



**Human
Services**

Submission to NSW Law Reform Commission

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

1. Introduction

This submission has been prepared from comments provided by Ageing, Disability and Home Care ("ADHC").

ADHC, as a major provider of specialist services to people with a disability and frail older people in NSW, aims to improve outcomes and to provide support to people with a disability to live in their own homes and participate in community life.

ADHC's responsibilities include:

- providing strategic leadership and policy advice on ageing and disability issues;
- delivering services to older people, people with a disability and their carers across NSW;
- providing funding and working with non-government organisations to deliver appropriate services;
- working with other Departments to influence services and policies; and
- undertaking strategic research and planning to develop a robust service system and to ensure services are developed in line with whole-of-government policies.

This submission addresses key issues raised by the Commission's consultation papers relevant to ADHC's operations. It first provides (in section 2, from page 5) the Commission with additional information regarding units within ADHC that have regular exposure to clients facing the criminal justice system, highlighting some of the policy developments within ADHC dealing with these issues. The submission then responds to various issues raised in a number of the Commission's consultation papers.

The criminal justice system and people with cognitive or mental health impairments

Effective legislative regimes regarding the operation of the criminal justice system in its dealings with offenders who have cognitive or mental health impairments are important issues.

Developing a system which balances a just outcome for society generally and for victims of crime, with a fair outcome for the perpetrators, is vital for maintaining the integrity of the criminal justice system. ADHC recognises that in circumstances where the perpetrator has a mental illness or cognitive impairment, what is the best outcome for society may differ from the outcome that would be seen to be appropriate in ordinary circumstances.

Statistics, referenced below, show that there is an over-representation of children, young people and adults with an intellectual disability¹ in the criminal justice system as both offenders and victims.

¹ In recognising intellectual disability for eligibility purposes ADHC uses the international definition of intellectual disability as an IQ of two standard deviations below the mean with significant deficits in adaptive behaviour skills; and as manifest in the developmental period prior to 18 years. This includes those with Acquired Brain Injury (ABI).

People with intellectual disability comprise between 1% and 3% of the NSW population², while research figures indicate that a significant proportion of adults in prison have an intellectual disability. Recent studies focusing on young people in NSW indicate that approximately 13% of those in custody³ and 11% on community orders⁴ have an intellectual disability. This over-representation is found amongst young people as well as adults.⁵

Over the past three years, researchers at the University of New South Wales have undertaken the *People with Mental Health Disorders and Cognitive Disability in the Criminal Justice System* (MHDCD in the CJS) study. A current research project, funded by ADHC, is building on this research with a detailed analysis pertinent to people with intellectual and other cognitive disability in the MHDCD cohort. The research will explore the pathways people with intellectual disability and other cognitive disability take into and through the criminal justice system. The project commenced in July 2009 and is expected to be completed in late 2010. It is anticipated that the results of this research will assist in the development of effective responses to minimising the impact of the criminal justice system on people with intellectual disability. A policy and legislative map (attached as Appendix A) has been developed as part of the research.

According to the *1996 NSW Law Reform Commission Report 80*⁶, offenders with an intellectual disability are treated differently to offenders without a disability in the criminal justice system. They are more likely to:

- be arrested, questioned and detained for minor infringements;
- come before the Courts due to Police prosecuting cases where the offender appears 'abnormal or possibly dangerous';
- confess to a crime they have not committed;
- not understand the meaning of their right to silence;
- confess rather than plea-bargain;
- be refused bail;
- receive custodial sentences due to the lack of alternative placements in the community;
- serve longer sentences or a greater percentage of their sentence before being released on parole;

² Simpson, J., Martin, M., Green, J. *The Framework Report (2001)* section 2.3, page 8

³ NSW Department of Juvenile Justice (2003), *NSW Young People in Custody Health Survey. Key Findings Report*

⁴ Kenny, D.T., Nelson, P., Butler, T., Lennings, C., Allerton, M., and Champion, U. (2006). *NSW Young People on Community Orders Health Survey 2003-2006: Key Findings Report*. The University of Sydney.

⁵ See Young People in Custody Health Survey 2003 and Young People on Community Orders Health Survey 2006 for discussion of the prevalence of intellectual and other disabilities in detention. Refer:

http://www.djj.nsw.gov.au/pdf_hm/publicatons/general/2003YoungPeopleInCustody.pdf

http://www.djj.nsw.gov.au/pdf_hm/publications/research/2006YoungPeopleCommunityOrders_KeyFindingsReport.pdf

⁶ NSW Law Reform Commission, *Report 80 (1996) – People With an Intellectual Disability in the Criminal Justice System*

- be vulnerable in the main gaol population and therefore be more likely to be housed in maximum security facilities for 'protection'.

People with an intellectual disability are also over-represented as victims of crime, particularly sexual assault⁷. In addition, they are in varying degrees vulnerable to fraud, abuse, discrimination and social marginalisation. This vulnerability can mean that they are less able to protect themselves from crime, physically remove themselves from it, or minimise any impact.

The 1996 Law Reform Commission report also recognised that people with an intellectual disability who come into contact with the criminal justice system are at an increased risk of further contact due to the lack of:

- early intervention and prevention programs;
- adequate access to support mechanisms;
- appropriate responses to their specific needs;
- systemic and coordinated approaches to assessment and the provision of community support services.

