

Criminal Law Review Division
NSW Department of Attorney General and Justice
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19 December 2011

Submission to Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987

The Intellectual Disability Rights Service ('IDRS') is a community legal centre and disability advocacy service that provides legal assistance and advocacy for people with intellectual disability throughout New South Wales. IDRS services include legal advice and legal casework. IDRS engages in policy and law reform work and community legal education with the aim of advancing the rights of people with intellectual disability.

IDRS operates the Criminal Justice Support Network ('CJSN') which provides volunteer support persons for people with intellectual disability when they come into contact with the criminal justice system, particularly at a police station and at court. CJSN volunteers support people with intellectual disability in at least 5 local courts in NSW every day. In 2008, IDRS published '*Enabling Justice*', a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the NSW local court system.

IDRS has recently published a 'Step by Step guide to Making a Section 32 application for a person with intellectual disability' to assist lawyers in making applications under section 32 of the *Mental Health (Forensic Provisions) Act 1990*.

With funding from the Public Purpose Fund of the Law Society of NSW IDRS provides legal assistance and advocacy for parents with intellectual disability who are involved in Care and Protection proceedings in relation to their children.

IDRS welcomes the opportunity to provide input to the review of the Young Offenders Act 1997 (YOA) and the Children (Criminal Proceedings) Act.

CJSN is a service of the Intellectual Disability Rights Service ABN 112 1637 1524

~~Our submission will focus on the needs of children with intellectual disability in relation to the following issues:~~

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• General Principles of YOA

- Are the interventions under the YOA adequate and appropriate for children with cognitive and mental health impairments?
- Effective diversion and service delivery
- Offences excluded from the YOA – specifically ADVOs and APVOs
- Background Reports prior to sentencing

General Principles

The *2009 NSW Young People in Custody Health Survey* has confirmed that a high proportion (13.6%) of children and young people in Juvenile Detention Centres are assessed within the IQ range that would suggest an intellectual disability. A further 32% were assessed with an IQ in the Borderline Intellectual Function range.

For the period 2003-2006 the *NSW Young People on Community Orders Health Survey* reported that 15% of young people serving community orders had IQ scores consistent with possible intellectual disability and 11% met both the IQ and adaptive behaviour deficit criteria consistent with possible intellectual disability. This is much higher than the incidence of intellectual disability amongst children under 18. The 2003 Survey of disability, Aging and Carers suggests that around 4.3% of children under 14 had an intellectual disability. This is an estimate based on carer reports and so is not directly comparable to the detention statistics which are based on assessment.

The incidence of mental health impairments amongst children and young people in juvenile detention is also revealed by the *2009 NSW Young People in Custody Health Survey* to be high. A significant proportion of children in the criminal justice system will have both conditions.

IDRS recommends that, given the high incidence of cognitive and mental health impairments amongst juveniles in the criminal justice system that the YOA should include a principle that the overrepresentation of children with cognitive and mental health impairments should be addressed by effective diversion from the criminal justice system.

This would be consistent with Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities.

Are the interventions under the YOA adequate and appropriate for children with cognitive and mental health impairments?

The fact that so many children with intellectual disability are detained in juvenile detention centres or receive community orders suggests that the short answer to this question must be NO. There are real questions as to whether current diversionary options are too limited in their approach and are too complex to cater for some children with cognitive and mental health impairment and indeed whether these children have equal access to effective diversionary opportunities.

Warnings

In response to question 7, IDRS supports the increased use of warnings for young offenders with intellectual disability. Accordingly IDRS supports the recommendation of the 2002 statutory review of the Young Offenders Act which recommended expanding the range of offences for which a warning can be used to include larceny involving theft from a shop. IDRS supports an amendment to the effect that warnings may be given in respect of all offences covered by the YOA, unless an offence is excluded by regulation. If the young person has an intellectual disability, IDRS believes that wherever possible there should be an emphasis on the police informing the carer about the warning, ensuring the carer has also explained the warning to the young offender, and if appropriate provide supports to the young offender to help them understand the warning and its implications.

Cautions

IDRS believes that there should be no limit on the number of cautions that a young offender with an intellectual disability may receive and that there should be discretion to issue further cautions beyond three. Behaviour change can be a long process for children with intellectual disability. Progress may seem slow but this is the norm and it is important not to give up should further incidents occur. It is often unrealistic to expect that the behaviour can be eliminated in a short time and there may be setbacks. With adequate support, sometime specialist intervention, persistence and patience, the problem behaviour will usually reduce in frequency and severity and eventually may well become rare or cease altogether.

