



# Family & Community Services

## **Submission by Family & Community Services on the NSW Law Reform Commission's Review of Sentencing, papers 8 to 12**

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The Department of Family and Community Services (FACS) welcomes the NSW Law Reform Commission's review of sentencing laws and appreciates the opportunity to make a submission to the review. This submission has been prepared from comments provided by divisions within FACS whose client groups this is most relevant to; namely Ageing, Disability and Home Care (ADHC) and Community Services (CS).

Please note that FACS has responded only to those questions where it has a specific comment to make. Further, the FACS submission to the NSW Law Reform Commission for Question Papers 5 – 7, provides relevant background to this paper.

FACS aims to:

- enable each child in NSW to have the best possible start to life
- help vulnerable young people build their capacity for a good future
- improve social and economic outcomes for Aboriginal people
- provide support to vulnerable adults and families so that they can participate fully in community life and
- build strong and inclusive communities.

### **People with a disability**

FACS operates a range of programs designed to meet the needs of people with intellectual and cognitive disabilities who are involved in the criminal justice system. In particular, the Criminal Justice Program assists people with mild or borderline disabilities associated with a higher level of functioning than those who would normally qualify as FACS clients. The Program primarily covers clients released from custody, but also includes some custody and pre-custody support.

## **Children and Young People**

FACS is the leading community service agency in NSW and the largest child protection agency in Australia. FACS works in cooperation with other government and community groups to help build a safer and stronger community for everyone. A core role of FACS is to ensure that children and young people receive a good start in life by providing a range of services and support to them and their families. In addition to taking appropriate child protection measures, FACS provides other services such as prevention and early intervention programs; arranges for appropriate care for children and young people who cannot live safely at home, and funds and supports organisations providing out of home care. FACS also offers a number of services designed to encourage community development and address issues that lead to family breakdown.

The response to these papers benefits from input from the FACS Community Justice Program (CJP), which provides residential and other support to people with cognitive and mental health impairments released from custody. The CJP and other FACS accommodation and support programs for people with intellectual disabilities also has dealings with clients who have intellectual disabilities and challenging behaviour that have been diverted from the criminal justice system.

FACS' submission to question papers 5 to 7 noted that people with cognitive and mental health impairments had limited opportunities to access current alternatives to custodial sentences and recommended consideration of an alternative option with requirements that tailored to the needs of these classes of offenders. It also noted that FACS' support programs were not set up in a way that facilitated the exercise of a detention function. Similar issues arise in relation to Question papers 8 to 12. Limited access to sentencing or diversionary alternatives for people with cognitive and mental health impairments runs the risk of evoking responses to offending behaviour which are either more severe or more lenient than for other offenders.

## **Response to Issues Paper Questions**

### **Question 8.1**

*Should the Crimes (Sentencing Procedure) Act 1999 (NSW) set out a hierarchy of sentences to guide the courts? What form should such a hierarchy take?*

### **Answer:**

No. Seeking to impose a single hierarchy on the complex task of appropriate sentencing runs risks of distorting the kind of decisions judges need to make in individual cases having regard to the characteristics of the offender.. It is difficult to see how any hierarchy could reflect the objective gravity of the offence, the subjective culpability of the offender or the gravity of the sentencing response at the same time. A prescribed hierarchy would also risk foreclosing the kind of flexibility in imposing different forms of sentence.

### **Question 8.2**

*Should the structure of sentences be made more flexible by:*

- a. creating a single omnibus community-based sentence with flexible components;*
- b. creating a sentencing hierarchy but with more flexibility as to components;*
- c. allowing the combination of sentences; or*
- d. adopting any other approach?*

### **Answer:**

The current sentencing structure is complex. It provides limited options for combining sentences or any type of flexibility in sentencing. Given the special needs of people with cognitive and mental health impairments FACS would support more flexible approaches that, for example, would reflect the availability and appropriate length of community based services provided through alternatives to imprisonment or diversionary support.

An omnibus community based sentence with flexible components would provide a streamlined approach to services and supervision for individuals which is an important factor in supporting those with an intellectual disability. This would also assist in decreasing the systemic issues and inconsistency that can arise due to the number of differing stakeholders involved.

### **Question 8.3**

*1. What sentence or sentence component combinations should be available?*

### **Answer:**

Non-custodial combinations are an important area of consideration for offenders with intellectual disability to have added to their therapeutic and rehabilitative outcomes.

