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## Submission to the NSW Law Reform Commission

### People with cognitive and mental health impairments in the criminal justice system

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#### Contact

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#### Our focus

We focus this submission on people with intellectual disability for whom we are a peak advocacy group which has had an intensive involvement for 25 years in issues facing people with intellectual disability in the criminal justice. We have had a particular focus on improvement in human service systems so that people with intellectual disability receive appropriate support services and therefore have a fair opportunity to avoid criminality and imprisonment.

We work closely with the Intellectual Disability Rights Service and are aware that IDRS is making a detailed submission to this inquiry. We shall confine ourselves to a small number of issues in which we have a particular interest.

An intellectual disability as most commonly defined requires that a person has an IQ below about 70, deficits in adaptive skills and that the disability arose prior to the age of 18. This is ADHC's approach to determining eligibility for service provision. Borderline intellectual disability involves an IQ from 70 to 79. We see alleged offenders with borderline intellectual disability and deficits in adaptive skills as needing specific support services similarly to people with clearcut intellectual disability.<sup>1</sup>

#### Where should forensic patients and prisoners with intellectual disability be detained?

Issues 6.90, 6.108

#### How many people are we talking about?

Our inquiries of Corrective Services and ADHC suggest that approximately 20 forensic patients have intellectual disability. Those agencies would be able to provide these figures and their basis for them. The Mental Health Review Tribunal may also have figures.

There is no strong data on how many NSW prisoners have intellectual disability. Easily the best data available for a NSW penal population is that for juvenile justice centres, where a 2003 study found 10-13% of detainees having a clearcut intellectual disability and 44% having IQs at least in the borderline range.<sup>ii</sup>

We are not aware of any strong current data in relation to the number of inmates in adult NSW gaols who have intellectual disability. The best study of which we are aware is Hayes and McIlwain 1988. They found 2.4% with a mild or greater disability and 10.5% borderline.<sup>iii</sup>

### ***Where are they housed at present?***

Corrective Services has four additional support units for inmates with intellectual disability, three at Long Bay and one at Goulburn. These include an assessment and general programs unit, a therapeutic unit with a focus on sexual offences (both maximum security), a pre-release unit and a general programs unit (both minimum security). These can house up to 80 inmates. These units are run by the Statewide Disability Services which also seek to support service provision to other inmates with intellectual disability around the State.<sup>iv</sup>

Other inmates with intellectual disability would be in the range of other prison units around the State. We understand from ADHC that there are a few forensic patients with intellectual disability in the Justice Health Forensic Hospital.

Some forensic patients with intellectual disability have been released on conditional release to supported accommodation run by the Community Justice Program (CJP) in ADHC. That program was only established in 2005 and has gradually grown to now have approximately 140 clients. Its committed funding growth will allow it to have up to 200 clients by June 2011. The CJP is focused on offenders with intellectual disability who need specialised post release accommodation and support. Clients are housed in a range of accommodation from community group homes through to drop in support in their own homes.

ADHC services are not community protection services. They are required to comply with the rights and needs of people with disability as set out in the Disability Services Act 1993.

### ***The role of guardianship***

Some residents of ADHC services do have their freedom of movement restricted to various (and often flexible) degrees under guardianship orders made by the Guardianship Tribunal. 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. Restrictions can sometimes occur to protect a person from misadventure or self harm or to assist a person to comply with conditions on bail or parole or the like. The restriction can also impose some necessary stability in the person's life while programs assist the person towards a more settled and positive lifestyle. The purpose of the restriction must be protection of the interests of the individual (though there might also be a by product of community protection).<sup>v</sup> 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.

This approach to the use of guardianship was recently endorsed by the Standing Committee on Social Issues of the Legislative Council.<sup>vi</sup>

***Should there be an option for forensic patients and prisoners with intellectual disability to be detained in accommodation run by a human service agency?***

In principle, it is inappropriate for forensic patients to be detained in gaol.

However, we are cautious about ADHC detaining forensic patients for community protection purposes. As stated above, ADHC's legislative focus is on the rights and interests of people with disability, not on community protection. This has been one of the strengths of the Community Justice Program. At a time when the UN Convention on the Rights of Persons with Disabilities is reinforcing the focus of disability services on the rights of clients, we would be wary of blurring ADHC's legislative mandate into community protection. Whilst the change in mandate might only apply to forensic patients as a matter of law, we would anticipate the overall culture of the CJP being adversely affected by it.

The CJP's current accommodation does not include property with the degree of security and segregation from the community that we would anticipate Government would expect for forensic patients who have not yet been allowed conditional release.

The single focus of ADHC and the Guardianship Act on the rights and interests of people with disabilities contrasts with the dual focus of Mental Health Services and the Mental Health Act on the interests of clients and the protection of society. We would not want ADHC to move in that direction.

The only other agency that might be appropriate to detain forensic patients with intellectual disability is Justice Health. This option is worth cautious consideration. However, it would be essential for Justice Health to build a new expertise in addressing the general needs and behaviour intervention and support needs of forensic patients with intellectual disability. The skills and qualifications of many or most existing staff would not be transferable. Also, an appropriate accommodation model would need to be developed. If Justice Health was to develop a new role of detaining forensic patients with intellectual disability, it would need to rely heavily on ADHC's Community Justice Program and other specialists in intellectual disability forensic issues for advice as to how to structure and staff an appropriate program.

We do not support the transfer of people serving terms of imprisonment into detention by ADHC. However, we do support people with intellectual disability who are on bail, bonds or parole being housed by ADHC, including, where the person's interests require, their freedom of movement being restricted via guardianship.

We also support the continued development by Corrective Services of appropriate units and programs for prisoners with intellectual disability.

**Medical treatment of forensic patients with intellectual disability**

Issues 6.92, 6.93, 6.94

The Guardianship Act Part 5 contains a comprehensive scheme for substitute consent to medical treatment for people who cannot understand the nature and effect of treatment. Treatment must only occur for the health and well being of the person concerned.

For contentious medical treatments such as androgen reducing medications, the Guardianship Tribunal's consent is required. The Tribunal has appropriate expertise.

We favour the Guardianship Act scheme applying to forensic patients who are unable to consent to treatment.

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<sup>i</sup> J Simpson, M Martin and J Green, *The Framework Report 2001*, section 2.2 [www.idrs.org.au](http://www.idrs.org.au)

<sup>ii</sup> Juvenile Justice NSW, *2003 NSW Young People in Custody Health Survey*  
<http://www.justicehealth.nsw.gov.au/publications/YPiCHS.pdf>

<sup>iii</sup> S C Hayes & D McIlwain *The prevalence of intellectual disability in the new South Wales prison population: an empirical study* (Criminology Research Council, Canberra, 1988)

<sup>iv</sup> [www.correctiveservices.nsw.gov.au/offender management/offender services and programs/statewide disability services](http://www.correctiveservices.nsw.gov.au/offender_management/offender_services_and_programs/statewide_disability_services)

<sup>v</sup> See The Framework Report section 4.14 for a more detailed discussion of this issue.

[www.idrs.org.au](http://www.idrs.org.au)

<sup>vi</sup> Report 43, *Substitute decision-making for people lacking capacity 2010* pages 145 – 148.

[www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/E00602D3C8F39CA5CA2576D500184231](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/E00602D3C8F39CA5CA2576D500184231)