⁷ Ibid

2. ADHC and the Office of the Senior Practitioner

As the primary provider of services to people with an intellectual disability in NSW, ADHC has developed policy guidelines regarding service delivery to individuals who are in, or at risk⁸ of, contact with the criminal justice system as victims, witnesses or alleged offenders.

ADHC's *Justice Services Policy* applies to all aspects of the planning, administration and delivery of ADHC operated services and is also provided to support the work practices of ADHC funded services. The Policy outlines the responses of staff at all stages where people with intellectual disability may come into contact with the criminal justice system or are at risk of doing so, from early intervention, through to police and court processes and reintegration into the community post release. A copy of the Policy is attached as Appendix B.

The *Criminal Justice Resource Manual* provides a practical guide to assist staff to undertake the Policy commitments. It is a resource to guide case management services and articulates work practices to support clients in contact with the criminal justice system.

The Office of the Senior Practitioner

Within ADHC, the Office of the Senior Practitioner (OSP) provides practice leadership for therapy, nursing, psychological and behaviour support services and delivers a range of specialist services and practice improvement for clients with complex needs and challenging behaviour.

The OSP is comprised of three specialist services and a policy and practice team.

The Community Justice Program

For people with an intellectual disability who are exiting custody and who present a level of complexity that requires services beyond what ADHC may normally be able to provide, the Community Justice Program (CJP) provides specialist accommodation and support services. The CJP is funded under ADHC's *Stronger Together Plan*.

A diverse range of accommodation options are provided to clients of the CJP ranging from intensive residential services to drop-in support. The program also provides participants with specialist assessment, case work and clinical services.

Over one hundred and forty clients had been accepted into the CJP as at June 2010 and accommodation services are now operating across all ADHC Regions.

Preliminary evaluation shows a significant reduction in recidivism.

⁸ 'At risk' of contact or involvement with the criminal justice system can range from behaviour that has escalated from challenging to potentially offending i.e. if reported, could result in charges being laid; to being at risk of further involvement in the criminal justice system through repeated offending behaviour. Being 'at risk' could also apply to people whose behaviour puts them at risk of becoming a victim of crime.

During 2008-09, the CJP established an internship program for post graduate forensic psychology students, with a view to attracting quality graduates to future CJP clinical positions.

The Integrated Services Project for Clients with Challenging Behaviour

The Integrated Services Project for Clients with Challenging Behaviour (ISP) is administered by ADHC in partnership with NSW Health and Housing NSW. The Project commenced as a pilot in September 2005.

The ISP coordinates cross-agency responses for approximately 25 adult clients per year who have been identified from across the service system as having complex needs and challenging behaviour. The project consists of the provision of a range of additional time-limited services to clients and their support network including comprehensive assessment, behaviour support, supervision, case coordination and accommodation support. All services provided by the project are progressively phased out as local service responses are planned and established.

Statewide Behaviour Intervention Service

The Statewide Behaviour Intervention Service (SBIS) is a specialist, statewide clinical service which provides research, training and clinical consultation to service providers working with people of all ages with intellectual disability who present challenges to their support networks.

The support networks involved may include group homes, families, respite agencies, government or non-government services. Work is undertaken in such a way as to build the knowledge base and practical skills of the local carers and clinicians.

The Policy and Practice Team

The Policy and Practice Team is responsible for the policy and practice improvement activity undertaken within the OSP.

The key focus areas include:

- Establishment of sector wide policy and practice standards for the delivery of behaviour support services.
- Development of Policy and Practice Resources for working with people in, or at risk of, contact with the criminal justice system.
- Working collaboratively to improve services for people with an intellectual disability and a mental health problem.
- The development of workforce capacity and support for ADHC therapy, psychology and behaviour support staff.

The OSP is focussed on improving services for people with an intellectual disability and a mental health problem. The OSP has worked closely with NSW Health and representatives of the tertiary education sector on a range of strategies to support this population as follows:

- ***University Chair in Intellectual Disability and Mental Health***

One such strategy is the establishment of Australia's first University Chair in Intellectual Disability Mental Health. In 2009, Associate Professor Julian Troller was appointed to this post. The Chair works with ADHC, NSW Health and the university sector to increase workforce and organisational capacity to deliver appropriate and effective services to people with an intellectual disability who have a mental health issue.

Associate Professor Troller's expertise in intellectual disability mental health is well recognised and widely respected. He has a background in teaching and clinical practice and is keenly interested in academic work. Associate Professor Troller has been a leader in the field of neuropsychiatry in Australia and internationally.

- ***Advanced Psychiatric Fellowship program and other initiatives***
The OSP works in partnership with the NSW Institute of Psychiatry to establish an advanced psychiatric fellowship program in intellectual disability mental health and the preparation of a Memorandum of Understanding between ADHC and NSW Health on services for people with an intellectual disability and a mental health problem.

Complementary initiatives are also occurring across the OSP, including the partnership projects between SBIS and the Children's Hospital at Westmead.

The NSW Senior Officers' Group

Led by ADHC, the Senior Officers' Group on People with an Intellectual Disability and the Criminal Justice System (SOG) was established to improve the whole-of-government coordination of services provided by NSW government agencies for people with an intellectual disability in, or at risk of, contact with the criminal justice system. The SOG is made up of a number of representatives of government agencies:

- ADHC, Department of Human Services NSW;
- Department of Justice and Attorney General;
- Juvenile Justice, Department of Human Services NSW;
- Corrective Services, Department of Justice and Attorney General;
- Department of Education and Training;
- NSW Police Force;
- Housing NSW, Department of Human Services;
- Justice Health; and
- NSW Health.

