for people to get out of gaol quicker and come out less dangerous and better equipped to deal with life in the outside community.

Some programs are there but the responsibility to ensure that those programs are being provided to all the people who need them within the gaol system is not. That failure of responsibility needs to be addressed.

Julie Hoysted, Parent

Parole – barriers for people with an intellectual disability

Julie has a son with an intellectual disability who has been in gaol three times for armed robbery. He demanded money and said he had a knife in his bag. The first time he was convicted he was sentenced to 12 months in gaol. While he was in gaol he tried to cut his wrists and hang himself. He was transported between different gaols. He ended up in Long Bay where he was aggressively raped. When he came home he was very aggressive. He re-offended. After he had served his second sentence and was released from gaol, he could not cope with being out of gaol. Julie could not cope with him. He lived on the street. He again re-offended and was sentenced to a minimum term of two years.

When the two years was almost up, his name was put down with DADHC for funding for supported accommodation. Julie was advised to say at the parole

hearing that she did not want her son to come home to her and that she wanted him to have help from DADHC. She was told that there would be a four to six week wait. It took two and a half years. Her son did his parole in gaol. He now lives in a group home where he has been for 6 months, and is doing very well. Julie feels that if he had received help after his first instance of offending, he would never have re-offended. He never wants to go back to gaol.

Meredith Martin

The paucity of appropriate support

There is "almost nothing" in terms of programs and services for people with an intellectual disability in the criminal justice system. There are some people who are ad hoc supported in the community with fierce advocates, but in NSW there is nothing.

There are some options in Victoria where there is a state-wide forensic system for people with an intellectual disability. This system has graded accommodation options. Other options available in Victoria exist in the non-government sector and these are graded to suit specific types of offences.

The accommodation option needs to include an option where people cannot leave. Some people who Meredith have worked with "vote with their feet very clearly" before they have a chance to settle in to supported accommodation.. In particular one young person she has worked with went from gaol to a group home and then said "I need a cigarette, I'll just pop down the street and get one", and was gone. Their access to accommodation lasted about an hour.

Di Robinson, Deputy President Mental Health Review Tribunal

Alternatives for forensic patients

The Mental Health Review Tribunal reviews forensic patients. The biggest thing about people with an intellectual disability in the forensic system is that they just simply do not fit.

In the big picture sense the forensic system is there for people who intersect the criminal justice and the mental health system. It is there for people who are essentially not guilty of a crime because they are mentally ill, or for people who are transferred from prison into hospital while they are serving their sentence because they become mentally ill.

Although the whole system is geared towards dealing with people with a mental illness, there are a large number of people in the system with an intellectual

disability who are referred to as “fitness people”. This includes people with an intellectual disability who are unfit to plead to an offence when they get to court because they are unable to make out their own defence. They come into the forensic system through the fitness pathway. They go through a special hearing where a limiting term is imposed followed by a review by the Tribunal. The MHRT then makes recommendations about release or placement but the Minister for Health then makes the decision.

The mental illness model is based on the idea that mentally ill people will get better after treatment and demonstrate a recovery, remission and rehabilitation. But for people with an intellectual disability it is hard to improve from hospital or prison “treatment”.

The options are to place people with an intellectual disability in maximum security at somewhere like Long Bay Prison Hospital or to place them in a forensic unit in a psychiatric hospital. There are no units for intellectual disability outside gaol. The MHRT can recommend conditionally releasing people into the community under the supervision of a mental health caseworker and a psychiatrist, but these people usually do not have expertise in working with people with an intellectual disability.

The basic overall picture is that people with an intellectual disability in the forensic system are a square peg being forced to fit into a round hole – a complete lack of a fit.

Tania Evers

Current movements in law reform

Under the current legislative scheme, forensic patients include people “unfit to be tried”. These are usually people with an intellectual disability, but they do not “recover” under treatment. They receive a special hearing in the District or Supreme Court. If they are found to have committed the offence the Sentencing Act does not apply.