The Department of Attorney General and Justice's May 2011 Report *A fairer fine system for disadvantaged people* outlines the way Work and Development Orders (WDO) as a means of paying off fines could be a positive alternative to custody. WDOs can be discharged through attending rehabilitation programs. Ideally the availability of such orders (even though not made by the court) could be combined with a bond to assist in reducing recidivism and targeting an individual's criminogenic needs.

Where a custodial order is appropriate, an Intensive Correctional Order (ICO) or similar order tailored to the need of offenders with cognitive and mental health impairments could be combined with WDOs or Community Service Orders (CSOs) to communicate to offenders the seriousness of their offences and their future options will be more limited unless they attempt to address their behaviour. Currently s32 orders are frequently utilised as a form of diversion without there being real consequences if the conditions are not followed.

2. *Should there be limits on combinations with:*

a. *finer;*

b. *imprisonment; or*

c. *good behaviour requirements?*

**Answer:**

There should be set limits on combinations to be used within sentencing requirements. The ability of an offender with an intellectual disability to pay fines may be restricted due to low income/disability pension. WDOs could be utilised to provide a natural consequence to clients and assist them to engage with services that may be quite beneficial.

Community based combinations should take into consideration an intellectual disability clients current circumstances, level of community support and current stakeholders involved as there may be a number of strategies that could be utilised under a court direction.

An important aspect in this area is the greater development and resources required to grow the extension of WDOs under the 2011 amendments to the *Fines Act*. Experienced services which are funded specifically to facilitate such a program would provide greater access and opportunities.

**Question 9.1**

*Should an early diversion program be established in NSW? If so, how should it operate?*

**Answer:**

Under the *Youth Offenders Act 1997* there is a scheme that provides an alternative process to court proceedings for dealing with children (under the age of 18 years) who commit certain offences through the use of youth justice conferences, cautions and warnings. The scheme applies to children who have committed summary offences, or indictable offences which can be dealt with summarily.

FACS supports schemes such as this to divert less serious offenders from entering into court proceedings. Further FACS notes that the 2009 evaluation of the Pre-Trial diversion of certain sexual offenders (see page 21 of Question Paper 9) found that "it effectively prevents child sexual abuse and exploitation, ensures that survivors receive adequate support, provides therapeutic and support services for families and children at risk of abuse, and strengthens family relationships." This Pre-Trial diversion program is strongly supported and FACS supports there being more Pre-Trial diversion programs

FACS sees merit in adopting a more formalised approach to cautioning with input from police prosecutors and the possibility of collecting more comprehensive information about the offender so that particular vulnerabilities and possible services to address them can be taken into account.

**Question 9.2**

*Is the Court Referral of Eligible Defendants into Treatment (CREDIT) program operating effectively? Should any changes be made?*

**Answer:**

Offenders with intellectual disability are usually referred to FACS from CREDIT.

**Question 9.4**

- 1. Is the Drug Court operating effectively? Should any changes be made?*
- 2. Should the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion?*

**Answer:**

There has been limited intake of FACS Community Justice Program clients into the Drug Court program (three to date). They have not had the ability to finish the program and have been excluded due to their violent conduct or lack of understanding of the program.

There are no specific community based drug treatment programs aimed to assist people with intellectual disability. This is an essential area of need as pointed out in other Law Reform reports, as the prevalence of alcohol and other drug issues for FACS clients is quite extensive.

Approximately 50% of Community Justice Program clients have had some level of violence as part of their offending. This does not include individuals that are supported through the Community Justice Program who may display quite aggressive behaviours towards staff but have never received a charge. These individuals are already excluded from such a program and hence are unable to receive an appropriate therapeutic option.

The geographical rule for Drug Court participation has made some Community Justice Program clients ineligible even if they are supported through community agencies. This again takes away a therapeutic option for this population.

**Question 9.5**

*Is deferral of sentencing under s 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working effectively? Should any changes be made?*

**Answer:**

A number of Community Justice Program clients have received a s11 adjournment which has proven more effective than a s32 order. Clients seem to have an understanding that s32 orders are "getting off" and at times don't provide the therapeutic components required due to what is perceived as a lack of supervision.

A section 11 order ensures that individuals are connected and receiving appropriate assessment, intervention and community planning around their assessed level of risk, criminogenic needs and responsivity factors.

**Question 9.6**

- 1. Is the current scheme of prescribing specific intervention programs operating effectively? Should any changes be made?*
- 2. Is there scope for extending or improving any of the programs specified under the scheme?*
- 3. Are there any other programs that should be prescribed as intervention programs?*

**Answer:**

Of the intervention programs outlined in the CP 9, no Community Justice Program clients have been deemed eligible or received an option of circle sentencing, forum sentencing or traffic intervention program.

