

***Mental Health
(Forensic Provisions)
Act 1990 (NSW)***

SECTION

**STEP BY STEP
GUIDE TO
MAKING A
SECTION 32
APPLICATION FOR
A PERSON WITH
INTELLECTUAL
DISABILITY**

ACKNOWLEDGEMENTS

32

STEP BY STEP GUIDE TO MAKING A SECTION 32 APPLICATION FOR A PERSON WITH INTELLECTUAL DISABILITY

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Disclaimer

While this publication has been prepared with due care, the Intellectual Disability Rights Service cannot guarantee that it is free from errors or omissions. Readers are responsible for checking the veracity of the information contained within this publication. The publication deals with the law at the time of publication, that is October 2011.

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IDRS advises that the views expressed herein do not necessarily reflect the views of Legal Aid NSW.

A work such as this builds upon the work of others. Many people associated with IDRS - legal and non-legal staff members, the staff of the Criminal Justice Support Network (CJSN), volunteers and other supporters, past and present - have been concerned with the over representation of people with intellectual disability in the criminal justice system and are keen to foster greater use of the diversionary measures available under section 32. All of these people have contributed to the development of this project. In particular, we would like to acknowledge the work of Peter McGhee, Anita Sekar, Ben Fogarty and Ali Craig who are past and present employees of IDRS.

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Finally, we thank the many clients who have generously allowed us to learn from their experience and to share their stories through the case studies included in the guide. These stories are the most compelling reason for lawyers to go the extra mile.

The final version of the guide was settled by Janene Cootes and Karen Wells. As such, all responsibility for its shortcomings and any inaccuracies lie with us.



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Acronyms and abbreviations

ABI	Acquired brain injury
ADD	Attention Deficit Disorder
ADHC	Ageing, Disability and Home Care
ADHD	Attention Deficit Hyperactivity Disorder
AVL	Audio Visual Link
AVO	Apprehended Violence Order
CJP	Community Justice Program (part of ADHC)
CJSN	Criminal Justice Support Network
DPP	Director of Public Prosecutions
DSM-IV-TR	Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision 2000
DSP	Disability Support Pension
IDRS	Intellectual Disability Rights Service
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)</i>
MHFPA	<i>Mental Health (Forensic Provisions) Act 1990 (NSW)</i>
NGO	Non-government organisation
SDS	Statewide Disability Services, a part of Corrective Services NSW

For almost 20 years, IDRS has been a resource for lawyers representing clients with intellectual disability who are charged with a criminal offence. This publication is aimed primarily at those seeking the dismissal of summary criminal charges against their client under the legislative diversionary mechanism that is so frequently sought it is known simply as a Section 32 application.

Such a procedure involves a pragmatic detour out of the criminal justice system, ideally into a services-based response intended to assist the defendant to address whatever circumstances contributed to the charges in the first place. The ability to make such applications should be an integral part of a Local Court criminal advocate's basic skills, and this publication will become a necessary part of their kit. Magistrates will also find this book useful, as will court support workers and others who have regular contact with defendants with an intellectual disability.

Although section 32 is often invoked, the section's underlying theory is an uncomfortable compromise of criminal law principles and practical outcomes. If the circumstances that warrant an abandonment of the criminal process are made out, the charges are dismissed and the defendant discharged, and yet, seemingly irreconcilably with the dismissal and discharge, subject to conditions. Not surprisingly, the section's rocky foundation has led to a number of issues that have prompted appeals to superior courts and legislative revisions, in which IDRS has played a central part; this book identifies key judgements in which the section has been considered, and offers an analysis of difficult issues.

This book alerts lawyers to some characteristics that may indicate the existence of intellectual disability or other relevant disability, their important distinguishing features, how to communicate with such clients, and the agencies and type of experts to consult. In this sense the utility of this publication extends beyond section 32 applications to appearing for such clients generally. The Public Defenders welcome the addition of this text to IDRS's resources, and congratulates the authors.

Mark Ierace SC
Senior Public Defender
10 October 2011

1. s 32 of the *Mental Health (Forensic Provisions) Act 1990*, and its Commonwealth counterpart, s 20BQ of the *Crimes Act 1914* (Cth).

INTRODUCTION

About the Intellectual Disability Rights Service

The Intellectual Disability Rights Service (IDRS) is a disability advocacy and community legal service that provides legal assistance and advocacy to people with intellectual disability throughout NSW. IDRS services include the provision of legal advice and legal representation. IDRS advocates for policy and law reform and provides community legal education to advance the rights of people with intellectual disability.

In recent years, IDRS lawyers have represented numerous defendants with intellectual disability in the Local Court. In most cases, an application under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (MHFPA) has been made. IDRS has found that magistrates are generally open to considering diversion of defendants with intellectual disability via section 32. IDRS has a success rate of over 90 per cent in section 32 applications, including applications for people who have multiple charges and previous section 32 orders.

