NSW Law Reform Commission

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

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REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

Terms of Reference and Participants

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

People with an intellectual disability and the criminal justice system

We make this final Report pursuant to the reference to this Commission dated 27 September 1991.

Professor David Weisbrot

(Commissioner)

Professor Brent Fisse

(Commissioner)

Judge Angela Karpin

(Commissioner)

Professor Michael Tilbury

(Commissioner)

Terms of Reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the then Attorney General, the Hon Peter Collins QC MP, referred, by letter dated 27 September 1991, the following matter to the Law Reform Commission for report:

> To inquire into and review the law and practice relating to the treatment of the intellectually disabled in the criminal justice system and matters incidental thereto; and in particular, without affecting the generality of the foregoing, to consider -
>
> (a) whether there should be a new uniform statutory definition of "intellectual disability";
>
> (b) whether, and to what extent, the intellectually disabled should be diverted from the criminal justice system, including consideration of the custodial and non-custodial alternatives to the sentencing and detention of the intellectually disabled;
>
> (c) the treatment of intellectually disabled persons in police custody and in prison;
>
> (d) the release from custody into the community of intellectually disabled persons considered dangerous;
>
> (e) whether specialist units should be established within the Office of the Director of Public Prosecutions, the Legal Aid Commission, the Corrective Services Commission, the Police Service and other related bodies, to deal with the intellectually disabled; and

(f) in so far as the law and practice relating to the treatment of the intellectually disabled is relevant to the treatment of the mentally ill in the criminal justice system, whether any recommendations should also be made in relation to the mentally ill.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967* (NSW). For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon R M Hope AC CMG QC (until 2 April 1993)

The Hon G J Samuels AC QC (until 28 February 1996)

Professor David Weisbrot*

Professor Brent Fisse

Ms Clare Petre (until 23 October 1992)

Ms Jane Stackpool (until 2 October 1996)

Professor Michael Tilbury (from 6 October 1994)

Judge Angela Karpin (from 3 May 1995)

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Kearney McKenzie & Associates

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

Executive Summary

People with an intellectual disability have the potential to be either the victims, perpetrators or witnesses of crimes. The criminal justice system must be able to provide for the fair treatment of all people appearing before it. For this group of people, however, equal treatment alone will not ensure that they are able to exercise their legal rights. More needs to be done to redress the imbalance caused by their lower intellectual abilities, likely communication and other difficulties, the lack of understanding of their disabilities and the discrimination to which they are often subjected.
This Report represents the culmination of five years' investigation by the Commission into the difficulties faced by people with an intellectual disability involved in the criminal justice system. The Commission's inquiry into this particularly vulnerable group of people arose from concerns about their over-representation and unfair treatment in the criminal justice system. In submissions and consultations there was general acceptance by criminal justice system personnel and disability representatives that people with an intellectual disability were disadvantaged in the criminal justice system and that their appropriate treatment raised dilemmas for the system as a whole. As victims, they were not able to bring their abusers to justice and as offenders, they were not receiving appropriate recognition for their intellectual condition.

This Report considers the difficulties faced by suspects, offenders, victims and witnesses with an intellectual disability, from commission of a crime and investigation by police, through to consideration by the courts and appropriate sentencing options. The Report recommends a package of reforms, recognising both the importance of legislative change (Chapters 3-8) and of administrative change (Chapters 9-11). The list of recommendations is set out in the following pages. The recommendations are designed to ensure that the particular needs of, and disadvantages faced by, people with an intellectual disability are met at each stage of the criminal justice system. In particular, the Report makes recommendations in the following areas:

police procedures - including the need for a statutory Code of Practice regulating police investigations, with specific provision for suspects and witnesses with an intellectual disability;

fitness to be tried - including the adaptation of procedures primarily designed for people with a mental illness to meet the particular needs of people with an intellectual disability;

giving evidence in court - including provision for people with an intellectual disability to give evidence with the assistance of support persons or by way of closed circuit television if they are unable to give evidence in the usual way;

sexual offences - including amendments to the existing sexual offences affecting people with an intellectual disability to overcome the practical difficulties which arise in prosecuting offenders who sexually exploit people with an intellectual disability;

custodial and non-custodial sentencing options - including recommending additional special units and services in prisons and a Special Offenders Service to provide the necessary specialist supervision to enable people with an intellectual disability to meet the requirements of non-custodial sentences such as bonds and Community Service Orders.

The Commission believes that legislative reform alone is not sufficient. Accordingly, the Commission has also focused on such issues as education for both people with an intellectual disability and criminal justice personnel, special services for offenders with an intellectual disability and has recommended the introduction of a comprehensive co-ordinated strategy for government agencies in this area.

The Report also considers the large volume of research in this area (Chapter 2 and Appendix B) and difficult issues such as an appropriate statutory definition of intellectual disability (Chapter 3).

Apart from this Report, the Commission's inquiry has produced six previous papers: an Issues Paper, two Discussion Papers and three Research Reports. Together the seven papers represent a significant contribution to research in this area. The papers reveal that people with an intellectual disability are over-represented in the criminal justice system as both victims and offenders. Deinstitutionalisation is likely to lead to increased contact between people with an intellectual disability and the system. Accordingly, all levels of the criminal justice system will need to be equipped with appropriate legislative provisions, expertise and resources in this area, and the issues raised in this Report cannot be ignored in any consideration of the appropriate and fair operation of the criminal justice system.

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List of Recommendations

CHAPTER 3: DEFINITIONS OF INTELLECTUAL DISABILITY

A new and uniform statutory definition of intellectual disability

1. The *Crimes Act 1900* (NSW), the *Mental Health Act 1990* (NSW), the *Mental Health (Criminal Procedure) Act 1990* (NSW), the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 1995* (NSW) should be amended to include the following standard definition of "intellectual disability":

> "Intellectual disability" means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour.*

CHAPTER 4: POLICE

Summons or arrest

2. Section 352 of the *Crimes Act 1900* (NSW) should be amended to provide that a police officer should only arrest a person if that officer has reasonable grounds to believe that proceedings against the person by way of a summons or court attendance notice would not be effective.

Time limits for detention after arrest before charging

3. Arrested persons should be detained only so long as is reasonably necessary, up to a fixed limit of four hours in the first instance. Additionally, legislation should provide that the criteria for determining what is "reasonably necessary" in the circumstances must take into account the vulnerability of a suspect (as a result of his or her intellectual disability or of other factors which render a suspect especially vulnerable in police custody) and the special protections applicable to such suspects.

The police caution

4. The police caution should be rewritten to increase comprehension by all suspects. An essential element of the caution should be to test the understanding of the substance of the caution by the suspect, for example, by asking suspects to respond by putting the caution into their own words.

Code of Practice

Development of Code of Practice

5. A Code of Practice which sets out the police procedures for conducting criminal investigations should be developed by a Working Group consisting of members of the New South Wales Police Service, as well as representatives of interest groups and the general community appointed by the Attorney General. This Code should:

(a) replace the relevant parts of the New South Wales Police Commissioner's Instructions;

(b) be a statutory instrument, prepared as regulations under an enabling Act;

(c) be developed after consultation with the police, other interested groups and the general community;

(d) be readily available at all police stations for consultation by police officers, detained persons and other interested persons and be made widely available to the public generally; and

(e) contain procedures in relation to police investigations involving people with an intellectual disability, whether as suspects, victims or witnesses.

Contents of Code of Practice

6. To provide additional safeguards for people with an intellectual disability, the Code of Practice should contain provisions covering the following matters:

(a) *Identification of intellectual disability.* Guidelines prepared with expert input should include the following list of indicators of the possibility of intellectual disability:

(i) difficulty understanding questions and instructions;

(ii) responding inappropriately or inconsistently to questions;

(iii) short attention span;

(iv) receipt of a disability support pension;

(v) residence at a group home or institution or employment at a sheltered workshop;

(vi) education at a special school or in special education classes at a mainstream school; and

(vii) inability to understand the caution.

(b) *Officer to follow procedures if intellectual disability suspected.* If a police officer has any reason to suspect that the person being questioned has an intellectual disability, the officer must follow the procedures for questioning a person with an intellectual disability.

(c) *Questioning a person with an intellectual disability.* Guidelines prepared with expert input should include the following list of factors to take into account when questioning a person with an intellectual disability:

(i) the need to attempt to pitch the language and concepts used at a level which will be understood;

(ii) the need to take extra time in interviewing;

(iii) the risk of the person's special susceptibility to authority figures, including a tendency to give answers that the person believes are expected;

(iv) the dangers of leading or repetitive questions;

(v) the need to allow the person to tell the story in his or her own words;

(vi) the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers;

(vii) the need to ask the person to explain back what was said; and

(viii) the possibility that the person may be taking medication which may affect his or her ability to answer questions.

(d) *The police caution.* Guidelines should include the following issues in relation to administering the police caution to a person with an intellectual disability:

(i) the difficulties which such a person may have in comprehending the concept of the right to silence and the police caution;

(ii) the possible evidentiary implications of a failure to understand the caution; and

(iii) the need for such a person to be reminded periodically of the caution, particularly after any substantial break in the questioning.

(e) *Adoption of record of interview.* The standard "adoption" questions used at the end of an interview should be in language appropriate to the person with an intellectual disability. If the interview is not electronically recorded, the person should have the opportunity to have the record of interview read back slowly, and to be asked frequently whether it is correct.

(f) *Electronic recording of interview.* To the extent practicable, all police interviews with arrested suspects or victims with an intellectual disability should be electronically recorded.

(g) *Identification parades.* Identification parades should not be used for people with an intellectual disability in circumstances where unfairness to the suspect is likely to result, due to the unusual manner or appearance of the particular suspect.

(h) *Bail.* An accused's intellectual disability must be taken into account when assessing the setting of bail conditions.

(i) *The right to the presence of a lawyer and "support person".* The Code should outline the right of a person with an intellectual disability to a lawyer and support person. (See Recommendations 7 and 8 below.)

Presence of a lawyer

7. Questioning of a suspect with an intellectual disability after arrest should take place only if a lawyer representing the person is present, absent exigent circumstances.

Presence of a "support person" at police interviews

8. Police must ask a person with an intellectual disability (whether suspect, victim or witness) whether they wish to have a third person (a "support person") present during police questioning. If the person wishes to have a support person, the police must take reasonable steps to arrange one. The procedures relating to that third person are set out in paras 4.93-4.108.

Related issues - presence of a "support person" at other interviews

9. A lawyer should consider and discuss the need for a support person with his or her client. As in police interviews, if the client wishes to have a support person, the lawyer must take reasonable steps to arrange one. Failure to raise the issue should be regarded as poor professional practice. Accordingly, compulsory consideration of this issue should be contained in the *Bar Rules* and the Legal Practitioners' *Revised Professional Conduct and Practice Rules 1995*.

CHAPTER 5: FITNESS TO BE TRIED

General issues: The Mental Health (Criminal Procedure) Act

10. The provisions of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be relocated in the *Criminal Procedure Act 1986* (NSW). [see draft Bill in Appendix C]

Fitness to be tried: Supreme and District Courts

11. Whenever the Mental Health Review Tribunal is required to determine whether a person has a mental illness, it should also determine whether the person has an intellectual disability.

12. Section 10(4) of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to extend the circumstances in which a charge may be dismissed as follows:

> If, in respect of a person charged with an offence (other than an offence to be dealt with summarily in a Local Court), the court is of the opinion that it is inappropriate to inflict any punishment or any punishment other than a nominal punishment, having regard to the trivial nature of the charge or offence, the nature of the person's condition, the periods of the person's custody or detention in respect of the offence or any other matter which the court thinks it proper to consider, the court may determine not to conduct an inquiry and may dismiss the charge and order that the person be released.

13. The right to election for a hearing by judge alone in fitness hearings should be removed. Instead, fitness hearings should always be heard by judge alone rather than by jury. The right to election for a hearing by judge alone should remain for special hearings, and, if the accused is unable to make the election, his or her counsel should have the statutory right to make the election on the client's behalf, in the client's interest.

14. Any statement made by an accused when interviewed by an expert for the purposes of preparing a fitness report about the events relating to the offence should not be received as evidence of the facts against the accused.

15. Section 14 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to provide that, in the period between a finding of unfitness and the special hearing, the court may, on an application by either side, have the matter brought back before it to consider any possible variation in the orders made under section 14(b).

16. For the purpose of setting the limiting term, the judge should be required to give the person the benefit of assuming that the person would have pleaded guilty had he or she been fit to be tried.

17. Section 27 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to the effect that, following the special hearing, the order as to the person's place of detention is made by the Tribunal, not the court.

18. A qualified finding of guilt at a special hearing should be an absolute bar to further prosecution in respect of the same circumstances, and should no longer be subject to section 28 of the *Mental Health (Criminal Procedure) Act 1990* (NSW).

19. Executive discretion should be removed from all decisions regarding forensic patients (except as limited by Recommendation 20) so that all decisions as to their placement, security conditions and release are made by the Mental Health Review Tribunal. This will require amendments to the *Mental Health Act 1990* (NSW) and the *Mental Health (Criminal Procedure) Act 1990* (NSW) to enable the Tribunal to make orders not recommendations.

20. Following the removal of executive discretion:

(a) section 84(1) of the *Mental Health Act 1990* (NSW) should be limited to apply only to forensic patients who have been transferred to hospital while serving a sentence of imprisonment or life sentence;

(b) section 84(3) of the *Mental Health Act 1990* (NSW) should be repealed; and

(c) the requirement that the Attorney General notify the Minister for Police and Emergency Services in sections 18 and 29(3) of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be removed.

21. The *Mental Health Act 1990* (NSW) and/or the *Mental Health Regulation 1990* (NSW) should be amended to include a non-exhaustive list of release conditions which may be imposed by the Mental Health Review Tribunal.

22. Following on from the abolition of executive discretion outlined in Recommendation 19, the following appeal structure should be established for Tribunal determinations:

(a) the Tribunal should have a duty to give reasons;

(b) Tribunal determinations should not be reviewable on the merits; and

(c) administrative review of all Tribunal determinations should lie to a single judge of the Supreme Court.

This will require amendments to the *Mental Health Act 1990* (NSW); the *Mental Health (Criminal Procedure) Act 1990* (NSW) and the *Supreme Court Act 1970* (NSW).

Local Courts

Fitness to be tried

23. If the question of a person's fitness to be tried is raised in any matter heard in a Local Court (apart from a committal hearing), the magistrate must:

(a) consider proceeding under section 32 or 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW); and

(b) if the magistrate does not dismiss the charge under section 32 or 33, the magistrate must hold a preliminary inquiry to determine the question of the person's fitness. If found fit to be tried, the matter is to be dealt with in the usual way in the Local Court. If found unfit to be tried, the usual fitness procedures involving the Mental Health Review Tribunal will apply.

Diversion

24. Section 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to provide that:

(1) A Magistrate may dismiss a charge and discharge an accused person if, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:

(a) that the accused person has an intellectual disability, a mental illness or a mental condition, but is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, and

(b) that it is not appropriate to proceed according to law, having regard to an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, the trivial nature of the charge or offence, the nature of the person's condition, the periods of the person's detention or custody in respect of the offence or any other matter that the Magistrate thinks it proper to consider.

The dismissal of charges under sections 32-33 is to be noted on a relevant record so that the court is aware of this fact on subsequent occasions.

CHAPTER 6: THE DEFENCE OF MENTAL ILLNESS

The defence of mental illness in Supreme and District Courts

25. The common law defence of mental illness should be renamed in legislation as the defence of mental impairment.

26. A person found not guilty on the ground of mental impairment should not be sentenced to indeterminate detention. Rather, after a finding of not guilty on the ground of mental impairment, the court should give the person a limiting term, representing the best estimate of the appropriate sentence if the person had been found guilty of the relevant offence.

27. Section 39 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to remove the requirement of detention in "strict custody" following a verdict of not guilty because of mental impairment. Accordingly, the court would have the power to order either a custodial or non-custodial option for the person for the period of the limiting term. The Mental Health Review Tribunal would have the power at the initial or subsequent reviews to alter the conditions of custody or release ordered by the court (including the power to revoke a non-custodial option and order some form of detention), or to release the person unconditionally.

The defence of mental illness in Local Courts

28. The defence of mental impairment should be available in Local Courts as well as in the Supreme and District Courts as recommended in Recommendation 25. If the defence is raised in any matter (whether summary or indictable) heard in a Local Court, the magistrate must:

(a) consider proceeding under section 32 or 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW); and

(b) if the magistrate does not dismiss the charge under section 32 or 33, the magistrate must hear the matter and return a special verdict that a person is not guilty of an offence because of mental impairment if he or she is satisfied that the person is not criminally responsible for the offence because of a mental impairment. If such a verdict is returned, the same procedures apply as for matters heard in the District and Supreme Courts.

CHAPTER 7: GIVING EVIDENCE

Special arrangements for giving evidence

29. If the court is satisfied that a witness with an intellectual disability may be unable to give his or her evidence without the use of special arrangements because he or she is unduly inhibited in giving evidence in the normal way, the court may order that special arrangements (for example, the assistance of a support person, the use of screens or changed seating arrangements and closed circuit television ("CCTV")) be made for taking that witness's evidence.

Right to make a statement not subject to cross examination

30. If the court is satisfied that the defendant has an intellectual disability, the defendant should have the right to make a statement not subject to cross examination to the court, subject to the court's direction about the length, subject matter and scope of the statement.

Expert evidence about reliability of evidence

31. On application by a party, the trial judge should have the power to allow expert evidence to be led to explain the characteristics and demeanour of a witness with an intellectual disability if his or her characteristics and demeanour are outside normal experience.

CHAPTER 8: OTHER LEGISLATIVE AMENDMENTS

Amendments to the Crimes Act 1900 (NSW)

Sexual offences

32. "Serious intellectual disability" should be abolished as a circumstance of aggravation in the aggravated sexual offences in sections 61J(2)(g), 61M(3)(e) and 61O(3)(d) of the *Crimes Act 1900* (NSW).

33. Section 66F of the *Crimes Act 1900* (NSW) should be retained with the following changes:

(a) the definition of intellectual disability in section 66F(1) should be that recommended in Recommendation 1;

(b) the requirement in section 66F(6) that no prosecution for an offence against this section shall be commenced without the approval of the Attorney General should be removed;

(c) the prohibited conduct should not be limited to sexual intercourse but should also include an act of indecency;

(d) the carer's offence in section 66F(2) should be redrafted in consultation with disability groups to ensure that it covers all relevant carers, including volunteers and staff providing home-based care, but not to prohibit sexual relations between two consumers of the same service; and

(e) the exploitation offence in section 66F(3) should be abolished.

Amendments to other legislation

Victims compensation

34. Victims compensation legislation should provide that a victim's intellectual disability is a relevant consideration for the purpose of granting leave to lodge a late application for compensation.

Apprehended Violence Orders

35. There should be further consideration of the impact of Apprehended Violence Orders on people with an intellectual disability as both complainants and defendants, particularly in the context of group homes. This consideration should involve consultation with relevant agencies, including the New South Wales Police Service and the New South Wales Department of Community Services.

Sentencing

36. Where an offender is unrepresented and has an intellectual disability, or one is suspected, and a custodial sentence is a reasonable possibility, sentencing legislation should provide that a Pre-sentence Report from someone who has expertise in the area of intellectual disability is mandatory.

37. A court should have the power to request information from relevant government agencies, including the New South Wales Department of Community Services and the New South Wales Probation and Parole Service about appropriate programs for an offender with an intellectual disability and to order that an offender attend such a program as a condition of the sentence.

CHAPTER 9: INFORMATION, EDUCATION AND 0TRAINING

Community legal education

38. The New South Wales government should fund the Ageing and Disability Department to take responsibility for developing comprehensive community legal information programs and resource material about the criminal justice system for people with an intellectual disability and their carers.

Provision of information by criminal justice agencies

39. All relevant government agencies* responsible for informing the community generally about their rights and duties in relation to the criminal justice system and for helping them when they come into contact with the criminal justice system should, so far as is practicable, ensure that they also prepare material that is appropriate for people with an intellectual disability.

Audit of training material on intellectual disability issues

40. The Ageing and Disability Department should be responsible for conducting an audit of training material and courses in intellectual disability issues conducted by government and non-government agencies in Australia. The Department should hold information about training courses in a generally accessible computerised data base and, as far as possible, should acquire and hold copies of programs and materials.

Training in government agencies

41. All relevant government agencies* should include training in intellectual disability issues in their staff training programs for new recruits and in their ongoing staff training. People with an intellectual disability should be involved in the development of these programs. The training should include at least the following matters:

(a) identification of people with an intellectual disability;

(b) effective communication with people with an intellectual disability;

(c) awareness of the disadvantages that may be suffered by people with an intellectual disability in the criminal justice system; and

(d) services available to help people with an intellectual disability and advice available for criminal justice personnel dealing with people with an intellectual disability.

Monitoring government agencies' training programs

42. Every two years all relevant government agencies* should review their intellectual disability training programs for staff. Agencies should also give an outline of the programs and a copy of the training material to the Ageing and Disability Department.

Educating the legal profession

43. Legal education providers should consider including intellectual disability issues in the courses for which they are responsible. In particular, intellectual disability issues should be included in compulsory practical legal training (College of Law and Bar Practice Course), continuing legal education courses and in-service training for lawyers in criminal law firms.

Role of Law Society and Bar Association

44. The Law Society of New South Wales and the New South Wales Bar Association should develop and distribute an information package for their members containing:

(a) guidelines for identifying intellectual disability, communicating with clients with an intellectual disability (including the new requirement to consider the necessity of a support person in Recommendation 9) and making decisions about psychological or psychiatric testing;

(b) a short summary of the issues involved in prosecuting and representing people with an intellectual disability;

(c) information about guardianship and people with an intellectual disability; and

(d) a list of telephone numbers of organisations that can provide further information.

The information package should be distributed to all legal practitioners and incorporated into the *New South Wales Solicitors Manual* loose-leaf service (Riley's).

Development of materials for judges and magistrates

45. The Judicial Commission of New South Wales, with the help of people with appropriate expertise, should:

(a) develop more materials dealing with intellectual disability issues for judges and magistrates, including at least the following matters -

(i) identification of people with an intellectual disability;

(ii) effective communication with people with an intellectual disability;

(iii) disadvantages that may be suffered by people with an intellectual disability in the criminal justice system;

(iv) services available to help people with an intellectual disability and advice available for criminal justice personnel dealing with people with an intellectual disability; and

(b) review, on a regular basis, the adequacy and appropriateness of the material about intellectual disability in the Bench Books.

Guardianship

46. The role of a guardian for a person with an intellectual disability involved in criminal proceedings should be the subject of training and education for criminal justice personnel, including lawyers, judges and magistrates. The Guardianship Board of New South Wales should be involved in this training.

Research about intellectual disability issues

47. There should be more research into intellectual disability issues. As part of the co-ordinated strategy referred to in Chapter 10, government agencies* should undertake relevant statistical collection and research to provide a better basis for policy development in this area.

CHAPTER 10: A CO-ORDINATED STRATEGY

Co-ordination between agencies

48. The Ageing and Disability Department should co-ordinate strategy for government agencies* responsible for the treatment of people with an intellectual disability who are involved in the criminal justice system through the development of a comprehensive interdepartmental policy and procedural framework designed to protect the rights and meet the needs of these people. To do this, the Department should, after consultation but within 12 months of the tabling of this Report:

(a) prepare an agreed set of principles about people with an intellectual disability in the criminal justice system;

(b) identify the service and other needs of people with an intellectual disability within the criminal justice system;

(c) decide which agency is primarily responsible for meeting those needs or providing those services and prepare interagency guidelines reflecting these responsibilities;

(d) develop a strategic plan and time frame for establishing new services needed;

(e) develop interagency guidelines: for overlapping agency responsibilities or a changeover of responsibility; for handling conflicts between agencies; and for regular communication between agencies, to ensure continuity of contact and service provision for a person with an intellectual disability.

The Department should monitor the implementation of (a)-(e) above. As part of this monitoring, it should report annually to the Attorney General through its Minister on its progress in implementing this recommendation and should also include information about this process in its Annual Report.

Monitoring by the Community Services Commission

49. The Community Services Commission's complaints and monitoring jurisdiction should be expanded to cover the provision of services by relevant government agencies* involved in the criminal justice system to people with an intellectual disability.

Exchange of information

50. The Ageing and Disability Department should develop mechanisms and guidelines to ensure that government agencies* involved in the criminal justice system exchange, where appropriate, relevant information they hold about a person with an intellectual disability. The mechanisms and guidelines should take into account privacy considerations.

Screening, assessing and identifying intellectual disability

51. The Ageing and Disability Department should contact and assist government agencies* to ensure that each has appropriate principles and procedures for screening, assessing and identifying people with an intellectual disability.

Government agencies' policies

52. Each government agency* should, using the principles, policies and procedures developed by the Ageing and Disability Department under Recommendation 48 as a basis, develop and implement a policy and operational guidelines for addressing the rights and needs of people with an intellectual disability.

Police intellectual disability liaison officers

53. The New South Wales Police Service should establish specialist intellectual disability police liaison officer positions.

Ensuring continuity of contact and service provision

54. The New South Wales Department of Community Services should establish a case manager service for all people with an intellectual disability who come into contact with the criminal justice system.

CHAPTER 11: SERVICES FOR OFFENDERS WITH AN INTELLECTUAL DISABILITY

Special units and services in prisons

55. Special units for both men and women with an intellectual disability within prisons should be retained (or in the case of women, established) and expanded.

56. Specialist services should be provided for prisoners with an intellectual disability who remain within the mainstream prison population.

Secure units outside prisons

57. Secure units outside the prison system should be established and administered by the New South Wales Department of Community Services for people with an intellectual disability found unfit to plead or found not guilty on the ground of mental impairment. These secure units should have the legislative guidelines outlined in para 11.29 to protect the rights of the people detained, including admissions and review criteria and provision of legal representation.

Access to Community Service Orders

58. The New South Wales Probation and Parole Service should ensure that there are available Community Service Order work options which are suitable for a person with an intellectual disability. Supervision would be provided by the Special Offenders' Service recommended in Recommendation 59.

Special Offenders' Service

59. Within 12 months from the tabling of this Report, the New South Wales Probation and Parole Service should establish a specialist supervision and support service for people with an intellectual disability who are serving non-custodial sentences (including bonds or probation) or who are on parole. The role of this Special Offenders' Service would be:

(a) to provide specialist supervision and support to people using its services; and

(b) to liaise with the New South Wales Department of Community Services, and in particular the person's case manager recommended in Recommendation 54, to ensure that the person receives appropriate services and accommodation.

Accommodation for people on bail

60. Places in the secure units recommended in Recommendation 57 should be set aside for people with an intellectual disability who could not otherwise obtain bail without physically secure accommodation.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

1. Introduction

OVERVIEW

1.1 This Report is concerned with people who have an intellectual disability[1] and their contact with the criminal justice system. It deals with the position of suspects, offenders, victims and witnesses. The Report is the seventh and final paper released as part of the Commission's five year inquiry into the treatment of people with an intellectual disability in the criminal justice system.

1.2 This chapter therefore provides an introduction to the background and conduct to date of the inquiry. It also considers the concerns which led to the referral of this area to the Commission and the principles which the Commission believes should guide our recommendations for reform. Accordingly, the principles and obligations (international, federal and New South Wales) which already exist in relation to people with an intellectual disability are briefly considered. Finally, the chapter outlines the areas to be covered in this Report.

BACKGROUND TO THE COMMISSION'S INQUIRY

1.3 This inquiry arose from concern that people with an intellectual disability were over-represented as offenders and victims in, and/or were being treated inappropriately by, the criminal justice system. Two hypothetical but typical examples demonstrate the types of difficulties faced by people with an intellectual disability in their contact with police, lawyers and courts:

> Jane is a teenager with an intellectual disability. She is sexually assaulted by an adult friend of the family. Later, she tells her school teacher who calls the police. The police arrive and are dismayed to find that the school is a "special" school for children with an intellectual disability. Even though Jane can explain to her teacher what happened to her, the police find it hard to understand what Jane is saying and refuse to take the matter further, saying that there is insufficient evidence and that a defence barrister will be able to destroy the girl's credibility in court, even if she were found competent to give evidence at all.
>
> Jerry has an intellectual disability and lives in a hostel. After a fire destroyed part of the hostel, another resident of the hostel tells a staff member that he saw Jerry light the fire. The staff member rings the police who question Jerry alone at the police station. Jerry, who is afraid to appear "stupid" to the police, answers yes to every question the police ask and agrees that he lit the fire. He is given a copy of his statement to read and signs it. He is charged and refused bail because he was unable to understand the requirements for entering bail and the hostel refuses to take him back. In court experts testify that Jerry could not have understood the questions asked, nor could he read.

1.4 Chapter 2 discusses the statistics behind these anecdotes to consider the impact of crime on people with an intellectual disability and reveals significant levels of over-representation for both victims and offenders. Changing community attitudes and a policy of "independent living" programs mean that people with an intellectual disability are now more likely to live in the community and use mainstream community services. Similarly, there is greater community contact with, and input into, institutions and other forms of supported accommodation. It is therefore believed that contact of people with an intellectual disability with the criminal justice system (both as offenders and victims) will increase.[2] The significance of the high levels of over-representation is that the treatment of people with an intellectual disability is not a marginal issue in the criminal justice system. The numbers are high enough to suggest that every police officer, every criminal lawyer, every prison officer, and every magistrate or judge dealing with criminal matters is likely to encounter people with an intellectual disability in his or her daily work.

THE COMMISSION'S INQUIRY

1.5 It was within the context of these concerns about over-representation and unfair treatment that the then Attorney General, the Hon John Dowd QC MP, convened a Committee to conduct a preliminary review of the operation of the criminal justice system as it affects people with an intellectual disability. The Committee contained representatives from a number of agencies, including the Department of Corrective Services, the Criminal Law Review Division of the Attorney General's Department, the Mental Health Review Tribunal, the Guardianship Board, the Office of the Director of Public Prosecutions, the Magistracy, the Public Defenders and (what is now known as) the Department of Community Services. The Committee's two meetings produced a brief Issues Paper which revealed the need for a more comprehensive review of the area.[3] Accordingly, the New South Wales Law Reform Commission received a reference to inquire into and review the law and practice relating to the treatment of people with an intellectual disability in the criminal justice system.[4] The full terms of reference for the Commission's inquiry are set out on page xiii of this Report.[5]

THE CONDUCT OF THE INQUIRY TO DATE

The Issues Paper

1.6 Considering the breadth of the terms of reference and the variety of interest groups to be consulted, the Commission decided that it should seek a preliminary response to the terms of reference and release an Issues Paper before formulating specific proposals for reform. The terms of reference were widely distributed and the Commission incorporated the comments made in preliminary meetings, interviews, written submissions and telephone calls in an Issues Paper ("IP 8") released in June 1992.[6] The Issues Paper traced the criminal justice process, beginning with the commission of a crime and covering contact with the police, appearing before court, sentencing, custody and release; raising questions for discussion about the treatment of people with an intellectual disability at each stage. It was designed to promote discussion and to seek information and comment about the issues raised, rather than to provide solutions.

The Research Reports

1.7 During the preliminary research for this inquiry, the Commission noted that there was a lack of recent statistics about the number of people with an intellectual disability in the New South Wales criminal justice system. It therefore sought funding to carry out some empirical research. The Commission also decided in the early stages of the inquiry that it should place a priority on seeking input from people with disabilities. This was not a simple matter. The Commission's usual methods of seeking written or telephone submissions, based on written documents, are inappropriate for people with low literacy levels and communication difficulties. With the assistance of the Intellectual Disability Rights Service, discussion groups were organised using a specially prepared session outline and appropriate discussion leaders. The Commission received funding assistance from the Law Foundation of New South Wales for these projects, resulting in three Research Reports, the first two released in March 1993:

Consultations ("RR 3").[7] This Research Report contains the comments and recommendations for reform made by people with an intellectual disability, who spoke to the Commission about their experiences in the criminal justice system and their ideas for change.

Appearances Before Local Courts ("RR 4").[8] This study, undertaken by Associate Professor Susan Hayes of The University of Sydney, surveyed people appearing before four selected New South Wales Local Courts on criminal charges. Local Courts were selected because of the high numbers of court appearances, and the range and diversity of offences. Social and adaptive skills were not able to be assessed due to privacy considerations, therefore an operational definition of intellectual disability, based on a test of cognitive reasoning ability, was used. With this test, the study found that 14.2% of the sample of 120 people had an intellectual disability and a further 8.8% were in the borderline category. The Research Report suggests some solutions to the problem of over-

representation of people with an intellectual disability in Local Courts and indicates where further research may be useful.

1.8 In March 1996, a follow up study to RR 4 was released:

Two Rural Courts ("RR 5").[9] The Research Report, again prepared by Associate Professor Susan Hayes, addressed a limitation of the previous Report, namely the small number of Aboriginal people who participated. The results show that more than one third (36%) of the sample of 88 persons appearing before two rural courts had an intellectual disability, and a further 20.9% were of borderline intellectual ability. The study identified that the Aboriginal population appeared to be at a particular disadvantage in court proceedings.

The findings of, and difficulties for, people with an intellectual disability highlighted by these Research Reports have been taken into consideration in preparing the Commission's final recommendations.

1.9 Apart from the Issues Paper and Research Reports, it was also decided to produce two discussion papers, the first dealing with issues relevant to the police, and the second with courts and sentencing issues. A discussion paper considers the issues raised in an issues paper in greater detail together with comments received in response and sets out specific, but provisional, proposals for reform. Such proposals do not represent the Commission's final recommendations, but allow further detailed comment and consultation.

The first Discussion Paper: Policing Issues

1.10 People with an intellectual disability come into contact with the police as suspects, as victims and as witnesses to crimes. In each case, identification by the police of a person's intellectual disability and the consequent use of appropriate questioning techniques is essential. In the Policing Issues Discussion Paper ("DP 29"),[10] released in October 1993, the Commission considered such issues as:

the adequacy of the existing police guidelines (the Police Commissioner's Instructions);

identification of a person's disability by the police;

police questioning of suspects, victims or witnesses with intellectual disabilities;

the effectiveness of the police caution for people with an intellectual disability;

the treatment of confessions made by people with an intellectual disability;

standard police procedures such as bail; and

education and training programs for police officers in all of these areas.

1.11 The Commission sought comments and submissions about the role of the police when dealing with people who have an intellectual disability and about the efficacy of the safeguards proposed in that Paper to ensure that people with an intellectual disability were treated appropriately. In particular, the Commission sought comments from the police about the practicality, within their normal work constraints, of such safeguards.

The second Discussion Paper: Courts and Sentencing Issues

1.12 In the Courts and Sentencing Issues Discussion Paper ("DP 35"),[11] released in October 1994, the Commission considered such issues as:

statutory definitions of intellectual disability;

lawyers and other legal personnel and their dealings with people with an intellectual disability, including issues of legal education and problems associated with obtaining instructions;

issues arising from the appearance in court of people with an intellectual disability, including fitness to be tried, competence, giving evidence and criminal defences;

sentencing, custody and release, including consideration of the custodial and non-custodial alternatives available for offenders with an intellectual disability and their release from custody; and

issues relevant to the whole criminal justice system such as the particular needs of juveniles with an intellectual disability, and the necessity for co-ordination and provision of services.

Again, submissions were sought on these and related issues.

Consultation

1.13 Consultation is always a significant part of the Commission's methodology, but this inquiry has involved even more consultation than usual, with people with an intellectual disability, their carers and families, and with criminal justice personnel. Over the course of the project the Commission has:

distributed (free of charge) over 1000 copies of each of the six consultation and research papers, both in Australia and overseas;

received 199 written and oral submissions;[12]

attended over 90 seminars and meetings with individuals and interest groups, including specialised consultation seminars, such as seminars with psychologists and psychiatrists about definitions of intellectual disability;

organised six discussion groups with people with an intellectual disability to ensure that their input is received (see RR 3);

spoken at nine public seminars to increase public knowledge about the inquiry, including organising a free seminar in Law Week 1994;

prepared posters and flyers about the inquiry and the consultation papers for schools and other groups;

undertaken prison tours and court observations;

given radio and newspaper interviews and prepared articles about the inquiry for professional organisations and journals, including the *Law Society Journal* and Department of Community Services newsletters; and

attended an Interdepartmental Committee set up following RR 4 to enable us to receive feedback on a regular basis from government departments.

The Commission is grateful to all the individuals and organisations who assisted us in these consultations. Though the consultations extended the time taken by the Commission to complete the reference, the Commission feels the effort was worthwhile.

1.14 The Commission was further assisted in the inquiry by the five week secondment to the Commission of Mr Mark Ierace in 1994. Mr Ierace is a barrister and the author of a textbook in the area. He has been an honorary consultant to the Commission throughout the inquiry. The Commission acknowledges the considerable assistance provided to the Commission over the five years of the inquiry by Mr Ierace and by the Commission's other honorary consultant, Associate Professor Susan Hayes, Head of the Department of Behavioural Sciences in Medicine at The University of Sydney.

OVERLAP WITH OTHER COMMISSION INQUIRIES

1.15 The Commission has two other current projects relevant to the treatment of people with an intellectual disability in the criminal justice system: Partial Defences to Murder and Sentencing.

Partial defence to murder: Diminished responsibility

1.16 The Commission has a current reference into the partial defences to murder: provocation, infanticide and diminished responsibility. The defence of diminished responsibility provides that a person shall not be convicted of murder if he or she was suffering from:

> such abnormality of mind (whether arising from a condition of *arrested or retarded development of mind* or any inherent causes or induced by disease or injury) as substantially impaired his [or her] mental responsibility for the acts or omissions ...[13] [emphasis added]

The Commission believes that "arrested or retarded development of mind" clearly encompasses an intellectual disability. Whether people with an intellectual disability will satisfy the test for diminished responsibility, however, will depend upon the nature or severity of their disability. A separate discussion paper has been released covering these issues,[14] and a report is being prepared. Accordingly, this defence will not be discussed in this Report, but will be deferred to the Partial Defences Report.

Sentencing

1.17 The Commission also has a wide-ranging reference into sentencing laws in New South Wales. A general discussion paper was published in April 1996,[15] and the first Report in December 1996. In 1997 the Commission will be specifically considering the sentencing of vulnerable groups, including people with an intellectual disability.[16] Though the sentencing of people with an intellectual disability is discussed in this Report,[17] a more detailed discussion of sentencing legislation will be found in the Sentencing reference papers.

OVERVIEW OF THIS REPORT

The Commission's approach

Our obligations: international, federal and New South Wales

1.18 Before making recommendations for reform in this area, the Commission considered it important to identify the existing rights and obligations of people with an intellectual disability. The rights of people with an intellectual disability are affected by international instruments and by federal and State legislation.

1.19 No specific international Convention on the rights of disabled persons exists, as in the case of other vulnerable or disadvantaged groups such as children. However, the rights of all people in general and of people with a disability, in particular, have been considered in the international arena by a number of international instruments, including:

Universal Declaration of Human Rights (1948);

International Covenant on Civil and Political Rights (1966, in force 1976);

International Covenant on Economic, Social and Cultural Rights (1966, in force 1976);

United Nations Declaration on the Rights of Mentally Retarded Persons (1971);

United Nations Declaration on the Rights of Disabled Persons (1975);

Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988); and

Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993).

1.20 Relevant principles recognised by these international instruments include:

people with an intellectual disability have the same fundamental rights as all other people;

people with an intellectual disability have the right to protection from exploitation, abuse and degrading treatment;

all people are entitled to equal protection of the law without discrimination, but measures designed to protect the rights of people with an intellectual disability are not deemed to be discriminatory (but should be subject to review by a judicial or other authority);

all people are entitled to a fair trial and people with an intellectual disability have the right to have their disability taken into account in legal procedures, including the determination of criminal responsibility;

whenever people with an intellectual disability are unable, because of the severity of their disability, to exercise all their rights in a meaningful way, or if it should become necessary to restrict or deny some or all of their rights, the procedure used must contain proper legal safeguards against every form of abuse; and

governments should ensure the development of legislation, policy-making, personnel training and support services to assist people with an intellectual disability to exercise their rights.

1.21 Australia has ratified the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. The Covenant on Civil and Political Rights, together with the Declarations on the Rights of Mentally Retarded and Disabled Persons, are also found in Schedules to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). While neither ratification nor the attachment of these documents to the Commonwealth Act automatically incorporates these instruments into Australian law,[18] the Commission believes that its recommendations should, as far as possible, be consistent with those international standards recognised by the Australian government. A number of practices in the criminal justice system which may affect people with an intellectual disability have been criticised for not complying with our international human rights obligations. These include, for example, the indeterminate detention, in some States, of people found unfit to be tried.

1.22 At the federal and New South Wales level, the rights of people with an intellectual disability are affected by disability services, mental health and anti-discrimination legislation. Relevant legislation includes:

Disability Services Act 1986 (Cth);

Human Rights and Equal Opportunity Commission Act 1986 (Cth);

Disability Discrimination Act 1992 (Cth);

Disability Services Act 1993 (NSW);

Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW);

Mental Health Act 1990 (NSW); and

Anti-Discrimination Act 1977 (NSW).

1.23 Though directed at civil issues such as the provision of services, this legislation also has consequences for the criminal justice system. For example, discrimination legislation applies to government departments,[19] and discrimination cases have been brought involving the police and the Department of Corrective Services. Mental health legislation affects persons detained after being found unfit to be tried or not guilty on the ground of mental illness. In New South Wales, disability services legislation requires a "public authority", which would include most criminal justice agencies, to plan for the provision of appropriate services for people with disabilities.[20]

Rights and responsibilities

1.24 The New South Wales disability services legislation also contains a set of principles and applications of principles, based upon the premise that people with disabilities have the same basic human rights as other members of Australian society.[21] As discussed in previous papers for this inquiry, the Commission recognises that each person with an intellectual disability has the same rights as all other members of the community. Because of the disadvantages and vulnerability to exploitation experienced by people with an intellectual disability, however, the community (and principles of justice) may require that extra procedures are followed in the criminal justice system to ensure that legal principles in practice apply to them equally and uniformly, and to allow them to exercise fully their rights. Similarly, lawyers, police and other personnel involved in the criminal justice system may need special training and techniques in order better to fulfil their legal, official and ethical responsibilities and to ensure that people with an intellectual disability are treated fairly. Submissions have made similar comments; for example, the New South Wales Council for Intellectual Disability commented that proposals for reform in this area:

> ... do not represent (and should not be seen to represent) a set of separate laws or standards for people with an intellectual disability. Society has a responsibility to ensure that all its citizens receive equal justice under the law, and must also acknowledge that currently this may not occur where people have difficulty in negotiating with the criminal justice system by virtue of their age, gender, ethnic background, communication difficulties or lack of understanding.[22]

1.25 The need for recognition of the equal rights of people with an intellectual disability does not ignore their consequent responsibilities, such as to obey the law. The Commission suggests that some alternatives, for example, automatic diversion from the criminal justice system, do not recognise these responsibilities. On the other hand, it must be queried whether equal responsibilities are really appropriate for some people with an intellectual disability, particularly those with more severe disabilities. There is a danger of taking the principle of treating all people, whether with or without a disability, the same way too far; for example by requiring police intervention or imposing punishment which is meaningless to the person.[23]

1.26 By contrast the principle of equality before the law does not mean that people with an intellectual disability necessarily have the same level of *criminal responsibility.* This may occur because they fall within the defences of mental illness or diminished responsibility or because they may not have the requisite *mens rea* (or mental state) to be convicted of an offence. For example, in relation to the offence of larceny (theft) the accused must have *intended* to deprive the owner of the relevant object permanently. A person with an intellectual disability may not have had such an intention. Alternatively, some people with an intellectual disability, because of their low level of understanding, may not be found fit to stand trial for an offence. These issues will be discussed further in this Report.

Principles guiding the Commission's recommendations

1.27 In light of the above discussion, the Commission has endeavoured to set out its underlying principles for this inquiry to provide a coherent basis for our recommendations. Our principles are a mixture of general human rights principles, disability/service provision principles and criminal justice system principles.[24] Recommendations affecting people with an intellectual disability involved in the criminal justice system should have the following characteristics:

consistency with international human rights principles, including respect for individual civil liberties;

consistency with standard criminal justice system principles and “rights” - in particular, the right to equality before the law; the right to due process and a fair trial; retention of the distinction between sentenced and non-sentenced people within the criminal justice system; and the recognition of the need to provide information about these principles and rights in terms people, including people with an intellectual disability, can understand;

consistency with the New South Wales *Charter of Victims' Rights*;[25]

consistency with accepted principles of service provision as outlined in Schedule 1 of the *Disability Services Act 1993* (NSW), including recognition of the need for involvement of people with an intellectual disability in the formulation and implementation of procedures which affect them;

avoidance of discrimination on the grounds of intellectual disability but recognition of the disadvantages of people with an intellectual disability - including their vulnerability to exploitation; their likely difficulty in understanding the criminal justice process; their likely lack of financial or other support - while allowing for special measures or different treatment on the ground of these disadvantages; and

efficient use of resources.

1.28 In relation to the avoidance of discrimination, it must be recognised that the identical treatment of all people, disabled or otherwise, will not overcome the disadvantages faced by people with an intellectual disability in the criminal justice system. The Commission believes that intellectual disability does lead to a difference which must be acknowledged and that society has an obligation to address this disadvantage to attempt to create an “equal playing field”. Accordingly, recommendations should aim for equal justice rather than identical treatment.

Outline of issues covered

1.29 Despite the enormous number of issues in the area of people with an intellectual disability and the criminal justice system, the Commission has tried to keep this Report as brief as possible through extensive cross-referencing to the previous consultation papers released. Not all of the proposals in those earlier papers have been adopted in this final Report. Some have been rejected or amended following further research. Some proposals have been overtaken by events, or have already been implemented, for example, through the passing of the *Evidence Act 1995* (NSW). However, this Report generally follows on from the proposals contained in the two Discussion Papers. This Report makes recommendations in the following areas:

definitions of intellectual disability (Chapter 3);

contact with the police (Chapter 4);

fitness to be tried (Chapter 5);

the defence of mental illness (Chapter 6);

giving evidence (Chapter 7);

sexual offences, victims compensation, Apprehended Violence Orders and sentencing (Chapter 8);

information, education and training for people with an intellectual disability, their carers and criminal justice personnel (Chapter 9);

a co-ordinated strategy for people with an intellectual disability in the criminal justice system (Chapter 10); and

special services for offenders with an intellectual disability (Chapter 11).

CONCLUSIONS

1.30 It is difficult to distil the results of five years of research and consultation into one report. The Commission considers, however, that the recommendations contained in this Report do not comprise the sole achievement of its work. It is also of the view that the inquiry, including the previously released consultation papers and research reports, has led to an increasing community awareness, especially amongst those involved in the criminal justice system, of the particular needs of people with an intellectual disability. Through the consultation process much useful information has been gathered and exchanged, and formal and informal networks established. Many changes have already occurred, in both legislation and administrative practices and procedures.

1.31 The recommendations contained in this Report are largely a "package". Each recommendation, while not necessarily dependent on the implementation of other recommendations, complements and facilitates the others. They are designed to ensure that the principles outlined above are followed consistently at every stage of the criminal justice system. Piecemeal adoption will do little to mitigate the difficulties the recommendations are designed to overcome. In particular, legislative amendments without the provision of necessary training, information and services outlined in Chapters 9-11 will not overcome the difficulties faced by people with an intellectual disability in the criminal justice system. Accordingly, the success of these recommendations will depend upon a decision by the Government to provide the resources necessary for their implementation.

FOOTNOTES

1. See Chapter 3 for an explanation of this term.

2. M Ierace *Intellectual Disability: A Manual for Criminal Lawyers* (Redfern Legal Centre Publishing, Sydney, 1989) at 2.

3. New South Wales - Attorney General's Department *The Intellectually Disabled in the Criminal Justice System* (Criminal Law Review Division, Issues Paper, 1991).

4. The reference, dated 27 September 1991, was received from the then Attorney General, the Hon P E J Collins QC MP. By a separate letter, dated 19 November 1991, the Attorney General also asked the Commission to examine amendments to the *Crimes Act 1900* (NSW) in relation to alternate arrangements for the taking of assault victims' evidence, which currently only apply to children under the age of 16 years: see Chapter 7.

5. Many submissions have commented on the language used in the terms of reference, and expressed a preference for "people with an intellectual disability" rather than "the intellectually disabled". The Commission has used the phrase "people with an intellectual disability" wherever possible throughout this reference.

6. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System* (Issues Paper 8, 1992).

7. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Consultations* (Research Report 3, 1993).

8. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* (Research Report 4, 1993).

9. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts* (Research Report 5, 1996).

10. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Policing Issues* (Discussion Paper 29, 1993).

11. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994).

12. For a list of written submissions received see Appendix A.

13. *Crimes Act 1900* (NSW) s 23A(1).

14. New South Wales Law Reform Commission *Provocation, Diminished Responsibility and Infanticide* (Discussion Paper 31, 1993).

15. New South Wales Law Reform Commission *Sentencing* (Discussion Paper 33, 1996).

16. See DP 33 at 1.13-1.17.

17. See Chapter 8.

18. Except to the extent that there may be a legitimate expectation that officers of the executive government will act in conformity with them pending implementation: see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

19. *Anti-Discrimination Act 1977* (NSW) s 5.

20. *Disability Services Act 1993* (NSW) s 9.

21. *Disability Services Act 1993* (NSW) Schedule 1.

22. New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 1.

23. See, for example, A Tang *Police Intervention and People with Intellectual Disability: Normalisation or Further Wounding?* (Foundations Forum Inc, Sydney, 1995).

24. A number of other people and interest groups, both in the course of this inquiry and otherwise, have prepared lists of principles which they believe should apply in this area. There is obviously a considerable amount of overlap between these principles and the Commission's. The Commission particularly acknowledges: T Carney "The Mental Health, Intellectual Disability Services and Guardianship Acts: How do they rate?" (1986) 11 *Legal Service Bulletin* 128; Intellectual Disability Rights Service *Submission* (28 January 1994) at 5-6; New South Wales Council for Intellectual Disability Policy Statement "A Decent Life" (June 1988); and New South Wales Sexual Assault Committee *Submission* (6 March 1995) at 1.

25. The *Victims Rights Act 1996* (NSW), Part 2, gives this Charter a legislative basis.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

2. Crime and People with an Intellectual Disability

INTRODUCTION

2.1 This chapter is concerned with how crime[1] affects people with an intellectual disability,[2] whether as offenders, victims or witnesses. The Commission considers that it is important to discuss in what ways and how frequently people with an intellectual disability come into contact with the criminal justice system before making recommendations about how they may be better treated. Much of the concern to date in relation to people with an intellectual disability in the criminal justice system has been directed towards the issue of over-representation. The aim of this chapter is to canvass other important issues as well, such as explanations of why such over-representation arises; the types of crimes involved; and the question of diversion of people with an intellectual disability from the criminal justice system.

Common life experiences of people with an intellectual disability

2.2 In order to understand how people with an intellectual disability interact with the criminal justice system, it is important to consider the typical life experiences of these people in our society. While the Commission recognises the individual nature of intellectual disability and the dangers of generalisation, people with an intellectual disability as a group have, in varying degrees, common experiences of vulnerability to abuse, discrimination, and social marginalisation due to their disability.

2.3 Although no hard data have been located, those who live in the community may be most at risk of coming into contact with the criminal justice system; in "whole of life" institutions challenging and antisocial behaviour and actions may be managed internally and not brought to the attention of the criminal justice system. In both community and institutional settings, people with an intellectual disability are disadvantaged by a limited and usually segregated education, and a greater likelihood of being unemployed and living on welfare on, or just above, the poverty line. In the community, people with an intellectual disability often reside in unstable accommodation such as boarding houses or hostels.[3] Some people may be aware of the fact that they have an intellectual disability and may feel stigmatised by such a label, and attempt to hide it from the outside world.[4] Those who have spent a large part of their lives in institutions are usually inadequately prepared for integration into mainstream society; and chronically inadequate and unco-ordinated service provision leads to many people being insufficiently supported or supervised in the community. People with an intellectual disability often experience a lack of social, recreational and sexual relationship opportunities in their lives. Substance abuse is also a frequent problem. Indeed, the high rate of appearances before the courts has been linked to the lack of support services able or willing to address the "high support" needs of individuals with challenging behaviour. It has even been commented that "[s]ome support workers look to the criminal justice system as a way of relieving them of 'troublesome' individuals".[5] This challenging behaviour may be linked to the cause of the intellectual disability, for example brain damage or chromosomal abnormality. It is against this disadvantaged background that the question of crime and people with an intellectual disability must be considered.

OVER-REPRESENTATION

Difficulties in determining the extent of the problem

2.4 Attempts to gain an accurate picture of the numbers of people with an intellectual disability involved in the criminal justice system, are affected by the following factors:

> **Lack of empirical evidence.** Statistics about offenders or victims with an intellectual disability are not kept by the police, courts, prisons or the New South Wales Bureau of Crime Statistics and Research.[6] Some organisations, for example, the Legal Aid Commission of New South Wales,[7] do not keep statistics on the numbers of clients with an intellectual disability, because they believe it is discriminatory. People with an intellectual disability may not use the specialist social services from which most statistics derive, or they may escape notice by belonging to another group such as the

homeless or substance abusers. Indeed, it has been found that most offenders with an intellectual disability have had no contact with specialist services other than perhaps a special class or school, and at the time of entering prison are not receiving social security benefits on the basis of their intellectual disability.[8]

Non-identification. People with an intellectual disability may not be identified by police, lawyers, courts or custodial personnel. Some people are particularly skilled at concealing their disability; they may become "street wise" and appear quite competent after a number of contacts with the law.[9] The fact that a person may not ever have been formally diagnosed means that there may be no records to alert criminal justice system personnel to the problem.

Use of different definitions of intellectual disability and methods of data collection. The definition used for a particular study will affect the numbers. Some include "borderline" intellectual disability while others do not; some only measure IQ (intelligence quotient) scores, while other definitions include adaptive deficits. Different figures are also obtained depending on the choice of sampling and assessment techniques.

Inter-jurisdictional variations. Statistics obtained from different jurisdictions necessarily differ owing to the variations in sentencing, custodial or non-custodial options, parole practices and availability of community services.

Despite these difficulties and variations, recent studies clearly indicate that people with an intellectual disability are over-represented within the criminal justice system, both as offenders and as victims.

OVER REPRESENTATION AS OFFENDERS

2.5 It has been estimated that approximately 2-3% of the New South Wales population has an intellectual disability.[10] By contrast, the most recent New South Wales prisons study suggested that people with an intellectual disability comprise at least 12-13% of the New South Wales prison population, that is, approximately four times that of the general population.[11] This study used a definition of intellectual disability which included both the results of intelligence tests and social and adaptive skills. While most research in relation to offenders has occurred in prisons, it has also been suggested that offenders with an intellectual disability are over-represented in other parts of the criminal justice system.

2.6 The Commission's own research in this area, undertaken by Associate Professor Susan Hayes of The University of Sydney and based upon a sample drawn from six New South Wales Local Courts, suggested that more than one third of persons appearing before such courts on criminal charges may have significant intellectual deficits.[12] The aim of the study was to explore one of the unanswered questions in relation to the acknowledged over-representation of people with an intellectual disability in prison populations, namely, whether the over-representation at the prison stage reflects an over-representation of persons with an intellectual disability appearing before courts, or whether they received differential treatment by the courts, resulting in a greater proportion of accused persons with an intellectual disability receiving custodial sentences. Local Courts were selected because of the high flow-through rate of court appearances, and the range and diversity of offences. Most minor offences are disposed of at this level, and serious criminal offences also initially come before Local Courts for committal proceedings.

2.7 The first phase of the study was undertaken in four Local Courts and found that 14.2% of the sample of 120 persons were in the mildly intellectually disabled range of cognitive ability with a further 8.8% in the borderline intellectual disability category. Since the first phase was limited by the small number of Aboriginal people in the sample, a follow-up study focused on two rural Local Courts, Bourke and Brewarrina, to ensure greater Aboriginal representation. The results revealed that 36% of the sample of 88 persons appearing before these Courts had an intellectual disability, including 7% in the range of moderate intellectual disability, with a further 20.9% of borderline intellectual ability. When the results of the two phases were combined, 23.6% of the sample had results in the intellectual disability range and a further 14.1% in the borderline range. Thus 37.7% of the total sample obtained results

which indicated serious deficits in cognitive skills.[13] Such people would have serious difficulties comprehending the court processes. These numbers are higher than the numbers of people with an intellectual disability in New South Wales prisons.

2.8 Although there is apparently no Australian research on the prevalence of suspects with an intellectual disability coming to the attention of the police, recent research in the United Kingdom indicates that over-representation also occurs at the police stage, for example, in one study 9% of suspects at police stations had an IQ below 70 (indicating intellectual disability) and a further 42% had IQ scores between 70 and 79 (indicating borderline intellectual disability).[14]

2.9 Other studies, both in Australia and overseas, generally point to the over-representation of people with an intellectual disability as offenders, though the numbers involved vary greatly. The different methodologies and possible shortcomings of each of these studies are not canvassed in this Report, but their results are summarised in Appendix B, Table 1.

Offenders: Explanations for over-representation

2.10 There are many possible explanations for this over-representation.[15] Some theories in relation to offenders include:

> **Susceptibility hypothesis** - this suggests that people with an intellectual disability "are more likely to engage in delinquent behaviour because of their impaired mental abilities".[16]
>
> **Different treatment hypothesis** - this suggests that people with an intellectual disability are not more delinquent but more likely to be found so by the courts owing to their vulnerability in criminal justice processes.[17]
>
> **Psychological and socio-economic disadvantage** - this covers a variety of theories about psychological and socio-economic disadvantage leading to over-representation, for example the fact that people with an intellectual disability are more likely to be living in community environments where they can become involved in, or suspected of, committing crimes.[18]

2.11 Although there is a dearth of research, intellectual disability and criminal behaviour have frequently been linked.[19] Deane and Glaser have stated:

> It was not until the Second World War that the seemingly inevitable nexus between intellectual disability and crime was seen to be a product more of inadequate services and facilities rather than any "innate" criminal tendencies of [people with an intellectual disability] themselves.[20]

Additionally, analyses of the characteristics of criminal offenders and the causation of crime, particularly the effect of low socio-economic status, point clearly to the fact that the background characteristics of the offender with an intellectual disability are not radically different from those of the general criminal population:

> In summary, a low intellectual level does indeed appear to be one of many factors predisposing criminal behaviour. However, the presence of family, social and environmental factors are of enormous importance, as is their interaction with intellectual disability.[21]

The most recent Australian studies, discussed below, support the different treatment hypothesis and the emphasis on psychological and socio-economic disadvantage as explanations for over-representation.

Different treatment hypothesis

2.12 A number of authors and studies suggest that offenders with an intellectual disability will be treated differently to non-disabled offenders in the criminal justice system, which in turn explains their over-representation.[22] They argue that people with an intellectual disability:

are more likely to be arrested, questioned and detained for minor infringements of public order law;[23]

are more likely to come before the courts as a result of police policies with respect to prosecuting cases where the offender appears abnormal or possibly dangerous;[24]

may be persuaded to confess to a crime they have not committed;

may not have their "rights", such as the right to silence, explained in a way they can understand;[25]

may be convicted more easily as they tend to confess rather than plea-bargain;[26]

may be more often refused bail, "perhaps as a result of previous breaches of conditions, or lack of support and resources enabling them to obtain bail, or inadequate supervisory arrangements which do not satisfy the court's requirements";[27]

may receive more custodial sentences, for example because of the lack of alternative placements in the community;[28]

tend to serve longer sentences or a greater percentage of their sentence before being released on parole;[29] and

may require maximum security facilities for segregation and "protection" needs.[30]

2.13 *Attitudes of criminal justice system personnel.* Linked to the different treatment hypothesis is the tendency for people with an intellectual disability to be stereotyped and attributed with characteristics which cause them to be seen as social outcasts. This can affect their treatment in the community, with people with an intellectual disability being singled out for negative attention, or not having their disability acknowledged.[31]

2.14 An on-going Western Australian study has been examining the attitudes, perceptions and procedures in the criminal justice system to see if they reflect negative community stereotypes which are likely to contribute to differential treatment, and, in turn, to the over-representation of people with an intellectual disability.[32] The research conducted to date, which involved police, judges/magistrates, prison officers, community corrections officers and service workers (including lawyers) responding to a questionnaire and interview, has provided some support for the different treatment proposition, but little support for the susceptibility hypothesis. Although all groups interviewed agreed that people with an intellectual disability have particular problems and special needs, such as communication difficulties, which would disadvantage them in the criminal justice system, some of the responses of police and service workers "were not logically derived from the agreed characteristics of people with an intellectual disability, which might indicate stereotyping and perceptions being based on underlying prejudices".[33]

2.15 The importance of the issue of community and professional attitudes to people with disabilities in addressing the needs of people with an intellectual disability in the criminal justice system has also been emphasised by Associate Professor Lindsay Gething of The University of Sydney's Community Disability and Ageing Program ("CDAP"). She stated that evidence collected by CDAP indicates that community attitudes towards people with disabilities are marked by negative stereotypes, which affect the manner and fairness of their treatment by various organisations and institutions. She concluded that unless attitudes are changed by increased awareness of disability issues, institutional and procedural changes to the criminal justice system will achieve little for people with an intellectual disability. Hence, she advocated mandatory disability awareness training for police, lawyers and correctional services officers, tailored to the needs of the particular group.[34]

2.16 Associate Professor Gething also prepared a report for the Commission in September 1992, which suggested that:

> there is a trend towards people anticipating higher levels of discomfort at the prospect of meeting someone with an intellectual disability ... than for most other forms of disabling conditions.
>
> Findings also suggest that members of the judicial system [legislators, judges, lawyers, solicitors, police and legal clerks] experience more discomfort and hence display more negative attitudes than members of the Australian population towards people with disabilities in general.[35]

Psychological and socio-economic disadvantage

2.17 A more complex approach than the different treatment theory is one which considers other psychological and socio-economic disadvantages faced by people with an intellectual disability who come into contact with the criminal justice system. A recent Victorian study of all admissions into two specialist units for offenders with an intellectual disability between 1990 and 1994 revealed that "intellectual disability is itself merely a marker for an overwhelming array of psychosocial disadvantages".[36] The Victorian study found that prisoners with an intellectual disability, "even more so than the 'mainstream' prison population, experience unemployment, major educational disadvantages, childhood institutionalisation, disrupted or disturbed families of origin, frequent contact with psychiatric services, alcoholism, drug addiction and poor social skills".[37] Other studies have found that there is a high incidence amongst offenders with an intellectual disability of "... multiple problems, such as psychiatric history, behaviour disorder, sensory deficit, or communication problem".[38] With such data it could be suggested that intellectual disability is only one possible explanation for over-representation and may not necessarily be the causal factor suggested by the susceptibility and different treatment hypotheses above.

2.18 It must also be acknowledged, however, that there may be reasons for offending that are linked to the pressures associated with the particular life experiences and attributes common to people with an intellectual disability which affect, and perhaps increase, their entry into the criminal justice system, including: a desire for recognition and status; a desire to please others; a yearning for acceptance and belonging; an unmet need for meaningful relationships; low self esteem; poor social skills; inability to deal with problems; a restricted social network; and lack of family support.[39] As well, the intellectual disability may contribute to impulsiveness, suggestibility, exploitability, and an inability to conceal actions, all of which may lead to increased offending (and increased detection).[40] Their background, which often includes alcoholism and an ensuing sense of failure,[41] may make people with an intellectual disability particularly susceptible to exploitation and learning inappropriate behaviour. The "inappropriate behaviour and petty crime may often be seen as a symptom of a deficit in the knowledge, skills and experience necessary for independent living".[42] For example, the Commission was told of a young man charged with shoplifting. A family member commented:

> Prior to this charge [X] had never stolen from his family or the public. Unfortunately, after family members questioned him, it was established that he stole because, at the residential [facility] for people with intellectual disabilities where he now lived, stealing was not reprimanded. Continuously other house residents wore his clothes, although clearly labelled with his name, and they claimed them as their own. Other items taken by other house residents included music tapes, Walkman, and presents from the family.

These facts were not considered in court and [X] was fined.[43]

2.19 Such factors may indicate that people with an intellectual disability are not necessarily or solely experiencing harsher treatment at later stages in the criminal justice process, but are actually coming into contact more often with the criminal justice system. This theory is supported by the conclusions of a Swedish birth cohort study, which followed subjects with an intellectual disability from birth to age 30. The study found that the men were three times more likely to offend than men without a disability, and

five times more likely to commit a violent offence, with the women being almost four times more likely to offend than their non-disabled peers, and nearly 25 times more likely to commit a violent offence.[44] Moreover, the criminal behaviour appeared before the age of 18 years in over half of the subjects. Such studies indicate the complexity of factors contributing to over-representation, including aspects of the lifestyle, characteristics and environment of people with an intellectual disability which increase the likelihood of engaging in behaviour which will bring them to the attention of the criminal justice system. Additionally, such studies reveal that the behaviour which eventually lead to arrest was usually apparent during childhood and yet was never addressed by schools, the health or social services system.

TYPES OF CRIMES COMMITTED

2.20 The wide media coverage of a number of violent crimes involving offenders with an intellectual disability[45] may have reinforced a distorted view amongst the general public about the criminal tendencies of people with an intellectual disability. Recent studies have shown that people with an intellectual disability are most likely to commit offences involving impulsive or unpremeditated behaviour, such as offences against property (arson, break and enter, car theft), against persons generally (murder, assault),[46] or sexual offences,[47] whereas crimes involving planning or foresight (drug trafficking, robbery, false pretences, escape) feature infrequently.[48] In contrast to what was previously thought, sexual offences have been found to be particularly prominent amongst offenders with an intellectual disability and the pattern of sex offending indicates that some offences are related to the functional age of the person (an adult with the interpersonal skills of a young child), while others reflect actual sexual deviancy.[49] (See also Appendix B, Table 2.)

2.21 As far as the severity of the crime is concerned, offenders tend to commit either relatively minor, but repeated, offences, or a major, violent crime, with only a low incidence for offences in the middle range of seriousness, which tend to be crimes requiring planning ability. It has been suggested that the high incidence of minor crimes reflects a high rate of recidivism. Those who commit serious crimes tend to do so owing to a lack of ability to inhibit expression of aggressive impulses, rather than being more aggressively motivated.[50]

2.22 People with an intellectual disability, it has also been suggested, are likely to be charged for "public order" offences. This may be because of a lack of understanding about "crime" and its consequences, and the difference between doing an act in private and doing the same act in a public place. Inadequate sex education, as well as legal education, may be a major problem. A person:

> does not learn appropriate sexual behaviour if he is not taught how to act socially. What may be seen by police and witnesses to be an intellectually disabled person committing an act of indecency could be a poorly educated adult who has never received the proper education.[51]

As Deane[52] points out, not only are people with an intellectual disability likely to explore their sexuality in inappropriate ways if released into the community after having been treated like children in institutions, but they are also more likely to be caught and are not as sophisticated as other offenders in their attempts to conceal their offences.

OVER-REPRESENTATION AS VICTIMS

2.23 The above discussion has focused on the disproportionate number of people with an intellectual disability featuring as suspects or offenders. The over-representation and particular vulnerability of people with an intellectual disability as *victims* of crime, particularly sexual assault, is also cause for concern. Recent studies in New South Wales,[53] and South Australia,[54] for example, have found a high incidence of sexual assault of such persons and, in the South Australian study, of other crimes.[55]

2.24 The actual level of victimisation may be even higher, as a Victorian study suggested that victims with an intellectual disability did not report crimes for a variety of reasons, including their lack of understanding that a crime had been committed, ignorance of where to go to seek help, especially if past responses from staff or service providers involved no action being taken, and fear of the

consequences or of the police or those in authority. The study also commented on the small number of cases which actually reach the courts, and the difficulty that these victims have in understanding court formalities and processes.[56] Similarly, the South Australian study found that while the rate of reporting crime occurrence to the police was comparable to that of people without a disability, the rate of victim-initiated report was not. Victims with an intellectual disability tended to report crime occurrence to a non-disabled caregiver.[57]

2.25 Further difficulties arise when both the offender and the victim have an intellectual disability, as is common in residential facilities, training centres or sheltered workshops. In some cases neither victim nor offender would be found to be competent as a witness in court. Often in such situations crime is either not reported to the police or if reported, the police leave the organisation to deal with the alleged offence.[58] Alternatively, some organisations now report every minor "crime" which tends to devalue the serious crimes in the eyes of the police. It has been suggested that this policy is motivated by a misunderstanding of "normalisation" theories or alternatively by factors such as insurance claims on property and workers' compensation.

Victims: Explanations for over-representation

2.26 The Public Interest Advocacy Centre has commented:

> ... the impact of crime is very unequally distributed across the community. It is the vulnerable and marginalised who are most likely to be victimised, and upon whom being victimised has the most effect. They are the least able to protect themselves from crime (insurance, security), to isolate themselves from it geographically (moving away) and to ameliorate its damage (fewer financial resources).[59]

These factors are borne out for people with an intellectual disability.

2.27 The common life experiences of people with an intellectual disability and the characteristics which make people likely to be suspects or offenders discussed at paras 2.2-2.3 and 2.18 above, also serve to explain the particular vulnerability of people with an intellectual disability as victims of crime and the problems they must overcome in order to be accepted as reliable witnesses. It has been stated that:

> [a] person with an intellectual disability is someone who will, by definition, have difficulty with reading, writing, comprehension, and money skills. He or she will have difficulty with community survival skills and in social situations. The disabled individual is likely to be unaware of many of the subtle, and sometimes even the gross, cues that guide our everyday behaviour and alert us to the possibility of criminal victimisation. Further, when a crime occurs, intellectually disabled individuals are unlikely to be fully cognisant of the variety of criminal justice services at their disposal, or of how they may be accessed. They may have difficulty realising that particular events constitute a crime, in conveying this fact, or in providing proof of the event. They are likely to have only limited knowledge of their rights and responsibilities in the situation ... therefore, individuals with an intellectual disability can be seen as exhibiting greater vulnerability and as engaging in behaviours which may facilitate the criminal in the performance of a crime. This increases their attractiveness as victims, while lack of knowledge of rights and responsibility may affect the impunity of the criminal who victimises these individuals.[60]

2.28 Living situation and level of disability have been found to affect victim likelihood, with the most dependent people and those living with other disabled individuals at the greatest risk, and the few very independent individuals living alone also at high risk.[61] As with offending behaviour, lack of social skills and sex education may also contribute to victimisation.[62]

CRIMES COMMITTED AGAINST PEOPLE WITH AN INTELLECTUAL DISABILITY

2.29 Many press reports depict the abuse and exploitation of people with an intellectual disability,[63] yet the Silent Victims Report commented on "the paucity of obtainable data in relation to the nature and

extent of crimes against people with intellectual disabilities". That Report also suggested a number of the reasons for this dearth of data, including: confusion about whether a crime had been committed against a person with an intellectual disability; low reporting rates by service providers; and the fact that thefts and minor assaults may be the norm in some institutional environments and therefore not recognised as crime.[64]

2.30 It is commonly suggested that people with an intellectual disability are particularly likely to be victims of fraud or sexual assault. These crimes figured prominently in the examples of types of crime committed against clients of the Intellectual Disability Rights Service.[65] (See also the studies cited in Appendix B, Table 3.) Submissions have also referred to the common occurrence of physical assault or "crimes of exploitation", whether monetary or emotional, with harassment also appearing to be common, in particular by neighbours. Some service providers believe that the sexual assault of people with an intellectual disability is such a problem because of their vulnerability and because the myths about disability and sexuality mean that the secret of the assault is more likely to be kept. As well, people with an intellectual disability find it harder to be believed in a justice system which relies on the verbal skills and the memory of witnesses. They may also put up with assault more than "normal" people. The perpetrator of the assault may also be a person in authority which makes it more difficult to report and be believed.

WITNESSES

2.31 The systemic discrimination against people with an intellectual disability does not only occur with suspects/offenders and victims. Given that many people with an intellectual disability live with and/or associate primarily with other people with an intellectual disability, there is every likelihood that the only witness to a crime committed against or by one of them will have an intellectual disability. As was observed above in the case of victims, such a witness will have to overcome the inevitable hurdles of not being taken seriously by the police, and possibly being regarded as an unreliable witness in court, as their credibility, as well as their capacity to understand the concept of telling the truth may be doubted by the judge or jury.

THE DILEMMA OF A "DOUBLE DISADVANTAGE"

2.32 Some people with an intellectual disability have other characteristics which universally set people at a disadvantage in society. Apart from the fact that many people with an intellectual disability belong to the lowest socio-economic classes, people with an intellectual disability may also be doubly disadvantaged by their youth (juveniles), indigenous status (Aborigines), ethnicity (people from non-English speaking backgrounds), mental illness, drug or alcohol addiction, physical disability, homosexuality or gender. Special rules and procedures already exist for most of these groups to ensure that they are fairly treated. The scope of this reference does not allow an in-depth analysis of the above factors, but the Commission recognises that they may add to the vulnerability of people with an intellectual disability in criminal justice system processes and their likelihood of becoming involved in crime. Such doubly disadvantaged groups must be recognised in the preparation of policy and services (see Chapters 10-11). The "double disadvantage" is accompanied by a general lack of information and specialist services for such groups. This chapter briefly summarises some of the particular issues which arise for juveniles, Aborigines, people with a mental illness and women who have an intellectual disability. More detailed background information was provided in the Commission's previous papers for this reference.

Juveniles

2.33 There have recently been a number of major reviews and initiatives affecting the juvenile justice system as a whole, all of which contain recommendations likely to be of assistance to juveniles with an intellectual disability.[66] Specific concerns for juveniles with an intellectual disability are their enhanced vulnerability in custody and the desirability of maintaining community links, as well as the danger that they will fall between the gaps of youth services and disability services despite being at risk of becoming victims and/or offenders. (See also paras 10.21-10.22 below.)

Aborigines

2.34 The over-representation of, and the discrimination and difficulties faced by, Aborigines within the criminal justice system have been extensively documented, in particular by the Royal Commission into Aboriginal Deaths in Custody.[67] Research Report 5, mentioned in para 2.7 above, confirmed the particular disadvantage of the general Aboriginal population entering the criminal justice system. Every attempt was made to reduce cultural bias in assessing whether people appearing before the chosen courts had an intellectual disability, but even if the results of the assessments were culturally biased, they nevertheless indicate that many Aborigines would find it difficult to comprehend the non-Aboriginal sub-culture prevailing in the criminal justice system.[68]

2.35 More research is required to determine the prevalence and particular problems of Aboriginal people with an intellectual disability, as deficits in communication amongst the general sub-group, and the extremely strong protective network of Aboriginal prisoners lead to many such people not being identified by criminal justice system personnel. Other concerns related to Aboriginality include difficulties caused by geographical isolation for those in remote areas, and lack of access to specialist services.[69]

Mental illness

2.36 Where a person has a "dual diagnosis", that is, both an intellectual disability and a mental illness, they may find themselves falling between services designed for either group. The Burdekin Report[70] found that there is a lack of services, research and expertise in the area, despite the fact that people with an intellectual disability were more likely than non-disabled people to experience mental illness, and that the existing psychiatric services are inappropriate. The Report referred to the negative effects of the "compartmentalisation" of the two conditions, particularly in terms of ongoing service provision, and the dangers of inappropriate use of medication. These findings were supported by the submissions received.[71]

Gender

2.37 As discussed in Research Report 4, although only a small proportion of the Australian prison population is female, it has been found that the likelihood of a woman receiving a harsh sentence increases if either she is economically disadvantaged, or she has been subject to previous legal control. Women with an intellectual disability are likely to face "double jeopardy" in the courts, with sentences probably being decided on the basis of a negative view of their social and economic circumstances, as well as upon a paternalistic "for their own good" paradigm of harsh treatment, reflecting the period during the early 1960s when female delinquents generally were so treated.[72]

DIVERSION

2.38 The discussion above of the disadvantages faced by offenders with an intellectual disability raises the final question of whether they should be dealt with by the criminal justice system at all. A specific term of the Commission's reference was whether, and to what extent, people with an intellectual disability should be diverted from the criminal justice system, including consideration of the custodial and non-custodial alternatives to sentencing and detention. Diversion schemes are sometimes used when it is believed that the usual punishments would be inappropriate or ineffective; for example, in relation to juveniles, drug offenders and certain types of sex offenders. The advantages and disadvantages of the different forms of diversion have been discussed extensively elsewhere.[73]

2.39 Diversion from the criminal justice system means different things to different people - for some it means special units within the mainstream options, while for others it means transferring people from the criminal justice system into a completely separate system. Diversion is difficult to define precisely because many "alternatives" have now been incorporated within the mainstream criminal justice system (for example, the use of mediation or other forms of alternative dispute resolution, or offender rehabilitation programs). Also, a number of measures sometimes described as "diversionary" may better be seen as alternative penalties. Many submissions received by the Commission supported diversion of some kind for people with an intellectual disability.[74]

2.40 However, the diversion of people with an intellectual disability does have its critics. A report of the Victorian Office of the Public Advocate argued that a decision by police not to charge because of a perception that people with an intellectual disability are childlike and therefore not "responsible" for their actions, or in need of "treatment" rather than legal sanctions, is not in the interests of the person (or the community), as the person is denied the right to an open examination of their guilt or innocence. The diversion away from the criminal justice system may also lead to additional social control or other adverse consequences.[75] By contrast, the New South Wales Attorney General's Committee considered that discretion should be used prior to charging an offender with an intellectual disability, such as is already available to police when administering cautions to children. While not advocating a lenient approach which would reinforce unacceptable behaviour in such an offender, the Committee considered that, in certain situations, having the police firmly impress on the offender that the behaviour is inappropriate may be beneficial.[76]

2.41 Various submissions have supported the second approach, considering it appropriate to have an option whether or not to involve a person with an intellectual disability in the criminal justice system, particularly for minor crimes. For example, the Commonwealth Office of Legal Aid and Family Services supported diversion and rejected the involvement of people with an intellectual disability in the system merely for the sake of applying the principle of normalisation. It pointed out that taking the principle to its extreme would mean denying these people any special procedures within the criminal justice system.[77] Also, the Legal Aid Commission of New South Wales stated that the option of not charging is appropriate for people with an intellectual disability in some cases, in the same way that police may exercise this option for non-disabled people, especially given the added trauma and distress that a person with an intellectual disability may face.[78] Diversion may be most appropriate for cases where the accused has such a severe level of disability that he or she is incapable of understanding the nature and effect of the alleged crime or the proceedings. In such cases prosecution is not in the public interest.[79] Automatic diversion, however, assumes that all people with an intellectual disability are the same, without allowing for individual levels of responsibility, and poses the problem of where all these people are to be diverted, given that services and facilities in general are already inadequate. It may be in the interests of the accused to receive a finite penalty within the criminal justice system, rather than indefinite supervision or detention under some diversionary options.

2.42 Diversion to some extent already occurs at various stages of the criminal justice system, for example:

> Police may not proceed against a person with an intellectual disability (see Chapter 4). Concern has been expressed, however about vesting in the police, who do not exercise legislative power, "discretionary powers which, for practical purposes, may amount to powers to make law, or dispense with compliance with the law".[80]
>
> Some offences can be dismissed at the Local Courts level because of the person's disability (*Mental Health (Criminal Procedure) Act 1990* (NSW), s 32 - see Chapter 5).
>
> People who are unfit to be tried or found not guilty on the ground on mental illness follow a different path within the criminal justice system and are ultimately governed by the recommendations of the Mental Health Review Tribunal (see Chapters 5 and 6).
>
> After conviction some people are "diverted" to special units (see Chapter 11).

2.43 The Commission does not consider that there should be automatic diversion from the criminal justice system. The appropriate treatment of a person with an intellectual disability should be considered. The Commission's recommendations for reform of such procedures at the various stages of the criminal justice system are outlined in the remainder of this Report.

FOOTNOTES

1. For the purposes of this chapter, "crimes" will refer to those offences found in the *Crimes Act 1900* (NSW) and the *Summary Offences Act 1988* (NSW), together with common law crimes.

2. See Chapter 3 for an explanation of this term.

3. J Noble and R Conley “Towards an epidemiology of relevant attributes” in R Conley, R Luckasson and G Bouthilet (eds) *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Paul H Brookes, Baltimore, 1992) at 17-53; A MacEachron “Mentally retarded offenders: prevalence and characteristics” (1979) 84 (2) *American Journal of Mental Deficiency* at 165-176 as cited in K Deane “Better represented by a poodle: The case of Dominic Simm” (1994) 15 *Socio-Legal Bulletin* 47 at 48; Roeher Institute *No More Victims: A Manual to Guide the Police in Addressing the Sexual Abuse of People with a Mental Handicap* (Roeher Institute, Ontario, 1992) at 5-9.

4. See J Dudley *Living with Stigma: The Plight of the People who we Label Mentally Retarded* (Charles C Thomas, Illinois, 1983).

5. Intellectual Disability Rights Service *Submission* (6 January 1992) at 2.

6. Lack of data in this particular area is linked to the problem of a general paucity of routine data on the personal characteristics, such as ethnicity and socio-economic status, of both offenders and victims who enter the system: Letter from the New South Wales Bureau of Crime Statistics and Research to the Commission dated 13 September 1995.

7. Legal Aid Commission of New South Wales *Submission* (8 January 1992) at 1.

8. S C Hayes and G Craddock *Simply Criminal* (2nd ed, Federation Press, Sydney, 1992) at 34, referring to S C Hayes and D McIlwain *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (Sydney, November 1988) at 39.

9. J Cockram, R Jackson and R Underwood “People with an intellectual disability and the criminal justice system: The family perspective”, paper presented at *Partnerships for the Future, 6th Joint National Conference of the National Council of Intellectual Disability and the Australian Society for the Study of Intellectual Disability* (26-30 October 1994, Perth) (“Cockram, Jackson and Underwood (1994a)”) at 8.

10. See for example Hayes and Craddock at 30. For administrative purposes, an estimate of 1% is generally used, while 3% is regarded as the highest estimate: Hayes and Craddock at 31.

11. Hayes and McIlwain at 47. This study assessed the prevalence of intellectual disability in five New South Wales prisons: Mulawa Training and Detention Centre for Women, Central Industrial Prison, Parramatta Gaol, Metropolitan Remand Centre and Broken Hill Gaol. The five gaols held a total population of 1,318 prisoners of whom 675 were screened: at 22.

12. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* (Research Report 4, 1993) (“NSWLRC RR 4”); and New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts* (Research Report 5, 1996) (“NSWLRC RR 5”).

13. NSWLRC RR 5 at para 3.67.

14. G Gudjonsson, I Clare, S Rutter and J Pearse *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Justice, HMSO, 1993) at 24. See also I Lyall, A J Holland, S Collins and P Styles “Incidence of persons with a learning disability detained in police custody: A needs assessment for service development” (1995) 35 *Medicine, Science and the Law* at 61-71.

15. See also NSWLRC RR 4 at paras 1.22-1.24 for a discussion of possible reasons for over-representation in prison.

16. C A Buser, P A Leone and M E Bannon “Segregation: Does educating the handicapped stop here?” (1987) 49 *Corrections Today* at 17.

17. J Zimmerman, W D Rich, I Keilitz and P K Broder “Some observations on the link between learning disabilities and juvenile delinquency” (1981) 9 *Journal of Criminal Justice* 1 at 10.

18. Hayes and McIlwain at 10.

19. Hayes and Craddock at 1-2.

20. K Deane and W Glaser *The Characteristics and Prison Experience of Offenders with an Intellectual Disability: An Australian Study* (University of Melbourne, 1994) at 1.

21. J Turk “Forensic aspects of mental handicap” (1989) 155 *British Journal of Psychiatry* 591 at 592, cited in Hayes and Craddock at 42.

22. See J Cockram, R Jackson and R Underwood “Attitudes towards people with an intellectual disability: Is there justice?”, paper presented at the *First International Congress on Mental Retardation: The Mentally Retarded in the 2000’s Society* (Rome, March 1994) (“Cockram, Underwood and Jackson (1994b)”) at 4. See also J Bright “Intellectual disability and the criminal justice system: New developments” (1989) 63 *Law Institute Journal* 933.

23. New South Wales Anti-Discrimination Board *Discrimination and Intellectual Handicap* (1981) at 320.

24. NSWLRC RR 4 at para 1.22.

25. See Cockram, Jackson and Underwood (1994b) at 4.

26. Hayes and McIlwain at 10.

27. NSWLRC RR 4 at para 1.22.

28. NSWLRC RR 4 at para 1.22; and Cockram, Jackson and Underwood (1994b) at 4.

29. M Ierace “Acting for the intellectually disabled offender” (1987) 25 (4) *Law Society Journal* 42 at 43; and Bright at 933. See also para 11.33.

30. Hayes and Craddock at 144.

31. W Wolfensberger *A Brief Introduction to Social Role Valorisation as a High Order Concept for Structuring Human Services* (Training Institute for Human Service Planning, Leadership and Change Agentry, Syracuse University, Syracuse NY, 1992) cited in Cockram, Jackson and Underwood (1994b) at 4.

32. Cockram, Jackson and Underwood (1994b).

33. Cockram, Jackson and Underwood (1994b) at 16.

34. Associate Professor L Gething, Community Disability and Ageing Program, University of Sydney *Submission* (5 July 1992) at 1.

35. L Gething *Attitudes Towards People with an Intellectual Disability of Professionals within the Judicial System* (Report compiled for the New South Wales Law Reform Commission, Community Disability and Ageing Program, University of Sydney, 14 September 1992). This preliminary report relied upon information taken from the computerised database for the Interaction with Disabled Persons Scale, which the report argues “is the only widely validated Australian instrument designed to measure community and professional attitudes towards people

with disabilities": at 2. The size of the overall sample, and the small percentage of legal personnel (59 of a total 481), suggests that a larger survey of this group is necessary to gather information about their attitudes to, and the accuracy of their knowledge about, intellectual disability: at 10.

36. Deane and Glaser at 6.

37. Dr W Glaser *Submission* (23 August 1995) at 2.

38. Hayes and Craddock at 40.

39. Inter-Departmental Committee on Intellectually Handicapped Adult Offenders in New South Wales, Australia *The Missing Services* (Departments of Corrective Services and Youth and Community Services, Report, 1985) ("The Missing Services Report") at 24. See also M Ierace *Intellectual Disability: A Manual for Criminal Lawyers* (Redfern Legal Centre Publishing, Sydney, 1989) at 5.

40. Cockram, Jackson and Underwood (1994b) at 3.

41. Ierace (1989) at 5.

42. The Missing Services Report at 24.

43. *Confidential Submission* (24 July 1992) at 2.

44. S Hodgins "Mental disorder, intellectual deficiency and crime: Evidence from a birth cohort" (1992) 49 (6) *Archives of General Psychiatry* 476.

45. Examples include the burning down of the Downunder Backpackers Hostel at Kings Cross (*The Sydney Morning Herald* (12 December 1992) at 44 and *The Weekend Australian* (12-13 December 1992) at 5); the bashing murder of an elderly woman near Newcastle (*The Newcastle Herald* (3 April 1993) at 1); and the strangling of a six year old girl (*The Australian* (23 March 1995) at 6).