As a statewide program the Community Justice Program has a large number of adult and juvenile Aboriginal clients in rural and remote communities (currently approx 34% of adult clients).

**Question 9.7**

- 1. Should restorative justice programs be more widely used?*

**Answer:**

FACS supports the concept of restorative justice which is behind programs such as NSW Youth Justice Conferencing, Forum Sentencing and Circle Sentencing, and supports their widened use.

- 2. Are there any particular restorative justice programs in other jurisdictions that we should be considering?*

**Answer:**

Restorative justice programs have an effective place in sentencing and would provide a beneficial sentencing option for many people with an intellectual disability by giving them an opportunity to understand the impact of their offending behaviour.

FACS notes that other restorative justice programs which should be considered are 'Family Group Conferencing' New Zealand; the 'Koori Youth Justice Program' in Victoria; the Koori Court, Victoria; Queensland's Youth Murri Court and South Australia's 'Community Mentoring Program'.

**Question 9.8**

1. *Should problem-solving approaches to justice be expanded?*
2. *Should any of the models in other jurisdictions, or any other model, be adopted?*

**Answer:**

Given the large amount of resources, support and stakeholder involvement in supporting offenders with an intellectual disability, problem solving approaches such as therapeutic jurisprudence are an important area for consideration.

A number of current predominant offender theories focus on the impact of the criminal justice system on an individual's emotional and psychological functioning and focus on targeting and intervening in these areas to reduce recidivism. A focus on specific offending behaviours would ideally utilise more appropriate evidence based practices and options to deal with individuals.

**Question 9.9**

*Are there any other diversion, intervention or deferral options that should be considered in this review?*

**Answer:**

People with disabilities should as far as possible receive legal treatment on a similar basis to other people. However if some of the more flexible options considered in the paper and the FACS response are not accepted, the Queensland special circumstances court model (9.169) and the Collingwood Neighbourhood Justice Centre (9.175) would provide more targeted alternatives for vulnerable offenders.

These types of programs would assist individual's with an intellectual disability to integrate into the community and find and attend appropriate services to assist in reducing their offending behaviours. Available resources and funding would be required for such programs to be conducted properly as there are currently a lack of community services available and willing to support such models.

**Questions 10.1**

*Are compensation orders working effectively and should any changes be made to the current arrangements?*

**Answer:**

It is noted that there is currently a review of the Victims Compensation Scheme and that FACS has made a submission in relation to this review. Crime victimisation is a significant issue for FACS client groups. Despite this they face a number of barriers in accessing the Scheme. Some of these barriers relate to their individual circumstances, such as lack of awareness of their legal rights and options and their higher dependence on others to take action, while others relate to the operation of the Scheme itself. Studies highlight that people with a disability, in particular women with a disability, older people, people experiencing homelessness, women, children and young people are significantly over-represented as victims of crime. It is noted that, in 2009-2010, 33.6% of all applications for victims' compensation related to domestic violence (Victims Compensation Tribunal New South Wales 2010, "Chairperson's Report 2009/2010", Victims Services, Department of Justice and Attorney General, Sydney).

There is also a large body of literature on the over-representation of people with a cognitive impairment and an over representation of young people as offenders in the criminal justice system, increasing the likelihood of an order for restitution being sought against them. The effectiveness of the Scheme needs to be considered in this context. To what extent are people from highly vulnerable groups able to access the Scheme, and how appropriate is the restitution scheme for vulnerable offenders?

Considering the above, a requirement for courts to consider making a compensation order is supported, taking into account various factors about the victim, the offender and the circumstances.

As indicated in earlier comments there is merit in sentencing options which integrate different sentencing options including compensation orders. However it is also recognised that this may be an unsuitable option for people with an intellectual disability who may never have the capacity to maintain any level of employment currently or in the future.

**Question 10.3**

1. *Should non-association and place restriction orders be retained?*
2. *Should any changes be made to the regulation and operation of non-association and place restriction orders?*

**Answer:**

It could be beneficial to consider the addition of non-association and place restriction orders to the kind of s11 adjournment orders that a number of FACS clients have previously received.

As with the section 93X consorting offence non-association orders have the potential to impact severely on vulnerable people including those with cognitive impairments who rely on informal carers other than close relatives to negotiate every day life situations. On the other hand orders can help to protect an offender from exposure to unsafe influences. The conditions imposed under section 100A of the *Crimes (Sentencing Procedure) Act* provide reasonable safeguards against the

arbitrary application of such orders but do not really recognise the role of informal carers.