IDRS also operates the Criminal Justice Support Network (CJSN), which provides trained volunteers to support people with intellectual disability when they come into contact with the criminal justice system, particularly at the police station, at court and in interviews with lawyers. CJSN volunteers are present in at least five Local Courts in NSW every day where they provide individual support for defendants with intellectual disability.

Through both these services, IDRS has gained considerable knowledge, experience and expertise of the issues and barriers facing alleged offenders and their legal representatives in appearing before the Local Courts, particularly in relation to applications under section 32 of the MHFPA.

IDRS has worked with many clients who have appeared repeatedly before the court but whose charges have significantly reduced in frequency or ceased due to receiving effective assistance following a section 32 order. For others a section 32 order has been the stimulus for seeking early intervention to meet their needs and avoid ongoing clashes with the criminal justice system.

About the guide

Research conducted in four Local Courts in NSW found that 14.2 per cent of those coming before the court were people with intellectual disability, while a further 8.8 per cent were found to have borderline intellectual functioning (New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts*, Research Report 4, 1993).

It is clear that lawyers in the Local Courts are regularly representing clients with intellectual disability in criminal matters. IDRS hopes that this guide will be a practical resource to assist lawyers across NSW to effectively prepare and make section 32 applications on behalf of their clients with intellectual disability.

Although the focus of this guide is intellectual disability, it should be noted that the legislation permits section 32 applications to be made for people suffering from mental illness or a mental condition, or with other developmental disabilities. The guide does not seek to cover section 32 applications for people suffering from mental illness in any detail. IDRS experience suggests that there is greater awareness of the application of this legislation for people suffering from mental illness than for people with other disabilities. Much of the information in the guide will be applicable for people suffering from a mental condition, such as acquired brain injury (ABI), and other developmental disabilities.

Contact IDRS

Please contact IDRS via email (section32@idrs.org.au) or telephone on (02) 9318 0144 if you have any queries about the guide or if you would like advice or assistance with any aspect of preparing a section 32 application for a client with intellectual disability. Please include your name and telephone number. One of our lawyers, experienced in section 32 applications, will respond to you as soon as possible. Please note that this project is run on a part-time basis, but we will respond to any queries as quickly as possible.

Alternatively, queries can be raised via our website at www.s32.org.au. Feedback is welcome.

PART 1: OVERVIEW OF SECTION 32

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Purpose

A section 32 order pursuant to the MHFPA is a way for the Local Court to divert people with particular conditions who have been charged with a criminal offence out of the criminal justice system. Part 3 of the MHFPA contains all of the provisions relevant to summary proceedings before a magistrate relating to people with intellectual disability, other developmental disabilities and mental disorders.

The magistrate's powers are inquisitorial rather than adversarial in nature and the magistrate can inform him or herself in any way they see fit but without requiring the defendant to incriminate him or herself. There is no prescribed form for an application and generally applications are made orally. Magistrates will most often rely on written reports from experts and service providers and generally there is no need for the applicant to give evidence.

MENTAL HEALTH (FORENSIC PROVISIONS) ACT 1990 (NSW)

SECTION 32

- (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:
 - (a) that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):
 - (i) developmentally disabled, or
 - (ii) suffering from mental illness, or
 - (iii) suffering from a mental condition for which treatment is available in a mental health facility, but is not a mentally ill person, and
 - (b) that, on an outline of the facts alleged in the proceedings or such other evidence as the magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law,
the magistrate may take the action set out in subsection (2) or (3).
- (2) The magistrate may do any one or more of the following:
 - (a) adjourn the proceedings,
 - (b) grant the defendant bail in accordance with the *Bail Act 1978*,
 - (c) make any other order that the magistrate considers appropriate.
- (3) The magistrate may make an order dismissing the charge and discharge the defendant:
 - (a) into the care of a responsible person, unconditionally or subject to conditions, or
 - (b) on the condition that the defendant attend on a person or at a place specified by the magistrate for assessment of the defendant's mental condition or treatment or both, or
 - (c) unconditionally.
- (3A) If a magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the magistrate may, within 6 months of the order being made, call on the defendant to appear before the magistrate.
- (3B) If the defendant fails to appear, the magistrate may:
 - (a) issue a warrant for the defendant's arrest, or
 - (b) authorise an authorised officer within the meaning of the *Criminal Procedure Act 1986* to issue a warrant for the defendant's arrest.
- (3C) If, however, at the time the magistrate proposes to call on a defendant referred to in subsection (3A) to appear before the magistrate, the magistrate is satisfied that the location of the defendant is unknown, the magistrate may immediately:
 - (a) issue a warrant for the defendant's arrest, or
 - (b) authorise an authorised officer within the meaning of the *Criminal Procedure Act 1986* to issue a warrant for the defendant's arrest.
- (3D) If a magistrate discharges a defendant subject to a condition under subsection (3), and the defendant fails to comply with the condition within 6 months of the discharge, the magistrate may deal with the charge as if the defendant had not been discharged.
- (4) A decision under this section to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise.
- (4A) A magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with under subsection (2) or (3).
- (4B) A failure to comply with subsection (4A) does not invalidate any decision of a magistrate under this section.
- (5) The regulations may prescribe the form of an order under this section.