46. Hayes and Craddock at 44. See also Deane and Glaser at 3-4.

47. See Deane and Glaser at 4; G P Jones and K Coombes *The Prevalence of Intellectual Deficit among the West Australian Prisoner Population* (Department of Corrective Services, Western Australia, October 1990) at 30.

48. For example, Deane and Glaser at 4.

49. Hayes and Craddock at 44, referring to S Hayes, "The intellectually disabled sex offender", paper presented at the conference *Sex Offenders: Management Strategies for the 1990s* (Office of Corrections and Health Department Victoria, Melbourne, 1990) at 89-94; S Hayes "Sex offenders" (1991) 17(a) *Australian and New Zealand Journal of Developmental Disabilities* 221-227.

50. Hayes and Craddock at 45-46.

51. Senior Constable P Fernandez *Submission* (8 December 1991) at 6.

52. "Disabled prisoners get raw deal with repeated jailings" (10-16 August 1995) *Campus Review* at 10.

53. New South Wales Women's Co-ordination Unit *Sexual Assault of People with an Intellectual Disability* (Final Report, 1990) at 11. In this study, in the first six months of collection, 55 out of 855 (6.4%) adults referred to the Sexual Assault Service had an intellectual disability. The Report

also refers, at 11, to overseas research which revealed a high prevalence of sexual assault against people with an intellectual disability.

54. C Wilson *The Incidence of Crime Victimization among Intellectually Disabled Adults* (Final Report, National Police Research Unit, South Australia, 1990). This study found that people with an intellectual disability were twice as likely as people without this disability to be victims of a personal crime (eg assault). They were also one and a half times more likely to be victims of a property offence (eg theft).

55. For an overview of Australian and overseas studies of prevalence of victimisation of people with an intellectual disability, see Appendix B, Table 3.

56. K Johnson, R Andrew and V Topp *Silent Victims: A Study of People with Intellectual Disabilities as Victims of Crime* (Office of the Public Advocate, Victoria, 1988). In Victoria, 19 agencies agreed to monitor (during the last quarter of 1987) their cases of alleged crime against people with an intellectual disability. The agencies included government and non-government organisations. Though the study stated that the data should be treated as tentative for a number of reasons, the survey revealed that the overwhelming majority of alleged crimes reported to agencies during the study period involved sexual offences: at Appendix 4.

57. Wilson at (ii).

58. Johnson, Andrew and Topp at 48.

59. Public Interest Advocacy Centre, cited in the Standing Committee on Social Issues' Report *Juvenile Justice in New South Wales* (Parliament of New South Wales, Legislative Council, Standing Committee on Social Issues, Report 4, 1992) at 25.

60. C Wilson and N Brewer "The incidence of crime victimisation of individuals with an intellectual disability" (1992) 27 (2) *Australian Psychologist* 114.

61. Wilson at (ii).

62. D Sobsey and T Doe "Patterns of sexual abuse and assault" (1991) 9 (3) *Sexuality and Disability* 243 at 255.

63. Examples include the elderly invalid pensioner who allegedly gave away his home to a young woman who had promised to look after him, but instead, allegedly verbally and physically abused him and then threw him out (see *The Sydney Morning Herald* (29 March 1993) at 1); the robbery and bashing to death of a pensioner who had lived in constant fear of a violent death after schoolyard experiences of taunts and bashings (see *The Sydney Morning Herald* (21 April 1994) at 2); and stories alleging abuse in institutions, hostels and boarding houses feature frequently, especially involving staff members.

64. Johnson, Andrew and Topp at 25-27.

65. Intellectual Disability Rights Service *Submission* (16 October 1992) at 4-5.

66. Recent reports include the New South Wales Department of Family and Community Services *Report from the Working Party on Services to Young Persons with Intellectual Disabilities in the Juvenile Justice System* (1988); the Youth Justice Coalition (NSW) *Kids in Justice: A Blueprint for the 90s* (1990); the New South Wales Legislative Council's Standing Committee on Social Issues *Juvenile Justice in New South Wales* (Report 4, 1992), Juvenile Justice Advisory Council of New South Wales *Future Directions for Juvenile Justice in New South Wales* (Green Paper, 1993); and *Breaking the Crime Cycle: New Directions for Juvenile Justice in New South Wales* (New South Wales Government White Paper, August 1994). See also New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System:*

Courts and Sentencing Issues (Discussion Paper 35, 1994) ("NSWLRC DP 35") at paras 13.3-13.8.

67. Royal Commission into Aboriginal Deaths in Custody *National Report* (AGPS, Canberra, 1991). See also NSWLRC DP 35 at paras 13.9-13.12.

68. NSWLRC RR 5 at ix.

69. NSWLRC DP 35 at para 13.11.

70. Human Rights and Equal Opportunity Commission *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (AGPS, 1993) (the "Burdekin Report"), Ch 21.

71. NSWLRC DP 35 at paras 13.13-13.15.

72. NSWLRC RR 4 at paras 1.36-1.43.

73. See, for example, R Snashall (ed) *Pre-Trial Diversion for Adult Offenders* (Australian Institute of Criminology, Seminar Proceedings 10, 1985); and New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Policing Issues* (Discussion Paper 29, 1993) ("NSWLRC DP 29"), Ch 7.

74. For example, Mr M Porter *Submission* (27 October 1993); New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 5; Office of the Director of Public Prosecutions, New South Wales *Submission* (7 February 1994) at 2; Legal Aid Commission of New South Wales *Submission* (2 February 1994) at 2; and Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 3.

75. L M Osman *Finding New Ways: A Review of Services to the Person with Intellectual Disability in the Victorian Criminal Justice System* (Office of the Public Advocate, Victoria, 1988) at 19.

76. New South Wales - Attorney General's Department *The Intellectually Disabled in the Criminal Justice System* (Issues Paper, 1991) at 12.

77. Australia - Attorney-General's Department, Office of Legal Aid and Family Services *Submission* (28 August 1992) at 2-3.

78. Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 3.

79. S Hayes "Prosecutorial discretion and mentally abnormal offenders" in I Potas (ed) *Prosecutorial Discretion* (Australian Institute of Criminology, Seminar Proceedings 6, Canberra, 1984) 191 at 195.

80. A M Gleeson in *Keeping the Peace, Police Accountability and Oversight, RIPAA/ NSW Office of the Ombudsman, A National Conference* (Nikko Hotel, Potts Point, Sydney, 20-21 May 1993) at 4. See also D Lane "The Victoria Police Shopstealing Warning Programme as alternative dispute resolution" (August 1992) 3 (3) *Australian Dispute Resolution Journal* 151-166; and D O'Connor "Legal aspects of pre-trial diversion schemes" in Snashall at 35-40.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

3. Definitions of Intellectual Disability

RECOMMENDATION

A new and uniform statutory definition of intellectual disability

> **1. The *Crimes Act 1900* (NSW), the *Mental Health Act 1990* (NSW), the *Mental Health (Criminal Procedure) Act 1990* (NSW), the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 1995* (NSW) should be amended to include the following standard definition of "intellectual disability":**
>
> "Intellectual disability" means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour.

Explanatory Note to Recommendation 1

For the avoidance of confusion, the Commission states that this definition has been formulated to be consistent with the standard clinical definitions outlined in para 3.6 below and hence to incorporate the usual interpretation given to the terms used in these definitions by experts. Accordingly, a recognised psychometric test of intellectual functioning would be used to determine "significantly below average intellectual functioning" and a recognised scale of adaptive behaviour to determine "deficits in adaptive behaviour". However, one limb of the traditional definitions, namely the manifestation of the disability before the age of 18 years, is not required to be proved for the purposes of this definition. The Commission considers that *for the procedures to which this definition relates* (but not necessarily for all criminal justice purposes) it is irrelevant *how* and *when* the condition arose, if the other two criteria (significantly below average intellectual functioning and two or more adaptive deficits) are satisfied. Thus the definition may apply to *some* people with a brain injury or dementia, as long as the condition manifests these two criteria.

The Commission considers that how and when the condition arose is important for an understanding of the person's disability and for appropriate responses and management of the person within the criminal justice system, but is not as relevant for the threshold question of whether the person's disability is such that some special measures are appropriate. In most cases, the court is likely to require more information than whether the person satisfies the definition of intellectual disability. The person's background and the implications of the person's disability will be introduced through expert evidence or through such procedures as a pre-sentence report. However, an accepted definition is a necessary precondition for these steps.

Introduction of a standard definition should be accomplished by amending the *Crimes Act 1900* (NSW), the *Mental Health Act 1990* (NSW), the *Mental Health (Criminal Procedure) Act 1990* (NSW), the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 1995* (NSW) to replace "developmental disability of mind", or variations of this term such as "developmentally disabled" and "appreciably below average general intellectual function", with "intellectual disability", and to include the above definition of intellectual disability. The Commission recommends that this definition be kept uniform in the relevant legislation, and included whenever the term is introduced in criminal or related legislation.

The implementation of Recommendation 1 will affect the interpretation of the sexual offences and Apprehended Violence Orders found in the *Crimes Act 1900* (NSW), the diversionary procedure set out in s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) and s 41, 42 and 85 of the *Evidence Act 1995* (NSW), as these are currently the only special procedures in criminal legislation triggered by reference to intellectual disability. Recommendations 11, 24, 29, 30, 31, 33, 34, 36 and 37 of this Report recommend further legislative changes specifically referring to people with an intellectual disability. The same definition of intellectual disability will apply to those proposed amendments.

The definition has a limited operational effect. It is not designed for the use of criminal justice personnel operating in the field, such as the police, lawyers and corrections staff. For these personnel, a list of indicators of intellectual disability is more useful and appropriate.

BACKGROUND TO THE RECOMMENDATION

Introduction

3.1 The terms of reference required the Commission to consider "whether there should be a new uniform statutory definition of intellectual disability". The Commission has determined that there should be such a definition and it is contained in Recommendation 1. This chapter contains the reasons for making this recommendation. The Commission considered clinical definitions, operational definitions, existing statutory definitions and a variety of submissions and consultations before recommending a new definition of "intellectual disability" for use in criminal legislation. The Commission has found this a particularly difficult issue to resolve as there does not appear to be a general consensus amongst experts.

What is an intellectual disability?

3.2 A person with an intellectual disability has a permanent condition of *significantly* lower than average intellectual ability. This disability does not simply mean that a person will perform poorly in academic areas. It also results in "adaptive deficits", that is, the disability usually affects such areas as the person's level of communication, social skills, and ability to live independently. The cause of a person's intellectual disability is not known in many cases. Some identifiable causes include: hereditary factors; chromosomal abnormalities, such as in Down Syndrome; brain damage before or at birth; brain damage after birth due to illness or accident; malnutrition or other deprivation in early childhood.[1]

3.3 The term "developmental disability" is sometimes used as a synonym for "intellectual disability", but it is generally considered to be a broader term,[2] as it can include other disabilities which arise during the "developmental" period but which may be of a physical, rather than an intellectual, nature. The "developmental period" is usually defined as the period up to adulthood (or 18 years of age). Furthermore, some developmental disabilities may not be permanent, but may be resolved with or without treatment or management. It is important to recognise that an intellectual disability is *not* a mental or a physical illness which can be "cured", although people with an intellectual disability can benefit from appropriate educational programs. Nor is an intellectual disability necessarily obvious from a person's appearance, or accompanied by a physical disability.[3]

3.4 The severity and consequences of an intellectual disability will vary from person to person and "generalisations about the needs of people with an intellectual disability ... must be treated with caution".[4] A person's intellectual disability can be classified as "mild", "moderate", "severe" or "profound", based upon certain IQ (intelligence quotient) ranges.[5] A further category, "borderline", is also used to indicate people just above the mild range in terms of intellectual functioning.[6] A person with a "severe" or "profound" disability may be unable to learn basic social skills such as speech, basic motor skills including walking and personal care, and is likely to require supported accommodation. The majority of people with an intellectual disability have a "mild" level of intellectual disability and "can learn skills of reading, writing, numeracy, and daily living sufficient to enable them to live independently in the community".[7]

3.5 These classifications have limited utility and can sometimes be misleading. For example, over three-quarters of people with an intellectual disability are classified as having a "mild" level of intellectual disability, and therefore a wide range of abilities will be found in this category. Additionally, there is anecdotal evidence that terms such as mild, moderate, severe and profound may suggest to criminal justice personnel that a "mild" intellectual disability is inconsequential.[8] It is also important to note that there may be little practical difference in understanding and ability between a person with a "mild" and a person with a "borderline" intellectual disability, though a person with a borderline intellectual disability may not satisfy many definitions of intellectual disability. The "cut off" point between the two is essentially arbitrary and the Commission recognises that the distinction may lead to injustices in certain

cases. However, as discussed at paras 3.14-3.15 below, it is important to balance this potential for individual disadvantage with the need for a definition which has sufficient precision.

Clinical definitions of intellectual disability

3.6 Three commonly used clinical definitions of intellectual disability are those of the World Health Organisation ("ICD-10"), the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("DSM-IV"). Their definitions of intellectual disability, or "mental retardation" as it is sometimes known, are set out below.

> **ICD-10, 1992:** Mental retardation is a condition of arrested or incomplete development of the mind, which is especially characterised by impairment of skills manifested during the developmental period, which contribute to the overall level of intelligence, ie cognitive, language, motor, and social abilities.[9]
>
> **AAMR, 1992:** Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.[10]
>
> **DSM-IV, 1994:** The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).[11]

3.7 According to DSM-IV:

> *General intellectual functioning* is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests ... Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument ... Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. ...
>
> Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. ...[12]

It is important to note that these definitions were designed for clinical purposes and not for the purposes of the criminal justice system. The definitions are sometimes used, however, by experts in criminal trials and, even if not referred to explicitly, are commonly understood by such experts. The Commission has not chosen to adopt one of these definitions for use in legislation but has instead recommended a simplified definition which is generally consistent with these definitions.

Distinction between intellectual disability and brain injury

3.8 A major dilemma faced by the Commission in this reference was whether a person's intellectual disability must have been acquired during the developmental period (that is, before 18 years) to be part of the target group. As outlined in para 3.6, clinical definitions of intellectual disability do not encompass adults who receive an injury to the brain or some other intellectual impairments which arise in adulthood. Such brain injuries may arise from industrial or motor vehicle accidents,[13] reduced or total loss of oxygen supply to the brain (for example, near drowning), drug and alcohol abuse, abuse of other chemicals (for example, glue sniffing), strokes, brain tumours, infections of the brain caused by virus, fungus, or parasites, or other deterioration of the brain.[14] The brain damage *may* lead to intellectual and adaptive deficits such that the person would be classified by a psychologist as having an intellectual disability. However, organisations which represent the interests of people with the conditions variously known as "brain damage", "head injury", "traumatic brain injury" or "acquired brain injury",[15] stress the difference between a "developmental" intellectual disability and an "acquired" disability.[16] Additionally, in the health and human services areas, a distinction is made between intellectual disability and brain injury because their needs and the best management approach for each group are considered to be different.[17]

3.9 The question remains whether the difference between the two conditions is *material for criminal justice purposes*, as people suffering a brain injury may, as with intellectual disability, experience permanent restrictions to their physical and cognitive abilities, with behavioural or personality implications. They may then encounter problems in remembering details, concentrating, comprehending complex ideas, planning or organising, and processing information quickly. The personality changes may affect their sense of drive or motivation, self control, emotional state, degree of personal insight and perceptions of relationships with others.[18] The Brain Injury Association's submission suggested a number of key differences between the two conditions which they believe are material for criminal justice purposes. These include: the need to consider the pre-injury social behaviour and criminal record of the person with a brain injury; the fact that the nature of recovery in the first 12 months after the injury is quite different from the course of intellectual disability; and the variety of possible outcomes following a brain injury. The Association stated that different procedures from those used for the identification of people with an intellectual disability will be needed to identify people with an acquired brain injury and that, as an acquired brain injury has a significantly different impact on a person's psycho-social functioning, the needs of such people will often require a different management approach.[19] Thus, it seems clear that there are differences between an acquired brain injury and a developmental disability which are material for *some* issues within the criminal justice system. Relevant issues would include: identification issues and training for criminal justice personnel, the likelihood of improvement in the person's condition and appropriate sentencing options and services. However, there is a clear need for expert opinion in deciding what is relevant to the court in terms of impaired functioning. (See also paras 3.23-3.26 below.)

DISCUSSION OF THE COMMISSION'S RECOMMENDATION

3.10 The remainder of this chapter discusses the detail of the Commission's recommended definition, including its advantages and disadvantages and the competing arguments which had to be resolved.

Terminology

3.11 The Commission believes "intellectual disability" to be the appropriate term for the purposes of this reference, and for legislation in New South Wales, although a variety of terms are used to refer to people with an intellectual disability in legislation and in the community. It has already been adopted in Commonwealth and Victorian legislation and most submissions to the Commission have accepted the use of this term.[20] "Mental retardation" is now generally considered stigmatising[21] and its use is discouraged by organisations which represent the interests of people with disabilities. Although, as discussed above at para 3.3, "developmental disability" is also used, the Commission believes one term should be employed consistently in statutes to avoid confusion. The Commission prefers the more precise "intellectual disability", particularly in the criminal law context.

Definitions: The current position in New South Wales

3.12 As well as inconsistency of terminology, there is no definition of intellectual disability which applies to all New South Wales criminal legislation. There is only one definition and it has a limited application. In New South Wales, "intellectual disability" or related terms are used (without definition) as follows:

> The *Crimes Act 1900* (NSW) contains provisions for harsher sentences for certain sexual offences where there are "circumstances of aggravation". One of these circumstances is the "serious intellectual disability" of the victim.[22]
>
> The *Crimes Act 1900* (NSW) also refers to "appreciably below average general intellectual function" in Part 15A, which deals with Apprehended Violence Orders ("AVOs"). Special provisions apply if the court is of the opinion that the person seeking an AVO "is suffering from an appreciably below average general intellectual function". In such a case the court does not need to be satisfied that the person "in fact fears that [a personal violence] offence will be committed, or that such conduct will be engaged in" before issuing an AVO.[23]
>
> The *Mental Health (Criminal Procedure) Act 1990* (NSW) refers, in s 32, to defendants who are "developmentally disabled". This section gives magistrates the discretion to dismiss (often on conditions) the charges against such defendants brought before the Local Courts.[24]
>
> The *Evidence Act 1995* (NSW) contains references to "any mental, intellectual or physical disability" to which a person is subject, as a factor that the court may take into account in disallowing certain questions or in relation to the reliability of admissions by defendants.[25] It also contains a reference to the kind of evidence which may be unreliable, including "evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like".[26] It is unclear whether this section will be interpreted to include intellectual disability. The competence provisions, especially s 13 of the *Evidence Act 1995* (NSW), are also likely to affect people with an intellectual disability, but contain no reference to "intellectual disability" or any related terms.[27]

3.13 Section 66F of the *Crimes Act 1900* (NSW) creates a number of sexual offences against people with an intellectual disability. That provision does contain - for the purposes of that section alone - a definition of intellectual disability, namely:

> an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with daily life activities.[28]

This definition has been criticised for being inconsistent with the term "intellectual disability" as understood by psychologists and for being "inappropriate, having regard to the policy objectives of the various legislative provisions which refer to either 'intellectual disability' or 'developmental disability' of the mind".[29] The requirement of supervision or "social habilitation" (that is, the gaining of social capacity or skills to enable the person to function in the community as a self-reliant citizen) appears to indicate a higher level of disability than that experienced by many people with an intellectual disability. The Commission therefore does not recommend that this definition be extended in operation; rather, it should be replaced by the Commission's recommended definition.

Advantages of a statutory definition

3.14 The threshold question for the Commission is whether there should be a statutory definition of intellectual disability at all. Some submissions have argued against a statutory definition on a variety of grounds, including: that it is a futile exercise to attempt to define intellectual disability as, amongst other things, any definition would involve an artificial cut off point;[30] that any definition would be clinically inaccurate;[31] that a definition would (unfairly) exclude some people;[32] and that a definition would be insufficient to encapsulate the full individualised implications of the person's disability.[33] However, leaving the determination of whether or not a person has an intellectual disability to expert evidence in court presumably still involves reference to some definition of intellectual disability as the basis of the expert opinion. Additionally, the greater certainty for the majority of people with an intellectual disability

provided by a clear statutory definition must be balanced against the difficulty of devising such a definition and the danger that some people may be excluded or included unfairly by its provisions.

3.15 The Commission considers that the advantages of a statutory definition outweigh the disadvantages and recommends that a clear definition be included in criminal legislation for the following reasons:

Statutory definitions of intellectual disability already exist in New South Wales and other Australian jurisdictions,[34] but the only New South Wales definition in criminal legislation is inaccurate and should be replaced.

Consistency and clarity in the terminology and definitions relating to intellectual disability are vital to avoid injustices, particularly if special procedures flow from a person's diagnosis. A clear definition should promote greater certainty in application and reduce expert arguments. A secondary benefit of this greater certainty is the likely reduction in stress on the person whose disability is being assessed.[35]

At present there is considerable confusion amongst criminal justice personnel in this area, because of the variety of terms and definitions used, and also because of a continuing confusion between intellectual disability and mental illness. A statutory definition could have a significant clarifying and educative role about intellectual disability for personnel involved in the criminal justice system.

Submissions and consultations generally have supported a statutory definition.[36]

The purpose of a statutory definition

3.16 The Commission also believes it is important to recognise that devising a definition of intellectual disability is not an arid or purely technical issue. A definition is designed to identify the type of person who needs some special understanding or procedure to ensure fairness in the criminal justice system. There would be no point in identifying whether or not a person has an intellectual disability unless it was believed that the fact of the disability meant that there was some disadvantage which must be addressed. The context in which the statutory definition will apply, however, is limited to court and sentencing purposes. Expert evidence will be required to satisfy it in those situations. It will only be utilised when a special legal procedure is to follow.

3.17 The recommended definition is not designed for general community use or for operational use in the criminal justice system. For example, it is not designed to enable a police officer or lawyer to determine formally or conclusively whether the person they are interviewing has an intellectual disability. For police and legal interviewing purposes, this definition would need to be clarified further to provide indicators of below average intellectual functioning and to list some potential adaptive deficits. Even then, without expert assistance, such guidelines would only indicate that a person may have an intellectual disability. (See also paras 4.49-4.52 and 9.30-9.31.)

Restriction to criminal legislation

3.18 The Commission believes that the definition should be restricted to legislation used in the criminal justice system and not extended to legislation designed for other purposes, such as service provision and education. Apart from the fact that non-criminal statutes affecting people with an intellectual disability fall outside the terms of the Commission's reference, the Commission believes that the criminal justice system is inherently different in its aims and context. For example, service provision usually favours a broad definition so as not to deny people services, whereas definitions in a criminal law context need to be as unambiguous as possible, bearing in mind the punitive consequences involved. The Commission recognises, however, the advantages of uniformity in both criminal and "welfare" legislation, where this is possible, and the danger of criminal lawyers and service providers using different definitions of "intellectual disability".

The Commission's definition

3.19 The Commission's recommended definition is:

> "Intellectual disability" means a significantly below average intellectual functioning existing concurrently with two or more deficits in adaptive behaviour.

3.20 The Commission has (with the exceptions outlined at paras 3.21-3.22 below) largely retained its definition of intellectual disability proposed in DP 35. The advantages of this definition are:

The definition is both brief and limited in application - the Commission believes that, in the context of a criminal trial, it is inappropriate to have a vague or possibly over-inclusive definition, or a definition which would enable a person to feign intellectual disability to gain a perceived advantage.

The definition is not based only on either adaptive skills or IQ scores,[37] but requires both elements to be considered, in line with the clinical definitions discussed above at para 3.6. Significantly subaverage intellectual functioning would usually be assessed by an intelligence test, as discussed in DSM-IV in para 3.7 above. These tests usually allow for a margin of error and therefore the Commission believes that a rigid IQ cut off point would cause injustices. Although adaptive behaviour scales are not as reliable or valid as intelligence tests, there are a number of accepted adaptive behaviour scales.[38]

Although the Commission's definition uses technical terms such as "significantly below average intellectual functioning" and "adaptive behaviour", the Commission's research, consultations and submissions have not revealed a sufficiently accurate definition which does not include these, or similar, terms. The advantage of such terms is that they are, according to the Commission's consultations, understood by the professionals who would be giving expert evidence.[39] The reference to "existing concurrently with" is designed to indicate that both below average intellectual functioning and the adaptive deficits must be present at the same time. The Commission does not believe that it is necessary to prove that the two are causally related.

The definition deliberately does not refer to categories of disability ("mild", "moderate", "severe" or "profound") as these can be misleading to lay people for the reasons discussed at para 3.5 above.[40]

Changes from the Discussion Paper proposals

3.21 In DP 35, the Commission proposed a more limited definition than the present recommendation, namely one limited to a disability "which has manifested before the age of 18 years". The reasons for removing this limitation are:

In many cases the cause of the disability and the time it arose will be unknown, even with a detailed client history.[41] For some people involved in the criminal justice system there is no evidence to indicate whether or not the disability arose in the developmental period, as they were not assessed psychometrically during the developmental period, nor were they known to any disability agencies.

The "cut off" age of 18 years is arbitrary in any event and there is no clinical reason for it to be 18 rather than a slightly lower or higher age. The age used in legislation has varied from as low as 16 to as high as 22.[42] Historically the age limit was relevant to the provision of service delivery and the age to which a person with an intellectual disability could remain at school.[43]

By removing the age requirement the Commission's definition will attract (not inappropriately) a wider group of people than the originally proposed definition, but not as many as a broader term such as "impaired intellectual functioning" (see below).

3.22 The Commission also has removed from the recommended definition the requirement of significantly subaverage *general* intellectual functioning. Most psychologists and psychiatrists consulted by the Commission did not see the need for the additional qualification of "general". The AAMR definition does not use the qualifier "general", although DSM-IV does. Additionally it was suggested that

this may exclude a person whose intellectual abilities were stronger in one area,[44] for example in the area of verbal skills. It may not be possible or appropriate to administer a test of *general* intellectual functioning to some people because of factors such as other impairments. In consultations it was also suggested that the qualifying phrase (italicised) "intellectual disability, *in relation to a person* ..." did not add anything to the definition of the term, and the Commission has therefore abandoned the phrase.

Extension to other impairments

3.23 DP 35 also proposed that, to overcome the potential injustice to a person whose disability arose after the age of 18 years, a wider "umbrella term" of "impaired intellectual functioning" be used in legislation wherever a policy decision was made that a wider group of people should attract the operation of a particular section. A similar approach was adopted by the Victorian Law Reform Commission, while acknowledging its limitations.[45] In DP 35, "impaired intellectual functioning" was defined as "includes impaired intellectual functioning because of intellectual disability, brain injury or dementia". Though there was some support for the proposal in submissions,[46] particularly the inclusion of both intellectual disability and brain injury, it has several disadvantages:

Impaired intellectual functioning is not a clinical term with a recognised meaning.[47]

It is difficult to define impaired intellectual functioning in other than circular terms (for example "impaired intellectual functioning means impaired intellectual functioning") or inclusive terms (for example "impaired intellectual functioning includes intellectual disability, brain injury or dementia").

It is impossible to list all of the impairments which could fall within this term, leading to uncertainty in its application.

There was concern in some submissions that such a term was too general,[48] and could include such a wide range of impairments that it would become unworkable.

Whether or not such a term could or should include people with a mental illness remains a matter of debate.[49]

The Commission believes that it should not make a global recommendation that all references to "intellectual disability" be changed to "impaired intellectual functioning" without considering each recommendation on a case by case basis. This would require obtaining information about each of the possible impairments and its impact on the procedure under consideration. This would greatly expand the scope of the Commission's (already broad) reference.

3.24 The Commission sought submissions, and received invaluable assistance, from individuals and organisations concerned about the needs of people with other forms of impaired intellectual functioning. However, the majority of submissions and most of the Commission's research time has focused on intellectual disability, reflecting the terms of reference. Without a much more extensive research and consultation program, the Commission does not believe it can safely assume that the concerns raised about people with an intellectual disability will necessarily apply to all people with some form of impaired intellectual functioning.

3.25 Acquired brain injury is a case in point. As the discussion in paras 3.8-3.9 above indicates, it can take many forms. If the brain injury is associated with an intellectual disability as defined above, then it is only fair that the person receive the same safeguards as other people with an intellectual disability, regardless of when that disability arose. However, the brain injury might not significantly affect the person's intellectual functioning, but rather cause specific adaptive deficits which may or may not be relevant to the criminal justice system. One submission argued that the reference in the definition to "significantly below average intellectual functioning" is inappropriate for many such people because:

a) a person can have a severe head injury, and sustain damage to certain parts of the brain (especially the frontal lobes), and have IQ scores within the average

range, but have grossly disturbed behaviour compared with their behaviour prior to the head injury. ...

b) a person with a very high IQ can have a severe head injury and even though their scores drop by a substantial amount as a result of their injury, they are still well within the average range.

The submission also noted that "the psychosocial deficits and behavioural disturbances which are often consequences of brain damage [including lack of insight into deficits and impulsive, reckless and disinhibited behaviour] are of more concern than purely 'cognitive' or 'intellectual' impairments".[50]

3.26 It is not clear to the Commission that the procedures proposed for a person with significantly below average intellectual functioning and deficits in such areas as communication skills and independent living skills will necessarily be appropriate for a person with perhaps reduced, but still above average, intelligence and with adaptive deficits such as mood swings or a short attention span. The Commission is concerned not to include too broad a range of people within its definition and thereby lose sight of the definition's purpose, or the purpose of our reference as a whole. However, the Commission recognises the likelihood of disadvantages faced by these other groups in the criminal justice system. It may be that our recommendations can be used as a basis by people who represent the interests of people with brain injury, dementia or other impairments to determine which recommendations meet their particular needs. The reasons for special consideration under the criminal justice system would differ, depending upon the type of impairment involved.

FOOTNOTES

1. L Gething, T Poynter and F Reynolds *Disability Awareness Package - Manual* (Community Disability and Ageing Program, University of Sydney, 1991) at 48. See also Anti-Discrimination Board *Discrimination and Intellectual Handicap* (1981) at para 2.7.

2. E Cocks *An Introduction to Intellectual Disability in Australia* (Australian Institute on Intellectual Disability, Canberra, 1989) at 24.

3. A list of these and other myths about intellectual disability is provided in S C Hayes and G Craddock *Simply Criminal* (2nd ed, Federation Press, Sydney, 1992) at 24-26 and in Gething, Poynter and Reynolds at 57-58.

4. Intellectual Disability Rights Service *Submission* (16 October 1992) at 2.

5. The World Health Organisation uses the following IQ ranges for these classifications: mild (IQ 50-69); moderate (IQ 35-49); severe (IQ 20-34); and profound (IQ less than 20): *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (World Health Organisation, Geneva, 1992) ("ICD-10") at 227-230. Other categorisation systems vary slightly in IQ range.

6. Depending upon the classification system used, the "borderline" IQ range is approximately 70-79 or 71-85.

7. Hayes and Craddock at 25.

8. See the discussion in New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Policing Issues* (Discussion Paper 29, 1993) ("NSWLRC DP 29") at para 1.4 and in New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) ("NSWLRC DP 35") at para 5.16.

9. ICD-10 at 226.

10. American Association on Mental Retardation *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed, American Association on Mental Retardation, Washington DC, 1992) ("AAMR") at 1. Significantly, the terms representing levels of disability ("mild", "moderate", "severe" and "profound") have been abandoned under the new definition. Classifications are still used, based on the individual's support needs, classifying the individual's need as "intermittent", "limited", "extensive" or "pervasive", but these are not linked to IQ scores: see J W Ellis "Decisions by and for people with mental retardation: Balancing considerations of autonomy and protection" (1992) 37 (6) *Villanova Law Review* 1779 at 1784.

11. American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, American Psychiatric Association, Washington DC, 1994) ("DSM-IV") at 39.

12. DSM-IV at 39-40.

13. 70% of severe brain injuries are sustained in road accidents according to Cuff Consultants *A Brain Injury Program for New South Wales: GIO's Commitment Under Transcover* (GIO, May 1987), cited in New South Wales - Department of Community Services *Brain Injury: What is it all about?* (July 1993) at 1.

14. Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 15.

15. According to a glossary provided by the New South Wales Department of Community Services: "[a]n individual is said to experience acquired brain injury when that injury is sustained and/or manifested after an initially unexceptional, predictable development. The terms: brain injury, head injury, traumatic head injury, traumatic brain injury and acquired brain injury, are all used to describe different aspects of brain injury. However, 'acquired brain injury' is the most inclusive term": see *Brain Injury: What is it all about?* at 15.

16. *Brain Injury: What is it all about?* at 10.

17. Consultation with Ms T Alting, Clinical Neuropsychologist, Head Injury Unit, Lidcombe Hospital, Mr G Simpson, Social Worker, Head Injury Unit, Lidcombe Hospital, and Ms B Winter, Social Worker, Brain Injury Association of New South Wales Inc on 7 July 1995.

18. *Brain Injury: What is it all about?* at 3-5; Mr G Simpson, Social Worker, Head Injury Community Outreach Team, Lidcombe Hospital *Submission* (21 February 1994) at 3-4.

19. Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 13-14.

20. For example: Law Society of New South Wales *Submission* (24 August 1992) at 2; Australia - Attorney-General's Department, Office of Legal Aid and Family Services *Submission* (28 August 1992) at 3; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (18 August 1992) at 1; Mr M Ierace *Submission* (16 December 1991) at 2; Magistrate T Cleary *Submission* (8 February 1995) at 1; Mental Health Advocacy Service *Submission* (21 February 1995) at 1; and New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 2. Many submissions have also expressed a preference for "people with an intellectual disability" rather than "the intellectually disabled". The Commission acknowledges this comment and has used the phrase "people with an intellectual disability" in preference throughout this reference.

21. Anti-Discrimination Board *Discrimination and Intellectual Handicap* (1981) at para 1.8.

22. *Crimes Act 1900* (NSW) s 61J(2)(g), s 61M(3)(e) and s 61O(3)(d). See also Chapter 8.

23. *Crimes Act 1900* (NSW) s 562B(2). See also Chapter 8.

24. See also Chapter 5.

25. *Evidence Act 1995* (NSW) s 41(2)(b), s 42(2)(d) and s 85(3)(a).

26. *Evidence Act 1995* (NSW) s 165.

27. See Chapter 7 for further discussion of these provisions.

28. *Crimes Act 1900* (NSW) s 66F(1). See also Chapter 8.

29. New South Wales - Attorney General's Department *The Intellectually Disabled in the Criminal Justice System* (Criminal Law Review Division, Issues Paper, 1991) at 5; Mr M Ierace *Submission* (16 December 1991) at 2.

30. Dr J Ellard *Submission* (19 April 1995) at 1.

31. For example, comments made by Ms T Ovadia of the Mental Health Review Tribunal at a consultation with representatives of the Mental Health Review Tribunal and the Mental Health Advocacy Service on 11 March 1994.

32. Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 1.

33. Mr P Hutten *Submission* (20 January 1995) at 2-5.

34. See NSWLRC DP 35, Appendix A for a list of definitions.

35. Law Society of New South Wales *Submission* (24 August 1992) at 2.

36. For example: Law Society of New South Wales *Submission* (24 August 1992) at 2; Legal Aid Commission of New South Wales *Submission* (8 January 1992) at 2; New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 4; Intellectual Disability Rights Service *Submission* (16 October 1992) at 2-3; Western Australia - Department of Corrective Services *Submission* (19 November 1991) at 1; and Associate Professor S C Hayes *Submission* (6 November 1991) at 1. This support was, however, often qualified and contained suggested limitations on the scope of the definition. The Commission has taken many of these qualifications into account in drafting the definition.

37. For criticisms of reliance upon IQ tests alone, see, for example, Hayes and Craddock at 6-7, referring to S C Hayes and R Hayes *Mental Retardation: Law, Policy and Administration* (Law Book Co, Sydney, 1982) at Ch 1; and J H Noble and R W Conley "Toward an epidemiology of relevant attributes" in R W Conley, R Luckasson and G N Bouthilet (eds) *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Paul H Brookes Publishing Co, Baltimore, 1992) at 21-22.

38. For example:

    - Inventory for Client and Agency Planning: R H Bruininks, B K Weatherman and R W Woodcock *ICAP Inventory for Client and Agency Planning* (DLM Teaching Resources, Allen, TX, 1986);

    - The Vineland Social Maturity Scale: E A Doll *Measurement of Social Competence: A Manual for the Vineland Social Maturity Scale* (American Guidance Service Inc, Minnesota, 1953; 1964); and

    - The AAMD Adaptive Behaviour Scale: K Nihira, R Foster, M Shellhass and H Leland *AAMD Adaptive Behaviour Scale 1974 Revision* (American Association on Mental Deficiency, Washington DC, 1974).

39. For example, consultation with psychologists and psychiatrists on 5 May 1995. A contrary view was offered by Dr J Ellard, who argued that the meaning of these terms was a matter for debate: *Submission* (19 April 1995) at 1.

40. The Commission's suggestion in NSWLRC DP 35 at para 2.30 that, for the purposes of the criminal justice system, expert witnesses develop a duplicate set of categories (for instance, borderline = Level 1, mild = Level 2, moderate = Level 3 etc), did not meet with much support.

41. See J Nelson Hall "Correctional Services for Inmates with Mental Retardation" in Conley, Luckasson and Bouthilet 167 at 176.

42. For example, in the American *Developmental Disabilities Assistance and Bill of Rights Act 1978*, the cut off age for a developmental disability was 22 years. However, until 1973, the limit for the developmental period in the AAMR's definition was 16 years: AAMR, 1992 at ix.

43. Consultation with psychologists on 4 May 1995.

44. Consultation with psychologists on 4 May 1995.

45. Law Reform Commission of Victoria *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) at paras 1-9 and *Sexual Offences Against People with Impaired Mental Functioning* (Report 15, 1988) at paras 4-5.

46. Law Society of New South Wales *Submission* (24 February 1995) at 1; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 1; and Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 1. The Brain Injury Association of New South Wales Inc and Intellectual Disability Rights Service supported the concept of an umbrella term, but not "impaired intellectual functioning": *Submission* (28 February 1995) at 16 and *Submission* (1 March 1995) at 3.

47. Consultation with psychologists on 4 May 1995.

48. For example New South Wales Police Service *Submission* (February 1995) at 2.

49. Even though the Commission's proposal was not designed to include such people, unless the definition specifically excluded mental illness, the scope of the term was likely to cause legal argument. It is arguable that some forms of mental illness should be included under such a term: Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 1.

50. Ms T Alting, Clinical Neuropsychologist, Head Injury Unit, Lidcombe Hospital *Submission* (30 May 1995). Ms Alting also commented that the other psychologists working in the Head Injury Unit had read and agreed with her comments.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

4. Police

RECOMMENDATIONS

Summons or arrest

2. Section 352 of the *Crimes Act 1900* (NSW) should be amended to provide that a police officer should only arrest a person if that officer has reasonable grounds to believe that proceedings against the person by way of a summons or court attendance notice would not be effective. [See paras 4.27-4.29]

Time limits for detention after arrest before charging

3. Arrested persons should be detained only so long as is reasonably necessary, up to a fixed limit of four hours in the first instance. Additionally, legislation should provide that the criteria for determining what is "reasonably necessary" in the circumstances must take into account the vulnerability of a suspect (as a result of his or her intellectual disability or of other factors which render a suspect especially vulnerable in police custody) and the special protections applicable to such suspects. [See paras 4.30-4.33]

The police caution

4. The police caution should be rewritten to increase comprehension by all suspects. An essential element of the caution should be to test the understanding of the substance of the caution by the suspect, for example, by asking suspects to respond by putting the caution into their own words. [See paras 4.34-4.39]

Code of Practice

Development of Code of Practice

5. A Code of Practice which sets out the police procedures for conducting criminal investigations should be developed by a Working Group consisting of members of the New South Wales Police Service, as well as representatives of interest groups and the general community appointed by the Attorney General. This Code should:

(a) replace the relevant parts of the New South Wales Police Commissioner's Instructions;

(b) be a statutory instrument, prepared as regulations under an enabling Act;

(c) be developed after consultation with the police, other interested groups and the general community;

(d) be readily available at all police stations for consultation by police officers, detained persons and other interested persons and be made widely available to the public generally; and

(e) contain procedures in relation to police investigations involving people with an intellectual disability, whether as suspects, victims or witnesses. [See paras 4.40-4.48]

Contents of Code of Practice

6. To provide additional safeguards for people with an intellectual disability, the Code of Practice should contain provisions covering the following matters:

(a) ***Identification of intellectual disability.*** **Guidelines prepared with expert input should include the following list of indicators of the possibility of intellectual disability:**

(i) difficulty understanding questions and instructions;

(ii) responding inappropriately or inconsistently to questions;

(iii) short attention span;

(iv) receipt of a disability support pension;

(v) residence at a group home or institution or employment at a sheltered workshop;

(vi) education at a special school or in special education classes at a mainstream school; and

(vii) inability to understand the caution. [See paras 4.49-4.52]

(b) ***Officer to follow procedures if intellectual disability suspected.*** **If a police officer has any reason to suspect that the person being questioned has an intellectual disability, the officer must follow the procedures for questioning a person with an intellectual disability. [See para 4.53]**

(c) ***Questioning a person with an intellectual disability.*** **Guidelines prepared with expert input should include the following list of factors to take into account when questioning a person with an intellectual disability:**

(i) the need to attempt to pitch the language and concepts used at a level which will be understood;

(ii) the need to take extra time in interviewing;

(iii) the risk of the person's special susceptibility to authority figures, including a tendency to give answers that the person believes are expected;

(iv) the dangers of leading or repetitive questions;

(v) the need to allow the person to tell the story in his or her own words;

(vi) the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers;

(vii) the need to ask the person to explain back what was said; and

(viii) the possibility that the person may be taking medication which may affect his or her ability to answer questions. [See para 4.54]

(d) ***The police caution.*** **Guidelines should include the following issues in relation to administering the police caution to a person with an intellectual disability:**

(i) the difficulties which such a person may have in comprehending the concept of the right to silence and the police caution;

(ii) the possible evidentiary implications of a failure to understand the caution; and

(iii) the need for such a person to be reminded periodically of the caution, particularly after any substantial break in the questioning. [See paras 4.55-4.58]

(e) *Adoption of record of interview.* The standard "adoption" questions used at the end of an interview should be in language appropriate to the person with an intellectual disability. If the interview is not electronically recorded, the person should have the opportunity to have the record of interview read back slowly, and to be asked frequently whether it is correct. [See paras 4.59-4.61]

(f) *Electronic recording of interview.* To the extent practicable, all police interviews with arrested suspects or victims with an intellectual disability should be electronically recorded. [See paras 4.62-4.67]

(g) *Identification parades.* Identification parades should not be used for people with an intellectual disability in circumstances where unfairness to the suspect is likely to result, due to the unusual manner or appearance of the particular suspect. [See paras 4.68-4.71]

(h) *Bail.* An accused's intellectual disability must be taken into account when assessing the setting of bail conditions. [See paras 4.72-4.78]

(i) *The right to the presence of a lawyer and "support person".* The Code should outline the right of a person with an intellectual disability to a lawyer and support person. (See Recommendations 7 and 8 below.) [See para 4.79]

Presence of a lawyer

7. Questioning of a suspect with an intellectual disability after arrest should take place only if a lawyer representing the person is present, absent exigent circumstances. [See paras 4.80-4.87]

Presence of a "support person" at police interviews

8. Police must ask a person with an intellectual disability (whether suspect, victim or witness) whether they wish to have a third person (a "support person") present during police questioning. If the person wishes to have a support person, the police must take reasonable steps to arrange one. The procedures relating to that third person are set out in paras 4.93-4.108.

Related issues - presence of a "support person" at other interviews

9. A lawyer should consider and discuss the need for a support person with his or her client. As in police interviews, if the client wishes to have a support person, the lawyer must take reasonable steps to arrange one. Failure to raise the issue should be regarded as poor professional practice. Accordingly, compulsory consideration of this issue should be contained in the *Bar Rules* and the Legal Practitioners' *Revised Professional Conduct and Practice Rules 1995*. [See paras 4.109-4.113]

BACKGROUND

Police and people with an intellectual disability

Critical nature of police role

4.1 It is widely accepted that the police and the investigative process play a crucial role in a person's entry into and subsequent journey through the criminal justice system. Both the outcome of a matter and the experience of a person in the criminal process may be substantially affected by police procedures. This is especially clear where the person is vulnerable in some way. For people with an intellectual disability, police are usually the "face" of the system and in the Commission's consultations with people with an intellectual disability most of the discussion involved the role of the police.[1]

4.2 The Commission found that many participants in the consultations viewed the police in a positive light and had stories to tell about their helpfulness. While a positive view of police among people with an intellectual disability is encouraging, another study has shown that such a perception often coexists with ignorance of legal rights and a tendency to sign anything the police requested.[2] In circumstances such as these, trust can increase vulnerability. Participants in the Commission's consultations also spoke of their fear of police stations, the ignorance of police officers of the problems of people with an intellectual disability and difficulties they may experience in understanding questions and the caution. They were particularly concerned that police take care with language, take adequate time to question people and not speak too quickly or use difficult language. It is crucial that police procedures ensure that people with an intellectual disability are aware of their rights and are provided with the opportunity to exercise them, while at the same time fostering mutual understanding and respect between people with an intellectual disability and the police.

Police attitudes

4.3 Policing is difficult. Operational police are routinely confronted with a wide range of challenging, potentially dangerous, distressing and difficult social problems which require skills beyond their traditional role of "law enforcement". Immersed in a society in which people with an intellectual disability may be seen as "different" or "difficult", it is not surprising that police reflect and act upon these attitudes. The most comprehensive New South Wales study to date on police responses to intellectual disability involved over 50 interviews with police of all ranks, ages and positions, in both rural and urban areas.[3] A number of issues were identified as being of particular concern in the contact between police and people with an intellectual disability: the confusion between mental illness and intellectual disability; police treating people with an intellectual disability like children; recognition of intellectual disability; and difficulties in questioning and communication.[4]

4.4 Another survey of 46 police officers revealed a surprising level of confidence by police in their ability to identify intellectual disability.[5] However there was also recognition of the importance of police education and training in this area and the need for assistance to both police and people with an intellectual disability.[6] Again, there appeared to be some police confusion about the difference between mental illness and intellectual disability.[7]

Suspects

4.5 The over-representation of people with an intellectual disability appearing before courts and in prison, referred to in Chapter 2, suggests that police will come into contact with many people with an intellectual disability in their daily work. An English study found that the average IQ of people detained in two London police stations was 82.[8] This is just above the IQ range for a borderline level of intellectual disability. It is significant that very few of these suspects were identified by the police (or the researchers themselves from a brief interview) as having an intellectual disability. It took psychological testing to identify this level of disability.

4.6 People with an intellectual disability may experience the following difficulties in their relationship with the police:

- lack of understanding or identification of intellectual disability by the police, for example they may believe that people with an intellectual disability are "dangerous" or that they should not be out in the community;[9]

lack of understanding by suspects of their legal rights, such as the right to silence;

being over-anxious to please, susceptible to suggestive questions by authority figures and to making false confessions;[10]

difficulties with the types of questions asked by police such as times, dates and descriptions;

memory difficulties; and

limited concentration.

4.7 Conversely, police may experience a variety of difficulties in their dealings with people with an intellectual disability:

the police may confuse the person's disability with minor substance abuse, or, alternatively, the person's disability may be masked by actual substance abuse;

the person may deny or attempt to hide their disability;

the police may be unable to distinguish between intellectual disability and mental illness;

the police may have previously had charges against people with an intellectual disability dismissed in court and may consider it difficult or inappropriate to take further action against such people;

there are few available resources to assist police to identify intellectual disability or to deal with people with an intellectual disability;

the police may be confused about the circumstances in which a guardian is required;

interviews may take a long time owing to problems of understanding;

police may feel obliged to arrest people with an intellectual disability for "public order" or "nuisance" offences on the streets, but become frustrated by the lack of appropriate options for police;

there may be difficulty obtaining an "appropriate adult" as required in the police procedural rules and delays caused by complying with these rules;

people with an intellectual disability may become extremely traumatised in police custody or require special protection from other prisoners in police cells; and

people with an intellectual disability may have to be kept in custody inappropriately because of lack of understanding of bail conditions or lack of support in the community.

The Commission's recommendations outlined in this chapter are designed to attempt to overcome some of these identified difficulties.

Victims and witnesses

4.8 Despite the over-representation of victims with intellectual disabilities, discussed in Chapter 2, submissions have commented upon the scarcity of successful prosecutions where the victim has an intellectual disability, particularly in the area of sexual assault. Reports have referred to the difficulties faced by both victims and the police in the police interview.[11] People with an intellectual disability have the same rights as other members of the community to report crimes and to have their complaints listened to and taken seriously by the police. However, examples have been provided to the Commission of police declining to investigate complaints from people with an intellectual disability after only cursory enquiries.[12] There appears to be a misconception in the community that people with an intellectual disability are more likely to lie or to make up complaints.[13] Ironically, discussions about the

suggestibility of *suspects* with an intellectual disability can reinforce ideas that, as *victims,* they are poor witnesses. Police (and prosecutors) may believe, wrongly in many cases, that a victim with an intellectual disability will be unable to make a statement and follow the complaint through the criminal justice system, through giving evidence.[14] The mistaken understanding of a person's ability to make a statement may mean that complaint details are never taken down or pursued.

4.9 It is difficult to prevent such misunderstandings through legal reform. The issue largely becomes one of appropriate training, particularly in relation to identification and questioning. It has been suggested to the Commission that the review of a decision to charge by a senior officer may overcome some of these difficulties. Limited guidance is found in the police procedural rules in relation to such decisions to charge.[15] In the Policing Issues Discussion Paper ("DP 29"), the Commission proposed that a refusal to prosecute by the police or to take a statement on the ground that a person has an intellectual disability and would therefore be unable to give a statement should be subject to review. It was proposed that a refusal to take a statement should be reviewed *automatically* (not on the request of the victim) by a senior officer. The refusal to prosecute where a complaint has been laid and a statement taken should be reviewable, either by a senior officer or the Director of Public Prosecutions ("DPP").[16]

4.10 Submissions, including that of the New South Wales Police Service, generally supported this proposal,[17] but some noted the need for more details about who would do the reviews, in what time period and how the procedure would be enforced.[18] A former Ombudsman[19] considered this to be an important safeguard for people with an intellectual disability, and provided an example of a complaint to his office from an alleged victim who experienced considerable delay in having a statement taken by the police. He also noted that the effectiveness of this proposal would depend on the knowledge and experience of the senior officer. The DPP said it was not appropriate for it to review police decisions whether or not to charge but that it could give advice on sufficiency of evidence.[20] No submissions provided any suggestions about how such a proposal could work in practice. The lack of identification by police that the person had an intellectual disability could mean that few complaints would reach the automatic review stage. One alternative suggested was to keep a record of presentations at police stations, as this would be useful for a number of purposes, for example, victims' compensation claims.[21] By comparison, the New South Wales Bar Association stated that "[i]t is not the experience of the Association that there is a widespread disinclination to proffer charges where the prosecution case depends upon the evidence of an intellectually disabled witness". It argued that the decision of a police officer not to prosecute is reviewable by senior officers and the DPP in any event and that the discretion of the police officer should not be amended in a piecemeal way.[22] However, such reviews will not be of assistance if the victim with an intellectual disability is effectively discouraged from making any complaint at all.

4.11 Following DP 29, the New South Wales Police Service has recently amended its Instructions in this area. Instruction 67.06 (set out at para 4.20 below) now provides for internal reviews of: decisions not to take a statement from a person with an intellectual disability; decisions not to prosecute an offender as a result of such a statement and decisions not to prosecute an allegation of sexual assault upon a person with an intellectual disability.[23] Accordingly, the Commission does not now make a recommendation in this area, but notes that the issue of police not understanding or taking seriously the complaints of victims with an intellectual disability should also be dealt with by education. (See Chapter 9.)

The Police Commissioner's Instructions

4.12 The starting point for considering legal reform of police relations with people with an intellectual disability is the New South Wales Police Service's own existing practices and procedures, as there is no primary legislative consideration of these issues. In New South Wales, police procedural rules are set out in the "Commissioner's Instructions" issued by the Commissioner of Police (the "Instructions"). These Instructions cover an enormous range of material, from arrest procedures to police sporting and social functions. Before considering the detail of the Instructions in relation to people with an intellectual disability, it is important to consider their legal status and the significance of a breach of Instructions. The legislative basis for the Instructions is found in the *Police Service Act 1990* (NSW).[24] The *Police Service Regulation 1990* (NSW) provides that breach of the Instructions can lead to a sanction for the

police officer concerned.[25] This would usually arise through a complaint by another police officer or by a member of the public to the Ombudsman or the Police Service. As discussed in DP 29, however, lack of awareness by the general public (or other police) of the detail of the Instructions may make a complaint less likely. A former Ombudsman expressed his concern that the Instructions are often breached, and commented that:

> [f]or people with intellectual disability who may be already at a disadvantage due to their limited knowledge, experience and comprehension, a breach of these Instructions could impact more seriously upon them than others.[26]

4.13 Though it is beyond the scope of this reference to review the present police complaints-handling mechanisms, it has been suggested that this mechanism is not sufficient to prevent, or at least discourage, breaches of the Instructions, particularly where the person affected has an intellectual disability and is unlikely to be able to access easily the complaints process.[27] It has also been suggested to the Commission that many breaches of the Instructions, where they do not also amount to a breach of the law, are not regarded as a particularly serious matter and, if a complaint is sustained, the police officer involved may be "counselled" rather than receiving a more serious penalty. As discussed in DP 29, it is difficult to obtain useful statistics in this regard.[28]

Evidence obtained in breach of the Instructions

4.14 Apart from the complaints system, a person with an intellectual disability who has not been dealt with by the police in accordance with the Instructions may look to the courts to exclude any evidence so obtained. This is a much more important area than later disciplinary action against a police officer in terms of protecting the rights of the suspect. Breach of police procedures may be raised directly or indirectly as the basis of an objection to the admissibility of evidence, such as a confession. Australian courts have traditionally interpreted narrowly the effect of a breach of the Police Commissioner's Instructions (or the equivalent in other States). Such rules have not been considered to be rules of law but rather to prescribe a standard of fairness or propriety. Departure from police guidelines or instructions has been seen as a secondary consideration to the consequences which flow from their breach in terms of fairness to the accused.[29] The courts have suggested that a departure may, in fact, be warranted depending on the "exigencies of an investigation".[30] Recently, however, there have been Australian cases where evidence obtained in breach of police guidelines has been excluded.[31] In New South Wales, breach of the Police Commissioner's Instructions, without more, will usually be insufficient to result in the exclusion of any evidence so obtained.[32] The relevant judicial discretions are now found in Part 3.11 of the *Evidence Act 1995* (NSW). It remains to be seen whether the new Act, which came into force on 1 September 1995, will significantly alter the operation of judicial discretion in this area.

Police questioning of suspects with an intellectual disability

4.15 Under the current system of Instructions, police are provided with specific procedures to overcome some of the possible difficulties referred to above in their interaction with people with an intellectual disability. Instruction 37.14 deals with questioning people in the course of an investigation:

> **Questioning of developmentally delayed or drug affected people**
>
> If you suspect the person being questioned is developmentally delayed or drug affected, question the person in the presence of an appropriate adult, unless there is proper and sufficient reason for not doing so.
>
> The term 'appropriate adult' means:
>
> > a relative, guardian, friend, or some other person responsible for the care or custody of the suspect concerned
> >
> > a person who has professional experience in dealing with such persons but does not include a police officer or a person employed by the Police Service.

If an appropriate adult is unavailable, use a responsible adult who is not a police officer or a person employed by the Police Service.

The term, 'proper and sufficient reason':

As a general rule the term proper and sufficient reason does not include mere difficulty in finding an appropriate or responsible adult. However, it is recognised there will be instances when police will have to ask questions without an appropriate or responsible adult being present, eg in cases of urgency or where police are not endeavouring to elicit legally admissible evidence.

General advice

before questioning you should be satisfied that the person fully understands the caution and the implication of any actions following the caution: -

make it clear in simple terms that the person has the right to remain silent

take care when questioning to ensure that each question is understood

do not assume that the person understands even simple questions

phrase questions in a way that avoids a simple 'yes' or 'no' answer. This will ensure the person has some understanding of the question.

The Instruction does not, however, provide a definition or explanation of "developmentally delayed" (which is often a synonym for intellectually disabled). Other Instructions refer to "mentally handicapped" and "mentally retarded" which could lead to confusion.[33] Nor does the Instruction define the role of the "appropriate adult". The Instruction, therefore, does not overcome the problem of identification of a person's disability and the role of the "appropriate adult" remains a matter for discussion.

The possibility of unreliable statements

4.16 In relation to the possibility of unreliable confessions from people with an intellectual disability, the Instructions provide as follows:

Doubtful confessions

Many people, from psychopathic or other causes, confess to crimes they did not commit, therefore, closely examine confessions before accepting them as statements of fact.

Before charging a person with a criminal offence on the basis of a confession, carefully investigate further to adduce independent corroborative evidence of the complicity of that person in the crime.

If you cannot find such corroboration, refer the matter to a senior officer for review, preferably one with detective experience, before preferring a charge.[34]

4.17 In response to this Instruction, Hayes and Craddock have commented that:

[e]xperience shows, however, that charges are quite frequently laid against persons who are mentally abnormal or intellectually disabled, entirely on the basis of their own admissions. The breach of the instruction is easily explained by an assertion that the confession did not seem doubtful. The instruction lacks any guidance as to the circumstances which might suggest that the confession is "doubtful", and ... there is no sanction for breach.[35]

Suspects in police custody

4.18 Instruction 155 deals with people in police custody. Section 1, "Screening Prisoners", deals with the importance of identifying pain, illness, injury or the signs of potential suicide in a person arrested. The "Apprehending Officer" is required to make an initial assessment of the arrested person and take note of the prisoner's physical condition and mental or emotional state. The "Custody Officer" is given the following guidelines in relation to "Mentally ill/handicapped/retarded prisoners":

> As soon as practicable inform the appropriate adult of the grounds for detention, and whereabouts, of a prisoner who is suffering from mental illness or is mentally handicapped. Ask the adult to come to the station to see the prisoner.
>
> In these circumstances, the appropriate adult means, either:
>
> > a relative, guardian or some other person responsible for the care or custody of the mentally ill person
> >
> > someone who has experience of dealing with mentally ill or mentally handicapped persons but is not a police officer or employed by the Police Service
> >
> > failing either of the above, some other responsible adult who is not a police officer or employed by the Police Service.
>
> Be aware that mentally retarded people may have difficulty understanding questions or comments because of a slowness in reacting, short attention span, weak memory, or language problems. Exercise close supervision to ensure they are not victimised by other prisoners. See Instruction 38, Mentally ill people.[36]

Under the heading "Mentally ill people",[37] the Instructions also provide guidance in relation to "mentally disturbed" people in custody, forensic patients, and "mental patients", but these Instructions do not contain any detailed information about intellectual disability.

4.19 In Instruction 155, guidelines are also provided in relation to:

- alternative placements to a prison cell if there is a "likelihood of the prisoner being in danger of suicide or illness, or if the prisoner falls within a high risk category";[38]
- releasing from custody people considered to be in a risk category;[39]
- escorting mentally ill people;[40]
- inspecting prisoners and cells;[41] and
- access to medical practitioners/medication.[42]

All of these Instructions could have relevance to people with an intellectual disability, but their usefulness is hampered by lack of cross-referencing and inconsistency in terminology.

Police questioning of victims and witnesses

4.20 The Final Report of the New South Wales Women's Co-ordination Unit on *Sexual Assault of People with an Intellectual Disability*[43] recommended, in relation to police procedures, that the Instructions be amended to include procedures for conducting police interviews of people with an intellectual disability, including victims of sexual assault, and to allow a third party to be present during interviews with victims who have an intellectual disability to assist with the interpretation of language and help overcome communication difficulties. The Instructions reflect these recommendations in the section dealing with sexual assault, which includes the following comments:

Indicators of intellectual disability include:

short retention span

difficulty understanding questions and instructions

responding inappropriately or inconsistently to questions.

Consider the following:

ensure the victim knows the reason for being there

establish rapport and make the victim feel comfortable

use simple language and ask short questions

frequent short breaks may help the victim's concentration

the victim has the right to have a support person present, who is acceptable to the victim

it is suggested that the statement be taken in question and answer form.

If communicating is difficult, contact the local Department of Community Services office, which should be able to assist you in contacting people to help communicate with the victim.

Brief any person helping you communicate with the victim not to show any emotion, or substitute or paraphrase anything the victim says. The person clarifies terminology used by the victim.

The victim, not parent or guardian, decides whether to proceed or not. If the victim is incapable of making an informed decision, the guardian decides. If the victim does not have a guardian, contact the Guardianship Board for assistance (this is a 24 hour service).

Take criminal proceedings under the appropriate section of the Crimes Act. No prosecution for an offence under Section 66F of the Crimes Act shall be commenced without the approval of the Director, Office of the Department of Public Prosecutions. The Attorney General has delegated this authority.

Report the following for review, with reasons for your decision, to the Commander, Region Legal Services:

a decision not to take a statement from an intellectually disabled person

a decision not to prosecute an offender as a result [of] a statement taken from an intellectually disabled person

a decision reached by yourself and your case reviewing officer not to prosecute an allegation of sexual assault upon an intellectually disabled person.[44]

Sexual assault, however, is not the only crime likely to be committed against people with an intellectual disability. There is also a brief mention in the Instructions relating to Apprehended Violence Orders of people "suffering from an appreciably below average general intellectual function".[45]

Conclusions

4.21 The rest of this chapter will explain why the Commission believes that the current position outlined above is inadequate to protect the interests of people with an intellectual disability. The Commission recommends a package of reforms to address the problems encountered when people with an intellectual disability come into contact with the police. These recommendations have taken into account the experiences of people with an intellectual disability, the police and other interested groups. As with all the other legislative and procedural recommendations in this Report, training and resources will be necessary to ensure that they are effective. These issues will be considered separately in Chapters 9-11.

DISCUSSION OF RECOMMENDATIONS

The Commission's Police Powers Report

4.22 The Commission's recommendations for people with an intellectual disability must be considered in the context of the Commission's previous recommendations for all people who come into contact with the police. Since 1982, the Commission has had a general reference to review the area of criminal procedure. The most recent Report released as part of that reference was *Police Powers of Detention and Investigation After Arrest*[46] (the "Police Powers Report"), which was tabled in Parliament in February 1991. That Report made substantial recommendations for reform of police investigations. The Commission used the English *Police and Criminal Evidence Act 1984* (usually referred to as "PACE"), and the Codes of Practice established pursuant to that Act, as a model for its recommendations.[47] Generally the Commission's recommendations have not been implemented in New South Wales. The recommendations of the Police Powers Report provide the necessary background to the reforms set out in this chapter and some repetition of matters discussed in the Police Powers Report is therefore necessary. Recommendations 2-5 repeat and elaborate upon key issues from that Report, which are crucial for people with an intellectual disability.

Custody Officers

4.23 Under the PACE system in England and Wales, senior level "Custody Officers" review the lawfulness and propriety of a person's arrest upon arrival at a police station and then determine whether or not a period of custodial investigation is necessary. The Custody Officer is also responsible for the suspect's treatment and well-being for the period of detention and for the maintenance of custody records.[48] The custody records are crucial if there is a later allegation in court that there has been a breach of police guidelines. The Custody Officer is also important in identifying whether the suspect has an intellectual disability and accordingly requesting the presence of a third person to be present at the interview. An English social worker who has been a third person in police interviews and undertaken research in this area, commented that "arresting officers do not easily recognise vulnerability, this may be due to their intense involvement with the issues surrounding the arrest". Therefore he saw trained Custody Officers, independent of the investigative role, as crucial for recognising vulnerability.[49]

4.24 The New South Wales Police Service also has "Custody Officers", defined as "any officer having the immediate responsibility for the detention and care of persons in custody at a police station".[50] The New South Wales Custody Officers have a more limited role than the PACE Custody Officers. Custody Officers are general police officers who are allocated this role by the shift supervisor. Some officers may undertake this task constantly and build up considerable expertise. A Safe Custody Course at the Police Academy provides additional training.[51] Guidance in this area is also provided by a Safety in Custody Task Force. The Custody Officers are primarily responsible for prisoners held in custody in police cells following arrest, questioning, charging and the refusal of bail. Unlike the PACE Custody Officers, they do not see suspects as soon as they enter the police station and therefore are not involved in such issues as whether a person requires the presence of a third person during questioning. They do complete a Prisoner Admission Management Form ("PAMF") which provides a record of management of the prisoner while detained in police cells and is designed to identify prisoners at risk, whether to themselves or others.[52] That form requires the escorting officers (for prisoner transfers), arresting officers and the Custody Officer to record their visual observations about the prisoner and also includes a number of questions which the Custody Officer must ask the prisoner, relating to issues such as medical conditions or Aboriginality. The answers to these questions may lead to the Custody Officer

suspecting that the person has an intellectual disability but by this stage the person has already been questioned and important decisions such as bail have been made. Obviously it would be preferable to identify the possibility of intellectual disability at an earlier stage of police contact. As set out at para 4.18 above, there are special guidelines for the detention of "mentally ill/handicapped/retarded prisoners".[53]

4.25 In the Police Powers Report, the Commission recommended that the New South Wales Police Service consider the practicality of the introduction of a formal system of Custody Officers, based upon the PACE system in England and Wales.[54] This proposal was repeated in DP 29.[55] The introduction of a formal system of Custody Officers in New South Wales was generally supported.[56] Additionally, some submissions referred to the need for appropriate training for Custody Officers[57] and for them to have power to direct arresting officers to follow certain procedures.[58] The New South Wales Police Service did not support the PACE system, arguing that it is administratively burdensome, personnel-intensive, stressful for police officers and that it would reduce front line supervision.[59] The Law Society of New South Wales also stated that it had reservations about the desirability and effectiveness of Custody Officers, but did not elaborate.[60]

4.26 The Commission accepts that the PACE system of Custody Officers may not be directly suitable for the different Australian conditions:

> First, in England and Wales, the distances are much smaller and the population is less spread out, so it is possible to designate regional police stations as custody stations, provide each with at least one custody officer per shift, and expect all arrested persons who might be subject to custodial investigation to be brought to those stations. In New South Wales there are many small country stations, often staffed by only one or two officers. Secondly, the British police forces are also older and more experienced, on average, with many senior sergeants who can be expected to handle the role of custody officer.[61]

The Commission nevertheless considers that the advantages of the PACE system can be adapted to Australian conditions. The Commission considers that a more extensive role for the Custody Officer is of particular importance for people with an intellectual disability, because of the role the Custody Officer can play in identification, calling for a support person and providing a supervisory control over the detention and treatment of the person. The Commission retains its support for the system of custodial detention outlined in the Police Powers Report, which would involve, amongst other things, the extension of the present role of Custody Officers to a responsibility for an initial assessment of suspects as they enter the police station after arrest for questioning. Meanwhile, the Commission supports the continued management of custodial detention after charging by "Custody Officers". The duties of such officers should be clearly prescribed.

Recommendation 2: Summons or arrest?

4.27 The majority of the Commission's recommendations in the area of police and people with an intellectual disability relate to police procedures after arrest. A preliminary issue is whether the police should have arrested the person in the first place. This decision affects all people who come into contact with the police, but it is particularly important for "vulnerable" people, including people with an intellectual disability. It has been argued that a person with an intellectual disability should not be arrested unless this course is absolutely necessary in the circumstances, and that proceedings should generally be initiated by means of a summons or court attendance notice. The Commission believes that this is an essential protection for vulnerable persons, to ensure that they are not in police detention unless necessary. Such a proposal does not only have merit in relation to people with an intellectual disability.[62]

4.28 Though the *Police Service Regulation 1990* (NSW) provides that "Police officers should not arrest a person for a minor offence when it is clear that a summons will ensure the offender will be dealt with by a court",[63] the Ombudsman has suggested that "the police have an entrenched preference for

proceeding by way of arrest rather than summons or other means".[64] For Commonwealth crimes, legislation provides:

> A constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that:
>
> (a) the person has committed or is committing the offence; and
>
> (b) proceedings by summons against the person would not achieve one or more of the following purposes:
>
> (i) ensuring the appearance of the person before a court in respect of the offence;
>
> (ii) preventing a repetition or continuation of the offence or the commission of another offence;
>
> (iii) preventing the concealment, loss or destruction of evidence relating to the offence;
>
> (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
>
> (v) preventing the fabrication of evidence in respect of the offence;
>
> (vi) preserving the safety or welfare of the person.[65]

4.29 The Commission believes that a similar (but simplified) requirement would be appropriate in New South Wales, that is, that a police officer must consider whether a summons (or court attendance notice) would be effective before making an arrest. This would require an amendment to s 352 of the *Crimes Act 1900* (NSW) to bring it into line with the Commonwealth position. This proposal was generally supported in submissions,[66] although the New South Wales Police Service argued that the issue was sufficiently covered by the Regulations and the Instructions.[67] As no submission argued against the proposal on policy grounds, the Commission believes that the New South Wales *Crimes Act 1900* should reflect in general terms the Commonwealth position.

Recommendation 3: Time limits for detention after arrest before charging

4.30 The issue of police detention after arrest was discussed at length in the Police Powers Report. In brief, the common law rule is that a person cannot be arrested or detained merely for the purpose of questioning or conducting investigative procedures and must be brought before a justice as soon as practicable after arrest.[68] Legislative alteration of the common law rule has taken two forms in Australia: the "fixed period" and the "reasonable period" of time for detention in police custody. In 1985, South Australia introduced a "fixed period" system of investigative detention, limited to an initial period of up to four hours.[69] Federal law also provides for a fixed period of detention for Commonwealth crimes.[70] In England and Wales, PACE provides for a fixed period system, although the permissible periods of detention far exceed what is generally considered acceptable in Australia. A "reasonable period" of detention operates in the Northern Territory[71] and in Victoria since 1988.[72] In 1994 a New South Wales Bill providing for a reasonable period of detention was introduced, but never passed.[73] In 1996 a non-government Bill was introduced, to enable police to detain a person after arrest for a maximum period of four hours or, if a detention warrant is obtained, for a maximum period of 12 hours, for the purposes of investigation.[74] As at November 1996, the Bill had not been passed.

A special rule for suspects with an intellectual disability?

4.31 The *Crimes Act 1914* (Cth) provides special detention procedures for Aboriginal persons and Torres Strait Islanders[75] and for persons under 18.[76] No special procedures, however, are provided for

a person with an intellectual disability. The Act limits the initial time during which a person can be held for questioning to two hours for Aboriginal persons, Torres Strait Islanders and persons under 18,[77] and to four hours for any other suspect (including, necessarily, adults with an intellectual disability).[78] The period of detention can be extended to eight hours through an application to a magistrate or justice of the peace where the offence carries a term of 12 months imprisonment or more.[79] The factors to be taken into account are listed in the legislation,[80] but do not include the suspect's intellectual disability. The Act provides the right to an interpreter in certain circumstances,[81] although this is unlikely to be of much assistance to most people with an intellectual disability.

4.32 In the Police Powers Report, the Commission rejected a "reasonable period" approach to detention before charging. Such an approach effectively gives police an enormous lawful discretion to detain suspects in custody for lengthy periods, and would legitimise acts in breach of the common law by detaining a person for the purpose of questioning. The Commission considers that this approach provides insufficient guidance for police and offers little by way of accountability mechanisms. The Commission retains its preference for a fixed time period for detention in police custody after arrest and before charging. It is important to understand that under a fixed time scheme, the person is detained only so long as is reasonably necessary, but a *maximum* period for detention is set. It may not be reasonable in some circumstances to detain the person for the maximum allowable period. In the Police Powers Report the Commission stated that what is a "reasonable period" for detention for the purpose of investigation must be determined by reference to all of the relevant circumstances. It set out a list of relevant circumstances, including the number and complexity of matters under investigation.[82] The Commission now believes that an additional factor should be added to that list of relevant circumstances affecting what time for detention is reasonably necessary, namely the vulnerability of the arrested person, whether as a result of youth, Aboriginality, intellectual disability or other relevant condition. Although a "reasonable time" approach (with no maximum period) was rejected by some submissions,[83] many submissions supported the idea that any determination of what is reasonable time should take into account the vulnerability of the suspect.[84] In its submission, Victoria Police commented that the presence of a support person was of assistance in determining reasonable time frames for the person concerned.[85] The Commission believes that police in New South Wales should similarly utilise the support person in this area.[86]

4.33 The Commission does not believe that the difficulties in this area for people with an intellectual disability would be solved merely by decreasing the maximum period of detention to a shorter period, for example, two hours. The Commission sees this as a superficially attractive safeguard, but one which may actually lead to inappropriate interviewing techniques. Interviews with a person with an intellectual disability are likely to take more time, not less, and the two hour period does not take into account the different needs of people with an intellectual disability. For some people, even two hours of detention may be unreasonable.

Recommendation 4: The police caution

4.34 The caution reminds suspects of one of the most important safeguards for people being questioned by the police, namely the right to silence. The merits or otherwise of this right have been canvassed extensively elsewhere and the Commission has stated its strong support for the retention of the right.[87] This right may be of more than usual importance for the person with an intellectual disability, owing to the added disadvantages they face in police questioning,[88] which would be likely to affect the reliability of any answers. The Police Powers Report made a number of recommendations in relation to the administration of the caution for all suspects which will not be repeated here.[89] Section 139 of the *Evidence Act 1995* (NSW) gives further weight to the caution by providing that evidence is obtained improperly if an arrested person is not cautioned before being questioned. The section continues that "[t]he caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency ...".[90]

4.35 The Instructions provide that police should be satisfied that a "developmentally delayed" suspect "fully understands the caution and the implication of any actions following the caution" and should "make it clear in simple terms that the person has the right to remain silent".[91] The mere reading of the caution

to a person with an intellectual disability may be an empty exercise. According to the Instructions, the caution to be used before questioning a person who has been arrested or where the police officer believes there is sufficient evidence to establish the person has committed an offence is:

> I am going to ask you certain questions. You are not obliged to say anything unless you wish to do so, but whatever you say or do may be used in evidence. Do you understand that?[92]

4.36 A person with even a mild level of intellectual disability may have difficulty in understanding this caution.[93] Words such as "obliged" may not be understood and other phrases, such as "may be used in evidence", may be understood literally, but not their intended meaning and the consequences.[94] At the Commission's consultations with people with an intellectual disability, when asked to explain what they understood by the caution, and the meaning of the word "evidence", the participants gave answers which showed clearly some of the possible misunderstandings.[95] Additionally, the caution ends with a question inviting a "yes" or "no" response, which could invite a person with an intellectual disability to answer "yes" without actually comprehending its meaning.[96] In these consultations some people with an intellectual disability thought they or other people with an intellectual disability would answer "yes" for a variety of reasons, including fear of not wanting to appear "silly".[97]

4.37 As it is impossible to draft a standard caution which can be understood by all people with an intellectual disability, in DP 29 a number of alternatives were suggested to ensure that a person understands the police caution, for example, the police officer asking the suspect to explain the caution back in his or her own words or using a simplified version of the caution.[98] The participants in the Commission's consultations with people with an intellectual disability made a number of suggestions about how the police could check that the person has understood the caution, for example, checking with the third person present or asking the person being interviewed "would you like me to explain it again" or "explaining it in different or simpler words and then asking them if they really understand it and taking time to do this".[99] The New South Wales Bar Association objected to use of a third person in this regard, commenting: "the Association regards the police caution as a crucial aspect of the interrogation of a suspect. It is inappropriate to rely upon any other person's interpretation of the understanding of the suspect."[100] The Commission agrees with this comment. The Association also argued that the caution:

> should be re-written in terms comprehensible to anyone with the most basic facility in English. It should be put and a response obtained in discrete elements. It is not appropriate to simply seek a single response to a number of discrete propositions.

4.38 The simplification of the caution would benefit all suspects. One of the Commission's Honorary Consultants, Mr Mark Ierace, has suggested three options instead of the traditional caution:

> 1st option: "I am going to ask you some questions. You do not have to answer any of them. Whatever you say may be used in evidence in court against you. Do you understand that?" (Objective: same structure, some words simplified, the second sentence shortened.)
>
> 2nd option: "I am going to ask you some questions. You do not have to answer any of them. Whatever you say may be used in evidence in court against you. Would you like me to explain that in greater detail to you?" (Objective: same as 1st option, but with a different final question, so a "yes" answer evinces further explanation.)
>
> 3rd option: Same as 1st or 2nd option, with an additional question "Can you tell me in your own words what that means?"

4.39 The Commission recommends that the police caution be rewritten. Considering its pivotal importance in police investigations generally, the Commission believes that the final wording of such a caution be a matter for more widespread debate and research. However, it argues that an essential element of the caution should be to test the understanding of the suspect, for example, by asking suspects to respond by putting the caution into their own words. Neither simplifying the caution nor

attempting to ensure that the person understands the caution through one of the listed suggestions guarantees that the person has in fact understood the caution. However, attempting to ensure that *all suspects* understand the caution is a matter for good police practice and training and is not just a matter relevant to people with an intellectual disability. Particular practices in relation to the caution and people with an intellectual disability are discussed further at paras 4.55-4.58 below.

Recommendation 5: Code of Practice

4.40 The Commission believes that the most important aspects of police powers and interaction with the general public, particularly those relating to arrest, detention and investigation, should be set out in a Code of Practice rather than in the Instructions. This reflects the Commission's approach in the Police Powers Report. The Report recognised that many of the matters in the Instructions refer to internal matters and that it was appropriate that these be retained in an Instruction format.[101] However, the Report argued that it was important to identify the police procedures which should attract external sanctions if breached. Such provisions should be set out in a separate public and enforceable document.

4.41 By way of example, the English PACE system contains five Codes of Practice providing guidelines in the following areas: Stop and search (Code A); Search of premises and seizure of property (Code B); Detention, treatment and questioning of persons by Police Officers (Code C); Identification (Code D); and Tape recording (Code E). Codes can be issued or amended by the Secretary of State preparing and publishing a draft and considering representations about the draft. If the Code is then approved by both Houses of Parliament, the Code is brought into operation by order made by statutory instrument.[102] In the Police Powers Report the Commission lauded the public process involved in the development of these Codes.[103] This is in marked contrast to the development of the Instructions. The Commission therefore recommends that such a Code be developed by a Working Group consisting of members of the New South Wales Police Service, as well as representatives of interest groups and the general community appointed by the Attorney General.[104]

4.42 The Commission recommends that there be a Code of Practice covering detention, treatment and questioning issues for all persons and that such a Code should include specific provisions for people with an intellectual disability. The reasons given for preferring a Code of Practice approach over the existing system of Instructions can be summarised as follows:

Public availability. Though the Instructions are now available internally in electronic and loose-leaf form and available in loose-leaf form in some public libraries and under Freedom of Information legislation, they are not widely known by, or accessible to, the general public. The Instructions cannot be purchased, nor are they on display at a police station (required in England). By contrast, a Code of Practice would be available for purchase and could easily be made accessible in every police station. This would assist people to determine their legal position at the relevant time.

Length and drafting. The Instructions consist of four ring-binder folders, which are constantly amended by Commissioner's circulars. Their length means that few police have a working knowledge of all of the areas covered, and their bulk limits their transportability. It is impractical, for example, to keep a copy in every police car and a set of Instructions is shared by a number of officers. They are not a reference tool which is quick and easy to use. The inadequate exterior labelling, lack of adequate indexing or cross-referencing makes it difficult to locate topics or specific instructions.[105] In any event, only some areas of the Instructions are of concern to the general public. The Code would be a short document, designed with a public audience in mind. Its brevity would also make training easier. Unlike the Instructions, which are often phrased in advisory terms, a Code could be drafted with sanctions for breach in contemplation.[106]

Legal status. It is argued that the Instructions provide little real control over police actions and are difficult to enforce.[107] The consequences of breach of Instructions were discussed at paras 4.12-4.14 above. The recommended Code of Practice would have the status of New South Wales regulations, giving it force of law and allowing for formal, open, legal regulation of the criminal investigation process. A Code could not be amended by the unilateral decision of the Police

Commissioner and would carry considerable weight in the courts. As a regulation, the Code would be subject to the consultation and regulatory impact statements of the *Subordinate Legislation Act 1989* (NSW).[108]

Public input, accessibility and awareness. As the development of the Code will involve community consultation and input, the process of consultation will provide an opportunity for scrutiny of policing practices. Public awareness has an educative function as well as providing an important mechanism for police accountability.[109]

Greater certainty of procedures. The greater certainty about correct police procedures which could be brought about by a public Code was seen as promoting the reliability of evidence obtained, fairness to the suspect, and reduction in court time.[110] Such certainty would also benefit the police.[111]

4.43 The majority of submissions were in favour of the adoption of a Code or Codes of Practice.[112] On the other hand, some submissions expressed reservations about the need for Codes. The New South Wales Police Service supported the current Commissioner's Instructions, arguing that Codes were unnecessary as current guidelines already had a statutory base. The same submission pointed out that accessibility has increased.[113] Another submission saw Codes as having "obvious benefits" but expressed concern about the onerous burden placed on police in cases where they failed to identify an intellectual disability.[114] Finally, concern was expressed about the delay that implementation of Codes of Practice might entail,[115] leading to consequent perpetuation of disadvantage for people with an intellectual disability.

4.44 The Commission recognises the force of these comments, but believes that the arguments in favour of Codes of Practice are compelling. The Commission believes the Codes should be available for purchase by members of the public, and displayed and accessible in every police station. Wide dissemination after drafting will increase both police and community awareness of the relevant procedures. Greater accessibility could be facilitated by distribution to community-based organisations and the presentation of relevant sections in alternative formats accessible to people with an intellectual disability.

Breach of a Code of Practice

4.45 Under PACE, any breach of a Code can lead to disciplinary action against the police involved[116] and can be taken into consideration by the courts.[117] The Commission believes that attempts to ensure compliance by punishing errant police officers (administratively or through the criminal justice system) rarely have proved to be effective. The only effective sanction is the exclusion of evidence obtained in contravention of those procedures, subject to a discretion to admit. The Commission accordingly recommended, in the Police Powers Report, that where evidence is obtained improperly or in contravention of a law or Code of Practice, the evidence should be presumed to be inadmissible. Such evidence should only be admitted where the desirability of admitting the evidence *substantially* outweighs the undesirability of admitting having regard to the manner in which the evidence was obtained.[118]

4.46 A similar provision is now contained in s 138 of the new *Evidence Act 1995* (NSW),[119] which came into operation on 1 September 1995. Section 138(1) provides:

> (1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law, or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

4.47 This provision differs from the Commission's proposal in that the Act does not require that the desirability of admitting the evidence *substantially* outweigh the undesirability. In DP 29 the Commission argued that, in light of the prevailing judicial practice of admitting evidence despite its improper or unlawful procurement, stronger wording was needed in the then Bill clearly to reverse the actual practice. The Commission was concerned that the balance still would usually come down on the side of admission, and stated that it would prefer a clear indication in the legislation that unlawfully or improperly obtained evidence normally should *not* be admitted, absent a finding that special circumstances exist or where it is imperative in the interests of justice.

4.48 In light of the recent passing of the Evidence Act at both the Commonwealth and New South Wales level, the Commission does not press its proposal. It remains to be seen how the section will be interpreted, though the Commission believes that the preferable interpretation would be that "outweighs" implies that there would need to be strong reasons for admitting the improperly or illegally obtained evidence. The Commission believes that its recommended elevation of the arrest and detention Instructions to a Code of Practice contained in a Regulation (which would clearly bring its breach within the operation of s 138 of the *Evidence Act 1995* (NSW)) will mean that the protections contained in that Code will be more widely known and will be treated with more weight by the police, the courts and the general public.

Recommendation 6: What a Code of Practice should contain about intellectual disability

Recommendation 6(a): Identification

4.49 Identification of intellectual disability is one of the most difficult issues for personnel in the criminal justice system. As discussed above, intellectual disability is not necessarily obvious from a person's appearance and some people with an intellectual disability attempt to conceal their disability or deny its existence. Nevertheless, without identification the police will not be able to implement any of the safeguards outlined in this chapter. Therefore the first issue which must be addressed in any Code of Practice is guidelines for identifying whether a person being questioned, whether suspect, victim or witness, may have an intellectual disability. This was generally supported in submissions.[120] The Commission recommends that such guidelines be prepared with expert assistance and include indicators of intellectual disability.

4.50 It must be made clear that there is a difference between *screening* for intellectual disability through a series of tests or questions administered to all suspects, *identification* of the possibility of intellectual disability and expert *assessment* of intellectual disability. This recommendation only expects police to identify the possibility of intellectual disability; it does not expect police officers to screen for intellectual disability or to undertake assessments of intellectual disability in any formal sense. Police officers obviously do not have the necessary professional qualifications to undertake assessments. Even if there was an appropriately qualified police officer or the police retained the services of such a person, a formal assessment raises consent and privacy issues, and the concern that such an assessment could be subsequently used against the person.[121] At the investigative stage a formal assessment is impractical for every person suspected of having an intellectual disability and may be unnecessary and an added trauma for the person. Formal assessments can be undertaken at a later stage of the criminal justice process if necessary.[122] Such an assessment would generally be arranged by the person's lawyer.

4.51 As set out above in para 4.20, the Instructions already provide a list of indicators of intellectual disability in the context of sexual assault victims, which should be used as the basis for new guidelines. It must be recognised that the role police can play in identification is controversial. Some submissions have suggested that administration of tests or tasks (looking up a number in a phone book etc) by police is inappropriate and creates difficulties for both the police and the suspect.[123] A list of indicators and appropriate questions also presents difficulties, for example, with deinstitutionalisation, many people

with an intellectual disability will no longer live in an institution or attend special schools and therefore questions about school/housing may not assist the police.[124] Another submission suggested that some possible questions may make people with an intellectual disability feel inferior and/or hostile.[125] However, a study of Custody Officers in England found that these officers, to identify vulnerability, needed to develop questions and strategies in addition to the basic questions in the custody record, particularly in the areas of medical history, communication and daily living skills.[126] The development of such questions may be a more appropriate area for training, rather than for inclusion in the guidelines. Accordingly, the Commission only recommends that a list of indicators of intellectual disability be contained in the identification guidelines in the recommended Code of Practice, and that identification issues be concentrated upon in training (see Chapter 9). It should be the responsibility of the Patrol Commander that someone at every station has appropriate training in this area - this may well be an area where the existing Custody Officers (see paras 4.23-4.26 above) should develop some expertise.