The ability for orders to change coinciding with an individual's time in the community should be considered. Service providers and stakeholders could be granted further time to engage and structure support effectively for a client if non-association and restriction orders commence at the time they are released from custody. A similar system in New Zealand is having positive outcomes.

### **Question 11.1**

*1. How can the current sentencing regime be improved in order to reduce:*

- a. the incarceration rate of Indigenous people; and*
- b. the recidivism rate of Indigenous offenders?*

*2. Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of Indigenous people?*

*3. Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?*

### **Answer:**

While not wishing to minimise the importance of the issues raised in this question we are hesitant to suggest any easy answers. Recent research has underlined the particular challenges facing indigenous offenders with cognitive and mental health impairments and substance abuse who are in frequent contact with the criminal justice system and the need for a more unified response to their various issues. More flexible sentencing options are part of any solution but need to be part of a more unified response involving all government and service agencies with whom they are in contact.

FACS is aware that Indigenous children appearing in the Children's Court on a criminal matter are disproportionately represented. FACS supports rehabilitation programs, restorative justice such as diversionary programs, and Circle sentencing. It is noted that the success of the Victorian Koori court model as one that NSW may wish to consider.

### **Question 11.2**

*1. Should the Crimes (Sentencing Procedure) Act 1999 (NSW) contain a more general statement directing the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments? If yes, what form should these principles take?*

**Answer:**

Yes. Section 21A of the Act should be amended to include 'cognitive impairment' a definition covering intellectual disability, acquired brain injury and mental health issues as per the Law Reform Commission's recent review on people with cognitive impairment and the criminal justice system. While the term disability is currently included, intellectual disability may not be easily identified or the person may not wish to identify as having an intellectual disability.

*2. In what circumstances, if any, should the courts be required to order a pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?*

**Answer:**

FACS supports the mandatory provision of pre-sentence reports prior to sentencing offenders with a cognitive impairment. There is potential for confusion between mental illness and intellectual disability amongst criminal justice personnel. A pre-sentence report, which clearly informs the court of the nature and severity of the offender's impairment, including environmental factors is needed. However it is important that reports are provided by people with an understanding of intellectual disability and the impact it has on the person's offending behaviour including any case history.

There is a lack of intervention programs for individuals with cognitive impairment and a pre-sentence report with input from the relevant services would provide details to the Court on what can be offered by Corrective Services NSW and/or Juvenile Justice in conjunction with other stakeholders.

This proposal will raise awareness of the lack of existing programs and will have resource implications should cross agency responses need to be developed and implemented.

*3. Should courts have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison? If so, how should such a power be framed?*

**Answer:**

There are no existing facilities for detaining people with an intellectual disability within the criminal justice system.

The *Mental Health Act 2007* distinguishes between people who have a mental illness, mentally ill persons and mentally disordered persons. Mental illness is defined as serious impairment of mental functioning characterised by: delusions; hallucinations; serious disorder of thought form; or severe disturbance of mood. Mental disorder is defined as irrational behaviour that requires temporary care, treatment or control. A mentally ill person who poses a risk of serious harm to themselves or others, may be detained in a health facility. A mentally disordered person may be detained for up to three days if they pose a serious risk to themselves or others and must be examined by a doctor every 24 hours during this

time. They must be discharged if no longer disordered and may only be detained for three, three day periods within a given month.

FACS has previously advised the NSW Government confidentially on possible options for new or expanded legislation that would address the needs of people that are not provided for under the Mental Health Act.

Possible options are to extend the provisions of the Mental Health Act or to adopt legislation similar to Victoria and Queensland that specifically address the needs of people with serious personality disorders and cognitive impairment. Whatever options are preferred will require dedicated services that provide appropriate support.

*4. Do existing sentencing options present problems for people with cognitive and mental health impairments? If so, how should this be addressed?*

**Answer:**

As previous outlined in response to questions 8.1, 8.2 & 8.3, a combination of sentencing options that add a therapeutic component to rehabilitation would be more beneficial.

*5. Should any new sentencing options be introduced for people with cognitive and mental health impairments? If yes, what types of sentencing options should be introduced?*

*Sentence combinations should be considered. Refer to points 8.1, 8.2 & 8.3.*

**Answer:**

Refer to response to Question 11.3.