Types of charges

Local Court matters: NSW state matters

A section 32 application is available in all criminal proceedings in the Local Court that are triable summarily. This includes both summary and indictable offences that are to be dealt with to finality by a magistrate. Matters that can only be dealt with by way of a fine are summary offences and may also be disposed of by way of section 32. A section 32 application is not available for bail or committal proceedings.

Children's Court matters

Under section 3 of the MHFPA, 'magistrate' includes a Children's Court magistrate. The Children's Court hears and finalises a greater range of matters than the Local Courts. These matters can be dealt with by way of section 32. The scope of these matters is outlined in section 28 of the *Children (Criminal Proceedings) Act 1987* (NSW).

Children (Criminal Proceedings) Act 1987 (NSW)

Section 28

- (1) The Children's Court has jurisdiction to hear and determine:
 - (a) proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence, and
 - (b) committal proceedings in respect of any indictable offence (including a serious children's indictable offence),
if the offence is alleged to have been committed by a person:
 - (c) who was a child when the offence was committed, and
 - (d) who was under the age of 21 years when charged before the Children's Court with the offence.

'Serious children's indictable offences' are the only criminal matters that cannot be dealt with by way of section 32 in the Children's Court. The excluded offences, as defined in section 3 of the *Children (Criminal Proceedings) Act 1987* (NSW), include offences that have maximum terms of imprisonment of 25 years and some categories of sexual offences. The scope of matters that can be dealt with by way of section 32 is greater in this jurisdiction than in the Local Court.

Commonwealth matters

Section 20BQ of the *Crimes Act 1914* (Cth) is similar to section 32 and is available for Commonwealth matters being dealt with to finality in the Local Court. It applies to people 'suffering from intellectual disability' or 'suffering from a mental illness within the meaning of the civil law of the State or Territory' who are charged with a federal offence.

Crimes Act 1914 (Cth)

Section 20BQ

Person suffering from mental illness or intellectual disability

- (1) Where, in proceedings in a State or Territory before a court of summary jurisdiction in respect of a federal offence, it appears to the court:
 - (a) that the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and
 - (b) that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under this Division than otherwise in accordance with law;
 the court may, by order:
 - (c) dismiss the charge and discharge the person:
 - (i) into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years; or

- (ii) on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or
- (iii) unconditionally; or
- (d) do one or more of the following:
 - (i) adjourn the proceedings;
 - (ii) remand the person on bail;
 - (iii) make any other order that the court considers appropriate.
- (2) Where a court makes an order under paragraph (1)(c) in respect of a person and a federal offence with which the person has been charged, the order acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence.
- (3) Where a court makes an order under subsection (1) in respect of a person and a federal offence with which the person has been charged, the court must not make an order under section 19B, 20, 20AB or 21B in respect of the person in respect of the offence.

The significant difference between section 20BQ and section 32 is that under section 20BQ(1)(c) if the charges are dismissed conditionally, the period of the final order can be up to three years as compared to the six-month final order period under section 32.

(Further case law on section 20BQ includes *Boonstoppel v Hamidi* [2005] 155 A Crim R 163 and *Morrison v Behrooz* [2005] 155 A Crim R 110.)

No requirement to enter a plea

An application under section 32 can be made at any time during the proceedings, including at the conclusion of a contested hearing. Section 32 applications may be made without having to enter a plea. Section 32 is most commonly raised by the defendant's lawyer, but it can be raised by any party to the proceedings. Sometimes a magistrate, of their own motion, may apply the provisions of section 32.

You should flag any potential application with the court at the earliest opportunity after you are satisfied that a section 32 application is likely to be appropriate in the circumstances of the particular case. (See Part 8: Making the application and submissions for more information on flagging the application.)

It is not necessary for a plea to be sought from your client or entered before a section 32 application is made (*Mackie v Hunt* [1989] 19 NSWLR 130 [134]; *Perry v Forbes* (Unreported, Supreme Court of NSW, Smart J, 21 May 1993); *DPP v El Mawas* [2006] NSWCA 154 [74]). It is suggested that it may be impermissible to require a guilty plea to be entered prior to the determination of a section 32 application because it would have the effect of requiring the defendant to self-incriminate in breach of section 36 MHFPA. (See Part 7: Legal principles for further discussion.)

