13 December 2013

The NSW Law Reform Commission
Level 13 Swire House
10 Spring Street
Sydney, NSW 2000

By Email: nsw_lrc@agd.nsw.gov.au

Re: *Consultation Paper 15- 'Encouraging appropriate early guilty pleas'*

Intellectual Disability Rights Service welcomes the opportunity to comment on the NSW Law Reform Commission consultation paper 'Encouraging appropriate early guilty pleas: Models for discussion'.

About us

The Intellectual Disability Rights Service ('IDRS') is a community legal centre that provides legal services to people with intellectual disability throughout New South Wales. IDRS' services include the provision of telephone 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 operates the Criminal Justice Support Network ('CJSN'), which supports people with intellectual disability when they come into contact with the criminal justice system, particularly at the police station and at court. CJSN volunteers support people with intellectual disability in at least 5 local courts in NSW every day.

IDRS' expertise derives from our significant experience with people with intellectual disability in the criminal justice system, including providing support persons and legal advice to them when they are arrested. As such, IDRS' focus in this submission is on the needs and interests of people with intellectual disability.

General Comments

In response to the consultation paper 'Encouraging appropriate early guilty pleas: Models for discussion', IDRS agrees that facilitating early resolution of matters is generally beneficial for all parties and generally agrees that facilitating the efficient conduct of criminal procedures is also beneficial. However, efficiency must not be promoted at the expense of the proper administration of justice. It is important to acknowledge that Guilty pleas should not be encouraged in such a way, or to the extent that a defendant (particularly a defendant with impaired capacity) feels obliged to plead guilty.

People with intellectual disability often face many barriers to justice in the NSW Court system. Complex legal language, legal processes and procedures, at times, make it extremely challenging for people with intellectual disability to participate in the criminal justice system on an equal basis to others. People with intellectual disability often require more time with their legal representative in order for their legal representative to obtain instructions about charges, what plea will be entered on their behalf and possible defences. Unfortunately, often as a consequence of busy court lists, it is the experience of IDRS that people with intellectual disability have historically been pressured into entering guilty pleas where they might otherwise have had alternative options available to them. For example, diversion under section 32 of the *Mental Health (Forensic Provisions)* Act 1990 (MHFPA), a plea of not guilty, or an indefinite stay on proceedings because of an unresolved issue of fitness to stand trial.

Inappropriate early guilty pleas can result in serious consequences for people with disability who are already significantly over-represented in the criminal justice system, particularly in NSW prisons.

Section 32

In NSW the primary diversionary mechanism for people with intellectual disability is section 32 of the *Mental Health (Forensic Provisions) Act* 1990 (MHFPA) which is a diversionary mechanism that allows for defendants with developmental disability or mental illness to be diverted out of proceedings in the Local Court.

Section 32 of the MHFPA makes provision for diverting alleged offenders with intellectual disability in the Local Courts out of the criminal justice system into a therapeutic environment. The purpose of section 32 is to allow defendants with a mental condition, a mental illness, or a developmental disability to be dealt with in an appropriate treatment and rehabilitative context enforced by the Court rather than being dealt with at law and subject to punishment.[1]

The availability of section 32 to defendants in the local courts is extremely important in order to ensure that people with intellectual disability are able to access just outcomes in the NSW Courts. By diverting offenders away from the court system it is suggested that there are many positive benefits to offenders in that they may avoid incarceration (and the subsequent negative effects of incarceration), avoid having to participate in a system that they have little comprehension of and avoid punitive sanctions imposed by the court. Further, section 32 has been thought to be consistent with human rights standards as it is considered to be an effective tool in reducing recidivism and allows offenders to receive the appropriate supports to address potential offending behaviours.

Although section 32 is available for any matter that can be dealt with summarily in the Local Court, section 32 orders are significantly underutilised by the courts. The NSW Law Reform Commission outlines that the total number of MHFPA related discharges has remained relatively stable since 2008. Of all the people appearing in the Local Court, approximately 1% of them receive orders under s 32 of the MHFPA.[2]

It is the experience of IDRS that reasons contributing to the underuse of section 32 include lack of time available to the courts, lack of time for solicitors to be able to give appropriate consideration to whether or not a person may have the s 32 available to them; and lack of time to be able to organise appropriate assessments necessary to make an application.

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

[2] NSW Law Reform Commission, 'People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion' (New South Wales Law Reform Commission, 2012) [40.73].

It is the experience of IDRS that clients are often advised to plead guilty to an offence where diversion under section 32 might have in fact been available to them. This issue may have further relevance to the present discussion paper as it is anticipated that in future the availability of section 32 might be extended to the higher courts.

IDRS submits that although in general we support the facilitation of early resolution of matters it is important that this should not be at the expense of allowing adequate time for lawyers to obtain instructions from their clients or time to undertake investigations (for example obtaining psychological assessments or reports) into whether alternatives are available to them such as an application under section 32.