The SOG developed the *NSW Interagency Service Principles and Protocols* that aimed to 'improve the planning, coordination and delivery of services to people with an intellectual disability and to improve the operation and responsiveness of the criminal justice system to the circumstances of people with an intellectual disability.' The Principles and Protocols are attached as Appendix C.

3. Consultation Paper 5 – An overview

Consultation Paper 5 presents a background and overview of the laws affecting people with mental illness or a cognitive impairment when they become involved as defendants in the criminal justice system.

ADHC makes the following comments in relation to the issues raised in Consultation Paper 5.

Definitional issues - Issues 5.1 to 5.5

The Commission acknowledges that the *Mental Health Act 2007* (MHA) and the *Mental Health (Forensic Provisions) Act 1990* (MHFPA) contain numerous terms describing the mental state of a person brought within the criminal justice system. In light of this, the Commission puts forward the proposition of whether it may be beneficial to develop an overarching definition covering the full range of impairments that could affect criminal responsibility, covering mental illness, intellectual disability and other cognitive impairments. The Commission also puts forward the alternative approach of redrafting the existing definitions or developing new ones to achieve greater consistency between the MHA and the MHFPA and to bring the terms into line with modern terminology.

Broad umbrella definition of mental health impairment?

ADHC does not support a broad umbrella definition of mental health impairment, which would incorporate the concepts of mental illness and cognitive impairment. Such a definition may cause greater confusion than clarity. Past studies have indicated the potential for confusion between mental illness and intellectual disability amongst criminal justice personnel. Any definition which incorporates both may create further confusion. A number of factors provide grounds for maintaining clear definitional division between mental illness and cognitive impairments:

- mental illness and cognitive impairments including intellectual disability are different disabilities, and persons afflicted have different needs and require differing support services;
- intellectual disability is not episodic, and is not usually treated by medication. A person suffering from a mental illness can however recover;
- confusion between intellectual disabilities and mental illness may lead to the incorrect expectation that people with intellectual disabilities can recover through treatment or medication.

Furthermore, clarity around the definitions used in the MHFPA would assist the criminal justice system's response being more appropriate to an individual's particular needs. Separation would also assist in changing peoples' perspectives in relation to distinguishing mental illness and cognitive impairment.

Clarifying or updating existing definitions

Currently, the diversionary power contained in section 32 of the MHFPA refers to the term 'developmentally disabled'. Although this term is not defined, ADHC considers the term is inadequate. As noted by the Commission, the term may describe conditions that arise during the developmental phase (that is, before the age of 18 years). It could therefore encompass conditions such as intellectual disability, cerebral palsy, autism, attention deficit hyperactivity disorder and Asperger's Syndrome. It would, however, fail to encompass conditions acquired in adulthood, such as acquired brain injuries or dementia.

ADHC recommends consideration be given to use of the term 'cognitive impairment'. This term can be used to describe a wide variety of impaired brain function relating to the ability of a person to think, concentrate, formulate ideas and problem solve. Furthermore, the term should be applicable in establishing the threshold criteria for identifying defendants whose condition may warrant special consideration in all phases of criminal proceedings and not just qualifying under section 32: for example, during sentencing, qualifying for diversion, consideration of unfitness or defences of mental illness or substantial impairment.

Cognitive impairment can be associated with many disabilities and disorders that can be present at birth or acquired later in life, and can apply to a range of severity in impairment, from mild through to severe. The term can be used to incorporate a number of conditions, including: intellectual disability, acquired brain injuries, dementia, and other developmental disorders (such as cerebral palsy, autism, attention deficit hyperactivity disorder and Asperger's Syndrome). A description of these conditions is provided below:

Intellectual Disability

Intellectual disability is a permanent condition characterised by significant limitations in intellectual functioning and adaptive behaviour which occur during the developmental period, i.e. before 18 years of age.

A person with an intellectual disability experiences significant deficits in their ability to reason, plan, solve problems, think abstractly, understand complex ideas, learn quickly and learn from experience. They also display significant deficits in adaptive behaviour. Adaptive behaviours are conceptual, social and practical skills which people learn in order to function in their everyday lives. This means that people with an intellectual disability are likely to require varying levels of support to communicate effectively, interact socially with others, live independently and develop vocational skills.

Intellectual Disability is defined as:⁹

- An IQ of approximately 70 or below (two standard deviations below the mean) on an individually administered IQ test;

⁹ American Psychiatric Association: *Diagnostic and statistical manual of mental disorders, Fourth Edition, Text Revision*. Washington, DC, American Psychiatric Association, 2000; American Association on Mental Retardation. *Mental Retardation: definition, Classification and systems of supports: 10th Edition*. Washington, 2002.

- Concurrent and significant deficits in adaptive behaviour in at least two areas (eg. communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety);
- Onset before 18 years of age.

Borderline Intellectual Functioning

Borderline intellectual functioning is defined as:

- An IQ of approximately 70 – 79.
- The person may or may not have deficits in adaptive functioning.

Acquired brain injury

Acquired brain injury or head injury are terms used to describe all types of brain injury that occurred after birth (not congenital). Acquired brain injury affects each person differently. The impairments people experience will depend on which part of the brain has been affected and the amount of damage sustained. Impairments can be temporary or permanent and result in physical or cognitive symptoms or a combination of both.