Decisions to be made by the magistrate

For a magistrate to make an order, he or she must make three decisions. The first is the jurisdictional question and is a finding of fact about whether or not the person is eligible to be dealt with under the section. (See Part 2: Eligibility for section 32 for more details.) The next question is whether or not it is more appropriate to deal with the person under section 32 than in accordance with law. If the jurisdictional question is satisfied and the magistrate decides that it is more appropriate to deal with the matter by way of section 32 than at law, the magistrate must then decide what orders should be made. (See *DPP v El Mawas* [2006] NSWCA 154).

PART 2: ELIGIBILITY FOR SECTION 32

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Section 32 is available to people who are 'developmentally disabled', 'suffering from mental illness', or 'suffering from a mental condition for which treatment is available in a mental health facility', but who are not mentally ill people. (See section 33 MHFPA for applications in the Local Court in relation to mentally ill persons.)

Section 32(1)(a)(i): People who are developmentally disabled

The term 'developmentally disabled' is not defined in the MHFPA. Magistrates may be unfamiliar with the meaning of this term and lawyers may need to clarify the meaning of the term for the magistrate.

The term 'developmental disability' was widely used in Australia in the 1980s and 1990s. Developmental disability is defined in the 1983 Richmond Report *NSW Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled*:

[Developmental disability is] a severe, chronic disability which is attributable to intellectual or physical impairment, is manifested before the person attains the age of 18, is likely to continue indefinitely and results in functional limitations in three or more of the following areas of major life activity: self-care; receptive and expressive language; learning; mobility; self-direction; capacity for independent living and economic self-sufficiency.

NSW Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled 1983, Part 2, pp 9–12

This definition is in keeping with definitions used in Australia and internationally.

Shortly after the release of the Richmond Report, the *Crimes (Mental Disorder) Amendment Act 1983* (NSW) introduced the term 'developmental disability' in the *Crimes Act 1900* (NSW) in sections 428W and 428X, which are the predecessors of section 32 and section 33 of the MHFPA.

The term 'developmental disability' applies to a wider group of disabilities than the term 'intellectual disability'. 'Developmental disability' is a broad term that usually covers disability categories such as:

- intellectual disability
- cerebral palsy
- epilepsy
- autism (including Asperger disorder)
- some neurological conditions.

Errol Cocks, *An Introduction to Intellectual Disability in Australia*, 3rd edition, Australian Institute on Intellectual Disability 1998

The term 'developmentally disabled' would also include people with ABI from accident or illness prior to the age of 18 and may include people with Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD), which can be seriously impairing disorders and may extend into adulthood.

Some developmental disabilities

Intellectual disability

Intellectual disability is clearly a developmental disability. If your client has been assessed as having any level of intellectual disability they clearly have a developmental disability and come within the ambit of section 32.

Intellectual disability is the main focus of this guide and is discussed in detail in Part 4: Clients with intellectual disability. Here we discuss some other developmental disabilities that fall within the jurisdiction of section 32.

Autism spectrum disorders

Autism spectrum disorders are lifelong developmental disabilities. The term 'spectrum' is used because the range and severity of the difficulties experienced by people with autism spectrum disorders varies widely. Generally speaking, people with autism spectrum disorders are likely to have significant problems in the areas outlined below.

- **Social interaction**

They may appear disinterested and withdrawn. They may be unable to engage in social interaction and be unresponsive to the experiences or emotions of others.

- **Communication**

They are likely to have difficulty expressing needs, wants or experiences, and with using or interpreting non-verbal communication.

- **Behaviour**

They may exhibit behaviours such as restricted or obsessive behaviour, relying on rituals and routines to bring some order to the chaos and confusion they feel. A change in routine can result in high levels of stress and behavioural problems.

- **Sensory sensitivities**

They may be overly sensitive to certain sounds, smells, colours or textures, which may cause stress and difficult behaviour.

Adapted from Fact Sheet, Autism, www.betterhealth.vic.gov.au and Aspect website www.autismspectrum.org.au

A significant proportion of people with autism spectrum disorders will also have intellectual disability or learning disability. Some of the behaviours associated with autism may appear odd or threatening and attract negative attention, including police attention.

There is no known cure for autism. However, social skills and other training can make a difference to the effects of autism on an individual. Adults with autism can be assisted to develop ways to manage the anxiety and behavioural effects of the disability.

For more information about autism spectrum disorders visit the Aspect website at www.autismspectrum.org.au.

Asperger disorder

Asperger disorder is one of the autism spectrum disorders and is classified as a developmental disorder. People with Asperger disorder commonly have:

- average or above average intelligence (IQ)
- problems with reasoning, problem solving, anticipating consequences
- difficulty empathising with others or recognising another person's point of view
- difficulty with social interaction
- problems controlling feelings - for example, anger, anxiety
- reliance on routines and schedules that can result in anxiety and acting out if disrupted
- difficulty understanding social codes of conduct.

Although Asperger disorder cannot be cured, appropriate intervention and experience can help individuals to develop their abilities, compensatory strategies and coping skills. Social skills training and counselling, including cognitive behaviour therapy, can help people with Asperger disorder.