The below case study is one example of the common experience of IDRS clients who have histories of pleading guilty where there may have been alternative options available to them.

Case Study 1

Sarah was 40 years old with moderate to severe intellectual disability. She lived at home with her elderly parents and younger brother. Although she lived at home Sarah had been receiving support from Aging Disability and Home Care for the past 5 years.

Sarah had a lengthy history of matters before the Local Court which primarily involved making 000 prank calls to the police. On this occasion Sarah had an argument with her family. Sarah was upset and allegedly made a number of 000 calls to the police. The police charged Sarah with making false calls to emergency services.

Sarah's record showed that she had 20 previous matters where she had entered a plea of guilty. Sarah received a number of good behaviour bonds but had also been given multiple prison sentences as a result of consistently breaching those bonds. Whilst in prison Sarah had been seriously assaulted by another inmate which caused her behaviours to increase.

When IDRS met Sarah the IDRS solicitor obtained a psychological assessment, court report and treatment plan from ADHC. Although these took a number of weeks to obtain IDRS was able to make a successful application that the matter should be dismissed under section 32 on the condition that Sarah engage with the behaviour intervention team from Ageing Disability and Home Care.

Fitness

It is the experience of IDRS that the issue of our clients' fitness to give instructions or enter a plea has previously been overlooked on many occasions. Again IDRS wishes to draw this issue to the attention of the NSW Law Reform Commission in order to ensure that any procedural or legislative reforms that aim to facilitate early guilty pleas do not come at the expense of ensuring adequate opportunity to resolve the issue of fitness.

Whether or not a person is able to give instructions and whether a person is fit to enter a plea is a matter relevant to both the local and higher courts. Although there has been a significant lack of clarity about the issue of fitness in the Local Court, this issue was resolved in the 2006 decision of *Mantell v Molyneux*[3] where it was held that even though there is currently no statutory enactment either dealing with determination of the question of fitness to be tried or as to what should occur if a person is found unfit to be tried in the Local Court, where a defendant is found unfit to be tried, he or she must be discharged.

It is the experience of IDRS that many clients in both the Local and higher courts end up entering a plea of guilty where they are in fact unfit to plead.

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[3] *Mantell v Molyneux* [2006] NSWSC 955 [33].

Case Study 2

Mitchell is a19 year old man with intellectual disability. He comes from a large and very supportive family and has never been in any trouble before. One day he was driving his friends' car and had a minor accident which caused a couple of hundred dollars worth of damage to the car. His friend said he would have to repay the cost of the damage by selling some "lollies" for him.

Mitchell agreed to this, however, the lollies turned out to be illegal drugs in tablet form. Mitchell had no knowledge of drugs at this time, didn't know what they were for and did not realise that selling them was wrong. He continued selling the tablets for his friend until his mum found them in his room and questioned him. She explained to Mitchell that they were illegal drugs and destroyed the tablets. After this he knew selling the tablets was wrong and stopped doing it. Police had been investigating the activities of Mitchell's friend. Resulting from this investigation, Mitchell was arrested and charged with supplying prohibited drugs.

In the ERISP, Mitchell was monosyllabic throughout, answering the majority of questions with a simple "yes". He could not supply any original information at all and the officers very quickly resorted to reading out the evidence they had against him and asking him to agree with it, which he did. They requested that he take part in a line-up and it was clear that Mitchell did not know what it was – they told him he had the right to refuse, which he did.

When Mitchell first met with his legal representative he was advised to plead guilty despite the fact that he had extremely limited understanding of what was going on, did not know who the parties involved in the court process were and believed his lawyer to be a police officer.

Fortunately IDRS became involved and the matter was referred to a different solicitor who raised the question of fitness. A fitness hearing occurred and it was found that Mitchell was in fact unfit to plead.

Case Conferencing

IDRS seeks to specifically comment on the following issue identified by the NSW Law Reform Commission discussion paper 15.

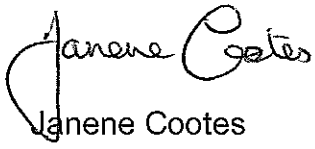
> **5.1 Should NSW reintroduce criminal case conferencing? If so, should case conferencing be voluntary or by compulsion?**
>
> **10.1 Should the Local Court of NSW introduce case conferencing as part of its case management processes?**

IDRS believes that it may be beneficial to reintroduce criminal case conferencing in NSW and to introduce it in the Local Court in as far as it may help to facilitate or resolve issues at an early stage in proceedings such as questions concerning eligibility for diversion under section 32 or unresolved concerns regarding a client's fitness. This may avoid long delays or numerous mentions at court.

If case conferencing was introduced in the Local Courts or reintroduced in the higher courts IDRS submits that this should not be mandatory, that defendants with impaired capacity would need to be assured of legal representation and defendants should have appropriate support persons made available to them.

Please contact our office if you have any further questions.

Yours faithfully,



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