Funding and development of specific community based services that can facilitate the supervision of Community Service Orders. All Community Justice Program clients have some level of community support that would assist the client in attending and maintaining such an order.

**Question 11.3**

*1. Are existing sentencing and diversionary options appropriate for female offenders?*

*2. If not, how can the existing options be adapted to better cater for female offenders?*

*3. What additional options should be developed?*

**Answer:**

An area requiring development is that of intervention programs adapted for those with an intellectual disability. A large number of female clients supported through FACS' Community Justice Program have been diagnosed with Borderline Personality Disorder, have high incidences of self harming and substance use.

**Question 11.5**

*Are there any other categories of offenders that should be considered as part of this review?*

**Answer:**

Sentencing legislation should have the capacity to respond to frequently encountered people with dual diagnoses, whether this involves a combination of intellectual disability or brain injury with mental illness or a combination of either or both with substance abuse issues.

**Question 12.1**

*How can information technology be used to improve the accessibility of sentencing law while maintaining judicial independence?*

**Answer:**

While the focus of this question is on enhanced public understanding of the sentencing process, better access to information on sentences should also be seen as a means of facilitating access by those providing services to vulnerable offenders, who need accurate and reliable information.

Where there is a therapeutic aspect to sentencing decisions, access to or publication of sentencing details will raise issues of privacy, not so much in relation to the sentence itself, but to the more detailed health and other sensitive information that the court has considered. There needs to be a balance that encourages public understanding of why the court has chosen a particular sentence, without the offender's private life becoming a matter of permanent public record.

**Question 12.4**

*How can the process of obtaining pre-sentence reports covering all sentencing options be made more efficient?*

**Answer:**

There is merit in the suggestion in the Question Paper for a single pre-sentence assessment report from one government agency that addresses the offender's eligibility and suitability for all of the sentencing options. However given the range of issues that could be relevant to such a report, covering health, disability, educational, child protection and other services it would clearly be necessary to

draw on resources from the various other services, particularly those that have previously supported the offender. The agency providing the support would need to have the resources and legal authority to coordinate this process.

**Question 12.5**

*Should oral sentencing remarks be encouraged by legislation with appropriate legislative protections to limit the scope of appeals?*

- 1. Should any change be made in sentence appeals to the test for appellate intervention (from either the Local Court or a higher court)?*
- 2. Should greater emphasis be given to the existing provision in s 43 of the Crimes (Sentencing Procedure) Act 1999 (NSW), which allows sentencing courts to correct errors on their own motion or at the request of one of the parties without the need for an appeal?*
- 3. Should appellate courts be able to determine appeals 'on the papers'?*

**Answer:**

As it stands section 43 does not appear to give courts the power to review a sentence in the light of more accurate knowledge of the contribution of the offender's cognitive or mental health impairment that was not recognised at the time of sentencing since the power only arises where it has imposed a penalty that is contrary to law, or failed to impose a penalty that is required to be imposed by law. A full understanding of these contributing factors may only occur when the offender is assessed in custody. It may assist in developing more effective rehabilitation if the Court has the power to revisit the sentence, for example, by adjusting non-parole periods.

**Question 12.8**

*Should specialisation be introduced to the criminal justice system in any of the following ways:*

- a. having specialist criminal law judicial officers who are only allocated to criminal matters;*
- b. establishing a Criminal Division of the District Court;*
- c. establishing a single specialist Criminal Court incorporating both the District Court and Supreme Court's criminal jurisdictions, modelled on the Crown Court;*
- d. amending the selection criteria for the appointment of judicial officers;*
- e. in any other way?*

**Answer:**

Specialist criminal law judicial officers could be trained to better recognise the sentencing issues that arise for people with cognitive and mental health impairments. However equal access to justice for people with disabilities is on the whole better served by including them in mainstream courts. Further specialised forums like the Drug Court have their place but there is also the attendant risk that people receive favourable treatment because they live in a particular locality or have the resources to have their disability recognised.

**Question 12.11**

1. *Should a court be permitted to give weight to the contents of a family victim impact statement when fixing the sentence for an offence in which the victim was killed?*
2. *Should any changes be made to the types of offences for which a victim impact statement can be tendered?*
3. *Are there any other ways in which victims should be able to take part in the sentencing process which are presently unavailable?*

**Answer:**

Our concern would be that if victims impact statements were to be given formal weight in the sentencing process there would be unequal access to justice for victims who were elderly or had cognitive impairments that prevented them from articulating a statement or expressing the impact that the offending behaviour has had on them.