Acquired brain injury should not be confused with intellectual disability, given that people with acquired brain injury do not necessarily experience a decline in their overall intellectual functioning, although that may be the case. Instead they tend to experience specific cognitive changes leading to difficulty in the areas of thinking and behaviour. These areas are not always easy to see and recognise, which is why acquired brain injury is often referred to as the hidden disability.

Individuals with frontal brain injury are particularly susceptible to a range of cognitive and behavioural impairments that increase the likelihood of offending behaviour. The frontal lobes of the brain are associated with what has been termed the 'executive functions (EF)'. These include initiation, planning, organising, judgement, problem solving and the ability to control impulses. Impulsivity in particular is associated with offending behaviour. The frontal lobes are especially vulnerable to damage in traumatic brain injury. This is because the front of the brain is often forced over bony protrusions and cavities within the skull by the force of the traumatic impact. The assessment of EF is particularly specialised as neuropsychological testing is often insensitive to impairments in EF.¹⁰ In addition, impairments in EF can exist even when formal IQ remains intact. Thus, the assessment of EF requires a careful review of behavioural evidence in addition to office based cognitive testing, and clinical interviews.

¹⁰ Manchester D., Priestley N, and Jackson H. (2004). The assessment of executive functioning. Coming out of the office. *Brain Injury*. Vol 18, No. 11, 1067-108.

Organic dementia

Dementia is the term used to describe the symptoms of a large group of illnesses or diseases that cause a progressive decline in a person's cognitive functioning. It is a broad term used to describe a loss of memory, intellect, rationality, social skills and what would be considered normal emotional reactions.

Most people with dementia are mature in age, but it is important to remember that it is not a normal part of the ageing process. Dementia can happen to anybody, but it is more common after the age of 65 years. People in their 40s and 50s can also have dementia, referred to as early onset or pre-senile dementia.

Power to order assessment - Issue 5.6

ADHC supports the establishment of a general power to order an assessment of a defendant's cognitive or mental state.

The NSW Senior Officers' Group recently conducted a trial, placing a Disability Access Officer in both the Burwood Local Court and the Parramatta Children's Court. The purpose of the trial was to identify barriers and put forward recommendations for change. The report is currently awaiting endorsement by member agencies. The issue of conducting assessments was specifically raised as a concern.

Relevant key issues identified included:

- lack of specialist disability knowledge - court staff, police and legal representatives often do not have the knowledge, skills or time required to communicate effectively with someone with a cognitive impairment.
- Identification - unless a disability is clearly apparent, such individuals can cycle through the criminal justice system without being identified.
- Misuse of terms - at times different government and non-government agencies use the term 'intellectual disability' to describe the condition of a person with a cognitive impairment irrespective of the fact that the person would not meet all the criteria of 'intellectual disability'.
- Inability to assess - there is no service within the Court system mandated with the task of conducting the required assessments to determine the presence of a cognitive impairment, excluding mental illness. This is a significant issue where a disability is suspected but not yet diagnosed. Specific information is required on the types of assessments that need to be conducted, information regarding validity of assessments, and clinicians in different fields who specialise in forensic disability matters.

Consideration must also be given to cases of dual diagnosis. Research has shown that having an intellectual disability increases a person's vulnerability to the development of mental illness. It is estimated that people with an intellectual disability have at least two to three times the prevalence of psychiatric problems as the rest of the community. People with this form of dual diagnosis have difficulties in obtaining an accurate diagnosis and receiving effective treatment and care. Treatment options include a range of medication and both cognitive and

behavioural programmes.

The health care needs of prisoners with an intellectual disability can be compounded if not properly assessed. Furthermore, individuals with both an intellectual disability and mental illness may require psychiatric facilities at times – otherwise there is a risk that they are further isolated from appropriate mental health care. Health interventions can be targeted to this disadvantaged group through strong systems of partnership between Justice Health, the Department of Corrective Services, Juvenile Justice and ADHC, as well as health and welfare services, to ensure that this population is identified and their health or other functional needs are met.

Who should conduct assessments?

In relation to assessments regarding a defendant's cognitive state, only registered psychologists are permitted to conduct these assessments. ADHC considers that an assessment of a person's intellectual disability could be conducted by a registered psychologist specialising in the field of disability, either an employee of ADHC or independent practitioner.

As noted above, an individual who has suffered traumatic brain injury, resulting in EF impairment, is particularly susceptible to a range of cognitive and behavioural impairments that increase the likelihood of offending behaviour. The assessment of EF is specialised as other forms of testing may be insensitive to detecting executive functioning impairment. Forensic neuropsychological assessment is a complex specialism, and requires integration of cognitive assessment, personality assessment, behavioural and psychiatric assessment and assessment of malingering. This would not be the typical skill base of a disability psychologist.

What information should the assessment contain?

An assessment report should go beyond merely reporting on the nature and degree of a person's impairment. It should also contain additional information such as:

- Developmental history, including the impact the impairment has on the individual's day to day life;
- Assessment of individual's communication skills, namely the individual's ability to process information;
- Support history;
- Medical history;
- Current functioning, including peer/social network, accommodation, living skills;
- Behaviour support, including strategies or plans in place to deal with behaviour;
- Support/treatment plan.