Adapted from Fact Sheet, Asperger Syndrome and Adults, www.betterhealth.vic.gov.au

For more information about Asperger disorder visit the Aspect website at www.autismspectrum.org.au.

Definitional confusion

Autism spectrum disorders and Asperger disorder are developmental disabilities and people who experience these disorders come within the ambit of section 32.

In the case of *Police v Ryan* (Children's Court of NSW at Bidura, 3 February 2005), reported in Children's Law News 2005 CLN 2, the presiding magistrate deemed a young person diagnosed as having Asperger disorder to be suffering from a mental condition (as opposed to a developmental disability) and subsequently dismissed charges under section 32(3)(a) of the MHFPA. This case illustrates the difficulties with the current criteria.

It is important that lawyers are alive to the confusion around classifications and aware that legal, medical and general definitions do not always coincide. It may be relevant to point out these differences to experts preparing reports in your client's matter.

Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder

ADD and ADHD could be viewed as either developmental disabilities or mental illnesses.

(For detailed discussion of section 32 and ADD/ADHD see Karen Weeks, 'To Section 32 or Not', *Law Society Journal*, May 2010, p. 49-55, which is also available at www.brrt.net.au under the Mental Health tab.)

Section 32(1)(a)(ii): People suffering from mental illness

The MHFPA distinguishes between people suffering from a mental illness and a mentally ill person. People suffering from mental illness are eligible for Section 32. **However, Section 32 is not available to a mentally ill person.** The definition of mentally ill person under the MHFPA has the same meaning as the term is given in the *Mental Health Act 2007* (NSW), which is as follows.

Mental Health Act 2007 (NSW) Section 14

- (1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:
 - (a) for the person's own protection from serious harm, or
 - (b) for the protection of others from serious harm.
- (2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.

See Section 33 MHFPA for provisions in relation to mentally ill persons.

Applications for people suffering from mental illness and mentally ill persons are not specifically covered in this guide.

Section 32(1)(a)(iii): People suffering from a mental condition for which treatment is available in a mental health facility

People suffering from mental conditions for which treatment is available in a mental health facility fall within the ambit of section 32. 'Mental condition' is defined in section 3 of the MHFPA to mean 'a condition of disability of mind not including either mental illness or developmental disability of mind'. We consider the example of ABI as a mental condition in Part 3: Clients with acquired brain injury as we believe that people with ABI are underrepresented in applications for section 32. Note that this guide does not canvass other conditions that may also be held to be mental conditions.

PART 3: CLIENTS WITH ACQUIRED BRAIN INJURY

Mental condition

At common law a 'mental condition' has been held to include a disability of mind resulting from ABI. In *DPP v El Mawas* [2006] NSWCA 154 [22] (*El Mawas*) the court did not question that ABI as a result of an accident was a 'mental condition' for the purposes of section 32 of the MHFPA. The relevant principles are set out in the decisions of *R v Tsiaras* (1996) 1 VR 398 [400]; *R v Verdins* (2007) VSCA 102 and *DPP v De La Rosa* (2010) NSWCCA 194.

Treatment available in a mental health facility

In order for a person with a mental condition such as ABI to come within the ambit of section 32, the condition must be one for which treatment is available in a mental health facility.

When *El Mawas* was decided, section 32(1)(a)(iii) required that the applicant have a mental condition for which treatment is available in a hospital, rather than in a 'mental health facility', as the section currently requires. The psychologist's report for Mr El Mawas stated that he could be treated at Liverpool Hospital Rehabilitation Unit for his brain injury. This change in the wording of the section from 'hospital' to 'mental health facility' is confusing and should be revisited by the legislature.

Lawyers should be aware of this change in the wording of the legislation in case it needs to be addressed in submissions. 'Mental health facility' has the same meaning as under the *Mental Health Act 2007* (NSW) and covers a range of facilities. The Act includes declared mental health facilities and private mental health facilities. Declared mental health facilities are by order of the Director General of the Department of Health and are gazetted. They include inpatient declared mental health facilities, community mental health facilities and many emergency departments of general hospitals. (See sections 3 and 32(1)(a)(iii) of the MHFPA and sections 4 and 109 of the *Mental Health Act 2007* (NSW).)

Private mental health facilities are licensed as such by the Director General of the Department of Health. (See sections 4 and 116 of the *Mental Health Act 2007* (NSW).) Private mental health facilities generally provide a wider range of services than public, or declared, mental health facilities.

These may include specialist drug and alcohol rehabilitation services, and counselling for conditions such as anxiety and mood disorders commonly experienced as a result of ABI. Most people with ABI are assessed and treated by neuropsychologists and neuropsychiatrists and mental health facilities routinely employ professionals with these areas of expertise.

It should be noted that there is no requirement for people with ABI making a section 32 application to actually undergo treatment at a mental health facility but only that such treatment be available.