4.52 However, it is important to be realistic about expectations of police, or any other personnel in the criminal justice system, in relation to identification of intellectual disability. In the English study referred to at para 4.5 above, it was commented:

> the police were very good at identifying the most disabled and vulnerable suspects ... Considering the difficulties in identifying mental handicap and mental illness, it is unlikely that the identification of vulnerable suspects can be made error-free. This is particularly the case with mental handicap. The reason for this is that often there are no obvious signs that police officers can be trained to look for. Unless every detainee is subjected to a clinical interview and psychological testing, which is totally impractical, there are going to be many vulnerable suspects who are not going to be identified as such by the police.[127]

Recommendation 6(b): Officer to follow procedures if intellectual disability suspected

4.53 Even if the procedures discussed above in relation to identification are followed, in most cases the police officer is likely to be uncertain whether or not the person has an intellectual disability. The PACE Codes provide that:

> If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or mentally handicapped, or mentally incapable of understanding the significance of questions put to him or his replies, then that person shall be treated as a mentally disordered or mentally handicapped person for the purposes of this code.[128]

It is therefore appropriate to recommend that the police should follow the safeguards if there is *any reason* to suspect that the person has an intellectual disability. Thus the presence of indicators of intellectual disability should set in train procedures without the need for confirming assessment.[129] Even if the person does not have an intellectual disability, the suspicion may be raised by behaviour which may turn out to have a medical or other cause. In this case, extra care with questioning and the provision of a support person are likely to be of assistance in ensuring that the person is fairly treated.

Recommendation 6(c): Guidelines for questioning

4.54 As discussed at para 4.6 above, one of the most common difficulties for people with an intellectual disability is understanding police questions. The Commission therefore recommends that the Code of Practice contain guidelines, prepared with expert input, for questioning a person with an intellectual disability, including reference to: the need to attempt to pitch the language and concepts used at a level which will be understood; the need to take extra time in interviewing; the risk of the person's special susceptibility to authority figures, including a tendency to give answers that the person believes are expected; the dangers of leading or repetitive questions; the need to allow the person to tell the story in his or her own words; the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers; the need to ask the person to explain back what was said to him or her; and the possibility that the person may be taking medication which may affect his or her ability to answer questions. The current police guidelines (Instructions 37.14 and 155, set out in

paras 4.15 and 4.18-4.19 respectively above) provide a good basis for a Code. This proposal was generally supported in submissions,[130] though the need for appropriate training was often stressed.

Recommendation 6(d): The caution

4.55 As discussed at paras 4.34-4.39 above, understanding the police caution is particularly problematic for suspects with an intellectual disability. Although the Commission has recommended that the caution be rewritten to enhance understanding by all suspects, it believes that police should receive additional assistance in the recommended Code of Practice in relation to suspects with an intellectual disability.

4.56 Police should be made aware of the particular difficulties a person with an intellectual disability may have in comprehending the right to silence and the police caution. Police should also be aware that a failure to understand the caution may have evidentiary implications, for example a confession may be later held to be inadmissible on the grounds of lack of voluntariness or unfairness. In some cases evidence of an interview has not been admissible in court where an accused did not understand the administered caution[131] or did not have the mental capacity to understand the *concept* of the right to silence.[132] In one case, a man with an intellectual disability was acquitted of murder after the judge excluded alleged confessional material. One of the grounds for exclusion was lack of voluntariness. According to newspaper reports, the judge commented that not only should a caution have been given by police, but it should have been given in terms likely to be understood by the accused, that is, not merely a caution phrased in the customary terms.[133] The Commission suggests that it is improbable that anyone with an intellectual disability would fully understand the caution. However, this is an issue that can only be ultimately addressed on a case by case basis in court.

4.57 It is also important to recognise that a person with an intellectual disability may not only need to have the right to silence explained to him or her but also may need to be reminded regularly during the course of the interview of that right.[134] This may lead to some conflict between the police and the lawyer involved.[135] The Commission, therefore, believes that guidelines need to be developed for the repetition of the caution at appropriate times for the person with an intellectual disability. There were no significant concerns raised about this proposal in submissions, indeed, the New South Wales Police Service stated that it is current practice to re-caution after a substantial break in questioning.[136] One submission, however, thought that the repetition of the caution could be confusing to a person with an intellectual disability.[137]

4.58 Accordingly, the Commission recommends that the Code of Practice contain reference to: the difficulties that a person with an intellectual disability may have in comprehending the concept of the right to silence and the police caution; the possible evidentiary implications of a failure to understand the caution; and the need for a person with an intellectual disability to be reminded periodically of the caution, particularly after any substantial break in the questioning.

Recommendation 6(e): Adoption and reading back of record of interview

4.59 Similar problems of understanding to those affecting the understanding of the caution are likely to arise in relation to the standard questions which the police are required to ask at the end of an interview to ensure that the suspect "adopts" the document.[138] The Instructions include such questions as:

> **Q**. Were you cautioned before making this statement that you were not obliged to make this statement unless you so desired, but any statement you did make may be used in evidence?[139]

The use of long and complex sentence structures and the conceptual nature of the language means that such questions are unlikely to be understood by a person with an intellectual disability. Such questions may well elicit a "yes" or "no" answer from the suspect, without indicating his or her lack of comprehension.[140] The Commission believes that such questions will need to be asked in language

appropriate for a person with an intellectual disability. The New South Wales Police Service stated that it is current practice to ensure adoption questions are understood.[141]

4.60 The Instructions also provide that the suspect should, if they have not written the statement, be asked to read the record of interview aloud or should have it read aloud to them.[142] This presents obvious difficulties for a person with an intellectual disability who may have low literacy or a poor short term memory and therefore "reading it or listening to it read aloud may not ensure that the document is an accurate and *complete* record of all that was said".[143] The difficulties involved in reading back the record of interview to a suspect will be largely overcome by the electronic recording of interviews, which is discussed below. However, police guidelines need to provide for this possibility for interviews which are not electronically recorded.

4.61 The Commission therefore recommends that the Code of Practice should provide that the standard "adoption" questions used at the end of an interview should be in language appropriate to the person with an intellectual disability, and, if the interview is not electronically recorded, the person should have the opportunity of having their record of interview read back to them slowly, and to be asked frequently whether it is correct. There were no significant concerns raised about this recommendation in submissions.

Recommendation 6(f): Electronic recording of police interviews

4.62 *Suspects.* Generally, evidence of an admission by a suspect to police is not admissible in court unless a "tape recording" is made or there is a reasonable excuse for the lack of a recording.[144] For New South Wales offences, this requirement is limited to admissions which relate to an indictable offence;[145] tape recording in practice will therefore be limited to more serious offences. "Tape recording" includes audio or video electronic recording.[146] Electronic recording of police interviews with a person with an intellectual disability may reveal, far more clearly than through a transcript, the nature of the person's response, including non-verbal responses and level of understanding. The difficulty of "reading back" a statement to a person with low literacy skills is also avoided. Electronic recording appears to be popular with the police, for it is not only an effective prosecution tool but also can resolve disputes about police conduct during the interview.[147] By removing the necessity for one officer to record the interview manually, it also allows for shorter interviews. Shorter interviews may also be helpful for people with an intellectual disability, many of whom find concentration for long periods difficult. The practice in Victoria is generally to make a tape recording of an interview with any suspect with an intellectual disability whether the offence is indictable or not.[148]

4.63 Accordingly, the Commission proposed in DP 29 that police interviews with a suspect with an intellectual disability in respect of *all* criminal offences, not just the more serious offences, should be videotaped. This proposal extends the current practice. Electronic recording for suspects was generally supported in submissions.[149] The New South Wales Police Service, however, was concerned that such a proposal would be too expensive and may require arrest to allow the recording to take place rather than proceeding by summons or infringement notice.[150] The Commission believes that the advantages of videorecording in terms of accurate reporting of what was said to the police outweigh the disadvantages and does not believe that the proposal should be limited to only the most serious offences. Where video equipment is not available, an audio recording should be made. The practice is particularly important in circumstances where there is no support person or lawyer present at the interview (see Recommendations 7 and 8). To overcome the concern that people would be arrested or detained to allow the interview to be recorded, the Commission suggests that its recommendation be limited to interviews *after arrest* for all offences. It may, however, be in the interests of the police to record electronically certain pre-arrest interviews, to ensure the admissibility of any admissions made.

4.64 Videotaping of interviews should not be seen as the perfect solution to all concerns about the police interview. Its potential abuses or limitations have been well documented.[151] In fact, by its appearance of fairness and verisimilitude, it can provide the jury with a confidence in the accuracy of all contained within the interview which may be unjustified.[152] It may also work against the suspect with an intellectual disability who has a high level of verbal skills, in that the jury may not believe, on viewing the

video, that the person does, in fact, have an intellectual disability. The Intellectual Disability Rights Service ("IDRS") supported the use of electronic recording but argued that there should be safeguards to protect the rights of suspects, including that a lawyer be present prior to the making of the recording and that a pre-recorded warning about the suspect's right to silence be played on tape to the suspect.[153] In the Police Powers Report the Commission commented that there were also: "questions about the propriety and fairness of taping staged re-enactments of the crime, visits to the scene of the crime and other presentational/non-discursive modes of investigation".[154] The Commission recommended in the Police Powers Report that a detailed Code of Practice be developed to regulate electronic recording, as is the case in England.[155]

4.65 *Victims.* Electronic recording of victims (or witnesses) with an intellectual disability also has obvious benefits in terms of accurately recording the victim's statement, including non-verbal communication, which may be particularly revealing. It is also likely to shorten interviews and make the police officer's task easier. A person with low literacy skills may be able to use their video statement to refresh their memory prior to the court appearance. The Commission therefore proposed that electronic recording facilities be used for all victims with an intellectual disability, and for witnesses where a detailed interview is necessary.[156] As the Commission accepted that there may be different concerns for non-suspects, the Commission sought submissions about whether there is any possible detriment to the victim or witness with an intellectual disability through the widespread use of electronic recording of interviews.

4.66 Submissions presented a mixed response: the New South Wales Police Service did not support the proposal, seeing it as discriminatory to victims with an intellectual disability and possibly giving unfair cross examination advantages to the defence. They also argued that undue criticism would flow to the prosecution if the victim's interview was not recorded, even if the police thought there were good reasons not to do so.[157] Nor did the New South Wales Sexual Assault Committee support the proposal.[158] Other submissions supported the proposal without detailed comment.[159] The DPP did not perceive any detriment to the victim, other than possible embarrassment, and rather thought that "the use of the videotape in court would serve to bolster the victim's credibility and defuse suggestions of coaching, fabrication and other improper activities".[160] The DPP and IDRS also thought the decision about electronic recording should be the victim's.[161] However it is likely to be difficult to obtain a properly informed consent from many victims with an intellectual disability.

4.67 Despite these concerns, the Commission recommends that, to the extent practicable, all police interviews with arrested suspects or victims with an intellectual disability should be videotaped. The Commission believes that leaving the decision to the discretion of either the police or the victim is inappropriate and could place both groups in a difficult situation. In response to the argument that such a practice is discriminatory to victims with an intellectual disability, the Commission argues that different measures are appropriate for this group of victims due to the disadvantages outlined in Chapter 2. A video is a legitimate aid to the administration of justice and cannot be seen as intrinsically different to, for example, photographs taken of a victim's injuries. The strongest argument against the use of electronically recorded interviews is the potential advantage to the defence or disadvantage to the prosecution, through the use made by the defence of such a tape. However, like many such dilemmas in the criminal justice system which involve the balancing of the rights of both sides, this is a risk which should be taken in the interests of the administration of justice, because of the likely greater accuracy of recording obtained. There are specific evidentiary and other protections which could be raised on a case by case basis to limit the use of the recording by the defence. Police may also choose to use the procedure for witnesses, but the Commission does not believe that it should make a recommendation in this area.

Recommendation 6(g): Identification parades

4.68 It has been suggested that identification parades should not be used where the suspect has an intellectual disability, as some people with an intellectual disability may be particularly obvious in such parades.[162] It is not within the scope of this reference to consider the general advantages and disadvantages of identification parades. The Instructions require that identification be carried out "fairly" and the other members of the line-up be "persons who are of similar age, height, appearance, and class

of life, to the suspect".[163] For federal offences, guidelines for identification parades are set out in legislation.[164] The *Crimes Act 1914* (Cth) provides that an identification parade must be conducted in a way that will not disadvantage the suspect. The parades are designed so that the suspect should not stand out in any way, for example, each of the persons in the parade must "resemble the suspect in age, height and general appearance".[165] The Act also provides that an identification parade "must not be held for a suspect who is incapable of managing his or her affairs unless a magistrate orders that it be held".[166]

4.69 The *Evidence Act 1995* (NSW)[167] provides that "visual identification evidence" adduced by the prosecution is not admissible unless an identification parade including the defendant was first held. The parade is not required if "it would not have been reasonable to have held such a parade". The Act then contains a non-exclusive list of matters which can be taken into account by the court in determining whether it was reasonable to hold the parade. There is no mention of intellectual disability or the appearance of the defendant. However, the Act also provides that "[i]t is presumed that it would not have been reasonable to have held an identification parade if it would have been unfair to the defendant for such a parade to have been held".[168] This appears to provide sufficient scope for the police to decide not to hold an identification parade if there is the likelihood of unfairness to the suspect.

4.70 Submissions on this issue were varied. Victoria Police, for example, commented: "[i]f there is doubt in relation to identification evidence as a result of the parade it is considered that it should be a matter for the court to direct of the danger of such identification evidence rather than remove such an investigatory process".[169] The New South Wales Police Service agreed that no identification parade should proceed if there was the likelihood of unfairness to the suspect, and noted the protections provided by evidence legislation.[170] The DPP thought that this issue was sufficiently covered by the Instructions, and added that if there was no identification parade, for reasons of unfairness, police should not be criticised in court.[171] IDRS supported the proposal, adding that identification parades are often particularly distressing for people with an intellectual disability.[172] Other submissions supported the proposal without detailed comment.[173]

4.71 Despite the provisions in the *Evidence Act 1995* (NSW) and the Instructions, the Commission believes the police should be warned in a Code of Practice about the possible unfairness of identification parades for a person with an intellectual disability. The Commission therefore recommends that the Code of Practice should include a recommendation that identification parades should not be used for people with an intellectual disability in circumstances where unfairness to the suspect is likely to result, owing to the unusual manner or appearance of the particular suspect. This is consistent with the provisions of the *Evidence Act 1995* (NSW) and the Instructions.

Recommendation 6(h): Bail

4.72 Refusal of bail and being remanded in custody may lead to particular difficulties for people with an intellectual disability. For example, it has been argued that, given that such a person's social ties and supports "may be especially fragile" and that their disability can be a disadvantage in finding employment and accommodation, the negative effects of a period in remand may be substantial and long-term.[174] In custody the accused with an intellectual disability is especially vulnerable to discrimination and assault.[175] Further, the special difficulties for lawyers in obtaining instructions from persons with an intellectual disability are exacerbated under custodial conditions by security measures, a lack of privacy, and the difficulty of a trusted friend or relative attending any conference.[176] Therefore, it is important to consider the effect of the current provisions for the determination of bail for people with an intellectual disability.

4.73 In practice, the majority of bail determinations are made by police.[177] There is a right to bail (with or without conditions) for certain minor offences defined by the Act.[178] This right is negated where, amongst other reasons, there has been a previous failure to comply with a bail undertaking or condition imposed in respect of the offence; or the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug, or is otherwise in danger of physical injury or in need of physical protection.[179] There is a presumption in favour of bail for all other offences, apart

from certain listed offences, including murder and certain drug and domestic violence offences.[180] Bail is granted or refused according to criteria set out in s 32 of the *Bail Act 1978* (NSW). People with an intellectual disability may lose their right to bail under s 8, or fail to satisfy the criteria of s 32, by:

being unable to understand the requirements for bail;[181]

having a history of failing to comply with bail undertakings, for example, owing to lack of understanding or poor organisational skills;

being mistaken for a person who is under the influence of alcohol or a drug owing to the person's behaviour;[182] or

having unstable living conditions or no family or community support.[183]

4.74 Bail conditions, such as reporting weekly to a police station or limitations on movement, may be more difficult to comprehend and comply with for the accused with an intellectual disability. Additionally, the person's likely low income or reliance on social security benefits may disadvantage him or her, as few of the possible conditions under which bail can be granted are non-monetary.[184] Of the non-monetary conditions which may be imposed, one provides for an "acceptable person",[185] acquainted with the accused, satisfying the police that he or she considers the accused to be responsible and likely to comply with any imposed conditions.[186] A lack of community ties and an unwillingness to disclose intellectual disability may restrict the number of persons that an accused with an intellectual disability would be willing to nominate as an acceptable person. Additionally, it has been suggested that the person with an intellectual disability may not wish to produce a case manager or a workshop manager as an acceptable person because of fear that they will lose their accommodation or position if the existence of a criminal charge is known. Even if a welfare worker or "citizen advocate" is available, their role often is limited to giving support.[187] Indeed, it has been stated that some government departments specifically prohibit their welfare worker employees from acting as surety or as an "acceptable person" for their clients.[188]

4.75 Submissions to the Commission have called for more effort to be taken to ensure that a person with an intellectual disability understands and can comply with bail conditions: "[f]or example if the person is required to report to the police, does the person understand the reporting requirements and does the person have access to the resources required to comply with the requirements such as access to transport and money?"[189] Apart from requirements relating to the provision of written information before the bail determination,[190] and the requirement for an acceptable person to be warned of penalties for giving a false acknowledgement,[191] there is no requirement in the Act, Regulations or Instructions that any conditions imposed on an accused be clearly explained before an undertaking is entered or acknowledgement sought. The continued presence of the support person is therefore likely to be important in explaining the conditions.

4.76 The Commission therefore proposed that police should be required to take an accused's intellectual disability into account in determining bail and bail conditions. The New South Wales Police Service argued that this proposal is unnecessary as the issue is adequately covered by s 32 of the *Bail Act 1978* (NSW), which requires police to take into account the accused's understanding, residential and employment status. The Service did not present any other objections to the proposal, apart from its usual lack of support for a Code of Practice.[192] Generally, the proposal was supported.[193] IDRS, however, was concerned that police could use this proposal to defer bail for people with an intellectual disability owing to their lack of understanding.[194] The Commission does not believe that it should change its proposal and therefore recommends that the Code of Practice set out a duty for police to take an accused's intellectual disability into account when setting bail conditions - for example, assessing the likelihood of the accused understanding and complying with bail conditions; the importance of the accused's residential and employment status in that assessment; and the relative burden upon the accused of any conditions imposed.

4.77 *Special bail provisions.* The Commission also sought submissions about whether special bail provisions should be developed to counter the disadvantages faced by persons with an intellectual disability. As discussed in DP 29, there already exist various provisions, and recommendations for provisions, which are concerned specifically with juvenile and Aboriginal offenders in relation to the determination of bail and procedures when bail is refused.[195] Similar provisions could be added to a Code of Practice (or the New South Wales Police Commissioner's Instructions) and the *Bail Act 1978* (NSW), to ensure that persons with an intellectual disability are not disadvantaged either in obtaining bail, or coping with the burden imposed either by conditional bail or remand.

4.78 Little specific information was received on this point. The Commission believes that the fundamental problem in this area does not appear to be a legislative one but rather that bail is often denied due to inadequate support and accommodation services for the person with an intellectual disability to allow them to understand and meet the conditions of bail. In DP 29, the Commission suggested that a pilot bail hostel be considered to overcome some of these difficulties.[196] Though recognising the severity of the problem this proposal was designed to address, many groups[197] were opposed to this proposal. Reasons provided included: that a hostel would be inappropriately stigmatising and segregating; that it could become a "dumping ground" for people with an intellectual disability; and that it would be better for the Department of Community Services to become more involved with finding accommodation in the community and assisting court attendance than creating a further institution. Accordingly, the Commission has decided to abandon this proposal, but suggests that some of the difficulties in this area should be overcome by the services recommended in Chapter 11, para 11.43.

Recommendation 6(i): Presence of a lawyer and support person

4.79 Two of the most important safeguards for the person with an intellectual disability interviewed by the police are the presence of a lawyer and a support person. The Commission believes that reference to these two important safeguards should be set out in the Code of Practice. The detail of these safeguards is set out below.

Recommendation 7: Presence of a lawyer at police interviews

The right to a lawyer

4.80 In theory, all people have the right to have a lawyer present during police questioning after arrest. The Police Commissioner's Instructions provide that police are to "give every reasonable assistance to [prisoners in custody] to obtain bail, or to communicate with their legal advisers".[198] Additionally police are "obliged to advise people charged of their entitlement to make a telephone call" to certain specified people including "a solicitor of their choice".[199] In practice, many people are interviewed by police without legal representation. Legal aid is not currently available for police interviews, which may affect suspects' decisions in relation to having lawyers present.

4.81 In the Police Powers Report, the Commission discussed the importance of a true "right" to legal assistance during police questioning, to ensure that an arrested person is treated fairly by the criminal process. The Commission made recommendations designed to increase the accessibility of such assistance.[200] For example, the Commission recommended that a person must not only be informed of the right to communicate or to attempt to communicate with a lawyer but must also be given the opportunity to exercise that right meaningfully.[201] The Commission also recommended that a 24-hour duty solicitor scheme be established.[202] The Commission does not resile from these recommendations which will benefit all suspects.

4.82 For a person with an intellectual disability, more may be required. Not only are such persons less likely to understand the right to (or the importance of) a lawyer, but they are less likely to be able to exercise that right in a meaningful way; for example, they may not know how to use a telephone book, nor be able to afford a lawyer in any event. The Commission therefore suggested in DP 29 that this protection be secured for a person with an intellectual disability by *requiring* that a lawyer be present for police questioning.

4.83 This proposal was not supported by the New South Wales Police Service, who argued that the police must retain the right to question a person without a lawyer to: "i) eliminate early a suspect from the inquiry, ii) carry out urgent investigation to preserve life and property, and iii) ensure valuable evidence is not lost". The Police Service also argued that the proposal must take into account the availability of lawyers; the period of time a suspect can be held pending arrival of a lawyer and the right of the individual to choose whether or not they have a lawyer.[203] The South Australian Police Department also suggested that the mandatory nature of the proposal caused practical problems for police, and suggested that a lawyer be used "wherever practical".[204] The New South Wales Bar Association did not support the proposal, referring to the varied capabilities of people with an intellectual disability. It did, however, comment that it was crucial that the suspect understand the *right* to a lawyer and to remain silent until one is present.[205] Other submissions supported the proposal but with reservations such as: the need to retain freedom of choice for people with an intellectual disability and the cost of a lawyer, particularly considering the low income levels of people with an intellectual disability;[206] the lack of experienced, available lawyers in this area;[207] and the possible delays caused by waiting for a lawyer to arrive. Other submissions supported the proposal without qualification.[208]

4.84 The Commission accepts, as discussed below, that there will be a small number of circumstances when the police should retain the right to question the person without a lawyer. Generally, however, owing to the difficulties faced by police when interviewing a person with an intellectual disability, it is in the interests of the police to ensure, to the extent that they are able, that any evidence obtained is not excluded by a court for reason of lack of voluntariness or unfairness to the accused. The other concerns of the Police Service can be addressed in the recommended Code of Practice.

4.85 The question arises whether a lawyer or a non-legal "support person" is more important in protecting the rights of a person with an intellectual disability, given that it may be unrealistic to require the presence of both in all circumstances. The Ombudsman thought that the presence of a support person may be a better alternative than the presence of a lawyer.[209] However, the Commission is of the other view. Despite the benefits of a support person to a person with an intellectual disability, discussed at Recommendation 8 below, the Commission believes that such a person is inappropriate and insufficient to protect the *legal* rights of a person with an intellectual disability.[210] There is also the additional disadvantage that private conversations between the interviewed person and the support person are not privileged, unlike lawyer/client discussions.

4.86 The Commission is well aware of the difficulties of ensuring that a lawyer is present at police interviews. Though the Commission believes that this right should be accessible by all people, it believes that the difficulties faced by people with an intellectual disability are so extreme that further steps should be taken for them. The Commission therefore recommends that a lawyer be present at all police interviews after arrest with a suspect with an intellectual disability. This would place an onus upon police to arrange for the presence of a lawyer. Telephone advice is unlikely to be a realistic option for a person with an intellectual disability, except as a last resort. Such a recommendation will be inoperable if the Commission's previous recommendations in the Police Powers Report in relation to the right to legal assistance, including a 24 hour duty solicitor scheme available free of charge to arrested suspects, are not implemented. Though it would be preferable if the lawyer had experience with people with disabilities, realistically, there will be few lawyers experienced in this area available. Hopefully, this position will change if the Commission's recommendations about training for lawyers in Chapter 9 are implemented.

4.87 The Commission recognises that there will be some circumstances where it is not possible to obtain a lawyer, for example in a situation of urgency or where reasonable efforts have been made and no lawyer is available. Hence the Commission's recommendation is that a lawyer should be present when a suspect with an intellectual disability is questioned by the police, absent exigent circumstances, namely circumstances of urgency or circumstances in which obtaining a lawyer would require unreasonable steps to be taken by the police. The Commission wishes to avoid a recommendation which results in lengthy debates in court about whether a lawyer should have been present or not and what consequences should flow from the absence of a lawyer. Accordingly, the Commission has limited its recommendation to situations where a suspect has been arrested, as this will exclude the more minor

offences where arrest is unlikely and will limit arguments about at what time the lawyer should have been called. If no lawyer is present, the treatment of the evidence obtained should be governed by the *Evidence Act 1995* (NSW) and the usual judicial discretions.

Recommendation 8: Presence of a support person at police interviews

4.88 As discussed above at para 4.15, the current New South Wales police practice requires the presence of an additional person at a police interview with a person with an intellectual disability, both for suspects and for victims of sexual assault. Such a person is referred to in the Instructions relating to suspects as an "appropriate adult", but the Commission prefers the term "support person". The role that person is to play in the police interview is not defined. Anecdotal evidence, including case studies from submissions, suggests that many people with an intellectual disability do not have a support person present at police interviews.[211] English studies also reveal a low usage of support persons compared to the likely numbers of suspects with an intellectual disability.[212] In the Commission's consultations with people with an intellectual disability there was considerable support for the presence of a third person, such as a social worker or advocate, at police interviews.[213] Submissions also have generally supported the need for such a person,[214] though some did not support the *mandatory* nature of the proposal.[215] Other reservations are discussed below.

4.89 Many other jurisdictions[216] have provision for the presence of a support person in police questioning of a person with an intellectual disability, for example: Victoria;[217] South Australia;[218] Western Australia;[219] Queensland;[220] the Northern Territory,[221] the Australian Capital Territory[222] and England and Wales.[223] In England, since 1984 a wealth of case law has grown up in relation to the support person, known as the "appropriate adult".[224] The Victorian system of support persons (known as "Independent Third Persons" or "ITPs") has the advantages that ITPs can be located by police, on a 24 hour basis, by contacting the police communications unit and that police and ITPs have been trained about the system through the co-ordination of the program by the Office of the Public Advocate.[225] By contrast, federal legislation limits the protection to persons under 18 and Aboriginal suspects.[226]

Difficulties raised by the support person requirement

4.90 The success of the requirement relies upon the police officer identifying that the person may have an intellectual disability and being aware of the support person requirement. Even if these two preconditions are satisfied, there are other difficulties which may arise in this area.

> It is difficult to determine the most appropriate person to fill this role. A stranger, such as a social worker, may, instead of providing support, actually add to the trauma of the situation for the person with an intellectual disability. A stranger may have difficulty communicating with the person and would not have knowledge of the way the disability may affect that person's understanding.[227] There is also the danger that a stranger may be seen as "another authority figure who wished to hear 'helpful' answers to the interviewer's questions".[228] Professionals who know the suspect with an intellectual disability may have other difficulties acting in this role, for example the possible conflict of interest between a social worker/client and a support person/suspect relationship,[229] and the need to maintain good relations with the police.[230] Relatives or friends, however, though likely to be able to communicate with the person, are not necessarily the best choice for this role for other reasons:
>
> - they may not be experienced or trained in the care of people with an intellectual disability;[231]
>
> - they may lack the necessary objectivity or be too eager to assist the police, to the possible detriment of the interviewed person;[232] or they may interfere excessively in the interview;[233]
>
> - their presence may suggest to the person being questioned that their friend or relative supports the police's actions; or, if they are used as a "translator", that the person is

> “answering a question asked by a relative, rather than by a police officer for the purposes of evidence”;[234] or

- the person may be reluctant to discuss the matter in front of a family member or may be affected by other family dynamics.[235]

Additionally, the person chosen by the person with an intellectual disability may be inappropriate, for example by reason of age or disability - the Legal Aid Commission of New South Wales has suggested there be some onus on the police to ensure the person is an appropriate person to provide the assistance needed.[236]

Whether the support person is known to the person with an intellectual disability or not, the support person might not understand police procedures, the protections available for an accused or the role of a support person in the police interview.[237] Training all support people would be impossible as many would only act in the role on a single occasion. This raises the question whether this role is one that should be left to an ad hoc system. It is arguably also inappropriate to rely on volunteers for such an important role.[238] The role is a potentially onerous one. It has been commented in relation to the Victorian system that ITPs:

> as volunteers receive no remuneration for their costs yet they are expected to be available at any time of the day or night, and sometimes to travel considerable distances to an interview. They may also be required to go to court when the case comes to trial ...[239]

There may be difficulties locating a support person[240] or delays caused by arranging for their presence. This may result in people with an intellectual disability being detained for longer periods in custody and may lead to additional stress and anxiety.[241]

Even if an appropriate support person is found, there are many possible interpretations of the person’s role, for example: advocate, interpreter, communication facilitator, substitute legal adviser, a provider of “moral support” or a neutral observer role. The different roles expected of the support person may be contradictory; for example, it may be difficult for the same person to fulfil both an interpreter and a support person role.[242] The police are likely to interpret the role in a less interventionist way; that is, as merely an observer, without an active role to play in the process or, alternatively, as being there to assist the police rather than the suspect.[243] This ambiguity has raised concerns about the role the third person is to play in the interview and the level of allowable intervention. For example, there have been concerns in Victoria that support persons may not intervene appropriately, even when it is clear that the person with an intellectual disability does not understand the questions, and that support persons are being inappropriately asked to assess the person’s fitness to be interviewed.[244] In one Victorian case a judge ruled a confession by a 15 year old boy with a borderline IQ not voluntary and therefore inadmissible, stating that the boy had probably been induced to answer questions by the ITP.[245]

There are considerable resource implications of the requirements, both for police and disability organisations who often provide the third persons.

Discussions between a suspect and a third person are not privileged and the third person may be required to give evidence against the suspect, or may feel they have a duty to pass on information gained in a private interview to the police.[246]

For suspects, there is a danger that the presence of a support person may create the appearance of fairness without the actuality[247] and that the person may be seen as a sufficient substitute for a lawyer.

4.91 This last concern is particularly important. Support persons are a relatively new requirement in police interrogation and the long term results of their presence are as yet largely unknown. Though a

support person may provide reassurance to the person with an intellectual disability in some cases, this should not occur at the expense of their legal rights. One commentator questioned:

> What is the impact of having [a support person] - does his/her presence make it easier for police to obtain a confession or does it ensure that people who are being interviewed are more aware of their rights and less inclined to answer questions if they are suspected of committing an offence?[248]

There needs to be further research in this area, in particular focusing on any detriment to the suspect.[249]

4.92 *Victims and witnesses*. Unlike a suspect, the victim with an intellectual disability would not generally require the assistance of a lawyer, but is likely to require emotional and practical support in police interviews. As discussed, in New South Wales this has been recognised in the Instructions for victims of sexual assault. In Victoria, where an "Independent Third Person" attends all interviews where a person with an intellectual disability is involved, it has been suggested that the presence of a third person may formalise the investigation process, which provides an additional benefit to the victim, and ensures that their complaint is taken seriously.[250] The New South Wales Bar Association saw potential detriment to the accused if a victim is always provided with a support person:

> [a] "victim" may or may not be so in fact. The presence of another person at the taking of a statement accusing another of crime, whose role is explicitly to "be supportive of the victim", may justly be the subject of criticism by a person wrongly accused.

The Bar Association concluded that "[t]here is no substitute for proper investigative technique. ... Raising matters of sensible police practice to prescriptions of law may have unintended adverse consequences."[251] It has also been suggested that a support person should not be mandatory if the person with an intellectual disability objects to their presence.[252] The New South Wales Police Service also commented that a mandatory support person is discriminatory for victims with an intellectual disability.[253]

Conclusions

4.93 Taking into account the concerns raised above, the Commission believes that the presence of a support person in police interviews is not sufficient to protect the legal rights of a suspect with an intellectual disability and that in some cases their presence may act to the detriment of the person, particularly in terms of the legal consequences of the interview. As discussed in Recommendation 7, the Commission believes that the most effective way of ensuring that the rights of the suspect with an intellectual disability are protected is through the presence of a lawyer, and that only the presence of a lawyer should be mandatory. However, the Commission does recognise the benefit to many suspects with an intellectual disability of a support person. The Commission therefore recommends that police, if they suspect the person they are interviewing (after arrest) has an intellectual disability, should ask whether the person requires a support person. People who cannot nominate such a person should not be disadvantaged and police should therefore have access to a list of appropriate persons. The police may have to assist the person with an intellectual disability to contact the chosen person or, if the person cannot name a person, to approach an appropriate person from a list. If this is not complied with, the usual protections under the *Evidence Act 1995* (NSW) would apply at a later trial in relation to the admission of evidence obtained at the interview. The Commission also believes that a support person for a victim or witness with an intellectual disability at police interviews is likely to assist both the person and the police and to be in the interests of justice.

4.94 The Commission's recommendations about the essential features of a support person are set out below. These details and all police responsibilities in relation to a support person must be set out clearly in the Code of Practice, as recommended in Recommendation 6, to avoid varying practices by the police and lengthy legal battles at any later trial. Potential areas of confusion over the role of the support person should be clarified, not left to the courts to resolve, as has occurred in the case of the

independent adult for children. Confusion in this area would be damaging to the interests of people with an intellectual disability.

4.95 *Role.* The Commission recommends that the third person should be known as a "support person", as this name reflects the role envisaged by the Commission for that person. The Commission believes that the terms "appropriate adult", with its implications of a child-like role for people with an intellectual disability,[254] and "independent third person", with its implications of a neutral and passive role, should be avoided. It is unrealistic to expect such a person, who is most likely to be a family member, friend or carer to be "independent" and not to be primarily concerned about the interests of the person interviewed. The Commission believes the role of the support person should be clear and should not contain contradictory elements. The Commission believes that the role of the support person should be to support the person with an intellectual disability, but not, in the case of a suspect, to attempt to take the place of a lawyer and to advise the person of their rights. It is unrealistic (and dangerous) to expect a person without legal training to fulfil such a role.

4.96 The support person should be clearly attending for the benefit of the person with an intellectual disability, rather than to assist the police, and should not be a neutral or passive observer of the proceedings. The support person should play a limited "interpretative" role if necessary, for example, suggesting the police rephrase a question if the suspect is having difficulties. A carer may be able to explain what a person with an intellectual disability means by a particular word. Of course, the police should try to confirm such information provided by the support person with the person interviewed. The support person should not detract from the suspect's right to silence or be seen as an interpreter in the sense that the word is used for people who do not speak English. In most cases the police should be able to address their questions directly to the person being interviewed. The New South Wales Bar Association, however, commented on the dangers of an interpretative role as, not only is there considerable potential for error in doing so, but this may link the support person to the questioner in the eyes of the suspect.[255] The Commission suggests that the potential dangers in this area should be noted but believes it would detract from the usefulness of the support person if that person were not able to assist communication. It is impossible to set limits on this role to cover every possible situation.

4.97 *Identity and gender.* The support person should be at least 18 years of age. The person being questioned should have the right to choose the support person, unless that person is disqualified in some way, for example, being under the age of 18, being an important witness in the case, or having an intellectual disability themselves. Ideally such a person will know the suspect well, for example as a family member, guardian, carer, case manager or friend, and be able to communicate easily with that person. If an intimate search or medical examination is required, the support person should preferably be of the same gender as the person with an intellectual disability. However, this is a matter where the wishes of the person with an intellectual disability should be paramount. The support person should not be a police officer or anyone likely to be involved in the alleged offence; for example, as a witness.

4.98 *List of support people.* If the chosen person is unavailable, unwilling to assist, or inappropriate owing to their potential involvement in the investigation, or the suspect cannot nominate a person, police should have access to a list of people with experience with the special needs of people with an intellectual disability in their geographical area who would be prepared to fulfil such a role from time to time. It is meaningless to have such a requirement for police if it is almost impossible to find a person to fulfil it. The Commission suggests that the system set out in the *Crimes Act 1914* (Cth) for development of a list of "interview friends" for Aboriginal people be used as a model.[256] The Minister for Disability Services, with the assistance of the Ageing and Disability Department should establish and update regional lists of the names and contact numbers of persons who are suitable to assist people with an intellectual disability and willing to give such help. Such people should receive a "callout" fee and travelling expenses if utilised. The development of such a list will take some time and consideration but the Commission believes that it is crucial that support people are available out of office hours and are easily accessible to the police. Ideally, such a list would also be available to lawyers to enable them to obtain the assistance of a support person in legal interviews, where no other suitable person was available. (See Recommendation 9 below.) The New South Wales Police Service did not support a centralised system, stating that: it "should be a local Patrol responsibility ... A centralised registry ... is not practicable nor efficient for local needs."[257] For example, preparing a list of independent adults for

child suspects is a patrol responsibility.[258] The Commission suggests that the logistics of preparing and updating such a list, taking into account the efficient use of resources, should be a matter for further consultation between the agencies involved.

4.99 *Private access.* The support person should have an opportunity to speak to the suspect in private before the commencement of the interview. Such an opportunity was considered essential by the Victorian Court of Criminal Appeal to ensure that the presence of the support person was not "part of a meaningless ritual" for the suspect.[259] This opportunity would be even more important if the support person was not well known to the suspect. There are similar provisions for Commonwealth offences involving Aboriginal people and children.[260] The New South Wales Police Service stated that it had no objection to this course as long as the conversation took place within the view of the police officer at all times and that the officer in charge of the case had the discretion to allow the conversation to take place, taking into account the suspect's wishes.[261]

4.100 *Continuing presence and recording procedures.* The support person should remain present for all aspects of the police interview, including cautioning, charging, fingerprinting, bail, medical examinations or other procedures. As discussed above, these issues can be particularly confusing for a person with an intellectual disability. The presence or absence of the support person in relation to all police procedures should be recorded by the Custody Officer.

4.101 *Information for support people*. The Commission makes no recommendations about the specific training which may need to be undertaken for such support persons. It will be impossible for most support persons, as friends or family, to be trained.[262] It is expected that the list of available support people referred to above would have experience with the needs of people with an intellectual disability. A pamphlet or other information, for example a short video, should be prepared setting out clearly the role of the support person. The information should be given to the support person before the commencement of the interview.[263] Such material will, however, be of little assistance if the support person does not have time to study the material before the interview.[264]

4.102 *Dispensing with the support person requirement.* Circumstances where the police should be able to dispense with the requirement for a support person include circumstances of urgency,[265] traffic or minor offences or where no support person is available despite reasonable efforts. This would not mark any change in current practice. For the protection of the rights of the person with an intellectual disability, the reason for dispensing with the support person requirement should be documented.

Should the support person be a compellable witness?

4.103 In DP 29 the Commission proposed that the support person should be a competent but not compellable witness in respect of any hearing relating to the content and conduct of the interview, to overcome the possibility of the support person being called to give evidence against the suspect.[266] This was based on the concern that it may be unfair to set up a system where a person with an intellectual disability is expected to place their trust in a person who may then be called to give evidence against them. ITPs have been called to give evidence in Victoria, where discussions between the ITP and the suspect are not privileged, which may have been to the detriment of the suspect.[267] In England, the British Association of Social Workers and the Association of Directors of Social Services "both take the view that social workers [acting as Appropriate Adults] have a duty to assist in the prevention and detection of crime and are therefore justified in passing such information on to the police, and, if asked, should certainly pass it on".[268] However, a Home Office review recommended that such discussions should be both confidential and privileged.[269]

4.104 The Commission's proposal was not supported by the New South Wales Police Service, which argued that the person must be able to be called, if necessary, to prove the validity of the interview and to give evidence in relation to any allegation of impropriety.[270] The New South Wales Bar Association argued that the support person should only be competent to give evidence if called by the accused, to avoid placing the support person in ethical dilemmas in having to decide whether to give evidence for the prosecution. It also recognised that:

there might be good reasons why the defence may wish to call the support person. For example, the condition of the accused or the behaviour of the interviewers, especially if there is an issue as to matters occurring beyond the gaze of the video camera. Naturally there would be no restriction upon the prosecution's right to cross-examine.[271]

4.105 The Commission suggests that the giving of evidence by a support person about what occurred in a police interview is not likely to raise significant difficulties. The interview is likely to have been videorecorded in any event. The more difficult issue is if the support person is asked about what the suspect said in a private interview, in the absence of the police. In New Zealand evidence of any communication between the young person and the independent adult is inadmissible in any proceedings in relation to an offence alleged to have been committed by the young person.[272] Similar proposals have been made in Australia by the National Children's and Youth Law Centre.[273]

4.106 In New South Wales, this issue is now governed by the *Evidence Act 1995* (NSW). Under that Act the general principle is that all people are compellable, that is they can be called by either side in a trial to give evidence. This means that, generally speaking, a support person could be called to give evidence, not only about what happened at the police interview but about the content of any private interview with the suspect before or after the police interview. However certain limited categories of people, namely the spouse, de facto spouse, parent or child of a defendant, may object to giving evidence in criminal proceedings as a witness for the prosecution. The court is to hear and rule upon any such objection.[274] Section 18(6) of the Act states that such a person must not be required to give evidence if:

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

4.107 The exceptions appear to be designed to respect the special nature of certain familial relationships.[275] This means that some support persons who are family members would not have to give evidence against the person with an intellectual disability, but there is no such protection for non-family members who act as support persons. However, a recent Discussion Paper issued by the New South Wales Attorney General's Department proposes that Part 3.10 of the *Evidence Act 1995* (NSW) be amended to protect, in certain circumstances, a communication made by a person in confidence to another person acting in a professional capacity, such as in doctor/patient or social worker/client relationships. This may, if introduced into legislation, have an impact on the disclosures which can be made by a "professional" support person such as a social worker.[276]

4.108 Even if the Attorney General's Department's proposals are implemented, support persons who are neither family members nor "professionals" would not receive such specific protection. However, confidential communications received by these people from people with an intellectual disability may be excluded from evidence under the general law, for example, on the ground that the evidence is more prejudicial than probative.[277] The Commission therefore prefers to leave this area to be governed by the new provisions of the *Evidence Act 1995* (NSW).

Recommendation 9: Related issues - presence of a support person at other interviews

4.109 Support persons are not only relevant for police interviews, but for interviews with lawyers throughout the investigation and preparation of the matter. The Commission recommends that a lawyer should consider and discuss the need for a support person with his or her client. As for police interviews, if the client wishes to have a support person, the lawyer must take reasonable steps to arrange one. The Commission believes that consideration of the necessity of a support person by a lawyer is of such importance that a failure to raise the issue should be regarded as poor professional practice. Accordingly the Commission recommends that compulsory consideration of this issue should be contained in the Bar Rules and the Legal Practitioners' *Revised Professional Conduct and Practice*

Rules 1995. (See also Recommendation 44.) Though different considerations apply to prosecution witnesses interviewed by the DPP, DPP solicitors should also consider the need for support persons.

4.110 A support person's role at such interviews is to provide aid and comfort to the person with an intellectual disability and to ensure that the client's rights and wishes are being recognised and implemented by the lawyer. A support person could also play a limited interpretative role, if appropriate. A support person should be familiar with, and trusted by, the person with an intellectual disability; for example, a family member, advocate or carer. Ideally, it should be the same support person who assisted at the police station. If the chosen person is unavailable, unwilling to assist, or inappropriate owing to their potential involvement in the proceedings, or the person with an intellectual disability cannot nominate a person, lawyers should have access to the same list of possible support people as the police (see para 4.98 above.)[278] A support person should not otherwise be connected with the proceedings, for example, as a potential witness.

Client legal privilege

4.111 Submissions generally supported (or did not oppose) the presence of a support person at legal interviews,[279] although conscious of the issue of resources and the need for training for such a person. Apart from the possible unavailability of a suitable support person for a person with an intellectual disability, the only likely controversial issue in relation to a support person at legal interviews is the person's status at any later hearing and the danger that such a person could be called to give evidence against the person. Though the Commission undertook extensive searches in this area, little useful case law or secondary materials could be found. The Commission originally proposed that such a person should be precluded by law from giving evidence in respect of any matter relating to the content of the lawyer/client interview, unless the client otherwise consents.[280] This proposal was generally supported except by the police, who commented that there were procedural difficulties in involving a support person in interviews.[281] However, no submissions considered this issue in any detail, and the Commission has revised its views, as discussed below.

4.112 The current law in relation to client legal privilege is found in Part 3.10, Division 1, of the *Evidence Act 1995* (NSW). Under the Act, if a client objects, evidence cannot be given if it would disclose a "confidential communication"[282] between a client and a lawyer, made for the dominant purpose of legal advice or litigation.[283] The definition of "client" in the Division does not include a support person but does include the manager (however described) of a person of "unsound mind"[284] and would presumably include a guardian appointed under the *Guardianship Act 1987* (NSW). The definition of "client" also includes "an employee or agent of a client", and the Commission believes that a support person could be considered the agent of a person with an intellectual disability in this context. Accordingly, under the current law, conversations between the *lawye*r and the support person would be covered by the extended definition of client. However, the Commission believes that to extend client legal privilege to conversations between a *client* and a support person outside the legal interview would be to extend the privilege inappropriately.

4.113 As discussed at para 4.108 above, the Commission considers that there is sufficient protection in this area available through the general law. If the support person falls within certain classes of family members, protection against being compelled to give evidence against the person with an intellectual disability is provided by s 18 of the *Evidence Act 1995* (NSW). Otherwise the Act also provides that evidence may be excluded for a number of grounds, including, for example, on the ground that the evidence is more prejudicial than probative.[285] Additionally, as outlined above, it has been proposed by the New South Wales Attorney General's Department that confidential communications with certain "professionals" who may act as support persons receive additional protection.

FOOTNOTES

1. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Consultations* (Research Report 3, 1993) ("NSWLRC RR 3") at para 3.46.

2. G Hyson “Police involvement: what are the problems?” (1988) 2 (4) *National Council on Intellectual Disability: Interaction* 13-14.

3. M Brennan and R Brennan *Cleartalk: Police Responding to Intellectual Disability* (Literacy Studies Network, Charles Sturt University, 1994) at 28.

4. See Brennan and Brennan, Ch 4.

5. 63% were either “confident” or “very confident” in their ability to identify intellectual disability: A Nivala and M Bowen “Police knowledge of and attitudes towards people with developmental disabilities”, paper presented at *Partnerships for the Future, 6th National conference of The National Council on Intellectual Disability and The Australian Society for the Study of Intellectual Disability* (Fremantle, Western Australia, 26-30 October 1994) at 8.

6. Nivala and Bowen at 12-13.

7. Nivala and Bowen at 14.

8. G Gudjonsson, I Clare, S Rutter and J Pearse *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Justice, Research Study 12, London, HMSO, 1993). According to the study, at 19: of the 156 people psychologically assessed, 14 (8.6%) had a Full Scale IQ score below 70; about a third (33.7%) had a score of 75 or below and 68 (42%) had a score between 70 and 79.

9. Ms T Van Dam, Hornsby Challenge *Oral Submission* (9 February 1995).

10. See, for example, K Deane “Better represented by a poodle: The case of Dominic Simm” (1994) 15 *Socio-Legal Bulletin* 47 at 49. (“Deane (1994a)”) and R Perske “Thoughts on the police interrogation of individuals with mental retardation” (1994) 32 *Mental Retardation* 377-380.

11. For example, K Johnson, R Andrew and V Topp *Silent Victims: A Study of People with Intellectual Disabilities as Victims of Crime* (Office of the Public Advocate, Victoria, 1988) at 48.

12. Intellectual Disability Rights Service *Submission* (6 January 1992) at 6.

13. Johnson, Andrew and Topp at 49.

14. Senior Constable P Fernandez *Submission* (8 December 1991) at 34. See also C Williams *Invisible Victims: Crime and Abuse Against People with Learning Difficulties* (draft paper, Norah Fry Research Centre, University of Bristol, October 1994) at 37.

15. New South Wales Police Service *Commissioner’s Instructions,* Instruction 96.02.

16. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Policing Issues* (Discussion Paper 29, 1993) (“NSWLRC DP 29”), Proposal 45.

17. New South Wales Police Service *Submission* (24 February 1994) at 32; New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 6; Intellectual Disability Rights Service *Submission* (28 January 1994) at 23; Law Society of New South Wales *Submission* (23 December 1993) at 5; Illawarra Disabled Persons’ Trust *Submission* (20 January 1994) at 2; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 5; Letter from the Community Living Programme Inc to the Commission dated 7 February 1994.

18. For example, New South Wales Sexual Assault Committee *Submission* (15 February 1994) at 3.

19. Office of the Ombudsman, New South Wales *Submission* (February 1994) at 6.

20. Office of the Director of Public Prosecutions, New South Wales *Submission* (7 February 1994) at 3.

21. Consultation with Marrickville Community Health Centre on 1 March 1995.

22. New South Wales Bar Association *Submission* (12 January 1994) at 7. See also Director of Public Prosecutions, New South Wales *Prosecution Policy* (1995). The Guidelines, at 5, state that whether the public interest requires a prosecution can be affected by such factors as "(xvii) the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim".

23. Commissioner's Circular "Intellectually Disabled Victims" dated 7 October 1996.

24. *Police Service Act 1990* (NSW) s 8(4).

25. *Police Service Regulation 1990* (NSW) cl 9(4).

26. Office of the Ombudsman, New South Wales *Submission* (February 1994) at 2.

27. New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 2.

28. NSWLRC DP 29 at para 2.27.

29. *R v Lee* (1950) 82 CLR 133 at 154. See also *McDermott v R* (1948) 76 CLR 501 at 514-515; *Smith v R* (1957) 97 CLR 100; and *Van Der Meer v R* (1988) 82 ALR 10 at 15 per Mason CJ.

30. *Collins v R* (1980) 31 ALR 257 at 314, 324 per Brennan J.

31. See *R v Warrell* [1993] 1 VR 671; and *R v W* [1988] 2 Qd R 308. Note that a later case, *R v Aubrey* (1995) 79 A Crim R 100, per Davies JA at 108, qualified some of the statements made in *R v W.*

32. *R v Pratt* (1965) 83 WN (Pt 1) (NSW) 358 at 363; *R v Robison* [1969] 1 NSWR 229 at 230; *Dixon v McCarthy* [1975] 1 NSWLR 617; *R v Olsen* (Court of Criminal Appeal, NSW, 9 February 1989, CCA 436/1987, unreported) at 7.

33. For example, Instruction 155 uses both terms.

34. Instruction 37.16.

35. S C Hayes and G Craddock *Simply Criminal* (2nd ed, Federation Press, Sydney, 1992) at 62.

36. Instruction 155 at 1.02.

37. Instruction 38.

38. Instruction 155 at 1.07.

39. Instruction 155 at 8.02.

40. Instruction 155 at 12.06.

41. Instruction 155 at 13.01-13.03.

42. Instruction 155 at 16.03-16.06.

43. New South Wales Women's Co-ordination Unit *Sexual Assault of People with an Intellectual Disability* (Final Report, 1990).

44. Instruction 67.06.

45. Instruction 43.05. See Chapter 8.

46. New South Wales Law Reform Commission *Police Powers of Detention and Investigation After Arrest* (Report 66, 1990) ("NSWLRC Report 66").

47. The English legislation arose from the *Report of the Royal Commission on Criminal Procedure* (Cmnd 8092, HMSO, London, 1981).

48. NSWLRC Report 66 at para 4.29.

49. Mr I Blackie *Submission* (12 December 1993) at 1. See also letter from Mr I Blackie to the Commission dated 16 March 1995 at 1; Gudjonsson at 27; and P Bean and T Nemitz *Out of Depth and Out of Sight: Final Report of the Research Commissioned by Mencap on the Implementation of the Appropriate Adult Scheme* (Mencap, London, 1995) at 44.

50. See Instruction 155 at 1.00.

51. The Course is a week long residential course, followed by a two day field placement at a detoxification centre: New South Wales Police Service *Submission* (24 February 1994) at 26.

52. Information supplied by Acting Sergeant A McGrath, Safety in Custody Task Force, New South Wales Police Service (12 October 1995). See also Instruction 155 at 1.00-1.08.

53. Instruction 155 at 1.02 ("Custody officer's visual opinion").

54. NSWLRC Report 66, Recommendation 3.4. See also paras 4.28-4.32 of that Report.

55. NSWLRC DP 29, Proposal 39.

56. For example: Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 3; Office of the Ombudsman, New South Wales *Submission* (February 1994) at 6; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 3.

57. Legal Aid Commission of New South Wales *Submission* (2 February 1994) at 2; and Intellectual Disability Rights Service *Submission* (28 January 1994) at 21.

58. Legal Aid Commission of New South Wales *Submission* (2 February 1994) at 2.

59. New South Wales Police Service *Submission* (24 February 1994) at 24.

60. Law Society of New South Wales *Submission* (23 December 1993) at 5.

61. See NSWLRC Report 66 at para 4.30.

62. See the discussion in NSWLRC Report 66, Ch 1.

63. *Police Service Regulation 1990* (NSW) cl 9(8). See also Instruction 37.01.

64. Office of the Ombudsman, New South Wales *Annual Report 1993* at 40.

65. *Crimes Act 1914* (Cth) s 3W(1).

66. For example: Legal Aid Commission of New South Wales *Submission* (2 February 1994) at 2; New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 5; Office of the Ombudsman, New South Wales *Submission* (February 1994) at 6; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January

1994) at 3; Law Society of New South Wales *Submission* (23 December 1993) at 5; Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 2.

67. New South Wales Police Service *Submission* (24 February 1994) at 22. The submission stated that Instruction 37.01 reflects the provisions of cl 9(8) of the Regulation.

68. See *R v Williams* (1986) 161 CLR 278 and s 352 of the *Crimes Act 1900* (NSW). See also NSWLRC Report 66 at paras 1.12-1.72.

69. This followed the recommendations of the Australian Law Reform Commission: *Criminal Investigation* (Interim Report 2, 1975) paras 89-98, 328-329. It also accords with the later report of the Gibbs Committee: Review of Commonwealth Criminal Law Committee *Detention before Charge* (Interim Report, AGPS, Canberra, 1989).

70. See Part 1C of the *Crimes Act 1914* (Cth), which commenced on 1 November 1991.

71. *Police Administration Act 1978* (NT) s 137-138.

72. *Crimes Act 1958* (Vic) s 464A. Previously a fixed period system operated.

73. *Crimes (Detention After Arrest) Amendment Bill 1994* (NSW). This Bill has now lapsed.

74. *Crimes Amendment (Police Detention Powers After Arrest) Bill 1996* (NSW). The Bill was introduced on 17 October 1996 by Mr A Tink MP.

75. *Crimes Act 1914* (Cth) s 23H.

76. Section 23K.

77. Section 23C(4)(a).

78. Section 23C(4)(b).

79. Section 23D.

80. Section 23D(4).

81. Section 23N.

82. See NSWLRC Report 66, Recommendation 3.3.1.

83. For example, New South Wales Bar Association *Submission* (12 January 1994) at 6.

84. New South Wales Police Service *Submission* (24 February 1994) at 27; Law Society of New South Wales *Submission* (23 December 1993) at 5; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 3; Office of the Ombudsman, New South Wales *Submission* (February 1994) at 6; and Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 2.

85. Victoria Police *Submission* (28 August 1992) at 3.

86. NSWLRC Report 66 para 4.24 recommended that Custody Officers play this role, however this would require the expanded role for Custody Officers to be implemented.

87. NSWLRC Report 66 at paras 5.1, 5.9-5.14.

88. M Ierace *Intellectual Disability: A Manual for Criminal Lawyers* (Redfern Legal Centre Publishing, Sydney, 1989) at 15; Hayes and Craddock at 69.

89. NSWLRC Report 66, Recommendation 2.5.

90. *Evidence Act 1995* (NSW) s 139(3).

91. Instruction 37.14, set out at para 4.15 above.

92. Instruction 37.14. Note that the same Instruction also provides a slightly longer version of the caution to be used when the answers are to be recorded, that is: "I am going to ask you certain questions which will be recorded (on a typewriter, tape recorder, video etc). You are not obliged to say or do anything unless you wish to do so, but whatever you say or do will be recorded and may be used in evidence. Do you understand that?"

93. S E K Hewitt "Interviewing mentally handicapped persons" (1983) 11 *Mental Handicap* 38 at 38.

94. Ierace at 17.

95. NSWLRC RR 3 at paras 3.57-3.59.

96. Ierace at 17.

97. NSWLRC RR 3 at para 3.60.

98. NSWLRC DP 29 at para 6.59.

99. NSWLRC RR 3 at para 3.61.

100. New South Wales Bar Association *Submission* (12 January 1994) at 3.

101. NSWLRC Report 66 at para 6.7. See also the Australian Law Reform Commission Report *Complaints Against Police* (Report 1, 1975) at paras 138-143; which proposed a Police Discipline Code with "housekeeping" matters left to General Orders, though with a provision in the Discipline Code relating to disobedience to Orders.

102. *Police and Criminal Evidence Act 1984* (Eng) s 67(1)-(7).

103. NSWLRC Report 66 at paras 6.3, 6.6.

104. For further discussion of the development of a Code of Practice see NSWLRC Report 66 at paras 6.1-6.7.

105. Office of the Ombudsman, New South Wales *Submission* (February 1994) at 2 agreed with these comments. For example, there are a number of references to intellectual disability (or similar terms such as mentally handicapped) throughout the Instructions; however the only reference in the Indexes (both the general Index and the special Index for Instruction 155) is to interviewing intellectually disabled victims of sexual assault.

106. New South Wales Bar Association *Submission* (12 January 1994) at 2.

107. Intellectual Disability Rights Service *Submission* (28 January 1994) at 7, citing comments made by the Royal Commission into Aboriginal Deaths in Custody.

108. Guardianship Board of New South Wales *Submission* (31 January 1994) at 1.

109. New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 2.

110. New South Wales Bar Association *Submission* (12 January 1994) at 1.

111. D Dixon “Reform by legal regulation: International experience in criminal investigation”, paper presented at the seminar *Police Reform: Options for Change* (Institute of Criminology, Parliament House, Sydney, 20 September 1995) at 18-19.

112. Law Society of New South Wales *Submission* (23 December 1993) at 1; New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 2; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 1; Australia - Attorney-General’s Department, Office of Legal Aid and Family Services *Submission* (28 August 1992) at 3; Intellectual Disability Rights Service *Submission* (28 January 1994) at 7-8; Guardianship Board of New South Wales *Submission* (31 January 1994) at 1; South Australia - Courts Administration Authority *Submission* (24 January 1994) at 1; Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 2; Australian Capital Territory Council on Intellectual Disability *Submission* (20 July 1992) at 2; New South Wales Bar Association *Submission* (12 January 1994) at 1; Illawarra Disabled Persons’ Trust *Submission* (20 January 1994) at 1; and Dr J Thompson *Submission* (26 January 1994) at 1.

113. New South Wales Police Service *Submission* (24 February 1994) at 2.

114. Office of the Director of Public Prosecutions, New South Wales *Submission* (7 February 1994) at 1.

115. Office of the Ombudsman, New South Wales *Submission* (February 1994) at 2.

116. *Police and Criminal Evidence Act 1984* (Eng) s 67(8).

117. *Police and Criminal Evidence Act 1984* (Eng) s 67(11), s 78.

118. NSWLRC Report 66, Recommendation 8.4 and paras 6.34-6.45. See also NSWLRC DP 29, Proposal 4 and paras 2.39-2.45.

119. Section 138 is substantially the same as cl 137 of the exposure draft of the *Evidence Bill 1993* (NSW).

120. For example: Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 1; Intellectual Disability Rights Service *Submission* (28 January 1994) at 11; Legal Aid Commission of New South Wales *Submission* (2 February 1994) at 1; and Illawarra Disabled Persons’ Trust *Submission* (20 January 1994) at 2. The New South Wales Police Service supported the cross referencing of the current guidelines in relation to victims in the Instructions relating to suspects but did not support a Codes of Practice approach: *Submission* (24 February 1994) at 6.

121. Law Society of New South Wales *Submission* (23 December 1993) at 2.

122. New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 3.

123. For example the Australian Attorney-General’s Department Office of Legal Aid and Family Services submitted that administration of tests by police is not appropriate and that a set of questions is preferable: *Submission* (28 August 1992) at 2. The Hobart Community Legal Service Inc submitted that performing tasks would seem peculiar in the context of police enquiries and would be disorientating and stressful for the subject: *Submission* (20 January 1994) at 2.

124. New South Wales Police Service *Submission* (24 February 1994) at 6.

125. Mr P Hutten *Submission* (8 November 1993) at 5.

126. Letter from Mr I Blackie to the Commission dated 16 March 1995 at 7-9.

127. Gudjonsson at 26.

128. PACE Code C at 1.4.

129. New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 2.

130. For example: Law Society of New South Wales *Submission* (23 December 1993) at 3-4; New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 5; Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 1-2; and Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 2.

131. For example, *R v Langdren* (Supreme Court, NSW, Mathews J, 15 February 1988, Crim D 87/09/80, unreported).

132. *R v Buchanan* [1966] VR 9 at 15. See also the discussion in National Council on Intellectual Disability *The Rights of People with Disabilities: Areas of Need for Increased Protection* (Discussion Paper, Human Rights and Equal Opportunity Commission, 1988) at 57-58.

133. "Man acquitted of hostel murder after judge upholds objections" *The Newcastle Herald* (22 February 1994) at 3.

134. K Deane *Sitting on a See-Saw: An Evaluation of the Independent Third Persons Program* (Unpublished Thesis, University of Melbourne, 1992) at 35. ("Deane (1992)")

135. Ierace at 19.

136. New South Wales Police Service *Submission* (24 February 1994) at 17.

137. Mr P Hutten *Submission* (8 November 1993) at 10.

138. A record of interview made by the accused is not admissible unless it is adopted by him or her by signing it or reading it aloud and stating that it is correct: *R v Harris* (1970) 91 WN 720.

139. Instruction 37.16. The Instructions follow the wording of the *Crimes Act 1900* (NSW) s 410, which is now repealed by the *Evidence (Consequential and Other Provisions) Act 1995* (NSW). This area is now governed by the *Evidence Act 1995* (NSW) s 138 and 139.

140. Ierace at 21. See also C K Sigelman, E C Budd, C L Spanhel and C J Schoenrock "When in doubt, say yes: Acquiescence in interviews with mentally retarded persons" (1981) 19 *Mental Retardation* 53-58.

141. New South Wales Police Service *Submission* (24 February 1994) at 17.

142. Instruction 37.16.

143. Ierace at 21 (emphasis in original).

144. *Crimes Act 1900* (NSW) s 424A; *Crimes Act 1914* (Cth) s 23U-23W.

145. *Crimes Act 1900* (NSW) s 424A(4).

146. *Crimes Act 1900* (NSW) s 424A(4); *Crimes Act 1914* (Cth) s 23B. In New South Wales the system is known as ERISP (Electronic Recording of Interviews with Suspected Persons). See DP 29 at para 6.75 for more information about this system.

147. In an English study 91% of interviewed officers "reported favourable or very favourable attitudes towards [tape-recording] because of its expected effects in producing unchallengeable evidence and reducing accusations of malpractice": D Dixon, C Coleman and K Bottomley "PACE in practice" (1991) 141 *New Law Journal* 1639 at 1640.

148. Victoria Police *Submission* (28 August 1992) at 3.

149. Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 4; New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 7; Office of the Ombudsman, New South Wales *Submission* (February 1994) at 5; Law Society of New South Wales *Submission* (23 December 1993) at 4; Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 2; and Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 3.

150. New South Wales Police Service *Submission* (24 February 1994) at 19.

151. See, for example, J Rowan "Electronic recording of police interviews in New Zealand (II)" [1992] *New Zealand Law Journal* 400 at 402; M McConville "Video taping interrogations" (1992) 142 *New Law Journal* 960 and "Interrogating the video" (1992) 142 *New Law Journal* 1120; New South Wales - Criminal Law Review Division *A Proposed System of Electronically Recording Police Interviews with Suspected Persons* (Attorney General's Department, Sydney, 1986); and J Baldwin "Videotaping in police stations" (1991) 141 *New Law Journal* 1512.

152. See also Intellectual Disability Rights Service *Submission* (28 January 1994) at 17.

153. Intellectual Disability Rights Service *Submission* (28 January 1994) at 17.

154. NSWLRC Report 66 at para 6.18 [footnote reference omitted].

155. NSWLRC Report 66, Recommendation 7.2.9.

156. See also Law Reform Commission of Victoria *Sexual Offences Against People with Impaired Mental Functioning* (Report 15, 1988), Recommendation 9 at paras 106-108.

157. New South Wales Police Service *Submission* (24 February 1994) at 33.

158. New South Wales Sexual Assault Committee *Submission* (15 February 1994) at 3.

159. Law Society of New South Wales *Submission* (23 December 1993) at 5; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 3; and Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 2.

160. Office of the Director of Public Prosecutions, New South Wales *Submission* (7 February 1994) at 3.

161. Intellectual Disability Rights Service *Submission* (28 January 1994) at 18.

162. L A Papaleo "The mentally retarded and the criminal justice system" (1985) 59 *Law Institute Journal* 947 at 948.

163. Instruction 37.18.

164. *Crimes Act 1914* (Cth) s 3ZM-3ZN.

165. Section 3ZM(6)(b).

166. Section 3ZN(2).

167. *Evidence Act 1995* (NSW) s 114.

168. *Evidence Act 1995* (NSW) s 114(4). Note that the forerunner to s 114, cl 113 of the exposure draft of the *Evidence Bill 1993* (NSW), did not include this sub-section.

169. Victoria Police *Submission* (28 August 1992) at 3-4.

170. New South Wales Police Service *Submission* (24 February 1994) at 20, referring to the *Evidence Bill 1993* (NSW) and *Submission* (18 July 1996) at 2.

171. Office of the Director of Public Prosecutions, New South Wales *Submission* (7 February 1994) at 2.

172. Intellectual Disability Rights Service *Submission* (28 January 1994) at 18.

173. Law Society of New South Wales *Submission* (23 December 1993) at 4; Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 2; and Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 3.

174. M Ierace "Acting for the intellectually disabled offender" in D Challinger (ed) *Intellectually Disabled Offenders* (Australian Institute of Criminology, Canberra, Seminar Proceedings 19, 1987) 69 at 75-76.

175. Ierace (1989) at 27. See also New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) at para 11.12.

176. Ierace (1989) at 31.

177. J Stubbs *Bail Reform in New South Wales* (Bureau of Crime Statistics and Research, Sydney, 1984) at 52.

178. *Bail Act 1978* (NSW) s 8.

179. Section 8(2)(a).

180. Sections 8A-9A.

181. Kingsford Legal Centre *Submission* (29 October 1992) at 2.

182. Ierace at 29.

183. Ierace at 29-30; Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 4.

184. F Devine "Bail in Australia" in D Challinger (ed) *Bail or Remand?* (Australian Institute of Criminology, Canberra, Conference Proceedings 6, 1991) 23 at 32. The conditions are set out in s 36(2) of the *Bail Act 1978* (NSW). Section 37 restricts the circumstances in which conditions can be imposed. Julie Stubbs found that of 198 police bail determinations, only 59 (30%) were granted under non-monetary conditions (although 93 (47%) involved the accused and/or an acceptable person agreeing, without security, to forfeit a sum of money in the event of non-compliance): at 16-17.

185. See *Bail Act 1978* (NSW) s 36(3) and *Bail Regulation 1994* (NSW) cl 13-14 in relation to the determination of who is an acceptable person.

186. Section 36(2)(b).

187. Ierace (1989) at 34.

188. Ierace (1989) at 34.

189. Intellectual Disability Rights Service *Submission* (16 October 1992) at 7. See also New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 7-8.

190. *Bail Act 1978* (NSW) s 18(1), s 54; *Bail Regulation 1994* (NSW) cl 5, cl 20; Instruction 155 at 7.05.

191. *Bail Act 1978* (NSW) s 57.

192. New South Wales Police Service *Submission* (24 February 1994) at 22.

193. Office of the Ombudsman, New South Wales *Submission* (February 1994) at 6; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 3; Law Society of New South Wales *Submission* (23 December 1993) at 5; Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 2; Office of the Director of Public Prosecutions, New South Wales *Submission* (7 February 1994) at 2; and New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 5-6.

194. Intellectual Disability Rights Service *Submission* (28 January 1994) at 21.

195. NSWLRC DP 29 at paras 8.25-8.28.

196. NSWLRC DP 29, Proposal 36, paras 8.21-8.24.

197. For example, Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 5; New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 6; Intellectual Disability Rights Service *Submission* (28 January 1994) at 21-22; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 3; and Office of the Ombudsman, New South Wales *Submission* (February 1994) at 6.

198. Instruction 155, 21.01.

199. Instruction 155, 4.07.

200. NSWLRC Report 66 at paras 5.20-5.36 and Recommendation 5.3.

201. Recommendation 5.3.1.

202. Recommendation 5.3.5.

203. New South Wales Police Service *Submission* (24 February 1994) at 13.

204. South Australia Police Department *Submission* (10 January 1994) at 1. Similar comments were made by the South Australian Courts Administration Authority: *Submission* (24 January 1994) at 2.

205. New South Wales Bar Association *Submission* (12 January 1994) at 3.

206. Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 4.

207. New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 5; and Office of the Ombudsman, New South Wales *Submission* (February 1994) at 5.

208. Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 2; Legal Aid Commission of New South Wales *Submission* (2 February 1994) at 2; Law Society of New South Wales *Submission* (23 December 1993) at 4; and Intellectual Disability Rights Service *Submission* (28 January 1994) at 15.

209. Office of the Ombudsman, New South Wales *Submission* (February 1994) at 5.

210. The English Home Office Working Party on Appropriate Adults (discussed at footnote 249 below) also recommended that whenever an appropriate adult was thought to be necessary, a legal

adviser should also be called: Recommendation 10. See C Palmer “The appropriate adult” (May 1996) *Legal Action* 6 at 7.

211. For example, in the case of *R v Brown* (Supreme Court, NSW, McInerney J, 11 December 1992, Crim D 70034/91, unreported) which turned substantially on confessions made by the invalid pensioner defendant, no appropriate adult was called for the defendant who was found to have “borderline intelligence”. See also the discussion of this case on ABC Radio National Background Briefing Program “Playing with Fire” (reporter Sharon Davis, broadcast on 7 December 1993).

212. In one study an examination of 20,805 custody records revealed that an appropriate adult attended only 38 times, despite the fact that a further 446 records revealed the need for such a person and that it was expected that about 7% of suspects (1,363) would require an appropriate adult: Bean and Nemitz at 1, 13. In the Gudjonsson study referred to at para 4.5 above, the researchers, at 25, estimated from the results of psychological testing that more than 20% of the suspects surveyed would fill the English criteria for the presence of an appropriate adult during the police interview, whereas appropriate adults were only called in 4% of cases: at 16.

213. NSWLRC RR 3 at para 4.11.

214. For example Legal Aid Commission of New South Wales *Submission* (2 February 1994) at 2; New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 5; Office of the Ombudsman, New South Wales *Submission* (February 1994) at 5; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 2; Intellectual Disability Rights Service *Submission* (28 January 1994) at 15; St Vincent de Paul Society, New South Wales Council, Disability Services - Residential, Client Group *Submission* (15 June 1993) at 1; Law Society of New South Wales *Submission* (23 December 1993) at 4, 5; Illawarra Disabled Persons’ Trust *Submission* (20 January 1994) at 1-2; South Australia - Courts Administration Authority *Submission* (24 January 1994) at 2.

215. For example: South Australia - Police Department *Submission* (10 January 1994) at 1.

216. For more detail about other jurisdictions see NSWLRC DP 29 at paras 6.16-6.31.

217. Victoria Police Service *Operating Procedure Manual* at para 4.6.3.

218. South Australia Police General Order 3580 at paras 11.1-11.3.

219. Western Australia Commissioner of Police *Orders and Procedures Manual* at Part A315.

220. Queensland Police Service *Operational Procedures Manual* (Vol 1) at paras 6.3.1-6.3.5.

221. Northern Territory Police General Order Q1 “Questioning and Investigations” at para 14.

222. Australian Federal Police’s ACT Region, Guideline 22/93 “Mental Health Patients and Forensic Patients”. This guideline is currently under review and substantial amendment to its content and form is anticipated.

223. *Police and Criminal Evidence Act 1984* (Eng) s 66: *Codes of Practice* (revised ed, HMSO, London, 1995) (the “PACE Codes”). See Code C: “Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers” at para 3.9. Note that the PACE system has been significantly altered by recent changes to the right to silence, see, for example B Littlechild “Reassessing the role of the ‘Appropriate Adult’ “ [1995] *Criminal Law Review* 540-545.

224. See, for example D Sheppard *The Appropriate Adult: A review of the case law 1988-1995* (The Institute of Mental Health Law, Norfolk, July 1995).

225. For evaluations of the ITP program see Victoria - Department of Community Services *Statewide Victoria Police and Independent Third Person Training Project Report* (Department of Community

Services, 5 April 1993) and Deane (1992). The Commission understands that a later review has been conducted for the Victorian Department of Human Services but the Commission has not yet been able to obtain a copy of the review.

226. *Crimes Act 1914* (Cth) s 23H, 23K. A recent review of the Act by the Commonwealth Attorney-General's Department did not support the extension of the "interview friend" and other special provisions to people with an intellectual disability: *Review of Part 1C of the Crimes Act 1914* (Discussion Paper, Canberra, 1995) at 6. It argued that a special regime would impose an unreasonable burden on police who were not qualified to identify intellectual disability and that questions as to the fairness of questioning and admissibility were better left to the courts. It argued that the existing protections such as the right to communicate with a legal practitioner meant that the extra burden on police was not justified. The paper also noted at 5, however, that people with an intellectual disability rarely are the subject of investigation for Commonwealth offences.

227. Australian Capital Territory Council on Intellectual Disability *Submission* (20 July 1993) at 2-3.

228. New South Wales Bar Association *Submission* (12 January 1994) at 4.

229. Bean and Nemitz at 42 list this and other problems encountered by professionals acting in this role. The report concludes "[g]iven the problems described above, it is reasonable to doubt whether some professionals can protect the rights of detained mentally disordered suspects".

230. D Dixon, K Bottomley, C Coleman, M Gill and D Wall "Safeguarding the rights of suspects in police custody" (1990) 1 *Policing and Society* 115 at 119-120.

231. The Notes for Guidance to the PACE Code express a preference for trained personnel to fulfil the role. Code C, Note 1E provides: "In the case of people who are ... mentally handicapped, it may in certain circumstances be more satisfactory for all concerned if the appropriate adult is someone who has experience or training in their care rather than a relative lacking such qualifications. But if the person himself prefers a relative to a better qualified stranger or objects to a particular person as the appropriate adult, his wishes should if practicable be respected."

232. L M Osman *Finding New Ways: A Review of Services to the Person with Intellectual Disability in the Victorian Criminal Justice System* (Office of the Public Advocate, Victoria, 1988) at 17. See also New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 7; Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 4; Littlechild at 542; and Dixon (1990) at 119.

233. Deane (1992) at 49.

234. Ierace at 17.

235. Mr P Hutten *Submission* (8 November 1993) at 13.

236. Legal Aid Commission of New South Wales *Submission* (2 February 1994) at 2.

237. For example, Intellectual Disability Rights Service *Submission* (16 October 1992) at 7.

238. Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (18 August 1992) at 3.

239. C Wood "Independent Third Persons - Friend or foe" (1994) 15 *Socio-Legal Bulletin* 54 at 55.

240. Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (18 August 1992) at 3.

241. Mr I Blackie *Submission* (12 December 1993) at 2 and *Letter* (16 March 1995) at 11.

242. D Feben *The Right to be Heard: Obtaining Evidence From Intellectually Disabled People* (Office of the Public Advocate, Victoria, Discussion Paper, August 1988) at 30-31. See also P Fennell "The Appropriate Adult" [1993] 90 (19) *[Law Society's] Gazette* 19 at 20; and Deane (1994a) at 50, referring to the contradiction between the ITP facilitating communication and the suspect's right to silence.

243. In relation to the role of the independent adult for police interviews with children, "[t]he Queensland, New South Wales, New Zealand and English courts have rejected the proposition that the role of the independent adult is that of a neutral observer or referee whose function is to ensure fair treatment of the young person": R Ludbrook *Police Questioning of Young People: The Role of the Independent Adult* (Discussion Paper 1/94, National Children's and Youth Law Centre, 1994) at 13.

244. Dr W Glaser *Submission* (23 August 1995) at 3. See also Deane (1994a) at 50.

245. K Deane "Intellectual disability: Police interrogation" (1994) 19 (4) *Alternative Law Journal* 194. ("Deane (1994b)")

246. Fennell at 20, referring to British cases where social workers acting as "Appropriate Adults" have given information to the police. See also Littlechild at 543.

247. Mr I Blackie *Letter* (16 March 1995) at 10; and Intellectual Disability Rights Service *Submission* (28 January 1994) at 16.

248. Wood at 55.

249. The *Royal Commission on Criminal Justice* (Cmmd 2263, London, HMSO, 1993) also recognised the need for further research about "appropriate adults" and, instead of making recommendations in this area, recommended that there be a further comprehensive review undertaken, "possibly by a multi-disciplinary working party chaired by the Home Office", Chapter 2, para 86 and Recommendations 72-73. Accordingly, a further report was prepared: *Appropriate Adults: Report of Review Group* (Home Office, London, 1995).

250. Deane (1992) at 59.

251. New South Wales Bar Association *Submission* (12 January 1994) at 6-7.

252. Ability Incorporated *Submission* (22 May 1995) at 1. See also Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 2.

253. New South Wales Police Service *Submission* (24 February 1994) at 29.

254. See Williams at 26-27.

255. New South Wales Bar Association *Submission* (12 January 1994) at 4.

256. *Crimes Act 1914* (Cth) s 23J.

257. New South Wales Police Service *Submission* (24 February 1994) at 16.

258. *Children (Criminal Proceedings) Regulation 1995* (NSW) cl 6, and Instruction 75.03.

259. *R v Warrell* [1993] 1 VR 671 at 678-679.

260. *Crimes Act 1914* (Cth) s 23H(2)(c) and s 23K(1).

261. New South Wales Police Service *Submission* (24 February 1994) at 14.

262. The Commission notes that the Illawarra Disabled Persons' Trust is currently undertaking a pilot program of providing trained support persons for suspects with an intellectual disability.

263. See also Littlechild at 544 for support for this recommendation.

264. Mr P Hutten *Submission* (8 November 1993) at 13.

265. See *Crimes Act 1914* (Cth) s 23L; PACE, Code C, Annexure C - "Vulnerable suspects: Urgent interviews at police stations".

266. NSWLRC DP 29, Proposal 26.

267. See NSWLRC DP 29 at para 6.28.

268. Fennell at 20.

269. *Appropriate Adults: Report of Review Group* (Home Office, London, 1995), cited in Palmer at 7.

270. New South Wales Police Service *Submission* (24 February 1994) at 16.

271. New South Wales Bar Association *Submission* (12 January 1994) at 4.

272. *Children, Young Persons and their Families Act 1989* (NZ) s 226.

273. Ludbrook at 30-31.

274. *Evidence Act 1995* (NSW) s 18. Section 18 does not apply to certain offences - see s 19.

275. See Australian Law Reform Commission *Evidence* (Report 38, 1987) at paras 79-83.

276. New South Wales - Attorney General's Department *Protecting Confidential Communications from Disclosure in Court Proceedings* (Sydney, June 1996).

277. *Evidence Act 1995* (NSW) s 137. See also s 135-136.

278. Ms J Lannen *Submission* (23 December 1993).

279. Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 1; Law Society of New South Wales *Submission* (24 February 1995) at 1; Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 1; Community Services Commission *Submission* (2 March 1995) at 4; Intellectual Disability Rights Service *Submission* (1 March 1995) at 6; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 2; and New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 5.

280. NSWLRC DP 35, Proposal 7.

281. New South Wales Police Service *Submission* (February 1995) at 4.

282. *Evidence Act 1995* (NSW) s 117(1).

283. *Evidence Act 1995* (NSW) s 118-119.

284. *Evidence Act 1995* (NSW) s 117(1).

285. *Evidence Act 1995* (NSW) s 137. See also s 135-136.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

5. Fitness to be Tried

RECOMMENDATIONS

General issues: The Mental Health (Criminal Procedure) Act

10. The provisions of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be relocated in the *Criminal Procedure Act 1986* (NSW). [See para 5.7 and draft Bill in Appendix C]

Fitness to be tried: Supreme and District Courts

11. Whenever the Mental Health Review Tribunal is required to determine whether a person has a mental illness, it should also determine whether the person has an intellectual disability. [See paras 5.23-5.24 and cl 73, cl 74 and cl 103 of the draft Bill]

12. Section 10(4) of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to extend the circumstances in which a charge may be dismissed as follows:

If, in respect of a person charged with an offence (other than an offence to be dealt with summarily in a Local Court), the court is of the opinion that it is inappropriate to inflict any punishment or any punishment other than a nominal punishment, having regard to the trivial nature of the charge or offence, the nature of the person's condition, the periods of the person's custody or detention in respect of the offence or any other matter which the court thinks it proper to consider, the court may determine not to conduct an inquiry and may dismiss the charge and order that the person be released. [See para 5.25 and cl 64(4) of the draft Bill]

13. The right to election for a hearing by judge alone in fitness hearings should be removed. Instead, fitness hearings should always be heard by judge alone rather than by jury. The right to election for a hearing by judge alone should remain for special hearings, and, if the accused is unable to make the election, his or her counsel should have the statutory right to make the election on the client's behalf, in the client's interest. [See paras 5.26-5.30 and cl 66 and cl 79 of the draft Bill]

14. Any statement made by an accused when interviewed by an expert for the purposes of preparing a fitness report about the events relating to the offence should not be received as evidence of the facts against the accused. [See paras 5.31-5.34 and cl 71 of the draft Bill]

15. Section 14 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to provide that, in the period between a finding of unfitness and the special hearing, the court may, on an application by either side, have the matter brought back before it to consider any possible variation in the orders made under section 14(b). [See paras 5.35-5.37 and cl 72 of the draft Bill]

16. For the purpose of setting the limiting term, the judge should be required to give the person the benefit of assuming that the person would have pleaded guilty had he or she been fit to be tried. [See paras 5.38-5.41 and cl 101 of the draft Bill]

17. Section 27 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to the effect that, following the special hearing, the order as to the person's place of detention is made by the Tribunal, not the court. [See para 5.42 and cl 103 of the draft Bill]

18. A qualified finding of guilt at a special hearing should be an absolute bar to further prosecution in respect of the same circumstances, and should no longer be subject to section 28 of the *Mental Health (Criminal Procedure) Act 1990* (NSW). [See paras 5.43-5.44 and cl 81 of the draft Bill]

19. Executive discretion should be removed from all decisions regarding forensic patients (except as limited by Recommendation 20) so that all decisions as to their placement, security conditions and release are made by the Mental Health Review Tribunal. This will require amendments to the *Mental Health Act 1990* (NSW) and the *Mental Health (Criminal Procedure) Act 1990* (NSW) to enable the Tribunal to make orders not recommendations. [See paras 5.45-5.50]

20. Following the removal of executive discretion:

(a) section 84(1) of the *Mental Health Act 1990* (NSW) should be limited to apply only to forensic patients who have been transferred to hospital while serving a sentence of imprisonment or life sentence;

(b) section 84(3) of the *Mental Health Act 1990* (NSW) should be repealed; and

(c) the requirement that the Attorney General notify the Minister for Police and Emergency Services in sections 18 and 29(3) of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be removed. [See paras 5.51-5.56 and cl 75 and cl 85 of the draft Bill]

21. The *Mental Health Act 1990* (NSW) and/or the *Mental Health Regulation 1990* (NSW) should be amended to include a non-exhaustive list of release conditions which may be imposed by the Mental Health Review Tribunal. [See paras 5.57-5.58]

22. Following on from the abolition of executive discretion outlined in Recommendation 19, the following appeal structure should be established for Tribunal determinations:

(a) the Tribunal should have a duty to give reasons;

(b) Tribunal determinations should not be reviewable on the merits; and

(c) administrative review of all Tribunal determinations should lie to a single judge of the Supreme Court.

This will require amendments to the *Mental Health Act 1990* (NSW); the *Mental Health (Criminal Procedure) Act 1990* (NSW) and the *Supreme Court Act 1970* (NSW). [See paras 5.59-5.65]

Local Courts

Fitness to be tried

23. If the question of a person's fitness to be tried is raised in any matter heard in a Local Court (apart from a committal hearing), the magistrate must:

(a) consider proceeding under section 32 or 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW); and

(b) if the magistrate does not dismiss the charge under section 32 or 33, the magistrate must hold a preliminary inquiry to determine the question of the

person's fitness. If found fit to be tried, the matter is to be dealt with in the usual way in the Local Court. If found unfit to be tried, the usual fitness procedures involving the Mental Health Review Tribunal will apply. [See paras 5.72-5.75 and cl 64 of the draft Bill]

Diversion

24. Section 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to provide that:

(1) A Magistrate may dismiss a charge and discharge an accused person if, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:

(a) that the accused person has an intellectual disability, a mental illness or a mental condition, but is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, and

(b) that it is not appropriate to proceed according to law, having regard to an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, the trivial nature of the charge or offence, the nature of the person's condition, the periods of the person's detention or custody in respect of the offence or any other matter that the Magistrate thinks it proper to consider.

The dismissal of charges under sections 32-33 is to be noted on a relevant record so that the court is aware of this fact on subsequent occasions. [See paras 5.76-5.82 and cl 88 of the draft Bill]

Explanatory Note to Recommendations 10-24

These recommendations refer to the current legislation, the *Mental Health (Criminal Procedure) Act 1990* (NSW). In Recommendation 10, the Commission recommended that all the provisions of the *Mental Health (Criminal Procedure) Act 1990* (NSW) be relocated in the *Criminal Procedure Act 1986* (NSW) but, for reasons of readers' convenience, the current legislation references are used. Appendix C sets out a new draft Part of the *Criminal Procedure Act 1986* (NSW), incorporating these recommendations. All references to "intellectual disability" in legislation are to be defined as in Recommendation 1. Note that the draft legislation does not include savings and transitional provisions. The Commission believes that such provisions should be determined at the time of enactment, as the choice of appropriate provisions may be affected by whether or not the draft legislation is enacted in its entirety.

The Commission has only chosen to prepare draft legislation to reflect the recommended changes to the *Mental Health (Criminal Procedure) Act 1990* (NSW). The recommendations in this chapter will also require amendments to other legislation, including the *Mental Health Act 1990* (NSW) and the *Supreme Court Act 1970* (NSW).