Attached at Appendices D, E and F are the following documents:

- ADHC letter to Court (D);

- **Excerpt of the Criminal Justice Resource Manual – Providing information to the Court (see in particular paragraph 6.6) (E);**
- **ADHC Support Plan (F).**

These documents are used by ADHC staff for clients appearing in Court and provide a useful guide as to content of the proposed assessment report.

4. Consultation Paper 6 – Criminal responsibility and consequences

Consultation Paper 6 considers the laws determining the nature and extent of criminal responsibility in relation to offenders with cognitive or mental health impairments. The Paper deals with:

- Fitness for trial
- Elements of the defence of mental illness
- The partial defence of substantial impairment
- Infanticide;
- Sentencing principles and options.

ADHC makes the following comments in relation to the issues raised in Consultation Paper 6.

As a preliminary comment, ADHC maintains its position that there must be a clear legislative distinction between people with cognitive impairments and people suffering a mental illness. The maintenance of such a distinction has clear implications for many areas including consideration of fitness, basis for defence against charges, review, and referral to diversionary programs. The MHFPA, MHA and the Mental Health Review Tribunal (MHRT) are all heavily geared towards people with mental illness and a thorough re-examination and re-working of the legislation is required to redress this inferred imbalance.

Fitness to stand trial

The MHFPA currently provides that if any party to the proceedings, or the court, raises the question of a person's unfitness, and it appears that the question was raised in good faith, the court must conduct an inquiry.¹¹ At common law, the court has a duty to consider the question of a defendant's fitness if there is material before it that raises the issue.

ADHC supports the proposition that the MHFPA expressly require the court to consider the issue of fitness whenever it appears that the accused person may be unfit to be tried.

The MHFPA further provides that in circumstances where a person is found to be unfit, the court must refer the person to the MHRT who will determine whether the person will during the next 12 month period, become fit to be tried.

ADHC notes that:

- The question of fitness is different for a person with a mental illness and a person with a cognitive impairment.
- Cases of dual diagnosis need to be taken into account.
- The MHRT may not have the specific expertise in the field of cognitive impairment/intellectual disability to determine the issue.

¹¹ Sections 5 and 10 of the *Mental Health (Forensic Provisions) Act 1990*.

- A person with a cognitive impairment will unlikely have any significant improvement over time, maintaining a permanent disability for life.¹² The current process in place is geared towards persons suffering from a mental illness who may improve overtime and become fit to be tried.

The defence of mental illness

ADHC supports the creation of legislation recognising cognitive impairment as a basis for acquitting a defendant in criminal proceedings. It is important that a person with a cognitive impairment, whose understanding of his or her conduct is affected by their condition to such an extent as to warrant a finding of not guilty, is not treated in the same way as a person found guilty of committing a crime.

However, any such legislation must maintain a clear distinction between reliance on this defence for persons with cognitive impairments (including intellectual disability) on the one hand, and persons suffering from mental illness on the other.

As noted above, there already exists a potential for confusion between mental illness and intellectual disability amongst criminal justice personnel. Further, the current mechanisms in place dealing with the consequences for a person where a mental illness defence is made out are not appropriate for a person with cognitive impairments. In this regard:

- Treatment and care plans for persons suffering from a cognitive impairment will be different to those suffering from a mental illness;
- Current mechanisms in place are geared towards persons suffering from mental illness which may be temporary and treatable, whereas persons suffering from a cognitive impairment will in most cases maintain a permanent disability.

The recognition of a specific defence based on a person's cognitive impairment will also require the establishment of specialist treatment facilities for such persons, including potentially custodial facilities as well as non-custodial options.

Partial defence of substantial impairment

As previously stated, ADHC supports the proposition that the term 'cognitive impairment' should be applied in circumstances where a defendant's condition is relevant to his or her criminal responsibility. This would apply to all phases of criminal proceedings: determinations of fitness to stand trial, suitability for diversion, eligibility for the defences of substantial impairment or mental illness and sentencing considerations.

In this regard, ADHC supports the expansion of the provisions of section 23A to allow for person's suffering from a cognitive impairment to invoke the defence of substantial impairment. ADHC agrees that the defendant would still need to demonstrate that the cognitive impairment resulted in the person's diminished capacity to understand events or control his or her actions.

¹² A cognitive impairment is not an underlying condition which may be treated with medication – an individual may however be provided with social and support services aimed at teaching life skills and managing behaviours.

Similarly to the application of the defence of mental illness to a person with cognitive impairments, the application of a defence of substantial impairment will require the establishment of specialist treatment facilities for such persons, including potentially custodial facilities as well as non-custodial options.

Detention of forensic patients in correctional centres and compulsory treatment

In circumstances where there is a finding and declaration of mental illness, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law.¹³ In such cases, and due to the lack of alternative options, the person is either held as a 'forensic patient' in hospital, or in prison.

ADHC acknowledges there may be cases where a person with a cognitive impairment engages in such conduct that warrants some form of detention, particularly where that person's conduct results in a risk of harm to other members of the community. ADHC contends that existing mechanisms in place are geared towards persons suffering from a mental illness. Holding a person with a cognitive impairment in a psychiatric facility is not appropriate as it is unlikely that the person will receive appropriate care and treatment,¹⁴ and the MHRT itself as currently configured does not have the relevant experience and expertise in dealing with and developing appropriate care plans for people with a cognitive impairment. Further, holding the individual in jail may also not be appropriate and would severely hamper any efforts to develop an effective care and treatment plan for the individual.