It is not necessary for a treatment or support plan for people with ABI to include treatment in a mental health facility. A treatment plan could recommend other, more appropriate types of assistance.

Given the broad meaning of the term 'mental health facility' under the MHFPA, it is suggested that it would usually be open to lawyers to argue that most people with ABI have a 'mental condition for which treatment is available in a mental health facility'. When seeking reports for clients with ABI, lawyers should fully advise report writers of the special meaning of 'mental health facility' under the MHFPA and require the writer to address whether or not there is treatment available for the client at a 'mental health facility' as defined.

Comprehensive lists of the three types of declared mental health facilities are available at the NSW's Institute of Psychiatry website www.nswiop.nsw.edu.au under the Mental Health Act tab along with a list of licensed mental health facilities.

The Brain Injury Association of NSW advises that over half of all people with ABI have mental health issues so it may also be open to lawyers to make section 32 applications under section 32(1)(a)(ii) on the basis that their client is suffering from mental illness.

Remember also if the ABI occurred before the age of 18 it is open to lawyers to make the application under Section 32 (1)(a)(i) on the basis of their client being developmentally disabled.

What is acquired brain injury?

ABI is 'an injury to the brain which results in deterioration in cognitive, physical, emotional or independent functioning' (Department of Human Services and Health, 1994). It is a complex disability that causes limitation to the day-to-day lives of around one in 45 Australians.

Damage may be caused by a traumatic injury to the head from a car accident, assault, fall etc. Non-traumatic events such as stroke, tumour, hypoxia or toxins such as alcohol and other drugs can also cause ABI.

Identifying acquired brain injury

ABI is not always readily identifiable by looking at or talking with a person and may not be something that a client thinks to mention to you, as they may not be aware of its relevance to how matters proceed in court.

Below is a list of some ABI indicators that you may notice in your clients. Your client may:

- have difficulty paying attention
- be easily confused and overwhelmed
- have difficulty keeping appointments
- become stuck on ideas and fixed patterns of thinking
- be slower at processing information
- be clumsy
- be unable to move an arm or leg
- have difficulties in emotional control.

Common signs of acquired brain injury

- **Client gets angry quickly.**
- **Client is forgetful and misses appointments and court dates.**
- **Client slurs when speaking (sounds drunk but is not intoxicated).**

If you think your client may have ABI, you can ask them directly. If your client is not sure, you might be able to clarify by asking some of the following questions.

- Have you ever had a head injury?
- Have you ever been unconscious?
- Do you get a pension?
- What type of pension do you get? (If your client answers 'Disability Support Pension' (DSP) then ask them what disability they have.)
- Do you have a case worker or support worker who helps you?

Effects of acquired brain injury

Problems resulting from a brain injury will differ from person to person because injuries will vary in extent and location. However, there are some common effects that people with ABI experience. Your client may have difficulty with:

- speaking and understanding speech
- reading and writing
- socialising - they may not make appropriate eye contact or conversation or acknowledge personal space when interacting with people
- remembering, learning or retaining information - they may forget appointments or future plans
- paying attention for long periods of time
- understanding complex ideas
- planning or organising
- exercising self control - they may be impulsive or aggressive, self-centred or demanding
- completing activities of daily living such as personal care, household chores etc.
- maintaining relationships.

Your client with ABI may also have a mental illness such as depression or anxiety.

Working with a client with acquired brain injury

Memory problems are the most commonly reported cognitive impairment after ABI, so please be patient and make reminder calls to clients whenever possible. Alternatively, ask your client if they have a friend or family member with whom they keep in regular contact who could remind them of upcoming appointments and court dates. Ask your client to sign an authority to allow you to discuss these aspects of their case with those nominated.

PART 4: CLIENTS WITH INTELLECTUAL DISABILITY

People with intellectual disability in the criminal justice system

People with intellectual disability make up around 2 to 3 per cent of the community. Research shows that adults and children with intellectual disability are overrepresented at all stages of the criminal justice system.

The 2009 Health Survey of Young People in Custody found that 14 per cent of young people in custody have intellectual disability (IQ below 70) and 45.8 per cent of young people in custody are assessed as having borderline intellectual functioning or below. Further, one in five Aboriginal young people in custody have intellectual disability. (See www.djj.nsw.gov.au/publication.htm#healthsurveys for full report.)

Research conducted in four Local Courts in NSW found that 14.2 per cent of those coming before the court were in the intellectually disabled range while a further 8.8 per cent were found to have borderline intellectual functioning. (New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts*, Research Report 4, 1993)

What is intellectual disability?

Intellectual disability is a disability that primarily affects the way people learn and understand. Other terms used to describe this disability are mental handicap or mental retardation. These terms are no longer in common use. Intellectual disability is the most commonly used term. Intellectual disability is one of the developmental disabilities.