BACKGROUND TO THE COMMISSION'S RECOMMENDATIONS

5.1 This chapter considers fitness to be tried, first discussing general issues and then the procedures in the higher and lower courts respectively. A person must be "fit to be tried", that is, capable of participating in the court process, before he or she can be dealt with by a criminal court:

> Natural justice requires that an accused person should be present at his trial and that he should have a reasonable understanding of its purpose. Just as it would be unfair to try a person in his absence, so it would be unfair to try a defendant who lacked the capacity to understand the charges against him or to give instructions for his defence.[1]

It is not an accused's fitness at the time of the offence which is relevant, but at the time of the trial.[2] Intellectual disability is one of many factors which may affect a person's ability to comprehend the court process, to give instructions to lawyers and to give evidence in court. Other such factors include age, mental illness and some physical disabilities.

5.2 The current regime for dealing with fitness to be tried in New South Wales came into operation on 22 August 1986 as a parcel of amendments to the *Crimes Act 1900* (NSW) and the enactment of part of the *Mental Health Act 1983* (NSW). The changes were prompted by general dissatisfaction with the previous system of indeterminate detention at the Governor's pleasure.[3] The Mental Health Review Tribunal (the "Tribunal") was also established in 1986 to provide, amongst other things, expert assistance to the courts in this area. Although the regime is largely unchanged, following the repeal of the *Mental Health Act 1983* (NSW) and amendments to the *Crimes Act 1900* (NSW), it is now governed by the *Mental Health (Criminal Procedure) Act 1990* (NSW) (the "MHCP Act") and the *Mental Health Act 1990* (NSW) (the "MH Act"), which both came into force on 3 September 1990. The two Acts contain a complex series of procedures designed to deal fairly with the accused's possible unfitness. The procedure to be followed in such cases differs depending on whether the matter is to be heard in the Local Courts or alternatively in either the Supreme or District Courts. The two types of procedures will be considered separately in this chapter.

5.3 After detailed consideration the Commission has largely endorsed the current regime. The Commission has considered the debate about the definition of fitness to be tried, the appropriateness of the concept of a special hearing and limiting terms, and the merits of the diverse systems operating in other jurisdictions such as England, but has declined to recommend changing the fundamental basis of the New South Wales system. Instead, the Commission has tried to improve the existing system to meet the circumstances of people with an intellectual disability, though some major changes are recommended, such as the removal of executive discretion (Recommendation 19).

Fitness to be tried

5.4 The New South Wales statutory regime does not define fitness to be tried, so the courts must rely on the common (or judge-made) law. The usual test can be summarised as the ability of the accused:

> to understand what he or she is charged with;
>
> to plead to the charge;
>
> to exercise his or her right of challenge to jurors;
>
> to understand generally the nature of the proceedings;
>
> to follow what is going on in court in a general sense (though not necessarily the purpose of court formalities);
>
> to understand the substantial effect of any evidence given against him/her; and
>
> to decide what defence he or she will rely upon, and make this and his or her version of facts known to the court and his or her counsel. (The accused need not, however, understand court procedure and need not have the mental capacity to make an able defence.)[4]

Fitness to be tried: General issues

5.5 The MHCP Act and the MH Act both include terminology which is confusing and/or inappropriate. However, changing some of these terms causes difficulties because of the overlapping civil and criminal roles of the Mental Health Review Tribunal and the fact that it makes determinations in relation to a variety of mental conditions. In Chapter 3, the Commission has already recommended that references to "developmentally disabled" be replaced by "intellectual disability" and that a new and uniform definition of "intellectual disability" be utilised. In DP 35, the Commission also proposed that references to "forensic patient" be amended to "forensic person".[5] The reference to "patient" implies that the person is ill and either in hospital or under medical care. Yet forensic patients with an intellectual disability (unless they also have a mental illness) will be detained in gaol rather than in hospital. However, on reflection, it was decided that the term "forensic person" would create greater confusion than the present term. Though the Commission is concerned by the reference to "patient" in relation to people with an intellectual disability, it has been unable to suggest a preferable term which also allows hospitals and the Tribunal to distinguish between their civil and "criminal" patients. Nor does the Commission consider that the Mental Health Review Tribunal should change its name to avoid reference to "mental health", despite the confusion sometimes caused by its name, as the majority of the Tribunal's work is in its civil commitment jurisdiction affecting people who have a mental illness or disorder. The forensic part of the Tribunal's work forms only a small percentage of its total workload[6] and people with an intellectual disability comprise a minority of these cases.

5.6 A further area of confusion is the fact that the current legislation refers to the issue of fitness as "the question of a person's unfitness to be tried".[7] Thus a judge or jury has to determine whether a person is "unfit" or "not unfit" to be tried, which can create confusion, particularly for juries' understanding of the trial judge's direction. However, unfortunately the use of unfitness is more appropriate because of the presumption of fitness to be tried. The presumption can only be overset by proving that the person is unfit to be tried, so that the question to be considered and proven is that of unfitness, not fitness.

Recommendation 10: Relocation of the provisions of the Mental Health (Criminal Procedure) Act 1990 (NSW)

5.7 In DP 35 the Commission also proposed that the provisions of the MHCP Act be returned to the *Crimes Act 1900 (NSW)* to avoid the confusion caused by the present title. The title of the current legislation, "Mental Health (Criminal Procedure) Act", suggests that the provision only applies to those who are mentally ill whereas the fitness and defence of mental illness provisions apply to a much broader category of persons, including people with an intellectual disability. The only submission which addressed this issue in detail stated that the provisions should not be relocated in the *Crimes Act 1900* (NSW) as they apply to criminal offences committed under any Act.[8] Taking this concern into account and also the current Parliamentary Counsel practice of separating substantive law and procedural provisions in criminal legislation, the Commission suggests that these provisions would be better placed in the *Criminal Procedure Act 1986* (NSW). This placement may also ensure that more practitioners are aware of these procedures than is presently the case. The draft legislation attached to this Report (see Appendix C) reflects this decision.

Adversarial nature of the proceedings

5.8 The current legislation provides that a fitness inquiry "is not to be conducted in an adversary manner".[9] However, in practice, such inquiries often result in conflicting expert reports and vigorous cross examination. The Commission has been informed that this sometimes occurs because of lack of understanding about the consequences which follow a finding of unfitness. A highly adversarial approach is particularly inappropriate where there is little dispute about the person's unfitness to be tried or where a person has a permanent condition and has been found unfit in relation to previous charges. The Commission suggests that some difficulties will be overcome by removing the involvement of a jury in fitness inquiries (see Recommendation 13), but again stresses the importance of the special nature of the fitness inquiry. This is reflected in cl 67(2) of the draft legislation contained in Appendix C.

SUPREME AND DISTRICT COURTS

Background to the recommendations

Who can raise fitness and when?

5.9 For criminal proceedings in the Supreme and District Courts, any party to the proceedings or the court can raise the issue of the accused's fitness.[10] The issue can be raised at any time during the course of the hearing but preferably is to be raised before the person is arraigned.[11] If raised before arraignment, the Attorney General must determine whether an inquiry should be conducted into a person's fitness to be tried prior to the hearing,[12] or, if the question is raised after the person is arraigned, the court must hear submissions, in the absence of the jury, about whether there should be such an inquiry.[13] If the Attorney General decides that an inquiry should be conducted, or the question of unfitness is raised in good faith after arraignment, the court must hold a fitness inquiry.[14] Before such an inquiry is carried out the court may make any appropriate orders, including either granting the person bail or remanding the person in custody, or requiring psychiatric examinations or reports.[15] The fitness inquiry is carried out by the court either with a judge sitting alone or with a jury constituted for that purpose.[16]

If found fit/unfit to be tried by the court?

5.10 If the defendant is found fit to be tried, criminal proceedings may re-commence or continue.[17] If a jury has been used to determine fitness, a new jury must be empanelled.[18] If found unfit to be tried, the person is referred to the Tribunal,[19] which must determine whether, on the balance of probabilities, the person will become fit to be tried during the period of 12 months after the finding of unfitness.[20] (This determination is referred to in this chapter as the "initial determination".)

The Mental Health Review Tribunal

5.11 The Tribunal makes or reviews a variety of orders and decisions affecting people with mental illnesses or mental disorders living in the community or in hospital. It also makes determinations and recommendations to government about certain people involved in the criminal justice system, namely those found unfit to be tried by a court, found not guilty on the ground of mental illness, or who became mentally ill while in prison and have been transferred to a psychiatric hospital. These people are known as "forensic patients".[21] The Tribunal consists of both full-time and part-time members, including lawyers, psychiatrists and other suitably qualified or experienced persons.[22] When considering forensic patients, the Tribunal meets as a three person panel consisting of the President or Deputy President, a psychiatrist and "a member (not being a psychiatrist or a barrister or solicitor) who has other suitable qualifications or experience".[23] Its meetings are to be conducted as informally as possible and it is not bound by the rules of evidence.[24] Proceedings of the Tribunal are open to the public except in cases where an objection made by one of the parties to the proceedings is upheld by the Tribunal.[25]

Determination that the person WILL become fit to be tried within 12 months

5.12 Given that intellectual disability is a permanent condition, it is unlikely that a person with an intellectual disability will become fit to be tried within the year. People with some forms of mental illness, however, may recover sufficiently to become fit. Additionally, a person with an intellectual disability who also has a mental illness may become fit when the mental illness is treated. If the Tribunal's initial determination is that (on the balance of probabilities) the person *will* become fit to be tried within 12 months, it also must determine whether the person is suffering from a mental illness or a mental condition for which treatment is available in a hospital.[26] The court is then notified of the Tribunal's findings and may make a number of orders affecting that person, including release on bail or detention for up to 12 months in a hospital or "place other than a hospital".[27] If the person is detained the Tribunal must review the person's case again as soon as possible and determine whether in its opinion:

(a) the person has become fit to be tried for an offence; and

(b) the safety of the person or any member of the public will be seriously endangered by the person's release.[28]

If, at this or subsequent reviews during the 12 month period, the Tribunal is of the opinion that the person has become fit to be tried, it must notify the Attorney General.[29] The Attorney General then either advises the Minister for Health that no further proceedings will be taken, and the person is released after certain notification requirements are fulfilled, or requests the court to hold a further inquiry about the accused's fitness.[30]

5.13 *Release.* If, at subsequent reviews during the 12 month period, the Tribunal still finds the person *has not become fit to be tried* (despite the original finding by the Tribunal that the person *is* likely to become fit) and is satisfied that the safety of the person or any member of the public will not be seriously endangered by the person's release, the Tribunal must make a recommendation to the Minister for Health for the person's release.[31] The Tribunal does not have the power itself to order the release of the person. The Minister for Health must then notify the Attorney General and the Director of Public Prosecutions ("DPP").[32] The DPP has 21 days to advise the Attorney General if criminal proceedings will be taken against the person.[33] At this point the Attorney General can object to the person's release either because the person "has served insufficient time in custody or under detention" or because the Attorney General or the DPP intends to proceed with criminal charges against the person.[34] If the Attorney General does not object, the Minister for Health may release the person, though such release may be subject to conditions.[35] Breach of conditions can lead to arrest and further detention.[36]

Determination that the person WILL NOT become fit to be tried within 12 months

5.14 If the Tribunal's initial determination (when the matter is first referred to it by the court) is that (on the balance of probabilities) the person *will not* be fit to be tried within 12 months, the Tribunal must notify the Attorney General.[37] The Attorney General, after receiving advice from the DPP, can then either direct that a "special hearing" be held or decide not to proceed against that person, and advise the relevant agencies accordingly.[38] In the latter case the person must be released.[39]

5.15 A number of submissions suggested that people with an intellectual disability should proceed directly to the special hearing following a finding of unfitness, as their condition is unchanging and the finding by the Tribunal that the person will not be fit to be tried within 12 months becomes an unnecessary formality and delay.[40] However, this presumes that the cause of the person's unfitness was correctly identified at the fitness hearing. Many people have a range of factors, some permanent, some treatable, which may affect their fitness to be tried. Treatment for a previously undiagnosed mental illness in the 12 month period may allow a person with an intellectual disability to become fit to be tried. The proposal removes the protection provided by having the person appear before an expert Tribunal, which not only makes a determination about the person's likely fitness (which may in fact be different from the court's determination) but which also makes a determination about the person's appropriate detention for the period before the special hearing. The Commission prefers that the Tribunal should consider all people who have been found unfit to be tried. It believes that the Tribunal, rather than a court, should make the decision that the person is unlikely to become fit to be tried within the 12 months, even for people with an intellectual disability. The Commission appreciates that this step does lead to some delays in the process, but believes that the protections provided are important. Other ways of reducing delays in the fitness process are considered in the recommendations below.

5.16 *Special hearing.* A special hearing is conducted like a normal criminal trial before a judge and jury or, if the accused elects, by a judge sitting alone. The verdicts available at the special hearing are:

(a) not guilty of the offence charged [in which case the person is released];

(b) not guilty on the ground of mental illness;

(c) that on the limited evidence available, the accused person committed the offence charged;

(d) that on the limited evidence available, the accused person committed an offence available as an alternative to the offence charged.[41]

If a finding of guilt "on the limited evidence available" is made at that special hearing (that is, verdicts (c) or (d)), the court must indicate the sentence it would have imposed if the special hearing had been a normal trial with a finding of guilt. Such a sentence, if any, is referred to as a "limiting term".[42] There is a right for an appeal from such a verdict.[43] After sentencing, the court refers the person to the Tribunal. The Tribunal must then determine whether or not the person has a mental illness or mental condition and notify the court of its determination,[44] following which the court can order that the person be detained in a hospital or "in a place other than a hospital".[45] In practice, the only other alternative in New South Wales to a psychiatric hospital is gaol, even though this generally will be inappropriate for a person who is unfit to be tried.

5.17 *Release after the special hearing.* After the special hearing, the responsibility of the Tribunal continues for the person serving a limiting term, who remains classified as a "forensic patient". As for persons found unfit to be tried and ordered to be detained (see para 5.10), the Tribunal must, as soon as practicable, review the person's case. It must determine whether:

(a) the person has become fit to be tried for an offence; and

(b) the safety of the person or any member of the public will be seriously endangered by the person's release.[46]

The procedure then is similar to that set out in paras 5.12-5.13. In any event, release will be automatic at the end of the limiting term.[47] There is no power to detain the person beyond the limiting term. However if the person is a "mentally ill person" or a "mentally disordered person" and a medical practitioner or an "accredited person" is satisfied that no other appropriate means for dealing with a person are reasonably available, the person can be detained as an involuntary patient.[48]

Continuing review by the Tribunal of forensic patients

5.18 The Tribunal may, at any time, review the case of persons detained who were considered unfit to be tried and make recommendations for release to the Minister for Health. Such a review (as for all forensic patients) must take place at least every six months.[49] As always, the Tribunal cannot make a recommendation for release "unless it is satisfied, on the evidence available to it, that the safety of the patient or any member of the public will not be seriously endangered by the person's release".[50] As part of the regular six monthly review, the Tribunal must notify the Attorney General if a detained person has become fit to be tried.[51] The Attorney General, after consultation with the DPP, must then either request the court to hold a further inquiry about the accused's fitness or advise the Minister for Health that no further proceedings will be taken and the Minister for Health must order the person's release.[52] Appeals are discussed at paras 5.60-5.65 below.

Developments since DP 35

Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995

5.19 The Model Criminal Code Officers Committee has developed a Model Bill in the area of fitness to be tried and mental impairment. The October 1995 version was completed following the release of a draft Bill in late 1994 and a period of consultation. The 1995 Bill, which is substantially similar to the 1994 version, has been sent to the Standing Committee of Attorneys General ("SCAG") and the relevant State Ministers, but has not yet been officially endorsed by SCAG. South Australia and Western Australia have recently introduced Acts with some similarities to the Model Bill.[53]

5.20 The Bill provides for fitness inquiries and special hearings, but all relevant decisions are made by the court, not the executive or a Tribunal. Other differences between the Model Bill and the New South Wales position are:

the same procedures apply to all courts, including Local Courts (cl 5);

there is a statutory definition of fitness (cl 6);

if the question of fitness is raised at a committal hearing, the committal must be completed and the question reserved for determination at trial (cl 8(2));

the same jury can be used for the fitness issue and the remainder of the proceedings involving the accused (cl 10(3));

the person's situation is reviewed by an appropriate expert every 12 months, not every 6 months as in New South Wales (cl 21);

the Bill sets out principles of release to guide the courts (cl 23);

evidence of findings made at the fitness or special hearings is not admissible against the defendant in criminal proceedings (cl 31); and

there are provisions for reporting on the attitudes and counselling of the next of kin and victims.

Victorian review of Governor's Pleasure legislation

5.21 The Community Development Committee of the Parliament of Victoria also reported on this area in October 1995.[54] In brief, the Committee appears to have largely followed the special hearing and limiting term approach adopted in the Model Bill, though with Victorian adaptations. The Committee has not recommended a system based on the New South Wales Tribunal model. Additionally, unlike the Model Bill, the Committee did not believe that the recommended system should apply to courts of summary jurisdiction. The Committee also recommended the establishment of a Forensic Leave Panel to hear all applications for leave of absence by forensic patients.

Discussion of the Commission's recommendations: Supreme and District Courts

5.22 The Commission's recommendations in this area are designed primarily to achieve two ends, first to ensure that the unfit accused is not disadvantaged compared to a "normal" accused person, and secondly to ensure that the unfit accused with an intellectual disability, which is a permanent condition, is not disadvantaged compared to other persons found unfit for other reasons, for example, because of mental illness and physical disability.

Recommendation 11: Reference to intellectual disability

5.23 The Commission recognises that the current fitness legislation contains few references to people with an intellectual disability, even though they appear to represent an increasing, though still small, proportion of forensic patients.[55] The Commission believes that the special needs of this group should be recognised in legislation. Therefore this recommendation inserts specific references to intellectual disability in those sections of the fitness legislation which refer to the Tribunal's determination about the person's mental illness or mental condition, currently s 16(2), s 17(3), s 24(2) and s 27 of the MHCP Act.[56] Without this insertion the Tribunal is not required to make any determination in relation to services or "treatment" for a forensic patient with an intellectual disability,[57] though it may do so as a matter of practice. By contrast, it has to make certain determinations for a person with a mental illness or a "mental condition", which is defined to exclude intellectual disability. These determinations then affect the orders a court is to make.

5.24 In DP 35 the Commission suggested that to overcome the confusion in this area about the difference between mental illness and intellectual disability and to ensure that specific consideration is given to the needs of the forensic patient with an intellectual disability, either "mental condition" needs to be re-defined, or a reference to intellectual disability inserted into the MHCP Act where appropriate. The Commission has adopted the latter solution as it considers it inappropriate to redefine "mental condition"

to include “intellectual disability” as that is clearly not the intention of the Act and it may continue the confusion between mental illness and intellectual disability.

Recommendation 12: Trivial offences, section 10(4)

5.25 The court may decide not to conduct a fitness inquiry, but instead to dismiss the charge and order that the person be released if:

> it is of the opinion that it is *inappropriate,* having regard to the *trivial* nature of the charge or offence, the nature of the person’s disability or any other matter which the court thinks proper to consider, *to inflict any punishment ...* [emphasis added].[58]

This alternative is only available for indictable offences (which are unlikely to be considered to be trivial offences) and it has been stated that the section can only be used in rare circumstances.[59] The Commission supports the retention of the section to avoid lengthy and futile fitness proceedings in appropriate cases.[60] However, it believes the section should be amended to overcome the present problem that a person who has already spent more time on remand than any likely sentence for the offence could not be discharged under this section, because a back-dated sentence (or even a bond) is still considered to be “punishment”.[61] The Commission therefore recommends that, instead of the words “any punishment”, the wording of the equivalent section in the Commonwealth legislation be adopted, that is: “to inflict any punishment, or to inflict any punishment other than a nominal punishment ...”,[62] together with a specific mention in the legislation that the court may take into account the time already spent in custody. This change was generally supported, except by the Police Service.[63] The phrase “nominal punishment” appears in s 556A of the *Crimes Act 1900* (NSW) and therefore is a concept with which courts are familiar.

Recommendation 13: The accused’s right to election for judge alone

5.26 In DP 35 the Commission discussed the problem of enabling an “unfit” accused knowingly to exercise his or her right to election for a hearing by a judge sitting alone, instead of with a jury. The right can only be exercised if the judge “is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor”.[64] The prosecutor must also consent to the election.[65] Seeking and receiving advice about such an election is likely to be a difficult matter for an accused whose understanding is questionable. Under the District Court Rules,[66] the election is indicated by signing an approved form and lodging that form with the registry.

5.27 An alternative would be to avoid the question of the informed consent of the accused by removing the element of choice. Accordingly, the Commission proposed in DP 35 that the right to election for a hearing by judge alone in fitness and special hearings be removed and that: (a) fitness hearings be always heard by judge alone; and (b) special hearings be always heard by judge and jury. This was based on the rationale that a fitness hearing (which is largely dependent on expert evidence) is most appropriately heard by a judge alone, while a special hearing (which is to be as similar as possible to a normal criminal trial) should be heard by a judge and jury.

5.28 This proved to be a particularly controversial recommendation. There were arguments both for and against this proposal - the main argument against was that it was unfair to the accused to remove their valuable right to elect.[67] In particular it was argued that an unfit accused should have the right to elect to have their special hearing heard by a judge alone. The ability to have a special hearing heard by a judge alone is clearly perceived as an advantage for the defence in some cases and an unfit accused should not be deprived of a potential advantage which is available to a fit accused. The Mental Health Advocacy Service argued that in recent years many cases which raise issues of mental illness or diminished responsibility are heard by judge alone and that such trials are quicker and less stressful for the accused. It also argued that a person may be unfit to be tried but still capable of making such an election.[68]

5.29 There were, however, submissions which favoured the automatic use of a judge alone for fitness hearings. It was argued that they involved primarily technical matters and were therefore most suitable for a hearing by judge alone.[69] A fitness hearing is not designed to be adversarial and no decisions are made about the person's criminal liability. Additionally, judge alone hearings may be quicker, less formal and less confusing or stressful for the accused, particularly if experts for both sides agree that the accused is clearly unfit to be tried. Some jurisdictions, for example the Northern Territory, require the issue of fitness to be tried before a judge alone, not a jury.[70] The Western Australian Law Reform Commission also made a recommendation to this effect.[71] The Attorney General's Criminal Law Review Division has undertaken some consultation on this issue, which indicated that most major interest groups consulted supported fitness hearings by judge alone.[72] The Commission therefore recommends that all fitness hearings always be heard by a judge alone. Consequently, the requirement of the consent of the prosecutor should be abandoned.

5.30 However, the Commission no longer proposes that the accused should lose the right of election to trial by judge alone at a special hearing and agrees that some, but not all, unfit accused should be able to understand their counsel's advice to a sufficient degree to make the election. If the accused is unable to make the election and to complete the form, it has been suggested the person's counsel or the judge in the matter should make this decision. It has been argued that the person's counsel makes other decisions in the accused's interests at a special hearing, and that this decision is not inherently different in nature. The Commission agrees. Notwithstanding concerns raised in the Commission's consultations with the legal profession, the Commission does not believe that a judge would be the more appropriate person to make the decision as, unlike the accused's counsel, the judge is not required to act in the best interests of one of the parties.

Recommendation 14: Expert reports

5.31 If the defendant is found fit to be tried, criminal proceedings may re-commence or continue.[73] However, evidence will have been gathered for the purposes of the fitness hearing. It has been argued that:

> legislation specifically excluding reliance by the Crown upon facts gathered about the accused or his case in the course of the fitness inquiry would ensure fairness. The court's power to request reports may allow the Crown an advantage which it is denied in the ordinary course of criminal proceedings.[74]

In interviews for the purpose of preparing fitness reports, expert witnesses, such as psychiatrists and psychologists, or the accused, may raise issues relevant to the facts of the offence. The current practice appears to be to allow the Crown experts to have qualified access to the accused, by seeking an undertaking that the expert will not ask for a history of the events. This practice has been challenged in the District Court where the prosecution unsuccessfully sought to obtain an order that the accused undergo "an unrestricted psychiatric examination" by a psychiatrist appointed by the Crown.[75] It is obviously in the interests of justice, however, that the prosecution's experts should have some access to the accused to make their own assessment of fitness.

5.32 Other legislation (or proposed legislation) has provided some protections for the defendant in this situation. The Model Bill provides that "[a] finding made on an investigation into a defendant's fitness to stand trial or a special hearing does not establish an issue estoppel against the defendant in any later (civil or criminal) proceedings, and evidence of such a finding is not admissible against the defendant in criminal proceedings against the defendant".[76] The Canadian Criminal Code provides that any statements made by an accused during the assessment process are protected for use against him or her, except in certain limited situations.[77] Submissions which considered the issue generally supported the proposal that, in fairness to the accused, expert report(s) as to fitness should not be able to be used in evidence at the subsequent trial,[78] though the Law Society argued there should be provision for the court to receive a (perhaps edited) report on the application of the accused.[79] The DPP stated that it supported the recommendation in principle but wanted to see the form of the legislation.[80]

5.33 The Commission recommends that any statement made by a defendant to an expert about the events relating to the offence should not be received as evidence of the facts against him or her. This wording would remove the need to have the proviso suggested by the Law Society. The Commission's recommendation would not, however, prevent the prosecution from pursuing a line of inquiry suggested by a statement made to one of their experts. The Commission makes no comment about any arrangements which may be made between the prosecution and the defence in relation to the terms on which access to the accused is granted, though it has been suggested in consultations that this may be an area for an internal DPP policy.

5.34 Problems may arise where the Crown relies on the same expert to give evidence about an accused's fitness, and later, either at a special hearing or a trial, to refute a defence based on psychiatric evidence. It would therefore be important that at the time of the initial interview with the accused, the expert clearly understood the purpose for which he or she was interviewing the accused and prepared the report accordingly.

Recommendation 15: Variation of bail and other orders

5.35 After a finding of unfitness, the court is obliged to refer the person to the Tribunal in order to determine whether he or she is likely to become fit within 12 months.[81] Pending the Tribunal's determination, the court may grant bail or other appropriate orders.[82] A possible difficulty is the fact that:

> there is no expressed statutory power for either the Court or the Tribunal to continue, vary or refuse bail. If a determination is made that the defendant is likely to become fit, the situation is covered to some extent by section 17(3) of the [MHCP Act], although there is still a gap between the determination and the Court's response to the Tribunal's finding.
>
> ...
>
> However there will be a problem if an unfit defendant requires a variation of "bail" conditions, or breaches their "bail", subsequent to a determination by the Tribunal that he or she is not likely to become fit within 12 months, but prior to coming before the Court for a Special Hearing. Such a scenario is quite possible, indeed inevitable.[83]

5.36 This issue has recently been the subject of judicial comment in a situation where such an unfit defendant, who was held in custody awaiting a special hearing, applied for bail. Two judges apparently refused bail on the grounds of lack of jurisdiction. On a third occasion, Justice Levine stated:

> It does seem strange that the legislature has at best created some form of limbo into which [a person in the defendant's position] could find himself or herself. If there is that gap, that hiatus or what I have now called "a limbo", then on my construction of the legislation it is capable of resolution in favour of the consideration of the liberty of the citizen. I propose to do so by ruling that this Court has jurisdiction to entertain the [bail] application and I so rule.
>
> Clarification by the Legislature would be desirable by appropriate provision in the *Bail Act*, Regulation 24 of the Bail Regulations or the *Mental Health (Criminal Procedure) Act*.[84]

5.37 The Commission agrees that this area needs to be clarified. Submissions have also supported the Commission's proposal.[85] The Commission recommends that the court be given the power to have a matter brought back before it on an application from either side in the period between a finding of unfitness and the special hearing to consider any possible variation in the orders made under s 14(b) of the MHCP Act.

Recommendation 16: Setting the limiting term

5.38 Following a finding of guilt at a special hearing, the judge must indicate whether he or she would have imposed a prison term if the person had been fit to be tried. If so, the court must set a "limiting term", which is defined as:

> the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence.[86]

If the judge would not have given a sentence of imprisonment, "the Court may impose any other penalty or make any other order it might have made on conviction of the person for the relevant offence in a normal trial of criminal proceedings".[87] Thus all the usual non-custodial options are available.

5.39 In setting the limiting term, unlike typical sentencing proceedings, the judge cannot allow a reduction in sentence for a plea of guilty.[88] Generally speaking, counsel could not indicate whether a plea of guilty would have been forthcoming if their client had been fit to be tried, because entering a plea is subject to the accused's fitness to be tried.[89] Nor is the limiting term divided into minimum and additional terms, which would allow the possibility of release on parole during the additional term. In DP 35 it was suggested that these restrictions were unfair and that unfit persons should have at least these two benefits which are available to other defendants. This proposal was generally supported, with submissions often arguing that people with an intellectual disability (or other unfit persons) detained under this legislation should not spend longer in gaol than those convicted of similar offences.[90] Dividing the limiting term adds an additional complication into what is already an artificial exercise. There is also the danger that requiring judges to set both minimum and additional terms could lead in practice to longer sentences for the unfit accused than under the present system. This is because the division between minimum and additional terms will be futile if there is no suitable non-custodial option for the person with a disability. If there is no appropriate accommodation in the community, the person is unlikely to be granted parole and will remain in jail for the full limiting term in any event. (See Chapters 10 and 11 for further discussion of this issue.) Therefore the Commission now abandons this proposal.

5.40 In relation to guilty pleas, the Commission believes that as unfit defendants are denied the right to plead guilty, even if they admit their guilt, they should not be disadvantaged in this regard. Accordingly, a judge, in setting a term based upon what would have been given in a normal trial, should be required in legislation to assume that the person had pleaded guilty and give the appropriate discount.[91]

5.41 The Commission accepts that the concept of setting a limiting term is somewhat artificial, since a judge has to fashion a sentence when criminal culpability has not been finally determined. This creates obvious difficulties for the sentencing judge.[92] However, the alternative option, indeterminate detention, is plainly no longer acceptable on human rights grounds. For this important pragmatic reason the Commission recommends that the limiting term device continue to be used (with the recommended amendment).

Recommendation 17: Orders made by Tribunal, not court

5.42 This recommendation involves an amendment to s 27 of the MHCP Act so that certain orders are made by the Tribunal, not the court. This recommendation arose from a proposal in DP 35 that the special hearings procedure could be simplified by terminating the court's involvement at the point where the person is referred to the Tribunal after the court has set a limiting term. Under the present law, after the court has set the limiting term, it refers the person to the Tribunal which must then determine whether the person has a mental illness/mental condition or not and notify the court of its determination.[93] Section 27 then provides as follows:

> **Orders Court may make following determination of Mental Health Review Tribunal after limiting term is imposed**
>
> 27. If a Court is notified by the Mental Health Review Tribunal of its determination in respect of a person under section 24(3), the Court may:

(a) if the Tribunal has determined that the person is suffering from mental illness or that the person is suffering from a mental condition for which treatment is available in a hospital and that person, not being in a hospital, does not object to being detained in a hospital - order that the person be taken to and detained in a hospital; or

(b) if the Tribunal has determined that the person is not suffering from mental illness or from a mental condition referred to in paragraph (a) or that the person is suffering from such a mental condition but that the person objects to being detained in a hospital - order that the person be detained in a place other than a hospital.

Following the court's order, the Tribunal must then continue to review the person's case as outlined in para 5.17 above. There seems no reason in principle why the Tribunal should not make the order as to the place of detention of the person, which is currently made by the court in s 27, as the court acts upon the Tribunal's determination about the mental condition of the person.[94] Submissions generally supported the removal of the additional court appearance.[95] The Mental Health Advocacy Service commented that clients find the return to court alarming and confusing and that usually the court order is a formality.[96] However another submission was concerned that the proposal removed the person from the court's control and the inherent safeguards this provides.[97] The Commission believes that appeal provisions against determinations of the Tribunal[98] are sufficient to protect the rights of the person. Additionally, the person is able to appeal to the Supreme Court if they believe that they are "wrongly detained in a hospital".[99]

Recommendation 18: Bar to further prosecution

5.43 The MHCP Act provides that a limited finding of guilt at a special hearing constitutes a bar to further prosecution in respect of the same circumstances,[100] subject to s 28(2). Section 28 is as follows:

Effect on other proceedings of finding on special hearing

28. (1) If, following a special hearing, an accused person is found on the limited evidence available to have committed the offence charged or some other offence available as an alternative, the finding, except as provided by subsection (2), constitutes a bar to any other criminal proceedings brought against the person for the same offence or substantially the same offence.

(2) Nothing in subsection (1) prevents other criminal proceedings referred to in that subsection from being commenced at any time before the expiration of any limiting term nominated in respect of a person unless, before the expiration of the limiting term, the person has been released from custody as a prisoner or discharged from detention as a forensic patient.

(3) ...

5.44 The Legal Aid Commission of New South Wales submitted:

> the bar should be absolute. The prosecution has already presented its entire case and obtained an order that the person spend up to a maximum time in custody. The person will only be released on a finding that to do so will not seriously endanger either that person or any other member of the public. The prospect of having the case again presented is ... oppressive.[101]

Other submissions have supported this proposal.[102] The Commission supports the Legal Aid Commission's proposal. The Commission believes that it is onerous to the accused and to the witnesses involved to have the possibility of a further hearing remaining. If the accused becomes fit and it is considered that an injustice has been done at the earlier hearing there is now scope for a review of the earlier conviction under the new Part 13A of the *Crimes Act 1900* (NSW). Thus the Commission

recommends that a limited finding of guilt at a special hearing should be a bar to further prosecution in respect of the same circumstances. This will require amendments to s 22(3)(c) and s 28 of the MHCP Act.

Recommendation 19: Removal of executive discretion

5.45 The Tribunal can recommend the release of a person found unfit to be tried if the Tribunal believes that the person is not dangerous. Recommendations are made to the "prescribed authority", who is variously the Governor, Governor-General or the Minister for Health, depending on the status of the forensic patient.[103] Statistics compiled by the Tribunal show that, in the majority of cases, the recommendations of the Tribunal are approved by the executive government.[104] The Commission supports the following arguments against leaving the final decision for the release of forensic patients with the executive government:

The executive government does not hear the evidence on which the decision is based, rather it relies upon the Tribunal's recommendations and reports. Nor does the decision-maker have to give reasons. This has led to concerns about the denial of natural justice to the forensic patient:

> Although the patient may give evidence at the review, and is to be legally represented unless s/he chooses otherwise, neither the patient's evidence nor the representative's submissions are transcribed or presented to the ultimate decision maker. Oral evidence which modifies the effect of written reports is not available, except to the extent that it is included in brief written reasons for the Tribunal's decision. No reasons have to be given by the Minister if he [or she] chooses not to accept the recommendations, and therefore the patient has no opportunity to address any fresh concerns or correct apprehensions of fact with which he or she disagrees.[105]

The additional step involved will inevitably lead to delays, as in some cases the recommendations have to be considered by the Minister, the Executive Council and the Governor. This delay can affect not only the person's release but any change in the person's custodial conditions which may be necessary due to changes in their mental condition.[106] The Mental Health Advocacy Service has commented:

> ... The number of forensic patients is steadily increasing and ... the number of decisions that are required to be made by the Minister for Health and the Executive Council every six months is quite substantial.
>
> As at [January 1995] this Service has been waiting for executive decisions regarding a large number of our clients since late November 1994. For the last two months, including the Christmas and New Year periods, we have received no advice from the Minister for Health of any decisions being made regarding our clients. For a number of our clients, this meant ongoing detention that is clinically inappropriate and in fact deleterious to rehabilitation.[107]

Political considerations may enter into the decision to release, for example a government may delay or refuse the release of certain people during an election campaign. This is an inappropriate basis for such decision-making. According to the Burdekin Report, discussing the situation in Australia generally:

> Perhaps mindful of how poorly equipped they are for the task, [executive government] decision-makers tend to make very conservative assessments. The impression of witnesses who gave evidence on this topic was that regardless of what the advisory body recommends, the decision-makers generally decide against release. ... It seems improbable that such decisions are always based on a rational assessment of the prisoner's potential threat to the rights of the wider community. The prime criterion is sometimes the potential for political damage to a government perceived by the public as being soft on criminals ...[108]

A refusal by the executive government to approve a recommendation for release may be in breach of the International Covenant on Civil and Political Rights, as such a decision is not reviewable by a court.[109] Article 9.4 of the Covenant, to which Australia is a signatory, is as follows:

> 9.4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[110]

5.46 In 1992, the Mental Health Act Implementation Monitoring Committee (the "Monitoring Committee") expressed its preference for the removal of executive discretion from all decisions regarding forensic patients. Instead it recommended that decisions be made by the Mental Health Review Tribunal.[111] The Burdekin Report and the Victorian Parliament Community Development Committee also recommended the removal of executive discretion.[112] Submissions have also generally supported the removal of executive discretion.[113] However, in 1988, the New South Wales Department of Health Steering Committee on Mental Health recommended that Ministerial discretion over Tribunal recommendations be retained, otherwise the executive would have "no power to prevent the implementation of decisions in matters which may be viewed as sensitive".[114] Similarly, a 1996 New South Wales Health Department Discussion Paper did not support the removal of executive discretion and leaving the final decision with the Tribunal, commenting that while the Tribunal "deals with issues of a clinical nature, it is not constituted to look at the broader community issues, which is really the province of the executive arm of government".[115]

5.47 *Advantages of a specialist tribunal over a court*. If the executive discretion is abolished, the question of who should be the final decision-maker in the areas of conditions of detention or release remains. The two options most often mentioned are a specialist tribunal, such as the Mental Health Review Tribunal, or a court. The crucial consideration is dangerousness. The Mental Health Review Tribunal has argued that it is better placed than a court to assess the person's dangerousness as it is:

> able to consider the forensic patient, and his or her situation, in a series of (for most forensic patients) progressively less restrictive environments, in order to determine whether a move to a situation allowing more freedom would be appropriate and safe. It can consider the conditions that would need to be imposed, and the circumstances and environment that would have to be established, in order to ensure the safety and appropriateness of the next less restrictive environment being developed for the patient. The Tribunal has the occasion to consider each forensic patient's case at least once every six months, and sometimes more often. ... The Tribunal has available to it, not only the court file and expert opinion contained therein, but also, its own expertise, the expertise which it may especially commission, the expertise marshalled on the forensic patient's behalf by the Mental Health Advocacy Service, and the expertise and day to day experience of the treating team which is managing the patient in the current environment.[116]

5.48 By comparison, the Model Bill referred to at paras 5.19-5.20 above provided that such decisions be made by a court. The Commission has considered the arguments in favour of judicial decision-making in this area and retains its preference for leaving such decisions with an expert tribunal for the following reasons:

- the varied expert membership of a tribunal allows for more expertise in the area of mental impairment and dangerousness;
- the adversarial system of the courts is inappropriate for the consideration of issues such as continuing fitness and dangerousness;
- the court has no continuing role after sentencing in the detention of "fit" defendants; and
- a tribunal is generally quicker and less formal than the courts, which has particular advantages for this group of defendants.

5.49 The Commission recommends that the executive discretion be removed from all decisions regarding forensic patients (except as limited by Recommendation 20) so that all decisions as to their placement, security conditions and release are made by the Mental Health Review Tribunal. This recommendation will require consequential amendments to the MH Act and the MHCP Act to enable the Tribunal to make orders rather than recommendations, and the appeal mechanisms will also be affected (see Recommendation 22, below).

5.50 *Delays relating to orders for release.* The Monitoring Committee was also concerned about current delays, noting that it was not uncommon that a six monthly review is conducted before notification of approval or otherwise from the previous review is received. It recommended that any order/decision/recommendation (as appropriate) be made within six weeks of the hearing or receipt of recommendation.[117] The Commission does not consider that it is appropriate to set a time limit on the handing down of the decision of such a decision-making body as the Tribunal. Delays are likely to be significantly reduced by the abolition of the executive discretion.

Recommendation 20: The Attorney General's veto and police notification

5.51 Apart from the removal of executive discretion, there are a number of related release issues which must be considered, namely: the Attorney General's veto; the requirement to notify the Minister for Police and Emergency Services; and the issue of conditions of release. These issues, discussed in this and the next recommendation, are presently governed by s 84 of the MH Act:

> **Release of persons after review**
>
> 84. (1) If, within 30 days after the date of being notified under section 83 of a recommendation for the release of a person, the Attorney General has indicated an objection to the person's release on the ground that:
>
> (a) the person has served insufficient time in custody or under detention; or
>
> (b) the Attorney General or the Director of Public Prosecutions intends to proceed with criminal charges against the person,
>
> the prescribed authority may not order the person's release.
>
> (2) If, within 30 days after the date of any such notification, the Attorney General has not indicated any such objection to the person's release, the prescribed authority may, subject to the regulations, make an order (either unconditionally or subject to conditions) for the person's release.
>
> (3) Before ordering the person's release, the prescribed authority must inform the Minister for Police and Emergency Services of the date of the person's release.
>
> (4) If a recommendation is made under section 81 for a person's release, the prescribed authority may, subject to the regulations, make an order (either unconditionally or subject to conditions) for the person's release.

5.52 *The Attorney General's veto.* Pursuant to s 84(1), the Attorney General has the power to veto the release of a forensic patient if "the person has served insufficient time in custody or under detention" *or* "the Attorney General or the Director of Public Prosecutions intends to proceed with criminal charges against the person". According to Hayes and Craddock this veto is inappropriate as:

> [t]here are serious ethical inconsistencies within the Attorney's power to object, which is effectively a power to imprison. If the system of detention of forensic patients is truly for the protection of the person and of society, there can be no basis for the power to withhold release merely because the Attorney holds the view that the person "has served insufficient time in custody".[118]

Another commentator argued, in relation to the earlier version of the legislation:

> ... how can one justify the power as to release/non release vesting in the Attorney General when it is effectively in his name that the prosecution has originally been brought. The idea of the prosecutor also being the arbiter of the length of "sentence" is a novel concept with far reaching ramifications.[119]

5.53 There are five categories of "forensic patient" to which this veto could apply:

> Those found unfit to be tried by a court and ordered to be detained, but who have not yet been the subject of a special hearing (see para 5.10 above);
>
> Those found unfit to be tried by a court and who, after a special hearing, have had a limiting term of detention imposed (see paras 5.14-5.16 above);
>
> Those detained in hospital pending their committal for trial or trial for an offence;
>
> Those detained after being found not guilty on the ground of mental illness (see Chapter 6); and
>
> "Mainstream" prisoners who have been transferred to a hospital from prison while serving a sentence of imprisonment or life imprisonment ("transferees").

5.54 The Monitoring Committee considered both bases upon which the Attorney General may veto release recommendations and argued as follows:

> *Sufficiency of time served in custody basis for veto.* For categories 1 and 3, such a discretion is inappropriate as legal charges are still pending. For category 2, release before the end of the limiting term is clearly contemplated by the current legislation (on the recommendation of the Tribunal on the ground that the person is not dangerous). In any event there has been no finding of full criminal responsibility against the person and therefore the concept of a sufficient term in custody is inappropriate. Similarly for category 4, as dangerousness is the basis for detention of persons found not guilty on the ground of mental illness, persons who the Tribunal no longer consider dangerous are entitled to their liberty: "[t]o effectively impose a sentence of an unspecified additional period after the stated release criteria has been met makes a mockery of both the verdict and the review system". The Monitoring Committee did, however, accept the appropriateness of the application of the discretion to transferees. Such forensic patients have been convicted by a court and then observed in gaol to be mentally ill and transferred to hospital, and "[w]here a court has imposed a sentence [not a limiting term], it is proper that a consideration be made as to whether a sufficient proportion has been served prior to release".[120]
>
> The Monitoring Committee therefore recommended the removal of the "sufficiency of time in custody" veto except for forensic patients who have been transferred to a psychiatric hospital from prison. Such "transferee" forensic patients fall outside the Commission's reference and therefore the Commission does not suggest any change to the existing law for such people. However, the Commission supports the removal of the veto for other forensic patients. Accordingly, it recommends that s 84(1)(a) of the MH Act be limited to apply only to forensic patients who have been transferred to hospital while serving a sentence of imprisonment or life sentence. The Mental Health Review Tribunal supported this recommendation.[121] The Mental Health Advocacy Service suggested that on one interpretation of the legislation, s 84(1)(a) would already be so limited, but supported the recommendation in the interests of clarity, agreeing that the veto was inappropriate in most cases.[122] This recommendation was also accepted in the 1996 New South Wales Health Department Discussion Paper.[123]
>
> *Pending charges basis for veto*. The 30 day period allowed for a response by the Attorney General or DPP delays the release of all forensic patients, including those not facing charges and otherwise entitled to release. The Monitoring Committee recommended that the "pending charges" discretion

be limited in its operation to forensic patients who have been found unfit to be tried or are in hospital awaiting either committal for trial or trial (categories 1 and 3 above). It commented:

> The operation of this section is reasonable with respect to persons who have been found unfit to be tried, or persons who are detained in hospital pending committal for trial or trial itself ... The 30 day period for an administrative procedure is not reasonable for forensic patients who have had the matter for which they became a forensic patient finalized. In these cases, the patient will either be granted bail or be in custody for any other outstanding offences, and the law should follow its usual course.[124]

> The 1996 New South Wales Health Department Discussion Paper followed the Monitoring Committee recommendation, arguing:

> The main additional concern here is the discriminatory aspect of the current provision. Offenders who are not mentally ill, remain in prison until such time as their sentence is served or parole is granted. There is no provision allowing the Director of Public Prosecutions to authorise detention for an additional period, simply in order to be able to lay charges on an unrelated matter. Individuals who become forensic patients should at least have access to the same rights accorded members of the prison population who do not suffer from a mental illness. It is understood however, that the Director of Public Prosecutions supports retaining the current provision.[125]

> However, the Commission believes this argument about the discriminatory aspect of the current provision is equally applicable to *all* forensic patients, including those in categories 1 and 3 above, though it makes no finding in relation to "transferees" who are outside the terms of its reference. Therefore the Commission does not accept the Monitoring Committee's recommendation in relation to the pending charges discretion. It believes that it is a matter for the DPP to proceed with any other charges in the usual way and that forensic patients should not be held longer in custody for this reason. Where charges are pending, continued detention in the mental health system amounts to an inappropriate form of remand, especially where the alleged offence is one for which the person would readily be granted bail. Thus the Commission also recommends that s 84(1)(b) of the MH Act be limited to apply only to forensic patients who have been transferred to hospital while serving a sentence of imprisonment or a life sentence.

5.55 The Commission therefore believes that the Attorney General's veto on recommendations for release on both the "sufficiency of time served in custody" and the "pending charges" bases should be abolished except for "transferee" forensic patients. The Commission recommends that s 84(1) of the *Mental Health Act 1990* (NSW) should be limited to apply only to forensic patients who have been transferred to hospital while serving a sentence of imprisonment or life sentence.

5.56 *Notification requirement.* The Monitoring Committee also recommended the deletion of s 84(3) of the MH Act, which requires the prescribed authority to notify the Minister for Police and Emergency Services of the date of a forensic patient's release as it inappropriately "implies that the police will then have some role in monitoring that person in the community".[126] The Commission also recommends the abolition of the s 84(3) requirement. The requirement is not only discriminatory and a breach of human rights, but it appears to be unnecessary, as the person (to be released) must have been found by the Tribunal to be neither dangerous to themselves nor the public. Usually they will be conditionally released and therefore under the care of mental health staff. If it is considered appropriate to notify certain victims of the release of such a person (as currently provided for in the Police Commissioner's Instructions[127]) this should be governed by the procedures which apply to *all* victims, not just victims of forensic patients.[128] The 1996 New South Wales Health Department Discussion Paper also supported the deletion of s 84(3) for similar reasons.[129] Accordingly, the Commission also recommends that the similar requirement found in sections 18 and 29(3) of the MHCP Act be removed.

Recommendation 21: Conditions of release

5.57 Where release is recommended by the Tribunal, it may be unconditional or conditional.[130] The need for, and form of, conditions often affects the determination of whether a person will be dangerous upon release. However, despite the significance of conditions, both the MH Act and the Regulations are silent as to their content. In practice, it appears that the Tribunal formulates conditions as part of a comprehensive recommendation to the Minister; and that the Minister may accept the recommendation in whole or in part, or return a rejected recommendation for further assessment or clarification.[131] Hence, as part of the discretion over release decisions, the Minister appears to exercise a discretion over the number and type of conditions imposed. Hayes and Craddock state that although in practice the Tribunal has overseen post-release programs: "[t]he Act should specify that the Tribunal has power to recommend conditions of release, as the Tribunal is more likely to be able to fashion appropriate conditions than the Minister".[132] By way of contrast, the *Crimes Act 1914* (Cth) provides that the Commonwealth Attorney-General sets release conditions; and that Act contains various optional, but non-exhaustive, conditions[133] which can be imposed for a period up to a specified maximum.[134]

5.58 The Commission considers that the Tribunal is best placed to formulate appropriate conditions for release, as it is the body charged with assessing the person's dangerousness; and that political considerations are separate from this assessment and should not impinge upon it. This reflects our recommendation for the removal of executive discretion in this area. Hence, the Commission recommends that the MH Act and/or the *Mental Health Regulation 1990* (NSW) be amended to include a non-exhaustive list of release conditions which may be imposed by the Mental Health Review Tribunal. Such a list will have an educative role for the public, and, by making decisions more openly structured, balance the recommended transfer of discretionary power from elected representatives to the unrepresentative and largely anonymous Tribunal. The Commission believes this recommendation should be implemented, regardless of whether Recommendations 19 and 20 are accepted.

Recommendation 22: The duty to give reasons and appeals

5.59 *The duty to give reasons*. Under the current system, neither the Tribunal[135] nor the Minister[136] has to give reasons for decisions affecting the release or conditions of detention for forensic patients. As a matter of practice, however, the Tribunal does give reasons in forensic cases, though this could change.[137] Whether the Tribunal or the executive government is the determinative body for decisions concerning forensic patients, the Commission believes that the decision-maker should be required to supply reasons for decisions, both to facilitate any appeal process and to ensure natural justice. The requirement to give reasons was generally supported by the few submissions which considered this point.[138]

5.60 *Appeals.* Under the current law, a person can appeal determinations of the Tribunal (or the failure to make a determination) to the Supreme Court.[139] Relevant determinations include:

> whether the person has become fit to be tried (s 80(2)(a)); and
>
> whether the safety of the person or any member of the public will be seriously endangered by the person's release (s 80(2)(b)).

In such cases a single judge of the Supreme Court rehears the matter "on the merits", that is, in the place of the Tribunal.[140] If the court considers it appropriate to do so, the court may use the services of two assessors selected by the court from a panel nominated by the Minister for Health.[141] However the court cannot review *recommendations* of the Tribunal, such as the recommendation to release.[142] Nor is the decision by the executive not to implement a Tribunal recommendation for release likely to be subject to judicial review.[143] The Commission's discussion of the disadvantages of executive discretion in this area is found at para 5.45. Additionally, the court has the ability to hear an application by a forensic patient that he or she is "wrongly detained in a hospital".[144] This may assist a person with an intellectual disability who does not also have a mental illness.

5.61 If, as recommended above, the Tribunal becomes the ultimate authority, the question arises whether broader appeal rights are appropriate or whether such rights could make the existing (relatively

informal) decision-making process unnecessarily legalistic and virtually unworkable. In DP 35, the Commission sought comments about the need for a new appeals mechanism if executive discretion was abolished. Few submissions addressed this issue.

5.62 The Mental Health Advocacy Service supported a right of appeal from the Tribunal to the Supreme Court on the merits, not just on questions of law:

> There would not be a flood of appeals because most forensic patients lack access to large financial resources. The vast majority of forensic patients are granted legal aid to facilitate legal representation. Any grant of legal aid to challenge a decision of the Mental Health Review Tribunal would only be made if the applicant could demonstrate that the case had reasonable prospects of success. If a fair decision making process was used and the Tribunal made the ultimate decision, supported by reasons, there would be few occasions when the appeal mechanism would actually be utilised.[145]

The Law Society of New South Wales, though suggesting that appeal provisions may lead to an unnecessary workload for the appellate body, argued that the Court of Criminal Appeal, rather than a single judge of the Supreme Court, was the appropriate forum:

> The members of this Division of the Supreme Court have the appropriate experience in dealing with the offences which would be under consideration and the tests of capacity which are applied. Clearly, any appeal based on a primarily factual dispute would have to meet the test that the decision was against the weight of evidence.[146]

5.63 The Commission believes that an appeal should be available to a single judge of the Supreme Court on questions of law. However, such administrative review does provide protections for the forensic patient and the government. For example, administrative review would lie where the Tribunal's decision took account of irrelevant considerations or failed to take into account relevant considerations, or was otherwise made in breach of the principles of natural justice.

5.64 The Commission does not, however, support an appeal on the merits, as a judge would not have the same level of expertise as a specialist Tribunal about the facts of the person's mental condition, and would be unlikely to interfere in such a decision in any case. A right of appeal on the merits may become unworkable. For instance, the Tribunal has to review forensic patients every six months, and the time taken to hear an appeal means there could easily be an overlap between the appeal and the next required Tribunal hearing, at which the recommendations made may well change and the issue involved at the appeal disappear. Given these recommended rights of appeal, it is important that hearings before the Tribunal be fully recorded.

5.65 Additionally, the Commission notes that the present appeals provisions also affect civil patients involuntarily detained by the Tribunal. Its recommendation is not designed to affect these civil patients, who are beyond the scope of the Commission's reference. It should also be noted that the issue of appeals from the Tribunal may be affected by the proposal to set up one appeal body (the "Administrative Decisions Tribunal") for all the different tribunals operating in New South Wales.[147]

LOCAL COURTS

Background to the Commission's recommendations

Fitness in Local Courts

5.66 The vast majority of criminal matters are heard in the Local Courts before a magistrate. Research published by the Commission reveals that there may be many people with an intellectual disability appearing before Local Courts.[148] Unlike Supreme and District Court judges, it has been commented that magistrates may not have the power to hold a fitness inquiry,[149] or to continue to hear a matter involving a person who is unfit to be tried.[150] Instead, the MHCP Act allows the dismissal of charges against persons with certain mental conditions as a diversionary measure, whether or not the person

charged with an offence (the defendant) is unfit to be tried, and without the necessity of a determination about fitness.[151] These procedures, found in s 32-33 of the MHCP Act (see below) are available for summary offences or indictable offences being tried summarily, that is, they apply to all matters which can be heard to finality in the Local Courts. The legislation does not apply to committal proceedings.[152] Until recently, if a magistrate decided that an indictable matter being heard summarily should not be dealt with under s 32 or s 33, and if there was still a question of the person's fitness to be tried, the magistrate could exercise his or her discretion under s 497 of the Crimes Act and commence committal proceedings.[153] This option is no longer available.[154] The Commission's recommendations are not designed to affect committal proceedings, nor to affect the presently existing right of appeal *de novo* to the District Court.

5.67 In addition to the specific problems which arise from the operation of the legislation, there are many general problems for such defendants in the Local Courts. There is a lack of appropriate support services and sentencing options for people with an intellectual disability who come into contact with the criminal justice system and therefore there are limited results that can be achieved by the law alone, particularly in preventing recidivism.[155] Dismissing charges in such circumstances raises concerns for the victims and the general community. The lack of sentencing options and the fact that people with an intellectual disability are often considered unsuitable for non-custodial options, means that magistrates are forced to send people to gaol because nothing is available in the community. Magistrates have also expressed frustration at other difficulties faced by defendants with an intellectual disability, particularly unrepresented defendants. The need for evidence about the person's disability raises particular difficulties. Common problems include: the lack of appropriate expert evidence about the person's disability; the poor quality of some of the reports obtained; the lack of resources to pay for the provision of such reports; and the cost of obtaining a report for extremely minor offences. Even if a report is ordered, some people with disabilities will not present themselves to the expert and magistrates are loath to place a person in custody to obtain a psychiatric or other report for minor offences. The Commission considers these general issues such as reducing recidivism, the need for appropriate services, education for people with disabilities about the criminal justice system and training for criminal justice personnel to be so important that they are discussed separately in Chapters 9-11. The remainder of this chapter focuses on the specific legal issues in relation to fitness and diversion in the Local Courts.

The section 32 procedure

5.68 Under s 32 of the MHCP Act, if it appears to the magistrate that the defendant is "developmentally disabled", and that on the facts or other evidence it would be appropriate to do so, the magistrate has the power to adjourn the proceedings, grant bail or make any other order. The magistrate may also dismiss the charge and discharge the defendant either unconditionally or with conditions. For example, the defendant may be discharged into the care of a "responsible person". Conditions can only be imposed on the defendant, not on any other person or organisation.[156] Furthermore, no sanction is provided if the conditions imposed are breached.

Disadvantages of the current procedures

5.69 The disadvantages of the current procedures in the Local Courts for people with an intellectual disability were discussed at length in DP 35 and can be summarised as follows:

> There are no fitness procedures available in the Local Courts. This means that if the person with an intellectual disability is unfit to be tried, the magistrate's only option is s 32.
>
> There is confusion about which groups of people are affected by s 32, caused in part by the lack of definitions.
>
> Section 32 involves the dismissal of charges with or without conditions. Any conditions are unenforceable as the charges have been dismissed. This means that the section provides no real sanction or assistance for the determined recidivist.[157]

The magistrate is not provided with a record of the number of occasions in which the person has previously had charges dismissed under s 32, which means that some defendants can have numerous charges dismissed with no alteration in their behaviour.

5.70 To address these problems, in DP 35 the Commission proposed a new legislative regime for the Local Courts, covering diversion from the criminal justice system, fitness and the defence of mental illness. The inclusion of draft legislation in DP 35 was designed to (and did) elicit detailed responses from the groups concerned. The Commission has also had the opportunity to observe Local Court matters, and to discuss its proposal with many New South Wales magistrates.[158] The Commission has discussed the difficulties in this area with lawyers, social workers, psychologists and the Public Guardian. Despite the limitations of the law, there is still support for the retention of a diversionary option for the courts for less serious matters.[159] However, many aspects of the Commission's proposal were questioned in submissions. In this Report, the Commission has revised its proposal to take these comments into account.

Possible scenarios in Local Courts

5.71 The Commission envisages four possible scenarios in the Local Courts for which its recommendations must provide.

> There is a question about the person's fitness to be tried but the matter is too serious for it to be dismissed and the defendant discharged. The magistrate does not have the power to hold a fitness inquiry or to order that the matter be heard by the District Court. [See Recommendation 23]
>
> The defendant is charged with a trivial offence. Evidence is tendered of the person's intellectual disability, mental illness or mental condition. The magistrate believes, considering the nature of the offence and the level of the person's disability, that it is not in anyone's interests for the person to be dealt with by the criminal justice system in the usual way and that the charge can be dismissed without risk to the community. The procedure in effect is similar to cautioning juveniles. [See Recommendation 24]
>
> The person is fit to be tried but there is evidence that the person has an intellectual disability. The matter is one which the magistrate considers too serious, or the disability too slight, to dismiss the charge and discharge the defendant. Alternatively, it is a reasonably trivial matter but the defendant has already appeared before the court on a number of occasions for similar offences and had charges dismissed. The magistrate therefore considers the matter should be dealt with according to law, but that the defendant's mental condition should be taken into consideration at the sentencing stage. [See Recommendation 24]
>
> The person is fit to be tried but the defence of mental illness may be appropriate in determining the matter. [See Recommendation 28 in Chapter 6]

Discussion of the Commission's recommendations

Recommendation 23: Fitness to be tried

5.72 As discussed at para 5.66 above, the current Local Court procedures do not provide for the determination of fitness to be tried, but only contain a diversionary procedure. This has caused confusion and DP 35, Proposal 25, therefore included both a diversionary procedure (formerly s 32) and new fitness procedures. The disadvantage of the proposed fitness procedures was that if the defendant was found unfit to be tried, the charges were dismissed and the defendant discharged. The concern was that this made a finding of unfitness advantageous and could lead to unmeritorious applications. It was also argued that dismissal was inappropriate considering the severity of matters which are now automatically heard in Local Courts. However, the Commission still believes that a distinction between fitness and diversion is appropriate.

5.73 The Commission is of the view that if a question as to the defendant's fitness arises, legislation should provide that the magistrate should first consider the possible application of the diversionary procedures before taking steps which would lead to a fitness inquiry.[160] This means that the complex issue of fitness would only need to be considered in a minority of cases. Many offences heard at Local Court level would not merit lengthy fitness inquiries. The question then arises as to who should conduct the inquiry, either the magistrate, as in the Commission's original proposal, or a judge, by transferring the matter to the District Court, where there is an established fitness procedure. A variety of viewpoints arose in submissions. Some supported the original proposal,[161] although one submission argued that the fitness provisions should be limited to summary offences, and not extended to indictable offences which can be heard summarily.[162] Another submission argued it would lead to unnecessary cost to have to transfer indictable offences able to be heard summarily to the District Court. Accordingly, he argued that for indictable offences triable summarily, the same fitness procedures available in the District and Supreme Courts should be applicable in the Local Courts, without the necessity to transfer the proceedings.[163] Another argued that it was not useful to have different procedures for indictable and summary offences as so many indictable matters are now heard summarily in Local Courts.[164] The Model Bill, referred to at paras 5.19-5.20 above, provides for the same fitness procedures for all courts and offences,[165] whereas the recent Victorian report recommends that different procedures be available in the Local Courts.[166]

5.74 The Commission now believes that, for ease of operation, the same procedures should apply for all offences heard in the Local Court, whether summary or indictable. In each case where an issue of the defendant's fitness arises (whether raised by the prosecution, the defence or the magistrate) and the magistrate has considered (and rejected) the possible application of s 32-33 of the MHCP Act (see below), the magistrate should hold an inquiry for consideration of the person's fitness to be tried as a preliminary issue. This avoids the delay involved in referral to the District Court for consideration of the fitness issue and there seems to be no reason why a magistrate could not determine the issue of fitness with appropriate expert reports. If found unfit to be tried, the matter should then proceed according to the usual fitness and special hearings procedures involving the Mental Health Review Tribunal which are applicable in the District and Supreme Courts (as discussed earlier in this chapter). If found fit to be tried by the magistrate, the person should be dealt with by the Local Court according to law. In either case, if the accused disputed the magistrate's determination as to fitness, there is a right of *de novo* appeal to the District Court.[167]

5.75 Where the person is found fit to be tried, and similarly in cases where there is no real question of the person's fitness to be tried but there is evidence of the person's disability, the disability really becomes a matter to be considered in sentencing. The usual options are available, including s 556A of the *Crimes Act 1900* (NSW). Under s 556A, any court may consider a charge proven but be of the opinion that:

> having regard to the character, antecedents, age, health, or *mental condition* of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, or to any other matter which the court thinks it proper to consider, it is inexpedient to inflict any punishment, or any other than a nominal punishment ...[168] [emphasis added]

In such circumstances the court dismisses the charge or discharges the person on a good behaviour bond without recording a conviction.

Recommendation 24: Diversion

5.76 Following submissions and further research, the Commission's current recommendation also includes some changes to the diversionary procedure in DP 35, Proposal 25. The Commission has found this a particularly difficult area to make recommendations as all of the options have disadvantages and advantages. As one submission commented, "[t]he arguments for and against reform under this section are almost balanced, particularly when the practical implications are considered".[169]

5.77 *Application of the diversionary procedure*. Submissions have referred to confusion about which groups of people are affected by the legislation and the meaning of "developmentally delayed". This is caused in part by the lack of definitions. (See also Chapter 3.) Currently the procedure applies to a defendant who:

> is developmentally disabled, is suffering from a mental condition for which treatment is available in a hospital, but is not a mentally ill person within the meaning of Chapter 3 of the Mental Health Act 1990.

The procedure applies to a variety of mental conditions, though excluding a "mentally ill person" as defined by the MH Act, for whom there is a separate procedure under s 33. Consideration of s 33 is beyond the terms of this reference. Instead of the current wording, Proposal 25 suggested that the procedure should apply to a person with "impaired intellectual functioning" and a person with a mental illness who does not satisfy the definition in the MH Act. For the reasons outlined in Chapter 3, the Commission has decided to abandon the term "impaired intellectual functioning", but the Commission still recognises that the diversionary provision should apply to people with a variety of conditions which affect mental functioning, and not be artificially limited. The Brain Injury Association, for example, has referred to the potential importance of extending this procedure to its members, who are excluded on a strict reading of the current provision.[170]

5.78 The Commission believes the diversionary procedure should not exclude people with a brain injury or other relevant people, such as people with a mental illness who do not satisfy the MH Act's limited definition of "mentally ill person" used in s 33. The Commission therefore recommends that the procedures apply to people with an intellectual disability (as defined in Recommendation 1), mental condition (as already defined - albeit vaguely - in the MHCP Act) and mental illness (as defined by the common law). The recommendation remains close to the present coverage except it excludes the current qualification on mental condition which excludes some people with a brain injury, namely "mental condition for which treatment is available in a hospital". This limitation appears unnecessary as some people have mental conditions which cannot be treated in a hospital but who nevertheless would be appropriately diverted from the criminal justice system. Importantly, the recommendation indicates the types of conditions which should be covered by the procedure and provides a definition for intellectual disability, yet allows for flexibility in application of the section through the broad definition of the term "mental condition". The recommendation does not specify the necessary severity of the person's mental condition. Some magistrates appear to believe that the current procedure is only available for people with more severe disabilities. The definition of intellectual disability recommended by the Commission would make clear that all people with an intellectual disability, whether their disability is classified as mild, moderate, severe or profound, could potentially fall within the terms of the section, though the Commission believes this is a matter for the magistrate's discretion, taking into account the nature of the offence and other relevant matters. Though this may cause some variation in the operation of the section, the Commission believes this cannot be avoided without affecting the flexibility of the section. The diversionary procedure, like fitness procedures, considers the person's mental condition at the time of the court hearing, not at the time of the offence. For a person with an intellectual disability, whose condition is permanent, this restriction is unlikely to create difficulties, but it may mean that a person with an episodic mental illness would be better dealt with under the provisions of the defence of mental illness (see Chapter 6).

5.79 *Criteria for discretion.* Currently the magistrate may exercise his or her discretion if "it would be *more appropriate* to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law".[171] This provides little guidance for the magistrate. Proposal 25 suggested a new test for the exercise of the magistrate's discretion, namely that he or she "is satisfied that to commence or continue the proceedings would not be in the *interests of the community and the defendant*". Some submissions expressed concerns about the variety of possible interpretations of this test, in particular the "interests of the community",[172] or the danger that defence lawyers would wish to call evidence about the subject.[173] One magistrate commented that it is unlikely that both sets of interests will coincide and that it would be sufficient to say that the magistrate will take those interests into account in making his or her decision.[174] Others supported the proposed test.[175] The Commission now believes that the best option is to retain the existing test, but to provide greater guidance as to the

circumstances in which the magistrate may think it appropriate not to proceed according to law. The circumstances are expressed to be: having regard to "the trivial nature of the charge or offence, the nature of the person's condition, the periods of the person's detention or custody in respect of the offence or any other matter which the Magistrate thinks proper to consider". This is similar to the wording used in the Supreme and District Courts to allow a judge to dismiss charges and discharge the defendant.[176] This is appropriate as it has been noted that s 32 and s 33 are companion provisions to those of s 10(3) and s 10(4).[177]

5.80 *Release without conditions.* The current legislation provides for release with conditions. These conditions are unenforceable as the section provides that they are only imposed if the magistrate has dismissed the charge and discharged the defendant. However, lack of compliance with conditions can be taken into account in deciding whether to utilise the section on future occasions, provided that the magistrate is aware of this non-compliance. Other problems with conditions are the lack of appropriate services or accommodation options and the difficulty many people with an intellectual disability have in understanding them and complying with them. Proposal 25 reflected the Commission's view that it was inappropriate to impose (unenforceable) conditions after the defendant was discharged where there had been no finding of guilt against the defendant. The Commission's view was supported by some submissions.[178] One submission added that "[i]f an order for the compulsory care and treatment of any person against whom a charge has been dismissed is demanded then it is for the legislature to introduce an appropriate law - a civil law not criminal".[179] Another submission argued that s 32 would continue to fail until the court has the ability to impose conditions on the government department with responsibility to provide services to this group of people.[180]

5.81 Other submissions supported the retention of conditions and commented that conditions, even if unenforceable, were still likely to be treated seriously by many offenders with intellectual impairments.[181] Without the possibility of conditions, a magistrate may choose not to apply the section, instead preferring a conviction as that allows for a number of non-custodial options and conditions, including the supervision of the Probation and Parole Service. One submission feared the lack of ability to order conditions would lead to a decreased use of the section by magistrates.[182] Even with conditions, submissions have referred to the reluctance by magistrates to use the section, because of the lack of sanctions if the conditions are breached.[183] Another submission argued:

> It is true that the provision itself contains no sanction but it seems implicit in s 32(4) that the dismissal could not be raised as an absolute barrier to the continuation of or further prosecution for the same offence. If no plea of autrefois acquit arises because the accused has never been placed in jeopardy of conviction then there would be advantage in limiting the further prosecution for the offence if all conditions of release have been met by the defendant.[184]

That submission suggested that an undertaking by the defendant may be more appropriate than conditions and that if the undertakings were complied with by the defendant for a period of 12 months then no further proceedings should be taken upon the charge.

5.82 Other submissions supported the introduction of a provision to enable the matter to be brought back before the court if the person breached the conditions.[185] However the problem is who should make such an application, as possible applicants may be unaware of the breach.[186] The Commission believes such a proposal is impractical. If some form of supervision is considered necessary, then the matter would be better dealt with according to law and the person could be placed on a supervised bond. The Commission retains its support for dismissal without conditions. Though a minority of people may benefit from conditions, it appears to the Commission to be wrong in principle to have conditions (which are, in any event, unenforceable) imposed where there has been no hearing or finding of guilt. It believes that the type of offences for which the diversionary option is designed to be available do not merit this form of continual involvement of the justice system. As discussed at para 5.75 above, there are sentencing options, for example, s 556A of the *Crimes Act 1900* (NSW), which can take the defendant's mental condition into account.

5.83 *Notification to the Minister in cases of unfitness.* In Proposal 25 the Commission suggested that, following dismissal of charges for reasons of unfitness, if a magistrate had concerns as to the adequacy of care, treatment or services for the defendant, the magistrate should notify the appropriate Minister. This has proved to be a controversial proposal. Critics argued that this was an inappropriate action for a judicial officer, as a magistrate can raise concerns in a judgment or speak directly to the Chief Magistrate who can then refer them to the Attorney General. It was argued that such concerns are more appropriately raised by a person's lawyers.[187] The Commission has accordingly abandoned this provision.

FOOTNOTES

1. D Chiswick "Fitness to stand trial and plead, mutism and deafness" in R Bluglass and P Bowden (eds) *Principles and Practice of Forensic Psychiatry* (Churchill Livingstone, 1990) at 171.

2. This refers to the accused's condition immediately before the commencement of the trial, and also to his or her likely condition during the course of the trial: *R v Kesavarajah* (1994) 181 CLR 230, per Mason CJ, Toohey and Gaudron JJ, Deane and Dawson JJ dissenting.

3. For a discussion of the pre-1986 position see P J M MacFarlane "Unfitness to be tried for an offence" (1987) 11 *Criminal Law Journal* 67.

4. *R v Presser* [1958] VR 45 at 48. In *R v Kesavarajah* (1994) 181 CLR 230 the High Court held that fitness to be tried is to be determined by reference to the factors mentioned in *Presser* and to the length of the trial.

5. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) ("NSWLRC DP 35"), Proposal 11.

6. In 1994, the Tribunal conducted 2865 civil patient reviews and 131 determinations under the *Protected Estates Act 1983* (NSW), but only 307 forensic patient reviews: Mental Health Review Tribunal *Annual Report 1994* at 10.

7. *Mental Health (Criminal Procedure) Act 1990* (NSW) (the "MHCP Act") s 5-12.

8. Magistrate T Cleary *Submission* (8 February 1995) at 1.

9. MHCP Act s 12(2).

10. MHCP Act s 5. See *R v Coffee* (Supreme Court, NSW, Badgery-Parker J, 20 November 1992, Crim D 70018/92, unreported) for further discussion about raising the question of fitness.

11. MHCP Act s 7. The arraignment is a brief pre-trial procedure where the accused appears in court, the charges against him or her are read and the accused pleads guilty or not guilty.

12. This power has been delegated to the New South Wales Solicitor General: M Ierace *Intellectual Disability: A Manual for Criminal Lawyers* (Redfern Legal Centre Publishing, Sydney, 1989) at 72.

13. MHCP Act s 8-9.

14. MHCP Act s 10(1)-(2).

15. MHCP Act s 10(3).

16. See MHCP Act s 11, 11A and 12 for detailed provisions about the circumstances in which the inquiry can be heard by a judge alone and about the conduct of that inquiry.

17. MHCP Act s 13.

18. MHCP Act s 11(4).

19. MHCP Act s 14.

20. MHCP Act s 16(1).

21. Defined in the *Mental Health Act 1990* (NSW) (the "MH Act") Schedule 1.

22. MH Act s 252-253. There must be at least one person selected from a group of persons who have been nominated by consumer organisations: s 253(1)(c).

23. MH Act s 265.

24. MH Act s 267.

25. MH Act s 272.

26. MHCP Act s 16(2).

27. MHCP Act s 17.

28. MH Act s 80(2).

29. MH Act s 80(3). A copy of the notification must be given to the DPP.

30. MHCP Act s 29.

31. MH Act s 80(4).

32. MH Act s 83(1).

33. MH Act s 83(2). According to S C Hayes and G Craddock *Simply Criminal* (2nd, Federation Press, Sydney, 1992) at 116, "[t]here is no indication in the Act that the possible charges are limited to those for which the person was found unfit to be tried or subjected to a limiting term". They state that this should be clarified by legislation.

34. MH Act s 84(1).

35. MH Act s 84(2). The Act does not refer to the Minister for Health directly but to the "prescribed authority", which, pursuant to cl 18(1)(c) of the *Mental Health Regulation 1995* (NSW), is the Minister.

36. MH Act s 93.

37. MHCP Act s 16(4). A copy of the notification must be given to the DPP.

38. MHCP Act s 18. As to the nature, conduct and available verdicts of a special hearing see s 19, 21-28.

39. MHCP Act s 20.

40. Mental Health Advocacy Service *Submission* (21 February 1995) at 3; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 5-6; and Intellectual Disability Rights Service *Submission* (16 October 1992) at 9.

41. MHCP Act s 22(1).

42. MHCP Act s 23.

43. MHCP Act s 22(3)(c). See also *Criminal Appeal Act 1912* (NSW) s 2, 5, 5D, 6A.

44. MHCP Act s 24.

45. MHCP Act s 27.

46. MH Act s 80(2).

47. Hayes and Craddock at 120.

48. MH Act s 21.

49. MH Act s 82(1).

50. MH Act s 82(4).

51. MH Act s 82(3).

52. MHCP Act s 29.

53. *Criminal Law Consolidation (Mental Impairment) Amendment Act 1995* (SA) and *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA).

54. Victorian Parliament Community Development Committee *Inquiry into Persons Detained at the Governor's Pleasure* (Victorian Government Printer, October 1995).

55. Consultation with the Mental Health Review Tribunal and the Mental Health Advocacy Service on 11 March 1994.

56. Note that in the draft Bill, the relevant clauses are cl 73, cl 74 and cl 103. Section 24(1) and 27 have been amalgamated in the draft Bill, as recommended later in this chapter, see Recommendation 17.

57. Mr M Ierace *Submission* (16 December 1991) at 1.

58. MHCP Act s 10(4).

59. See, for example, *R v Nguyen* (District Court, NSW, Nash J, 27 February 1990, 89/21/0940, unreported) at 4, referring to the predecessor of s 10(4), s 428F(5) of the *Crimes Act 1900* (NSW).

60. See also New South Wales - Attorney General's Department *The Intellectually Disabled in the Criminal Justice System* (Criminal Law Review Division, Issues Paper, 1991) at 3.

61. *R v Nguyen* (District Court, NSW, Nash DCJ, 27 February 1990, 89/21/0940, unreported) at 3-4.

62. *Crimes Act 1914* (Cth) s 20BA(2).

63. The New South Wales Police Service did not support the retention of the s 10(4) procedure on the basis that there has been no hearing: *Submission* (February 1995) at 7.

64. MHCP Act s 11A and 21A.

65. MHCP Act s 11A(2) and 21A(2).

66. *District Court Rules 1973*, Pt 53, r 10B.

67. Law Society of New South Wales *Submission* (24 February 1995) at 2.

68. Mental Health Advocacy Service *Submission* (21 February 1995) at 4. For example, see *R v Coffee* (Supreme Court, NSW, Badgery-Parker J, 20 November 1992, Crim D 70018/92, unreported) at 5.

69. Mental Health Advocacy Service *Submission* (21 February 1995) at 3; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 6.

70. *Criminal Code 1983* (NT) s 357. See also *R v P* (1991) 1 NTLR 157.

71. Law Reform Commission of Western Australia *The Criminal Process and Persons Suffering from Mental Disorder* (Report 69, 1991) Recommendation 35 and para 4.26.

72. Mandatory "judge alone" fitness hearings (unless the judge determined otherwise) were supported in correspondence with the Criminal Law Review Division by the Criminal Law Committee of the District Court *Submission* (18 August 1995), the Legal Aid Commission of New South Wales *Submission* (3 October 1995), the Mental Health Advocacy Service *Submission* (10 October 1995) and the Public Defenders *Submission* (27 September 1995), but not supported by the Law Society of New South Wales *Submission* (5 October 1995) or the New South Wales Bar Association *Submission* (20 September 1995), who supported the retention of the current position.

73. MHCP Act s 13.

74. Hayes and Craddock at 103.

75. *R v Butler* (District Court, NSW, Bell J, 20 January 1992, 91/11/0407, unreported).

76. *Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995* cl 31.

77. Section 672.21. See also A J C O'Marra "Hadfield to Swain: The Criminal Code amendments dealing with the mentally disordered accused" (1993) 36 *Criminal Law Quarterly* 49 at 65-70.

78. For example: Mental Health Advocacy Service *Submission* (21 February 1995) at 4; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4.

79. Law Society of New South Wales *Submission* (24 February 1995) at 2.

80. Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 2-3.

81. MHCP Act s 14(a), 16(1).

82. MHCP Act s 14(b).

83. Mr M Ierace *Submission* (6 April 1993) at 1-2.

84. *R v Smith* (Supreme Court, NSW, Levine J, 21 March 1995, CLD 71386/95, unreported) at 7-8.

85. Mental Health Review Tribunal *Submission* (5 June 1995) at 1; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4.

86. MHCP Act s 23(1)(b).

87. MHCP Act s 23(2).

88. *Crimes Act 1900* (NSW) s 439.

89. Hayes and Craddock at 110.

90. Mental Health Advocacy Service *Submission* (21 February 1995) at 5-6; Intellectual Disability Rights Service *Submission* (1 March 1995) at 6; New South Wales - Department of Community Services *Submission* (23 March 1995) at 2; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 6; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4.

91. The appropriate discount, though often a controversial issue, is a matter for the sentencing judge. See the discussion of this issue in New South Wales Law Reform Commission *Sentencing* (Discussion Paper 33, 1996) at paras 5.67-5.85.

92. See *R v Parker* (Supreme Court, NSW, Roden J, 17 June 1988, Crim D 84/9/005, unreported) at 10-12.

93. MHCP Act s 24.

94. This change was originally suggested by the Legal Aid Commission of New South Wales: *Submission* (24 July 1992) at 4.

95. For example: Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4; and Mental Health Review Tribunal *Submission* (5 June 1995) at 1.

96. Mental Health Advocacy Service *Submission* (21 February 1995) at 4.

97. New South Wales - Department of Community Services *Submission* (23 March 1995) at 2.

98. MH Act s 281. See para 5.60 above.

99. MH Act s 285. See para 5.60 above.

100. MHCP Act s 22(3)(b).

101. Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 5.

102. Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4; and Law Society of New South Wales *Submission* (25 February 1995) at 1.

103. For example, for orders under s 84 of the MH Act, the prescribed authority is the Governor or Governor-General if the patient was found not guilty by reason of mental illness, or the Minister, if the patient is a sentenced prisoner or was found unfit to be tried: *Mental Health Regulation 1995* (NSW) cl 18. See also R Hayes, M Sterry, W Greer and A Langley *Forensic Patients: Background 1995* (Mental Health Review Tribunal, 1995) at 5-6 for a discussion of the various prescribed authorities for the available orders under the MH Act.

104. Mental Health Review Tribunal *Annual Report 1994,* Table 34.

105. Mental Health Act Implementation Monitoring Committee (NSW) *Report to the Honourable R A Phillips Minister for Health on the NSW Mental Health Act 1990* (New South Wales Parliamentary Paper 275, August 1992) at 31.

106. Mental Health Review Tribunal *Annual Report 1992* at para 11.3. See also Mental Health Act Implementation Monitoring Committee at 31.

107. Mental Health Advocacy Service *Submission* (21 February 1995) at 6.

108. Human Rights and Equal Opportunity Commission *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (AGPS, Canberra, 1993) (the "Burdekin Report") Vol 2, at 799-800. [footnote references omitted]

109. Mental Health Act Implementation Monitoring Committee at 31-32.

110. According to the Burdekin Report at 801: "[t]he United Kingdom, which gave Australia its Governor's pleasure system, was taken to the European Court of Human Rights in 1983 for these same breaches of international law. As a result the UK changed its law, giving the Mental Health Review Tribunal the power to order the release of an offender whom it considers no longer mentally disordered or dangerous." [footnote references omitted]

111. Mental Health Act Implementation Monitoring Committee at 32.

112. Burdekin Report at 802, 901. Victorian Parliament Community Development Committee at 113-114, 190. Note that the Victorian Government, in its response to the Committee Report tabled in Parliament on 20 June 1996, supported the Committee's recommendation that release decisions be made by the judiciary, not the government: *Victorian Government Response to the Community Development Committee Inquiry into Persons Detained at the Governor's Pleasure* (1996) at 1.

113. Mental Health Advocacy Service *Submission* (21 February 1995) at 6; Law Society of New South Wales *Submission* (24 February 1995) at 2; Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 7; Intellectual Disability Rights Service *Submission* (1 March 1995) at 6; Mental Health Review Tribunal *Submission* (5 June 1995) at 1; and Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4. The New South Wales Department of Corrective Services supported the proposed ability of the Tribunal to make release decisions, but did not support giving the Tribunal the ability to make decisions about classification and placement within the correctional system: *Submission* (3 March 1995) at 1.

114. New South Wales Health Department Steering Committee on Mental Health *Report to the Minister for Health on the Mental Health Act 1983* (May 1988) at 65-66.

115. New South Wales Health Department *Caring for Health: Proposals for Reform - Mental Health Act 1990* (Discussion Paper, 1996) ("1996 New South Wales Health Department Discussion Paper") at 41.

116. Mental Health Review Tribunal *Annual Report 1992* at para 10.7.2.

117. Mental Health Act Implementation Monitoring Committee (NSW) at 32-33.

118. Hayes and Craddock at 116-117.

119. N A Harrison "Forensic Patients 1986 - For better or worse", paper presented at a seminar on *Medical and Legal Aspects of Current Mental Health Legislation* (Proceedings 70, Institute of Criminology, The University of Sydney, 1986) at 24.

120. Mental Health Act Implementation Monitoring Committee at 33-34.

121. Mental Health Review Tribunal *Submission* (5 June 1995) at 1.

122. Mental Health Advocacy Service *Submission* (21 February 1995) at 6.

123. 1996 New South Wales Health Department Discussion Paper at 22-24.

124. Mental Health Act Implementation Monitoring Committee at 34.

125. 1996 New South Wales Health Department Discussion Paper at 25.

126. Mental Health Act Implementation Monitoring Committee at 35.

127. New South Wales Police Service, Commissioner's Instructions, Instruction 38.16.

128. See the *Victims Rights Act 1996* (NSW).

129. 1996 New South Wales Health Department Discussion Paper at 25-26.

130. For example, MH Act s 82(1)(c).

131. Information supplied by Mr B Boerma, Registrar, Mental Health Review Tribunal (14 April 1994).

132. Hayes and Craddock at 117.

133. *Crimes Act 1914* (Cth) s 20BL(4). Suggested conditions include that the person reside at a specific address, undertake treatment and/or therapy, and undertake behavioural and lifestyle modification programs.

134. *Crimes Act 1914* (Cth) s 20BL(3). The time for which conditions remain in force is limited to either the balance then remaining of the period of detention set by the court (that is, the period imposed under s 20BJ(1)), or 5 years, whichever is the lesser.

135. *J v Mental Health Review Tribunal* (Supreme Court, NSW, Foster J, 21 October 1986, Protective Division, 87/86, unreported) at 6-8.

136. *Public Service Board of New South Wales v Osmond* (1986) 60 ALJ 209.

137. Mental Health Advocacy Service *Submission* (21 February 1995) at 9.

138. For example, New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 12.

139. MH Act s 281.

140. MH Act s 284.

141. MH Act s 283.

142. See Hayes and Craddock at 120. See also *J v Mental Health Review Tribunal* (Supreme Court, NSW, Foster J, 21 October 1986, Protective Division, 87/86, unreported) at 5-6.

143. *South Australia v O'Shea* (1987) 61 ALJR 477.

144. MH Act s 285.

145. Mental Health Advocacy Service *Submission* (21 February 1995) at 9.

146. Law Society of New South Wales *Submission* (24 February 1995) at 4.

147. S Loane "Move to speed up court hearings" *The Sydney Morning Herald* (30 August 1996) at 4.

148. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* (Research Report 4, 1993) and *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts* (Research Report 5, 1996). See the discussion of these Reports in Chapter 2.

149. See obiter comments in *Mackie v Hunt* (1989) 19 NSWLR 130 at 135-136 and *Perry v Forbes* (Supreme Court, NSW, Smart J, 21 May 1993, CLD 11333/93, unreported) at 13.

150. *Pioch v Lauder* (1976) 13 ALR 266.

151. *Mackie v Hunt* (1989) 19 NSWLR 130 at 134, referring to the precursor of s 32, s 428W of the *Crimes Act 1900* (NSW).

152. MHCP Act s 31(1).

153. See *Perry v Forbes* (Supreme Court, NSW, Smart J, 21 May 1993, CLD 11333/93, unreported) at 18.

154. The passing of the *Criminal Procedure Amendment (Indictable Offences) Act 1995* (NSW) means that certain indictable offences are now automatically tried summarily unless the prosecuting authority, or (in the case of more serious offences) the prosecuting authority or the person charged with the offence, elects to have the offence dealt with on indictment: *Criminal Procedure Act 1986* (NSW) s 33C.

155. For example: Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 6; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 6; Magistrate I Pike, Chief Magistrate, Local Courts of New South Wales *Submission* (30 July 1992) at 1; Magistrate C Gilmore, Deputy Chief Magistrate, Local Courts of New South Wales *Submission* (2 March 1995).

156. *Minister for Corrective Services v Harris* (1989) 8 (12) *Petty Sessions Review* 3892 at 3896-3897.

157. See NSWLRC DP 35 at para 5.19.

158. The Commission has received a number of individual submissions from Magistrates. It has also participated in Magistrates' conferences on intellectual disability organised by the Judicial Commission of New South Wales: (Metropolitan Seminar Series, Sydney, 30 October - 3 November 1995). The Commission also met with a number of Magistrates, including the Chief Magistrate, at the Downing Centre on 22 March 1994.