The sentencing act determines what penalty is imposed if a person is not unfit. A limiting term is imposed on a person with an intellectual disability who is unfit to plead and found guilty of an offence. But procedures under the Sentencing Act allow all sorts of options such as suspended sentences that will not apply to people with an intellectual disability who are “unfit to plead”.

Therefore a person with an intellectual disability who goes through this regime spends more time in gaol. If they can not plead guilty they receive no 25 percent discount at sentencing. Even if they do plead, their plea does not count because they are “unfit to plead” and again they receive no discount at sentencing.

Furthermore, under case law they are not entitled to a non-parole period. Therefore these people get a limiting term, no parole and no support.

Lloyd Babb, Director, Criminal Law Review Division, Attorney-General's Department (from floor)

Current movements in law reform

Reforms to the laws discussed by Tania were being considered by the Criminal Law Review Division in the *Mental Health Act* Discussion Paper No. 2 at the time of the forum. The paper specifically outlines Executive discretion and the government's role in determining the release of forensic patients.

Lloyd reported that he had been exploring the limiting terms issue and the case law. However, he was unable to say more at this stage.

Jim Simpson

Reforms to human services

"Agencies have just got to get together and sort all this out".

This was meant to happen three years ago with the creation of a Senior Officers Group but things frankly descended into a farce. The Council for Intellectual Disability has complained to the New South Wales Ombudsman. The Ombudsman is currently completing an investigation.

Jim has been an advocate for 20 years in the field of intellectual disability and criminal justice. He has observed that there has been some progress since 2000. In 2001 the government made a commitment that a legislative and service framework would be established to address the over-representation of people with intellectual disability in the criminal justice system. Last year a regression took place where DADHC was retreating from its commitments to offenders with intellectual disabilities and failed to provide leadership to the Senior Officers Group.

In recent months there has been a regime change at the top of DADHC. This change of regime has restored clarity regarding DADHC's acceptance that it has to work with this group. The Senior Officers Group is also being reconstructed.

One other agency

The study conducted by Juvenile Justice and Justice Health indicates that young people with an intellectual disability are 400 percent over-represented in juvenile detention. It also indicates that over 40 percent of young people in juvenile detention have IQs below 80, and that over 80 percent of young people in detention centres have psychiatric disorders.

The message that Jim and the Coalition have for the agencies is: "It's too modest what you're doing, but let's work together on identifying some practical changes that can occur".

Funding has a huge impact on the capacity to provide supported accommodation. Services will always be limited unless the government digs deep to provide the funds.

Intellectual disability and indigenous people

This is a complex area. Various factors hide intellectual disability in indigenous cultures. Indigenous Australians tend not to think in terms of disability. Often services are not available to, or are not culturally appropriate for, indigenous people.

Keppie Waters, Aboriginal Legal Service (from floor)

Intellectual disability and indigenous people

Keppie appears regularly at the Parole Board. A barrier for indigenous people with intellectual disability applying for parole is the lack of services such as supported accommodation.

Keppie appeared before the Parole Board on the day of the forum. Her client was refused parole based on their past failures on parole and behaviour in custody.

Nick O'Neill, President, Guardianship Tribunal (from floor)

The role of the Guardianship Tribunal

Guardianship can make a contribution to meeting the needs of a person with an intellectual disability. The person needs to be found to have a decision-making disability before a guardian can be appointed.

Guardianship can assist an offender with an intellectual disability in two ways:

- (1) A guardian can advocate to DADHC and other agencies for appropriate accommodation and services to be provided to the person and accept them on behalf of the person.
- (2) Financial management can also help a person with an intellectual disability. This means that their money will be managed so that they are supplied with board and lodging and access to spending money.

Graeme Smith, Director, Office of the Public Guardian (from floor)

The role of the Office of the Public Guardian

The OPG is often appointed as a decision-maker and advocate for people with intellectual disability. However, it has a very limited role once a person with an intellectual disability enters the prison system.

