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31 October 2011

The Hon J Wood AO QC
Chairperson
New South Wales Law Reform Commission

Via email: nsw_lrc@agd.nsw.gov.au

Dear Judge Wood

RE: Preliminary Submission on Sentencing

About IDRS

The Intellectual Disability Rights Service (IDRS) is a community legal centre that provides legal services to people with intellectual disability throughout New South Wales. IDRS services include the provision of legal advice and representation in select matters. IDRS engages in policy and law reform work, and community legal education with a view to advancing the rights of people with intellectual disability. IDRS provides 24 hour state wide on-call volunteer solicitors to give over the phone legal advice to people with intellectual disability who have been arrested.

IDRS also operates the Criminal Justice Support Network ("CJSN") which provides trained volunteers to people with intellectual disability when they come into contact with the criminal justice system, particularly at the police station and at court.

IDRS' expertise derives from our experience with people with intellectual disability in the criminal justice system. As such, IDRS' focus in this preliminary submission is on the needs and interests of people with intellectual disability.

People with intellectual disability and the criminal justice system

In IDRS' experience, there is a lack of knowledge amongst the wider community, including justice personnel, about the nature and possible effects of intellectual disability. IDRS has also found that the distinction between intellectual disability and mental illness is often misunderstood by personnel at every level of the criminal justice system. That is, from police officers, to lawyers, to members of the judiciary.

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We note that the High Court of Australia, citing the NSW Law Reform Commission, recently said,

A person's intellectual disability can be classified as 'mild', 'moderate', 'severe' or 'profound', based upon certain IQ (intelligent quotient) ranges. A further category, 'borderline', is also used to indicate people just above the 'mild' range in terms of intellectual functioning. A person with a 'severe' or 'profound' disability may be unable to learn basic social skills such as speech, 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.' These classifications have limited utility and can sometimes be misleading. For example, such terms may suggest to criminal justice personnel, who do not have a full understanding of the disability involved, that a 'mild' intellectual is inconsequential.' *Muldrock v The Queen* [2011] HCA 39 [50]

People with intellectual disability are over represented at all stages of the criminal justice system. Many people with intellectual disability who are incarcerated are only assessed as having an intellectual disability once they are in prison. An important consequence of assessment of intellectual disability for people can be the provision of supports from agencies such as Aging, Disability and Homecare ("ADHC") or other non government agencies. ADHC's Community Justice Program ("CJP") provides a useful community option for people with intellectual disability who are exiting prison. However, incarceration of people with intellectual disability often results in entrenchment in a criminal culture.

Many lawyers are not aware that a section 32 order pursuant to the *Mental Health (Forensic Provisions) Act 1990* may be available to people with intellectual disability that have been charged with a matter that is to be finalised in the Local Court. Even if the lawyer is aware of eligibility under the section, it is often a difficult and lengthy process to make referrals to ADHC or to other suitable non government agencies for support services to assist the client to remain uninvolved with the criminal justice system. (IDRS is currently engaged in a joint project with Legal Aid NSW to foster greater use of section 32.) A possible consequence of the difficulties in referrals to appropriate services may be the refusal of the section 32 application. For further discussion of these issues, see Baldry et al, NSW District Court Annual Conference 2010, *Background Paper: Pathways to Prison for Mentally Ill and Cognitively Impaired Offenders* and IDRS (2008) *Enabling Justice*; Sydney; IDRS.

When people with intellectual disability are dealt with accordingly to law, often sentencing options are limited because of the lack of appropriate supports and adjustments to ensure accessibility for this group. For example, accessibility to the Drug Court may be limited because of a lack of residential rehabilitation facilities that cater for the special needs of people with intellectual disability. A similar situation exists in relation to Community Service Orders. A key to successful completion of these and other sentencing alternatives for people with intellectual disability is the availability of appropriate supports to assist with compliance. Unfortunately often such supports are non-existent.

People with intellectual disability frequently receive prison sentences for repeated minor offences. Examples are repeatedly calling emergency services without proper cause, repeated shoplifting, repeated minor assaults which are related to behavioural disturbance. Magistrates are sometimes reluctant to impose custodial sentences but feel they have no option in the absence of appropriate support options. While the Community Justice Program ("CJP") has provided a useful community option for people with intellectual disability exiting prison, a similar program is needed for people with an intellectual disability at an earlier stage to provide effective support in order to minimize involvement with the criminal justice system.

In the higher courts, the difficulties faced by people with intellectual disability are compounded by the lack of a diversionary scheme such as section 32 *Mental Health (Forensic Provisions) Act 1990*. The operation of standard non-parole period scheme to date has adversely affected people with intellectual disability. *Muldrock* is a clear example of the types of inappropriate outcomes that can occur when a person's intellectual disability is misunderstood and when the standard non-parole period scheme has been applied. While we trust that the High Court's decision in *Muldrock* will alleviate some of the difficulties, we would welcome a review of the existing legislation in relation to standard non-parole periods and in particular, its application to people with intellectual disability.

We request that the review on sentencing pay particular attention to this highly vulnerable and over-represented group. IDRS suggests the following areas for consideration:

- Greater pre-charge diversion of people with intellectual disability
- Greater use of section 32 diversion for people with intellectual disability
- Accessibility to already existing alternatives to imprisonment for people with intellectual disability

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- Exploration of specific programs that are alternatives to imprisonment for offenders with intellectual disability in line with the principles of restorative justice
- The effect of the application of the standard non parole period scheme on people with intellectual disability

Please do not hesitate to contact IDRS should you wish to further discuss this submission.

Yours faithfully

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