159. For example: Mr M Ierace *Submission* (16 December 1991) at 4; Intellectual Disability Rights Service *Submission* (1 March 1995) at 6; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4; and New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 6.

160. This follows the comments of Smart J in *Perry v Forbes* (Supreme Court, NSW, Smart J, 21 May 1993, CLD 11333/93, unreported) at 18.

161. For example, Law Society of New South Wales *Submission* (24 February 1995) at 2.

162. New South Wales Police Service *Submission* (February 1995) at 10.

163. Magistrate T Cleary *Submission* (8 February 1995) at 3.

164. Magistrate D Kok *Oral Submission* (14 February 1995). The Law Reform Commission of Western Australia also recommended that similar procedures be available in both the lower and higher courts and that accordingly the lower courts be given the power to hold a special hearing: *Report on the Criminal Process and Persons Suffering from Mental Disorder* (Report 69, 1991), Recommendation 40 and para 5.13.

165. *Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995* cl 5.

166. Victorian Parliament Community Development Committee at 159-161 and Recommendation 89 at 199-200.

167. *Justices Act 1902* (NSW) s 122, s 125.

168. *Crimes Act 1900* (NSW) s 556A(1).

169. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 6.

170. Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 23-25.

171. MHCP Act s 32(1)(b).

172. For example: Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 6; and Magistrate T Cleary *Submission* (8 February 1995) at 2. Magistrate Cleary argued that it will always be in the interests of the community that any person who commits a crime should be punished, therefore the new test will mean that the provision applies to less people than now.

173. Magistrate M Beveridge *Submission* (5 April 1994) at 1.

174. Magistrate D Kok *Oral Submission* (14 February 1995).

175. For example, Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 25-26.

176. MHCP Act s 10(4).

177. *Perry v Forbes* (Supreme Court, NSW, Smart J, 21 May 1993, CLD 11333/93, unreported) at 10.

178. For example: Intellectual Disability Rights Service *Submission* (1 March 1995) at 7; and Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 1.

179. Magistrate T Cleary *Submission* (8 February 1995) at 2.

180. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 7.

181. For example: Mental Health Advocacy Service *Submission* (21 February 1995) at 7; and Magistrate D Kok *Oral Submission* (14 February 1995).

182. Mental Health Advocacy Service *Submission* (21 February 1995) at 7.

183. For example: Kingsford Legal Centre *Submission* (29 October 1992) at 4; and Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 6.

184. Magistrate J Crawford *Submission* (5 November 1995) at 1.

185. For example: Victims Advisory Council *Submission* (27 February 1995) at 5; and Magistrate D Kok *Oral Submission* (14 February 1995).

186. Magistrate D Kok *Oral Submission* (14 February 1995).

187. Magistrate D Kok *Oral Submission* (14 February 1995).

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

6. The Defence of Mental Illness

RECOMMENDATIONS

The defence of mental illness in Supreme and District Courts

25. The common law defence of mental illness should be renamed in legislation as the defence of mental impairment. [See paras 6.23-6.27 and Division 4 of the draft Bill in Appendix C]

26. A person found not guilty on the ground of mental impairment should not be sentenced to indeterminate detention. Rather, after a finding of not guilty on the ground of mental impairment, the court should give the person a limiting term, representing the best estimate of the appropriate sentence if the person had been found guilty of the relevant offence. [See paras 6.28-6.36 and cl 98 and Division 5 of the draft Bill]

27. Section 39 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) should be amended to remove the requirement of detention in "strict custody" following a verdict of not guilty because of mental impairment. Accordingly, the court would have the power to order either a custodial or non-custodial option for the person for the period of the limiting term. The Mental Health Review Tribunal would have the power at the initial or subsequent reviews to alter the conditions of custody or release ordered by the court (including the power to revoke a non-custodial option and order some form of detention), or to release the person unconditionally. [See paras 6.37-6.45 and cl 98 and Division 5 of the draft Bill]

The defence of mental illness in Local Courts

28. The defence of mental impairment should be available in Local Courts as well as in the Supreme and District Courts as recommended in Recommendation 25. If the defence is raised in any matter (whether summary or indictable) heard in a Local Court, the magistrate must:

(a) consider proceeding under section 32 or 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW); and

(b) if the magistrate does not dismiss the charge under section 32 or 33, the magistrate must hear the matter and return a special verdict that a person is not guilty of an offence because of mental impairment if he or she is satisfied that the person is not criminally responsible for the offence because of a mental impairment. If such a verdict is returned, the same procedures apply as for matters heard in the District and Supreme Courts. [See paras 6.46-6.49 and cl 95 of the draft Bill]

Explanatory Note to Recommendations 25-28

These recommendations refer to the current legislation, the *Mental Health (Criminal Procedure) Act 1990* (NSW). In Recommendation 10 in Chapter 5, the Commission recommends that all the provisions of the *Mental Health (Criminal Procedure) Act 1990* (NSW) be relocated in the *Criminal Procedure Act 1986* (NSW). This recommendation also applies to this chapter but, for reasons of readers' convenience, the current legislation references are used. Recommendations 11 (Tribunal determination whether person has an intellectual disability), 19 (removal of executive discretion) and 22 (Tribunal duty to give reasons and administrative review of Tribunal determinations), discussed in Chapter 5, all apply

to the treatment of the defence of mental impairment. Appendix C sets out a new draft Part of the *Criminal Procedure Act 1986* (NSW), incorporating these recommendations. All references to "intellectual disability" in legislation are to be defined as in Recommendation 1. Note that the draft legislation does not include savings and transitional provisions. The Commission believes that such provisions should be determined at the time of enactment, as the choice of appropriate provisions may be affected by whether or not the draft legislation is enacted in its entirety.

The Commission has only chosen to prepare draft legislation to reflect the recommended changes to the *Mental Health (Criminal Procedure) Act 1990* (NSW). The recommendations in this chapter will also require amendments to other legislation, including the *Mental Health Act 1990* (NSW).

BACKGROUND TO THE RECOMMENDATIONS

Introduction

6.1 This chapter considers the defence of mental illness. This and the defence of diminished responsibility are the most likely criminal defences to be raised for a person with an intellectual disability. Diminished responsibility is not considered in this Report. As discussed in Chapter 1, it is, together with the other partial defences, the subject of its own inquiry. The defence of mental illness is, like fitness to be tried, an area in which both people with an intellectual disability and people with a mental illness are affected by the Commission's recommendations. The Commission's recommendations are designed to recognise, within the same broad procedures, the different needs of people with an intellectual disability and those with a mental illness.

6.2 The defence of mental illness is available for all crimes, although as a matter of practice it tends to be raised only for serious offences. A person who has been found unfit to be tried may also be found "not guilty on the ground of mental illness",[1] which is equivalent to a finding of "not guilty by reason of mental illness" at a normal trial,[2] and has the same consequences.[3] The defence, often referred to as the "insanity defence", is derived from the rules laid down in *M'Naghten's* case (hence it is also referred to as the "M'Naghten defence") and is usually expressed by the following test:

> to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[4]

The common law test applies in New South Wales and Victoria. In Queensland, Western Australia, Tasmania, the Northern Territory, the Australian Capital Territory and South Australia, the defence, with some changes, is set out in legislation.

6.3 The Commonwealth *Criminal Code* contains a general defence of "mental impairment" based partly on the M'Naghten defence, but also including (in s 7.3(1)(c) below) the inability to control conduct:

> 7.3 (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:
>
> (a) the person did not know the nature and quality of the conduct; or
>
> (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
>
> (c) the person was unable to control the conduct.
>
> (2) The question whether the person was suffering from a mental impairment is one of fact.

> (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.
>
> (4) The prosecution can only rely on this section if the court gives leave.
>
> (5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.
>
> (6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.
>
> (7) If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.
>
> (8) In this section: **"mental impairment"** includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
>
> (9) The reference in subsection (8) to **mental illness** is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.[5]

6.4 The Explanatory Memorandum introducing the Bill commented that "[a] broad definition of mental impairment allows the jury to hear psychiatric testimony based on the latest expertise while properly leaving the ultimate question of responsibility to the jury".[6] The Commonwealth reforms were introduced as part of a long term project to introduce uniform criminal laws into Australia. Since the introduction of the Commonwealth Act, a Victorian Parliamentary Committee has made a similar recommendation for the introduction of a defence of mental impairment, but, unlike s 7.3(1)(c), the recommendation omitted inclusion of an inability to control conduct as a limb of the defence.[7] In New South Wales, the inability to control conduct is, to some extent, taken into account through the partial defence of diminished responsibility.[8]

Application of the defence to people with an intellectual disability

6.5 As discussed in Chapter 3, intellectual disability differs from mental illness, and is not an illness itself. However, it has been suggested that because, at the time the M'Naghten defence was formulated, intellectual disability was regarded medically as a form of insanity (or at least could not be differentiated from it), it was intended to be included within the legal definition of insanity, and that this anomaly has been perpetuated by the failure of the law to keep pace with the recognition of the distinct nature of intellectual disability.[9] In DP 35, the Commission took the view, though noting some conflicting commentaries,[10] that people with an intellectual disability could fall within the terms of the defence.[11] As a matter of practice, some people with an intellectual disability have received such a verdict. The Commission has noted, however, the inappropriateness and confusion caused by a defence of *mental illness* applying to people with an intellectual disability. It has been argued:

> ... the law needs to be reformed so that intellectual disability does not continue to be defined as an illness for the purpose of defences to criminal charges. Quite apart from the questions of principle involved, it is ludicrous that during a trial the jury will hear from the experts that intellectual disability is not an illness and be then directed by the trial judge that they must consider it as such for the purpose of determining whether to return a special verdict of not guilty by reason of mental illness.[12]

6.6 As recognised in relation to fitness to be tried, there are fundamental problems beyond those of terminology when intellectual disability is treated as a sub-set of mental illness. The channelling of people with an intellectual disability from the criminal justice system into the mental health system (which occurs when the mental illness defence is made out) may not reflect or adequately address their needs in terms of supervision and care. Additionally, the detention consequences of the defence (see below) are more appropriate for people with an impairment which may be temporary and treatable than for people with a permanent disability such as intellectual disability.

The position in New South Wales

6.7 In New South Wales, the *Mental Health (Criminal Procedure) Act 1990* (NSW) ("the MHCP Act") regulates the application of the defence of mental illness. A "special verdict" of "not guilty by reason of mental illness" is returned where a person is found to have committed the relevant offence, but, at the relevant time, was "mentally ill, so as not to be responsible, according to law".[13] "Mental illness", for the purposes of this defence, is not defined by the MHCP Act or by any of the similar legislative provisions which preceded it.[14] The defence of mental illness regulated under the MHCP Act is therefore the common law M'Naghten defence.

6.8 The issue of mental illness can be raised by either the accused or the prosecution, with the burden of proof (on the balance of probabilities)[15] falling on the party who raises it. If the issue is raised, the judge must explain to the jury:

the findings which it can make;

the legal and practical consequences of those findings;

the existence, composition, and function of the Mental Health Review Tribunal ("the Tribunal"); and

the requirement that before releasing a person detained under the MHCP Act, the Tribunal must be satisfied that the person does not pose a danger to themselves or the public.[16]

6.9 When a judge[17] or jury returns a verdict of "not guilty by reason of mental illness" under the MHCP Act, it is not a determination as to guilt or innocence in the ordinary sense, but a finding as to the mental responsibility of the offender at the time of the offence. The judge or jury is called upon to make a legal determination based on clinical evidence.

Consequences of the defence

6.10 The defence of mental illness has many critics. For example, the Burdekin Report stated:

> The purpose of the [defence of mental illness] is to recognise that mental illness can rob people of the capacity to understand what they are doing. Conviction for a crime requires that both the act itself and the requisite intent be proved. An acquittal on the grounds of mental illness means the accused person committed the criminal act, but cannot be held responsible for it.
>
> This solution appears to emphasise treatment rather than punishment of the offender. However, the purpose of Governor's pleasure detention is not treatment, but only protection of the public. In reality, such detention can be a particularly severe punishment because it is not subject to the normal legal protections which apply to those convicted of crimes.[18]

6.11 The defence is unusual in that despite a "not guilty" verdict, the person is not automatically released. The person is effectively transferred from the criminal justice system to the mental health system:

> Community concern about “violent offenders” ... [has] been used to justify a disposition that is otherwise antithetical to principles of criminal law. Other defences involving a lack of criminal intent result in a complete acquittal of the defendant ... By comparison, offenders with a mental impairment have often been seen to pose a threat to the safety of the community. This perception has resulted in the detention of serious offenders with a mental impairment.[19]

6.12 Some critics are particularly concerned about the impact of the verdict on people with an intellectual disability. The Legal Aid Commission of New South Wales stated that while the defence of mental illness:

> may well be effective in terms of avoiding a conviction, ... it is not appropriate and generally not in the intellectually disabled client’s best interest to obtain such a verdict.
>
> ...
>
> A successful mental illness defence may ... be the worst possible outcome for a person with an intellectual disability.[20]

6.13 The concern that the defence of mental illness can lead to injustice has been raised in submissions and consultations primarily because of the *consequences* of the defence, following the verdict, rather than because of the verdict itself. The process which governs the continued detention and release of a person who has received such a verdict is a complicated one, and has many similarities with the process applicable to people found unfit to be tried, discussed in Chapter 5. There are two opposing misconceptions about the consequences of the defence of mental illness: the first is that the person is simply acquitted and released into the community because he or she has been found “not guilty”; and the second is that the person is detained for life. Neither is accurate.

6.14 *Strict custody.* If the judge or jury returns a verdict of not guilty by reason of mental illness “the Court must order that the person be detained in strict custody in such place and in such manner as the Court thinks fit until released by due process of law”.[21] As there are no other detention options, the person is held in prison or hospital as a “forensic patient”.[22] Unless they also have a mental illness, people with an intellectual disability will not be held in hospital, but in gaol.[23] There is no provision allowing immediate release by order of the court, even if the offence is relatively minor and would have attracted a non-custodial sentence.

6.15 Not only is there no provision for release, but there is no provision for some other form of less restrictive conditions than “strict custody”, which means either gaol or the locked ward of a psychiatric hospital, even though the person may have been in a less restrictive environment prior to the handing down of the verdict. For example, a person may have been residing in special cottages in the grounds of a psychiatric hospital while waiting for the matter to come to trial. An order for “strict custody” will require such a person to be moved to a locked psychiatric ward, which may be completely unnecessary from a safety point of view and unsatisfactory for the person’s continuing treatment.[24]

6.16 The *Crimes Act 1914* (Cth) is significantly different from the New South Wales position on this point. Generally the court must order the detention of a person acquitted because of mental illness (for a period not exceeding the maximum period which could be imposed if the person was found guilty); but allows conditional or unconditional release “if in the court’s opinion it is more appropriate to do so”. Where a person has been granted conditional release, these conditions can only extend for three years and the person or the Director of Public Prosecutions may at any time apply to the court to have those conditions varied.[25]

6.17 *Review by the Mental Health Review Tribunal.* As soon as practicable after a person has been detained in strict custody as a forensic patient in New South Wales, the Tribunal must review that person’s case and make a recommendation to the Minister for Health[26] about the person’s detention, care or treatment, or conditional/unconditional release.[27] The types of conditions of release include: supervision by a psychiatrist and a case manager, with a minimum frequency of contact between the

treating staff and the patient; medication; accommodation; or provision for alcohol/drug abuse counselling or abstinence.[28] The Tribunal's recommendation *may* be implemented by the "prescribed authority", which (in relation to the mental illness defence) is the Governor.[29] If there is no recommendation for release made after this initial review, the Tribunal may at any time, but must at least every six months, similarly review the person's case and make an appropriate recommendation.[30] As at April 1995, the Tribunal was supervising 85 such forensic patients.[31]

6.18 A recommendation for release at any stage is made only if the Tribunal is satisfied that:

> the safety of the person or any member of the public will not be seriously endangered by the person's release.[32]

Where a recommendation for release is made upon a subsequent review, the Minister is required to notify the Attorney General of that recommendation, and to provide a copy of that notification to the Director of Public Prosecutions.[33] The Attorney General then has 30 days to object on the following grounds:

> (a) the person has served insufficient time in custody or under detention; or
>
> (b) the Attorney General or the Director of Public Prosecutions intends to proceed with criminal charges against the person ...[34]

6.19 If an objection is made, the Governor may not order the person's release;[35] otherwise, the Governor *may* order the person's release.[36] The person ceases to be a forensic patient once unconditionally released by the Governor, or, if conditionally released, on the expiry of any time specified in the conditions of release.[37]

6.20 Thus, once detained as a forensic patient, a person's release (or return from strict custody to previous less restrictive conditions) is subject to inevitable administrative delay:

> [e]ven where the Mental Health Review Tribunal recommends an immediate release and this recommendation is followed by the Minister for Health and the Attorney General, the person in fact is not released for some weeks and perhaps months ...[38]

Detention in prison or the locked ward of a psychiatric hospital as required by the "strict custody" provision, for however long, may have a negative impact on a forensic patient out of proportion to the seriousness of the alleged offence.

6.21 The Commission has already recommended (Recommendation 19) that the executive discretion for the release of forensic patients be removed. It is not necessary to repeat the arguments in favour of this recommendation here, except to note that the Attorney General's veto on the ground that "the person has served insufficient time in custody or under detention" is both particularly difficult to quantify and inappropriate. The person has not been convicted of a crime and is supposedly being detained on the ground of the person's danger to themselves or the community, rather than for punishment. As with all forms of executive discretion, the veto allows political, media and public pressure to intrude upon the release process. Abolition of the requirement of executive acceptance of the Tribunal's recommendation will decrease the minimum time before possible release from strict custody, but, without further changes to the current law, the verdict may still involve a traumatic and inappropriate move to a locked psychiatric ward or gaol for the forensic patient.

6.22 This chapter does not consider the general issue of where and how people found not guilty on the ground of mental illness should be detained - this is an area where different provisions are suitable for people with a mental illness and people with an intellectual disability. Detaining a person with an intellectual disability, who has been found not guilty on the ground of mental illness, in a psychiatric ward or treating him or her like an ordinary sentenced prisoner in gaol is clearly unjust.[39] The need for

special treatment, specialist custodial units and non-custodial options for people with an intellectual disability is discussed in Chapters 10 and 11.[40]

DISCUSSION OF THE COMMISSION'S RECOMMENDATIONS

The defence of mental illness in Supreme and District Courts

Recommendation 25: Extension of the common law defence

6.23 Despite the possible problems caused by the overlap between intellectual disability and mental illness, the Commission believes it is important that there be an appropriate defence available for people with an intellectual disability whose understanding is affected to the extent expressed by the M'Naghten defence. It is clearly unjust for people who do not understand the nature and quality of their conduct, or that their conduct was wrong, to be punished as though they were guilty of committing crimes, whatever the nature of their mental impairment. Although the defence of mental illness does have its critics,[41] the many reviews and restatements of the defence over the years have not generally led to significant changes to the M'Naghten formulation. The Commission believes it is beyond the scope of this inquiry to undertake a further in-depth review of the whole defence. Rather, the Commission has attempted to work within the existing framework and develop the law so that it better reflects the needs of people with an intellectual disability. Rather than proposing a separate defence[42] on the grounds of intellectual disability, the Commission supports the continued application in appropriate cases of the current common law M'Naghten defence, discussed above, to people with an intellectual disability.

6.24 However, because of the confusion caused by referring to this defence as the defence of "mental illness", the Commission believes the defence should be renamed the "defence of mental impairment". So long as the elements of the M'Naghten test are satisfied, "mental impairment" may include senility, intellectual disability, mental illness, brain damage and severe personality disorder, as provided in the Commonwealth *Criminal Code*. In relation to the provisions of the Commonwealth Code it was commented:

> The Committee believes that the Code's broad definition of mental impairment allows the jury to hear psychiatric testimony based on the latest expertise while properly leaving the ultimate question of responsibility to the jury.[43]

Accordingly, all references in the *Mental Health (Criminal Procedure) Act 1990* (NSW) to the defence/verdict of "not guilty by reason of mental illness" or "not guilty on the ground of mental illness" should be amended to "the verdict of not guilty because of mental impairment".

6.25 Additionally, though supporting the retention of the common law defence, the Commission has recommended changes to the *consequences* in New South Wales of a successful defence (see Recommendations 26-28 below) to overcome some of the difficulties which arise for people with an intellectual disability.

6.26 Despite the appeal of uniformity, the Commission does not now support the direct adoption of the whole of s 7.3 of the Commonwealth *Criminal Code* into New South Wales legislation. First, the Code provision contains three possible effects of mental impairments which lead to the person being not criminally responsible for an offence:

> (a) the person did not know the nature and quality of the conduct; or
>
> (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
>
> (c) the person was unable to control the conduct.

Only (a) and (b) represent the current M'Naghten defence. Under the common law, the inability to control conduct (also known as "irresistible impulse") is of itself insufficient to satisfy the M'Naghten defence.[44] The inclusion of an inability to control conduct as a ground for application of the defence would be controversial and was not supported by, for example, the New South Wales Police Service.[45] As discussed above, the Victorian Parliamentary Committee did not include this ground in their recommendations. The fact that New South Wales, unlike some other Australian jurisdictions, also has the defence of diminished responsibility must be taken into account in any proposals to change the defence of mental illness in this way.[46]

6.27 Secondly, the importation of the Commonwealth Code provision would not also incorporate the "glosses" on the M'Naghten defence which have developed in the common law since 1843, as a "code" provision is designed to be free standing, not interpreted in light of previous case law. Some of the cases which have developed and extended the interpretation of the defence are particularly useful for people with an intellectual disability.[47] The Commission supports the continued development of the defence through the common law.

Recommendation 26: Indeterminate detention

6.28 A major concern about the defence of mental illness is that people receiving such a verdict are detained *indeterminately.* There is no release date set; rather, they must wait for a determination by the Tribunal that they are no longer a danger to themselves or others and for a recommendation for release. Under the current system that recommendation cannot be acted upon by the Tribunal but must be approved by the executive government. Even with the abolition of executive discretion as recommended by the Commission in Recommendation 19, the person is still subject to indeterminate detention based on the perception of dangerousness. As discussed in the previous chapter, the situation has now changed for people who are found unfit to be tried. An unfit person who has been found guilty at a special hearing now receives a "limiting term" at the end of which, if not before, the person must be released.

6.29 It has been commented that as a "successful" defence of mental illness results in indeterminate detention:

> using the defence only appears to be advantageous in the most serious cases where the penalty for being found guilty is likely to be extremely severe. ... Traditionally, people detained indeterminately have spent lengthy periods in custody, often far longer than those who receive definite sentences for similar crimes.[48]

In light of the perceived disadvantages of the insanity defence, an accused may attempt to avoid consideration of his or her mental illness by giving a false version of events, pursuing a different defence strategy or deciding to plead guilty. Consultations have referred to the difficult ethical issues which may therefore arise for lawyers in this area, particularly if the offence is a relatively minor one.[49] The avoidance of the defence means that some people do not have their mental state appropriately taken into account at their trial. This may hinder appropriate treatment or support after sentencing.[50]

6.30 The current procedure raises particular difficulties for people with an intellectual disability. The Legal Aid Commission of New South Wales noted that:

> [a] person with a mental illness may satisfy the Tribunal that his/her release will not present a serious danger to the public and may progress from the prison hospital to open wards of a public hospital, and may finally progress to leave, with appropriate treatment conditions. ...
>
> This path to freedom is not available to a person with an intellectual disability. By its nature, intellectual disability does not resolve with treatment and it is therefore, very much harder to persuade the Tribunal that the dangerous behaviour said to have arisen from the intellectual disability will not recur in the future. Further, there are no "civilian" facilities in NSW providing some level of security where a person with an intellectual disability may

> progressively prove that he/she is no longer a danger. There are now specialist facilities for males at each level of security within the NSW prison system, but the rigidity of that system does not provide the same level of opportunities available to those with a mental illness.
>
> ...
>
> ... The lack of certainty of release however, can of itself, be a factor giving rise to anger and other behaviour likely to affect the decision to recommend early release.[51]

6.31 An alternative to indeterminate detention is not obvious. In DP 35 the Commission discussed three possible options: (1) impose a term of detention *equal to* the maximum period of imprisonment for the offence; (2) impose a limiting term of detention *not exceeding* the maximum period of imprisonment for the offence;[52] or (3) retain indeterminate detention but with release controlled by the Tribunal rather than the executive government. Despite the advantages of certainty of release date, the Commission initially rejected the first two options because these options involve the imposition of a sentence, based upon the hypothetical finding of guilt of a person already found not guilty. Additionally, the Commission commented that such a determinate sentence does not allow the person's mental condition or the likely risk to the public to be taken into account. DP 35 accordingly leaned toward the third option.

6.32 The Commission has reconsidered its proposal following submissions and further consultations. Few submissions supported the prospect of indeterminate detention for people found not guilty on the ground of mental illness.[53] Indeterminate detention was of particular concern in relation to people with an intellectual disability whose condition is unlikely to improve with time or "treatment".[54] Another danger with indeterminate detention is that a person may spend longer in custody merely because appropriate community services are not available. Some submissions argued that if there was to be any indeterminate provision, it should not be longer than the maximum penalty for the relevant offence, that is, option (2) outlined above.[55] It was also argued that, if a person is still dangerous at the end of the maximum term for the relevant offence, the civil procedures in the *Mental Health Act 1990* (NSW) for the involuntary commitment of such a person are more appropriate than continuing treatment as a forensic patient.[56] However, such procedures for civil detention, being based on a strict definition of mental illness, do not apply to a person with an intellectual disability (unless that person also has a mental illness).

6.33 By contrast to the Commission's original proposal, the Commonwealth *Crimes Act 1914,* discussed at para 6.16 above, effectively provides for a limiting term for a person found not guilty on the ground of mental illness. Similarly, the *Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995*, discussed at paras 5.19-5.20, provides that the same detention procedures are available for both persons found unfit to be tried and persons found not guilty because of mental impairment. Accordingly, under that Bill, if the person found not guilty is not released, the court must fix a limiting term, based upon what the court would have considered appropriate had the person been convicted of the offence. As discussed in Chapter 5, the 1995 Bill has not yet been publicly released but has been sent to the Standing Committee of Attorneys General and the relevant State Ministers. South Australia and Western Australia have recently introduced Acts with some similarities to the Model Bill.[57]

6.34 There is generally a strong philosophical opposition to indeterminate detention, and it seems harsh to single out this small group of defendants for such sentences. Giving such people the maximum term for the offence charged also seems unjust. The Commission now is of the view that a judge should be required to set a "limiting term" for a person found not guilty on the ground of mental illness, being the best estimate of the sentence he or she would have considered appropriate if the person had been found guilty of the relevant offence. A limiting term (as for people found unfit) should apply to both custodial and non-custodial sentencing options (see Recommendation 27 below). The Commission believes that a requirement to set a limiting term would have a number of advantages. First, a person found not guilty on the grounds of mental illness would no longer serve more than the maximum penalty for a guilty verdict for the same offence. Instead there would be a relationship between the seriousness of the offence and the *maximum* length and type of the sentence. Secondly, as for limiting terms set for people found unfit to be tried, the length of the limiting term given could be appealed in the same way as

a normal sentence.[58] Thirdly, it may encourage more use of the defence in appropriate cases. Finally, even if Recommendation 19 was not accepted, this recommendation would remove executive involvement in the release of a person found not guilty on the ground of mental illness, except in the period before the expiration of the limiting term.

6.35 The disadvantages of a limiting term must also be acknowledged. First, setting the limiting term will be a difficult task for the judge. The usual sentencing principles such as deterrence and retribution will not apply to people in this situation and the judge will have to assess the person as if he or she were criminally responsible for the offence.[59] As discussed in relation to limiting terms for people found unfit to be tried at para 5.41 above, the Commission acknowledges the artificiality of setting a limiting term, but supports it as the only pragmatic alternative to indeterminate detention. Secondly, the imposition of any sentence (however named) is inconsistent with the fact that the person has been found "not guilty". Finally, a limiting term means that release is automatic at the end of the limiting term, and there may be, as with all released prisoners, a continuing risk to the community or to the detained person. Though civil commitment is available for some people with a mental illness who remain dangerous at the end of the limiting term, a person with an intellectual disability is unlikely to satisfy the legislative requirements under the *Mental Health Act 1990* (NSW) for involuntary detention in a psychiatric hospital, unless he or she also has a mental illness. However, the Commission's research has not revealed any clear or necessary connection between intellectual disability and "dangerousness". Therefore, it seems inappropriate to single out people with an intellectual disability for further detention beyond the limiting term.[60]

6.36 A limiting term would not prevent the Tribunal from recommending an earlier release date, as provided for in the current law. As outlined in the previous chapter[61] the Commission believes that release decisions in this area should be made by an expert tribunal rather than a court, although the court will have the power to set the *maximum* period of detention/supervision. The Commission acknowledges the difficulties involved in predicting dangerousness,[62] but believes that an expert tribunal is the better body for such decisions. In Victoria, by comparison, the Parliamentary Committee discussed above recommended a release and supervision system controlled by the courts.[63]

Recommendation 27: Abolition of strict custody requirement

6.37 Related to the question of limiting terms is the issue of the circumstances of detention for the period of the limiting term. As discussed at paras 6.14-6.21 above, following a special verdict of not guilty by reason of mental illness, s 39 of the MHCP Act currently provides that the accused *must* be detained in "strict custody ... until released by due process of law". This means *mandatory* detention in gaol or a locked psychiatric ward until the Tribunal recommends otherwise *and* that recommendation is accepted by the executive government.[64]

6.38 The injustices which can arise from the strict custody requirement have been raised in consultations,[65] and discussed at length in DP 35.[66] Judges also have commented on the need for greater flexibility in this area.[67] Additionally, the New South Wales Health Department's Mental Health Act Implementation Monitoring Committee ("the Monitoring Committee") has recommended that the MHCP Act should be amended to allow the court to continue bail or make such order as to custody as it sees fit pending review by the Tribunal.[68]

6.39 In DP 35, the Commission supported the inclusion in the MHCP Act of a judicial discretion to release, with or without conditions, a person found not guilty by reason of mental illness during the period between the finding and the Tribunal's initial recommendation as to detention/release. This recommendation received strong support in submissions.[69] For example, the solicitors of the Mental Health Advocacy Service argued that:

> [w]e have been involved in numerous cases, some current, where persons have been detained inappropriately in psychiatric hospitals. It is not uncommon for many months to go by before the political decision is made to authorise release. As pointed out by the Commission, many of these people are on bail in the time leading up to the trial. It is

> grotesque that being placed in "strict custody" is the only possible outcome of a successful mental illness defence.[70]

6.40 Similarly the Intellectual Disability Rights Service argued that:

> [i]t seems ridiculous to detain people when they have not committed an act of violence or to deny people access to treatment they may already be receiving. Furthermore unless the person is considered to be a risk to the community, they should not be incarcerated for a crime of which they have been found not guilty.[71]

No submission argued against the proposal in DP 35.

6.41 By comparison, a 1996 New South Wales Health Department Discussion Paper argued that such a proposal:

> appears to presume that the Mental Health Review Tribunal is likely to draw the same or similar conclusions on ongoing treatment needs, as the criminal court drew when deciding on issues relating to bail options. These are two different matters, requiring the application of two different sets of criteria.
>
> ...
>
> ... the Tribunal is a specialist body created to assess and review the condition of mentally ill people. As such, it will take into account a range of considerations not necessarily considered by a criminal court. The so-called "injustice" of detaining someone previously out on bail must thus be viewed in context.[72]

The Discussion Paper did, however, support the removal of the phrase "strict custody" in s 39, commenting:

> This will mean that the person will still be required to be detained, pending a Tribunal review, but it will allow the courts a wide discretion as to where they are detained, thereby allowing for a consideration of the person's current mental state and current therapeutic regime.[73]

6.42 In some ways, the proposal has been superseded by the new recommendation that the court be allowed to set a limiting term, with both custodial and non-custodial options available. If that recommendation were to be implemented, the requirement to order strict custody would necessarily be removed. However, the Commission persists in this recommendation for two reasons.

6.43 First, there may be a period of time between the verdict of not guilty on the ground of mental illness and the setting of the limiting term. A judge should be allowed to make whatever arrangements for the person's detention or otherwise that he or she considered appropriate in this period, and not be required to remove a person from his or her present situation to a gaol or locked psychiatric ward if unnecessary. This is particularly important for people with a mental illness, as the person may already have recovered from the psychiatric condition which caused the offence by the time of trial.

6.44 Secondly, the Commission appreciates that Recommendation 19 (which abolishes executive discretion) and Recommendation 26 (which allows limiting terms rather than indeterminate detention for people found not guilty on the ground of mental illness) may be controversial and attract opposition from some groups. Whether Recommendations 19 or 26 are implemented or not, the Commission believes it is particularly important that the injustices caused by the strict custody requirement[74] be removed. A judicial power of release is not an unusual one for the courts. For example, the courts are used to taking community and individual interests into account in making bail decisions or allowing people to remain in the community while their appeal is heard. Where the person has been on bail prior to trial, the same or similar conditions of release could apply, though release would not be by way of "bail", as a charge would no longer lie against the person. Where the person has been on remand, conditional release

could be granted where the judge considers it appropriate; for example, where there has been a substantial change in the circumstances in which bail was refused previously. Conditional release from "strict custody" does not necessarily mean release without supervision in the community. In many cases release into an open ward of a psychiatric hospital for a person with a mental illness, or into supervised accommodation for a person with an intellectual disability, may be more appropriate. The judge should be able to set any conditions that he or she believes fit for the intervening period between the court finding and the Tribunal's recommendation.

6.45 It must be acknowledged that this recommendation (together with the recommendation to abolish executive discretion in this area - see Recommendation 19) does give the Tribunal significantly more power than at present. Pursuant to the recommendation, though the court can make orders for a person's detention or release and set conditions for the period until the Tribunal considers the matter, the Commission believes that the Tribunal should be able to alter these orders to make them more or less restrictive, until the time it recommends unconditional release or until the end of the limiting term, whichever occurs first. The Tribunal's power is tempered by the duty to give reasons and the appeal structure recommended in Recommendation 22. This recommended structure is far preferable to the present situation, as a person's detention or release conditions are controlled by the court and an expert tribunal rather than the executive government.

The defence of mental illness in Local Courts

Recommendation 28

6.46 The current legislation has no provision for the defence of mental illness in the Local Courts. This does not necessarily preclude its application. However, if the defence succeeded, the magistrate would not be able to make the orders which can be made by Supreme and District Court judges under the MHCP Act, nor would the detailed review system, outlined above, involving the Tribunal be available. Accordingly the person would have to be released. It is likely that this issue is currently avoided by the dismissal of the charge pursuant to sections 32 or 33 of the MHCP Act.[75] However, it is not inconceivable that a magistrate may properly decline to apply these sections and then have to contend with a successful defence. In DP 35, the Commission proposed that this defence (and the relevant consequences) be provided for in legislation, as is the case in the District and Supreme Courts. The Commission retains its support for this amendment. Accordingly, Recommendation 28 provides that the defence of mental impairment, recommended in Recommendation 25, should expressly apply to all courts.

6.47 The more difficult question concerns the consequences of a successful defence. The passing of the *Criminal Procedure (Indictable Offences) Amendment Act 1994* (NSW) means that many indictable offences are now automatically tried summarily unless the prosecuting authority, or (in the case of more serious offences) the person charged with the offence, elects to have the offence dealt with on indictment.[76] This means that more serious offences are now being heard to finality in the Local Courts. In DP 35 the Commission suggested that if a person was found not guilty by reason of mental impairment, the magistrate must: (a) dismiss the charge and discharge the defendant; and (b) if the magistrate has concerns as to the adequacy of care, treatment or services for the defendant, notify (or cause to be notified) in writing the appropriate Minister or Ministers of the concerns. Though there was little consideration of this issue in submissions, they generally disagreed with this proposal or queried its necessity.[77] One submission was concerned that the proposal would

> have the effect of drawing people committing summary offences into the criminal justice system whereas at the present time police exercise discretion not to proceed by way of arrest but to remove the intellectually disabled person from the scene and attempt to find someone to take care of the person.[78]

Another concern was with the anomaly of different treatment for the same indictable offence following a mental impairment verdict, depending on whether the matter was heard summarily or not.[79] Another submission raised the problem of repeat offenders.[80]

6.48 The Commission now considers that the same procedures should apply in all courts for this defence, with necessary amendments to take into account their different procedures; for example, juries are not used in the Local Courts. Thus the magistrate would have the ability to set a limiting term for a person found not guilty on the grounds of mental impairment, within the limits of their sentencing powers. The Commission also recommends that the magistrate should first consider the appropriateness of the simpler procedures available under s 32-33 of the MHCP Act. Therefore, it seems likely that mental impairment will only be an issue in a small number of Local Court trials. Additionally, it should be noted that the Commission's other recommendations in relation to the defence should make its consequences less harsh for the defendant.

6.49 The *Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995* came to the same conclusion.[81] The opposite view was taken by the Victorian Parliamentary Committee, which believed that the inclusion of summary offences within the system recommended for indictable offences would be inappropriate.[82] However, the Committee did not consider the position for indictable offences heard summarily, nor offer any alternatives.

INTELLECTUAL DISABILITY AND CRIMINAL DEFENCES: ISSUES REQUIRING FURTHER CONSIDERATION

6.50 Apart from the defence of mental illness, there are other issues relating to criminal defences which warrant further consideration, but which have not been discussed at length in this inquiry. Many defences in the criminal law are subject to a "reasonable person" or "reasonable grounds" test. An objective requirement of this kind can represent a difficult or insurmountable obstacle to an accused with an intellectual disability. It is questionable whether such an obstacle should exist.

6.51 Self defence requires that the accused believed on reasonable grounds that it was necessary to do what he or she did in response to an attack or threatened violence.[83] Another example is the *Proudman v Dayman*[84] defence of reasonable mistake of fact which requires not only a genuine mistake but also a belief or perception based on reasonable grounds. An accused with an intellectual disability may be able to point to a genuinely innocent state of mind but that in itself is insufficient to found the defences instanced unless there was also an objectively reasonable basis for the accused's belief. The orthodox view is that an intellectual disability is to be taken into account when assessing the accused's subjective state of mind but that a test based on "reasonable grounds" or the "reasonable person" relates to the reactions, beliefs, or risk assessment of a person in the position of the accused but who is not suffering from an intellectual disability or any other "abnormal" condition.[85] Similar considerations apply in the context of provocation, where an accused's intellectual disability is relevant to the gravity of the provocation offered but not to the test whether an ordinary person might have been induced to lose self control.[86] Duress is also subject to an objective limitation, namely the "ordinary firmness" test in relation to whether the duress should have been resisted.[87]

6.52 The extent to which criminal responsibility should be governed by objective tests is a controversial issue, in relation to the elements of both an offence and a defence. Despite centuries of case law and statutory development, little headway has been made in devising objective tests which can screen out false or spurious attempts at exculpation while also recognising the particular capacities and degree of blameworthiness of the individual accused. Objective tests in the criminal law result in the punishment and stigmatisation of an accused for not being a different person, namely someone else who is blessed with "normal" capacities of reasoning or self control. As currently formulated and applied, objective tests fail to assess whether the accused, given his or her intellectual disability, failed to live up to a reasonably expected standard and, if so, whether the failure was a sufficiently gross departure from that standard to warrant the imposition of liability for an offence. These questionable basic features of objective tests are of particular concern where an accused is charged with a serious offence, such as murder or sexual assault, but the issue of principle is also generally relevant to criminal responsibility.

6.53 The Commission is currently of the view that the problems created by objective tests of criminal responsibility need to be addressed with reference to their impact across the whole range of potential accused persons rather than in the particular setting of accused persons with an intellectual disability. Although the Commission is attracted to the possibility of applying a subjective test where an accused

with an intellectual disability pleads a defence or excuse, that approach could hardly be recommended in isolation - it would require a far-reaching re-examination of the elements of defences which are now defined partly in terms of an objective test. Timely as such a re-examination would be, it is beyond the scope of the present reference.

6.54 The Commission has in this reference confined its attention to the defence of mental illness or "mental impairment" as it would be re-titled under the re-formulation proposed by the Commission. The defences of diminished responsibility and provocation are, as discussed above, currently being examined in the separate reference on partial defences to murder. Other defences, including duress and the *Proudman v Dayman* defence of reasonable mistake of fact, warrant further consideration elsewhere.

FOOTNOTES

1. *Mental Health (Criminal Procedure) Act 1990* (NSW) ("MHCP Act") s 22(1)(b).

2. MHCP Act s 22(2).

3. MHCP Act s 25.

4. *M'Naghten's Case* (1843) 10 Cl & Fin 200 at 210; 8 ER 718 at 722.

5. The *Criminal Code Act 1995* (Cth) was assented to on 15 March 1995, but has not yet been proclaimed. If the Act does not commence within five years after Royal Assent, it commences on the first day after the end of that period: s 2(2). Accordingly, the defence of mental illness at the Commonwealth level remains governed by the *Crimes Act 1914* (Cth), Part 1B, Divisions 7-8.

6. Explanatory Memorandum to the *Criminal Code Bill 1994* (Cth) at 18.

7. Victorian Parliament Community Development Committee *Inquiry into Persons Detained at the Governor's Pleasure* (Victorian Government Printer, October 1995), Recommendation 2.

8. *Crimes Act 1900* (NSW) s 23A.

9. S C Hayes and G Craddock *Simply Criminal* (2nd ed, Federation Press, Sydney, 1992) at 140-141. See also G Williams *Criminal Law: The General Part* (2nd ed, Stevens & Sons, London, 1961) at 447; and J H McClemens and J M Bennett "Historical notes on the law of mental illness in New South Wales" (1962-1964) 4 *Sydney Law Review* 49.

10. D O'Connor and P A Fairall *Criminal Defences* (2nd ed, Butterworths, 1988) at 249 [footnote references omitted].

11. See, for example, M Ierace *Intellectual Disability: A Manual for Criminal Lawyers* (Redfern Legal Centre Publishing, Sydney, 1989) at 127-130. See also New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) ("NSWLRC DP 35") at paras 10.11-10.18.

12. Hayes and Craddock at 141.

13. MHCP Act s 38.

14. Part 4 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) (the "MHCP Act") replaced, and is similar to, Part XIB (s 428Z - 428ZB) of the *Crimes Act 1900* (NSW), which operated from 1986 and which replaced s 23 of the *Mental Health Act 1958* (NSW) and s 439 of the *Crimes Act 1900* (NSW) pursuant to the *Crimes (Mental Disorder) Amendment Act 1983* (NSW).

15. *R v Ayoub* [1984] 2 NSWLR 511. Also in that case the New South Wales Court of Criminal Appeal (per Street CJ at 515, Slattery J agreeing) held that "irrespective of whether or not the

accused raises or disclaims such a defence, a trial judge, if he sees it as fairly open, may well have a positive duty to put the defence himself".

16. MHCP Act s 37.

17. An accused may, with the consent of the prosecution, elect to have the matter tried by a judge sitting alone, rather than a judge and jury: *Criminal Procedure Act 1986* (NSW) s 32.

18. Human Rights and Equal Opportunity Commission *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (AGPS, Canberra, 1993) (the "Burdekin Report") Vol 2 at 797-798. [footnote references omitted]

19. Victorian Parliament Community Development Committee at 23. [footnote references omitted]

20. Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 5-6.

21. MHCP Act s 39.

22. *Mental Health Act 1990* (NSW) (the "MH Act"), Chapter 5 (s 79-113) and Schedule 1.

23. See also Hayes and Craddock at 144; and the Burdekin Report, especially Ch 25.

24. See *R v Phuong Cam Su* (Supreme Court, NSW, Blanch J, 6 June 1994, Crim D 70073/93, unreported).

25. *Crimes Act 1914* (Cth) s 20BJ. For a discussion of this section see *R v Goodfellow* (1994) 33 NSWLR 308.

26. According to Hayes and Craddock, at 116, footnote 94: "This follows from the scheme of the Act which is administered by the Department of Health. The 'Director-General' where referred to in the Act is defined as the Director-General of the Department of Health by the 'Dictionary of Terms Used in the Act' which is Schedule 1 to the Act. 'Minister' is not defined, but logically means the Minister for Health."

27. MH Act s 81. In 1994, the Tribunal undertook 22 such initial reviews. Of the 22 forensic patients, it recommended that three be immediately released on conditions and that one be unconditionally released: Mental Health Review Tribunal *Annual Report 1994* at 63.

28. Mental Health Review Tribunal Procedural Note 3/94 "Forensic Patients" at 24-25.

29. *Mental Health Regulation 1995* (NSW) cl 18(1)(a).

30. MH Act s 82.

31. Mental Health Review Tribunal *Annual Report 1994* at 63.

32. MH Act s 81(2)(b), 82(4). The Tribunal's Procedural Note 3/94 "Forensic Patients" sets out the Tribunal's criteria in this area, including those for unconditional release, at 27.

33. MH Act s 83(1).

34. Section 84(1).

35. Section 84(1).

36. Section 84(2).

37. Section 101.

38. Mr M Ierace *Submission* (16 December 1991) at 4.

39. See Hayes and Craddock at 144-145.

40. See also the comments of the Mental Health Review Tribunal on "Forensic patient disposition, care, treatment, and management" in its *Annual Report 1994* at 66-67.

41. See Victoria - Attorney-General's Department *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988), Vol 2 at para 10.6.

42. Arguments against a separate defence are set out in K Menninger "Mental retardation and criminal responsibility: Some thoughts on the idiocy defense" (1986) 8 *International Journal of Law and Psychiatry* 343-357.

43. Australia - Criminal Law Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code: Chapter 2 - General Principles of Criminal Responsibility (Final Report, December 1992)* (AGPS, Canberra, 1993) at 35.

44. *Attorney-General for South Australia v Brown* [1960] AC 432. Inability to control conduct is, however, expressly included in all Australian jurisdictions which have a statutory defence, except in the Australian Capital Territory.

45. New South Wales Police Service *Submission* (February 1995) at 13.

46. See para 1.16 above.

47. See, for example, the direction to the jury found in *R v Porter* (1936) 55 CLR 182.

48. Australia - Attorney-General's Department, Office of Legal Aid and Family Services *Submission* (28 August 1992) at 4.

49. Consultation with representatives of the Office of the Director of Public Prosecutions, New South Wales, Police Prosecutors, Legal Aid Commission of New South Wales, Law Society of New South Wales, Public Defenders, Aboriginal Legal Service and the Judicial Commission of New South Wales on 1 March 1994.

50. Burdekin Report at 801-802.

51. Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 5-6. Note that a forensic patient held in prison is still subject to prisoner classification regulations and procedures and must have an appropriate prisoner classification before executive orders for less secure accommodation or leave privileges can be implemented: Mental Health Review Tribunal Procedural Note 3/94 "Forensic Patients" at 18.

52. This represents the position at the Commonwealth level: *Crimes Act 1914* (Cth) s 20BJ(1).

53. The submissions which agreed with the proposal to retain indeterminate detention were: Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 5; New South Wales Police Service *Submission* (February 1995) at 14; Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 5; and Law Society of New South Wales *Submission* (24 February 1995) at 1. Submissions which opposed indeterminate detention were: Mental Health Advocacy Service *Submission* (21 February 1995) at 8; Intellectual Disability Rights Service *Submission* (1 March 1995) at 13; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 5; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 39; and New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 11-12. See also the Victorian Parliament Community Development Committee, Recommendation 65 and discussion at 191-192, which supported limiting terms instead. Note that the Victorian Government did not accept this recommendation

because it did not allow for the need for ongoing treatment or supervision at the end of the limiting term: *Victorian Government Response to the Community Development Committee Inquiry into Persons Detained at the Governor's Pleasure* (1996) at 4 and 9.

54. Intellectual Disability Rights Service *Submission* (1 March 1995) at 13.

55. Mental Health Advocacy Service *Submission* (21 February 1995) at 8; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 5; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 39; and New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 11.

56. Mental Health Advocacy Service *Submission* (21 February 1995) at 8.

57. *Criminal Law Consolidation (Mental Impairment) Amendment Act 1995* (SA) and *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA).

58. MHCP Act s 22(3)(c); *Criminal Appeal Act 1912* (NSW) s 2, 5, 5D, 6A.

59. See *R v Goodfellow* (1994) 33 NSWLR 308, in relation to setting a term of detention for a person "acquitted because of mental illness" under the *Crimes Act 1914* (Cth) s 20BJ.

60. NSWLRC DP 35 at paras 12.2-12.28.

61. See paras 5.47-5.49 above.

62. See NSWLRC DP 35 at paras 12.3-12.4. See also New South Wales Law Reform Commission *Sentencing* (Discussion Paper 33, 1996) at para 4.106.

63. Victorian Parliament Community Development Committee, Recommendations 64-82.

64. It should also be noted that the wording of s 39 creates confusion for the court, the person and his or her family for, under the processes outlined at paras 6.14-6.21 above, the person is not usually kept in "strict custody" until release, but only until the Tribunal recommends otherwise and that recommendation is accepted by the executive government: Mr M Ierace *Submission* (16 December 1991) at 9. The section should be reworded.

65. For example: consultations with the Office of the Director of Public Prosecutions, New South Wales, Police Prosecutors, Legal Aid Commission of New South Wales, Law Society of New South Wales, Public Defenders, Aboriginal Legal Service and the Judicial Commission of New South Wales on 1 March 1994; with Mr P Berman, Crown Prosecutor on 9 March 1994; and with solicitors from the Legal Aid Commission of New South Wales on 17 March 1994.

66. NSWLRC DP 35 at paras 10.23-10.31.

67. See *R v Phuong Cam Su* (Supreme Court, NSW, Blanch J, 6 June 1994, Crim D 70073/93, unreported) at 5.

68. Mental Health Act Implementation Monitoring Committee (NSW) *Report to the Honourable R A Phillips Minister for Health on the NSW Mental Health Act 1990* (New South Wales Parliamentary Paper 275, August 1992), Recommendation 6 at 35-36.

69. Mental Health Advocacy Service *Submission* (21 February 1995) at 8; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 5; Intellectual Disability Rights Service *Submission* (1 March 1995) at 13; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 5; Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 5; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 11; New South Wales Police Service *Submission* (February 1995) at 14; Law Society of New South Wales *Submission* (24 February

1995) at 1; Mental Health Review Tribunal *Submission* (5 June 1995) at 1; and Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 39.

70. Mental Health Advocacy Service *Submission* (21 February 1995) at 8.

71. Intellectual Disability Rights Service *Submission* (1 March 1995) at 13.

72. New South Wales Health Department *Caring for Health: Proposals for Reform - Mental Health Act 1990* (Discussion Paper, 1996) ("1996 New South Wales Health Department Discussion Paper") at 38-39.

73. 1996 New South Wales Health Department Discussion Paper at 40.

74. See paras 6.14-6.21 above.

75. See paras 5.68-5.71 above.

76. *Criminal Procedure Act 1986* (NSW) s 33C.

77. Magistrate M Beveridge *Submission* (5 April 1994) at 2; New South Wales Police Service *Submission* (February 1995) at 9; Magistrate J Crawford *Submission* (5 November 1995) at 3; and Magistrate D Kok *Oral Submission* (14 February 1995) at 3.

78. Magistrate P Cloran *Submission* (13 February 1995) at 4.

79. Magistrate J Crawford *Submission* (5 November 1995) at 3.

80. Magistrate D Kok *Oral Submission* (14 February 1995) at 3.

81. Clause 5 of the *Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995* provides that the same procedures are to apply in all courts.

82. Victorian Parliament Community Development Committee at 159, 199.

83. *Zecevic v DPP* (1987) 162 CLR 645.

84. *Proudman v Dayman* (1941) 67 CLR 536.

85. *R v Vangelder* (Court of Criminal Appeal, NSW, 28 February 1994, CCA 60107/93, unreported). Compare *R v Conlon* (1993) 69 A Crim R 92 in relation to intoxication and self defence.

86. *Stingel v R* (1990) 171 CLR 312.

87. *R v Abusafiah* (1991) 24 NSWLR 531.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

7. Giving Evidence

RECOMMENDATIONS

Special arrangements for giving evidence

> **29. If the court is satisfied that a witness with an intellectual disability may be unable to give his or her evidence without the use of special arrangements because he or she is unduly inhibited in giving evidence in the normal way, the court may order that special arrangements (for example, the assistance of a support person, the use of screens or changed seating arrangements and closed circuit television ("CCTV")) be made for taking that witness's evidence. [See paras 7.10-7.21]**

Right to make a statement not subject to cross examination

> **30. If the court is satisfied that the defendant has an intellectual disability, the defendant should have the right to make a statement not subject to cross examination to the court, subject to the court's direction about the length, subject matter and scope of the statement. [See paras 7.22-7.29]**

Expert evidence about reliability of evidence

> **31. On application by a party, the trial judge should have the power to allow expert evidence to be led to explain the characteristics and demeanour of a witness with an intellectual disability if his or her characteristics and demeanour are outside normal experience. [See paras 7.30-7.32]**

BACKGROUND

7.1 A person with an intellectual disability who has been a victim of crime should have the same opportunity to make a complaint to police and to give evidence in a court against the perpetrator of the crime as anyone else. A person with an intellectual disability who has been charged with a criminal offence should have the same opportunity to answer the case against him or her as a person without such a disability. This may well require special measures. In this chapter, the Commission considers the particular difficulties faced by people with an intellectual disability who give evidence - whether as the defendant in a criminal trial, as the victim or as a witness - and makes recommendations aimed at overcoming these difficulties.

Competence to give evidence

General rule

7.2 In New South Wales, the general rule is that all witnesses in criminal and civil proceedings are both competent and compellable to give evidence. Section 12 of the *Evidence Act 1995* (NSW) states:

> Except as otherwise provided by this Act:
>
> (a) every person is competent to give evidence, and
>
> (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

The test of competence to give sworn evidence is the capacity to understand the *obligation* to give truthful evidence. A person who is "incapable of understanding" that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.[1] Such a person may, however, be competent to give unsworn evidence. The test of competence to give unsworn

evidence is the capacity to understand the difference between the truth and a lie. If the court is satisfied that the person understands the difference between the truth and a lie and tells the person it is important to tell the truth, and the person indicates, by an appropriate response when asked, that he or she will not tell lies in the proceedings, the person is competent to give unsworn evidence.[2] The Act does not treat unsworn evidence differently from other evidence.

When is a person not competent to give evidence?

7.3 There are several circumstances in which a person is not competent to give evidence.

> A person who cannot give a rational reply to a question about a fact is not competent to give evidence about that fact. He or she may, however, be competent to give evidence about other facts.[3]
>
> A person who cannot hear or understand, or communicate a reply to, a question about a fact is not competent to give evidence about the fact if the incapacity cannot be overcome.[4]

The Act assumes that measures necessary to overcome a person's inability to hear, understand, or reply to, a question will be taken. If doing so would involve "substantial cost or delay" and adequate evidence on the matter has been, or will be able to be, given, the person is not compellable to give evidence on the matter.[5]

Competence of people with an intellectual disability to give evidence

7.4 In DP 35, the Commission described the lengthy debate involved in challenging the competence of a victim of an alleged sexual assault who had an intellectual disability at the trial of the alleged offender.[6] DP 35 also outlined the difficulties for people with an intellectual disability caused by the competence test which existed before the passing of the *Evidence Act 1995* (NSW). However, submissions have noted that victims' difficulties in relation to competence generally start well before the trial. The Intellectual Disability Rights Service said that victims of physical or sexual assault who have an intellectual disability are often denied access to courts because the police and the prosecutors assume they are not competent.[7] The Commission concluded that the broad test of competence in the *Evidence Bill 1993* (NSW) (an exposure draft of the current Act) would overcome many problems. Submissions generally supported this view.[8] The Commission did not make a specific proposal about competence but instead supported the Bill. In the Commission's view the test of competence in the *Evidence Act 1995* (NSW) is appropriate and does not discriminate in an unacceptable way against witnesses with an intellectual disability. Accordingly, the Commission makes no recommendations in this area.

Importance of ability to present and challenge evidence

7.5 It is fundamental in any system of criminal justice, that the parties must have a full opportunity to present and challenge evidence. A defendant with an intellectual disability may be disadvantaged in this regard even if he or she is legally represented. In lower courts, many defendants are not represented. The prosecution may be inappropriately hindered if the victim, or another witness, with an intellectual disability cannot give evidence.

Overcoming lack of understanding of the court process

7.6 In Chapter 9 of this Report, the Commission makes recommendations designed to assist people with a disability, and their carers, to have access to information about the criminal justice system. The Commission also makes recommendations aimed at ensuring that all people who work in the criminal justice system have access to education and training about intellectual disability issues.

Overcoming communication difficulties

Judicial control over questioning

7.7 If a witness's intellectual disability is such that he or she is able to answer questions that are short, clearly expressed and simple, it should not be beyond the capacity of the lawyer to frame the questions accordingly. There may, however, be tactical reasons for not asking questions clearly: defence counsel, for example, may wish to cast doubt on the credibility of a victim with an intellectual disability. The court has an inherent power to control the conduct of proceedings.[9] It may, for example, order frequent breaks when a person with an intellectual disability is giving evidence. In addition, the *Evidence Act 1995* (NSW) gives the court control over the questioning of witnesses, in particular, "the way in which witnesses are to be questioned".[10] The court may disallow a question, or tell the witness he or she need not answer it, if it is "improper" (that is, misleading, or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive).[11] It may also disallow a leading question in cross examination, or tell the witness not to answer it, if satisfied that the relevant facts would be better ascertained if leading questions were not used.[12] In deciding these issues the witness's intellectual disability is one of the matters the court must take into account.[13] In some circumstances a witness may give evidence wholly or partly in narrative form, rather than in answer to questions put to him or her.[14] These powers equip the court to help a witness with an intellectual disability to overcome the barriers to giving evidence and improve the quality of his or her evidence. Some submissions noted the court's responsibility to ensure that people giving evidence do not misunderstand questions and are not misunderstood:

> Questions that include abstract concepts, double negatives and terminology that the person does not understand should be disallowed. The witness should be closely monitored ... and if there is any doubt as to their understanding then questions should be rephrased. Judges and magistrates should take control of the courtroom to ensure this happens.[15]

Interpreters

7.8 Some witnesses with an intellectual disability may not be able to communicate at all (either understand or respond) in standard spoken English. Others may be able to understand a question but be unable to respond to it in standard speech. This does not necessarily disqualify such people from giving evidence. The *Evidence Act 1995* (NSW) provides that a person who is incapable of hearing or understanding, or communicating a reply to, a question is not competent to give evidence about a fact only if "that incapacity *cannot be overcome*" (emphasis added).[16] It makes specific provision for non-English speaking witnesses and for witnesses who cannot hear or speak adequately. A witness may give evidence through an interpreter unless he or she can understand and speak English well enough to understand and reply to questions.[17] A witness who cannot hear adequately can be questioned in any appropriate way and a witness who cannot speak adequately can give evidence by any appropriate means.[18] Submissions generally welcomed the provisions of the Evidence Act, assuming they will make it easier for a person with an intellectual disability to give evidence. For example, one submission commented that "the processes of justice generally and the rights of people with an intellectual disability specifically will be enhanced by the use of (qualified) interpreters".[19] Most of the submissions that addressed the issue did so on the basis that the witness should be entitled to an interpreter. One submission stated that the interpreter should be available to the court itself for the use of the court, "rather than being the 'servant' of one side or the other".[20] In the Commission's view, the policy reasons for allowing non-English speaking witnesses, and witnesses who cannot hear or speak adequately, to give evidence through an interpreter apply equally to witnesses with an intellectual disability, where the witness's limited language skills make the use of an interpreter desirable.

7.9 However, unlike deaf people or people who do not speak English, the real difficulties involved in finding an appropriate "interpreter" for a person with an intellectual disability must be acknowledged, and the different nature of the interpretation generally offered. For example, the person who best understands a witness with an intellectual disability is usually a family member without formal interpreting qualifications and who may well have some involvement or at least interest in the outcome of the trial - independent, qualified interpreters who can understand the particular idiosyncrasies of many

people with an intellectual disability are almost non-existent. Additionally, "word for word" translation may not be possible for people with an intellectual disability in the same way as for most other people who require an interpreter. A person with an intellectual disability may use simple sign language, a communication board, or a combination of speech, gestures and pointing to symbols to communicate. The means used are likely to vary from person to person. Providing some independent check on the quality of the interpreting offered may be almost impossible, as would be training and accrediting appropriate interpreters. These are matters which will require further consideration as the limits of these provisions in the Evidence Act are explored by the courts.

DISCUSSION OF RECOMMENDATIONS

Recommendation 29: Special arrangements for giving evidence

Special arrangements for "vulnerable" witnesses

7.10 Generally speaking, a witness gives his or her evidence from the witness box in open court. There are exceptions to this: for example, the court may be closed to the public. There are also arrangements available to enable a witness to give evidence without seeing the defendant: for example, the use of screens or seating arrangements that have that effect, and closed circuit television ("CCTV").[21] In New South Wales, a child witness (under 16) now has the right to the presence of a support person in all criminal proceedings and to give evidence[22] by means of CCTV in any proceedings involving a "personal assault offence" or apprehended violence, unless the court orders otherwise.[23] Accused children also have the right to a support person and may give evidence by CCTV in certain circumstances.[24] Where a child does not give evidence by CCTV, for example, if CCTV is not available, a child has the right to give evidence by alternative arrangements such as screens, changed seating arrangements or the adjournment of proceedings to other premises.[25] Other alternative arrangements are available for a child witness if the accused is unrepresented.[26]

7.11 In all Australian jurisdictions, except New South Wales, special arrangements for giving evidence are available to some *adult* witnesses with an intellectual disability, namely:

> a witness with "impaired mental functioning" in sexual or other assault proceedings, in Victoria;[27]
>
> a witness who, as a result of "intellectual impairment" would be likely to be disadvantaged as a witness, in Queensland;[28]
>
> a "special witness" who, by reason of intellectual disability, is (or is likely to be) unable to give evidence satisfactorily in the ordinary manner, in Tasmania;[29]
>
> a witness who is unlikely to be able to give evidence (or to give it satisfactorily) "by reason of mental ... disability", in Western Australia;[30] and
>
> "a witness who suffers from an intellectual disability", in South Australia and the Northern Territory.[31]

In the Australian Capital Territory, adult complainants in sexual offences, regardless of disability, have the right to give evidence by CCTV unless the court orders otherwise.[32]

Should special arrangements be available to witnesses with an intellectual disability?

7.12 In general terms, the main policy reasons for special arrangements are the protection of particularly vulnerable witnesses from some of the trauma associated with giving evidence in a particular case, and to help them give their evidence more effectively. The witness may be afraid of giving evidence in a courtroom full of people or may be afraid that the defendant might still be able to inflict harm. This fear might make it difficult, if not impossible, for the witness to give evidence. Without the evidence of a particular witness a prosecution may fail, or not be able to be brought at all. In DP 35, the

Commission proposed that the court should be able to make special arrangements for vulnerable witnesses to give evidence in certain circumstances. The New South Wales Police Service rejected the Commission's proposal on the ground that it was too broad. It asked how the court would determine which factors would subject the witness to embarrassment and distress.[33] Most submissions, however, strongly supported the proposal,[34] arguing, for example that:

> people with an intellectual disability should have the same access to justice as a victim or a defendant as does the rest of the community and may need special measures to do so;[35] and
>
> special arrangements are the "most effective and flexible manner of dealing with the many issues involved in this area".[36]

The Commission agrees, but has limited its recommendations to witnesses with an intellectual disability rather than "vulnerable witnesses" in general. There may be arguments for extending these provisions to other witnesses but this is beyond the scope of this reference.

Should not be restricted to victims

7.13 Fear of a defendant may not be limited to the victim of the alleged offence. A witness of an assault may be as frightened of the offender as the victim. People with an intellectual disability often live in group homes and the defendant, the victim and other witnesses may all live in the same group home. The defendant's relationship with a witness may be the same as his or her relationship with the victim: for example, the defendant may be a carer of both. The witness may be equally reluctant to give evidence against the alleged offender in court and the quality of his or her evidence may be similarly affected. In some circumstances, the defendant or a defence witness may also have difficulties giving evidence in the usual way. In the Commission's view, special arrangements for giving evidence should be available in appropriate circumstances to all witnesses, including the accused.

Special arrangements should be available on the basis of need

7.14 Special arrangements should be available to witnesses (including, where appropriate, the defendant), on the basis of need. Intellectual disability can range from mild to severe and degrees of vulnerability may vary widely. In the Commission's view, whether or not special arrangements ought to be available should be decided by the court, case by case, on the basis of expert evidence.

What arrangements should be available?

7.15 *General principles.* The rationale for allowing child witnesses and witnesses with an intellectual disability to use special arrangements to give evidence is that they are necessary to enable the witness to give his or her evidence, or to give it effectively. The use of special arrangements is intended to overcome the barriers to giving evidence faced by a particular witness and to put him or her in the same position as witnesses generally, not in a more favourable position. Special arrangements must not derogate from the right of the defendant to a fair trial. A fair trial does not, however, demand that the witness must be in the witness box and the defendant in the dock or even that they must both be in the same room. These principles have influenced the Commission's recommendations about special arrangements.

7.16 *Support person.* In DP 35, the Commission noted that, in a number of Australian jurisdictions, a support person may sit with a witness with an intellectual disability while he or she is giving evidence.[37] The Commission proposed that a support person should be available to a witness with an intellectual disability, subject to the court's leave. Submissions that addressed this issue directly gave the proposal qualified support. The Intellectual Disability Rights Service ("IDRS") reported that people who had had a support person in court thought that it was very important and that the support person's role should be extended to include sitting with them in the witness box and being able to tell the judge or magistrate if the witness did not understand the question. In IDRS's view, however, it is important not to confuse the support and interpreting roles.[38] The Victims Advisory Council agreed that a witness, subject to the

court's discretion, should be able to have a support person as long as the support person was not also a witness and that this was decided before the trial.[39]

7.17 In Chapters 9 to 11, the Commission makes recommendations designed to reduce the stress associated with going to court for people with an intellectual disability. For example, all relevant departments and agencies would be required to develop policies and operational guidelines which specifically address the rights and needs of people with an intellectual disability.[40] In addition, the Commission has recommended that certain victims with an intellectual disability have access to a case manager to provide continuing contact, support and information for the person and his or her carer or guardian.[41] Nevertheless, entering the witness box, having one's capacity to give sworn or unsworn evidence tested, being sworn (if appropriate) and giving evidence will inevitably be a very lonely and very stressful experience for a person with an intellectual disability. In these circumstances the Commission sees no reason to change the views expressed in DP 35. In an appropriate case, the court may now allow a support person to sit in court while a witness with an intellectual disability is giving evidence. On application by counsel for the party calling the witness, the court should have a discretion to allow a support person to sit with the witness in the witness box while he or she is giving evidence. The support person should be permitted to interrupt in appropriate circumstances, for example, to tell the court that the witness is tiring and needs a break, or has not understood a question.

7.18 *Pre-trial videorecording of evidence.* In DP 35, the Commission considered and rejected the use of videorecorded police interviews, which may include irrelevant and inadmissible material, as a substitute for a witness's testimony. It did so on the grounds that using the material would be more prejudicial than probative and that it is inconsistent with the general principle that all material facts are inferred from witnesses' oral testimony, tested in cross examination.[42] The Commission also considered and rejected pre-trial videorecording of evidence. The defendant has a right to test a witness's evidence through cross examination. There is nothing to be gained from pre-trial videorecording of evidence in chief unless cross examination of the evidence occurs very soon after. The defendant may not be ready to cross examine at the time of the recording and may not be ready for weeks or months. The Commission is aware that pre-trial recording of evidence in chief has been introduced in some jurisdictions.[43] Nevertheless it does not favour the use of evidence that has been videorecorded because it represents too great an interference in the right of the defendant to hear and to answer the case against him or her. It may well also create difficulties for a judge or jury which may be considering the issues at a considerable remove from the occasion. Submissions that addressed the issue directly did not favour videorecording evidence in chief because doing so would not eliminate cross examination, which is the procedure that most concerns people with an intellectual disability.[44]

7.19 *Screens.* Screens and CCTV do not, however, interfere unduly with the defendant's right to hear and to answer the case against him or her. The advantages and disadvantages of using screens and other simple measures, such as changing seating arrangements, were outlined in DP 35. The main advantage of these measures over CCTV is that they are relatively easy and inexpensive to set up. The disadvantages include the possibility of prejudicing the defendant in the eyes of the jury and the difficulties a defendant who conducts his or her own defence would have.[45] The prejudice against the defendant in a jury trial can be overcome, however, by an appropriate judicial warning. (See para 7.21 below.) IDRS reported that people with an intellectual disability favoured having screens available in cases involving personal violence where the witness could be intimidated.[46] The Commission favours the use of screens in appropriate cases.

7.20 *CCTV.* The advantages and disadvantages of CCTV were outlined in DP 35. The main advantage of using CCTV is that it may reduce the stress associated with giving evidence. On the other hand, the technology is expensive. It may make giving evidence more difficult for some people and it may change and possibly reduce the impact of their evidence.[47] IDRS reports that people with an intellectual disability were less enthusiastic about CCTV than screens. Generally, they thought it should be available if the witness wanted it and said that there should be a CCTV pilot project involving people with an intellectual disability.[48] The Commission supports the use of CCTV, where appropriate.

Judicial warning

7.21 Making special arrangements for a vulnerable witness to give evidence against a person accused of committing an offence of violence against the witness or someone else may well prejudice the jury against the defendant. For example, the arrangements may suggest to the jury that the defendant is dangerous, and confirm the probability of guilt in the jury's mind. A study done for the Australian Law Reform Commission found that most legal professionals did not think that using CCTV prejudiced the conduct of the defence case.[49] Nevertheless, the risk of prejudice sufficiently justifies taking special precautions against it. Accordingly, a warning should be given.[50]

Recommendation 30: Right to make a statement not subject to cross examination

7.22 In DP 35, the Commission outlined the considerations taken into account by defence lawyers in making the difficult decision whether or not a defendant with an intellectual disability should give evidence. A defendant with an intellectual disability is likely to be severely disadvantaged under cross examination. He or she may be suggestible, have difficulty understanding the questions, appear evasive or inadvertently say something that unfairly prejudices the defence. The defendant's demeanour, in the absence of a satisfactory explanation, may affect the jury. On the other hand, failure to give evidence may suggest guilt. DP 35 canvassed three options to overcome the disadvantages faced by defendants with an intellectual disability:

give judges greater control over cross examination; or

reintroduce the unsworn statement for people with an intellectual disability as one of several classes of vulnerable defendants; or

allow defendants with an intellectual disability to make a statement to the court that is not subject to cross examination.

Giving judges greater control over cross examination

7.23 As discussed above,[51] the *Evidence Act 1995* (NSW) gives the court control over the questioning of witnesses and the power to disallow "improper" questions and leading questions in some circumstances. These powers, if exercised appropriately, will help overcome some of the problems faced by a witness with an intellectual disability. They will not, however, avoid them all. Of the three options canvassed in DP 35, the Office of the Director of Public Prosecutions ("DPP") favoured giving courts greater control over cross examination to enable witnesses to give their evidence in the usual manner. The DPP also stated that an appropriate balance between protecting the defendant's rights and ensuring witnesses are not disadvantaged requires education programs. It noted a New Zealand initiative for vulnerable witnesses which provides that the court is bound by the findings of a court-appointed panel of experts. The panel gives guidance on appropriate forms of questioning and language in each case.[52]

Making a statement that is not subject to cross examination

7.24 Two of the options discussed in DP 35 would allow a defendant with an intellectual disability to make a statement to the court that is not subject to cross examination, namely: reintroducing the unsworn statement for vulnerable defendants, including defendants with an intellectual disability; or allowing defendants with an intellectual disability to make a statement to the court that is not subject to cross examination. There are difficulties with both of these. The former goes beyond the terms of this reference and would involve creating an exception to a recent, if somewhat controversial, amendment to the law. The latter is clearly within the terms of reference but would involve treating defendants with an intellectual disability as a distinct class of defendants. In DP 35, the Commission supported the latter proposal.

7.25 Until 1994,[53] a defendant in New South Wales could give evidence by making an unsworn (or "dock") statement which was not subject to cross examination by the prosecution. This protected the defendant from hostile or unfair cross examination. It also allowed the defendant to tell the court his or her version of the event in his or her own words, without taking the risk that gaps and inconsistencies at

best (and lies at worst) in the story would be exposed by the prosecution in cross examination. Since the *Evidence Act 1995* (NSW) came into operation there is no practical difference between sworn and unsworn evidence. The issue is whether vulnerable defendants, including defendants with an intellectual disability, should have the right to make a statement that is not subject to cross examination.

7.26 The Commission received a mixed response to its proposal to allow defendants with an intellectual disability to make a statement not subject to cross examination. The Victims Advisory Council was "implacably opposed" to it, saying that all victims (as witnesses) are subject to cross examination and all defendants should be too.[54] Some submissions strongly supported the proposal.[55] For example, the Law Society of New South Wales said:

> It is totally unfair for persons of limited intellectual ability ... to be subject to cross-examination by highly trained counsel.[56]

Other submissions gave qualified support. For example, IDRS supported the introduction of a modified dock statement with safeguards as to length and content. This would ensure that important evidence could be introduced and that the defendant could speak without being subject to cross examination.[57]

The Commission's view

7.27 In its earlier Report, *Unsworn Statements of Accused Persons*,[58] the Commission recommended that the unsworn statement should be retained. One of the reasons for doing so was that it gave less articulate defendants an opportunity to respond to the evidence against them that they might otherwise not have because of their incapacity to cope with cross examination. Cross examination tests not only the truthfulness of a witness's evidence but also his or her capacity to understand legal language that is not always clear, abstract concepts, subtle nuances and, as often as not, sentences that are long, complicated and convoluted. It is an intimidating experience for all defendants and pits an often inarticulate and uneducated defendant against a highly skilled lawyer. The fear that the defendant will not perform well in the witness box (whether or not his or her evidence is truthful) is a common reason for a defence lawyer to advise a defendant not to give evidence (or, before the abolition of the unsworn statement, to give unsworn evidence). This may prejudice the defendant in the eyes of a jury who may think that the defendant has something to hide. If the defendant is being tried for an indictable offence with another defendant who gives evidence (the "co-defendant"), the co-defendant can comment on the defendant's failure to give evidence, including suggesting the defendant is, or believes he or she is, guilty of the offence.[59] Abolition of the unsworn statement has limited the use of evidence of the defendant's intellectual disability in challenging confessional evidence or in testing whether the defendant's disability makes various defences available. Before abolition, the defendant could adopt the medical history he or she had told a psychologist or psychiatrist by stating, in the unsworn statement, that what he or she had said to the expert was true. That history may have been the result of painstaking and highly expert interviewing techniques by the appropriate specialist, quite possibly over a number of occasions. Where properly done, this might well enhance accuracy. The witness box is scarcely a comparable environment. Yet the defendant must enter the witness box and subject himself or herself to cross examination.[60]

7.28 As discussed above, witnesses with an intellectual disability have some protection from the rigours of cross examination. The court has the power to disallow an "improper" question and, in some circumstances, a leading question in cross examination put to a witness with an intellectual disability.[61] In the Commission's view, a defendant with an intellectual disability should also be permitted to make a statement not subject to cross examination. The court should, however, have the power to limit its content and length. In Chapter 3 of this Report, the Commission has recommended the reintroduction of a statutory definition of "intellectual disability" which would apply to the *Evidence Act 1995* (NSW), namely:

> "Intellectual disability" means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour.

7.29 In the Commission's view, a defendant whose intellectual disability fits within this definition may well be deprived of a fair trial unless there is a limited right to make a short statement to the court that is not subject to cross examination, if he or she wishes to do so. This is a case where special measures are necessary to overcome the severe disadvantages faced by defendants with an intellectual disability. The court would have to be satisfied, on the balance of probabilities, that the defendant has an intellectual disability as defined. This would be established in a particular case on the basis of expert evidence. The court would also have the power to give directions about the length, subject matter and scope of the statement. It could vet the statement and, by direction, exclude material which, in its opinion, was irrelevant or vexatious, would make the statement too long, or would constitute an unjustified attack on the character or credit of a witness.[62] It follows that the statement would have to be reduced to writing before its delivery.

Recommendation 31: Expert evidence about reliability of evidence

Evidence of a witness with an intellectual disability may be discounted

7.30 When a witness with an intellectual disability gives evidence in court, the judge or magistrate, lawyers and members of the jury may find it difficult to understand what the witness is saying. They may notice that the witness has a short attention span, appears nervous and hesitant or, possibly, frustrated and angry. The witness may not look at the lawyer asking the questions or the magistrate or judge, may wear a fixed smile or frown persistently or mumble answers to questions or possibly shout them out. The trier of fact (a judge sitting without a jury, a magistrate or a jury) must assess the credibility of the witness's evidence and, in doing so, will take account of his or her demeanour. This involves assumptions about the meaning of aspects of the witness's appearance, body language, tone of voice and other characteristics. It may be dangerous to put much weight on a witness's demeanour at any time. It is certainly dangerous to do so in the case of a witness with an intellectual disability. If the witness does not behave conventionally (for example, establishing eye contact with the questioner and speaking clearly and confidently in a forthright manner) the judge, magistrate or members of the jury may discount his or her evidence as unreliable when it is not. However, under the present law, apart from evidence of a very general nature (for example, information on employment and marital status), a party may not lead evidence in chief to explain the witness's demeanour as this is considered to bolster the credibility of the party's own witness.[63] Counsel can call evidence to explain to the jury why the witness behaves as he or she does, or about other matters affecting the witness's credit, only if the other side has attacked the witness's credibility.[64]

Expert evidence to help understand the witness's demeanour

7.31 In DP 35, the Commission therefore proposed that both the prosecution and the defence should be able to lead expert evidence about the intellectual disability of one of their own witnesses, including the defendant if the defendant gives evidence. The expert (a psychiatrist or psychologist) would give evidence about the nature of the witness's intellectual disability, the characteristics of the witness's intellectual disability (so far as they are relevant) and the likely physical responses to the court environment of a person with that kind of intellectual disability, but not evidence about credibility. The purpose of the expert evidence would be to help the trier of fact make a fairer assessment of witness's reliability than would otherwise be the case. Submissions generally supported the proposal.[65] The DPP stated that the expert should be appointed by the court, not called by a party. He or she would give the court guidance about the way evidence might best be taken from the particular witness, and place in context the evidence the jury hears from the witness.[66]

The Commission's view

7.32 In the Commission's view, the current rules do not sufficiently address the disadvantages suffered by witnesses with an intellectual disability. Warning the jury about the dangers of drawing conclusions from the witness's demeanour may not be effective. The Commission therefore recommends that, on application by a party, the trial judge should have the power to allow expert evidence to be led to explain the characteristics and demeanour of a witness with an intellectual disability if they are outside normal experience. The Commission does not consider that such an expert

should be court-appointed but rather a matter for the relevant party. The Commission acknowledges that the ability to call an expert in these circumstances is a departure from the common law and would require amendments to the *Evidence Act 1995* (NSW). However it is merely a common-sense extension of the rules relating to the admissibility of relevant opinion evidence.

OTHER ISSUES: INTELLECTUAL DISABILITY AS A POSSIBLE INDICATOR OF UNRELIABILITY

Warnings about unreliable evidence

7.33 The *Evidence Act 1995* (NSW) provides that, in a jury trial, if a party asks for it, the judge must, unless there are good reasons for not doing so:

> warn the jury that evidence may be unreliable;
>
> tell the jury of matters that may cause it to be unreliable; and
>
> warn the jury of the need for caution in deciding whether to accept it and what weight to give it.[67]

The Act includes a list (not exhaustive) of the kinds of evidence that may be unreliable. The list includes: some kinds of admissions; oral evidence of official questioning of a defendant where there is an unsigned record of interview; and evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like.

The Commission's proposals

7.34 Concerns have been raised about the reliability of the evidence of some people with an intellectual disability.[68] In DP 29, the Commission drew attention to the danger of people with an intellectual disability being convicted of a criminal offence on the basis of an unreliable confession. People with an intellectual disability are not the only people who make false confessions but "they possess, more frequently than other groups, the constellation of characteristics which render them especially vulnerable".[69] To overcome the danger of convictions on the basis of a false confession, the Commission proposed, among other things, that, where a confession made by a person with an intellectual disability is admitted into evidence, the judge should be required to warn the jury of the danger of convicting on the basis of the confession alone because it may be unreliable.[70]

7.35 In DP 35, the Commission proposed that the *Evidence Bill 1993* (NSW) cl 164 (now the *Evidence Act 1995* (NSW) s 165) should be amended to add to the list of kinds of evidence that may be unreliable "evidence of people with an intellectual disability". One of the reasons for doing so was that the Bill included in the list "evidence the reliability of which may be affected by age, ill-health (whether physical or mental), injury or the like" and there was some uncertainty as to whether this was intended to include people with an intellectual disability. DP 35 noted that the Evidence Bill did not affect any other power of the judge to warn the jury about unreliable evidence, and that the courts have a general power to warn.[71] It also noted that the High Court has said that the jury should be warned of the danger of convicting on the uncorroborated evidence of a witness whose evidence is important and who "has some mental disability which may affect his or her capacity to give reliable evidence".[72] This case has been applied by the New South Wales Court of Criminal Appeal on a number of occasions.[73]

Comments in submissions

7.36 There was a mixed response to the latter proposal in submissions. Only one submission supported the proposal without qualification.[74] Most submissions that addressed the issue did not support the proposal.[75] Some submissions rejected the notion that the warning should be mandatory[76] and said that the warning should not say merely that the evidence may be unreliable but say how.[77] The Victims Advisory Council said a mandatory warning would be open to abuse.[78] IDRS expressed concern about labelling all witnesses with an intellectual disability as unreliable because this could be used to discredit a witness's evidence.[79] The DPP said that there is nothing to indicate that the

evidence of people with an intellectual disability is more likely to be unreliable than that of any other witness and that a witness's reliability should remain a matter for the jury:

> Where difficulties may arise in the evidence of [witnesses with an intellectual disability], those difficulties are due to the fact that the witness may be ill-equipped to communicate information to a jury in the method that our criminal justice system presently demands.[80]

The Commission's view

7.37 The Commission is persuaded by the arguments against the proposal, in particular the argument that it might result in all witnesses with an intellectual disability being labelled as unreliable witnesses. The Report's recommendations as a whole are designed to ensure that the criminal justice system serves people with an intellectual disability as well as it serves the rest of the community. The interests of defendants, including defendants with an intellectual disability, who make an unreliable confession are protected by other provisions of the *Evidence Act 1995* (NSW) relating to the admissibility of confessions,[81] and the discretion to exclude them.[82] There is also ample scope within s 165 of the *Evidence Act 1995* (NSW) for the judge to raise concerns about a witness's unreliable testimony. Therefore, the Commission does not recommend that the Act should be amended to add to the list of kinds of evidence that may be unreliable "evidence of people with an intellectual disability".

FOOTNOTES

1. *Evidence Act 1995* (NSW) s 13(1).

2. Section 13(2).

3. Section 13(3).

4. Section 14(4).

5. Section 14.

6. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) ("NSWLRC DP 35") at para 6.11.

7. Intellectual Disability Rights Service *Submission* (1 March 1995) at 7. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 7.

8. For example, Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 3; New South Wales Police Service *Submission* (February 1995) at 10; and Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 3.

9. This power is recognised in the *Evidence Act 1995* (NSW) s 11.

10. *Evidence Act 1995* (NSW) s 26.

11. Section 41.

12. Section 42.

13. Sections 41(2) and 42(2).

14. Section 29.

15. Intellectual Disability Rights Service *Submission* (1 March 1995) at 9. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 8.

16. *Evidence Act 1995* (NSW) s 13(4).

17. Section 30.

18. Section 31.

19. Mr M Brennan *Submission* (19 July 1995) at 2. See also Intellectual Disability Rights Service *Submission* (1 March 1995) at 8; and New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 8.

20. Mr M Brennan *Submission* (19 July 1995) at 2.

21. The advantages and disadvantages of these measures are discussed in NSWLRC DP 35 at paras 7.26-7.39.

22. Special rules apply to identification evidence: *Crimes Act 1900* (NSW) s 405DC.

23. *Crimes Act 1900* (NSW) s 405CA, 405D. These amendments were introduced by the *Crimes Amendment (Children's Evidence) Act 1996* (NSW), following the *Report of the Children's Evidence Taskforce: Taking Evidence in Court* (Attorney-General's Department, New South Wales, October 1994).

24. *Crimes Act 1900* (NSW) s 405CA, 405DA.

25. *Crimes Act 1900* (NSW) s 405F.

26. *Crimes Act 1900* (NSW) s 405FA.

27. *Evidence Act 1958* (Vic) s 37C.

28. *Evidence Act 1977* (Qld) s 21A.

29. *Evidence Act 1910* (Tas) s 122I.

30. *Evidence Act 1906* (WA) s 106R.

31. *Evidence Act 1929* (SA) s 13; *Evidence Act 1939* (NT) s 21A.

32. *Evidence (Closed-Circuit Television) Act 1991* (ACT) s 4A.

33. New South Wales Police Service *Submission* (February 1995) at 11.

34. Law Society of New South Wales *Submission* (24 February 1995) at 1; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4; and Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 3.

35. Intellectual Disability Rights Service *Submission* (1 March 1995) at 8.

36. Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 3.

37. NSWLRC DP 35 at para 7.24.

38. Intellectual Disability Rights Service *Submission* (1 March 1995) at 9. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 9.

39. Victims Advisory Council *Submission* (27 February 1995) at 2.

40. Recommendation 52.

41. Recommendation 54.

42. NSWLRC DP 35 at para 7.47.

43. For example, in Queensland (*Evidence Act 1977* (Qld) s 21A) and Western Australia (*Evidence Act 1906* (WA) s 106K).

44. Intellectual Disability Rights Service *Submission* (1 March 1995) at 10. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 9.

45. NSWLRC DP 35 at paras 7.26-7.28.

46. Intellectual Disability Rights Service *Submission* (1 March 1995) at 10. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 9.

47. NSWLRC DP 35 at paras 7.31-7.34.

48. Intellectual Disability Rights Service *Submission* (1 March 1995) at 10. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 9.

49. J Cashmore *The Use of Closed-Circuit Television for Child Witnesses in the ACT* (Children's Evidence Research Paper 1, Australian Law Reform Commission, 1992) at paras 6.69-6.99. A Western Australian study also found that all judges and most lawyers surveyed thought that screens and CCTV were fair to the defendant: Ministry of Justice *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in WA* (Perth, June 1995) cited in M Dixon " 'Out of the mouths of babes ...' - A review of the operation of the Acts Amendment (Evidence of Children) Act 1992" (1995) 25 *Western Australian Law Review* 301 at 312. Compare the concerns of defence lawyers in M Pipe, M Henaghan, S Bidrose and J Egerton "Perceptions of the legal provisions for child witnesses in New Zealand" [1996] *New Zealand Law Journal* 19-26.

50. The warning in s 405H of the *Crimes Act 1900* (NSW), relating only to child witnesses, will need to be appropriately amended.

51. See para 7.7 above.

52. Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 4.