Problems with admission of guilt and restorative justice approach for some children with cognitive disability

A child with an intellectual disability may well have difficulty understanding or appreciating that a particular action constitutes a crime, that it is wrong or that there has been harm caused. By definition a child with intellectual disability will have more difficulty understanding this concept than another child of similar age without intellectual disability. This is the nature of the disability. IDRS believes that the requirement to admit guilt in order to achieve diversion via a caution or juvenile justice conference is likely to restrict the availability of diversion at an early stage to some children with intellectual disability. This requirement may also push children with intellectual disability into making admissions that they do not fully understand or in some cases to make false admissions.

Further some children with intellectual disability will be limited in their ability to understand and participate in a conference focused on restorative justice processes.

Access to the existing diversionary options is not only limited by the child's capacity but is likely to be limited by the perceptions of police and others about the child's ability to fulfill the pre-requisites for cautioning and juvenile justice conferencing. Based on IDRS experience, it is unlikely that the significant assistance that may be needed by a children with intellectual disability to qualify for diversion at the police station is in fact provided.

Particularly through its Criminal Justice Support Network (CJSN), IDRS has worked with Juvenile Justice on its process for identifying and responding to additional support and more recently has liaised with Juvenile Justice specifically to facilitate referrals for support persons for children with intellectual disability in juvenile justice conferences. While there have been referrals, it is rare that the conference actually occurs. The experience of our support persons is that the child with intellectual disability often finds the idea of the conference too intimidating and fails to turn up or withdraws after the preliminary conference. Intellectual disability affects a child's capacity to understand abstract concepts. A child with intellectual disability is more likely to think and relate in the here and now and is less likely than other children to recognize and take into account future benefits. They will also have difficulty understanding reassurances that they will be looked after through the process and in our experience are simply afraid.

IDRS does not suggest that children with intellectual disability should not have access to current diversionary options. Some children with intellectual disability will be able to meaningfully participate in these options with adequate support and this option should remain available for those children. However there are others who will not be able to understand the process and its purpose

or will not be able to meaningfully participate and therefore will not have the early option of diversion and will need to proceed through the Children's Court.

Need for an alternative model of early diversion for some children with intellectual disability

IDRS believes there is a need for an additional diversionary option that focuses on the needs and welfare of the child without requiring an admission of guilt or participation in a restorative justice process for those children with cognitive impairment or mental health impairments who are not suited to these options. This process should include individualized support planning for the child and their family (where appropriate). Ideally this process would include relevant government agencies such as Ageing Disability and Home Care, Department of Health, Department of Education being mandated to contribute.

IDRS is unaware of statistics on the use of section 32 Mental Health (Forensic Provisions) Act 1990 (NSW) for children with cognitive disability. While IDRS would prefer that diversion is achieved at an earlier stage in the process, section 32 should be used as an avenue for diversion for children with intellectual disability who come before the court.

Effective diversion and service delivery issues

Effective diversion would be assisted by better co-operation bringing together the expertise of Juvenile Justice, ADHC, Health and other services for young people to meet the needs of children with cognitive and mental health impairments who are in contact with the criminal justice system.

The Community Justice Program (CJP) of Ageing, Disability and Home Care (ADHC), part of the NSW Department of Family and Community Services, provides services for people with intellectual disability, including children, who have been involved with the criminal justice system and who meet the eligibility criteria.

Of the 209 people accepted by CJP up until October 2011, 42 were juveniles at the time they entered the program. There has been a relatively low rate of referral from Juvenile Justice to the CJP with only 15% of referrals to the program as at October 2011 having come from Juvenile Justice.

The eligibility criteria for the CJP generally require that the child/young person has a significant offence history in order to be accepted. It is important that children with intellectual disability are able to access specialist assistance via ADHC at an early stage of their offending behaviour. IDRS recommends that the criteria for CJP be clarified and broadened to enable assistance to be provided

as part of diversionary planning for children with cognitive disability at an earlier stage. Alternatively it is vital that clear pathways are established for priority assistance for these children through ADHC regional services.

Offences excluded from YOA – breach APVO and ADVO

IDRS believes that breaches of APVO and ADVO orders should not be excluded from the YOA. Breaches of APVO and ADVO orders are frequent amongst children and young people with intellectual disability. ADVOs taken out on children with intellectual frequently result from incidents involving a parent and child. Sometimes children with intellectual disability, including those with severe intellectual disability, display aggressive behaviour in the home. Sometimes the child does not have the capacity to control this behaviour. The parents rarely support the use of an ADVO in this circumstance, but police feel obliged to seek an order.

Domestic violence orders are taken out against people with intellectual disability who cannot understand the orders and who do not have the ability to comply with the orders. Breaches are inevitable.

Background Reports Prior to Sentencing.

IDRS applauds the requirement that a background report must be obtained by the court when considering sentencing a young offender to detention. It is vital, however, if it is suspected that the child may have a cognitive disability, that the clinician providing this report have expertise in disability and that the child's disability has been assessed.

In conclusion, IDRS calls for greater collection and availability of data on children with cognitive and mental health impairments in the criminal justice system to inform legislative and policy development

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