The OPG recently had a client with an intellectual disability who was also autistic. He was dependent and vulnerable. The bail conditions that had been imposed on him required him to stay in Moree where he lived. His father took him to his mother in Sydney where he was arrested when he wandered from home and was found to be in breach of his bail conditions. The behaviour of clients like this needs sophisticated responses. The client has since been placed in Long Bay Prison Hospital where he has been transferred to the psychiatric unit. The psychiatric unit cannot manage his behaviour. He requires specialist behaviour management which the psychiatric unit is unable to provide.

The infrastructure simply does not exist once a person with an intellectual disability enters the criminal justice system, and the OPG finds it very hard to create solutions that satisfy the Parole Board.

Ethel McAlpine, Deputy Director-General, Department of Ageing, Disability and Home Care (from floor)

The position of DADHC

Ethel has previously worked with offenders with intellectual disabilities in Victoria and she has brought this experience with her to New South Wales.

Some of the recent developments in DADHC services for people with an intellectual disability include the forensic casework capacity in the state-wide Behaviour Intervention Service (BIS), training programs for disability workers

around the state and specialist programs and accommodation for some people with a history of sexual offences.

However, Ethel believes that DADHC has gone about as far as it can within its current capacity in developing services for offenders. Also, there is a limited range of models for disability accommodation:

- (i) large residential services, which are not a preferred model;
- (ii) group homes; and
- (iii) drop in support.

Sometimes group homes are an inappropriate form of accommodation and can exacerbate behaviour problems.

Janene Cootes, Sydney Regional Co-ordinator, the Criminal Justice Support Network (from floor)

The Criminal Justice Support Network

The Criminal Justice Support Network is a new service which is part of the Intellectual Disability Rights Service, and is funded by DADHC.

Intellectual disability affects understanding and the ability to deal with new situations. This creates problems for people with an intellectual disability involved with court and police processes.

The CJSN service aims to provide support people 24 hours a day. One of the roles of the support person is to assist people with an intellectual disability to prepare for court hearings.

The problem with the criminal justice system is that it does not provide enough time for people with intellectual disability. Support people are trained to help minimise such discrepancies so that people with intellectual disability can put their best foot forward when they come into contact with the criminal justice system.

People with intellectual disability are entitled to have a support person present in police interviews, just as young people under 18 are entitled to have access to a support person. Police often are not aware of this.

CJSN encourages lawyers to contact it for support workers. Support workers are not intended to replace disability services. CJSN is seeking people interested in training and in becoming volunteers. In particular CJSN is trying to recruit volunteer lawyers with criminal experience. During police interviews it is

important that people with intellectual disability receive legal advice. Support workers cannot replace lawyers.

Audience member 1 (open floor)

Intellectual disability, gender and the criminal justice system

This audience member is part of a support group for a woman with an intellectual disability who is currently in Mulawa. She says it is important that people consider the possibility that there is a gender bias when it comes to discussing the difficulties faced by people with intellectual disability in the criminal justice system. Women are also offending and are in the same situation as male offenders.

Bringing legal services up to a “glossy level” will never be enough unless the services outside the legal sector are also fixed. This is DADHC’s role.

The audience member’s client is currently in Mulawa and is not being allowed out. Her behaviour has gotten worse since she has been given shock treatment. She is being kept in the prison system for longer by staff who occasionally bring charges against her when she hits them.

DADHC has said in the past that they want to wash their hands of her. Although the attitude of DADHC has changed, the services that it is offering her are completely inadequate.

Audience member 2 (open floor)

Comparing the intellectual disability and youth sectors

This audience member has worked in the youth and intellectual disability sectors. He noted an earlier comment made by the panel about looking at human beings holistically. One issue that he noticed had not been raised in detail by the panel was “do we ever listen to the voice of those people” that are the topic of discussion? What options do they want?

He also noted the somewhat “controversial” comment made by the panel that people should be housed and kept in housing. In his opinion, the rest of the community, as tax payers should be forced to attend and see what the lives of people with intellectual disability are like.