53. See *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* (NSW).

54. Victims Advisory Council *Submission* (27 February 1995) at 2. See also New South Wales Police Service *Submission* (February 1995) at 11.

55. Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 3; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4; Legal Aid Commission of New South Wales *Submission* (5 May 1995) at 1; and Mental Health Advocacy Service *Letter* (21 February 1995).

56. Law Society of New South Wales *Submission* (24 February 1995) at 3.

57. Intellectual Disability Rights Service *Submission* (1 March 1995) at 10. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 9.

58. New South Wales Law Reform Commission *Unsworn Statements of Accused Persons* (Report 45, 1985).

59. *Evidence Act 1995* (NSW) s 20.

60. See NSWLRC DP 35 at para 7.60. Compare, however a recent Supreme Court trial, where Justice Hidden admitted the history given by the accused to expert witnesses as evidence of the matters contained within it without the necessity for a dock statement, stating that this evidence was admissible for this purpose under s 60 of the *Evidence Act 1995* (NSW): *R v Hunt* (Supreme Court, NSW, Hidden J, 9 February 1996, Crim D 70017/95, unreported) at 14-15. Note that this evidence was admitted without objection and the Court of Criminal Appeal has not yet considered this issue, and the interaction between s 60 and s 136 of the *Evidence Act 1995* (NSW).

61. See para 7.7 above.

62. This is based on the *Crimes (Dock Statements) Amendment Bill 1994* (NSW), a Private Member's (Dr P Macdonald) Bill.

63. *R v Turner* [1975] 1 All ER 70 at 75. This case has been applied in Australia, for example, *R v Nelson* [1982] Qd R 636.

64. See *R v Connolly* [1991] 2 Qd R 171 at 173-4 (CCA) per Thomas J. See also *Evidence Act 1995* (NSW) s 102, 108.

65. New South Wales Police Service *Submission* (February 1995) at 11; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 3; Intellectual Disability Rights Service *Submission* (1 March 1995) at 10; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 9; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4; Law Society of New South Wales *Submission* (24 February 1995) at 1; and Victims Advisory Council *Submission* (27 February 1995) at 2.

66. Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 4.

67. *Evidence Act 1995* (NSW) s 165(2)-(3).

68. For example, K Howells and M Ward "Intellectual impairment, memory impairment, suggestibility and voir dire proceedings: A case study" (1994) 34 (2) *Medicine, Science and the Law* 176-180; C Price and J Caplan *The Confait Confessions* (Marion Boyers, London, 1977); G H Gudjonsson *The Psychology of Interrogations, Confessions and Testimony* (John Wiley & Sons, Chichester, 1992), especially Ch 6 and 7.

69. S Hayes "Intellectual Disability" in I Freckelton and H Selby (eds) *Expert Evidence* (Law Book Co Ltd) (in press).

70. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Policing Issues* (Discussion Paper 29, 1993), Proposal 29 and paras 6.61-6.72.

71. NSWLRC DP 35, Proposal 32 and paras 8.15-8.16.

72. *Bromley v R* (1986) 161 CLR 315 at 319 per Gibbs CJ.

73. See, for example, *R v Clough* (1992) 28 NSWLR 396 at 404, per Hunt CJ at CL; *R v Halls* (Court of Criminal Appeal, NSW, 1 September 1993, CCA 60386/92, unreported) per Grove J at 3-5; *R v Small* (1994) 33 NSWLR 575 at 602-603, per Hunt CJ at CL; and, in relation to a person with an intellectual disability, *R v Parker* (1990) 19 NSWLR 177 at 183-4 per Gleeson CJ.

74. Law Society of New South Wales *Submission* (24 February 1995) at 1.

75. For example: Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 5; and New South Wales Police Service *Submission* (February 1995) at 12.

76. Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 2; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 4.

77. Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 3.

78. Victims Advisory Council *Submission* (27 February 1995) at 3.

79. Intellectual Disability Rights Service *Submission* (1 March 1995) at 10-11; see also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 10.

80. Office of the Director of Public Prosecutions, New South Wales *Submission* (3 April 1995) at 5.

81. *Evidence Act 1995* (NSW) s 85.

82. *Evidence Act 1995* (NSW) s 90 and Part 3.11.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

8. Other Legislative Amendments

RECOMMENDATIONS

Amendments to the Crimes Act 1900 (NSW)

Sexual offences

32. "Serious intellectual disability" should be abolished as a circumstance of aggravation in the aggravated sexual offences in s 61J(2)(g), 61M(3)(e) and 61O(3)(d) of the *Crimes Act 1900* (NSW). [See paras 8.7-8.15]

33. Section 66F of the *Crimes Act 1900* (NSW) should be retained with the following changes:

(a) the definition of intellectual disability in s 66F(1) should be that recommended in Recommendation 1;

(b) the requirement in s 66F(6) that no prosecution for an offence against this section shall be commenced without the approval of the Attorney General should be removed;

(c) the prohibited conduct should not be limited to sexual intercourse but should also include an act of indecency;

(d) the carer's offence in s 66F(2) should be redrafted in consultation with disability groups to ensure that it covers all relevant carers, including volunteers and staff providing home-based care, but not to prohibit sexual relations between two consumers of the same service; and

(e) the exploitation offence in s 66F(3) should be abolished. [See paras 8.16-8.36]

Amendments to other legislation

Victims compensation

34. Victims compensation legislation should provide that a victim's intellectual disability is a relevant consideration for the purpose of granting leave to lodge a late application for compensation. [See paras 8.37-8.44]

Apprehended Violence Orders

35. There should be further consideration of the impact of Apprehended Violence Orders on people with an intellectual disability as both complainants and defendants, particularly in the context of group homes. This consideration should involve consultation with relevant agencies, including the New South Wales Police Service and the New South Wales Department of Community Services. [See paras 8.45-8.48]

Sentencing

36. Where an offender is unrepresented and has an intellectual disability, or one is suspected, and a custodial sentence is a reasonable possibility, sentencing legislation should provide that a Pre-sentence Report from someone who has expertise in the area of intellectual disability is mandatory. [See paras 8.57-8.59]

37. A court should have the power to request information from relevant government agencies, including the New South Wales Department of Community Services and the New South Wales Probation and Parole Service about appropriate programs for an offender with an intellectual disability and to order that an offender attend such a program as a condition of the sentence. [See paras 8.60-8.61]

INTRODUCTION

8.1 Chapters 5, 6 and 7 made recommendations in the areas of fitness to be tried, the defence of mental illness and giving evidence in court. This chapter continues to consider the position of a person with an intellectual disability appearing before the courts and considers a number of unrelated legislative amendments, all of which aim to correct other identified difficulties in this area. These amendments affect victims (sexual offences and victims' compensation) or offenders (sentencing), or both (Apprehended Violence Orders).

Sexual offences against people with an intellectual disability

Background to the recommendations

8.2 Chapter 2 discussed the particular vulnerability of people with an intellectual disability to sexual exploitation or assault. Few of these assaults result in sanctions for the offender, or even reach court. For example, according to the New South Wales Council for Intellectual Disability, the Royal North Shore Hospital Sexual Assault Unit received approximately 50 allegations of sexual assault on people with an intellectual disability in 1994, but only one person was charged with an offence.[1] Reforms to overcome the difficulties faced by people with an intellectual disability in pursuing sexual offenders in court require a combination of training, procedural and legislative changes - as with many other areas in this Report, statutory reform alone is likely to be unsuccessful. Many of these issues have already been considered in the New South Wales Women's Co-ordination Unit's report on sexual assault of people with an intellectual disability and a later report on access to services for women with disabilities and deaf women.[2] In this Report, Chapter 4 considered recommendations to overcome the difficulties faced by victims and witnesses at the investigation stage, through their contact with the police, and Chapter 9 will consider the need for training and information for criminal justice personnel.

8.3 This chapter considers the legislative provisions which govern the court's consideration of sexual offences involving people with an intellectual disability. Such charges can be brought both under the general sexual offences[3] and under the specific sexual offences relating to people with an intellectual disability found in s 66F of the *Crimes Act 1900* (NSW). Intellectual disability is a relevant factor in the general sexual assault provisions, for example, intellectual disability can be a "circumstance of aggravation" under the aggravated sexual assault offences.[4] This has been a particularly difficult area for the Commission, with a dearth of submissions and information about many aspects. Accordingly, in DP 35 the Commission outlined a list of questions for discussion rather than proposals for reform.[5] The Commission has limited its recommendations in this Report to those provisions which specifically affect people with an intellectual disability, rather than the general law of sexual assault.

Consent

8.4 In New South Wales the general offence of sexual assault prohibits a person from having sexual intercourse with another person without the *consent* of the other person and who *knows* that the other person does not consent (or is reckless about the consent) to the sexual intercourse.[6] Though consent is no defence for some sexual offences,[7] generally the issue of capacity to consent and actual consent raises particular difficulties for victims with an intellectual disability. Capacity to consent to a sexual act involves having sufficient knowledge or understanding to comprehend the physical nature of the sexual act and to appreciate the difference between that act and an act of a different character, such as a medical examination.[8] The majority of people with an intellectual disability would have the capacity to consent,[9] though people with a more severe level of intellectual disability would lack this capacity. If lack of capacity is established then the intercourse is in fact without consent[10] and the Crown then needs to establish that the accused knew of (or was reckless about) that lack of capacity. If the person has the

capacity to consent, the denial of consent must be established, or the circumstances that vitiated consent.[11]

8.5 The Victorian Law Reform Commission ("VLRC") recommended (for all sexual offences) that the present position for capacity to consent be retained. The VLRC rejected a proposed alternative test (namely, that a person lacks the capacity to consent if incapable of appreciating the nature and significance of sexual intercourse), on the ground that it would unduly restrict peoples' sexual rights.[12] Alternatively, a report prepared by a number of disability interest groups recommended that the level of understanding required for sexual intercourse be reduced (and therefore the test for capacity widened) so that "a person is capable of consenting to sexual intercourse provided that he or she understands the physical act of sexual intercourse, without necessarily understanding the nature and consequences of sexual intercourse".[13]

8.6 A variety of viewpoints were recognised in the few submissions which considered this issue, revealing the difficult balancing act involved in providing protection for some people with an intellectual disability but not impinging on the sexual freedoms of others. Like the disability organisations referred to above, the Illawarra Disabled Persons' Trust supported a widening of the test for capacity for consent to include understanding the nature of the act of sexual intercourse but not including understanding the consequences of the act, "as this may restrict the ability of people with intellectual disabilities from engaging in sexual relationships".[14] By comparison, the New South Wales Council for Intellectual Disability and the New South Wales Sexual Assault Committee agreed with the VLRC that the present law should be retained.[15] The Commission's research and consultations have not revealed sufficient justification to recommend changes to the law of capacity to consent.[16]

Discussion of the Commission's recommendations

Recommendation 32: Aggravated sexual offences

8.7 The general sexual assault provisions include "aggravated" sexual offences, namely, aggravated sexual assault, aggravated indecent assault and aggravated act of indecency.[17] If an aggravated offence is proved, the legislation provides for substantially heavier maximum gaol sentences than otherwise, for example, sexual assault has a maximum penalty of 14 years, but aggravated sexual assault has a maximum of 20 years. The consequences of proving a circumstance of aggravation are therefore potentially very significant for the offender. The offence of aggravated sexual assault is as follows:

> **61J. Aggravated sexual assault** (1) Any person who has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse is liable to penal servitude for 20 years.
>
> (2) In this section, "circumstances of aggravation" means circumstances in which:
>
> (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby; or
>
> (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument; or
>
> (c) the alleged offender is in the company of another person or persons; or
>
> (d) the alleged victim is under the age of 16 years; or

(e) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender; or

(f) the alleged victim has a serious physical disability; or

(g) the alleged victim has a serious intellectual disability.

The other offences are in similar terms. "Circumstances of aggravation" for the offences are varied but all include the "serious intellectual disability" of the victim or the fact that the victim is "under the authority of the alleged offender",[18] which may also be relevant for people with an intellectual disability.

8.8 Aggravated offences (in their present form) were introduced in 1989. The provisions were designed to simplify and extend the pre-existing aggravating categories. The policy behind aggravated sexual offences appears to be that there should be a higher sentence for certain factors in crimes which the community sees as especially abhorrent, such as when the victim is particularly vulnerable.[19] There has been limited judicial comment on the provisions. Inquiries of the Director of Public Prosecutions ("DPP") and the New South Wales Bureau of Crimes Statistics have revealed only a few cases where intellectual disability as a circumstance of aggravation has been successfully argued, and all the cases the Commission is aware of involved a guilty plea, and therefore provide little insight into the interpretation of the sections. The Commission's research and consultations have revealed a number of areas of uncertainty in the sections, in particular: who is covered by the reference to a victim with a "serious intellectual disability"; and what level of knowledge must the alleged offender have about the victim's disability.

8.9 *Definitions.* The lack of definition of "serious intellectual disability" for the purposes of these aggravated offences has been criticised. According to the Second Reading Speech of the then Attorney General, the term was not defined, as "[t]his is a matter for the courts".[20] It is unclear, however, what level of intellectual disability is considered to be "serious", when the usual terms employed to differentiate levels of disability are "borderline", "mild", "moderate", "severe" and "profound". It could be argued that any intellectual disability is "serious" in that it involves, by definition, a significantly below average level of intellectual functioning. (See Chapter 3.) However, if it is argued that "serious" cannot include a mild level of intellectual disability, then, as the majority of people with an intellectual disability fall within this category, this section will have limited application. There is no case law on the point.

8.10 A variety of amendments have been suggested, though all recognised the need for greater clarity in this area. The Attorney General's Committee stated that either amending the sections to replace "serious" with a more meaningful term or defining the word "serious" in this context should be considered.[21] The New South Wales Sexual Assault Committee called for the removal of the reference to "serious" intellectual disability as this term was not used professionally and excludes people with a less severe disability, preferring instead a reference to the particular vulnerability of the victim.[22] The Law Society of New South Wales and the Intellectual Disability Rights Service also supported the removal of the "serious" qualification.[23] The Commonwealth Office of Disability also thought that "serious intellectual disability" should be replaced by a more general category, in line with Australian Bureau of Statistics classifications.[24] The New South Wales Women's Co-ordination Unit Report recommended that the Attorney General (through the Criminal Law Review Division) take advice from disability organisations and the Department of Community Services and develop a clear definition of this term.[25] By comparison, the New South Wales Council for Intellectual Disability recommended that circumstances of aggravation be a matter for sentencing, rather than a category of sexual assault.[26]

8.11 Even if the definition difficulty can be overcome, the question must be asked why the circumstances of aggravation are limited to people with a serious intellectual or physical disability. It appears anomalous not to include people with a mental illness or other forms of mental impairment such as senility or brain injury. There are obvious difficulties, however, in attempting to list all the relevant circumstances which may make a victim particularly vulnerable.

8.12 *Knowledge.* Apart from the issue of which victims should be included in the circumstances of aggravation, there is still the problem of whether the offender knew that the victim had the defined

disability. Knowledge by the accused of the existence of the victim's disability (and that the disability was "serious") is not stated to be an element of the offence. It has been queried whether knowledge could be assumed to be necessary, particularly as the requirement for knowledge is clearly spelt out in s 66F(5).[27] Circumstances of aggravation relating to the offender, such as whether the offender threatened to inflict actual bodily harm, are clearly known by the offender. Most of the "circumstances of aggravation" relating to the victim also would be necessarily within the knowledge of the offender, for example whether the victim was under the offender's authority, and whether the victim had a serious physical disability. But a person's intellectual disability may not necessarily be obvious to the ordinary person, particularly if there is no pre-existing relationship between the offender and the victim. (Similar difficulties arise with the aggravating circumstance that "the alleged victim is under the age of 16 years".) It might be argued that the word "serious" is meant to imply "obvious", but this would be a difficult argument to sustain. It can probably be assumed, despite the absence of case law on this issue, that knowledge is required for the operation of the section so that the accused satisfies the mental element (*mens rea*) of the offence.[28] If so, is the accused required to have the same understanding as a psychologist of the victim's intellectual disability and to know that it was a "serious" one? The community in general does not have a very sophisticated understanding about intellectual disability. It is unclear what the prosecution must actually prove to satisfy the offence. In the absence of a guilty plea it may be virtually impossible for the prosecution to overcome the difficulties referred to above.

8.13 The few submissions which considered this issue have generally considered that knowledge of the victim's intellectual disability should be an element of the offence.[29] The Commission also believes that knowledge of the victim's relevant aggravating factor (in this case the person's intellectual disability) by the offender should be an element of the aggravated sexual offences. The Commission considers that possible alternatives to knowledge, such as "recklessness" or "awareness of likelihood" are inappropriate. As discussed above, the aggravated offences involve much higher potential sentences for the offender. It appears unjust that such penalties should be imposed unless the offender was aware of the aggravating factor. Without a knowledge requirement, an offender who also had an intellectual disability could be brought under the provisions, which does not appear to reflect the policy behind them. However, as discussed, a knowledge requirement will make the offence extremely difficult to prove, unless there is a significant pre-existing relationship between the victim and the offender.

8.14 It seems clear that the aggravated offences relating to intellectual disability are not used often in practice. Even if used, it is unlikely that a sentence above the maximum for general sexual assault (14 years) would be given. The Commission believes that the difficulties involved in the intellectual disability limbs of the aggravated offences are impossible to overcome while remaining fair to the offender, considering the potentially much more severe penalty involved. It is also anomalous to limit the section to people with an intellectual disability, rather than people with other mental impairments. Why should a few categories of vulnerable victims be singled out if the policy is designed to protect vulnerable victims in general? There are also disadvantages in making the person's disability a part of the offence which must be proved. For example, the DPP argued that:

> By alleging aggravating features, more latitude appears to be given to the defence in relation to access to documents [such as medical records], often causing more personal embarrassment for the complainant in some matters that are unrelated to the charges, all because the Crown alleged circumstances of aggravation.[30]

8.15 The Commission therefore recommends that this limb of each of the aggravated offences be abolished. The Commission notes that, even without the "serious intellectual disability" limb, all the aggravated offences retain an "under the authority of the offender" limb. In many cases where the offender actually knew of the victim's intellectual disability, this limb would also be applicable. The victim's intellectual disability or other vulnerability would remain a matter which could be taken into account by the sentencing judge to set a sentence at the more severe end of the spectrum.[31]

Recommendation 33: Specific sexual offences - s 66F

8.16 It has been recognised that the general sexual assault offences, which are "designed to protect freedom of choice in sexual connections" may not provide sufficient protection where the victim is "not

capable of making a mature and rational choice of this kind".[32] This concern has led to specific offences prohibiting sexual intercourse with people below certain ages and people with an intellectual disability. For such offences consent is generally not a defence because, it has been argued, the victim has a lower "capacity to evaluate sexual persuasion" than the general adult community.[33] However, whether or not specific offences for people with an intellectual disability are appropriate is a matter of some controversy because, by removing the issue of consent, limits are arbitrarily imposed on their sexual rights. The VLRC commented in relation to people with a mental impairment, including intellectual disability:

> The law must balance two competing interests - protecting people with impaired mental functioning from sexual exploitation, and giving maximum recognition to their sexual rights. The difficulty for the legal system in striking an appropriate balance between these interests is compounded by the considerable diversity of people with mental impairment in terms of extent of impairment, living circumstances, and sexual interest and knowledge.[34]

The international human rights principles outlined in Chapter 1 accepted that there may be a need for restriction of the rights of people with an intellectual disability, for example, whenever they are unable, because of the severity of their disability, to exercise all their rights in a meaningful way.[35]

8.17 The arguments against specific offences for people with an intellectual disability include:

there is sufficient protection provided by the general law, for example, if the person lacks capacity to consent, then the intercourse is without consent;

specific offences limit the sexual freedoms of people with an intellectual disability; and

people with an intellectual disability should not be singled out in this way from, for instance, people with some other form of impaired mental functioning.

8.18 Arguments in favour of retaining such offences refer to the particular vulnerability of people with an intellectual disability to sexual exploitation. It is also argued that the general provisions are difficult to prosecute successfully, particularly in the area of proving lack of consent, and are therefore insufficient to protect people with an intellectual disability. For example, it has been commented:

> Targeted abuse of vulnerable persons is real and lack of access and justice as victims of sexual assault is also real. These realities ought to force us, no matter what our ideological persuasion, to examine the legitimacy of rhetoric which exclaims that intellectually disabled people are the same as anyone else before the law and ought to be treated the same before the law.[36]

8.19 Some argue that there should be specific offences prohibiting sexual intercourse between people with an intellectual disability and certain groups of people, such as their carers. Arguments against permitting a relationship between a person with an intellectual disability and their carer included: people with an intellectual disability might not want the sexual relationship, but find it difficult to refuse; and a sexual relationship can exploit a person with an intellectual disability, even if he or she freely wants the relationship.[37]

8.20 In New South Wales, s 66F of the *Crimes Act 1900* (NSW) was designed to prevent the sexual exploitation of people with an intellectual disability, not just by their carers, but by other people who have knowledge of the person's intellectual disability and the intention to take advantage of their vulnerability to sexual exploitation. It has only been used, since its introduction in 1987, in a small number of cases.[38] Rather than focusing on the issue of consent, it prohibits certain consensual and exploitative sexual relationships. The section replaced the offence of "carnal knowledge of an "idiot" or "imbecile", which prohibited *all* sexual relations outside marriage.[39] It has been stated that "[s]uch laws were discriminatory and obviously restrictive of the rights of people with an intellectual disability to have normal relationships".[40] Section 66F states that:

(1) In this section -

"intellectual disability" means an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with daily life activities.

(2) Any person who has sexual intercourse with another person who -

(a) has an intellectual disability; and

(b) is (whether generally or at the time of the sexual intercourse only) *under the authority of* the person in connection with any facility or programme providing services to persons who have intellectual disabilities,

shall be liable to penal servitude for 10 years. ["the carer's offence"]

(3) Any person who has sexual intercourse with another person who has an intellectual disability, *with the intention of taking advantage of the other person's vulnerability to sexual exploitation,* shall be liable to penal servitude for 8 years. ["the exploitation offence"]

(4) Any person who attempts to commit an offence under this section upon another person who has an intellectual disability shall be liable to the penalty provided for the commission of the offence.

(5) A person does not commit an offence under this section unless the person *knows that the person concerned has an intellectual disability.*

(6) No prosecution for an offence against this section shall be commenced without the approval of the Attorney General. [emphasis added]

8.21 Thus, *regardless of the consent* of the person with an intellectual disability, s 66F prohibits sexual intercourse in two situations:

between a person with an intellectual disability and a person who has authority over the person "in connection with any facility or programme providing services to persons who have intellectual disabilities" ["the carer's offence"]; and

between *any* person and a person with an intellectual disability if the person has "the intention of taking advantage of the other person's vulnerability to sexual exploitation" ["the exploitation offence"].

8.22 Different problems arise for the carer's offence and the exploitation offence, which are discussed at paras 8.30-8.32 below. However, the section also contains a number of general limitations on its operation:

a limited definition of intellectual disability;

the requirement that the offender know that the victim had an intellectual disability;

the requirement for the consent of the Attorney General to bring a prosecution; and

the restriction on the availability of the offence to "sexual intercourse".

These general difficulties are discussed before raising those specific to the two types of offence.

8.23 *Level of intellectual disability required.* The prohibition against sexual intercourse is limited by the definition of intellectual disability used in s 66F(1), which would probably not include many people with a

mild level of intellectual disability. The intention that the section would not apply to all people with an intellectual disability seems clear from the Second Reading Speech:

> [i]ntellectual disability is carefully defined to attract the protections afforded by the legislation to those people whose level of disability requires such protection ... The intent of these reforms is to provide protection from sexual exploitation and assault to people with a *significant* intellectual disability.[41] [emphasis added]

It may be suggested, however, that some protection is already provided for people with a significant (or more severe) level of intellectual disability under the capacity to consent test referred to above. It was also suggested by prosecution lawyers in consultations with the Commission that there have been cases where s 66F was appropriate but where it was impossible to obtain sufficient evidence, due to the severity of the victim's disability.[42] Thus limiting the victims to those with a more severe level of intellectual disability, may make the section unworkable, in the absence of a guilty plea.

8.24 The Commission has already recommended (Recommendation 1) that there should be a new and uniform definition of intellectual disability in all relevant criminal legislation. Accordingly, it recommends that this definition should also apply to s 66F and that the current definition should be repealed. The Commission believes that the definition is sufficiently clear and limited to prevent use of this section in inappropriate circumstances, but acknowledges that the section will apply to more people with an intellectual disability than was previously the case.

8.25 *The knowledge requirement.* Another limitation is that the alleged offender must *know* that the person has an intellectual disability. This causes particular difficulties for the exploitation offence, where there is no necessary pre-existing relationship. One commentary stated:

> ... the knowledge of the accused may be established by admissions, by proof of long standing acquaintance, or by the fact that the victim's appearance made it obvious that he or she was intellectually disabled: the victim's appearance is a proper matter for the jury to observe and consider.[43]

In DP 35 the Commission queried whether recklessness about whether or not the person had an intellectual disability should be sufficient to establish the knowledge requirement, and, if so, how should recklessness be defined? Some submissions have supported the introduction of the element of recklessness to satisfy the requirement of knowledge.[44] As discussed in relation to the aggravated offences, there are obvious dangers in extending the meaning of knowledge in this area. The Commission prefers to leave this area to the development of the common law about the meaning of "knowledge" in the general area of sexual assault and does not make any further recommendation in this area.

8.26 *Consent of the Attorney General.* The section also provides that no prosecution can be brought without the consent of the Attorney General. The New South Wales Women's Co-ordination Unit Report recommended that this consent requirement be removed, as "[t]his appears to be an unnecessary restriction which is only applied to a limited number of other sexual assault offences".[45] It has also been suggested that the need for this requirement to avoid inappropriate prosecutions is no longer necessary, following the establishment of the position of the Director of Public Prosecutions, whose role includes consideration of the appropriateness of prosecutions. This power to consent has in fact been delegated from the Attorney General to the DPP himself/herself.[46] The VLRC also considered, but rejected, the need for a requirement that the approval of the DPP be obtained before a case could be prosecuted, "particularly in view of the general power of the DPP to determine whether specific prosecutions should continue, having regard to evidentiary and other considerations".[47]

8.27 Though few submissions addressed this issue, they have generally supported the removal of the requirement of the consent of the Attorney General.[48] However, the DPP supported the requirement, arguing it "highlights the need to ensure that only matters where there is a clear advantage derived by the alleged abuser to his/her victim are proceeded with".[49] Despite this comment, the Commission is of the view that a specific requirement is probably unnecessary, as it is part of the role of the DPP to

consider the appropriateness of prosecutions in any event. Therefore the Commission recommends that this requirement be removed.

8.28 *Sexual intercourse restriction.* The section only applies to sexual intercourse, not to other sexual acts, unlike the general sexual assault provisions. Sexual intercourse is broadly defined.[50] The Intellectual Disability Rights Service supported prohibiting any other sexual act under the same conditions as:

> [t]he trauma experienced by someone who has been sexually assaulted can be just as severe in cases where indecent assault rather than penetration occurred. Such an offence could incur a lesser penalty than where sexual intercourse took place.[51]

The Commission does not see any reason in principle why this provision should be limited to sexual intercourse for, as the general sexual offence provisions recognise, inappropriate sexual contact can take a variety of forms. Accordingly the Commission recommends that the prohibited conduct in s 66F should not be limited to sexual intercourse, but should also include any act of indecency. The penalty should be appropriately lower.[52]

8.29 Even with the above recommended changes, the section still presents problems, which may explain the small number of successful cases. The New South Wales Sexual Assault Committee, for example, has criticised this section, stating:

> advice from solicitors in the DPP as well as defence lawyers is that s 66F ... is badly worded. Inappropriate prosecutions are occurring. The DPP apparently prosecutes under the usual sections of the Crimes Act rather than s 66F if they can.[53]

Both the carer's offence and the exploitation offence present different difficulties.

8.30 *The carer's offence.* Though there was particular support for the carer's offence, there were concerns that the prohibition against sexual intercourse between a person with an intellectual disability and a person who is in authority over them "*in connection with any facility or programme* providing services to persons who have intellectual disabilities", could include inappropriate people. The Intellectual Disability Rights Service was concerned that the section could prohibit consumers of a service from having sexual relationships with each other.[54] Many people with intellectual disabilities now have management or other responsible roles in disability services organisations in which they are also clients. The scope of the section will depend upon how wide an interpretation is given to "in connection with" and to whether the person with an intellectual disability is "under the authority of"[55] such a person.

8.31 In DP 35, a number of varied alternatives to the carer's offence were discussed to meet the delicate balance between protecting people from inappropriate sexual relationships with their carers while retaining their sexual autonomy. One alternative is to limit this offence to people with custody and control (whether permanent or temporary) over the person with an intellectual disability. Another alternative was suggested by a working party drawn from three groups representing the interests of people with an intellectual disability (the Intellectual Disability Rights Service, the New South Wales Council for Intellectual Disability and the Australian Society for the Study of Intellectual Disability) which supported, in 1987, the introduction of a "carer's offence", where consent was no defence.[56] The provisions proposed by those organisations contained a definition of intellectual disability and a broad definition of "facility" and stated:

> 2. (a) whosoever being the proprietor of or an employee in a facility and who has sexual intercourse with a person with an intellectual disability who, to the knowledge of the proprietor or employee, is receiving accommodation, care, treatment, education or training in or from that facility shall be guilty of an offence;
>
> (b) whosoever being a person who provides care, treatment, education or training to a person or people with an intellectual disability at a facility where or from which a

> person with an intellectual disability is receiving accommodation, care, treatment, education or training and who has sexual intercourse with such person, shall be guilty of an offence.[57]

The provision was designed to cover volunteers as well as paid workers, but not situations where both people involved have an intellectual disability or are otherwise both clients of the facility. A carer would not, however, be caught by the provision if he or she changed jobs before commencing a sexual relationship; the working party stated that it "certainly did not wish to prohibit the development of genuine relationships between workers and people with an intellectual disability".[58] The need to cover staff providing home-based care has also been referred to.[59]

8.32 *The exploitation offence.* The exploitation offence presents some fundamental difficulties. As discussed, the exploitation offence is not concerned with whether the victim *is* actually exploited, rather, the focus is on the *intention* of the accused. Such an intention is not only hard to define meaningfully, it may be extremely difficult, if not impossible, to prove. Little judicial guidance about the section is available. The only case which appears to have reached the Court of Criminal Appeal involved a guilty plea.[60] In that case the Court commented on the difficulties involved in setting an appropriate sentence, even when the defendant pleaded guilty.[61] There is clearly scope, where consent is irrelevant, for inappropriate prosecutions to occur. The knowledge requirement (of the person's intellectual disability) is also difficult to establish. Some submissions have suggested that the exploitation offence (s 66F(3)) be abolished because of such difficulties, though the Illawarra Disabled Persons' Trust suggested it might have deterrent value.[62]

8.33 *Conclusions: s 66F.* Despite concerns that the sexual freedom of people with an intellectual disability is impeded by this section, the Commission has not received any submissions recommending that s 66F as a whole be repealed. Comments in submissions have instead focused on difficulties with the current drafting. Nor did the New South Wales Women's Co-ordination Unit Report recommend its abolition. A number of submissions have recommended its retention,[63] or at least the retention of the carer's offence.[64] Without such a provision, inappropriate sexual conduct involving a particularly vulnerable group of people may be left unsanctioned. Nor are carers likely to have the same professional regulation and strict conduct codes as, for example, doctors, despite their considerable potential power over the people in their care. This makes the provisions of the criminal law particularly important.

8.34 The VLRC also recommended that a specific sexual offence against people with "impaired mental functioning" be retained, to prohibit "a person who is employed in a facility providing services [residential or non-residential] for mentally ill or intellectually disabled people" from taking part in any sexual act with "a person receiving services at that facility". The VLRC also recommended that consent was to be a defence only where the accused was married to, or in a de facto relationship with, the alleged victim.[65] However, the VLRC, while accepting the need for a "carer's offence", specifically rejected a general "exploitation offence", on the grounds that:

> [t]here is too great a risk that an offence of that type would unduly restrict expression of the sexual rights of people ... The offence should be confined ... to specified situations in which people ... are particularly dependent - and therefore particularly vulnerable. It should be targeted at specified caregivers, as it is reasonable to impose a special prohibition on those people who are responsible for the care and welfare of others.[66]

8.35 The Commission considers that consensual relationships should only rarely be prohibited and that people with an intellectual disability should not have greater restrictions on their sexual relationships than other people, where they have the capacity to consent. (Lack of capacity is considered at paras 8.4-8.6 above.) The Commission considers, however, that consensual sexual relationships with carers raise different concerns to such relationships with other people. In light of the above, the Commission believes that the carer's offence in s 66F(2) should be redrafted in consultation with disability groups to ensure that it covers all relevant carers, including volunteers and staff providing home-based care, but not to prohibit sexual relations between two consumers of the same service.

8.36 The Commission also recommends that the exploitation offence in s 66F(3) be abolished, because, despite lengthy consideration, it cannot suggest a way of overcoming the identified difficulties. However, the Commission acknowledges the fears of sexual exploitation of people with an intellectual disability which led to the insertion of the exploitation offence. One area which has raised particular concern is the issue of transport - consultations have referred to a disproportionate number of sexual offences by taxi or bus drivers involving the people with an intellectual disability who rely on their services.[67] Though the act may be without consent, this may be difficult to prove because of all the difficulties in giving evidence referred to in Chapter 7. A section such as s 66F has the advantage of not having to prove lack of consent. However, the exploitation offence still has the overwhelming difficulty of proving an intention to exploit. The Commission suggests that transport issues may be better addressed through the carer's offence as, in many such situations, the driver will have some connection with an organisation which provides services to a person with an intellectual disability.

COMPENSATION FOR VICTIMS OF CRIME

Background to the recommendation

8.37 As discussed in Chapter 2, people with an intellectual disability are often victims of crime. However, as Chapters 4 and 7 commented, they are often disadvantaged compared to other victims in their contacts with the police and the courts in obtaining redress. Lack of understanding about crime and the criminal justice system, including their right to complain to the police, dependence on other people, or the fact that offences in supported accommodation have been handled internally by carers rather than through the criminal justice system may result in delays in reporting or failure to report the crime.[68] At both the investigation and the trial stages, their complaints may be dismissed because they are not believed or they have difficulty giving evidence in admissible (or persuasive) form. As people with an intellectual disability are often also poor and lack support networks, the impact of a crime can be even more devastating, financially and socially, than for other victims. Accordingly, the existence of government victims' compensation payments is particularly important for them.

Victims Compensation Act 1987

8.38 The Victims Compensation Tribunal was established on 15 February 1988 under the *Victims Compensation Act 1987* (NSW) to provide compensation for victims of "acts of violence" (defined by the legislation) and to recover compensation from offenders and fraudulent claimants. As the Tribunal operates on a civil, not a criminal, standard of proof, acquittals and the failure of a prosecution for any other reason are not conclusive in the determination of whether compensation should be granted to the victim.[69] A person may thus apply for compensation even if the alleged offender was acquitted or if the Director of Public Prosecutions decided not to proceed with the charges. This may be important for a person with an intellectual disability, as "[t]he Tribunal also receives claims by applicants in which the authorities have not prosecuted because of their assessment of the victims' evidence".[70] The Victims Compensation Tribunal does not hold any statistics about the numbers of complainants who have an intellectual disability.[71]

8.39 Few submissions discussed victims' compensation in detail, though some of the particular difficulties in this area for people with an intellectual disability were noted, such as the likelihood of delays in reporting to the police, which may have a detrimental effect on their application, and the fact that they may have trouble proving their psychological damage, pain and suffering. It was also stated that it was hard for people with more severe disabilities to get compensation, as they are reliant on statements from people around them, and the awards have generally been low.[72] The New South Wales Sexual Assault Committee has queried whether psychological damage is an appropriate assessment basis in any event for some people with disabilities.[73]

Recovery of compensation from offenders

8.40 If an order for compensation is made, the Victims Compensation Tribunal may, in certain circumstances, seek to recover the sum paid from a person who has been convicted of an offence arising from substantially the same facts as those which led to the order for compensation ("the

defendant").[74] Restitution proceedings are commenced by serving a notice on the defendant, and the onus is then on him or her to show cause why such an order should not be made. If such restitution is sought, the amount to be paid is fixed with regard to such matters as the financial means of the defendant and the Tribunal's assessment of his or her culpability.[75] Such restitution proceedings may be incomprehensible to some (though not all) defendants with an intellectual disability; for example they may have difficulty in understanding the difference between the restitution proceedings and the original criminal proceedings.[76] The New South Wales Council for Intellectual Disability and the Intellectual Disability Rights Service recommended that restitution should not be sought from offenders with an intellectual disability where they have no understanding of their actions.[77]

Proposals for reform

8.41 In 1993 the victims' compensation legislation was reviewed by Mr C Brahe, Deputy Chief Magistrate and former Chairperson of the Victims Compensation Tribunal (the "Brahe Report").[78] The Brahe Report made a number of recommendations relevant to a victim with an intellectual disability. The Brahe Report recommended that applications for compensation should be lodged within a period of two years from the act of violence, but that the Tribunal should have a discretion to accept claims outside that period in exceptional circumstances, including the victim's intellectual disability.[79] The Brahe Report also recommended that failure to report the crime to a police officer within a "reasonable time", or to assist the prosecution, could be excused on grounds including the victim's intellectual disability.[80]

Victims Compensation Act 1996

8.42 To implement these and other recommendations of the Brahe Report a *Victims Compensation (Amendment) Bill 1994* (NSW) was introduced into Parliament. The 1994 Bill was never passed and lapsed when Parliament was prorogued. In late 1996 the *Victims Compensation Act 1996* (NSW) was passed, which makes significant changes to the whole victims' compensation system and repeals the 1987 Act. As at 30 November 1996, the Act had been passed but had not received assent. Commencement of the new regime will be on a date to be proclaimed, with the exception of provisions relating to claims in the transitional period, which come into effect from assent. As recommended by the Brahe Report, the Act provides that in determining whether a matter was reported to a police officer within a "reasonable time", the victim's intellectual disability can be considered.[81] Additionally, again as recommended by the Brahe Report, the 1996 Act provides that applications must be lodged within two years after the relevant act, though the Director of Victims Compensation may give leave for out of time applications.[82] However, unlike the Brahe Report, there is no reference to intellectual disability as a relevant consideration in granting leave. Furthermore, a decision by the Tribunal to refuse leave for a late application cannot be appealed to the District Court.[83] This provision is likely adversely to affect people with an intellectual disability.

8.43 As the Act does involve significant changes to the current system there have been concerns raised about possible disadvantages to claimants. Contentious aspects include:[84]

> decreased flexibility in considering the particular circumstances of the claimant through the abolition of common law principles to assess damages and the introduction of a Table of Injuries with standard amounts of compensation for each injury;[85]
>
> an increased threshold amount for compensation (from $200 to $2,400);[86]
>
> the abolition of appeals to the District Court except on matters of law;[87] and
>
> the provision for only one award of compensation for a series of related acts such as a history of sexual abuse.[88]

These features will have significance for people with an intellectual disability. One concern which has been raised is that the lack of flexibility in awards under the 1996 Act may have a greater impact on people with an intellectual disability than other people due to an inability to take the particular

circumstances and predisposition of the person into account in making the award, for example, the consequences of the act of violence may have been more extreme on such a person due to their disability. These issues require more consideration and research than is possible in this context. The Commission is aware that the Disability Council of New South Wales is considering such issues in undertaking research on the impact of the 1996 changes on people with disabilities.

Discussion of the Commission's recommendation

Recommendation 34: Reference to intellectual disability in victims' compensation legislation

8.44 The Commission believes that both of the clauses recommended by the Brahe Report and included in the 1996 Act are important for the fair treatment of people with an intellectual disability, though it believes that it would be preferable for "intellectual disability" to be specifically mentioned as a possible reason for late lodgements of applications, as was recommended by the Brahe Report. These provisions were generally supported in the few submissions which considered this issue.[89] Accordingly, the Commission recommends that victims' compensation legislation should specifically provide that a victim's intellectual disability is a relevant consideration for the purpose of granting leave to lodge a late application for compensation.

APPREHENDED VIOLENCE ORDERS

8.45 A further issue for victims with an intellectual disability is the availability of apprehended violence orders. The Commission has been informed of the difficulties faced by people with an intellectual disability in obtaining an apprehended violence order ("AVO").[90] The difficulties may be compounded by the limited capacity of some people with an intellectual disability to leave abusive situations owing to their lack of financial and social resources,[91] for example, the person feared may be another resident or a staff worker in a group home. An AVO is made when the court is satisfied that a person fears, on reasonable grounds, violence or other conduct amounting to harassment, molestation, intimidation or stalking from another person.[92] When a person "is, in the opinion of the court, suffering from an appreciably below average general intellectual function", the court does not have to be satisfied that the person actually fears the violence or other conduct.[93] The AVO imposes restrictions or prohibitions on the second person (the defendant), for example, prohibiting the defendant from approaching the other person for a set period of time.[94] To obtain an AVO a complaint must be made on oath, either orally or in writing, before a justice. Such a complaint can only be made by the person seeking protection, where that person is over the age of 16 years, or by a police officer.[95]

8.46 Some people with an intellectual disability may have insufficient communication skills to bring a complaint to a justice. They will therefore require the police to do so on their behalf. One possible reform is for matters involving a complainant with an intellectual disability always to be brought by the police, as is presently the case for children under the age of 16 years.[96] Such a blanket rule may, however, be inappropriate if the police do not believe the person bringing the complaint or have difficulties in obtaining instructions due to the person's disability, and the Commission does not support such a change. Alternatively, the Intellectual Disability Rights Service suggested that the justice have the discretion to receive a complaint even if the person is not able to substantiate the complaint on oath, or, in limited circumstances, to allow another person to provide the supporting information on oath.[97] Such a proposal does increase the risk of inappropriate complaints, and has been made less necessary through recent amendments to the *Oaths Act 1900* (NSW), which provide that a complaint may be made by declaration instead of by oath if the person is not competent to take an oath.[98]

8.47 AVOs also cause difficulties for people with an intellectual disability as *defendants* as well as complainants as discussed above. The Commission has heard of neighbours taking out AVOs against people with an intellectual disability living in nearby group homes and of AVOs being used in disputes between two residents in group homes.[99] As defendants, people with an intellectual disability may not have the capacity to understand the conditions imposed on them and "in supported accommodation situations, there is a strong risk that service providers will evict a person against whom an AVO has been made or is being sought".[100] The Intellectual Disability Rights Service argued that AVOs should

not be made against a person who does not have the capacity to understand and comply with the conditions sought and that AVOs should only be used as a last resort for disputes between residents in supported accommodation.[101] The absence of automatic legal aid for defending AVOs also disadvantages such defendants, for example:

> a person with an intellectual disability was attending court to defend an [AVO] issued by a next door neighbour. As the person was unable to access Legal Aid for this court appearance, he had to accept the order without an admission of guilt, as he was unable to defend himself in this circumstance without legal representation, even though he had not done what the next door neighbour had accused him of doing. This person is now in a position, where the next door neighbour can accuse him of violating the order and the police will have to arrest him, after which he can then access Legal Aid.[102]

Recommendation 35: Need for further consideration

8.48 In light of the above discussion, the Commission believes that there are a number of difficult outstanding issues relating to the appropriate use of AVOs and people with an intellectual disability, whether as complainants or defendants. Recent amendments in this area of the law[103] do not include consideration of such issues. Some difficulties are better overcome with appropriate training for criminal justice personnel and more support services for people with an intellectual disability (see Chapters 9 and 11) rather than legislative amendment. However other issues need further consideration by key organisations. In a situation of apprehended or actual violence, a person with an intellectual disability is likely to need an immediate remedy, not a long term solution like a complaint against a service provider for their housing situation or attempts to find new accommodation. Criminal charges against the perpetrator may not be possible for a variety of reasons. Without the possibility of an AVO, a victim may be left without redress. However, inappropriate use of AVOs can work against other people with an intellectual disability. The Commission therefore recommends that there be further consideration, with assistance from the police and the Department of Community Services, of apprehended violence orders involving people with an intellectual disability, particularly in the context of group homes.

SENTENCING

Background to the Commission's recommendations

8.49 The Commission discussed the relevance of a person's intellectual disability for appropriate sentencing in DP 35, including such issues as the length of sentence, the structure of the sentence and the availability, advantages and disadvantages of custodial and non-custodial sentencing options.[104] In summary, in New South Wales:

> intellectual disability may (but need not) operate in mitigation of sentence, either generally[105] or because the impact of imprisonment is likely to be more burdensome on an offender with some illness or disability than on other offenders;[106]
>
> intellectual disability can be a "special circumstance" for the purpose of determining the ratio of the minimum to the additional term of imprisonment under s 5(2) of the *Sentencing Act 1989* (NSW);[107]
>
> some of the traditional justifications for punishment will have less relevance for an offender with an intellectual disability, for example, general deterrence should be given less weight.[108] However deterrence of the particular offender and protection of society may be of greater importance than usual.[109]

8.50 Additionally, many Australian judges have commented on the general difficulties in sentencing offenders with an intellectual disability, taking into account both the needs of the offender and of the

community and the possible unsuitability of existing sentencing options. For example, one New South Wales judge commented in sentencing a 19 year old offender:

> Sentencing the prisoner presents formidable difficulties. ... conduct of the type in which the prisoner engaged cannot be tolerated and it must not be overlooked that the primary purpose of punishment is protection of the community and deterrence from further offending, not only by the prisoner but also by others who might otherwise be tempted to offend. The Court cannot have regard solely to considerations of what would be best for the future welfare of the prisoner. I have no doubt that he is in desperate need of help. ... There is no doubt that he is borderline mentally retarded. ... Drugs did play a minor part in the offences which he committed. I am satisfied that he did not really appreciate that what he did was, objectively, appalling. ... If he goes to gaol, he will be a sexual target for other prisoners. ...
>
> He was assessed as unsuitable for either a community service order or for periodic detention. I reluctantly agree. I am satisfied that there is a very high degree of risk that he would not have the self-discipline to comply with the obligations attendant upon either [option].[110]

8.51 Owing to the increased recognition in case law of the relevance of intellectual disability in sentencing decisions and the difficulty in making blanket rules, the Commission has decided to make few recommendations for legislative reform in this area, though the issue will be reconsidered in the Commission's sentencing reference.[111] Where the Commission has made recommendations for reform this has mainly been in the area of services (see Chapter 11) to ensure that existing sentencing options, such as community service orders, are more readily available to offenders with an intellectual disability.

8.52 One area where legislative amendment at the court stage has been recommended is in relation to pre-sentence reports. Submissions have commented on the need for appropriate expert assistance for the judge or magistrate in deciding the most appropriate placement (and conditions) for the offender with an intellectual disability.[112] It has been commented:

> Failure to recognize [intellectual disability] and to give it appropriate consideration will nearly always result in a disposition that is neither fair, just, nor effective. There is indisputable evidence that most people with [intellectual disability] differ from those without [intellectual disability] in their capacity to make the benefit-risk analyses involved in committing a crime with the degree of reason the criminal justice system assumes is present. To the extent that the postconviction phase of the criminal justice system continues to treat offenders with [intellectual disability] who have different degrees of blameworthiness-competency and response to punishment as though they were equal to offenders without [intellectual disability], the system cannot be fair or effective.
>
> In addition to moral culpability, the court must take into account, based upon advice of both [intellectual disability] professionals and correctional experts, the capacity of persons with [intellectual disability] to tolerate or survive conditions of confinement.[113]

8.53 As discussed in DP 35, pre-sentence reports, to assist the court in sentencing, are prepared by the New South Wales Probation and Parole Service (formerly known as the New South Wales Probation Service), following a conviction or a plea of guilty. Generally, pre-sentence reports are only prepared when requested by a magistrate or judge; they are not mandatory for any particular offence or class of offender.[114] A report must, however, be prepared before the imposition of a community service order or an order for periodic detention.[115] In the financial year 1993/1994, the Probation Service prepared 15,631 pre-sentence reports for the courts.[116] A pre-sentence report may sometimes be prepared by an independent professional, particularly if Probation Service officers do not have the necessary expertise in the area.[117] Judicial views about pre-sentence reports are discussed in a recent report prepared by the Judicial Commission of New South Wales. The majority of judges and magistrates interviewed supported the use of pre-sentence reports and indicated that if such reports were no longer provided the "courts would be deprived of useful information, the sentencing process would be impaired,

... there would be less use of non-custodial sentences, and ... the defendant would be disadvantaged".[118]

8.54 A matter can be adjourned (usually for four to six weeks) for the purpose of preparing a pre-sentence report, and the court can ask for specific information, such as the availability or suitability of particular programs, to be included. A pre-sentence report usually contains background information about the offender, his or her education and employment, the officer's assessment and recommendations. Information can be included about relevant mitigating factors, the appropriate length and place of detention, or the suitability of the offender for a non-custodial order. Alternatively, a matter (usually Local Court) can be adjourned for a short period to allow a "Court Duty Officer" to interview the offender. That officer can then give information, usually about the availability and suitability of particular sentencing options, verbally or in written form in court.[119] According to the Probation Service, Court Duty Officers provide a court advice service to all metropolitan Local and District Courts and to major country centres: some courts have a full time service and the remainder receive a part time or on-call service.[120] The Probation Service has estimated that court advice and pre-sentence reports occupy 40% of the Service's resources.[121]

8.55 If it is suspected that the offender has an intellectual disability, it has been suggested that his or her lawyer alert the court that the following additional issues should be covered in a pre-sentence report:

> whether the offender indeed has an intellectual disability, and if so, whether in the opinion of the probation and parole officer the disability is causally related (directly or indirectly) to the offence; and
>
> what services (if any) are available for the disabled offender within a sentencing option.
>
> ... The court should be requested to order a psychological assessment if it has not already been done as part of the case.[122]

8.56 It has also been suggested that pre-sentence reports should be mandatory for a person with an intellectual disability, as is currently the case for children.[123] Such a proposal has obvious resources implications, however, and will only be of assistance if the staff preparing the pre-sentence reports have access to training and expertise and there are sufficient numbers of them to meet the likely increased workload. Without appropriate knowledge and training of probation personnel, the pre-sentence reports could disadvantage offenders with an intellectual disability, as their disability could be wrongly identified as indicating, for instance, a lack of co-operation, with resulting implications for their sentence. The Australian Law Reform Commission also stated that it:

> has not recommended that pre-sentence reports be mandatory because of the delay and expense that would be involved. Where, however, there are reasonable grounds to expect that it would assist in sentencing, courts should avail themselves of pre-sentence reports. Reasonable grounds are particularly likely to exist where it appears that an offender may be suffering from an intellectual disability ...[124]

Discussion of the Commission's recommendations

Recommendation 36: Pre-sentence Reports

8.57 Despite the resources issue, the Commission believes that pre-sentence reports are particularly important for offenders with an intellectual disability. Due to the possibly enormous increase in workload caused by a requirement for mandatory pre-sentence reports and the need to avoid inappropriate adjournments or delays for minor offences, the Commission recommends that a mandatory pre-sentence report be limited to circumstances where a person with an intellectual disability is unrepresented and a custodial sentence is a reasonable possibility, to ensure that a report is prepared for the more serious offences in situations where the person may not have anyone to raise the need for such a pre-sentence report with the court. It notes that this recommendation does not involve a major

change from existing practice. As discussed above, there is already a requirement for pre-sentence reports for community service orders and periodic detention. Judicial officers are likely to request a pre-sentence report when they are considering a custodial sentence in any event.[125] If the person is represented, it is likely that the person's lawyer would request the judge or magistrate to order a report in such circumstances.

8.58 Submissions have generally supported this recommendation.[126] Some submissions suggested that the proposal be extended to more offenders with an intellectual disability, including those represented or those not facing the possibility of a custodial sentence, for example:

> While it is acknowledged that mandatory Pre-sentence reporting for all people with an intellectual disability would incur extra costs, it should be highlighted that the consequences of an inappropriate sentencing (eg appeals, custody costs) is likewise extremely costly.[127]

Dr William Glaser commented further that a court should be required to provide written reasons for the imposition of a prison sentence, including "reference not only to the nature of the offence and the offender's antecedents but also a report as to what other options the court has considered and its reasons for rejecting them".[128]

8.59 The Law Society of New South Wales supported the proposal on the basis that the pre-sentence report would be prepared, as recommended by the Australian Law Reform Commission, namely by multi-disciplinary teams, covering the offender's physical and mental health, cognitive abilities and social and adaptive skills, and involving consultation with the offender's family, friends, psychiatrist, psychologist, social worker or welfare worker.[129] However, the Law Society submitted that most probation officers would lack the necessary expertise to prepare such a report.[130] The Probation Service, while supporting the proposal, commented that the question of the best agency to provide specialised assessments for such reports needed to be addressed, and if assessments were to be provided by other agencies, such as the Department of Community Services, streamlined procedures would need to be instigated to avoid possible delays.[131] The co-ordinated provision of services in this area is discussed in Chapter 10. However, many Probation officers will not have sufficient expertise to provide an appropriate pre-sentence report for a person with an intellectual disability. In one area where specialist sentencing options were trialed it was commented:

> ... Probation Services staff felt ill equipped to fully assess the capacities of an offender with an intellectual disability for the purpose of determining a viable option. While indeed the Probation Service reported that many people with an intellectual disability were users of their service, they did not feel able to fully consider the rehabilitative opportunities for a person with an intellectual disability inherent in community based options.[132]

The Commission believes that pre-sentence reports must be prepared by a person with appropriate expertise in the area of intellectual disability, otherwise the reports will not meet the needs they are designed to address.

Recommendation 37: Court power to request information

8.60 Related to pre-sentence reports is the need for courts to have access to information from relevant government departments about the programs and support available to offenders with an intellectual disability. In Victoria, if a court finds a person with an intellectual disability guilty of an offence and is considering ordering either a suspended sentence, a "community-based order" (similar to the New South Wales community service order), or release on adjournment (with or without recording a conviction), the court may request the preparation of a "Justice Plan", in addition to a pre-sentence report.[133] A Justice Plan is prepared by the Director-General of Community Services (or a person authorised on his or her behalf) and does not recommend sentencing options but rather specifies appropriate *available* services for the offender "which are designed to reduce the likelihood of the person committing further offences".[134] If the court orders either a suspended sentence, a community-based order, or release on adjournment, it may also order that the offender participate in the services

specified in the Justice Plan for a period of up to 24 months or for the length of the sentence, whichever is the shorter.[135] Review provisions for the special conditions are provided. The effectiveness of Justice Plans is limited by the programs and services available, as the court does not have the power to order a special condition if no appropriate option exists.[136]

8.61 Though New South Wales does not have Justice Plans, there appears to be scope for the court to seek information (usually through a pre-sentence report) about the options available for the offender in the community, and to make attendance at various programs a condition of, for instance, a bond. However, the Commission suggests that the power to seek information and order special conditions for an offender with an intellectual disability sentenced to a non-custodial option should be made more explicit. The Commission therefore recommends that courts be given the power to request information from relevant government departments, including the Department of Community Services and the Probation and Parole Service about appropriate programs and to order that the offender attend such a program as a condition of the sentence.

FOOTNOTES

1. New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 7.

2. New South Wales Women's Co-ordination Unit *Sexual Assault of People with an Intellectual Disability* (Final Report, 1990); New South Wales - Department for Women *Reclaiming Our Rights: Access to Existing Police, Legal and Support Services for Women with Disabilities or who are Deaf or Hearing Impaired who are Subject to Violence* (1996). See also The Roeher Institute *No More Victims: A Manual to Guide the Legal Community in Addressing the Sexual Abuse of People with a Mental Handicap* (The Roeher Institute, Ontario, 1992).

3. *Crimes Act 1900* (NSW) s 61H-80A.

4. *Crimes Act 1900* (NSW) s 61J(2)(g), 61M(3)(e) and 61O(3)(d).

5. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) ("NSWLRC DP 35") at para 9.24.

6. *Crimes Act 1900* (NSW) s 61I, 61R. There are also a variety of other sexual offences of greater and lesser severity.

7. *Crimes Act 1900* (NSW) s 77.

8. *R v Morgan* [1970] VR 337 at 341-342 per Winneke CJ (with whom Little and Starke JJ agreed); K Rosser "Sexual assault" (1989) 3 (4/5) *National Council on Intellectual Disability: Interaction* 23. See also *R v Beserick* (1993) 30 NSWLR 510 at 531, per Hunt CJ at CL (with whom Finlay and Levine JJ agreed).

9. Rosser (1989) at 23.

10. *R v Barratt* (1873) LR 2 CCR 81.

11. *Crimes Act 1900* (NSW) s 61R.

12. Law Reform Commission of Victoria *Sexual Offences Against People with Impaired Mental Functioning* (Report 15, 1988) Recommendation 1 and paras 33-40.

13. J Simpson *Sexual Assault Laws and People with an Intellectual Disability* (Redfern Legal Centre Intellectual Disability Rights Service, unpublished paper, 6 July 1987) at 2.

14. Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 4.

15. New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 10; New South Wales Sexual Assault Committee *Submission* (6 March 1995) at 1.

16. Compare England and Wales - The Law Commission *Consent in the Criminal Law* (Consultation Paper 139, 1995) at paras 5.12-5.22.

17. *Crimes Act 1900* (NSW) s 61J (aggravated sexual assault), s 61M (aggravated indecent assault) and s 61O (aggravated act of indecency).

18. According to s 61H of the *Crimes Act 1900* (NSW): "For the purposes of sections 61H-66F, a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person."

19. New South Wales - *Parliamentary Debates (Hansard)* Legislative Assembly, 28 November 1989, Hon J R A Dowd, Attorney General, Second Reading Speech at 13569-13570.

20. New South Wales - *Parliamentary Debates (Hansard)* Legislative Assembly, 28 November 1989 at 13570.

21. New South Wales - Attorney General's Department *The Intellectually Disabled in the Criminal Justice System* (Criminal Law Review Division, Issues Paper, 1991) at 6.

22. New South Wales Sexual Assault Committee *Submission* (6 March 1995) at 1.

23. Law Society of New South Wales *Submission* (24 February 1995) at 3; and Intellectual Disability Rights Service *Submission* (1 March 1995) at 12.

24. Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 2.

25. New South Wales Women's Co-ordination Unit, Recommendation 5.2.

26. New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 10.

27. Mr M Ierace *Submission* (16 December 1991) at 8. See para 8.25 below.

28. *He Kaw Teh v R* (1985) 59 ALJR 620.

29. Law Society of New South Wales *Submission* (24 February 1995) at 3; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 4; and Office of the Director of Public Prosecutions, New South Wales *Submission* (21 August 1996) at 2.

30. Office of the Director of Public Prosecutions, New South Wales *Submission* (21 August 1996) at 2.

31. R Fox and A Freiberg *Sentencing: State and Federal Law in Victoria* (Oxford University Press, Melbourne, 1985) at 456.

32. B Fisse *Howard's Criminal Law* (5th ed, Law Book Co, Sydney, 1990) at 189.

33. Fisse at 190.

34. VLRC Report 15 at 3. See also S Brady "Special (sexual) offences for people with intellectual disability - discrimination or appropriate redress?" (1994) 15 *Socio-Legal Bulletin* 24.

35. See, for example, the United Nations *Declaration on the Rights of Mentally Retarded Persons*, 1971, Article 7.

36. Brady at 26.

37. VLRC Report 15 at para 51.

38. According to the Judicial Commission of New South Wales's Sentencing Information System, for the period January 1990-August 1995, there were only six successful cases under s 66F(3) (the exploitation offence) and no cases under s 66F(2) (the carers offence). In each case listed the defendant pleaded guilty and, in four of the six cases, received a custodial sentence. According to the New South Wales Bureau of Crime Statistics and Research, there were no s 66F charges during the period January 1988-December 1989: *Letter* (4 November 1993). Consultations and more detailed statistics from the Bureau of Crime Statistics and Research for 1992-1994 suggest that there may have been some other 66F cases which do not appear in the Sentencing Information System database.

39. See s 72A ("carnal knowledge of idiot or imbecile") and s 78M ("homosexual intercourse with idiot or imbecile") of the *Crimes Act 1900* (NSW), both of which were repealed by the *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW), assented to on 4 December 1987.

40. Rosser (1989) at 23.

41. New South Wales - *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 1987, Hon B J Unsworth, Premier, Second Reading Speech at 15466.

42. Consultation with representatives of the DPP, Police Prosecutors, Legal Aid Commission of New South Wales, Law Society of New South Wales, Public Defenders, Aboriginal Legal Service and the Judicial Commission of New South Wales on 1 March 1994.

43. R Watson, A M Blackmore and G S Hosking *Criminal Law (NSW)* (Loose-leaf Service, Vol 1, LBC Information Services) at 1-1257, referring to *R v Colgan* [1959] SR (NSW) 96; *R v Hudson* [1966] 1 QB 448; and *R v Schell* [1964] Tas SR 184.

44. For example, Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 2.

45. New South Wales Women's Co-ordination Unit, Recommendation 5.1, at 21-22. (The requirement of the consent of the Attorney General to prosecute also exists for incest and certain homosexual intercourse offences, see s 78F(1), 78T(2).)

46. New South Wales *Government Gazette* (23 September 1988) at 5021.

47. VLRC Report 15 at para 88.

48. Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 2; and Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 4.

49. Office of the Director of Public Prosecutions, New South Wales *Submission* (21 August 1996) at 3.

50. *Crimes Act 1900* (NSW) s 61H(1).

51. Intellectual Disability Rights Service *Submission* (1 March 1995) at 11. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 11.

52. The Irish Law Reform Commission also recommended that other sexual acts be prohibited: *Sexual Offences against the Mentally Handicapped* (Report 33, 1990), Recommendation 2, at para 33.

53. See New South Wales Sexual Assault Committee *Submission* (August 1992) at 1.

54. Intellectual Disability Rights Service *Submission* (1 March 1995) at 11.

55. See *Crimes Act 1900* (NSW) s 61H(2): "For the purposes of sections 61H-66F, a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person."

56. Simpson at 6-7.

57. Simpson at 7.

58. Simpson at 2.

59. Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 37.

60. *R v Parsons* (Court of Criminal Appeal, NSW, 17 December 1990, CCA 60014/90, unreported).

61. *R v Parsons* (Court of Criminal Appeal, NSW, 17 December 1990, CCA 60014/90, unreported) at 5 (per Grove J, the other judges agreeing).

62. For example Intellectual Disability Rights Service *Submission* (1 March 1995) at 11; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 37; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 11; and Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 4.

63. New South Wales Sexual Assault Committee *Submission* (6 March 1995) at 2; Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 2; New South Wales Police Service *Submission* (February 1995) at 12; and Office of the Director of Public Prosecutions, New South Wales *Submission* (21 August 1996) at 2.

64. Intellectual Disability Rights Service *Submission* (1 March 1995) at 11; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 37; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 11; and Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 4. See also J Wallace "Disabled victims of sexual assault? Rights and wrongs" in I Freckelton, D Greig and M McMahon (eds) *Forensic Issues in Mental Health* (Proceedings of the 12th Annual Congress of the Australian and New Zealand Association of Psychiatry, Psychology and Law, 1991) at 249-253.

65. VLRC Report 15, Recommendations 3-7.

66. VLRC Report 15 at para 64. Following that Report, in 1991, the *Crimes Act 1958* (Vic) s 50-52, was amended to prohibit sexual/indecent acts between people who provide medical or therapeutic services to people with impaired mental functioning or workers at residential facilities and their clients. Consent to such acts is no defence unless the accused was married to, or was in a de facto relationship with, the alleged victim.

67. For example, Disability Council of New South Wales, 1992 Submission to the New South Wales Legislative Council Standing Committee on Social Issues Inquiry into the Incidence of Sexual Offences in New South Wales.

68. Intellectual Disability Rights Service *Submission* (16 October 1992) at 13; and Victims Compensation Tribunal, New South Wales (Registry) *Submission* (16 March 1994) at 2.

69. Victims Compensation Tribunal, New South Wales (Registry) *Submission* (16 March 1994) at 1.

70. Victims Compensation Tribunal, New South Wales (Registry) *Submission* (16 March 1994) at 2.

71. Consultations with representatives of the Victims Compensation Tribunal and the Victims Advisory Council on 16 March 1994. For general statistics, see P Salmelainen *Criminal Victim Compensation: A Profile of Claims, Claimants and Awards* (New South Wales Bureau of Crime Statistics and Research, Sydney, 1993).

72. Consultations with representatives of the Intellectual Disability Rights Service, New South Wales Council for Intellectual Disability, Disability Council of New South Wales, New South Wales Sexual Assault Committee and the Brain Injury Association of New South Wales Inc on 10 March 1994. See also Intellectual Disability Rights Service *Submission* (16 October 1992) at 13. Compare M Maneschi "Suffering of victim with disability recognized by VCT" (July/September 1993) 29 *On The Record* 12.

73. New South Wales Sexual Assault Committee *Submission* (6 March 1995) at 3.

74. See *Victims Compensation Act 1987* (NSW) Part 5.

75. *Victims Compensation Act 1987* (NSW) s 47.

76. Victims Compensation Tribunal, New South Wales (Registry) *Submission* (16 March 1994) at 2.

77. New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 10; and Intellectual Disability Rights Service *Submission* (1 March 1995) at 12.

78. New South Wales - Attorney General's Department *The Review of the Victims Compensation Act* (Victims Compensation Tribunal, Attorney General's Department, March 1993) (the "Brahe Report").

79. The Brahe Report, Recommendation 1(c).

80. The Brahe Report, Recommendation 11(a).

81. *Victims Compensation Act 1996* (NSW) s 30.

82. Section 26.

83. Section 39(4).

84. For comments on proposed changes to victims compensation legislation see: G Bartley "Victims compensation appeals" (June 1995) 33 *Law Society Journal* 32; Law Society Report "Society gears up for spring legislation on victims' compensation" (October 1995) 33 *Law Society Journal* 76; Combined Community Legal Centres Group of New South Wales *Response to the Victims Compensation Bill 1996* (16 May 1996).

85. *Victims Compensation Act 1996* (NSW) s 17 and Schedule 1.

86. Section 20.

87. Section 39.

88. Section 5.

89. Victims Advisory Council *Submission* (27 February 1995) at 4; Intellectual Disability Rights Service *Submission* (1 March 1995) at 12; and Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 4.

90. For example, Intellectual Disability Rights Service *Submission* (16 October 1992) at 13.

91. New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 7.

92. See Part 15A of the *Crimes Act 1900* (NSW), especially s 562B(1).

93. Section 562B(2).

94. Section 562D.

95. Section 562C.

96. See s 562C(3)(b).

97. Intellectual Disability Rights Service *Submission* (16 October 1992) at 13.

98. *Oaths Act 1900* (NSW) s 32. This amendment was introduced by the *Evidence (Consequential and Other Provisions) Act 1995* (NSW).

99. For example, information supplied by Ms L Byrnes, Intellectual Disability Rights Service (19 July 1996).

100. Intellectual Disability Rights Service *Submission* (28 January 1994) at 23.

101. Intellectual Disability Rights Service *Submission* (28 January 1994) at 23.

102. Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 6.

103. *Crimes Amendment (Apprehended Violence Orders) Act 1996* (NSW).

104. See NSWLRC DP 35, Ch 11, especially paras 11.3-11.15. See also R G Fox "Sentencing the mentally disordered offender" (1986) 60 *Law Institute Journal* 416-421; A Ashworth and L Gostin "Mentally disordered offenders and the sentencing process" [1984] *Criminal Law Review* 195-212; M Bowen and A Nivala "Sentencing options for offenders with disabilities", paper presented at *Partnerships for the Future, 6th National Conference of The National Council on Intellectual Disability and The Australian Society for the Study of Intellectual Disability* (Fremantle, Western Australia, 26-30 October 1994); and A Haesler "Practical issues in appearing for intellectually disabled offenders in the Higher Courts: Sentencing", paper presented at the *Justice for All* Seminar (Wollongong, 8 November 1995).

105. See *R v Vangelder* (Court of Criminal Appeal, NSW, 28 February 1994, CCA 60107/93, unreported) at 8; and *R v Bassett* (Supreme Court, NSW, Hunt CJ at CL, 20 May 1994, Crim D 70082/93, unreported) at 16-19; affirmed on appeal (Court of Criminal Appeal, NSW, 2 November 1994, CCA 60268/94, unreported). Compare *R v Ryan* (Court of Criminal Appeal, NSW, 18 July 1990, CCA 60071/89, unreported) at 6; *R v Tucker* (Court of Criminal Appeal, NSW, 13 April 1992, CCA 60254/90, unreported); *R v Leaver* (Court of Criminal Appeal, NSW, 23 November 1994, CCA 60907/93, unreported) at 9; and *R v Trotter* (Supreme Court, NSW, Hunt CJ at CL, 10 August 1993, Crim D 70032/93, unreported) at 3.

106. For example, *R v Bailey* (1988) 35 A Crim R 458; and *R v Peuna* (Court of Criminal Appeal, NSW, 15 July 1993, CCA 60593/91, unreported) at 8-9. See also *R v Barriston* (Court of Criminal Appeal, NSW, 14 November 1994, CCA 60333/94, unreported) at 4 in relation to both aspects of mitigation.

107. *R v Shinfield* (Court of Criminal Appeal, NSW, 13 May 1993, CCA 60090/93, unreported) at 3; *R v Sanders* (Court of Criminal Appeal, NSW, 18 February 1992, CCA 60480/90, unreported) at 7-10; *R v Powell* (Court of Criminal Appeal, NSW, 23 March 1993, CCA 60647/91 and 60002/92, unreported) (brain damage) at 3-6; *R v Bassett* (Supreme Court, NSW, Hunt CJ at CL, 20 May 1994, Crim D 70082/93, unreported) at 23; affirmed on appeal (Court of Criminal Appeal, NSW, 2 November 1994, CCA 60268/94, unreported).

108. See *R v Letteri* (Court of Criminal Appeal, NSW, 18 March 1992, CCA 60407/91, unreported) at 14; and *R v Champion* (1992) 64 A Crim R 244 at 253-255. Compare *R v Mason-Stuart* (1993) 68 A Crim R 163 at 164; *R v Shinfield* (Court of Criminal Appeal, NSW, 13 May 1993, CCA 60090/93, unreported) at 3; *R v Heather* (Court of Criminal Appeal, NSW, 1 August 1995, CCA 60933/93, unreported) at 5-9; and *R v Elchami* (Court of Criminal Appeal, NSW, 15 December 1995, CCA 60456/95, unreported) at 6-7.

109. *R v Leaver* (Court of Criminal Appeal, NSW, 23 November 1994, CCA 60907/93, unreported) at 9; *R v Engert* (Court of Criminal Appeal, NSW, 20 November 1995, CCA 60654/94, unreported) at 8; and *R v Rivera* (Court of Criminal Appeal, NSW, 19 February 1996, CCA 60403/95, unreported) at 3, referring to brain damage.

110. *R v Darcy* (Supreme Court, NSW, Allen J, 6 November 1992, Crim D 70074/92, unreported) at 3-5.

111. See the discussion of this reference in Chapter 1 at para 1.17.

112. For example, Mr P Hutten *Submission* (6 January 1992) at 10.

113. F J Laski "Sentencing the offender with mental retardation: Honoring the imperative for intermediate punishments and probation" in R W Conley, R Luckasson and G N Bouthilet (eds) *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Paul H Brookes, Baltimore, 1992) 137 at 149-150.

114. Occasionally reports are prepared without such a request where an offender is subject to supervision and must appear to face new charges: J Hickey and C Spangaro *Judicial Views About Pre-Sentence Reports* (Judicial Commission of New South Wales, 1995) at 2.

115. *Community Service Orders Act 1979* (NSW) s 6; *Periodic Detention of Prisoners Act 1981* (NSW) s 5.

116. New South Wales - Department of Courts Administration *Annual Report 1993/1994* at 50.

117. S C Hayes and G Craddock *Simply Criminal* (2nd ed, Federation Press, Sydney, 1992) at 201.

118. Hickey and Spangaro at 41.

119. Hickey and Spangaro at 2.

120. Letter from Ms B Smith, Director, New South Wales Probation Service to the Commission dated 24 March 1994.

121. Letter from Ms B Smith, Director, New South Wales Probation Service to the Commission dated 24 March 1994.

122. M Ierace *Intellectual Disability: A Manual for Criminal Lawyers* (Redfern Legal Centre Publishing, Sydney, 1989) at 168.

123. *Children (Criminal Proceedings) Act 1987* (NSW) s 25; see Hayes and Craddock at 203.

124. Australian Law Reform Commission *Sentencing* (Report 44, 1988) ("ALRC Report 44") at para 203 [footnote references omitted]. See also the general recommendations about pre-sentence reports at paras 189-190.

125. Hickey and Spangaro at 51.

126. Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 5; and New South Wales Police Service *Submission* (February 1995) at 14.

127. Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 5. See also New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 12; Intellectual Disability Rights Service *Submission* (1 March 1995) at 14; and Dr W Glaser *Submission* (23 August 1995) at 5.

128. Dr W Glaser *Submission* (23 August 1995) at 5.

129. ALRC Report 44 at para 203.

130. Law Society of New South Wales *Submission* (24 February 1995) at 4.

131. New South Wales Probation Service *Submission* (27 February 1995) at 1.

132. Bowen and Nivala at 8, referring to the Illawarra region.

133. *Sentencing Act 1991* (Vic) s 80.

134. *Sentencing Act 1991* (Vic) s 3.

135. *Sentencing Act 1991* (Vic) s 80(2).

136. See, for example *R v Roadley* (1990) 51 A Crim R 336 at 347-349.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

9. Information, Education and Training

RECOMMENDATIONS

Community legal education

38. The New South Wales government should fund the Ageing and Disability Department to take responsibility for developing comprehensive community legal information programs and resource material about the criminal justice system for people with an intellectual disability and their carers. [See paras 9.7-9.11]

Provision of information by criminal justice agencies

39. All relevant government agencies responsible for informing the community generally about their rights and duties in relation to the criminal justice system and for helping them when they come into contact with the criminal justice system should, so far as is practicable, ensure that they also prepare material that is appropriate for people with an intellectual disability. [See para 9.12]

Audit of training material on intellectual disability issues

40. The Ageing and Disability Department should be responsible for conducting an audit of training material and courses in intellectual disability issues conducted by government and non-government agencies in Australia. The Department should hold information about training courses in a generally accessible computerised data base and, as far as possible, should acquire and hold copies of programs and materials. [See paras 9.13-9.16]

Training in government agencies

41. All relevant government agencies should include training in intellectual disability issues in their staff training programs for new recruits and in their ongoing staff training. People with an intellectual disability should be involved in the development of these programs. The training should include at least the following matters:

(a) identification of people with an intellectual disability;

(b) effective communication with people with an intellectual disability;

(c) awareness of the disadvantages that may be suffered by people with an intellectual disability in the criminal justice system; and

(d) services available to help people with an intellectual disability and advice available for criminal justice personnel dealing with people with an intellectual disability. [See paras 9.17-9.26]

Monitoring government agencies' training programs

42. Every two years all relevant government agencies should review their intellectual disability training programs for staff. Agencies should also give an outline of the programs and a copy of the training material to the Ageing and Disability Department. [See para 9.27]

Educating the legal profession

43. Legal education providers should consider including intellectual disability issues in the courses for which they are responsible. In particular, intellectual disability issues should be included in compulsory practical legal training (College of Law and Bar Practice Course), continuing legal education courses and in-service training for lawyers in criminal law firms. [See paras 9.28-9.29]

Role of Law Society and Bar Association

44. The Law Society of New South Wales and the New South Wales Bar Association should develop and distribute an information package for their members containing:

(a) guidelines for identifying intellectual disability, communicating with clients with an intellectual disability (including the new requirement to consider the necessity of a support person in Recommendation 9) and making decisions about psychological or psychiatric testing;

(b) a short summary of the issues involved in prosecuting and representing people with an intellectual disability;

(c) information about guardianship and people with an intellectual disability; and

(d) a list of telephone numbers of organisations that can provide further information.

The information package should be distributed to all legal practitioners and incorporated into the *New South Wales Solicitors Manual* loose-leaf service (Riley's). [See paras 9.30-9.31]

Development of materials for judges and magistrates

45. The Judicial Commission of New South Wales, with the help of people with appropriate expertise, should:

(a) develop more materials dealing with intellectual disability issues for judges and magistrates, including at least the following matters -

(i) identification of people with an intellectual disability;

(ii) effective communication with people with an intellectual disability;

(iii) disadvantages that may be suffered by people with an intellectual disability in the criminal justice system;

(iv) services available to help people with an intellectual disability and advice available for criminal justice personnel dealing with people with an intellectual disability; and

(b) review, on a regular basis, the adequacy and appropriateness of the material about intellectual disability in the Bench Books. [See paras 9.32-9.33]

Guardianship

46. The role of a guardian for a person with an intellectual disability involved in criminal proceedings should be the subject of training and education for criminal

justice personnel, including lawyers, judges and magistrates. The Guardianship Board of New South Wales should be involved in this training. [See paras 9.34-9.37]

Research about intellectual disability issues

47. There should be more research into intellectual disability issues. As part of the co-ordinated strategy referred to in Chapter 10, government agencies should undertake relevant statistical collection and research to provide a better basis for policy development in this area. [See paras 9.38-9.39]

Explanatory Note to Recommendations 38-47

The relevant New South Wales government agencies for the purposes of Recommendations 39, 41, 42 and 47 are:

Ageing and Disability Department;

Attorney General's Department, including the Crown Solicitor's Office;

Crown Prosecutors;

Department of Community Services;

Department of Corrective Services, including the New South Wales Probation and Parole Service;

Department of Health;

Department of Juvenile Justice;

Guardianship Board of New South Wales;

Legal Aid Commission of New South Wales;

Mental Health Review Tribunal;

New South Wales Police Service;

Office of the Director of Public Prosecutions;

Office of the Public Guardian and the Protective Commissioner; and

Public Defenders.

If administrative arrangements change, the list of agencies is to include the agencies that take responsibility for the areas currently administered by the above agencies.

BACKGROUND

Introduction

9.1 As discussed in Chapter 2, people with an intellectual disability are over-represented in the criminal justice system as both victims and offenders. In the previous chapters the Commission has made recommendations about the law and procedures affecting people with an intellectual disability in their contact with the police and the courts. However, a common theme throughout the reference, and in many earlier reports in this area[1] is that changing the law alone will not solve the problem.

9.2 In this and the next two chapters, the Commission discusses the other measures that are fundamental to achieving positive change for people with an intellectual disability. In this chapter, the

Commission makes recommendations designed to ensure that people with a disability and their carers have access to information about the criminal justice system and that all people who work in the criminal justice system have access to education and training about intellectual disability issues. In Chapter 10, the Commission considers means to overcome the lack of coherence and co-ordination in service provision to people with an intellectual disability. In Chapter 11, the Commission makes recommendations about specific services that are needed to achieve rehabilitation for people with an intellectual disability who come into contact with the criminal justice system. Though the recommendations will involve considerable expenditure, these costs must be balanced against the high costs of incarcerating people with an intellectual disability, and the other high, but less quantifiable, costs of the involvement of people with an intellectual disability in the system. Without the carefully co-ordinated expenditure of considerable amounts of money in this area to provide services and education, the recommended legislative and procedural amendments will be futile.

9.3 The recommendations the Commission makes are not radical or even new. There is a surprising level of consensus among key agencies about what is needed to solve the problems the Commission has identified in the course of this reference. In the words of the Office of the Public Guardian, "the insurmountable task is in implementation of the commonly held views and recommended proposals for reform". The Office:

> holds very serious concerns for the progress of implementation of any significant reforms unless there are commitments to undertake innovative responses at Ministerial and department levels and that adequate funding and resources are provided.[2]

9.4 In the areas of information and education, the Commission has recognised the importance of ensuring that people with an intellectual disability and their carers have an opportunity to learn about their rights and how to protect them, and that they have access to information about the criminal justice system if they need it. The Commission has also become aware of how little people involved in the criminal justice system understand about intellectual disability, and the difficulties that face people with an intellectual disability in their dealings with the criminal justice system.

Community legal education for people with an intellectual disability and their carers

9.5 The criminal justice system is alien and threatening to most people. It is very difficult to understand its processes as suspect, defendant, prisoner, victim, witness or juror (or as a relative of any of these people) without specific information. Most people in the community have access to legal advice and publications that can help them. There are government and community-based programs to help people who have been caught up in the system, such as court support services. Agencies involved in the system publish promotional material to assist people in their dealings with the system, for example, in New South Wales, the Office of the Director of Public Prosecutions' Witness Assistance Scheme, which provides support and information to victims and other prosecution witnesses, has prepared a number of brochures. People with an intellectual disability are as entitled as anyone else to such assistance.

Education and training for criminal justice system personnel

9.6 The people who administer the criminal justice system are all highly trained and have access to in-service training. About intellectual disability, however, they may know very little. They may have misconceptions about the appearance or behaviour of a person with an intellectual disability. They may not know how to identify a person with an intellectual disability, and be unable to imagine the possible disadvantage he or she might suffer. They may not be able to communicate effectively with a person with an intellectual disability. This lack of knowledge on the part of the administrators of the system has serious implications for people with an intellectual disability, and the Commission's recommendations in this chapter are designed to overcome the issues raised above.

DISCUSSION OF RECOMMENDATIONS

Recommendation 38: Community legal education

Available programs

9.7 The Commission recommends that the New South Wales government should fund the Ageing and Disability Department ("ADD") to take responsibility for developing comprehensive community legal information programs and resource material about the criminal justice system for people with an intellectual disability and their carers. There are already some community legal education programs for people with an intellectual disability and their carers. The Intellectual Disability Rights Service ("IDRS") provides legal education programs and develops resource materials for people with an intellectual disability, their families and advocates, disability workers and lawyers. It conducts courses in the metropolitan area and in country centres. It has developed educational material for people with an intellectual disability, including *Streetwize* comic stories, posters, games, the *Rights at Work* kit and *Rights for All*, a magazine. In this area, it has conducted research about effective means of teaching people with an intellectual disability about their rights.[3] It also runs courses to train people to conduct courses about rights throughout New South Wales and has produced the *Legal Rights Teaching Kit* to help them.[4] The University of Sydney's Community Disability and Ageing Program has developed a Disability Awareness Package to give training and information about disability issues for service providers, especially those who are not employed by specialist disability services. In Wagga, the Police Service's Special Needs Unit, together with government agencies, local solicitors and disability and other services, has organised seminars for people with an intellectual disability and their parents and carers.[5]

The need for access to information about the system

9.8 As discussed in Chapter 1, the principles of equality before the law and equal protection of the law are fundamental to the criminal justice system of New South Wales. Formal equality, however, does not necessarily guarantee equality of treatment and equal protection may require special measures to compensate for disadvantage which affects an individual or group within the community. The rights of a person involved in the criminal justice system as an offender or a victim may be seriously curtailed if he or she cannot get clear, accurate information about his or her rights in the particular circumstances and about the services that may be available to help them. For example, a suspect who does not understand that he or she is not obliged to answer police questions may unwittingly incriminate himself or herself. A victim who does not know how apply for victims compensation may not be able to afford necessary treatment for the effects of injury. If participants in the criminal justice system do not have access to information about how it works and their role in it, the integrity of the system itself may be compromised. For example, a witness who does not understand the importance of accurately reporting to police what he or she saw may limit the effectiveness of an investigation.

9.9 Everyone in the community needs access to information about their rights and obligations in relation to the criminal justice system. It is not enough to say that the information available to the community generally is equally available to people with an intellectual disability. The research referred to in Chapter 2 of this Report shows that there is a disproportionately high number of people with an intellectual disability caught up in the criminal justice system, as both offenders and victims. To the extent that this over-representation in the system is caused by a lack of appropriate information, justice demands that the situation be redressed. Even if there is no link, over-representation provides a good reason for giving people with an intellectual disability and their carers more information about the law and the legal system. Submissions were overwhelmingly in favour of this and of providing information about crime and how it affects individuals.[6] This means that suitable programs must be developed and implemented and materials devised and distributed. Submissions suggested that information programs should focus on legal rights and obligations, recognising and reporting crime, crime prevention, assertiveness and how to empower people with an intellectual disability and to increase their self esteem.[7] The information should be accessible and presented in a manner appropriate to the needs of people with an intellectual disability.[8] People with an intellectual disability suggested a wide range of possible formats for information, including: classes; video and audio cassettes; posters and brochures; books about crime and legal rights; and a 24 hour disability "hotline".[9]

Funding and provision of community legal information

9.10 The New South Wales government has responsibility for providing services of various kinds to people with an intellectual disability. Funding the provision of information about the law for people with an intellectual disability should also be the responsibility of government, in accordance with its principles of access, equity and equal opportunity. Accordingly, in the Commission's view, the New South Wales government, through the ADD, should take responsibility for funding community legal education for people with an intellectual disability. The ADD could either develop the programs and resources itself or fund community organisations, such as the Intellectual Disability Rights Service, to do so.

9.11 To be effective, the content and format of programs and material must be appropriate to the needs of people with a disability and their carers. Materials must be distributed through the support networks of people with a disability, including their carers, disability workers and advocates. A number of community organisations and government agencies have considerable expertise in developing legal education programs and resource materials for people with an intellectual disability and their carers.[10] They have done considerable research into the most effective ways of communicating with people with an intellectual disability and the most effective media for resource materials. Funding organisations with this expertise to develop programs and materials would be the most cost effective use of government resources.

Recommendation 39: Provision of information by criminal justice agencies

9.12 Most government agencies produce information about the services they provide. Some adapt their material to make it suitable for people with special needs, for example, by translating it into community languages or providing audio or videotapes. Few agencies produce information specifically aimed at people with an intellectual disability. The Commission acknowledges that it might not be easy for agencies to amend their information and promotional material to make it suitable for people with an intellectual disability. It does not suggest that agencies should be required to amend all their material. Nevertheless, information needed by the community generally is also needed by people with an intellectual disability and, in the Commission's view, agencies should consider means for ensuring it reaches them. An emphasis on simple, clear presentation of government information can only benefit all members of the community. The information must be available when and where they are needed, for example, at police stations, Legal Aid Commission offices and courts.

Recommendation 40: Audit of training material on intellectual disability issues

Rationale: Efficient use of resources and the need to identify gaps in training

9.13 It is clear that training in disability issues for the staff of government agencies involved in the criminal justice system is neither comprehensive nor systematic, and that there is not enough of it. Submissions agreed that there should be more such training than now exists for criminal justice personnel.[11] As discussed below, inadequate training of police, legal professionals, corrections personnel and others can have serious consequences for individuals and for the integrity of the criminal justice system.