ADHC considers that this perceived imbalance must be corrected. The establishment of prescribed facilities, either in a custodial or non-custodial setting, in which persons with a cognitive impairment found not guilty on the grounds of mental illness or are not fit to be tried can be provided with appropriate treatment and support options, may go a long way in helping to reduce the risk of the person re-offending and being considered a risk of harm to others upon release.

Sentencing

As stated previously, ADHC considers that the term 'cognitive impairment' should be applicable in establishing the threshold criteria for identifying defendants whose condition may warrant special consideration in all phases of criminal proceedings, including sentencing. In this regard, ADHC agrees that section 21A of the *Crimes (Sentencing Procedure) Act 1999* (CSPA) should be amended to include a person's cognitive impairment as a factor in sentencing.

ADHC supports the mandatory provision of pre-sentence reports prior to sentencing offenders with a cognitive impairment. As previously noted, prior studies have indicated a potential for confusion between mental illness and intellectual disability amongst criminal justice personnel. A pre-sentence report, which clearly informs the court of the nature and severity of the offender's

¹³ Section 39 of the *Mental Health (Forensic Provisions) Act 1990*.

¹⁴ Subject to a determination that the individual's primary support need is a mental illness.

impairment will assist in alleviating this confusion. ADHC acknowledges there may be clear resource implications for adopting this approach.

ADHC also supports the establishment of specialist treatment facilities (custodial and non-custodial) for offenders with cognitive impairments. A pre-sentence report would assist in determining the most appropriate services for the offender. ADHC acknowledges there are significant resource implications for this approach, and considers that an agreed approach between the MHRT, Justice Health, Corrective Services as well as ADHC, would be required.

5. Consultation Paper 7 – Diversion

Consultation Paper 7 considers the topic of diversion, particularly sections 32 and 33 of the MHFPA which empower the Local Court to divert defendants with a 'mental illness or developmental disability' away from criminal proceedings and potentially into treatment or support services.

ADHC makes the following comments in relation to the issues raised in Consultation Paper 7.

As a preliminary comment, ADHC is supportive of the use of diversionary mechanisms for people with an intellectual disability. Diversion is one of the main policy objectives within the Justice Services Policy, providing:

'That children, young people and adults with an intellectual disability in, or at risk of, contact with the criminal justice system are supported to access available and culturally appropriate diversionary options away from detention or custody and into more appropriate support and treatment options'.

Police power to issue warnings and cautions

ADHC supports the implementation of a formalised scheme for cautions and warnings to deal with offenders with a cognitive impairment. For such a scheme to operate successfully, the issue of identification must be addressed. It is acknowledged that in certain circumstances, proper identification of an individual's cognitive impairment or intellectual disability may be difficult, particularly where the offender is intoxicated at the time of arrest.

The Senior Officers' Group on People with an Intellectual Disability and the Criminal Justice System (SOG) addresses the issue of Police warnings and cautions in its *NSW Interagency Service Principles and Protocols* (Principles and Protocols). Section 9.3.2 provides:

"The Police regularly come into contact with people with intellectual disability in the course of performing their duties. Contact may be with people with intellectual disability causing nuisance or engaged in anti-social behaviour, as well as in cases of crime or suspected criminal activity where an alleged perpetrator or victim has an intellectual disability. Police may also be called upon to assist in circumstances where a person with intellectual disability is facing difficulties or causing disruption to others and a more suitable organisation cannot be identified or contacted. Such cases, though not involving a crime, can take up police time and may escalate into criminal activity.

The ability to identify people with intellectual disability and guide them to appropriate support services will help to reduce impacts on Police work and help to avoid circumstances where challenging behaviour or other problems can lead to criminal behaviour. Where criminal conduct is involved, Police need the capacity to access diversionary opportunities for less serious cases and/or to call appropriate supports for individuals concerned."

The Principles and Protocols sets out roles and responsibilities of parties to the document aimed at ensuring that a system of warnings and cautions can work in practice and that help towards proper identification of a person suffering from a cognitive impairment or intellectual disability. These include:

- Members of the Police Force will continue to work with the wider disability service system towards ensuring that people with intellectual disability are not subjected to the criminal justice system inappropriately. This includes ensuring the use of a support person when interviewing people with an intellectual disability.
- The Police will continue to implement their Disability Action Plan and, in consultation with ADHC, develop disability awareness training materials and include in training their operational and administrative personnel to:
 - i. appreciate the distinction and interrelationship between intellectual disability and mental illness and dual diagnosis and criminality;
 - ii. be conscious of the possibility that a person with intellectual disability may not want them to know that they have an intellectual disability or wish to hide the effect of the disability;
 - iii. identify indicators of intellectual disability that can be gleaned from careful questioning – questions about school (school history, number of schools attended, special school placement, school attendance record, teaching and learning outcomes);
 - iv. undertake questioning in a way that enhance the likelihood of detection of slow speech, poor memory, poor sequencing of events, childhood history of hospitalisation or other institutional placement; and
 - v. deal with people suspected of having an intellectual disability in a way that accommodates that possibility. This training will recognise the range of factors which the Police use to identify people with an intellectual disability.
- When a member of the Police Force reasonably suspects that a person alleged to have committed a crime has an intellectual disability they will:
 - i. take reasonable steps to contact a support person where one is known or available;
 - ii. bring this to the attention of other Police through appropriate record-keeping, in particular the COPS system.¹⁵
- With the support of ADHC, the Police Force will develop a service referral pamphlet that provides general information on the types of assistance available from the disability service system and how to enquire about obtaining a service.
- The Police Force and ADHC will jointly investigate ways to establish a pathway, consistent with privacy and informed consent requirements, for direct referral of people who may have an intellectual disability to ADHC.
- The Police Force will actively participate in, local area networks with other relevant agencies to co-ordinate timely and effective responses for people with intellectual disability.
- Where the Police Force knows a person is identified as having an intellectual disability, the Police will liaise with their family, carer and/or service provider before putting forward to a Magistrate a proposed course of action regarding a breach of bail. This will occur in a way that reflects a collaborative, interagency approach.