In drawing a parallel with youth services, he observed that it is easy for youth services to create exclusion policies, especially for people with multiple difficulties.

When people get out of the correctional system what options are there? Housing is not enough. Once people have houses they will need other services. In NSW there is a model for the diversion of young offenders from the mainstream criminal justice system. This involves developing a plan for the young person's future and getting, for example, their parents to sign up. This model could be adapted to ensure that people with intellectual disability who are diverted from the criminal justice system also receive the services they require.

The question that remains is – how much of the voice of people with intellectual disability is raised in this debate?

Audience member 3 (open floor)

Identifying intellectual disability

This audience observed that the criteria for recognising intellectual disability mentioned by the panel was somewhat unclear. Can more information be provided from the panel about this?

Meredith Martin

Identifying intellectual disability

The question of recognising intellectual disability is the million dollar question. The proper assessment process takes a long time to conduct. Intellectual disability is difficult to recognise because it is so well hidden, particularly by people in the criminal justice system. When an actual assessment is carried out it is not so difficult to recognise, but it is much more difficult to recognise intellectual disability at a first meeting.

It is probably not a good idea to ask someone whether they have an intellectual disability, because there is a tendency for a person with an intellectual disability to say “yes” to questions put to them. One question that can be asked is where the person went to school.

Jane Sanders

Identifying intellectual disability

Other questions to ask the person are:

Have you been in a special class?

Do you get money from Centrelink?

However, during a situation such as a police interview where a person is scared and under pressure it may be difficult for them to provide answers to these sorts of questions.

In Jane's experience, the more experience you have, the easier it is to identify when someone has intellectual disability.

Tania Evers

Identifying intellectual disability

The Code of Practice for police, called CRIME, sets out the criteria that the police are supposed to apply to identify intellectual disability. There are seven criteria which cover things like whether the person is on the pension, whether they can read or write, whether they went to a special school.

Tania has been involved with a case where her client fit five of the criteria and the police still said that the client was not intellectually disabled or mentally impaired. In a different case Tania produced a plethora of material to prove a client's intellectual disability only to have the magistrate say that this material was "only reports" and turn to the client and tell them that they were "fabricating" their intellectual disability.

Meredith Martin

Identifying intellectual disability

Caution needs to be exercised in applying the question about where a person went to school because education has been moving towards a more inclusive system where people with intellectual disability are being incorporated into the mainstream schooling system.

Andrew Haesler SC

People holding senior positions in the public service

Having occupied a senior position in the bureaucracy, and having tried over a number of years quite desperately and with a lot of energy to get things moving. I can appreciate how difficult it is for those of us, or those of you who are public servants to get the resources for programs which you either have in place or you would like to put in place.

The more senior people within the public service who you can get into the senior officers groups the better; the more access they have to their Ministers the better; the more support you can get from Treasury and the Cabinet office to push those programs through the better; and the more access you have to Cabinet the better.

Motion moved and carried

Andy proposed a motion:

That the meeting call on the New South Wales Government to urgently honour its commitment made in 2001, to provide a service and legislative framework to address the over-representation and vulnerability of people with intellectual disabilities in the criminal and juvenile justice systems.

This includes the striking need to make new budget allocations for accommodation and related support for this group.

The motion was seconded by Tania Evers, and passed without dissent.

Julian Porter, Queensland Advocacy

International conference on intellectual disability

Queensland Advocacy is organising an international conference on criminal justice and intellectual disability in October 2006. They are keen to make contact with anyone interested in contributing to discussions that will be raised at the conference.

Jane Sanders

The Coalition on Intellectual Disability and Criminal Justice

The Coalition on Intellectual Disability and Criminal Justice was formed to advocate for legal and systemic change in the human services and justice systems so that people with intellectual disability have proper access to a fair go and to the support services and fairness that they are entitled to.

The Coalition is made up of a number of organisations, mainly disability organisations, and also legal and criminal justice groups. It meets every two to

three months at the NSW Council for Intellectual Disability. Anyone who is interested in becoming part of the Coalition either in a personal capacity or on behalf of their organisation is encouraged to contact the Coalition.