9.14 There are, however, a number of existing training programs and materials about intellectual disability issues for criminal justice personnel in New South Wales, prepared by both government and non-government agencies.[12] Programs and materials have also been developed in other States and Territories of Australia.[13] Government agencies within New South Wales do not always co-ordinate their efforts and there is little co-ordination between the States and Territories. This means that efforts may be duplicated, resources wasted and expertise lost. Similarly, the programs and resources developed by community organisations, and their expertise, could be used more effectively. For example, the Legal Aid Commission of New South Wales suggested that it might be useful to explore co-operative arrangements between like agencies in developing training programs.[14]

9.15 The Commission recommends that an audit be undertaken of training material in disability issues conducted by government and non-government agencies in New South Wales and in other States and Territories. This would provide a comprehensive picture of the resources available. It would enable scarce training money to be used more effectively. An audit would also identify the gaps in the

availability of courses in New South Wales and would produce useful information about how many staff of the different agencies are exposed to disability training and how often. It would identify which agencies are not training staff and which staff, within agencies, are not being trained. This information would be useful in devising future programs.

Who should do the audit?

9.16 The audit should be done by a body that has expertise in disability issues and is able to play an ongoing co-ordinating role. In the Commission's view, the ADD should be responsible for completing the recommended audit. The information should be kept by ADD, preferably on a computerised database, and should be generally accessible. ADD should encourage both government and non-government agencies to send it details of their new courses and materials and the data base should be updated accordingly. ADD should also keep copies of programs and materials as a resource collection for all Departments and agencies. The recommended audit should provide a starting point for a comprehensive review of training needs and the database established should provide a useful resource for the development of new training. The remainder of this chapter considers the types of training needed in particular areas of the criminal justice system: government agencies, the legal profession and judges and magistrates.

Recommendation 41: Training in government agencies

Existing training

9.17 *Police.* Police are the most visible participants in the criminal justice system. They exercise considerable power on behalf of the community and are the public face of the system for suspects, defendants, victims and other witnesses of crime. They make decisions that are of critical importance and that can have very significant consequences for the individuals involved; police decide whether or not to take a complaint seriously, whether or not to charge and what the charge will be. Submissions overwhelmingly supported intellectual disability training for police.[15] As discussed in Chapter 4, in exercising their authority, police are bound by the Police Commissioner's Instructions which include guidelines to help identify victims with an intellectual disability, procedures to be followed when questioning a person who is "developmentally delayed", and special provisions for detaining people with an intellectual disability. These guidelines will not be effective without training. The recommendations in Chapter 4 will also require appropriate police training. For example, guidelines for questioning people with an intellectual disability will offer little protection if the officer doing the questioning does not have the skills to act in accordance with the guidelines.

9.18 However, there is little formal training about intellectual disability for police in New South Wales, though consideration of such issues has increased in recent years and, in July 1996, a special issue of the Policing Issues and Practices Journal dealt with the interaction between people with an intellectual disability and the police. In their initial training, Police Recruit Education Program ("PREP") recruits consider social and disadvantage issues in a community policing unit. They are also encouraged to network with community organisations so that they can divert people from the criminal justice process or take account of special needs when questioning suspects. Formal training about intellectual disability is limited to an examination of psychological/developmental/social aspects of intellectual disability. PREP course content is continually reviewed.[16]

9.19 Some specialist courses include a segment about intellectual disability issues:

- the Initial Response Officer Course for officers dealing with sexual assault and child abuse includes a two hour guest lecture about victims of sexual assault with an intellectual disability;
- the Senior Investigators Course receives a presentation on offenders with an intellectual disability;
- the Safe Custody Program for custody officers includes a segment on the special needs of people with an intellectual disability; and

the Detectives Education Program is currently being restructured to improve interviewing skills, through the introduction of the Cognitive Interviewing method, and the program now includes reference to the special needs of people with an intellectual disability in the unit dealing with sexual assault and child abuse.

The curriculum content for the "investigative stream" for all police is also being reviewed. Additionally, police training and education is being examined by the Police Service Standing Committee on Intellectual Disabilities and Mental Illness.[17]

9.20 *Corrections officers.* The Department of Corrective Services includes sessions on the identification and management of prisoners with an intellectual disability in its training for new recruits and for its Governors and Commissioning courses. It is also developing new units for existing vocational and professional courses at Southern Cross University and a training package for staff in special units with Charles Sturt University.[18] The New South Wales Probation Service (now the Probation and Parole Service within the Department of Corrective Services) also mentions intellectual disability briefly in initial training[19] but stated that it intends to develop a training module for probation officers working with people with an intellectual disability.[20]

9.21 *Government lawyers.* Lawyers do not, as a matter of course, receive education or training in intellectual disability issues in their undergraduate or practical legal training, although solicitors employed by the Legal Aid Commission of New South Wales and the Office of the Director of Public Prosecutions, New South Wales have the opportunity of attending regular continuing legal education seminars about intellectual disability issues.[21]

9.22 *Judges and magistrates.* At a conference in November 1994 for magistrates, organised by the Australian Institute of Judicial Administration, there was a full day program, *People with Disability and the Courts* (particularly on intellectual disability).[22] The Judicial Commission of New South Wales organised sessions on intellectual disability issues for metropolitan magistrates in late 1995 and similar sessions for country magistrates in 1996.[23] In Western Australia, there are guidelines for courts on intellectual disability issues[24] and for court staff.[25]

The need for training in intellectual disability issues

9.23 The criminal justice system is administered by officers of a number of government agencies for the community as a whole. It is administered consistently with a number of principles, including the right to silence, the right to a fair trial and the right to present and challenge evidence. The responsibility for ensuring that these rights are not infringed belongs to every participant in the system. Unless the people who administer the system are aware of issues affecting people with an intellectual disability, they cannot properly discharge this responsibility. For example, a lawyer may not communicate with a client in a way that he or she can understand; or a police officer may not understand the meaning of particular behaviour and may react to it in an inappropriate way.

9.24 The Commission recommends that all agencies that have a role in the administration of the criminal justice system should include intellectual disability issues in their training programs. This training should not be limited to junior staff; nor should it be offered only on recruitment. Rather it should be an integral part of the training programs available at all stages of the working lives of police, legal professionals and corrections officers. The Commission recommends that all relevant government agencies should include training in disability issues in their staff training programs for new recruits and their ongoing staff training.

Involvement of people with an intellectual disability in training programs

9.25 A number of submissions suggested that people with an intellectual disability should be involved in training programs.[26] Involving people with an intellectual disability in training programs would help reduce negative stereotyping of people with an intellectual disability by police, lawyers and others and would help break down myths and prejudices about them.[27] It would increase the participants' understanding of the difficulties facing people with an intellectual difficulty in their passage through the

criminal justice system. Finally, it would give participants an opportunity to communicate with people with an intellectual disability and to learn how to communicate with them effectively. People with an intellectual disability are already involved in some departmental training programs.[28] Self Advocacy, a group of people with an intellectual disability, is involved in the Community Disability and Ageing Program's Disability Awareness Workshops and teaches communication skills to community groups and others.[29]

Content of training programs

9.26 Training programs should be devised to suit the specific roles of the various participants in the criminal justice system. The agencies themselves are in a better position than the Commission to devise a program to meet the needs of their staff. However, in the Commission's view, programs will be of little use unless one of their results is an improvement in the way agency staff deal with people with an intellectual disability. The Commission's work has identified a number of critical issues that must be addressed by training and education in all agencies. They are:

identification of people with an intellectual disability by criminal justice system personnel;

effective communication with people with an intellectual disability;

awareness of the disadvantages that may be suffered by people with an intellectual disability in the criminal justice system; and

services available for people with an intellectual disability and advice available for staff dealing with people with an intellectual disability.

Recommendation 42: Monitoring government agencies' training programs

9.27 Government agencies regularly monitor their own training courses.[30] The Commission considered whether there should be monitoring of agencies' training courses by an external body (either the ADD or an independent body). Regular monitoring of courses by an outside agency with expertise in disability issues would ensure that gaps are identified and duplication and wastage avoided. It would give smaller agencies an opportunity to take advantage of the expertise of a specialist body and to ensure that their materials remained appropriate. It would make it easier to develop the co-operative arrangements suggested by the Legal Aid Commission. In the Commission's view, external monitoring involves excessive intrusion in the internal affairs of government agencies. The Commission recommends, however, that government agencies review their own intellectual disability training programs for staff every two years and give ADD an outline of their programs and a copy of their training materials. This will enable ADD to build up its collection and give smaller agencies access to useful materials. This is consistent with a key recommendation in Chapter 10 of this Report that ADD should develop a procedure for ensuring co-ordination between government agencies.[31]

Recommendation 43: Educating the legal profession

Existing education and training

9.28 The Commission's survey of Australian law schools and other institutions that provide legal education[32] showed that intellectual disability issues arise in some courses in some universities, in particular, discrimination law and criminal law or procedure courses. Several universities include discussion about interviewing clients and the lawyer/client relationship in their elective clinical legal experience courses. However, the issues are not covered in very much detail in any course and the courses in which they are covered are not necessarily compulsory. Post-graduation training is available - Intellectual Disability Rights Service lawyers and others have conducted programs for lawyers through the College of Law, the Young Lawyers Section of the Law Society and the Legal Aid Commission - but not extensive.

The need for training for lawyers

9.29 Like police, lawyers play a very important role in the criminal justice system. For example, if a lawyer does not identify his or her client as a person with an intellectual disability and lacks the skills necessary to communicate effectively with the client, he or she may fail to get proper instructions, to arrange for appropriate services and to put relevant material before the court. Some submissions have expressed concerns about the quality of legal services provided to people with an intellectual disability.[33] Others have focused on the need to communicate clearly with clients and have suggested that skills-based training should include skills for communicating with people with higher support needs.[34] Without appropriate training, lawyers may have difficulty obtaining instructions, ensuring the instructions are adequate if given by someone else, explaining legal procedures and representing their clients in court.[35] There was overwhelming support in submissions for providing more training in disability issues for lawyers at undergraduate level, in practical legal training and continuing legal training.[36] Accordingly, the Commission recommends that legal education providers should consider including intellectual disability issues in the courses for which they are responsible. In particular, such issues should be included in the compulsory practical legal training (College of Law and Bar Practice Course), continuing legal education and in-service training for lawyers in criminal law firms.

Recommendation 44: Role of the Law Society and the Bar Association

9.30 The Commission has already expressed the view that all participants in the criminal justice system should have ongoing training in intellectual disability issues. It has recommended that the government agencies responsible for the administration of the system should ensure that their staff receive appropriate training. This includes lawyers who work in the Office of the Director of Public Prosecutions and the Legal Aid Commission. It does not, however, include lawyers who are private practitioners. If Recommendation 43 is implemented all lawyers will have some exposure to intellectual disability issues in practical legal training courses and will have access to them in continuing legal education courses. In the Commission's view, however, this is not enough. Private practitioners represent people with an intellectual disability and need access to information to help them do so properly. At the very least, they should have access to guidelines for identifying intellectual disability and communicating with clients with an intellectual disability and information about the services that are available. The professional associations, the Law Society and the Bar Association, should be responsible for developing and distributing them. The guidelines and information will assist lawyers not only in their work in the criminal justice system but also in civil matters involving clients with an intellectual disability. In England the Law Society has prepared a training pack for lawyers giving advice at police stations, *Police Station Skills for Legal Advisers,* including information about the identification of mental vulnerability and about communication skills.[37]

9.31 Accordingly, the Commission recommends that the Law Society of New South Wales and the New South Wales Bar Association should develop and distribute an information package for their members containing: guidelines for identifying intellectual disability, communicating with clients with an intellectual disability (including considering the necessity of a support person - see Recommendation 9) and making decisions about psychological or psychiatric testing; a short summary of the issues involved in prosecuting and representing people with an intellectual disability; information about guardianship and people with an intellectual disability; and a list of telephone numbers of organisations that can provide further information. The information package should be distributed to all legal practitioners and incorporated into the *New South Wales Solicitors Manual* loose-leaf service (Riley's).

Recommendation 45: Development of materials for judges and magistrates

9.32 The Judicial Commission of New South Wales is responsible for judicial education and training in New South Wales. It commissions research, holds conferences and workshops for judicial officers and publishes bulletins, Bench Books (confidential guides for judges) and sentencing information. Like police and lawyers, judges and magistrates also play a critical role in the criminal justice system. Some submissions suggested that judicial officers need training in intellectual disability issues.[38] In the Commission's view, judicial officers should have access to training programs that include those matters it has recommended should be included in training programs for all other participants in the criminal justice system. As discussed in para 9.22 the Judicial Commission has already organised seminars for magistrates in this area. At the invitation of the Judicial Commission, the Commission has reviewed two

Bench Books prepared for Local Courts and trial courts. The Commission understands that the comments already made by the Commission in DP 35 have been considered by the Judicial Commission and the relevant Bench Books updated,[39] but believes this should be an ongoing process, taking into account legal, medical and service provision developments.

9.33 The Commission recommends that the Judicial Commission, with the help of people with appropriate expertise, develop more materials dealing with intellectual disability issues for judges and magistrates, including at least: the identification of people with an intellectual disability; effective communication with people with an intellectual disability; awareness of disadvantages that may be suffered by people with an intellectual disability in the criminal justice system; and services available to help people with an intellectual disability and their carers; as well as continue to review the adequacy and appropriateness of the material about intellectual disability in the Bench Books.

Recommendation 46: Education about guardianship

9.34 One area in which there appears to be confusion amongst criminal justice personnel is guardianship. The Victorian Law Reform Commission recommended that, for all indictable cases involving people with an intellectual disability, the Office of the Public Advocate ("OPA") should be notified so that the need for the OPA's services, including the possible appointment of a guardian, could be assessed.[40] The VLRC commented that, where a guardian had been appointed at a number of fitness hearings, the practice appeared to work well and assisted the legal representatives who were unfamiliar with the particular needs of people with an intellectual disability.[41] However, it must be acknowledged that a guardian constrains a person's liberty and can only be appointed if the Guardianship Board of New South Wales is satisfied that the person needs a guardian, considering such factors as the person's level of disability.[42] It may also be difficult to justify such a notification provision for all indictable offences.

9.35 There is no direct equivalent of the OPA in New South Wales, however the Public Guardian can be appointed as a guardian for a person who requires one but has no family member or other person who could, or is willing to, be appointed. The difficulty is that the Public Guardian must be notified of the person's situation to enable it to make such an application, or an application must be brought by some other person to the Guardianship Board, before this need could be met. Criminal justice agencies are often unaware of the availability of guardianship and the possibility that proceedings could be adjourned to allow an appropriate person to be notified of the person's position; and to consider bringing an application to the Guardianship Board. The appropriate person may be the Public Guardian.

9.36 Though it is important that people with the requisite level of disability have a Guardian appointed, the limits of guardianship must be acknowledged. The Office of the Public Guardian commented:

> The Public Guardian however remains in an invidious situation in relation to persons with an intellectual disability in contact with the criminal justice system as it is mostly unable to make decisions that represent the best option and are in the best interests of these persons due to lack of suitable services and support options.[43]

9.37 The need for a co-ordinated strategy for people with an intellectual disability in the criminal justice system and the need for extra services for this group of people are discussed at length in Chapters 10 and 11. Additionally, there is need for greater clarity in relation to the role that a guardian can play in criminal proceedings and what decisions can be properly made by such a person. Again the Office of the Public Guardian commented:

> a legally appointed guardian may play a role in assisting an individual with an intellectual disability in securing legal assistance and support while progressing through the criminal justice system. The Public Guardian is often appointed with such a function in the guardianship order and sees its purpose as facilitating a plan of action to ensure the person's needs for legal representation, support and advice are appropriately met by the relevant agencies and service providers. Confusion and differing expectations have arisen however over the legal ability of the guardian to instruct a solicitor on behalf of a person

> under guardianship. The Public Guardian has no difficulty in recommending a course of action in terms of sentencing options or consideration of [s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) - see Chapter 5] for example. However the Public Guardian is concerned regarding demands or requests placed on it by solicitors to provide views as to pleas of individuals or other views on factual matters in relation to an alleged offence.
>
> The Public Guardian [has] no legal authority or ability to act to provide instructions on behalf of a client in regard to factual matters as it has no direct knowledge of events surrounding alleged crimes, the pursuit of legal action by police or other parties nor of any mitigating or other relevant circumstances. Solicitors approach the Public Guardian due to their inability to obtain instructions in relation to their client but are concerned regarding their discretion in matters, for example, how far to pursue questioning of evidence in a court hearing. **There is need for clarification in this area as considerable disagreement does arise and may affect the individual so concerned.**[44]

The proper role for guardians in criminal proceedings is a matter for further consideration, and then for education and training, not legislation. The Commission recommends that guardianship be a particular matter for education of criminal justice personnel and that the Guardianship Board of New South Wales be involved in this training.

Recommendation 47: Research about intellectual disability issues

9.38 Five years ago, when the Commission commenced work on this inquiry, research and statistics available about people with an intellectual disability and the criminal justice system were very limited in New South Wales. Many New South Wales criminal justice agencies do not keep records about the number of people with an intellectual disability with whom they deal.[45] Nor do they have access to relevant material from non-criminal justice agencies. It is therefore difficult to determine the extent of the problem facing the criminal justice system and to plan accordingly. Although this reference has generated more interest in data collection and research, there is still a need for ongoing research about the numbers of people with an intellectual disability involved in the system, whether as offenders, victims or witnesses, their special needs and the impact on them of various criminal justice options. Continual development of the research referred to in this Report is important to remedy the deficits we have identified. Such existing and new data should be drawn together with statistics and research from relevant non-criminal justice agencies by such organisations as the ADD to ensure that future policy developments are securely based.

9.39 The Commission therefore recommends that there should be more research into intellectual disability issues. As part of the co-ordinated strategy referred to in Chapter 10, government agencies, both criminal justice and other relevant agencies such as the Department of Community Services, should undertake relevant statistical collection and research. Such projects should have appropriate safeguards to protect the privacy and rights of people with an intellectual disability. Areas of particular need include:

- the general incidence of intellectual disability, particularly among Aboriginal people and other ethnic groups;
- the numbers and outcomes of fitness and special hearings;
- the judiciary's knowledge of, and attitudes to, intellectual disability;
- trends in the sentencing and diversion of offenders with an intellectual disability;
- the relationship between recidivism and lack of appropriate services;
- substance abuse by offenders with an intellectual disability;

sex offenders with an intellectual disability; and

juvenile offenders with an intellectual disability.

FOOTNOTES

1. Report of the Inter-Departmental Committee on Intellectually Handicapped Adult Offenders in New South Wales Australia *The Missing Services* (Departments of Corrective Services and Youth and Community Services, Sydney, 1985); New South Wales - Department of Family and Community Services *Report from the Working Party on Services to Young Persons with Intellectual Disabilities in the Juvenile Justice System* (Department of Family and Community Services, 1988); New South Wales - Community Youth Support Taskforce *Supporting Young People in their Communities* (Report, Social Policy Directorate, New South Wales, 1993); C Puplick *The Last to be Served: A Review of the Adequacy and Comprehensiveness of the Provision of Services to Developmentally Delayed Inmates by the New South Wales Department of Corrective Services* (Report to the Minister for Justice, 1994); S Hayes *Reducing Recidivism amongst Offenders with an Intellectual Disability* (unpublished, prepared for the Office on Disability, New South Wales Social Policy Directorate and the Disability Council of New South Wales, 1994).

2. Letter from the Office of the Public Guardian, New South Wales to the Commission dated 2 March 1995.

3. J London (ed) *Effective Communication Research Report* (unpublished, Intellectual Disability Rights Service, Sydney, 1992).

4. Intellectual Disability Rights Service *Five Years of Rights 1986-1991* (Redfern Legal Centre, 1992).

5. This Unit is no longer operating: New South Wales Police Service *Submission* (18 July 1996) at 1.

6. See, for example, Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 1; Intellectual Disability Rights Service *Submission* (1 March 1995) at 4; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 1; Law Society of New South Wales *Submission* (24 August 1992) at 2-3; Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 2; New South Wales Sexual Assault Committee *Submission* (August 1992) at 2-3. There should also be legal education programs for people with acquired brain injury: Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 19.

7. Law Society of New South Wales *Submission* (24 August 1992) at 2; New South Wales Sexual Assault Committee *Submission* (August 1992) at 2-3; and Australia - Attorney-General's Department, Office of Legal Aid and Family Services *Submission* (28 August 1992) at 4.

8. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Consultations* (Research Report 3, 1993) at para 4.16.

9. NSWLRC RR 3 at para 4.16.

10. See para 9.7 above.

11. For example, St Vincent De Paul Society, New South Wales Council, Disability Services - Residential, Client Advisory Group *Submission* (13 December 1993).

12. For example, M Brennan and R Brennan *Cleartalk: Police Responding to Intellectual Disability* (Literacy Studies Network, Charles Sturt University, 1994).

13. For example, Community Services Victoria "What is Intellectual Disability: A Training Guide" (1990) 26(4) *The Probation Officer* 11-17; and *Intellectually Disabled Offenders and Victims* (Law and Procedure Publication Section, 1990).

14. Legal Aid Commission of New South Wales *Submission* (5 May 1995) at 1.

15. Kingsford Legal Centre *Submission* (29 October 1992) at 2; Law Society of New South Wales *Submission* (23 December 1993) at 2; Community Living Programme Inc *Submission* (7 February 1994) at 1; Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 3; Hobart Community Legal Service *Submission* (20 January 1994) at 1-2; Intellectual Disability Rights Services *Submission* (28 January 1994) at 12-13.

16. Letter from Mr N Bridge, Executive Director, Strategy and Review, New South Wales Police Service to the Commission dated 29 September 1996.

17. New South Wales Police Service *Submission* (18 July 1996).

18. Department of Corrective Services response to the Commission's Questionnaire dated 12 September 1995.

19. Probation and Parole Service response to the Commission's Questionnaire dated 27 September 1995.

20. New South Wales Probation Service *Submission* (28 February 1995) at 1.

21. See Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 8 and (5 May 1995) at 1; and Office of the Director of Public Prosecutions, New South Wales *Submission* (March 1992) at 1.

22. Information supplied by Ms A Wallace, Australian Institute of Judicial Administration (16 October 1995).

23. Judicial Commission of New South Wales *Submission* (13 September 1996) at 1.

24. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) ("NSWLRC DP 35") at para 3.16.

25. NSWLRC DP 35 at para 3.18.

26. See, for example, Law Society of New South Wales *Submission* (23 December 1993) at 2; and Intellectual Disability Rights Service *Submission* (28 January 1994) at 13.

27. St Vincent de Paul Society, New South Wales Council, Client Advisory Group, Disability Services - Residential Services Team *Submission* (13 December 1993) at 1.

28. For example, Department of Community Services response to the Commission's Questionnaire dated 13 October 1995.

29. NSWLRC DP 29 at para 4.17.

30. See, for example, New South Wales Police Service *Submission* (24 February 1994) at 8.

31. See Recommendation 48 below.

32. NSWLRC DP 35 at para 3.9.

33. Meeting with Illawarra Criminal Justice Sub-Committee (2 March 1992); Intellectual Disability Rights Service *Submission* (16 October 1992) at 8 and (28 January 1994) at 16; and Australian Capital Territory Council on Intellectual Disability *Submission* (20 July 1992) at 4-5.

34. For example, New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 8.

35. Australian Capital Territory Council on Intellectual Disability *Submission* (20 July 1992) at 4.

36. See, for example, New South Wales Bar Association *Submission* (12 January 1994) at 2; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 3; and Law Society of New South Wales *Submission* (24 February 1995) at 1.

37. Letter from Mr I Blackie to the Commission dated 16 March 1995. The pack includes: a Supervisor's Guide, a Pocket Reference, two tapes on Putting Skills into Practice, Guidelines for Solicitors - Advising a Suspect in the Police Station, Becoming Skilled - A Resource Book, and Putting Skills into Practice - A Workbook.

38. For example, Intellectual Disability Rights Service *Submission* (16 October 1992) at 9 and (28 January 1994) at 19.

39. NSWLRC DP 35 at paras 4.34-4.35. Judicial Commission of New South Wales *Submission* (13 September 1996) at 2.

40. Victorian Law Reform Commission *Mental Malfunction and Criminal Responsibility* (Report 34, 1990), Recommendation 25.

41. VLRC Report 34 at para 129.

42. See the *Guardianship Act 1987* (NSW).

43. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 2.

44. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 4. [emphasis in original]

45. See para 2.4 above.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

10. A Co-ordinated Approach

RECOMMENDATIONS

Co-ordination between agencies

48. The Ageing and Disability Department should co-ordinate strategy for government agencies responsible for the treatment of people with an intellectual disability who are involved in the criminal justice system through the development of a comprehensive interdepartmental policy and procedural framework designed to protect the rights and meet the needs of these people. To do this, the Department should, after consultation but within 12 months of the tabling of this Report:

(a) prepare an agreed set of principles about people with an intellectual disability in the criminal justice system;

(b) identify the service and other needs of people with an intellectual disability within the criminal justice system;

(c) decide which agency is primarily responsible for meeting those needs or providing those services and prepare interagency guidelines reflecting these responsibilities;

(d) develop a strategic plan and time frame for establishing new services needed;

(e) develop interagency guidelines: for overlapping agency responsibilities or a changeover of responsibility; for handling conflicts between agencies; and for regular communication between agencies, to ensure continuity of contact and service provision for a person with an intellectual disability.

The Department should monitor the implementation of (a)-(e) above. As part of this monitoring, it should report annually to the Attorney General through its Minister on its progress in implementing this recommendation and should also include information about this process in its Annual Report. [See paras 10.9-10.22]

Monitoring by the Community Services Commission

49. The Community Services Commission's complaints and monitoring jurisdiction should be expanded to cover the provision of services by relevant government agencies involved in the criminal justice system to people with an intellectual disability. [See paras 10.23-10.24]

Exchange of information

50. The Ageing and Disability Department should develop mechanisms and guidelines to ensure that government agencies involved in the criminal justice system exchange, where appropriate, relevant information they hold about a person with an intellectual disability. The mechanisms and guidelines should take into account privacy considerations. [See paras 10.25-10.26]

Screening, assessing and identifying intellectual disability

51. The Ageing and Disability Department should contact and assist government agencies to ensure that each has appropriate principles and procedures for screening, assessing and identifying people with an intellectual disability. [See para 10.27]

Government agencies' policies

52. Each government agency should, using the principles, policies and procedures developed by the Ageing and Disability Department under Recommendation 48 as a basis, develop and implement a policy and operational guidelines for addressing the rights and needs of people with an intellectual disability. [See paras 10.28-10.31]

Police intellectual disability liaison officers

53. The New South Wales Police Service should establish specialist intellectual disability police liaison officer positions. [See paras 10.32-10.37]

Ensuring continuity of contact and service provision

54. The New South Wales Department of Community Services should establish a case manager service for all people with an intellectual disability who come into contact with the criminal justice system. [See paras 10.38-10.50]

Explanatory Note to Recommendations 48-54

Relevant New South Wales government agencies for the purposes of these Recommendations are:

Ageing and Disability Department;

Attorney General's Department, including the Crown Solicitor's Office;

Crown Prosecutors;

Department of Community Services;

Department of Corrective Services, including the New South Wales Probation and Parole Service;

Department of Health;

Department of Juvenile Justice;

Guardianship Board of New South Wales;

Legal Aid Commission of New South Wales;

Mental Health Review Tribunal;

New South Wales Police Service;

Office of the Director of Public Prosecutions;

Office of the Public Guardian and the Protective Commissioner; and

Public Defenders.

If administrative arrangements change, the list of agencies is to include the agencies that take responsibility for the areas currently administered by the above agencies.

Reference in the above recommendations to involvement in the criminal justice system includes people who are *at risk of* involvement in the criminal justice system.

Reference to people with an intellectual disability includes consideration of the special needs of people with an intellectual disability who face the additional disadvantages of having a "dual diagnosis" of both mental illness and intellectual disability or of coming from Aboriginal, Torres Strait Islander or non-English speaking backgrounds. Wherever possible, people with an intellectual disability should be consulted about the procedures outlined above.

The Commission considers that Recommendations 48 and 54 above are key recommendations for the inquiry as a whole.

BACKGROUND

10.1 A number of reports in Australia and overseas have considered the difficulties faced by people with an intellectual disability in the criminal justice system. Many of these have identified the fundamental problem of the *lack of a systematic and coherent approach* to people with an intellectual disability at risk of becoming involved in, and involved in, the criminal justice system.[1] Submissions and consultations also emphasised lack of co-ordination as a problem and referred to the need for a systematic and co-ordinated approach.[2] Problems of lack of co-ordination occur at a number of levels.

> There is little co-ordination between government agencies, including government departments, for example: there are no clear interdepartmental arrangements for the transfer of relevant information about a person[3] or responsibility for a person from one agency to the next;[4] there is uncertainty about which agency is the appropriate contact, provider of services or source of information;[5] and there are people needing services for whom no agency will accept responsibility.[6]
>
> Many criminal justice agencies do not have a systematic approach to clients who have an intellectual disability, for example: they do not have appropriate procedures to identify people with an intellectual disability;[7] staff often do not understand the needs of people with an intellectual disability or how to meet them;[8] the agency's responses to difficulties may be inappropriate, based on wrong information or inconsistent;[9] and there is no adequate formal system of liaison and consultation between agencies and people with an intellectual disability, their carers and representatives.[10]
>
> There is no overall co-ordination or continuity in the way support is provided to an individual when he or she comes into contact with the criminal justice system. It tends to be provided in a sporadic and crisis-based manner.[11]

The consequences of poor co-ordination

10.2 Lack of co-ordination has caused a range of difficulties for people with an intellectual disability. Those who fall into grey areas of departmental responsibility often do not get the services they need. For example, no department accepts clear responsibility to provide supervised accommodation for people with an intellectual disability who need appropriate accommodation while on probation or parole.[12] Those with a dual diagnosis of intellectual disability together with behavioural problems or psychiatric illness are likely to fall between the mental health system and services for people with an intellectual disability.[13]

10.3 People trying to find services find themselves referred from one department to another. One commentator stated:

> Some families have been to literally hundreds of agencies in an attempt to find consistent help for their child. Education, health, community, welfare, church and non-government, recreational, and vocational training programmes have been the sieves through which these clients and their families have fallen.[14]

10.4 Where services or programs are provided, they are not necessarily provided by the most suitable department or agency, for example they may be provided by a criminal justice agency such as the Department of Juvenile Justice rather than a services agency such as the Department of Community Services.[15] Service provision is fragmented and does not address "whole of life" needs of the person. Because there is no systematic way of ensuring that a person with an intellectual disability receives continuity of service provision, a person may lose services when he or she moves from the responsibility of one department to another. Without these services, a person may return to earlier behaviour patterns and re-offend.[16]

10.5 The person is often exposed to a constant change in personnel which may add to his or her distress. As outlined above, information about identification and assessment gathered at one stage in the system, for example, in court proceedings, is not always passed on to the next stage, for example, the prison. A person with an intellectual disability may be assaulted or abused in prison or may not receive special services because the prison was not aware that the person had been identified as having an intellectual disability.[17] Services and functions may be unnecessarily duplicated, for example, a person may be assessed more than once for the same purpose.[18] For people with an intellectual disability who are Aboriginal people or Torres Strait Islanders, of non-English speaking backgrounds or who are diagnosed with both intellectual disability and mental illness, these problems are even more acute.[19]

Reasons for lack of co-ordination

10.6 Achieving co-ordination is particularly difficult in this area because so many agencies and personnel can become involved when a person with an intellectual disability enters the criminal justice system. These include the Department of School Education, Department of Technical and Further Education, Department of Community Services, Department of Health, Department of Housing, New South Wales Police Service, Attorney General's Department, Department of Juvenile Justice, Department of Corrective Services (including the New South Wales Probation and Parole Service), Ageing and Disability Department, Ombudsman, Judiciary/Magistracy, Legal Aid Commission of New South Wales, Office of the Director of Public Prosecutions, other lawyers, Office of the Public Guardian, Guardianship Board of New South Wales, non government agencies, Mental Health Review Tribunal, and Department of Social Security. The complexity is added to by the existence of both federal and State responsibilities in the area of disability services.

10.7 Achieving a systematic approach has also been difficult because departments and agencies have not given the issue a high priority. The misconception that only small numbers are involved appears to be partly responsible for this.[20] The Office of the Public Guardian stated:

> There persists an inadequate level of commitment and resolve on behalf of some of the key departments and service agencies to undertake appropriate action to ameliorate difficulties experienced by this extremely vulnerable group of people. In particular, motivation to attempt to undertake innovative strategies or programs is gravely lacking. This had been evidenced by the significant lack of co-operation in strategic planning and advocacy in this area by such departments.
>
> ... While we understand that some internal developments are being considered within this Department in this area, the Office of the Public Guardian remains dissatisfied with the level of activity and consultation by the Department of Community Services. Despite a significant number of attempts to gain undertakings from the Department to develop innovative strategies in the areas of supported accommodation and service provision for people who are in contact with the criminal justice system, or people with significant difficulties in challenging behaviour ..., this has not been forthcoming and no indications have been provided as to when this might occur.[21]

10.8 Agencies, particularly government departments such as the Department of Community Services are often under-resourced and therefore are unlikely to take responsibility for the provision of services in areas other than those that clearly fall within their self-defined "target population".[22] The Commission's

recommendations in this chapter are designed to provide a comprehensive and systematic approach to the difficulties faced by people with an intellectual disability and to "plug the gaps" in the current system. A key player in achieving this co-ordination must be the Ageing and Disability Department, established in 1995 (see below). As discussed in Chapter 9, these recommendations cannot be achieved by simply reshuffling resources, there will need to be additional sums spent.

DISCUSSION OF COMMISSION'S RECOMMENDATIONS

Recommendation 48: A co-ordinated approach

10.9 The Commission believes that the first priority in this reference is to ensure that immediate steps are taken to ensure there is a systematic and co-ordinated approach to people with an intellectual disability in the criminal justice system. The current ad hoc and crisis-based approach results in a violation of the human rights of many people with an intellectual disability by preventing them from realising their individual capacities for physical, social, emotional and intellectual development and to live in and be part of the community.[23] The New South Wales Council for Intellectual Disability stated that its:

> observations of attempts at inter-agency co-ordination have been that while local efforts may be effective, this depends largely on the individuals involved, and therefore produces variable results across the state. Alternatively, various Departments may send representatives to centralised Inter-departmental Committees, such as that currently auspiced by the Office on Disability, to discuss issues and strategies. However, in both scenarios, CID believes much effort is wasted and good intentions lost when such inter-agencies are not operating from the basis of clearly established policies from each jurisdiction. The issues of inter-departmental co-operation and responsibilities must start from much higher than is possible through any of the Committees we have observed. CID argues that the various Departments and bodies involved must develop and make public clear statements of responsibility and policy regarding their dealings with people with intellectual disability.[24]

Who should be responsible for co-ordination?

10.10 In DP 35 the Commission proposed establishing an Intellectual Disability Commissioner as the mechanism for overcoming the lack of co-ordination among agencies in the criminal justice system.[25] The Commission also envisaged that the Intellectual Disability Commissioner would have an educational and training role and a research-promoting function. A number of submissions supported the proposal.[26] They emphasised the need for independence,[27] adequate funding[28] and a legislative base[29] for the proposal. The Commission remains convinced that there is a need for a separate, adequately funded body to undertake a co-ordination role. Concerns raised in submissions have led the Commission to conclude that establishing an Intellectual Disability Commissioner is not necessarily the most efficient way to achieve co-ordination. Concerns raised by submissions include:

- it would be a duplication of resources and bureaucracy;[30]
- its functions would overlap with those of the recently established Community Services Commission and other watchdog bodies;[31]
- it would cause confusion;[32] and
- singling out intellectual disability as needing a Commissioner may not be practical or appropriate.[33]

10.11 Additionally, since the release of DP 35 in October 1994, new administrative arrangements have been established in this area. There is now an Ageing and Disability Department ("ADD") which has responsibility for developing and managing disability policies including implementing and reviewing disability services legislation. It also funds and monitors some programs for people with a disability. The service delivery functions are to remain with the Department of Community Services ("DOCS"). The

functions of an Intellectual Disability Commissioner would overlap significantly with the functions of the new Department. The Commission has concluded that the appropriate body to take responsibility for achieving co-ordination is the ADD, rather than a new bureaucratic structure. It is independent of service delivery departments. It clearly has responsibility for Policy in relation to people with an intellectual disability. Part of its brief is to monitor adequacy of services to people with an intellectual disability.

Requirements for achieving co-ordination

10.12 There are a number of vital tasks that the ADD must carry out to achieve a well co-ordinated and integrated approach to people with an intellectual disability in the criminal justice system. It must involve all the relevant agencies, but responsibility for finalising and resolving issues and conflicts should lie with the ADD. To ensure that it properly takes into account the rights, wishes and needs of people with an intellectual disability, the ADD should consult, as appropriate, people with an intellectual disability.

10.13 *Recommendation 48(a): A common set of principles.* The starting point for co-ordination is to have a set of principles that all relevant government agencies use as a basis for their work with people with an intellectual disability. Agencies cannot work together effectively unless they have agreement about such matters as: the nature of intellectual disability; objectives of services for people with an intellectual disability involved in the criminal justice system and for those at risk; the rights of people with intellectual disability in the criminal justice system; and training and information obligations. Some suggested principles are:

> where appropriate, legal processes affecting a person with a disability should be expedited;[34]
>
> there should be the highest level of continuity of personnel possible;[35] and
>
> there should be specific measures for educating the person with an intellectual disability about the criminal justice process.[36]

10.14 *Recommendation 48(b): Identification of service needs.* The Commission has identified a number of areas in which the needs of people with an intellectual disability in contact with the criminal justice system, or at risk of coming into contact with the criminal justice system, are not being met.[37] It has also been told of the double disadvantage suffered by people with the additional disadvantages of mental illness, non-English speaking and Aboriginal and Torres Strait Islander backgrounds, and the particular difficulties faced by women and juveniles with an intellectual disability.[38] The Commission has made recommendations about the services it thinks are most critical in Chapter 11. However, there are a number of other unmet needs. The ADD should systematically identify the unmet service needs of people with an intellectual disability at all stages of the criminal justice process. In particular, it should focus on the preventative service needs of people with an intellectual disability at risk of entering the criminal justice system.

10.15 *Recommendation 48(c)-(d): Allocation of responsibility and plan for new services.* Uncertainty about which department or agency is responsible for meeting the various service needs of people with an intellectual disability must end. Having identified the needs, the ADD should finally resolve the issue of who has primary responsibility for providing services. If possible, it should reach a decision based on the consensus of relevant agencies. If that is not possible the final decision should lie with the ADD. The decision should be based on the best interests of people with an intellectual disability. As part of this process, the ADD should develop a strategic plan for establishing the new services needed. The plan should ensure that additional resources are made available to the agencies taking on additional responsibilities.

10.16 *Recommendation 48(e): Interagency co-operation.* Agencies must be able to work together at a local level. To ensure continuity of service provision, ADD should develop procedures that agencies must follow when a person with a disability moves from the responsibility of one to another. It should also develop guidelines for when more than one agency is involved with a person with an intellectual disability. Guidelines should include procedures for handling conflicts between agencies, and provide

procedures and mechanisms for regular communication and information provision. A possible model would be the interagency guidelines for sexual assault victims.[39]

Monitoring

10.17 The above recommendations do not involve a "one off" process. The ADD (and its successors) will need to monitor the implementation of the steps outlined above and also undertake (or allocate) other long term tasks such as: monitoring policy developments in Australia and overseas; encouraging research, initiatives in service delivery and other developments; and monitoring department and agency policies, procedures and training. Additionally, considering the poor record of implementation of the many previous reports in this area, the Commission considers that the progress of ADD in implementing this critical recommendation must also be monitored. It should report annually to the Attorney General through its Minister on the progress it has made and, to enable public scrutiny, ADD should also report on its progress in its Annual Report.

Date for implementation

10.18 The Commission regards this recommendation as playing a key role in improving the circumstances of people with an intellectual disability within the criminal justice system. The Commission believes that this recommendation should be acted on without delay. The Commission has therefore decided to recommend a deadline of 12 months from the date of tabling of this Report for ADD to implement this recommendation.

10.19 The Commission believes that the short term costs involved in implementing this recommendation will be recovered in the long term because:

if, as the Commission believes, better co-ordination, particularly in the provision of services, reduces recidivism, there will be much less money spent on accommodating people with an intellectual disability in prison and processing offenders and reoffenders through the criminal justice system;[40]

there will be less wasteful duplication of services; and

less time and money will be wasted on trying to find services for people with an intellectual disability.

10.20 Achieving co-ordination is complex. The guidelines and procedures ADD develops will need adjusting. Every three to five years the ADD should commission an independent review of the effectiveness of its policies, guidelines and procedures and the effectiveness of each relevant agency's and department's policies, guidelines, procedures and training.

Juvenile justice

10.21 As discussed in Chapter 2, there are particular concerns and issues for juveniles with an intellectual disability. There have been a number of major reviews and initiatives affecting the juvenile justice system as a whole: New South Wales Department of Family and Community Services *Report from the Working Party on Services to Young Persons with Intellectual Disabilities in the Juvenile Justice System* (1988); Youth Justice Coalition (NSW) *Kids in Justice: A Blueprint for the 90s* (1990); New South Wales Legislative Council's Standing Committee on Social Issues *Juvenile Justice in New South Wales* (Report 4, 1992); Juvenile Justice Advisory Council of New South Wales *Future Directions for Juvenile Justice in New South Wales* (Green Paper, 1993); and New South Wales Government *Breaking the Crime Cycle: New Directions for Juvenile Justice in New South Wales* (White Paper, 1994). Some of the recommendations of the White Paper are in the process of being implemented. A report by the New South Wales Ombudsman on Juvenile Justice Centres is also due to be released in December 1996. There have also been other reports on issues affecting youth generally or youth with an intellectual disability in particular including: New South Wales Social Policy Directorate *Supporting Young People in their Communities: Report of Community Youth Support Taskforce* (1993); New South

Wales Council for Intellectual Disability *Homeless & 15: Young People With Intellectual Disability in Crisis* (1995); New South Wales Legislative Council's Standing Committee on Social Issues *A Report into Youth Violence in New South Wales* (Report 8, 1995); Human Rights and Equal Opportunity Commission and Australian Law Reform Commission *Speaking for Ourselves: Children and the Legal Process* (Issues Paper 18, 1996) and New South Wales Legislative Council's Standing Committee on Social Issues *Inquiry into Children's Advocacy* (Report 10, 1996).

10.22 All of these reports make recommendations likely to be of assistance to young people with an intellectual disability. Many of these reports, and submissions and consultations, confirm that the problems of co-ordination of service provision for adults with an intellectual disability also apply to youth with an intellectual disability in the juvenile justice system.[41] A priority of the Juvenile Justice White Paper was the need to co-ordinate effectively the work of agencies involved in juvenile justice. As a result, an Inter-departmental Committee on Juvenile Justice was given responsibility for "developing an integrated, consistent and co-ordinated response from all agencies involved in the juvenile justice system".[42] The Commission does not want to pre-empt any initiatives that are taking place in the juvenile justice area. However, the Commission is concerned that the co-ordination strategy found in this recommendation should include the Department of Juvenile Justice. Youth with an intellectual disability are particularly vulnerable, and also have the greatest potential for benefiting from habilitation or rehabilitation programs. Therefore, the Commission recommends that the ADD and the Community Services Commission (see Recommendation 49 below) closely monitor policy development and service delivery for youth with an intellectual disability.

Recommendation 49: Monitoring by the Community Services Commission

10.23 Apart from the co-ordination strategy outlined above, the Commission is convinced that there is also a need for a body which can actively monitor service delivery to all people with an intellectual disability involved in the criminal justice system and which is able to handle complaints about the services they receive. The Community Services Commission has this role in relation to services provided to people with an intellectual disability by defined community service providers.[43] But it does not have the authority to monitor, or handle complaints in relation to, services delivered by other agencies to people with an intellectual disability involved in the criminal justice system.[44] The *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) allows for the Commission's jurisdiction to be expanded into other portfolios by arrangement between the relevant Ministers.[45]

10.24 To avoid creating yet another body to monitor the services provided by other departments and agencies, arrangements should be made between the relevant Ministers, as foreshadowed by the current legislation, to enable the Community Services Commission to play this role in relation to people with an intellectual disability involved in the criminal justice system. This would enable a more integrated approach to monitoring service delivery and complaints.

Recommendation 50: Exchange of information

10.25 The failure of departments, courts and agencies to exchange relevant information about a person with an intellectual disability has caused a variety of problems for people with an intellectual disability involved in the criminal justice system. It is vital that important relevant information about a person reaches the departments, agencies or individuals who have responsibility for, or provide services to, that person. For example, in DP 35, the Commission outlined the likely importance of information provided to the court, primarily for the purposes of sentencing, for an appropriate (and expeditious) placement and treatment of the person in both custodial or non-custodial options.[46] Accordingly, the Commission proposed that procedures be instituted to ensure that relevant information about an offender's intellectual disability is transferred from the courts to the New South Wales Department of Corrective Services and the New South Wales Probation Service.[47]

10.26 The Commission now believes, that in the interests of consistency, consideration of this issue should be extended to all the relevant agencies. Accordingly, as part of its co-ordination tasks, the ADD should develop mechanisms and guidelines to ensure that departments and agencies involved in the

criminal justice system, exchange, where appropriate, relevant information they hold about a person with an intellectual disability. The guidelines should take into account privacy and confidentiality considerations and when the person's consent is required. Guidelines should include provisions about the kinds of information that can and cannot be exchanged, the circumstances in which it is appropriate to release information and to whom information can be released.

Recommendation 51: Screening, assessing and identifying intellectual disability

10.27 The failure of agencies to identify people with an intellectual disability has been a major issue of concern throughout this reference. All relevant agencies should have effective screening, assessment and identification procedures. Screening usually involves a series of tests and/or questions to identify the possibility of intellectual disability. The screen is usually administered to all people at the point of admission to an agency, for example when a person is first admitted to prison. A person may then be referred for more detailed assessment if the screen reveals possible intellectual disability. Assessment is a far more complicated process involving appropriate professionals and more in-depth testing. Assessment for intellectual disability usually involves some form of intelligence test and interviews with the person and people connected to him or her, such as carers. Identification involves putting together the results of screens and assessments and giving a person the label of intellectual disability. Many screening tests used by agencies are not conclusive, they only establish the possibility of intellectual disability. Establishing these procedures is complex and requires expertise. The Commission considers that the ADD should contact and assist the relevant agencies to ensure each has appropriate principles and procedures for screening, assessing and identifying people with an intellectual disability. The agencies' principles and procedures (see Recommendation 52 below) should ensure that the person with a disability is fully involved and consulted in the processes.[48]

Recommendation 52: Government agencies' policies

Rationale

10.28 The Commission believes that many of the problems people with an intellectual disability have with the criminal justice system are caused by the fact that the government agencies they come into contact with do not have a systematic approach for providing support to this group. The starting point for overcoming these problems at the service level is for each agency to have a policy, or strategic plan. There is already a legislative requirement that a "public authority" prepare a "Disability Strategic Plan", "to encourage the provision of services by that authority in a manner that furthers the principles and applications of principles set out in Schedule 1 [of the Disability Services Act]".[49] The principles and applications set out in Schedule 1 are based on the principle that people with disabilities have the same basic human rights as other members of Australian society together with the rights needed to ensure that their specific needs are met.

10.29 A policy ensures that an agency recognises that people with an intellectual disability are part of the community and have needs. It ensures that each agency knows its responsibilities within the wider framework of the criminal justice system. It helps achieve consistency across agencies involved in the criminal justice system. It sets out the principles that the agency should follow in relation to people with an intellectual disability. It ensures consistency within agencies at all levels. It is a statement that the agency places considerable importance on the issue, and is a signal to staff that they should take these issues seriously. It sets the basis for allocation of resources. It provides a benchmark for an agency to evaluate its progress. It also enables those outside the system to know what the agency's approach is, and to complain if it does not appear to be following and implementing its policy. The Commission's recommendation merely amplifies the existing legislative provision in this area.

Policy contents

10.30 The Commission believes that each government agency's policy should be consistent with the principles and guidelines which Recommendation 48 argued should be developed by the ADD. Each agency should develop the agreed principles further to make them relevant to the agency's specific functions and operations. Policies should include general principles about the rights and needs of

people with an intellectual disability, including Aboriginal and Torres Strait Islanders, people of non-English speaking backgrounds and people diagnosed with both intellectual disability and mental illness. This ensures that all agencies are working towards the same goals. The policy should also clearly outline the specific responsibilities for people with an intellectual disability that the agency has been allocated within the overall ADD plan. It should outline the agency's commitment to liaising with other relevant bodies and provide for regular evaluation and review of the policy and of progress in implementing it.

Operational guidelines

10.31 A policy sets a framework. It sets out principles but it does not tell staff how to implement it. To make policy effective the Commission believes that each agency should also have guidelines which put the policy into day to day practice. Operational guidelines should identify the tasks which must be done to implement the policy. They should say when tasks should be carried out. They should say who will carry out the tasks, for example, they may provide that there should be a special unit or a special liaison officer responsible for implementing policy and procedures. Guidelines should address training needs and also include measures, for example, data collection, which enable the agency or others to evaluate the policy and practice. The policy and operational guidelines should be written in plain English and the agency should publicise and make them available to people with an intellectual disability, their carers and representatives. It should consult with these groups when preparing the policy and guidelines. Each agency should include information in its Annual Report about its policy and guidelines and its progress in implementing them.

Recommendation 53: Special units and officers

10.32 It is a term of this reference that the Commission report on whether specialist units should be established within the Office of the Director of Public Prosecutions, the Legal Aid Commission, the Department of Corrective Services, the Police Service and other related bodies to deal with the special needs of people with an intellectual disability. The Commission received a mixed response on this issue. In responding, people had in mind different concepts of what a special unit might be. Some considered the creation of specialist units as involving a total removal of people with an intellectual disability from the criminal justice system. This raises the issue of diversion which is considered in Chapter 2. Others saw special units either as vehicles for developing policy, or as information and liaison points, or alternatively as separate operational units or designated officers. Submissions in favour of having special units said that they:

> provide a point of contact for people outside the agency;[50]
>
> provide expert knowledge about and links to appropriate outside referrals, for example to psychologists and counselling services;[51]
>
> improve access to the range of services available for people with an intellectual disability who come into contact with the criminal justice system;[52]
>
> allow accumulation of expertise which enables greater accuracy in the identification of intellectual disability;[53] and
>
> can provide a pool of expertise which is a basis for advice and training for other people within the agency.[54]

10.33 Arguments against or concerns raised about specialist units or officers raised in submissions included:

> resources would be more appropriately spent on training general personnel, as the person has to be recognised as having an intellectual disability before he or she can receive specialist services;[55]

specialist units may create more bureaucratic complexity when what is really needed is increased co-operation between service providers;[56]

specialist units may reduce the availability and diversity of legal and other services for people with an intellectual disability throughout the State;[57]

if people with an intellectual disability are exclusively dealt with by such units, it may further stigmatise and alienate them from mainstream services and the community;[58]

a specialist unit may become a dumping ground where people with an intellectual disability become invisible to, and ignored by, the general community;[59]

specialist units may suggest to criminal justice personnel generally that they no longer have a responsibility in matters involving intellectual disability;[60] and

agencies may not have the funds to establish a specialist unit or officer.[61]

The Commission's conclusions

10.34 The Commission has concluded that the specific measures needed to ensure that an agency protects the rights and meets the needs of people with an intellectual disability will vary depending on the size and function of the agency. The Commission considers that special measures, including providing special units or appointing specialist officers, will be justified and appropriate in some circumstances but not in others. It makes a specific recommendation about the police below. The Commission has decided, on reflection, to abandon its proposal for a pilot study of court liaison officers,[62] preferring to focus on general training and information recommendations which should make such a position redundant. To provide such a service state-wide would be enormously expensive and could be a waste of resources. In Recommendation 52 the Commission places obligations on relevant agencies to establish appropriate policies and procedures to ensure that rights are protected and needs are met. The Commission leaves it to the agency to work out, consistently with ADD policies, principles and procedures, the manner in which it will meet this obligation.

Specialist police liaison officers

10.35 The Commission has identified the New South Wales Police Service as needing specialist officers available to ensure support and co-ordination at the operational service level. Police are the first point of contact with the criminal justice system. They work in the community and are critical to ensuring that cases involving people with an intellectual disability are handled properly from the very beginning. For this reason, there is value in having specialist police officers that can provide support for, and play a co-ordinating role in relation to, every operational level of the Police Service. Officers holding these positions must be appropriately trained. This recommendation was supported in submissions[63] and a similar recommendation was made by the New South Wales Women's Co-ordination Unit.[64]

10.36 Every operational level of the Police Service should have access to the expertise of these officers. The role of these officers would be to:

identify all the agencies that provide services to people with a disability in the local area and establish contact with them;

discuss with relevant local services and agencies (in line with the ADD co-ordinated policy) procedures to be followed when a person with an intellectual disability comes into contact with the criminal justice system;

establish specific procedures about who should be contacted if a person is arrested;

give information and advice to other officers, for example, about screening, assessment and identification and available services;

run training programs for local police on intellectual disability; and

develop and run programs for local people with an intellectual disability on the role of the police and the duties of citizens.

10.37 The Police Service already has specialist officers for other special interest groups, for example, gay and lesbian liaison officers. The Commission considers there should be enough specialist officers to enable all police officers at the operational level to have ready access to support and advice. The role of these special liaison officers would not be to insulate all other officers from intellectual disability issues. Rather it would be to improve the effectiveness of all police officers in the area in handling cases involving people with an intellectual disability. As extra resources will be involved, the positions could be established in stages.

Recommendation 54: Ensuring continuity of contact and service provision

10.38 A critical issue raised during this reference has been that no agency will take overall responsibility for a person with an intellectual disability as they move through the criminal justice system. Associate Professor Susan Hayes stated:

> A major difficulty is the lack of comprehensive case management by a single individual or agency who is responsible for the client and who cannot negate or hand on that responsibility. There must be a service which has the ultimate responsibility and coordinating role.[65]

Similarly, the New South Wales Council for Intellectual Disability ("CID") stated:

> CID believes there is a need for one Department to take the central role in co-ordinating, tracking and case managing those individuals whose needs and circumstances will take them across Department boundaries.[66]

Strong evidence of this need is that the courts, tribunals, lawyers, the Guardianship Board of New South Wales and carers of people with an intellectual disability are increasingly asking the Public Guardian to carry out this function.[67]

10.39 In DP 35 the Commission discussed the importance of the continuity provided by a case manager, and proposed that a case manager from DOCS should be appointed and be available when required to assist a client in the criminal process.[68] Submissions generally supported the proposal.[69] A number of submissions commented on the general unwillingness of DOCS to take on this role despite the fact that the Department clearly has the authority and expertise to do so.[70] The Office of the Public Guardian in its submission gave an example of one case in which DOCS developed a plan of action on release from prison for a young man with an intellectual disability who had been incarcerated as a result of an alleged serious offence. The Office commented:

> This plan of action was innovative, individualised and intensive. Following considerable pressure and advocacy, the Director General of the department approved the plan. ...
>
> Unfortunately, despite extensive lobbying, senior officers of the Department of Community Services have recently stated that they will not consider adoption of a plan with similar elements ... due to the high costs of providing such an extensive support service to those persons who are not included in the Department's target group. The Office of the Public Guardian is concerned with the inconsistencies in delivery of service to individuals and the reluctance of the Department to consider individualised service according to assessed need.[71]

One submission was concerned that if the proposal were implemented funding would be cut in a very short space of time and the system would become "window dressing in an area where there is no votes and the very few willing to speak out in its favour are mostly trying to do what they can [to] alleviate the

plight of the intellectually impaired".[72] This submission suggested that there could be problems if a person were only able to get a case manager if he or she committed an offence.[73]

The current service

10.40 Through its Community Support Teams, DOCS officers may already have a case manager role for some people with an intellectual disability who are involved in the criminal justice system. Generally speaking, they would act as case manager for a person who is already a DOCS client at the time the offence is committed. However, many people with an intellectual disability are not known to DOCS before they offend and until recently DOCS has tended to provide services for those with more severe intellectual disabilities. Community Support Teams can provide a range of support services to people with an intellectual disability, for example, speech therapy, social education and counselling. If a client comes into contact with the criminal justice system, the case manager may arrange assessments and programs, and support the person in court. DOCS also has specialist teams which service a small number of people with an intellectual disability who have challenging behaviours. An increasing number of people are being referred to these specialist teams as offenders.[74] The Commission understands that generally speaking, the case manager's role does not continue while the person is in prison, and often does not recommence on release. The Commission noted at the time of DP 35 that there were insufficient resources for DOCS to undertake this role for all people with an intellectual disability who enter the criminal justice system.

10.41 Under the Department of Juvenile Justice Disability Strategic Plan, that Department will have policies and protocols for case management, particularly for offenders with an intellectual disability. Every detainee in a Juvenile Justice Centre will be given a case manager. According to the Department:

> As a part of the case management plan, health/mental needs of detainees will be monitored and reviewed through multi-disciplinary teams. Case plans will be formulated with a view to meeting the special needs of clients and case management will be made subject to regular review. An evaluation project of the multi-disciplinary teams has been established to ensure optimum efficiency and standard of service delivery to clients with special needs.[75]

The Department has also developed a protocol with DOCS:

> to ensure that services are more responsive to children and families who require assistance from both departments. The protocol is regularly reviewed to address any gaps or problems in service provision.[76]

The Commission understands that a similar case management system is being introduced in the Department of Corrective Services.

The Commission's recommendation: A case manager service

10.42 The Commission is convinced that it is absolutely critical, to prevent reoffending and to achieve rehabilitation, that there is a professional who takes case management responsibility for each person with an intellectual disability who enters the criminal justice system. Victims should also receive co-ordinated support. This is not only for their welfare but also because there is evidence that victims may become offenders.[77] The Intellectual Disability Rights Service stated that it:

> knows of many cases where people who have been sexually assaulted have received inadequate assistance and have then acted out in a sexual manner only to be charged and brought before the courts. It is truly depressing that inadequate assistance is forthcoming for these people when they are victims, but as soon as they become the 'offender' they are readily charged, brought before the courts, frequently imprisoned and later released having never received any help for their problem.[78]

10.43 The Commission has concluded that a case management service should be provided to both offenders and victims with an intellectual disability and that DOCS is the appropriate Department to provide it, building upon the service it already provides to a limited number of clients. The Department is designed to provide services to support people with an intellectual disability and therefore case management is clearly within its area of responsibility and expertise. Its role is not limited, as are other government agencies, to one particular part of a person's life and, as it can provide services before, during and after involvement with the criminal justice system, it is best placed to provide continuity of support across other government agencies. The Commission considers that a person with an intellectual disability, of whatever level of severity, who comes into contact with the criminal justice system has high support needs which justify access to DOCS services. The consequences of not providing that support are amply documented by this inquiry.

10.44 *Voluntary nature of the service.* Except when a court, tribunal or the Offenders Review Board makes it a condition of bail, probation, parole or release that a person have a case manager, the case manager service should only be provided if a person, or his or her guardian, agrees to have one.[79] It should be part of the service procedure that it hold regular review meetings to discuss with the person with an intellectual disability, or his or her guardian, whether he or she still wants or needs the services provided.

10.45 *Availability of the service.* If the person with an intellectual disability or his or her guardian asks to have a case manager, the case manager service should be required to provide one if the person with an intellectual disability is accused of, or has committed an offence or is at risk of committing one. (Guidelines should establish criteria for deciding if a person is at risk of committing an offence.) The service should also be required to provide a case manager if a court, tribunal, or the Offenders Review Board orders or makes it a condition of bail, probation or parole release that the person have one. The case manager service should also be required to provide a case manager, on request, for a victim of a serious offence, including all offences punishable by imprisonment. It should have a discretion to provide a case manager to a victim of a minor offence. The service's decision whether or not to provide a case manager should be reviewable by the Community Services Appeals Tribunal.

10.46 The service should be widely publicised and relevant agencies in the criminal justice system should inform their clients about the service. DOCS should tell a carer or guardian of a person with an intellectual disability about the case management service as soon as the Department becomes aware of challenging behaviours likely to lead to contact with police. The case management service should make sure that all relevant agencies know about the service so that they can put carers of people with an intellectual disability with challenging behaviours in touch with the service. As soon as a person with an intellectual disability is arrested or charged with an offence, the police should tell the person, guardian or carer that they are, or may be, entitled to have a case manager and tell them how to go about getting one. A lawyer, magistrate, judge, prison officer, or probation or parole officer should also tell the carer or guardian of a person newly identified as having an intellectual disability, or the person with the disability if most appropriate, about the case management service.

10.47 *Role of the case manager.* The level of involvement of the case manager would depend on the needs of the person with the intellectual disability. The role of the case manager would continue, as needed and agreed to, through all stages of the criminal justice system, including police investigation, seeing lawyers, court, non-custodial options, prison and post release. It could continue while the person is involved with other agencies. The case manager would not provide therapeutic, social education, general education, or employment or other services. He or she would:

provide continuing contact, support and information for the person and their carer or guardian;

act as a point of liaison for police, lawyers, courts, probation or parole officers;

either develop, or ensure that someone else from the service develops a comprehensive ("whole of life") support plan for the person with an intellectual disability which could include: accommodation; supervision; social education; behaviour management programs; living skills; programs for sex offenders; counselling; speech therapy; employment preparation; on the job support; health services; and mental health services;

broker and co-ordinate the provision of the supports or services needed;

monitor the progress of a person towards habilitation or rehabilitation;

ensure that the support plan is updated and new services provided, where appropriate, as the person progresses through the criminal justice system and support needs change; and

ensure that services and support continue regardless of the person's stage in the criminal justice system.

10.48 *Needs of Aboriginal people and Torres Strait Islanders and people of non-English speaking backgrounds.* In establishing this service, care needs to be taken to ensure that it meets the needs of Aboriginal people and Torres Strait Islanders and people of non-English speaking backgrounds. These groups would need to be closely consulted on a local basis and case management services provided in a way that is responsive to the needs of the local communities.

10.49 *Additional funding needed.* The advantage of this proposal is that it is not new or radical. It builds on services and skills already provided and available within DOCS. However DOCS will need extra funding to provide this service and to employ case managers. It will also need extra funding to pay for some of the services the person needs that are not available, or not available in a suitable form. The Commission recommends that the government and ADD make available extra funding to enable DOCS to provide a case manager service. For too long lack of resources has been used to justify inaction. The Commission believes that the short term costs of ensuring that each case is properly managed will be offset by the savings to the Police Service, courts and Corrective Services resulting from early and comprehensive support, and the reduction in repeat offending. Although they cannot be easily measured in monetary terms, the benefits to people with an intellectual disability in terms of their welfare and the protection of their rights must be taken into account.

10.50 As a case manager service is urgently needed, the Commission recommends that ADD should develop a comprehensive plan to establish the service within 12 months of the tabling of this report. However, because of the extra resources needed, the Commission suggests that a staged approach to establishing the service be taken. ADD should identify the numbers of case managers that would be needed to support all the people with an intellectual disability who come into contact with the criminal justice system or are at risk of doing so, and prepare a staged plan over a number of years for DOCS to establish a comprehensive case management service.

FOOTNOTES

1. New South Wales - Report of the Inter-Departmental Committee on Intellectually Handicapped Adult Offenders in New South Wales Australia *The Missing Services* (Departments of Corrective Services and Youth and Community Services, Sydney, 1985) and the follow-up story in the Ombudsman of New South Wales *Annual Report 1990* at 115-119; New South Wales - Department of Family and Community Services *Report from the Working Party on Services to Young Persons with Intellectual Disabilities in the Juvenile Justice System* (Department of Family and Community Services, 1988); New South Wales - Community Youth Support Taskforce *Supporting Young People in their Communities* (Social Policy Directorate, New South Wales, 1993); C Puplick *The Last to be Served: A Review of the Adequacy and Comprehensiveness of the Provision of Services to Developmentally Delayed Inmates by the NSW Department of Corrective Services* (Report to the Minister for Justice, 1994) at 30; S Hayes *Reducing Recidivism Amongst Offenders with an Intellectual Disability* (unpublished, prepared for the Office on Disability of the New South Wales Social Policy Directorate and the Disability Council of New South Wales, 1994).

2. For example, New South Wales - Office on Disability *Submission* (13 March 1995) at 1; Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 3; Community Services Commission *Submission* (2 March 1995) at 1; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 15-16; Letter from the Office of the Public Guardian, New South Wales to the Commission

dated 2 March 1995 at 1; Intellectual Disability Rights Service *Submission* (1 March 1995) at 16-17; consultation with representatives of the New South Wales Probation Service, the Department of Corrective Services and the Aboriginal Legal Service on 2 March 1994.

3. See, for example, consultation with a New South Wales Department of Community Services Community Support Team (29 November 1993); consultation with representatives of the New South Wales Probation Service, the Department of Corrective Services and the Aboriginal Legal Service on 2 March 1994; and Puplick at 17-18.

4. See, for example, New South Wales Council on Intellectual Disability *Submission* (4 April 1995) at 15; Mr P Hutten *Submission* (6 January 1992) at 4.

5. New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 2; and Intellectual Disability Rights Service *Submission* (1 March 1995) at 16.

6. See Hayes (1994) at 13 in relation to mild intellectual disability. Legal Aid Commission solicitors referred to the lack of facilities and the "buck passing" between departments and services which occurs in relation to clients considered particularly difficult in a consultation on 17 March 1994. See also Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 9.

7. Puplick at 14-15.

8. See, for example, consultations with people with an intellectual disability reported in New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Consultations* (Research Report 3, 1993) at para 4.10; see also Chapter 9.

9. See, for example, consultation with a New South Wales Department of Community Services Community Support Team on 29 November 1993.

10. See, for example, Intellectual Disability Rights Service *Submission* (6 March 1995) at 17; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 15.

11. See Hayes (1994); and consultation with representatives of the New South Wales Probation Service, the Department of Corrective Services and the Aboriginal Legal Service on 2 March 1994.

12. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 8-9.

13. Hayes (1994) at 10; Intellectual Disability Rights Service *Submission* (1 March 1995) at 16.

14. Hayes (1994) at 15.

15. See, for example, letter from Mr I Graham, Director-General, Department of Juvenile Justice to the Commission dated 7 March 1994.

16. Hayes (1994).

17. See consultation with New South Wales Department of Community Services Community Support Team on 29 November 1993.

18. Over-assessment for some purposes has been identified as a reason why some people with an intellectual disability hide their disability or are reluctant to be tested: see, for example, Intellectual Disability Rights Service *Submission* (16 October 1992) at 4; and New South Wales Council on Intellectual Disability *Submission* (4 April 1995) at 4-5.

19. For example, consultation with Disability Services Aboriginal Corporation on 10 October 1995.

20. For a discussion of the significant numbers of people with an intellectual disability coming into contact with the criminal justice system see Chapter 2.

21. Letter from the Office of the Public Guardian, New South Wales to the Commission dated 2 March 1995.

22. See, for example, Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 9 and Intellectual Disability Rights Service *Submission* (16 March 1995) at 16.

23. See *Disability Service Act 1993* (NSW), Schedule 1 "Principles and applications of principles".

24. New South Council for Intellectual Disability *Submission* (4 April 1995) at 15.

25. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) ("NSWLRC DP 35"), Proposal 48.

26. New South Wales Police Service *Submission* (February 1995) at 17; Intellectual Disability Rights Service *Submission* (1 March 1995) at 16-17; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 6; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 45; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 5; Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (28 February 1995) at 3; Victims Advisory Council *Submission* (27 February 1995) at 4; Law Society of New South Wales *Submission* (24 February 1995) at 1.

27. See, for example, New South Wales Police Service *Submission* (February 1995) at 17; Intellectual Disability Rights Service *Submission* (1 March 1995) at 16-17.

28. Intellectual Disability Rights Service *Submission* (1 March 1995) at 17; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 5; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 45.

29. Intellectual Disability Rights Service *Submission* (1 March 1995) at 17; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 45.

30. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 10; Community Services Commission *Submission* (2 May 1995) at 2.

31. New South Wales - Department of Community Services *Submission* (23 March 1995) at 3; Community Services Commission *Submission* (2 May 1995) at 2; Office of the Public Guardian, New South Wales, *Submission* (1 March 1995) at 10.

32. Community Services Commission *Submission* (2 May 1995) at 2.

33. See, for example, Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability *Submission* (27 February 1995) at 3; Community Services Commission *Submission* (2 May 1995) at 3.

34. See, for example, New South Wales Council on Intellectual Disability *Submission* (4 April 1995) at 8.

35. New South Wales Council on Intellectual Disability *Submission* (4 April 1995) at 4.

36. See Chapter 9.

37. See Chapter 11.

38. See Chapter 2.

39. *Interagency Guidelines for Responding to Adult Victims of Sexual Assault* (New South Wales Police Service, Office of the Director of Prosecutions, Department of Health, 1995). The Guidelines include: details of each Department's roles and responsibilities, the policies and principles which underpin each Department's response, and chronological details of the procedures to be followed from the time a victim presents at the police station or hospital through to the court room.

40. There are currently an estimated 720-780 people with an intellectual disability in prison (1994 figures); see Puplick at 10.

41. See NSWLRC DP 35 at paras 13.3-13.8.

42. New South Wales - Department of Juvenile Justice *Submission* (21 July 1995) at 1.

43. *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) s 4 and s 12.

44. Community Services Commission *Submission* (2 May 1995) at 2-3.

45. *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) s 4 (para (f) of the definition of "service provider").

46. NSWLRC DP 35 at paras 11.51-11.52.

47. NSWLRC DP 35, Proposal 43.

48. New South Wales Council on Intellectual Disability *Submission* (4 April 1995) at 5.

49. *Disability Services Act 1993* (NSW) s 9(1). Pursuant to s 9(7), a "public authority" means a government department, administrative office or declared authority specified in Schedule 1, 2 or 3 of the *Public Sector Management Act 1988* (NSW), and includes an authority prescribed as a public authority by the regulations.

50. New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 9.

51. New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 9.

52. New South Wales - Department of Family and Community Services, Office on Disability *Submission* (26 November 1991) at 3.

53. Senior Constable P Fernandez *Submission* (8 December 1991) at 40.

54. Senior Constable P Fernandez *Submission* (8 December 1991) at 40; and Intellectual Disability Rights Service *Submission* (16 October 1992) at 12.

55. Australia - Attorney-General's Department, Office of Legal Aid and Family Services *Submission* (28 August 1992) at 6.

56. Western Australia - Department of Corrective Services *Submission* (19 January 1991) at 7.

57. Legal Aid Commission of New South Wales *Submission* (8 January 1992) at 3.

58. Intellectual Disability Rights Service *Submission* (6 January 1992) at 5; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (18 August 1992) at 6; consultation with Disability Services Aboriginal Corporation on 10 October 1995.

59. Intellectual Disability Rights Service *Submission* (1 March 1995) at 14.

60. National Council on Intellectual Disability *Submission* (18 December 1991) at 2.

61. Legal Aid Commission of New South Wales *Submission* (5 May 1995) at 2.

62. NSWLRC DP 35, Proposal 39.

63. For example, Law Society of New South Wales *Submission* (23 December 1993) at 2-3; Illawarra Disabled Persons' Trust *Submission* (20 January 1994) at 1; Hobart Community Legal Service Inc *Submission* (20 January 1994) at 2; and Office of the Ombudsman, New South Wales *Submission* (4 March 1994) at 4. The New South Wales Council for Intellectual Disability *Submission* (16 December 1993) at 4; the Intellectual Disability Rights Service *Submission* (28 January 1994) at 14; and the Queensland Department of Family Services and Aboriginal and Islander Affairs *Submission* (31 January 1994) at 2; supported the recommendation with reservations, including the need for training and support and the concern that such officers would reinforce the separation of people with an intellectual disability and allow general police to avoid their responsibilities in this area.

64. New South Wales Women's Co-ordination Unit *Sexual Assault of People with an Intellectual Disability* (Final Report, 1990), Recommendation 4.5.

65. Hayes (1994) at 19.

66. New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 15; see also Mr P Hutten *Submission* (6 January 1992).

67. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 1-2.

68. See NSWLRC DP 35, para 13.40 and Proposal 8.

69. See, for example, Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 1-2; Mr P Hutten *Submission* (20 January 1995) at 8; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 20; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 3.

70. See, for example, Mr P Hutten *Submission* (20 January 1995) at 8.

71. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 9.

72. Magistrate P Cloran *Submission* (13 February 1995) at 1.

73. Magistrate P Cloran *Submission* (13 February 1995) at 5.

74. Consultation with a New South Wales Department of Community Services Community Support Team on 29 November 1993.

75. New South Wales - Department of Juvenile Justice *Submission* (21 July 1995) at 2.

76. New South Wales - Department of Juvenile Justice *Submission* (21 July 1995) at 1.

77. See, for example, Intellectual Disability Rights Service *Submission* (1 March 1995) at 16.

78. Intellectual Disability Rights Service *Submission* (1 March 1995) at 16.

79. One submission emphasised the importance of informed choice and having the right to refuse to have a case manager; see Ability Incorporated *Submission* (22 May 1995) at 1.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

11. Services for Offenders with an Intellectual Disability

RECOMMENDATIONS

Special units and services in prisons

55. Special units for both men and women with an intellectual disability within prisons should be retained (or in the case of women, established) and expanded. [See paras 11.14-11.15]

56. Specialist services should be provided for prisoners with an intellectual disability who remain within the mainstream prison population. [See para 11.16]

Secure units outside prisons

57. Secure units outside the prison system should be established and administered by the New South Wales Department of Community Services for people with an intellectual disability found unfit to plead or found not guilty on the ground of mental impairment. These secure units should have the legislative guidelines outlined in para 11.29 to protect the rights of the people detained, including admissions and review criteria and provision of legal representation. [See paras 11.17-11.29]

Access to Community Service Orders

58. The New South Wales Probation and Parole Service should ensure that there are available Community Service Order work options which are suitable for a person with an intellectual disability. Supervision would be provided by the Special Offenders' Service recommended in Recommendation 59. [See paras 11.35-11.37]

Special Offenders' Service

59. Within 12 months from the tabling of this Report, the New South Wales Probation and Parole Service should establish a specialist supervision and support service for people with an intellectual disability who are serving non-custodial sentences (including bonds or probation) or who are on parole. The role of this Special Offenders' Service would be:

(a) to provide specialist supervision and support to people using its services; and

(b) to liaise with the New South Wales Department of Community Services, and in particular the person's case manager recommended in Recommendation 54, to ensure that the person receives appropriate services and accommodation. [See paras 11.38-11.42]

Accommodation for people on bail

60. Places in the secure units recommended in Recommendation 57 should be set aside for people with an intellectual disability who could not otherwise obtain bail without physically secure accommodation. [See para 11.43]

BACKGROUND

11.1 In Chapter 10 the Commission made recommendations aimed at overcoming the lack of co-ordination between government agencies in the provision of services to people with an intellectual

disability. Lack of co-ordination is not, however, the only problem. The lack of services available to people with an intellectual disability involved in, or at risk of being involved in, the criminal justice system, has been a constant theme in earlier reports[1] and in submissions and consultations for this reference. For example, one submission stated:

> the lack of appropriate services providing accommodation, care and support for people with an intellectual disability is well known. Although it is occasionally possible to find care for persons who have not committed offences, this becomes virtually impossible for those who have offended.[2]

It is feared that prisons "fill the gap" caused by the lack of services in the community, contributing to the over-representation of people with an intellectual disability outlined in Chapter 2.[3] Judges have also expressed the concern that some offenders with an intellectual disability should be the responsibility of community service departments rather than of the Department of Corrective Services.[4]

11.2 In particular, submissions and recent reports have commented that:

- there are not enough preventative services and programs;[5]
- there are not enough programs to address behaviour that has led to the person coming into contact with the law;[6]
- there are not enough appropriate programs in prison to prevent reoffending and achieve habilitation (that is the gaining of skills to enable the person to function in the community as a self-reliant citizen);[7]
- there is no appropriate alternative to prison for people with an intellectual disability who require secure or supervised accommodation;[8] and
- there is not enough support for people with an intellectual disability to enable them to undertake the bail, sentencing, release and parole options available to other people involved in the criminal justice system.[9]

11.3 The goal for programs, support and services for people with an intellectual disability should be to enable them to participate, as fully as possible, as productive members of the community.[10] Accordingly, in the criminal justice system, the emphasis should be on prevention and rehabilitation (or habilitation).[11] People with an intellectual disability should be subject to the least level of restriction on their movement that is compatible with the safety of the person and the community.[12] In this chapter, the Commission makes recommendations about the specific programs and services needed to enable this goal to be reached. The Commission has tried to identify some of the key services - a more comprehensive list will be completed (and updated) by the Ageing and Disability Department if the recommendations in the previous chapter are implemented.

DISCUSSION OF RECOMMENDATIONS

Recommendations 55 and 56: Special units and programs in prisons

Existing units and programs

11.4 The Department of Corrective Services provides special units for some male prisoners with an intellectual disability and programs for others with an intellectual disability within the mainstream prison system.[13] However, it has been argued that prison programs are "spasmodic in operation, inadequate in number, under resourced, designed without an appropriate level of professional input, and are essentially unevaluated, through ongoing independent review".[14]

11.5 As at August 1996, there were three special units:

a development unit for 18 inmates at Long Bay in Sydney for sentenced and unsentenced inmates of all security classifications;

a development unit for 12 minimum security inmates at Goulburn;

a special support program at Kirconnel near Bathurst to provide work, education and counselling activities for 20 minimum security inmates.

11.6 Other units are planned. According to the Department:

> It is proposed that the current special unit at Long Bay be replaced by a 40 bed development unit at Long Bay as part of the redevelopment of that site after the new Metropolitan Remand and Reception Centre opens at Silverwater in 1997. It is planned that this unit will provide the following programs:
>
> > a sex offender program for 10 inmates
> >
> > a Koori support program for 10 inmates
> >
> > a program to cater for 20 sentenced and unsentenced inmates of all security classifications to replace the current 18 bed unit.
>
> A support program for female inmates with an intellectual disability is to be established in the women's correctional centres under the direction and supervision of the psychological services section of the Department.[15]

11.7 The Department has stated that the purpose of these units is to provide appropriate services which will improve the ability of people with an intellectual disability "to cope in gaol and to live in the general community as self-reliant, law abiding citizens".[16] In these units, individual program plans are developed which cover areas including literacy and numeracy, work preparation, personal care and hygiene, interpersonal skills, relaxation training, sport and exercise, domestic skills, budgeting, skills for coping with frustration and violence and personal counselling. Officers in the unit are specially trained and are appointed as case mangers for specific inmates. Each officer is responsible for monitoring progress with program plans, preventing crises and giving relevant information to other members of the team. The case plans are developed by a case management committee composed of the special unit's nurse, teaching and custodial staff.

11.8 Department of Corrective Services guidelines for managing people with an intellectual disability in correctional centres state that people with an intellectual disability should not be placed in special units by reason of intellectual disability alone. The draft guidelines state that inmates:

> will be placed in special units if they are considered by a psychologist to be unsuitable for mainstream programmes because of their youth, the nature of the offence, personality or behavioural factors or other "at-risk" characteristics, or because there is a particular programme which will be of benefit to the inmate which is not available elsewhere within the correctional system.[17]

Should special units be retained?

11.9 In DP 35 the Commission considered the issue of special units in prison for people with an intellectual disability. In its proposals, the Commission supported the retention of special units in the prison system, with the qualification that the units should be regularly reviewed. The Commission also supported the provision of funding for services for mainstream prisoners with an intellectual disability.[18]

11.10 *Support for special units.* Submissions and consultations have generally supported the work of these special units in prison.[19] The main reason given is that they protect people with an intellectual disability from their well-documented exploitation and abuse by other prisoners.[20] Other benefits are

that the units: have specialist staff; apply a consistent approach; and may reduce the chances of reoffending. Some submissions and reports question whether the principle of mainstreaming or normalisation is appropriate in a prison environment. They point out that prison is not a "normal" environment and that there is little to be gained by ensuring that people with an intellectual disability are included in the mainstream prison service.[21]

11.11 *Reservations about special units.* Consultations and submissions also noted the limitations of the units. For example, there are only limited places available and the full range of therapeutic programs such as speech pathology, sex offender programs and physiotherapy are not available.[22] The programs do not necessarily include professionally run and individually tailored programs to address the behaviour that led to imprisonment.[23] It has also been said that special units in prisons do not meet the needs of many Aboriginal people and Torres Strait Islanders. For example, the strong stigma among some Aboriginal people attached to being identified as having an intellectual disability was noted. As the units are not available in a wide range of locations, admission to a unit may mean isolation from important family connections, both inside and outside the prison.[24] Such concerns will also affect non-Aboriginal prisoners and are difficult to overcome.

11.12 A 1994 review (the "Puplick Report") of the services being provided to prisoners with an intellectual disability raised the following concerns about the units:

> there are only 68 places in special units for an estimated 720-780 people with an intellectual disability;
>
> there are no places for female prisoners;
>
> more input from formally qualified personnel is required in the administration area;
>
> there are not enough places in basic formal education programs and the education programs are not designed by professionals;
>
> there are no sex offender programs suitable for people with an intellectual disability;
>
> life skills programs are not tested against the real needs of the inmates; and
>
> prison staff run the units.[25]

11.13 The report also supported the separation of people with an intellectual disability from the mainstream population, especially those people in prison for non-violent offences for short periods, because: their safety is at risk if they remain in the general prison population; "tough" inmates become role models which makes reintegration into the community more difficult; and special educational services are better provided in separate units away from the general population.[26]

The Commission's recommendations

11.14 *Special units.* The Commission has concluded that special units within prisons assist in protecting and meeting the needs of prisoners with an intellectual disability. The units represent one of the few providers of skills development programs to offenders with an intellectual disability. For some prisoners with an intellectual disability they provide a secure and stable environment in which appropriate programs tailored to individual needs can be delivered. The Commission believes that the current available places are inadequate for the likely demand, and is particularly concerned by the lack of facilities for women with an intellectual disability. It recommends that the units be retained (or in the case of female prisoners, established) and expanded to take into account the significant numbers of prisoners with an intellectual disability suggested by the studies outlined in Chapter 2 and to provide accommodation at each prisoner security level. The Commission considers that whether or not a person with an intellectual disability is placed in a special unit should be determined according to the vulnerability and the needs of the particular individual. Additionally, the units should be regularly reviewed.

11.15 The Commission believes that prisoners in special units should have the same basic rights and privileges as other prisoners of the same security classification. Accordingly, they should have access to appropriate drug and alcohol programs, sex offender programs, therapy and contact visits to the extent they would be available if the prisoner were in the main part of the prison. In addition, people with an intellectual disability in prison should have access to professionally run programs designed to address the behaviour which led to imprisonment.

11.16 *Specialist services in mainstream prison population.* As with special units, the vulnerability and special needs of prisoners with an intellectual disability should be taken into account in the provision of services and supports within the mainstream prison system. Where there are insufficient places in special units, there should be funding available to enable a person with an intellectual disability in the general prison population to receive appropriate support and services outside the units. Funds should be available to train and employ an Aboriginal or Torres Strait Islander support person for Aboriginal people or Torres Strait Islanders with an intellectual disability who remain in the general prison population.

Recommendation 57: Secure units outside prisons

11.17 The need for appropriate sentencing options for offenders with an intellectual disability has been an important issue in this reference. One issue is whether it is appropriate to place a person with an intellectual disability in a prison. A person with an intellectual disability may be in prison if he or she has been:

charged with an offence and refused bail (see Recommendation 60 below);

found guilty of an offence and sentenced (see Recommendation 56 above);

found unfit to plead and received a limiting term (see Chapter 5); or

found not guilty on the ground of mental illness (see Chapter 6).

11.18 A number of submissions and reports on this issue state that mainstream prison is not an appropriate option for any person with an intellectual disability.[27] The reasons given include:

people with an intellectual disability are very vulnerable in prison;[28]

people with an intellectual disability are seen as susceptible to the negative influences of the prison environment which may reinforce rather than reduce criminal behaviour;[29]

if the focus of sentences is habilitation, custodial sentences are counter-productive because of the artificial nature of prison environment;[30]

to achieve a deterrent effect the person must be able to connect the crime with the punishment and some people with an intellectual disability may not be able do this[31] - in cases where people with an intellectual disability do not understand why they are in prison, punishment becomes meaningless and cruel; and

prison may be more burdensome for people with an intellectual disability than for others because it disrupts normal routines and patterns which many such people rely on for their well-being,[32] and the emotional and psychological consequences of prison may be more onerous.[33]

11.19 It has been argued that people who have been found unfit to be tried or not guilty on the ground of mental illness (which can include intellectual disability), in particular, should not be detained in prison.[34] However, it has been commented that non-custodial options will not always be suitable, for example, where a person has committed a serious act of violence.[35]

Secure services in Victoria

11.20 In DP 35 the Commission discussed whether people with an intellectual disability who need custodial care should be placed in secure units outside the prison system. In New South Wales there are no secure units outside the prison system other than the locked wards of psychiatric hospitals, which are clearly inappropriate for persons with an intellectual disability (unless they also have a psychiatric illness which requires secure confinement). The Department of Community Services ("DOCS") states that it does not have any special secure facilities in which a person can be confined.[36] It also argues that it does not have the statutory capacity to provide a community-based alternative to incarceration, because of the voluntary nature of its service provision role.[37] Though all DOCS facilities are designed to be voluntary, if the person has a guardian because of his or her level of disability, the guardian (acting as the person's substitute decision-maker) can consent to the person's placement in a particular facility.[38] Additionally, in practice, many DOCS institutions do control their clients' freedom of movement.

11.21 DP 35 discussed the Victorian Secure Services Unit, which is in the grounds of the Kingsbury Training Centre. The unit is a four to five bedroom house which has at least two staff on duty. It accommodates four to five prisoners with an intellectual disability within a high fence. The inmates are primarily those who have been found unfit to plead and are being held at the Governor's pleasure. They may also include sentenced prisoners believed to be particularly vulnerable within the prison system, offenders on Justice Plan conditions under s 80 of the *Sentencing Act 1991* (Vic) or people residing there under the directions of a guardian.[39] The inmates are transferred out of the control of the Corrections Services into the control of the Department of Health and Community Services by order of the Minister, pursuant to s 21 of the *Intellectually Disabled Persons Services Act 1986* (Vic). The unit is part of a system of supervised and supported accommodation run by the Statewide Forensic Program, which provides services for offenders with dangerous or anti-social behaviour. The program also provides less restrictive levels of accommodation designed to enable a person to move gradually to lower levels of security and ultimately back into the community. Kingsbury provides "Stage One" security; "Stage Two" consists of less secure 24 hour supervised accommodation in the grounds of an institution; and "Stage Three" consists of 24 hour supervised accommodation in the community. In 1994, a new house for offenders with both an intellectual disability and an active psychiatric illness was established, with similar levels of security and support to Stage Two accommodation.[40]

11.22 In DP 35 the Commission proposed that the Victorian model of a secure unit (not within the grounds of a prison) for people with an intellectual disability who are either unfit to be tried or not guilty on the ground of mental illness, or other offenders with an intellectual disability for whom prison is considered inappropriate, should be adapted for use in New South Wales. It proposed that appropriate safeguards and services should be provided and the conditions for the transfer of such people from prison be set out in legislation. It sought further information on the question of the appropriate department to run the unit. It proposed that the unit should be able to offer more flexible leave and rehabilitation programs than are available in prison, and that, as in the prison system, there should be provision for decreasing levels of security.