Clinical definition

Intellectual disability is a disability that is present from birth or occurs in the developmental period, usually taken to be before 18 years of age. It is characterised by significant sub-average intellectual functioning, existing concurrently with related limitations in two or more areas of adaptive functioning including:

- communication
- self-care
- home living
- social skills
- self-direction

- use of community resources
- leisure
- work
- functional academic skills
- health and safety.

Significantly sub-average intellectual functioning is indicated by an IQ assessed at about 70 or below.

An IQ score may involve a measurement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75 if they also exhibit significant deficits in adaptive behaviour.

'Mental Retardation' in the American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, 4th edition, Text Revision 2000 (DSM-IV-TR)

'Borderline intellectual functioning' is defined in the DSM-IV-TR as describing 'an IQ range that is higher than that for mental retardation' (generally IQ 71-84). An assessment of borderline intellectual functioning may bring a client within the ambit of section 32 if there are concurrent deficits in areas of adaptive functioning.

Diagnosis

Most people with intellectual disability are born with their disability. However, it may not become apparent or be diagnosed until well into childhood. For other people, the disability may result from illness or an injury during their developmental years. It is not uncommon for a person's intellectual disability to be first identified when they come into contact with the criminal justice system.

A person's intellectual disability is generally not apparent from their appearance. It is usually through interacting with your client that you may begin to suspect there is a difficulty. It is not unusual for people with intellectual disability to deny that they have a difficulty and to work hard to cover up the effects of their disability in their everyday life.

Labels attached to intellectual disability

The terms 'mild', 'moderate', 'severe' and 'profound' may be used to describe the severity of a person's intellectual disability. These terms simply refer to the range of IQ within which your client has been assessed. They are included here because, while limited in their usefulness, they continue to be used and it is important to understand what they mean. Note that 'average' IQ is around 100.

Label	IQ range
Borderline intellectual functioning	71 up to 84
Mild	50-55 up to around 70
Moderate	35-45 up to around 50-55
Severe	20-25 up to around 35-45
Profound	Below 20-25

Categories are derived from the *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision 2000 (DSM-IV-TR)*

Common misconceptions about 'mild' intellectual disability

Around 85 per cent of people who have intellectual disability are within the mild category. This term may be misinterpreted to suggest the disability is somehow insignificant or minimal in its effects. This notion is very misleading. A lawyer representing a person whose disability is described as 'mild' should be alert to this possible interpretation.

People who have been assessed to have mild intellectual disability fall within the bottom 2 per cent of the population in terms of intellectual functioning. They are likely to have significant difficulty with everyday life and may lack skills, understanding, learning abilities and coping mechanisms to deal with problems. Without support when problems arise, people with mild intellectual disability are likely to have great difficulty in successfully managing their lives although they may have become quite skilled and determined at covering up their difficulties.

An assessment by a psychologist will enable you to look to the detail of your client's performance in the various areas of cognitive ability tested, as well as the deficits in their adaptive functioning (how the disability affects their everyday functioning). This detail is important to understand the individual effect of intellectual disability, including any links between the effects of the disability and the alleged offending behaviour. The IQ score alone does not tell you enough.

Identifying intellectual disability

It can be difficult to identify that someone has intellectual disability, especially as some people may not self-identify as having a disability or may try to conceal it. Every person with intellectual disability and the effects of the disability will vary from one person to another. Some common effects are outlined here.

People with intellectual disability may:

- require special teaching/training to learn what others learn easily
- have difficulty reading and writing
- have difficulty accurately remembering information
- have difficulty with communication - understanding and expressing ideas
- have difficulty understanding abstract concepts, for example time, value of money
- struggle to adapt to new or unfamiliar situations
- have difficulty with planning ahead
- have difficulty translating an intention into action, for example a client may be willing to comply with a bail condition in theory but unable to work out the implications of a condition or how to comply
- have difficulty solving every day problems without support
- exercise poor impulse control
- have difficulty weighing up options and connecting actions and consequences
- give literal answers to questions and may not see the relevance or importance of information they have.

Common signs of intellectual disability

- **Client has difficulty in responding to questions or avoids responding.**
- **Client has difficulty making him or herself understood.**
- **Client has difficulty in following instructions.**
- **Client has poor concentration.**
- **Client acts younger than their actual age.**

If you think your client may have intellectual disability, you can ask them directly. If your client is not sure, you might be able to clarify by asking some of the following questions.

- Do you receive a Disability Support Pension? Why is that?
- Do you receive assistance in housing or employment?
- Do you receive help from a disability service? Do you receive help from Ageing, Disability and Home Care (ADHC)? Do you have a case worker?
- Did you have trouble with learning at school? Did you get any extra help with lessons at school?
- What school did you go to? Were you ever in a special school? Why do you think that was?

Note that some people with intellectual disability will not have attended special classes or schools due to their disability not having been recognised at school. In more recent years this may be due to the change in government policy towards integration of children with disabilities into regular schools and classes.