¹⁵ Computerised Operational Policing System.

- When ADHC receives a referral for a person in contact with the criminal justice system from any relevant agency or individual, it recognises this as a priority service request for assessment, individual planning and referrals to appropriate service providers. The focus will be early intervention to identify risks of further contact with the criminal justice system and address these through individual planning, implementation and review.

Power to take a person to hospital or other appropriate services

ADHC considers there may be some difficulty in establishing a legislative regime whereby Police have the power to take a person, suspected of having a cognitive impairment, to a facility offering appropriate services. Disability services are provided on a voluntary basis, and are not run in the same way as hospitals – there are no specific services operating 24 hours a day which could accept persons brought in by the Police.

Having said that, guardianship orders may authorise, in circumstances where it is necessary for an individual's safety and well-being, others, including members of the NSW Police Force and the Ambulance Service of NSW, to take someone from their present location to a place of residence approved by the guardian, keep them at that place of residence and bring them back to that place of residence should they leave it.

Decision to charge or prosecute

As noted earlier in this submission, the number of people with intellectual disability who come into contact with the criminal justice system is significantly disproportionate to their representation in the community. In this regard, prevention of initial contact with the criminal justice system is an important step in avoiding possible entrenched criminal behaviour.

A proper scheme providing for diversionary options incorporating mechanisms such as Police warnings and cautions, discretionary powers regarding decisions to prosecute or charge are important in assisting early intervention to avoid future criminal behaviour as well as seeking to minimise the impact of the criminal justice system on people with a cognitive impairment or intellectual disability.

The importance of emphasising a discretion to prosecute or charge is recognised in the SOG's Principles and Protocols. It provides:

- Attorney General's will work with the Legal Aid Commission, the Aboriginal Legal Service, the Intellectual Disability Rights Service and the chief judicial officers of NSW trial courts to build strategies to ensure that, where possible, their clients suspected of having an intellectual disability are appropriately assessed before they are formally charged and tried.
- Attorney General's Criminal Law Review Division will work with the Director of Public Prosecutions to ensure that prosecutorial discretion reflects the thrust of this Agreement.

Bail

People with cognitive impairments including intellectual disability are more likely to be refused bail. This is in part due to the fact that there is a greater occurrence of such an offender having previously breached bail conditions in relation to the offence. The implication of this is that such offenders are less likely to be successfully diverted into treatment and support services.

Offenders with a cognitive impairment are more likely to breach bail conditions due to a number of factors:

- Some offenders with a cognitive impairment do not want to acknowledge their disability due to stigma;
- Offenders with a cognitive impairment often state that they understand the conditions of bail, yet are unable to read and comprehend the conditions;
- Many such offenders have difficulties in complying with conditions that require regular attendance, for example, at a police station at specific times;
- Bail conditions that require a particular behaviour to immediately cease can result in anxiety and an escalation of the offending behaviour;
- In ADHC's experience, courts often impose more restrictive bail conditions for people with intellectual disability because they have a service provider who is expected to "enforce" these undertakings, that is more so than if they did not have the service (eg in a supported accommodation setting). These individuals can essentially be disadvantaged by having a service in this sense.¹⁶

ADHC considers that if bail conditions are too restrictive or unreasonable for a person with a cognitive impairment, they will likely be unable to meet those conditions, thereby breaching them and leading to the position that future bail will be denied.

ADHC agrees that a person's cognitive impairment should be taken into determining bail and the conditions of that bail. Steps which may assist in compliance with conditions include:

- The provision of bail conditions in plain English;
- In circumstances where an offender with a cognitive impairment has a support person, it may be helpful if the bail conditions are provided to the support person. In such cases, the support person can work with the offender to develop a plan for how the conditions can be complied with.

Police training

As noted above, a key difficulty associated with successfully diverting a person with a cognitive impairment away from the criminal justice system is initial identification of the impairment. ADHC has in the past delivered disability awareness training to police operational and administrative staff.

Further, the SOG's Principles and Protocols contain agreed responsibilities to be

¹⁶ This issue is also evident in relation to parole orders.

undertaken by the participating parties. These include further development of disability awareness training materials and training.

ADHC acknowledges that additional resources would be required to allow more Police to undertake training to identify intellectual disability. It is further acknowledged that systems would need to be put in place to support Police in identifying offenders with an intellectual disability and providing referrals for assessments.