Qualified support for secure units outside the prison system

11.23 Submissions gave qualified support to secure units outside the prison system.[41] The Western Australian Department of Corrective Services said that, if professionally administered, the units would provide the most favourable environment to meet the special management and habilitation needs of offenders with an intellectual disability.[42] It was also argued that, in contrast to prisons, secure units can provide the opportunity for supervised community access.[43] Concerns expressed about secure units outside prison included:

- the units might become a "dumping ground" for people who should not require custodial care;[44]
- the units have the potential to become institutional facilities that foster abuse and reinforce maladaptive behaviour;[45]
- there might be no progression through the system from maximum to minimum levels of security;[46]

the units may not provide better treatment and services than those in prisons;[47]

it is not clear who should run the units; and

it is not clear which offenders with an intellectual disability should go to these units.

Several submissions emphasised that security for people with intellectual disability should "be considered in terms of high levels of supervision and intensive programming", rather than locked units.[48] The Office of the Public Guardian argued that, for most offenders with an intellectual disability, "the necessary ingredient of care and support required in community placements is appropriate supervision, not specifically secure custody". It stated that it has found support among senior staff of a prison Forensic Ward for the view that "many individuals with an intellectual disability who are incarcerated require not a secure physical environment but supervision. ... They also require positive training and appropriate support staff and programs."[49]

11.24 The Intellectual Disability Rights Service stated that to overcome these concerns any special service of this kind should:

service no more than a few clients in any one location;

not be isolated from the community;

have a sufficient staff-client ratio to ensure real support and assistance;

be staffed with qualified personnel; and

have regular review procedures.[50]

The submission stated that any new facilities should be the joint responsibility of DOCS and the Department of Corrective Services to ensure that clients receive appropriate support or services.[51] Hayes and Craddock also argue that to transfer a person to an intellectual disability facility there must be a formal commitment procedure in which the person is represented by legal counsel and the decision is reviewed regularly.[52]

The Commission's conclusions

11.25 *Secure units outside prisons.* The Commission believes that people who are found unfit to plead or found not guilty on the ground of mental illness should not be in prison. In law, they have a different status to other offenders and, as a matter of human rights, should not be incarcerated in the same way in prisons. The Commission agrees with submissions that, in most cases, high level supervision and intensive programs would meet both the individual's needs and the community's need for safety. There will remain a small group of people with an intellectual disability who have received these "verdicts" and may need to be in secure accommodation, not as punishment, but because they may be a real danger to the community and likely to reoffend if they are not.[53] The Commission recommends that there must be a range of levels of secure and supervised environments outside the prison system. The Commission notes that the maximum numbers involved are small - New South Wales, as at December 1994, had 123 "forensic patients", who include people found unfit to be tried or found not guilty on the ground of mental illness, as well as other prisoners who become mentally ill in prison.[54] The overwhelming majority of these people would have a mental illness and would be most appropriately detained in a psychiatric hospital or treated in the community. Of the 133 forensic patients reviewed by the Mental Health Review Tribunal between July and December 1994, 19 were located in the community, 49 were in prison hospitals, 63 were in psychiatric hospitals and only two were in prison (but not in a prison hospital).[55]

11.26 The Commission has concluded that the recommended secure units for people found unfit to plead and people found not guilty on the ground of mental illness, should not be available to people with an intellectual disability who have been sentenced to imprisonment. Placing sentenced and

"unsentenced" people in the same facility would involve mixing people whom the law has found fit to be punished with those whom it has not. People with an intellectual disability who have been found fit to plead and given a custodial sentence but who need special protection or services can be accommodated through special units or services within the prison system, followed up by properly supervised and supported parole services. (See Recommendations 55, 56 and 59.)

11.27 *Units to be run by Department of Community Services.* The Commission notes that for people with a mental illness who are detained there are different levels of secure accommodation run by the Health Department, staffed by psychiatric staff rather than prison officers, which enable a person to progress through the levels and ultimately to return to the community. It seems unjust that there is not a parallel range of accommodation for people with an intellectual disability run by the department which provides services for people with disabilities, DOCS.

11.28 The Commission therefore recommends that DOCS should provide the recommended secure units. Although security is needed, the fundamental role of these units is to address the behaviour that brought the person into contact with the criminal justice system and to provide the services and programs the person needs to achieve habilitation. DOCS staff have the skills and experience to provide these services. Additional resources will be necessary. In Victoria the Statewide Forensic Program is run by the Department of Health and Community Services. The Puplick Report also argued that habilitation services should not be solely provided by prison officers whose main function and culture is corrective.[56] A forensic psychologist with the Victorian Statewide Forensic Program also commented on the need to avoid confusion from the outset about whether the role of staff of these units is custodial or rehabilitative.[57] If the units are run by DOCS their rehabilitation/habilitation orientation will be established from the beginning. DOCS' reservations about involving itself in security issues should be explicitly addressed through the legislative safeguards outlined below. The Commission's recommendation will not require DOCS to provide secure accommodation for large numbers of people. For most "unsentenced" people with an intellectual disability involved in the criminal justice system, highly supervised and supported arrangements will be adequate to meet their needs and to protect the community. For the few cases where physical security is genuinely an issue, DOCS should be able to access the assistance and expertise of the Department of Corrective Services or other relevant agencies if needed.[58]

11.29 *Safeguards.* The Commission notes concerns raised at para 11.23 above, for example that secure units may become quasi-prisons or a "dumping ground" where people with an intellectual disability with challenging behaviours are forgotten and left without proper support or programs. The Commission recommends that secure units for people with an intellectual disability should be established with the following conditions and safeguards to meet these concerns:

> There must be a legislative basis for the units, including the admissions criteria and review procedures.
>
> Admissions criteria should include consideration of the appropriate level of security for the person and there must be clear criteria to enable the person to move to increasingly less secure environments and ultimately to be released into the community.
>
> Key decisions in the process should include legal representation for the person.
>
> There should be an external case manager[59] to oversee the progress of the person in the units, review the case plan, and ensure that the person gets the necessary services to enable him or her eventually to return to life in the community.
>
> The units should: be group homes with only a small number of residents in any one location; be located in a community setting as far as possible; have a sufficient staff-client ratio to ensure effective support and assistance; be staffed by qualified persons; and be regularly monitored through visits by the Community Services Commission.

The Ageing and Disability Department should fund research to evaluate these units in comparison to the other detention options, namely special prison units and specialist services provided in the main part of the prison.

Recommendations 58 and 59: Non-custodial or semi-custodial sentencing options

Existing non-custodial options

11.30 Provision of appropriate non-custodial sentencing options is another area in which offenders with an intellectual disability are denied the rights or options available to those without an intellectual disability because of a lack of support services, or because the options are not geared towards the needs of people with an intellectual disability. The range of non-custodial (or semi-custodial) options include:

Community Service Orders ("CSOs");

completing specified hours at an Attendance Centre;

bonds;

periodic detention;

home detention;[60] and

program probation orders (federal offenders only).[61]

11.31 In DP 35, the Commission outlined some reasons why many people with an intellectual disability may not understand the requirements of, or have difficulty complying with, these non-custodial and semi-custodial sentencing options.[62] For example, a person with an intellectual disability may find it hard to tell the time to keep appointments with their Probation Officer or they may need help (such as travel training) to reach an Attendance Centre to meet their reporting conditions.[63] A survey of judicial officers suggested that some magistrates believe that physical or mental disabilities make some offenders unsuitable for CSOs.[64] Some work options for CSOs are not suitable for a person with an intellectual disability unless there is more supervision than is currently given.

Benefits for people with an intellectual disability

11.32 Non-custodial sentencing options offer benefits to people with an intellectual disability. For example, CSOs may: boost self esteem though the work undertaken; maintain or enhance normal social skills rather than institutional skills and values; give the person a chance to model themselves on typical members of the community rather than on prisoners; and may be a more meaningful punishment for a person with an intellectual disability than other options.[65] CSOs and Attendance Centres, bonds and program probation orders have the potential to provide individuals with further community living skills,[66] while allowing people to keep their community ties. Home detention raises more difficult issues. Though it may protect vulnerable offenders from abuse in prison, the procedures involved may be beyond the abilities of some people with an intellectual disability and may be unsuitable for the residential options of other people. There are also concerns that home detention may impose an inappropriate supervision burden on family members or other carers. However, it is inappropriate to generalise in this area and each case should be judged on its own merits.[67]

Parole

11.33 Similar issues arise in relation to the release from prison on parole of people with an intellectual disability. Offenders with an intellectual disability tend to serve longer sentences (for the same crimes) than non-disabled offenders and are less likely to be released on parole.[68] To be released on parole, a prisoner must show the potential, and then the ability, to adapt to normal lawful community life. People with an intellectual disability are likely to have low levels of adaptive and social skills, which may affect

their ability to obtain parole. There are few community facilities willing to accept people with an intellectual disability on release,[69] and they may not have any family willing or able to provide the necessary support. When they are released, there is a likelihood that they will return to prison because they may have difficulty understanding and, without support, meeting the conditions of parole.[70]

11.34 It is a breach of human rights if people with an intellectual disability are imprisoned (or not released on parole in the same way as other prisoners) because there are no appropriate non-custodial or post release options. The breach is made worse because of their vulnerability to physical and emotional abuse by other prisoners. If a major reason for their presence in prison is that there are not adequate facilities or support to make non-custodial options or parole workable, then these facilities and supports should be provided without delay.

Recommendation 58: Access to Community Service Orders

11.35 The New South Wales Probation and Parole Service has stated that it is committed to providing specialist offender management programs where appropriate.[71] However, there are as yet no specialised options for people with an intellectual disability within the Probation and Parole Service designed to enable a person on probation, serving other non-custodial sentences, or on parole to complete a sentence or parole period successfully. Lack of funding to provide extra services is a constraint,[72] as is the high client-staff ratio. The average ratio of active supervision cases to field staff is 45 offenders per officer.[73] Supervision often means no more than a weekly or monthly request for the person to attend the Service's office for an interview. This is unlikely to be sufficient for a person with an intellectual disability but the client-staff ratio makes the provision of the extra supervision required for a person with an intellectual disability difficult.[74] Because officers may feel unable to give this extra supervision and as there are no special services to enable this to happen, a probation officer preparing a pre-sentence report may inform the court that the person is not suitable for a non-custodial sentence.[75]

11.36 In DP 35 the Commission proposed that, with the assistance of DOCS, the Probation and Parole Service should develop appropriate non-custodial programs for offenders with an intellectual disability within the existing non-custodial or semi-custodial options, such as CSOs. Submissions strongly supported this proposal.[76] Comments included:

> alternatives to prison such as CSOs should be accessible to people with an intellectual disability;[77]
>
> CSOs and attendance at programs which provide living skills and work training are most appropriate for offenders with an intellectual disability;[78] and
>
> the kinds of programs available with a CSO should also be available as a condition of a good behaviour bond.[79]

11.37 As discussed in para 11.32 above, in principle the CSOs are suitable for a person with an intellectual disability, but the chosen "community service" work will need to be carefully chosen, taking into account the abilities of people with an intellectual disability. Accordingly, the Commission recommends that the Probation and Parole Service should ensure that there are CSO work options available which are suitable for a person with an intellectual disability. Appropriate supervision for offenders with an intellectual disability serving non-custodial options is considered further below.

Recommendation 59: Special Offenders' Service

11.38 The Commission believes that with only minor modifications, the current non-custodial sentencing options for offenders with an intellectual disability are adequate. The court already has the power to require a person to live at a certain place, attend particular programs, to be supervised by a particular person or organisation and to follow a program for rehabilitation they devise.[80] However, to complete a non-custodial sentence successfully, offenders with an intellectual disability may require

additional specialist supervision and support, adequate accommodation, and access to programs which address challenging behaviour and other needs and promote rehabilitation.

11.39 Accordingly, in DP 35 the Commission proposed that a pilot service co-ordination scheme, based upon the Special Offenders' Service, Lancaster County, Pennsylvania in the United States of America,[81] be established jointly by DOCS and what was then known as the New South Wales Probation Service, with staff drawn from both organisations. It also proposed that appropriate community-based accommodation be established to allow offenders without adequate accommodation or community ties to be involved.[82] There was considerable support in submissions for this proposal.[83] The Probation Service said that it would be important to consider whether such a service would be diversionary or post-release.[84] DOCS did not support the proposal for a number of reasons:

> This proposal has serious resource implications for [DOCS]. In addition, there are major issues outstanding, not the least of which remains the level of disability and support requirements of the majority of people with intellectual disability within the criminal justice system; the identification by people with intellectual disability as potential clients of the Department, the compounding issues of consent to receive services and what shape the legislation required to establish such a service will take. Administrative and occupational health and safety issues would also need to be considered.[85]

11.40 The Commission still supports this proposal and suggests that the most cost effective way of providing the required specialist supervision and support is through an extension of the services already provided by what is now known as the Probation and Parole Service. The principal function of this recommended "Special Offenders' Service" would be to provide specialist supervision and support to people with an intellectual disability who have received non-custodial sentences, or who are on parole.[86] The officers providing this supervision and support would require special training. A further function would be to liaise with DOCS, and in particular the person's case manager (see Recommendation 54) to ensure that the person receives the appropriate behaviour management, habilitation services and placement in suitable accommodation. Close co-operation between DOCS and the Probation and Parole Service will be necessary to ensure that appropriate accommodation is available. The Department of Ageing and Disability should address this need for appropriate accommodation and support services for people with an intellectual disability serving non-custodial sentences and on parole as part of its overall co-ordination task outlined in Recommendation 48. The Commission understands that in discussions between the Probation and Parole Service and DOCS about co-ordination of accommodation, DOCS indicated that it was not prepared to accept responsibility, at that stage, for the provision of these residential services, either jointly or solely.[87] The Commission believes DOCS should provide a range of accommodation for people with an intellectual disability apart from the secure units recommended in Recommendation 57, including for people who need accommodation to enable them to complete a non-custodial sentence.

11.41 Access to the Special Offenders' Service should be by order of the court (in the case of non-custodial sentences) or through the parole administrative processes. The court order or the administrative process should prescribe the period the person should participate in the Service and review mechanisms should also be established. In addition the Probation and Parole Service should develop an administrative process for admitting clients who were not identified as having an intellectual disability when sentenced or paroled and people sentenced to less than three years' imprisonment who receive automatic parole. The Special Offenders' Service should be accessible to people with an intellectual disability from non-English speaking backgrounds and Aboriginal people and Torres Strait Islanders.

11.42 The Commission regards this recommendation as crucial to preventing recidivism and promoting rehabilitation. The Special Offenders' Service in Lancaster achieved a recidivism rate of 5%, compared to a national rate of 60%.[88] Establishing a similar service will require extra resources for both the Probation and Parole Service and for DOCS, and the Commission recommends that a special budget allocation be made available to implement it. If recidivism is prevented and rehabilitation is promoted, the expenditure will be balanced by savings in money spent on prisons and on the legal

process. Community safety will be considerably enhanced and the quality of life for many people with an intellectual disability and their families will be improved.[89]

Recommendation 60: Accommodation for people who would otherwise be denied bail

11.43 Not only may people with an intellectual disability be found unsuitable for many non-custodial options due to the lack of appropriate support services but, as discussed in Chapter 4, a person with an intellectual disability may also be denied bail because he or she does not have the appropriate support or accommodation services. In some cases, this is because a residential facility refuses to take a person back after he or she has been charged with an offence,[90] or because he or she is homeless and does not have adequate community or family ties.[91] There is currently no service or facility which provides emergency accommodation for a person with a disability in this situation and so a person with an intellectual disability may be denied liberty due to lack of services.[92] As discussed in para 4.78, the Commission has abandoned its proposals for a pilot bail hostel owing to the concerns of disability organisations, but recognises that there is still a need for emergency secure accommodation which is not in a prison which has to be addressed. Accordingly, the Commission recommends that for those few who need *secure* accommodation, a number of places in the secure units recommended by the Commission in Recommendation 57 above should be set aside. For the majority who simply require supervision, care and accommodation to meet bail requirements, DOCS should, as discussed, provide some supervised crisis accommodation specifically for this purpose or put together an appropriate arrangement as needed. As discussed for the Special Offenders' Service, the Ageing and Disability Department should include this need in its co-ordinated plan for service provision outlined in Recommendation 48.

Conclusion: Gaps in services

11.44 There are major gaps in service provision for people with an intellectual disability. If these gaps were filled, many people would not enter the criminal justice system in the first place and many others would not reoffend. Key services that are needed include:

pre-offence programs for people who are at risk of committing offences but with support could be diverted from that path;

counselling for offenders and victims;

more supervised accommodation and programs for people with an intellectual disability in contact or at risk of contact with the criminal justice system, particularly for people with mild and borderline intellectual disability;[93] and

post release or re-integration programs.

The Commission is particularly concerned that pre-offence and post release programs be available. Pre-offence programs can prevent entry to the criminal justice system and the associated financial and other costs to the community. Before this can be done, there must be a co-ordinated plan agreed to by all the relevant disability and criminal justice agencies. Recommendation 48 outlined such a process for identifying needs, allocating responsibility and planning for new services.

FOOTNOTES

1. See, for example, New South Wales - Report of the Inter-Departmental Committee on Intellectually Handicapped Adult Offenders in New South Wales Australia *The Missing Services* (Departments of Corrective Services and Youth and Community Services, Sydney, 1985) ("The Missing Services Report"); see also the follow-up story in New South Wales - Ombudsman of New South Wales *Annual Report 1990* at 115-119; and New South Wales - Department of Family and Community Services *Report from the Working Party on Services to Young Persons with Intellectual Disabilities in the Juvenile Justice System* (Department of Family and Community Services, 1988).

2. Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 6. Other submissions which refer to the issue of lack of services included: Mr M Porter, Clinical Psychologist *Submission* (8 June 1994) at 1; Mr R Hogan, Director, Parole Service, Department of Corrective Services, New South Wales *Submission* (22 June 1994); Mr G Simpson, Social Worker, Lidcombe Hospital, Head Injury Community Outreach Team *Submission* (21 February 1994) at 16; Intellectual Disability Rights Service *Submission* (1 March 1995) at 16; Kingsford Legal Centre *Submission* (29 October 1992) at 5; New South Wales - Department of Corrective Services *Submission* (14 November 1991) at 2; Office of the Public Guardian, New South Wales *Submission* (1 March 1995); Epistle Post Release Service *Submission* (26 August 1992) at 1; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 15-16; Community Services Commission *Submission* (2 March 1995) at 1.

3. For example, New South Wales Council for Intellectual Disability, Rights, Legislation and Advocacy Action Team “Missing Services - Are Prisons Filling the Gap?” (July 1994) 2 *CID News,* special supplement at 2.

4. For example, *R v Crawford* (Court of Criminal Appeal, NSW, 28 June 1995, CCA 06043/95, unreported) per Dunford J at 7.

5. See, for example, Intellectual Disability Rights Service *Submission* (1 March 1995) at 16; Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 3.

6. See, for example, S Hayes *Reducing Recidivism Amongst Offenders with an Intellectual Disabilit*y (unpublished, prepared for the Office on Disability of the New South Wales Social Policy Directorate and the Disability Council of New South Wales, June 1994) at 14; consultation with representatives of Intellectual Disability Rights Service, New South Wales Council for Intellectual Disability, Disability Council of New South Wales, New South Wales Sexual Assault Committee and the Brain Injury Association on 10 March 1994; Office of the Public Guardian, New South Wales *Submission* (1 March 1995).

7. See, for example, Ms A Birgden *Submission* (15 February 1995).

8. Consultation with representatives of Intellectual Disability Rights Service, New South Wales Council for Intellectual Disability, Disability Council of New South Wales, New South Wales Sexual Assault Committee and the Brain Injury Association on New South Wales Inc on 10 March 1994; Intellectual Disability Rights Service *Submission* (1 March 1995) at 13-15.

9. See, for example, Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 4-10; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 12-15.

10. See *Disability Services Act 1993* (NSW) s 3.

11. International Covenant on Civil and Political Rights, Article 10(3): “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

12. See *Disability Services Act 1993* (NSW), Schedule 1, Principles 1(b), (c) and (g) and Applications of Principles 2(a) and (g).

13. The 1994-95 budget for these services was $0.586M: *Programs for People with Disabilities: Budget 1994-95* (Office on Disability, Social Policy Directorate, 1994) at 21.

14. Mental Health Review Tribunal *Annual Report 1994* at 7.

15. Letter from Mr C Rannard, Department of Corrective Services, New South Wales to the Commission dated 14 August 1996.

16. New South Wales Department of Corrective Services *Annual Report 1990/1991* at 76.

17. “Policy Guidelines for Managing Offenders who have an Intellectual Disability”, para 6.5. These guidelines are currently being considered by management for adoption by the Department: Letter from Mr C Rannard, Department of Corrective Services, New South Wales to the Commission dated 14 August 1996.

18. New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (Discussion Paper 35, 1994) (“NSWLRC DP 35”), Proposal 40 and paras 11.25-11.33.

19. Consultation with the Illawarra Criminal Justice Sub-Committee on 2 March 1992; Dr J A Thompson, Consultant Psychiatrist, Community Health Services, Central Sydney Health Service *Submission* (26 January 1994) at 1; Intellectual Disability Rights Service *Submission* (1 March 1995) at 14; Queensland - Department of Family Services and Aboriginal and Islander Affairs *Submission* (8 March 1995) at 6; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 13.

20. See, for example, Intellectual Disability Rights Service *Submission* (1 March 1995) at 14.

21. See, for example, Intellectual Disability Rights Service *Submission* (1 March 1995) at 14, New South Wales Council on Intellectual Disability *Submission* (4 April 1995) at 13; C Puplick *The Last to be Served: A Review of the Adequacy and Comprehensiveness of the Provision of Services to Developmentally Delayed Inmates by the New South Wales Department of Corrective Services* (Report to the Minister for Justice, 1994) at 28-29.

22. See, for example, Hayes and Craddock at 279-280; Mrs V Breheny *Submission* (14 July 1992) at 5.

23. Ms A Birgden *Submission* (15 February 1995) at 3.

24. Consultation with Disability Services Aboriginal Corporation on 10 October 1995.

25. Puplick Report at 21-26.

26. Puplick Report at 28-29.

27. See, for example, New South Wales Sexual Assault Committee *Submission* (August 1992) at 5; Mrs V Breheny *Submission* (14 July 1995) at 3; Puplick at 30.

28. Kingsford Legal Centre *Submission* (29 October 1992) at 5; New South Wales - Department of Family and Community Services, Office on Disability *Submission* (26 November 1991) at 2; Legal Aid Commission of New South Wales *Submission* (24 July 1992) at 4; Queensland Corrective Services Commission *Submission* (23 September 1992) at 1; Intellectual Disability Rights Service *Submission* (6 January 1992) at 4; Mr W Challis, Administrative Officer, Prisoner Classification and Placement, Department of Corrective Services, New South Wales *Submission* (25 June 1992) at 1; and Mr F De Silva *Submission* (17 March 1994) at 2-3.

29. The Missing Services Report at 3; and New South Wales - Department of Family and Community Services, Office on Disability *Submission* (26 November 1991) at 2.

30. Dr W Glaser *Submission* (23 August 1995) at 4-5; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 12.

31. M Ierace *Intellectual Disability: A Manual for Criminal Lawyer*s (Redfern Legal Centre Publishing, Sydney, 1989) at 158; New South Wales - Department of Corrective Services *Submission* (20 July 1992) at 1.

32. Kingsford Legal Centre *Submission* (29 October 1992) at 5.

33. Law Society of New South Wales *Submission* (24 August 1992) at 4.

34. For example, Intellectual Disability Rights Service *Submission* (16 October 1992) at 11. See also the Victorian Parliament Community Development Committee *Inquiry into Persons Detained at the Governor's Pleasure* (Victorian Government Printer, October 1995), Recommendation 40.

35. Mrs V Breheny *Submission* (14 July 1992) at 4-5.

36. Letter from Ms J Woodhouse, Director, Ageing and Disability Services, New South Wales Department of Community Services to the Commission dated 29 January 1993.

37. New South Wales - Department of Community Services *Submission* (23 March 1995) at 2, and letter from Mr D Semple, Department of Community Services to Ms J Woodruff, Ageing and Disability Department, attached to letter from Mr J Jacobsen, New South Wales Council for Intellectual Disability to the Commission dated 8 May 1996.

38. New South Wales - Department of Family and Community Services [now Department of Community Services] *Submission* (21 January 1992) at 3.

39. Letter from Ms T Brown, Health and Community Services, Victoria to the Commission dated 11 December 1995.

40. Letter from Ms T Brown, Health and Community Services, Victoria to the Commission dated 11 December 1995.

41. Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 43; Queensland - Department of Family Services and Aboriginal and Torres Strait Islander Affairs *Submission* (8 March 1995) at 6; New South Wales - Department of Corrective Services *Submission* (3 March 1995) at 1-2; Intellectual Disability Rights Service *Submission* (1 March 1995) at 14; Mental Health Advocacy Service *Submission* (21 February 1995) at 11; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 5.

42. Western Australia - Department of Corrective Services *Submission* (19 November 1991) at 3. See also New South Wales - Department of Corrective Services *Submission* (20 July 1992) at 1-2.

43. Ms A Birgden *Submission* (15 February 1995) at 6.

44. Intellectual Disability Rights Service *Submission* (1 March 1995) at 14; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 13.

45. New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 13.

46. Associate Professor S C Hayes *Submission* (31 August 1992) at 1-2.

47. Intellectual Disability Rights Service *Submission* (1 March 1995) at 14; Associate Professor S C Hayes *Submission* (31 August 1992) at 2.

48. See, for example, New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 13.

49. Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 8.

50. Intellectual Disability Rights Service *Submission* (16 October 1992) at 11. These safeguards were also supported in Ms A Birgden *Submission* (15 February 1995) at 6.

51. Intellectual Disability Rights Service *Submission* (16 October 1992) at 10.

52. Hayes and Craddock at 291. See also Ms A Birgden *Submission* (15 February 1995) at 7.

53. The Commission has already discussed the difficulties in predicting "dangerousness": see NSWLRC DP 35, Chapter 12.

54. Mental Health Review Tribunal *Annual Report 1994* at 57-58.

55. Mental Health Review Tribunal *Annual Report 1994* at 65 (Table 35).

56. Puplick at 26; see also consultation with Disability Services Aboriginal Corporation on 10 October 1995.

57. Ms A Birgden *Submission* (15 February 1995) at 5.

58. See Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 8.

59. See Recommendation 54 in Chapter 10.

60. In New South Wales a pilot of home-based detention ("Intensive Community Supervision") was launched in June 1992. An Act was recently passed to make the option more widely available, the *Home Detention Act 1996* (NSW): New South Wales - *Parliamentary Debates (Hansard)* Legislative Assembly, 20 June 1996, Hon R J Debus, Minister for Corrective Services, Second Reading Speech at 3384-3386.

61. *Crimes Act 1914* (Cth) s 20BY.

62. NSWLRC DP 35 at paras 11.67-11.70. See also, for example, Intellectual Disability Rights Service *Submission* (1 March 1995) at 15.

63. See, for example, Hayes (1994) at 3.

64. R Bray and J Chan *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in New South Wales* (Judicial Commission of New South Wales, Monograph Series 3, 1991) at 19.

65. See, for example, Hayes and Craddock at 207-209. See also G M Crombie *Residential and Community Based Options for the Remand and Sentencing of Intellectually Disabled Offenders in Victoria: A Proposal from Harrison Youth Services* (Harrison Youth Services, Uniting Church in Australia, Victoria, 1988) at 19, which supported the provision of specially designed community-based orders for people with an intellectual disability, arguing such orders would "promote self-discipline and recognition of limits".

66. See, for example, Intellectual Disability Rights Service *Submission* (1 March 1995) at 15.

67. See the *Home Detention Act 1996* (NSW) s 8-11. See also Hayes and Craddock at 215-216.

68. S C Hayes "What corrections should offer the intellectually disabled offender - an idealistic view" in D Challinger (ed) *Intellectually Disabled Offenders* (Australian Institute of Criminology, Seminar Proceedings 19, Canberra, 1987) 85 at 89; consultation with representatives of the Office of the Director of Public Prosecutions, Police Prosecutors, Legal Aid Commission of New South Wales, Law Society of New South Wales, Public Defenders, Aboriginal Legal Service and the Judicial Commission of New South Wales on 1 March 1994; consultation with solicitors from the Legal Aid Commission of New South Wales on 17 March 1994.

69. See, for example, Mr R Hogan, Director, Parole Service, Department of Corrective Services, New South Wales *Submission* (22 June 1994).

70. S C Hayes “Services for offenders: Mentally disabled prisoners - planning resources” (1991) 5 (2) *National Council on Intellectual Disability: Interaction* 32 at 34-35.

71. Letter from Mr C Kenna, Acting Director, New South Wales Probation Service to the Commission dated 27 February 1995.

72. Letter from Mr C Kenna, Acting Director, New South Wales Probation Service to the Commission dated 27 February 1995.

73. Letter from Ms B Smith, Director, New South Wales Probation Service to the Commission dated 24 March 1994.

74. See, for example, Hayes and Craddock at 205.

75. See Hayes and Craddock at 209 in relation to Community Service Orders.

76. For example, Intellectual Disability Rights Service *Submission* (1 March 1995) at 14; Law Society of New South Wales *Submission* (24 February 1995) at 4; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 5; New South Wales Police Service *Submission* (February 1995) at 16; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 13.

77. See, for example, Intellectual Disability Rights Service *Submission* (1 March 1995) at 15.

78. Intellectual Disability Rights Service *Submission* (1 March 1995) at 15.

79. Law Society of New South Wales *Submission* (24 February 1995) at 4.

80. See *Crimes Act 1900* (NSW) s 432, 554, 556A and 558; *Justices Act 1902* (NSW) s 49 and 96 and common law bonds.

81. See H R Wood and D L White “A model for habilitation and prevention for offenders with mental retardation: The Lancaster County (PA) Office of Special Offenders Services” in R Conley, R Luckasson and G Bouthilet (eds) *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Paul H Brookes, Baltimore, 1992) at 153-165.

82. NSWLRC DP 35, Proposal 46.

83. See, for example, New South Wales Police Service *Submission* (February 1995) at 16; Illawarra Disabled Persons' Trust *Submission* (23 February 1995) at 5; Mr R Hogan, Director, Parole Service *Submission* (13 January 1995) at 1; Brain Injury Association of New South Wales Inc *Submission* (28 February 1995) at 44; Queensland - Department of Family Services and Aboriginal and Torres Strait Islander Affairs *Submission* (8 March 1995) at 6; Community Services Commission *Submission* (2 March 1995) at 4; Intellectual Disability Rights Service *Submission* (1 March 1995) at 15-16.

84. New South Wales Probation Service *Submission* (27 February 1995) at 2.

85. New South Wales - Department of Community Services *Submission* (23 March 1995) at 3.

86. People with an intellectual disability found unfit to plead and who receive a limiting term, or who are found not guilty on the ground of mental illness and detained would receive supervision through the secure units recommended in Recommendation 57.

87. New South Wales Probation Service *Submission* (27 February 1995) at 3.

88. Wood and White at 162.

89. See Hayes (1994) at 18-19.

90. B Bodna “People with an intellectual disability and the criminal justice system” in Challinger (1987) 11 at 19.

91. Kingsford Legal Centre *Submission* (29 October 1992) at 2.

92. New South Wales Council for Intellectual Disability *Submission* (16 September 1992) at 7.

93. A number of submissions have stated that this group have unjustifiably been outside the DOCS target group: see, for example, the Office of the Public Guardian, New South Wales *Submission* (1 March 1995) at 9; New South Wales Council for Intellectual Disability *Submission* (4 April 1995) at 14.

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Appendix A: Written Submissions Received

Ability Incorporated (22 May 1995)

Alting, Ms T (30 May 1995)

Anti Discrimination Board (12 November 1991)

Australia - Attorney-General's Department, Office of Legal Aid and Family Services (4 December 1991; 28 August 1992)

Australia - Department of Health, Housing, Local Government and Community Services, Office of Disability (27 February 1995)

Australian Capital Territory Council on Intellectual Disability (20 July 1992)

Australian Institute of Criminology (20 December 1991)

Barker, Mr J (6 September 1994, 24 January 1995)

Beveridge, Magistrate M (5 April 1994)

Birgden, Ms A (15 February 1995)

Blackie, Mr I (12 December 1993)

Brain Injury Association of New South Wales Inc (7 March 1994; 28 February 1995)

Breheny, Mr G (July 1992)

Breheny, Mrs V (14 July 1992)

Brennan, Mr M (13 July 1992; 10 August 1992; 19 July 1995)

Cleary, Magistrate T (7 February 1995)

Cloran, Magistrate P (13 February 1995; 20 February 1995)

Community Justice Centres (9 July 1992)

Community Living Programme Inc (7 February 1994, 12 January 1995)

Community Services Commission (2 March 1995)

Confidential Submission (24 July 1992)

Confidential Submission (4 September 1992)

Crawford, Magistrate J (5 November 1995)

De Silva, Mr F (17 March 1994)

Disability Information and Resource Centre, South Australia (19 November 1991)

Dover, Mr K (11 August 1992)

Ellard, Dr J (19 April 1995)

Epistle Post Release Service (26 August 1992)

Fernandez, Senior Constable P (8 December 1991)

Fleming, Ms J (30 March 1994)

Gething, Associate Professor L (5 July 1992; 5 August 1992)

Gilmore, Magistrate C (2 March 1995)

Glaser, Dr W (25 August 1995)

Guardianship Board of New South Wales (31 January 1994)

Hampton, Mr N (5-6 September 1993)

Hayes, Associate Professor S (6 November 1991; 7 May 1992; 31 August 1992)

Hobart Community Legal Service Inc (20 January 1994)

Hogan, Mr R (22 June 1994; 13 January 1995)

Hutten, Mr P (6 January 1992; 14 July 1992; 2 April 1993; 8 November 1993; 17 June 1994; 20 January 1995)

Ierace, Mr M (16 December 1991; 6 April 1993)

Illawarra Area Consultative Committee (12 August 1992)

Illawarra Disabled Persons' Trust (10 August 1992; 20 January 1994; 23 February 1995)

Intellectual Disability Review Panel, Victoria (17 December 1992)

Intellectual Disability Rights Service (6 January 1992; 16 October 1992; 23 October 1992; 28 January 1994; 1 March 1995)

Intellectual Disability Services Council, South Australia (13 November 1991)

Judicial Commission of New South Wales (13 September 1996)

Kingsford Legal Centre (29 October 1992)

Lannen, Ms J (23 December 1993)

Law Society of New South Wales (24 August 1992; 23 December 1993; 24 February 1995)

Legal Aid Commission of New South Wales (8 January 1992; 24 July 1992; 2 February 1994; 5 May 1995)

Local Courts (New South Wales) (30 July 1992)

McGuire, Mr T (13 August 1992)

Mental Health Advocacy Service (17 May 1994; 21 February 1995; 6 March 1995)

Mental Health Review Tribunal (25 February 1992; 5 June 1995)

Moss, Ms J (1 December 1992; 5 March 1995)

National Council on Intellectual Disability (18 December 1991)

New South Wales - Department of Community Services (21 January 1992; 2 September 1992; 23 March 1995)

New South Wales - Department of Community Services, Mt Druitt Community Services Centre (17 November 1992)

New South Wales - Department of Corrective Services (14 November 1991; 25 June 1992; 20 July 1992; 3 March 1995)

New South Wales - Department of Courts Administration (28 August 1992)

New South Wales - Department of Juvenile Justice (4 August 1992, 21 July 1995)

New South Wales - Office On Disability (26 November 1991; 13 March 1995)

New South Wales Bar Association (12 January 1994)

New South Wales Council for Intellectual Disability (16 September 1992; 16 December 1993; 4 April 1995)

New South Wales Police Service (7 September 1992, 24 February 1994; February 1995; 18 July 1996)

New South Wales Probation Service (27 February 1995)

New South Wales Sexual Assault Committee (August 1992; 4 June 1993; 15 February 1994; 6 March 1995)

Office of the Director of Public Prosecutions, New South Wales (March 1992; 7 February 1994; 3 April 1995; 21 August 1996)

Office of the Ombudsman, New South Wales (February 1994)

Office of the Public Guardian, New South Wales (26 August 1992; 2 March 1995)

People With Disabilities NSW Inc (January 1992)

Porter, Mr M (2 July 1992; 20 October 1992; 27 October 1993; 8 June 1994, 14 November 1994; 12 April 1995)

Power, Miss M (23 January 1994)

Queensland - Corrective Services Commission (23 September 1992)

Queensland - Department of Family Services and Aboriginal and Islander Affairs (18 August 1992; 31 January 1994; 8 March 1995)

Queensland - Department of Health, Mental Health Branch (3 March 1992)

Rosanna Forensic Psychiatry Centre (21 July 1992)

Simpson, Mr G (21 February 1994)

South Australia - Courts Administration Authority (11 August 1992; 24 January 1994)

South Australia - Department of Correctional Services (27 August 1992)

South Australia - Police Department (14 April 1992; 10 January 1994)

St Vincent De Paul Society, New South Wales Council, Disability Services - Residential, Client Advisory Group (15 June 1993; 13 December 1993)

Thompson, Dr J (26 January 1994)

Townsend, Mrs M (15 July 1992)

Victims Advisory Council (27 February 1995)

Victims Compensation Tribunal (Registry) (16 March 1994)

Victoria - Health and Community Services (2 February 1994; 2 March 1995)

Victoria Police (28 August 1992)

Waller, Mr K (7 April 1993)

Western Australia - Crown Solicitor's Office (11 November 1991)

Western Australia - Department of Corrective Services (19 November 1991; 25 August 1992)

Winter, Mr M (18 July 1992)

Zachmann, Ms S (20 March 1996)

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

Appendix B: Select Intellectual Disability Studies

Table 1: Offenders - Estimates of Prevalence

Offenders with an Intellectual Disability	Source (see Select Bibliography for full citation)
12-13% of prison population have an intellectual disability.	**NSW:** Hayes and McIlwain (1988) at 47.
5% of prisoners serving sentences longer that 12 months have an IQ less than 70.	**NSW:** J Gordon (1980) Research Officer, New South Wales Department of Corrective Services, personal communication with authors: Hayes and Craddock (1992) at 33.
Of juvenile offenders, **2.1%** had an IQ below 70, and **11.3%** had and IQ of 70-80. Estimated **7.7%** of young offenders on control orders have an intellectual disability.	**NSW:** New South Wales - Department of Family and Community Services (1989) at 22 (Appendix E).
2-20% of prisoners have an intellectual disability.	**NSW:** 1983 informal survey cited in New South Wales - Inter-departmental Committee on Intellectually Handicapped Adult Offenders in New South Wales Australia (1985) at 25.
14.2% of the sample of persons appearing before Local Courts were in the mildly intellectually disabled range of cognitive ability with a further **8.8%** in the borderline intellectual disability category.	**NSW:** New South Wales Law Reform Commission RR4 (1993).
36% of the sample of persons appearing before Local Courts were in the mildly intellectually disabled range of cognitive ability with a further **20.9%** in the borderline intellectual disability category.	**NSW:** New South Wales Law Reform Commission RR5 (1996).
3-4% of prison population have an IQ below 69.	**Victoria:** Bodna (1987) at 21.
At least **2-3%** of juvenile offenders surveyed between 1984 and 1986 had an IQ below 69.	**Victoria:** Bodna (1987) at 18 and 19.
At least **1.3%** of prison population has an intellectual disability.	**WA:** Fitzgerald and Downs-Stoney (1987).
1.17% of prison population is intellectually disabled.	**WA:** Jones and Coombes (1990) at 27.
0.5% of offenders coming before the lower and higher courts have an intellectual disability.	**WA:** Jones and Coombes(1990) at 4.
50-80 clients of intellectual disability services charged each year with a criminal offence.	**WA:** G Jones "Doing something positive: Developments in Western Australia" in Challinger (ed) (1987) 129 at 131.
A range of **2.6-24.3%** of prisoners across various States have an intellectual disability, with a national average of **9.5%** with an IQ below 70, and **1.6%** with an IQ belwo 55.	**USA:** Brown and Courtless (1971) at 29-31.
On average **2%** or **6.2%,** depending upon the testing method utilised, of prisoners across various States have an intellectual disability.	**USA:** Denkowski and Denkowski (19850 at 59-62.
40% of prison population have an IQ below 86.	**USA:** R March, C Friel and V Eissler "The adult MR in the criminal justice system" (1975) cited in Russell and

	Bryant (1987) at 54.
13% of male and **17%** of female admissions to a juvenile offender service in Texas had an IQ below 70.	**USA:** D Kirkpatrick and J Haskins *The Mentally Retarded Youthful Offender: A Preliminary Statistical Summary* (1971) cited in Hayes and Craddock (1992) at 38.
9% of suspects at police station had an IQ below 70 and a further **42%** had an IQ scores between 70 and 79.	**UK:** Gudjonsson, Clare, Rutter and Pearse (1993).
10% of prison population has an intellectual disability.	**Denmark:** B Svendsen and J Werner "Offenders within ordinary services for the mentally retarded in Denmark" cited in Hayes and Craddock (1992) at 32.
3.4-30% of juvenile offenders have an intellectual disability as compared with 1.86% of children with an intellectual disability receiving special education (from a review of various surveys).	D Murphy "The prevalence of handicapped conditions among juvenile delinquents" (1986) cited in Hayes and Craddock (1992) at 39.

[Link to text only version of table 1]

Table 2: Offenders - Types of Crime

Offenders with an Intellectual Disability	Source (see Select Bibliography for full citation)
Incidence of sex offending similar for prisoners with an intellectual deficit **(3.7%)** and the non-intellectually disabled **(4%)**.	**NSW:** Hayes and McIlwain (1988) at 36.
13% of registered clients with the Office of Intellectual Disability (Community Services Department) had been involved with the criminal justice system as offenders, the most common offences being theft and indecent or sexual assault.	**Victoria:** Bodna (1987) at 13-15.
Of the 77% of Disability Service (intellectually disabled) clients surveyed: **1.7%** had been convicted of a criminal offence, **33%** of these offences were considered of a type dangerous to public safety.	**Victoria:** Community Services Victoria, Office of Intellectual Disability Services, Submission to the Victorian Parliament Social Development Committee's *Inquiry into Mental Distrubance and Community Safety* (Fourth Report, 1992) at 121.
66.7% of intellectually disabled and **46.2%** of borderline offenders incarcerated for offences against the person as compared with 4.5% of the non-intellectually disabled prison population.**50%** of intellectually disabled and **30.8%** of borderline offenders incarcerated for sex offences as compared with 15.4% of the non-intellectually disabled prison population.	**WA:** Jones and Coombes (1990) at 21-22.
35.4% of sample group convicted of property offences as compared to 1.8% of general prison population. **11.8%** of sample group convicted of sex offences and traffic offences, as compared with 10.4% and 15.9% respectively in the general prison population. **5.9%** of sample group convicted for theft as compared with 24.6% in general prison population.	**WA:** Fitzgerald and Downs-Stoney (1987) at 9.
63.1% of intellectually disables offenders in Kentucky prisons had committed crimes against the person and **36.9%** against property.	**USA:** State of Kentucky, Legislative Research Commission "Mentally retarded offenders in adult and juvenile correctional institutions" (1975) cited in Sanatamour and West (1977) at 8.
No significant relationship between intellectual disability and type of offence committed.	**USA:** W McConochie "Juvenile delinquents: Relationships between WISC score, offences, race, chronological age, and residence"(1970) cited in Santamour and West (19770 at 8.
50% of intellectually disabled prisoners convicted of sex offences.	**USA:** G Gross *Activities of the Deveolopmental Disabilities Adult Offenders project* (1985) cited in W Glaser "A comparison of intellectually disabled and non-disabled sex offenders" in Freckelton, Greig and McMahon (eds) (1991) 243 at 247.
10-15% of sex offenders are intellectually impaired.	**USA:** W Murphy, E Coleman and M Haynes "Treatment and evaluation issues with the mentally retarded sex offender" (1983) cited in W Glaser " A comparison of intellectually disabled and non-intellectually disabled sex offenders" in Freckelton,,

	Greig and McMahon (eds) (1991) 243 at 243.
Nearly 40% of offender found to be intellectually disabled were sentenced for criminal homicide (not necessarily murder). Intellectually disabled prisoners found to have committed higher ratio of homicide and other violent crimes, and had more convictions and a longer history of imprisonment, than non-disabled prisoners.	**USA:** R Allen "Legal norms and practices affecting the mentally deficient" (1968) cited in S Hayes "Prosecutorial descretion and mentally abnormal offenders" in Potas (ed) *Prosecutorial Discretion* (1984) 191 at 194.
50% of victims of sex offences with an intellectual disability are women, compared to 89% of victims of non-intellectually disabled sex offenders.	**USA:** D Griffiths, D Hingsburger and R Christian "Treating developmentally handicapped sexual offenders: The York Behavioural Management Services Treatment Program" (1985) cited in Hayes "Sex offenders" (1991) at 2.
Percentage of intellectually disabled offenders dealt with for sexual offences was **six times higher** than the percentage for all offenders.	**UK:** G Simon "A manual of practice" (1980) cited in M Little "Sport and recreation: Help for intellectually disabled offenders" in Challinger (ed) (1987) 113 at 117.
15% of adolescent and **10%** of adult arsonists were intellectually disabled.	**Canada:** J Bradford and J Dimock "A comparitive study of adolescents and adults who wilfully set fires" (1986) cited in Hayes and Craddock (1992) at 44.
3-4% of exhibitionists and paedophiles are intellectually disabled.	**Canada:** J Mohr, R Turner and M Jerry *Paedophilia and Exhibitionism, Toronto* (1964) cited in W Glaser " A comparison of intellectually disabled and non-disabled sex offenders" in Freckelton, Greig and McMahon (eds) (1991) 243 at 247.
Higher and increasing incidence of sex offenders among intellectually disabled persons.	**Denmark:** L Lund "Mentally retarded criminal offenders in Denmark" (1990) cited in W Glaser "A comparison of intellectually disabled and non-disabled sex offenders" in Freckelton, Greig and McMahon (eds) (1991) 243 at 247.

[Link to text only version of table 2]

Table 3: Victims - Estimated of Prevalence and types of crimes

Victims with an Intellectual Disability	Source (see Select Bibliography for full citation)
6.4% of adults referred to Sexual Assault Services of the NSW Department of Health had an intellectual disability.	**NSW:** New South Wales Department of Health (1990) *Adult Sexual Assault Data Collection, January-June 1989* cited in New South Wales - Women's Co-ordination Unit (1990) at 11.
Of intellectually disabled victims, **70.34%** were sexually assaulted, **5.51%** assaulted, **2.75%** murdered, **1.37%** theft victims and the remaining **20%** victims of unspecified crimes.	**Victoria:** Johnson, Andrew and Topp (1988) at Appendix 4.
Victimisation rated of people with an intellectual disability: Offences against the person (assault, sexual assault, robbery, auto theft, other theft): **25.3%** of people with an intellectual disability are likely to be a victim compared to 10.5% of the general population; Household offences (break and enter, household property theft): **13.3%** of people with an intellectual disability are likely to be a victim compared to 9.8% of the general population.	**SA:** Wilson (1990) at 7.
Intellectually disabled individuals are more likely than non-disabled adults to be the victims of personal and household offences.	**SA:** Wilson and Brewer (1992) at 115.
75% of intellectually disabled people studied had survived at least one sexual assault, 99% of which had been committed by a person known to the victim.	**USA:** Seattle Rape Releif Project study cited in R Luckasson "People with mental retardation as victims of crime" in Conley, Luckasson and Bouthilet (eds) (1992) 209 at 210.
25% of 87 adolescent females with an intellectual disability had been sexually abused.	**USA:** A Chamberlain, J Rauh, A Passer, M McGrath and R Burket "Issues in fertility control for mentally retarded female adolescents: 1. Sexual activity, sexual abuse and contraception" (1984) cited in Tharinger, Burrows Horton and Millea (1990) at 304.
1 in 30 cases of sexual abuse/assault of persons with an intellectual disability is reported compared with 1 in 5 cases in the non-disabled population.	**USA:** S James "Sexual abuse of the handicapped" (1988) cited in Tharinger, Burrows Horton and Millea (1990) at 304.
55 cases of abuse occured over 33 month period in four facilities for intellectual disability with a combined population of approximately 1,000:40 physical abuse; 7 verbal abuse; 4 sexual abuse; 3 behavioural abuse; 1 neglect.	**USA:** Marchetti and McCartney (1990) at 368.
83% of women and **43%** of men of people with intellectual disabilities had been sexually assaulted.	**USA:** S Hard *Sexual abuse of the Developmentally Disabled: A Case Study* (1986) cited in New South Wales - Women's Co-ordination Unit (1990) at 11.
100,000 people with disabilities were raped in the USA in 1981, and the rate of other forms of sexual assault was considerably higher than this.	**USA:** Centre for Women's Policy Studies "Sexual exploitation and abuse of people with disabilities" (1984) cited in New South Wales - Women's Co-ordination Unit (1990) at 11.

4-5% of patients of British consultants have suffered abuse, predominantly sexual.	**UK:** L Cooke "Abuse of mentally handicapped adults" (1990) cited in McCormack (1991) at 143.
10% of all children with an intellectual disability have suffered sexual abuse.	**UK:** A Baker and S Duncan "Child sex abuse: A study of prevalence i Great Britian" (1985) cited in McCormack (1991) at 143.
Of children with various levels of learning disability in a "subnormality" hospital: **22%** were victims of physical abuse and **10%** were at risk, and **11%** could have been rendered learning disabled as a result of abuse.	**UK:** A Buchanan and J Oliver "Abuse and neglect as cause fo mental retardation: A study of 140 children admitted to sub-normality hospitals in Wiltshire (1977) in Westcott (1991) at 246.

REPORT 80 (1996) - PEOPLE WITH AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

Appendix C: Amendment to the Criminal Procedure Act 1986 (NSW)

[STATE ARMS]
New South Wales

Criminal Procedure Amendment (Mental Impairment) Bill 1996

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Criminal Procedure Act 1986* to insert provisions relating to procedures in criminal proceedings where the question of a defendant's unfitness to be tried for an offence is raised, or where the question whether a person should be found not guilty because of mental impairment is raised, and to clarify the operation of such provisions in relation to persons having an intellectual disability.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Criminal Procedure Act 1986* set out in Schedule 1.

Clause 4 repeals the *Mental Health (Criminal Procedure) Act 1990.*

Schedule 1 Amendments

Schedule 1 [2] inserts proposed Part 13 (Fitness to be tried and mental impairment) into the *Criminal Procedure Act 1986*. The proposed Part contains the following provisions:

Division 1 Preliminary

This Division defines words and expressions for the purposes of the proposed Part.

Division 2 Procedure relating to unfitness to be tried

Inquiries into fitness to be tried

- proposed sections 58–75

Clause 58 extends the proposed Division to criminal proceedings in all courts, including courts of summary jurisdiction.

Clause 59 sets out the presumption that a person is fit to be tried for an offence unless an inquiry establishes the contrary, on the balance of probabilities, and makes it clear that the onus does not rest on any particular party.

Clause 60 enables the question of a person's unfitness to be tried for an offence to be raised by any party or by the court.

Clause 61 requires the question, so far as practicable, to be raised before a person is indicted or before the start of summary proceedings. It may, however, also be raised at any other time in the proceedings.

Clause 62 enables the Attorney General to determine whether there is a need for an inquiry into fitness if the matter is raised before the trial in connection with an indictable offence.

Clause 63 enables the court to determine the need for an inquiry if the matter is raised after arraignment for an indictable offence.

Clause 64 requires the court to hold an inquiry into fitness if the Attorney General determines that it should be conducted or if the matter is raised after indictment or in relation to a summary offence. In the case of a Local Court, the Magistrate must first determine not to proceed under proposed Division 3 before conducting an inquiry. A court may dismiss the charge if of the opinion that it is inappropriate to proceed. A court is not required to hold an inquiry if it thinks the matter was not raised in good faith.

Clause 65 enables the court to make orders concerning the detention or examination of a person before an inquiry is held.

Clause 66 requires the question of unfitness to be tried to be determined by a Judge or Magistrate.

Clause 67 requires the accused person to be represented by counsel or a solicitor at an inquiry. An inquiry is not to be conducted in an adversary manner.

Clause 68 provides that if a person is found fit to be tried, the criminal proceedings proceed in accordance with usual procedures.

Clause 69 provides that if a person is found unfit to be tried, the court must refer the person to the Mental Health Review Tribunal (the ***Tribunal***) and enables the court to make other interim orders.

Clause 70 creates a presumption that a person found unfit to be tried after an inquiry continues to be unfit to be tried and, similarly, that a person found fit to be tried after an inquiry continues to be fit to be tried, unless the contrary is proved on the balance of probabilities.

Clause 71 excludes statements or other evidence given by accused persons to other persons in the course of examinations for the purposes of an inquiry.

Clause 72 gives the court additional powers to make, and to vary and revoke, interim orders after a person has been found unfit and before a special hearing is heard in respect of the person.

Clause 73 sets out the functions of the Tribunal when a person is referred to it after a finding by a court that the person is unfit to be tried for an offence. The Tribunal must determine whether the person is likely to become fit to be tried for the offence within the next 12 months. If it determines that the person will become fit to be tried, the Tribunal must then determine the mental condition of the person, whether appropriate treatment is available and whether the person objects to detention in a hospital. The provision extends the existing determinations to enable the Tribunal to make a determination as to intellectual disability. The Tribunal must notify the Attorney General if it is of the opinion that a person will become fit to be tried within the next 12 months.

Clause 74 sets out the orders the court may make after being notified of the Tribunal's determinations under proposed section 73. The court may release the person on bail for up to 12 months or may make an order detaining the person in a hospital or other place for treatment or in a different place (if the person objected to detention in the hospital).

Clause 75 enables the Attorney General, after being notified of the Tribunal's determination that a person will not be fit to be tried within 12 months, to direct that a special hearing be conducted or to advise that further proceedings will not be taken. The Attorney General must first receive and consider the advice of the Director of Public Prosecutions.

Special hearings

- proposed sections 76–86

Clause 76 requires a special hearing to be held if the Attorney General so directs. A special hearing is to be for the purpose of ensuring that, despite the unfitness of a person to be tried in accordance with normal procedures, the person is acquitted unless it can be proved to the requisite criminal standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative to the offence charged.

Clause 77 requires the person to be released if the Attorney General advises that the person will not be further proceeded against.

Clause 78 sets out procedural requirements for special hearings, which are to be conducted as nearly as possible as if they are trials of criminal proceedings. The requirements include the assumption that the accused person is taken to have pleaded not guilty, that any appropriate defence may be raised, an entitlement to give evidence and a requirement for the Judge to explain the proceedings to any jury.

Clause 79 enables an accused person to elect to have the special hearing determined by a Judge alone rather than by a jury.

Clause 80 makes it clear that a Judge's determination has the same effect as that of a jury and requires the Judge to set out the reasons for a determination.

Clause 81 lists the verdicts available to a Judge at a special hearing and the effect of a verdict. They include not guilty of the offence charged, not guilty on the ground of mental impairment, that, on the limited evidence available, the person committed the offence charged or that, on the limited evidence available, the person committed an offence available as an alternative to the offence charged. A verdict that the person committed the offence charged or another offence will constitute a bar to further prosecution in respect of the same circumstances and to further criminal proceedings in relation to the offence or substantially the same offence.

Clause 82 applies the procedure set out in Division 5 if a person is found at a special hearing to have committed the offence charged or an alternative offence.

Clause 83 applies the procedure set out in Division 5 if a person is found not guilty by reason of mental impairment at a special hearing.

Clause 84 requires a person who is found not guilty at a special hearing to be dealt with as if the person had been found not guilty at a normal trial.

Clause 85 describes the procedure to be followed when the Tribunal advises the Attorney General that a person has become fit to be tried for an offence and a special hearing has not been held. The Attorney General must (after consulting the Director of Public Prosecutions) determine whether to request a further inquiry as to unfitness or to advise the court that no further proceedings will be taken. The person must be released by the Minister for Health if no further proceedings are to be taken.

Clause 86 requires criminal proceedings to recommence if a person is found to be fit to be tried after a further inquiry is held. In a case where a person is found unfit to be tried after a further inquiry and the person has been held for a total period of not less than 12 months, the court must hold a special hearing. In any other case, the court may conduct a special hearing or order the person's return to custody.

Division 3 Summary proceedings before Magistrate relating to persons with mental disorders or intellectual disability

Clause 87 applies proposed sections 88 and 89 (relating to diversion of offenders) to summary offences or indictable offences triable summarily, heard before a Magistrate.

Clause 88 enables a Magistrate to dismiss a charge and discharge an accused person if it appears to the Magistrate that the person has an intellectual disability, a mental illness or a mental condition but is not a mentally ill person within the meaning of the *Mental Health Act 1990* and the Magistrate thinks that it is not appropriate to proceed according to law. The matters to be considered in reaching a decision to take action under the proposed section include the evidence, the trivial nature of the charge or offence, the person's condition and the person's period of detention.

Clause 89 enables a Magistrate to discharge an accused person, or to order the person's assessment at a hospital if it appears to the Magistrate that the person is a mentally ill person within the meaning of the *Mental Health Act 1990*. If a person is dealt with under the proposed section, the relevant charge is taken to have been dismissed after 6 months, unless within that period the person is brought back before the court to be further dealt with in relation to the charge.

Clause 90 enables an accused person to apply to have a Magistrate disqualify himself or herself from further hearing proceedings if the Magistrate decides not to proceed under proposed section 88 or 89.

Clause 91 enables a Magistrate to order that a person who is awaiting committal for trial or trial for an offence or summary disposal of the person's case be examined with a view to enabling the transfer of the person, under the *Mental Health Act 1990*, from prison to a hospital.

Clause 92 gives a Magistrate power to inform himself or herself as the Magistrate thinks fit for the purposes of the proposed Division, but not so as to require an accused person to incriminate himself or herself.

Division 4 Defence of mental impairment

Clause 93 applies the proposed Division to criminal proceedings in all courts, including courts of summary jurisdiction.

Clause 94 makes it clear that the references in the proposed Part to the defence of mental impairment are references to the common law defence of insanity.

Clause 95 requires a Magistrate to consider applying the diversionary options in proposed sections 88 and 89 if the defence of mental impairment is raised in proceedings.

Clause 96 sets out the explanation to the jury required in a case where the defence of mental impairment is raised.

Clause 97 requires a special verdict of not guilty by reason of mental impairment to be returned if a jury or Judge is of the opinion that a person did the act or omission charged but was mentally impaired at the time.

Clause 98 applies the procedure set out in Division 5 if a person is found to be not guilty by reason of mental impairment.

Division 5 Procedures relating to disposition of persons found at a special hearing to have committed offences or not guilty by reason of mental impairment

Clause 99 applies the proposed Division to persons found, at a special hearing, to have committed an offence and to persons found not guilty of an offence by reason of mental impairment.

Clause 100 requires the court concerned to determine whether it would, in normal circumstances, have imposed a sentence of imprisonment or penal servitude and to nominate a term (called the ***limiting term***) in respect of the offence. If it would not have imposed a sentence of imprisonment or penal servitude, the court may impose any other penalty or make any other order it might have made on the person's conviction for the offence concerned.

Clause 101 requires a limiting term to be the estimated sentence a person would have received if the person had pleaded guilty to the offence concerned and had been convicted of the offence. The court may also take into account any periods the person has already spent in custody.

Clause 102 requires the court to refer a person to the Tribunal and to make appropriate custody orders if it nominates a limiting term.

Clause 103 sets out the actions the Tribunal must take when a person is referred to it. It must determine the mental condition of a person and, if it finds that the person has a mental illness or mental condition for which treatment is available in a hospital and the person does not object to being in a hospital, order the person to be detained in a hospital. If it finds that the person does not have such a mental condition or objects to being so detained, the Tribunal may order that the person be detained in a place other than a hospital. If the Tribunal determines that the person has an intellectual disability and does not have a mental illness, the Tribunal may determine that the person be detained in a place other than a hospital.

Schedule 1 [1] makes a consequential amendment.

[STATE ARMS]

New South Wales

Criminal Procedure Amendment (Mental Impairment) Bill 1996

Contents

[STATE ARMS]

New South Wales

Criminal Procedure Amendment (Mental Impairment) Bill 1996

No , 1998

A Bill for

An Act to amend the *Criminal Procedure Act 1986* with respect to criminal proceedings involving persons affected by mental illness, intellectual disability and other mental conditions; and to repeal the *Mental Health (Criminal Procedure) Act 1990*.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Criminal Procedure Amendment (Mental Impairment) Act 1996*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Criminal Procedure Act 1986 No 209

The *Criminal Procedure Act 1986* is amended as set out in Schedule 1.

4 Repeal of Mental Health (Criminal Procedure) Act 1990 No 10

The *Mental Health (Criminal Procedure) Act 1990* is repealed.

Schedule 1 Amendments

(Section 3)

[1] Section 3C

Insert after section 3B:

3C Notes

Notes in the text of this Act do not form part of this Act.

[2] Part 13

Insert after Part 12:

Part 13Fitness to be tried and mental impairment

Division 1 Preliminary

57 Definitions

(1) In this Part:

accused person means a person who has been charged with an indictable or summary offence, whether or not the person has been committed for trial.

forensic patient has the same meaning as in the *Mental Health Act 1990*.

hospital has the same meaning as in the *Mental Health Act 1990*.

inquiry means an inquiry under section 64 conducted in order to determine whether a person is unfit to be tried for an offence.

intellectual disability means a significantly below average intellectual functioning existing concurrently with 2 or more deficits in adaptive behaviour.

Judge includes a Magistrate.

Magistrate means:

(a) a justice or justices, or

(b) a Magistrate, or

(c) a Children's Magistrate, or

(d) an Industrial Magistrate.

mental condition includes senility, brain damage and severe personality disorder but does not include mental illness or intellectual disability.

Mental Health Review Tribunal means the Mental Health Review Tribunal constituted under the *Mental Health Act 1990*.

mental illness includes, but is not limited to, mental illness within the meaning of the *Mental Health Act 1990*.

special hearing means a special hearing under section 76.

(2) In this Part, a reference to a person having done an act alleged to have been done is a reference to a person having done or having omitted to do an act, matter or thing alleged to have been done or alleged to have been omitted to be done.

Division 2 Procedure relating to unfitness to be tried

58 Application

This Division applies to criminal proceedings in all courts, including courts of summary jurisdiction.

59 Presumption of fitness to stand trial and standard of proof

(1) A person's fitness to stand trial is to be presumed unless it is established, on an inquiry under this Division, that the person is unfit to stand trial.

(2) The question of a person's unfitness to stand trial is to be determined on the balance of probabilities.

(3) The onus of proof of the question of a person's unfitness to be tried for an offence does not rest on any particular party to the proceedings in respect of the offence.

60 Person by whom question of unfitness may be raised

The question of a person's unfitness to be tried for an offence may be raised by any party to the proceedings in respect of the offence or by the court.

61 Time at which question of unfitness may be raised

(1) The question of a person's unfitness to be tried for an indictable offence is, so far as practicable, to be raised before the person is arraigned on a charge in respect of the offence but may be raised at any time during the course of the hearing of the proceedings in respect of the offence.

(2) The question of a person's unfitness to be tried for a summary offence or an indictable offence that is to be dealt with summarily is, so far as practicable, to be raised before the hearing of proceedings in respect of the offence but may be raised at any time during the course of the hearing of the proceedings in respect of the offence.

(3) Nothing in this section prevents the question of a person's unfitness to be tried for an offence from being raised on more than one occasion in respect of the same proceedings.

62 Procedure where question of unfitness raised before arraignment

(1) If the question of a person's unfitness to be tried for an indictable offence is raised at any time before the person is arraigned on a charge in respect of the offence, the Attorney General must determine whether an inquiry should be conducted before the hearing of the proceedings in respect of the offence.

(2) The Attorney General may, at any time before the inquiry is commenced, determine that there is no longer any need for such an inquiry to be conducted.

63 Procedure where question of unfitness raised after arraignment

If the question of a person's unfitness to be tried for an indictable offence is raised after the person is arraigned on a charge in respect of the offence, the court must hear any submissions relating to the conducting of an inquiry in the absence of any jury which has been constituted for the purposes of the proceedings relating to the offence.

64 Procedure on raising question of unfitness

(1) The court must (except as provided by this section) conduct an inquiry in order to determine whether the person is unfit to be tried for the offence if, in respect of an offence:

(a) the Attorney General determines that an inquiry should be conducted and does not subsequently determine, before the inquiry is commenced, that there is no longer any need for such an inquiry to be conducted, or

(b) the question of a person's unfitness to be tried for an indictable offence is raised after the person is arraigned on a charge in respect of the offence, or

(c)the question of a person's unfitness to be tried is raised in respect of a summary offence or an indictable offence that is to be dealt with summarily.

(2) The inquiry must be conducted as soon as practicable after the Attorney General's determination is made or the question is raised.

(3) If the question of a person's unfitness to be tried is raised in respect of an offence to be dealt with summarily in a Local Court, the Magistrate must not conduct an inquiry into the question of the person's unfitness to be tried for the offence unless the Magistrate first considers whether to take action under section 88 or 89 and has determined not to take action under either of those sections.

(4) If, in respect of a person charged with an offence (other than an offence to be dealt with summarily in a Local Court), the court is of the opinion that it is inappropriate to inflict any punishment or any punishment other than a nominal punishment, having regard to the trivial nature of the charge or offence, the nature of the person's condition, the periods of the person's custody or detention in respect of the offence or any other matter which the court thinks it proper to consider, the court may determine not to conduct an inquiry and may dismiss the charge and order that the person be released.

(5) If it appears to the court that the question of a person's unfitness to be tried for an offence has not been raised in good faith, the court must not conduct an inquiry into the question.

65 Powers of court before conducting inquiry

Before conducting an inquiry, the court may do any one or more of the following:

(a) adjourn the proceedings,

(b) grant the accused person bail in accordance with the *Bail Act 1978*,

(c) remand the accused person in custody for a period not exceeding 28 days,

(d) request the accused person to undergo a psychiatric examination or other examination,

(e) request that a psychiatric report or other report relating to the accused person be obtained,

(f) discharge any jury constituted for the purpose of those proceedings,

(g) make any other order that the court considers appropriate.

66 Determination of unfitness

(1) The question of a person's unfitness to be tried for an offence is to be determined by a Judge alone.

(2) A Judge must give reasons for a determination, including the principles of law applied by the Judge and the findings of fact on which the Judge relied.

67 Conduct of inquiry

(1) At an inquiry, the accused person is, unless the court otherwise allows, to be represented by a legal practitioner.

(2) An inquiry is not to be conducted in an adversary manner.

68 Person found fit to be tried

If, following an inquiry, an accused person is found fit to be tried for an offence, the proceedings brought against the person in respect of the offence are to recommence or continue in accordance with the appropriate criminal procedures.

69 Person found unfit to be tried

(1) If, following an inquiry, an accused person is found unfit to be tried for an offence, the proceedings brought against the person in respect

of the offence must not, except for the purpose of doing any of the things referred to in paragraph (b), be recommenced or continued and the court:

(a) must refer the person to the Mental Health Review Tribunal, and

(b) may discharge any jury constituted for the purpose of those proceedings and may, pending the determination of the Tribunal under section 73, take any one or more of the actions set out in subsection (2).

(2) The court may:

(a) adjourn the proceedings,

(b) grant the person bail in accordance with the *Bail Act 1978*,

(c) remand the person in custody until the determination of the Tribunal has been given effect to,

(d) make any other order that the court considers appropriate.

70 Presumptions as to findings concerning unfitness

It is to be presumed:

(a) that a person who has, in accordance with this Division, been found to be unfit to be tried for an offence continues to be unfit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case, and

(b) that a person who has, in accordance with this Division, been found fit to be tried for an offence continues to be fit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case.

71 Evidence excluded

A statement, or other evidence, given by an accused person to another person in the course of a medical or other examination of the accused person by the other person for the purposes of preparing a report for an inquiry as to the accused person's mental condition is not admissible against the accused person in any criminal proceedings.

72 Additional orders court may make following determination that person is unfit to be tried

(1) An application may be made under this section if an accused person has been found unfit to be tried for an offence and a special hearing has not been held in respect of the person.

(2) A court may, on the application of an accused person or the prosecuting authority, make any order that it could make under section 69 (2) or may vary or revoke any order made under that section or this section.

73 Functions of Mental Health Review Tribunal on referral after an inquiry

(1) If a person has been referred to the Mental Health Review Tribunal under section 69 after a finding that the person is unfit to be tried for an offence, the Tribunal must, as soon as practicable after the person is so referred, determine whether, on the balance of probabilities, the person will, during the period of 12 months after the finding of unfitness, become fit to be tried for the offence.

(2) If the Tribunal determines that a person will, during the period of 12 months after the finding of unfitness, become fit to be tried for an offence, the Tribunal must also determine whether or not:

(a) the person has a mental illness, or

(b) the person has a mental condition for which treatment is available in a hospital and, if the person is not in a hospital, whether or not the person objects to being detained in a hospital, or

(c) the person has an intellectual disability.

(3) After determining in respect of a person the matters referred to in this section, the Tribunal must notify the court which referred the person to it of its determination.

(4) If the Tribunal determines that a person will not, during the period of 12 months after the finding of unfitness, become fit to be tried for an offence, the Tribunal must notify the Attorney General of the determination and furnish the Director of Public Prosecutions with a copy of the notification.

74 Orders court may make following determination of Mental Health Review Tribunal that person will be fit to plead within 12 months

(1) If the court is notified by the Mental Health Review Tribunal of its determination that a person will, on the balance of probabilities, become fit to be tried during the period of 12 months after the finding of unfitness and of its determination in relation to the matters set out in

section 73 (2), the court may take the action set out in subsection (2) or may take action under subsection (3), (4) or (5), as appropriate.

(2) The court may grant the person bail in accordance with the *Bail Act 1978* for a period not exceeding 12 months.

(3) The court may order that the person be taken to and detained in a hospital, for a period not exceeding 12 months, if the Tribunal has determined that the person has a mental illness or that the person has a mental condition for which treatment is available in a hospital and that the person, not being in a hospital, does not object to being detained in a hospital.

(4) The court may order that the person be detained in a place other than a hospital, for a period not exceeding 12 months, if the Tribunal has determined that the person does not have a mental illness or a mental condition referred to in subsection (3) or that the person has such a mental condition but that the person objects to being detained in a hospital.

(5) The court may order that the person be taken to and detained in a place other than a hospital, for a period not exceeding 12 months, if the Tribunal has determined that the person has an intellectual disability and has not determined that the person has a mental illness.

75 Attorney General's functions following determination of Mental Health Review Tribunal that person will not be fit to plead within 12 months

If the Attorney General is notified by the Mental Health Review Tribunal of its determination that a person will not, on the balance of probabilities, become fit to be tried during the period of 12 months after the finding of unfitness, the Attorney General (after receiving and considering the advice of the Director of Public Prosecutions) may:

(a) direct that a special hearing be conducted in respect of the offence with which the person is charged, or

(b) advise the court which referred the person to the Tribunal that the person will not be further proceeded against by the Attorney General or the Director of Public Prosecutions in respect of the offence.

76 Court to hold special hearing on direction of Attorney General

(1) If the Attorney General directs that a special hearing be conducted in respect of an offence with which a person is charged, the appropriate court must, as soon as practicable after the Attorney General so directs, conduct a special hearing for the purpose of ensuring, despite the unfitness of the person to be tried in accordance with the normal procedures, that the person is acquitted unless it can be proved to the

requisite criminal standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative to the offence charged.

(2) The question whether a person has committed an offence charged or any other offence available as an alternative to an offence charged is, except as provided by section 79, to be determined at a special hearing by a jury constituted for that purpose or, if the proceedings relate to an offence to be dealt with summarily, by a Judge.

(3) The *Jury Act 1977* applies to and in respect of the constitution of a jury and a jury constituted as referred to in subsection (2) in the same way as it applies to and in respect of the constitution of a jury and a jury for the trial of any criminal proceedings.

(4) A member of a jury otherwise constituted for the purpose of any proceedings relating to the same accused person and the same offence is disqualified from being a member of a jury constituted as referred to in this section.

77 Release of certain persons

If, under section 75, the Attorney General advises a court that a person will not be further proceeded against in respect of an offence, the court must order the release of the person.

78 Nature and conduct of special hearing

(1) Except as provided by this Act, a special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings.

(2) At a special hearing, the accused person must, unless the court otherwise allows, be represented by a legal practitioner and the fact that the person has been found unfit to be tried for an offence is to be presumed not to be an impediment to the person's representation.

(3) At a special hearing:

(a) the accused person is to be taken to have pleaded not guilty in respect of the offence charged, and

(b) the counsel or solicitor, if any, who represents the accused person may exercise the rights of the person to challenge jurors or the jury, and

(c) without limiting the generality of subsection (1), the accused person may raise any defence that could be properly raised if the special hearing were an ordinary trial of criminal proceedings, and

(d) without limiting the generality of subsection (1), the accused person is entitled to give evidence.

(4) At the commencement of a special hearing, the court must explain to the jury the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts that are available and the legal and practical consequences of those verdicts.

79 Judge may try special hearing

(1) At a special hearing, the question whether an accused person has committed an offence charged or any other offence available as an alternative to an offence charged is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a legal practitioner.

(2) An election may be made by a legal practitioner acting for the accused person, if:

(a) the legal practitioner is of the opinion that it is in the best interests of the person to do so, and

(b) the person is not able to make an election.

(3) An election may be made only with the consent of the prosecuting authority.

(4) An election must be made before the date fixed for the person's special hearing in the Supreme Court or District Court.

(5) An accused person who elects to have a special hearing determined by the Judge alone may, at any time before the date fixed for the person's special hearing, subsequently elect to have the matter determined by a jury.

(6) Rules of court may be made with respect to elections under this section.

80 Verdict of judge

(1) The verdict of a Judge who determines a special hearing without a jury has, for all purposes, the same effect as a verdict of a jury.

(2) A Judge must give reasons for a determination, including the principles of law applied by the Judge and the findings of fact on which the Judge relied.

81 Verdicts at special hearing

(1) The verdicts available to a court at a special hearing include the following:

(a) not guilty of the offence charged,

(b) not guilty on the ground of mental impairment,

(c) that on the limited evidence available, the accused person committed the offence charged,

(d) that on the limited evidence available, the accused person committed an offence available as an alternative to the offence charged.

(2) A verdict in accordance with subsection (1) (b) is to be taken to be equivalent for all purposes to a special verdict that an accused person is not guilty by reason of mental impairment under section 97.

(3) A verdict in accordance with subsection (1) (c) or (d):

(e) constitutes a qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates, and

(f) constitutes a bar to further prosecution in respect of the same circumstances and to any other criminal proceedings brought against the person for the same offence or substantially the same offence, and

(g) is subject to appeal in the same manner as a verdict in an ordinary trial of criminal proceedings, and

(h) is to be taken to be a conviction for the purpose of enabling a victim of the offence in respect of which the verdict is given to make a claim for compensation.

82 Finding that person committed offence

If, following a special hearing, it is found on the limited evidence available that an accused person committed the offence charged or some other offence available as an alternative, the procedure set out in Division 5 is to be followed.

83 Special verdict of not guilty by reason of mental impairment

If at a special hearing the defence of mental impairment is raised and the jury or Judge, as the case may be, returns a special verdict that the

accused person is not guilty by reason of mental impairment, the procedure set out in Division 5 is to be followed.

84 Verdict of not guilty

If at a special hearing it is found that an accused person is not guilty of an offence charged other than by reason of mental impairment, the person is thereafter to be dealt with as if the person had been found not guilty at a normal trial of criminal proceedings.

85 Action to be taken on notification that a person is fit to be tried

(1) If the Mental Health Review Tribunal has notified the Attorney General that it is of the opinion that a person who has been found to be unfit to be tried for an offence has become fit to be tried for the offence and a special hearing has not been conducted in respect of the offence, the Attorney General (after consultation with the Director of Public Prosecutions):

(a) must request the court before which the person was found to be unfit to be tried for the offence to hold a further inquiry as to the person's unfitness, or

(b) must advise the Minister for Health that the person will not be further proceeded against by the Attorney General or the Director of Public Prosecutions in respect of the offence.

(2) If the Attorney General requests that a further inquiry be held, the appropriate court must, as soon as practicable after the Attorney General so requests, hold a further inquiry.

(3) If the Attorney General advises the Minister for Health that a person will not be further proceeded against, the Minister for Health must do all such things within the power of the Minister for Health to order the person's release from detention or to otherwise ensure the person's release from detention.

(4) Sections 64 (subsection (4) excepted), 65, 66 and 67 apply to and in respect of a further inquiry under subsection (2) in the same way as those sections apply to and in respect of an inquiry.

86 Procedure after completion of further inquiry

(1) If, following a further inquiry under section 85, an accused person is found fit to be tried for an offence, the proceedings brought against the person in respect of the offence are to recommence or continue in accordance with the appropriate criminal procedures.

(2) If, following a further inquiry under section 85, an accused person is found unfit to be tried for an offence:

(a) in the case of an accused person who has been detained in custody as a prisoner or in a hospital as a forensic patient for a period or continuous periods in the aggregate of not less than 12 months and in respect of whom a special hearing has not been held—the court must conduct a special hearing, or

(b) in the case of any other accused person—the court may conduct a special hearing (if a special hearing has not been held) or order that the person be returned to the custody or hospital from which the person was taken.

Division 3 Summary proceedings before Magistrate relating to persons with mental disorders or intellectual disability

87 Application

(1) Sections 88 and 89 apply to criminal proceedings in respect of summary offences or indictable offences triable summarily, being proceedings before a Magistrate, but do not apply to committal proceedings.

(2) Sections 88 and 89 apply to the condition of an accused person as at the time when a Magistrate considers whether to apply the relevant section to the accused person.

(3) This Division applies whether or not the question of a person's unfitness to be tried for an offence is raised.

88 Persons with mental illness, mental condition or intellectual disability

(1) A Magistrate may dismiss a charge and discharge an accused person if, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:

(a) that the accused person has an intellectual disability, a mental illness or a mental condition, but is not a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, and

(b) that it is not appropriate to proceed according to law, having regard to an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, the trivial nature of the charge or offence, the nature of the person's condition, the periods of the person's detention or custody in respect of the offence or any other matter which the Magistrate thinks it proper to consider.

(2) Before deciding whether to take action under this section, the Magistrate may do any one or more of the following:

(a) adjourn the proceedings, or

(b) grant the accused person bail in accordance with the *Bail Act 1978*, or

(c) order the accused person to undergo a psychiatric examination or other examination, or

(d) order that a psychiatric report or other report relating to the accused person be obtained, or

(e) make any other interim order that the Magistrate considers appropriate.

(3) A decision under this section to dismiss charges against an accused person does not constitute a finding that the charges against the accused person are proven or otherwise.

(4) A decision under this section is to be recorded by the court.

89 Mentally ill persons

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate that the accused person is a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, the Magistrate:

(a) may order that the accused person be taken by a police officer to, and detained in, a hospital for assessment, or

(b) may order that the accused person be taken by a police officer to, and detained in, a hospital for assessment and that, if the accused person is found on assessment at the hospital not to be a mentally ill person or mentally disordered person, the person be brought by a police officer back before the court, or

(c) may discharge the accused person, unconditionally or subject to conditions, into the care of a responsible person.

(2) If an accused person is dealt with at the commencement or at any time during the course of the hearing of proceedings before a Magistrate in accordance with this section, the charge that gave rise to the proceedings, on the expiration of the period of 6 months after the date on which the accused person is so dealt with, is to be taken to have been dismissed unless, within that period, the accused person is brought before a Magistrate to be further dealt with in relation to the charge.

(3) If an accused person is brought before a Magistrate to be further dealt with in relation to a charge as referred to in subsection (2), the Magistrate must, in dealing with the charge, take account of any period during which the accused person was in a hospital as a consequence of an order made under this section.

(4) The fact that charges are to be taken to have been dismissed under subsection (2) does not constitute a finding that the charges against the accused person are proven or otherwise.

(5) The regulations may prescribe the form of an order under this section.

(6) A decision under this section is to be recorded by the court.

(7) Nothing in subsection (1) limits any other order the Magistrate may make in relation to the accused person, whether by way of adjournment, the granting of bail in accordance with the *Bail Act 1978* or otherwise.

90 Disqualification of Magistrate

(1) If:

(a) a Magistrate has inquired into whether an accused person should be dealt with under section 88 or 89, and

(b) the Magistrate has decided not to so deal with the accused person,

the Magistrate must, on the application of the accused person, disqualify himself or herself from further hearing the proceedings concerned or from conducting an inquiry into the question of the person's unfitness to be tried, as the case requires.

(2) An application may be made by an accused person under this section only if:

(a) except as provided by paragraph (b), the question whether the accused person should be dealt with under section 88 or 89 has not been previously inquired into by another Magistrate in the same proceedings, or

(b) in the case of proceedings in which another Magistrate has previously inquired into whether the accused person should be dealt with under section 88 or 89, the Magistrate before whom the proceedings are being heard considers that it should, because of the circumstances of the case, be permitted to be made.

91 Transfer of prisoners

(1) This section applies to a person who is awaiting committal for trial or trial for an offence or summary disposal of the person's case.

(2) If it appears to a Magistrate that it may be appropriate to transfer a person to whom this section applies from prison to a hospital under section 97 or 98 of the *Mental Health Act 1990*, the Magistrate may make an order directing:

(a) that the person be examined by 2 medical practitioners, one of whom is a psychiatrist, and

(b) that, if appropriate, the relevant certificates be furnished to the Chief Health Officer under section 97 or 98 of the *Mental Health Act 1990*, and

(c) that the Chief Executive Officer of the Corrections Health Service notify the Magistrate of the action, if any, taken under section 97 or 98 of the *Mental Health Act 1990*.

92 Means by which Magistrate may be informed

For the purposes of this Division, a Magistrate may inform himself or herself as the Magistrate thinks fit, but not so as to require an accused person to incriminate himself or herself.

Division 4 Defence of mental impairment

93 Application

This Division applies to criminal proceedings in all courts, including courts of summary jurisdiction.

94 Mental impairment

For the purposes of this Part, a person is mentally impaired if the person is mentally impaired so that the person is not responsible according to law for an act or omission the subject of a charge.

Note. A person suffering from senility, intellectual disability, mental illness, brain damage or severe personality disorder may be mentally impaired for the purposes of the common law defence of insanity.

95 Magistrate to consider diversionary options

If, on the trial of a person charged with an offence in a Local Court, a question is raised as to whether the person was, at the time of the

commission of the offence, mentally impaired, the Magistrate must not continue the proceedings unless the Magistrate first considers whether to take action under section 88 or 89 and determines not to take action under those sections.

96 Explanation to jury

If, on the trial of a person charged with an offence, a question is raised as to whether the person was, at the time of commission of the offence, mentally impaired, the Judge, in a case tried before a jury, must explain to the jury the findings which may be made on the trial and the legal and practical consequences of those findings and must include in its explanation:

(a) a reference to the existence and composition of the Mental Health Review Tribunal, and

(b) a reference to the relevant functions of that Tribunal with respect to forensic patients, including a reference to the requirements of the *Mental Health Act 1990* that the Tribunal may make a determination for the release of a person detained in accordance with Division 5 only if the Tribunal is satisfied, on the evidence available to it, that the safety of the person or any member of the public will not be seriously endangered by the person's release.

97 Special verdict

If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally impaired at the time when the act was done or omission made, then, if it appears to the jury or the Judge before which the person is tried that the person did the act or made the omission charged, but was mentally impaired at the time when the person did or made it, the jury or Judge must return a special verdict that the accused person is not guilty by reason of mental impairment.

98 Effect of finding and declaration as to mental impairment

If, on the trial of a person charged with an offence, the jury or Judge returns a special verdict that the accused person is not guilty by reason of mental impairment, the procedure set out in Division 5 is to be followed.

Division 5 Procedures relating to disposition of persons found at a special hearing to have committed offences or not guilty by reason of mental impairment

99 Application

This Division applies if a person has been:

(a) found, at a special hearing, on the limited evidence available to have committed the offence charged or some other offence available as an alternative, or

(b) found not guilty of an offence by reason of mental impairment (whether at a trial or at a special hearing).

100 Penalty to be determined

(1) At a special hearing, the court must indicate whether, if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for the offence that the person is found to have committed, it would have imposed a sentence of imprisonment or penal servitude.

(2) At a trial, the court must indicate whether, if the person had been convicted of the offence that the person is found to have committed, it would have imposed a sentence of imprisonment or penal servitude.

(3) If a court indicates under subsection (1) or (2) that it would have imposed a sentence of imprisonment or penal servitude, it must nominate a term, in this Part referred to as a ***limiting term***, in respect of that offence.

(4) If a court indicates that it would not have imposed a sentence of imprisonment or penal servitude in respect of a person, the court may impose any other penalty or make any other order it might have made on conviction of the person for the relevant offence in a normal trial of criminal proceedings.

(5) Any such other penalty imposed or order made, under subsection (4), is to be subject to appeal in the same manner as a penalty or order in a normal trial of criminal proceedings.

101 Limiting terms

(1) The limiting term nominated by a court under section 100 is to be the best estimate of the sentence the court would have considered appropriate if:

(a) the person had pleaded guilty to the offence, and

(b) the person had been convicted of the offence.

(2) In nominating a limiting term in respect of a person or imposing any other penalty or making any other order under section 100, the court may, if it thinks fit, take into account the periods, if any, of the person's custody or detention before, during and after the special hearing or trial (being periods related to the offence).

(3) A limiting term nominated in respect of a person takes effect from the time when it is nominated unless the court, after taking into account the periods, if any, of the person's custody or detention before, during and after the special hearing or trial (being periods related to the offence), directs that the term be taken to have commenced at an earlier time.

102 Consequences of nomination of limiting term

If in respect of a person a court has nominated a limiting term, the court:

(a) must refer the person to the Mental Health Review Tribunal, and

(b) may make such order with respect to the custody of the person as the court considers appropriate.

103 Tribunal to determine placement of accused persons

(1) If a court refers a person to the Tribunal, the Tribunal must determine whether or not:

(a) the person has a mental illness, or

(b) the person has a mental condition for which treatment is available in a hospital and, if the person is not in a hospital, whether or not the person objects to being detained in a hospital, or

(c) the person has an intellectual disability.

(2) If the Tribunal determines that the person has a mental illness or that the person has a mental condition for which treatment is available in a hospital and that the person, not being in a hospital, does not object to being detained in a hospital, the Tribunal may order that the person be taken to and detained in a hospital.

(3) If the Tribunal determines that the person does not have a mental illness or a mental condition referred to in subsection (2) or that the person has such a mental condition but that the person objects to being detained in a hospital, the Tribunal may order that the person be detained in a place other than a hospital.

(4) If the Tribunal determines that the person has an intellectual disability and that the person does not have a mental illness, the Tribunal may order that the person be detained in a place other than a hospital.

(5) An order under this section has effect according to its tenor.

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