Julie Hoysted

Conclusion

Julie is grateful to DADHC for helping her son and looks forward to DADHC helping other people with intellectual disability with housing.

Her concluding remark was that "gaol is not a disability centre".

Services for offenders with intellectual disabilities

Information on current options

Jim Simpson lawyer and senior advocate,

NSW Council for Intellectual Disability

November 2004

Introduction – what is needed

Many agencies need to be able to assist offenders with intellectual disabilities. These include:

- Disability services provided or funded by the Department of Ageing, Disability and Home Care (DADHC).
- Health services including mental health and alcohol and other drug services. Many offenders with intellectual disabilities have these additional diagnoses.
- The Department of Housing in relation to public and community housing.
- Education and training, both schools and adult education.
- Child protection and other children's services provided by the Department of Community Services.
- Juvenile justice community and detention services.
- Corrective Services through Probation and Parole, in gaol and transition to release.
- The justice system – police, lawyers and courts.

These agencies need to be well coordinated both in response to individual needs and at a systemic level.

Accommodation and related support is often an individual's core need.

Lawyers and others seeking services for offenders with intellectual disabilities often face a daunting challenge. However, there are some avenues worth pursuing. All of the above agencies have acknowledged they need to lift their capacity to respond to offenders with intellectual disabilities and some useful initiatives have occurred. This paper provides information on some of these and details of policy statements that can be quoted from.

The Government’s core undertaking and obligations

The NSW government is committed to providing a legislative and service framework that is able to address the complex policy and service provision issues presented by the over-representation, high recidivism and vulnerability of people with an intellectual disability within the criminal justice system or at risk of contact with the criminal justice system.

Faye Lo Po’ Minister for Disability Services, December 2001

Government and non-government service providers are obliged to provide their services in a non-discriminatory manner including making reasonable accommodation for the impact of a disability (Anti-Discrimination Act NSW, Disability Discrimination Act Cth). Government agencies must have plans to make their services more appropriate for people with disabilities (Disability Services Act 1993 NSW section 9).

Disability services

These include case management, behaviour intervention, respite care, supported accommodation and support for people in their own homes.

Criminal lawyers will often have clients needing services from the Department of Ageing, Disability and Home Care or non-government disability services funded by it. Appropriate disability services may be vital to the client getting bail or a non custodial sentence or having a charge dismissed under section 32 of the Mental Health (Criminal Procedure) Act.

Traditionally, offenders with intellectual disabilities were not a priority for government disability services. Now, DADHC acknowledges a high priority to offenders with intellectual disabilities in its service provision.

DADHC’s Priorities and Allocation Policy 2002 sets out prioritisation criteria for the Department’s services. The highest priority “Immediate Response” group, includes situations of:

- Violence or abuse resulting in anybody being at risk of injury.
- Homelessness including people who need a home to get parole or other release from prison.
- Challenging behaviour so that the person is at risk of justice system involvement or of reoffending.
- Clients who need services if they are to get bail, bond or parole etc.
- Clients at imminent risk of incarceration.

This policy includes that if a client refuses a service intervention, DADHC should look for strategies to engage the person.

DADHC services are sorely stretched like many government services. There is a particular shortage of supported accommodation. And working with offenders is a new challenge for many DADHC workers.

However, lawyers and others can now approach local DADHC offices with an expectation that the above policy will be met. DADHC also has a specialist Behaviour Intervention Service which includes forensic casework specialists and behavioural specialists.

Note that DADHC services are targeted to people with an intellectual disability. An intellectual disability has three required elements:

- Intellectual functioning at least two standard deviations below the mean on a full scale score on a recognised test of intelligence. This usually means an IQ below 70, though this may extend to about 75 because of error factors in IQ tests.
- Significant deficits in adaptive functioning in two or more areas.
- The disability being manifest prior to the age of 18.