As discussed above in relation to Consultation Paper 5, the NSW Senior Officers' Group recently conducted a trial, placing a Disability Access Officer in both the Burwood Local Court and the Parramatta Children's Court. One of the recommendations arising from the trial was the development and distribution of a comprehensive resource manual on working with offenders with an intellectual disability. This manual would be developed through inter-agency collaboration, including key non-government organisations such as Aspect, Brain Injury Association and would be provided to Police, legal and court staff.

Diversion under section 32

The Commission seeks comments in relation to the term 'developmentally disabled' as used in section 32 of the MHFPA.

As discussed in response to Consultation Paper 5, ADHC supports the use of the term 'cognitive impairment'. This is a broad term that can describe a wide variety of impaired brain function relating to the ability of a person to think, concentrate, formulate ideas and problem solve. Cognitive impairment can be associated with many disabilities and disorders that can be present at birth or acquired later in life, and can be used to incorporate the following conditions: intellectual disability, acquired brain injuries, dementia, and other developmental disorders (such as cerebral palsy, autism, attention deficit hyperactivity disorder and Asperger's syndrome). Further, for the reasons discussed in response to Consultation Paper 5, ADHC does not support a broad umbrella definition of mental health impairment, which would incorporate mental illness and cognitive impairment.

A person suffering from a cognitive impairment will in most cases maintain a permanent disability. In light of this ADHC supports the proposition that the term 'treatment' not be limited to curing a condition, but could incorporate social services or programs aimed at providing various life skills and support. Although intellectual disability is life long, behaviours can be managed and re-offending minimised by referral to correct services and support.

Consideration of seriousness of offence in determining whether or not to divert under section 32

ADHC proposes that decisions as to diversion should be based on a consideration of the seriousness of the offence and the merits and appropriateness of a Support Plan provided. Such a determination would involve a consideration of how to manage community protection whilst enabling time for change (for example, the effects of treatment) to occur.

In this regard, Human Service agencies should provide the most comprehensive support plan possible within service availability and resources. Human Service agencies such as ADHC can provide a range of supports to assist a person to avoid re-offending; however, cannot eliminate the risk of re-offending. People with a disability who come before the Courts often have a range of complex needs. Section 32 is seen to be under-utilised or less successful because change (ie the effects of any treatment) does not occur quickly enough - support plans may seem not to be working, while the offender may need more time for change to occur.

ADHC does not support the proposition that a decision to divert depends upon a direct causal connection between the offence and the defendant's cognitive impairment. The impact of a person's impairment is more encompassing and impacted by environment. People with cognitive impairments are generally socially disadvantaged, with limited skills, including problem solving, and low level communication skills.

ADHC also does not support the proposition that a decision to divert should take into account the sentence that is likely to be imposed on the defendant. People with cognitive impairments are generally considered unsuitable for community based sentencing options and more likely to receive custodial sentences. This is not based on the seriousness of the offence or the risk of harm to the community, but on the lack of resources available to support the person if a community based order is made.

A centralised system within the Local Court and NSW Police for assessing defendants for cognitive impairments

ADHC supports the development of a centralised system to help identify and assess defendants for, amongst other things, cognitive impairments.

In Victoria, the Court Integrated Services Program (CISP) is a program that has been in operation in three Victorian Magistrates' Courts¹⁷ since November 2006. It often works in conjunction with the Assessment and Referral Court List,¹⁸ which is a specialist court list developed to meet the needs of accused persons who have a mental illness and/or a cognitive impairment.

CISP aims to address the causes of offending through a case management model in order to reduce the rate of re-offending. The target group for CISP are those individuals with complex needs such as "physical or mental disabilities or illnesses [including intellectual disability], drug or alcohol dependency and misuse issues, or inadequate social, family and economic support that contribute[s] to the frequency or severity of their offending" and is designed to provide "a coordinated, multi disciplinary team-based approach to... assessment and referral to treatment".¹⁹ CISP's close partnerships with key organisations allow for the program to provide priority access to certain treatments and services and address a wide range of

¹⁷ Melbourne Magistrates Court, Sunshine Magistrates Court and Latrobe Valley Magistrates Court.

¹⁸ Aims of the list include reducing the number of offenders with a mental impairment received into the prison system. Once a referral is made, an initial assessment is conducted followed by a comprehensive clinical assessment.

¹⁹ Guide to Court Support & Diversion Services.

issues such as drug and alcohol issues, homelessness, mental health, disability, acquired brain injury and indigenous specific needs.

Referrals to the CISP can be made by the police, legal representatives, magistrates, court staff, support services, family, friends, or the person themselves.

Preparation of reports for a section 32 application

ADHC supports the preparation of reports (such as assessment reports and treatment plans) supporting applications under section 32.

Attached at Appendices D, E and F are the following documents:

- ADHC letter to Court;
- Excerpt of the Criminal Justice Resource Manual – Providing information to the Court;
- ADHC Support Plan.

These documents are used by ADHC staff for clients appearing in Court and provide a useful guide as to content of a potential assessment report.

As a final point, ADHC notes that often there is an inconsistency between the material expected by the Court as to what is appropriate as a proposed treatment plan. ADHC is aware of instances in section 32 applications where magistrates have apprehensively accepted a comprehensive case management plan as a treatment plan, while at other times have accepted a single piece of paper with dot points about service provision as a treatment plan.

Without there being a consistent approach to what is an appropriate treatment plan, it makes it difficult for services to provide the required plan at the earliest possible opportunity. As such, this will lead to adjournments in matters and increase the risk of breaches bail and further offending.