(Circular to DADHC staff from Ethel McAlpine, Deputy Director General October 2002)

For DADHC to provide services there needs to be an appropriate professional assessment demonstrating that a person has an intellectual disability. DADHC can carry out these assessments (urgently if required) but much delay may be avoided if an assessment is already available. For example, a young man may have been assessed in high school or there may be a previous assessment for court.

DADHC has adopted specific procedures for its staff to prepare court reports and case plans where a magistrate is considering dismissing a charge under section 32 of the Mental Health (Criminal Procedure) Act.

DADHC is also finalising a Criminal Justice Resource Manual which will provide clearer guidance for its staff and others about DADHC's role.

There are also many non-government agencies also funded by DADHC. Again, historically, these tended not to work with offenders. Now, some have a specific interest in this area. DADHC case managers, and certainly the Behaviour Intervention Service, should be aware of these.

Strong advocacy is often essential for DADHC's policies to lead to service provision that will meet a particular individual's needs. Disability advocacy groups can sometimes assist with this advocacy. Information about local advocacy groups can be obtained from the information service at the NSW Council for Intellectual Disability.

Lawyers seeking disability services should initially approach the relevant local office of DADHC. These are listed on the DADHC website at www.dadhc.nsw.gov.au. If approaching the local office proves inadequate, you can go up the line in DADHC or contact the Behaviour Intervention Service on 8876 4000. The DADHC head office phone number is 8270 2000

Statewide Community and Court Liaison Service

This service run by Justice Health has a network of psychiatric nurses at many local courts. These nurses can seek out diversion options for accused people with mental illnesses and those with intellectual disabilities. They commonly need cooperation from disability services to provide such options.

Contact number - 8295 7099

Guardianship

Sometimes, a person may be initially reluctant to accept support. Service workers should use imagination and persistence to seek to engage the person. Sometimes, a guardianship order from the Guardianship Tribunal may be appropriate as a way of providing some degree of coercion in service provision and providing a guardian (often the Public Guardian) who can continue to advocate for optimal service provision.

Where appropriate, the Tribunal can also appoint a financial manager to manage the money of a person who lacks the capability to manage his or her own affairs.

Contacts -

Guardianship Tribunal 9555 8500 or 1800 463928

www.gt.nsw.gov.au

Office of the Public Guardian 9265 3184 or 1800 451510

www.lawlink.nsw.gov.au/opg

Department of Corrective Services

The Department has a multidisciplinary Disability Resource Team in its central office and has an expanding number of special units in gaols for prisoners with intellectual disabilities. It is currently unclear whether these units will be adequately resourced with professional staff. However, a lawyer whose intellectually disabled client is in prison would be wise to alert the Disability Resource Team and advise them of special needs of the client.

Contact – 9289 1333

Other contacts

NSW Council for Intellectual Disability 9211 1611 or 1800 424 065

Advocates for systemic change on behalf of people with intellectual disabilities, provides an information service about services for people with intellectual disabilities.

www.nswcid.org.au

Intellectual Disability Rights Service 9318 0144 or 1800 666611 www.idrs.org.au

Provides legal advice and limited legal assistance, carries out systemic advocacy and education. Also operates the -

Criminal Justice Support Network 9318 0144 or 1300 665908 (24 hours)

Provides and promotes support for people with intellectual disabilities in police interviews and in court. At present, the Network provides support workers in Sydney, the Hunter and Illawarra/Shoalhaven areas, and advises on support in other parts of NSW.

Select references in relation to offenders with intellectual disabilities

Hayes S and Craddock G, (1992) *Simply Criminal* 2nd ed, Federation Press

Simpson J, Martin M and Green J, (2002) *The Framework Report* www.idrs.org.au

Simpson J and Rogers L, (2002) *Intellectual Disability and Criminal Law*, Hot Topics 39, Legal Information Access Centre, State Library of NSW

Law Reform Commission (1996), *People with an Intellectual Disability and the Criminal Justice System Report 80*, www.lawlink.nsw.gov.au/lawlink/lrc