- Were you ever in a special class at school?

In recent years these classes have been called IM and IO classes. For people in their 30s or 40s, special classes or schools may have been called OA or OF classes or schools.

Introducing Ageing, Disability and Home Care (ADHC)

ADHC is an agency of the Department of Family and Community Services. It is the primary provider of services for people with intellectual disability in NSW. ADHC services include case management, behaviour intervention services, accommodation services and assessment. ADHC also funds non-government organisations providing a similar range of disability services. Some people with intellectual disability who are deemed to be ineligible for direct ADHC services may be eligible for services from non-government disability services funded by ADHC. ADHC should provide information about these.

ADHC is important to people with intellectual disability in the criminal justice system because it can provide services. ADHC also has staff who specialise in analysing challenging behaviour and developing strategies for assisting people with intellectual disability to move towards more positive behaviour.

ADHC or ADHC-funded non-government services are important providers of support plans for people with intellectual disability who have been charged with criminal offences. In most cases, a court will require a support plan (also referred to as a treatment plan) before exercising its discretion to deal with a matter pursuant to section 32.

(See Appendix 1: More about ADHC for detailed information about ADHC services, eligibility criteria and how to refer to ADHC. See Part 12: Contacts and referral points for ADHC contact details.)

Seeking further information

If you suspect that your client may have intellectual disability, you will need to seek further information to confirm this. Speak with your client's family or other supporters about whether or not they have intellectual disability or perhaps some other developmental disability that would mean section 32 was relevant.

Check your client's criminal history to see if they have previous section 32 orders. With your client's consent, contact ADHC to enquire whether or not your client is either a current or past client of ADHC. (See Part 12: Contacts and referral points.) Clients of ADHC will usually have been assessed as having intellectual disability.

(See Part 6: Obtaining evidence, services and a support plan for further suggestions about evidence of disability.)

Challenging behaviour

Some people with intellectual disability may have developed entrenched problematic behavioural patterns over time, for example ringing emergency services when they are anxious or bored. Other people may self-harm or become aggressive.

People with intellectual disability who have developed such challenging behaviour may need a great deal of assistance, often specialist assistance, to analyse the cause of the behaviour and assist them to change that behaviour. The behaviour patterns may be fundamental to their way of coping and are unlikely to be resolved quickly. However, over time and with planning, adequate support, persistence and patience, the problem behaviour will usually reduce in frequency and intensity and eventually may become a rare occurrence or cease altogether. Progress may seem slow but this is the norm and it is important not to give up when further incidents occur. **Further incidents do not mean that the section 32 order has been a failure or that section 32 should be ruled out in the future.**

When people with intellectual disability have access to effective services, support and, for some, specialist behaviour intervention assistance, their challenging behaviour may never come to the attention of the police. For those who do not have this access, challenging behaviour is more likely to lead to contact with the criminal justice system.

Socially or sexually inappropriate behaviour

As a result of their difficulties with learning and understanding often compounded by restricted life experience, people with intellectual disability may not have learnt or understood legal restrictions, social expectations or rules about acceptable and unacceptable behaviour. They may behave in ways that appear threatening or are socially or sexually inappropriate. They may be unaware that their behaviour is unacceptable. Behaviour that was accepted and uncorrected in the child with intellectual disability may be unacceptable in an adult. Usually people are able to amend such behaviour with the assistance of counselling and training.

Anthony: sexually inappropriate behaviour

At 17, Anthony was charged with two counts of aggravated indecent assault. Anthony was alleged to have touched his younger sister on the breasts during a game. She was under 16 years of age.

Anthony had been diagnosed as having a mild intellectual disability and autism. He lived in a stable family home with both of his parents. The younger sister told her mother that her brother had touched her during the game. The mother contacted Community Services to seek help for both her children. The Joint Investigative Response Team came to the family home, arrested Anthony and he was refused bail for 15 days.

It was a condition of bail that Anthony not reside in the family home when he was released. After staying with his grandparents for three months, a placement in supported accommodation was found for him by his ADHC case manager.

Psychological assessments revealed that Anthony had received very little sex education. Anthony did not understand inappropriate touching. Anthony was, for the first time, linked with disability services, in particular services specifically aimed at educating persons with intellectual disability about sexuality.

An application was made under section 32 on behalf of Anthony. The matter was adjourned a number of times over a 12-month period to allow Anthony

to undertake extensive training, counselling and education in relation to sexuality. Assessments were then provided to the Court that outlined that Anthony had progressed significantly in his understanding. The support plan included continuing intensive counselling. The application was successful.

Intellectual disability and mental illness

A client with intellectual disability may also have a mental illness or mental disorder. Research shows that people with intellectual disability have a disproportionately high rate of mental illness when compared with the general population and a much lower rate of treatment and care. Prevalence estimates of 'mental disorder amongst Australian adults is 20 per cent, compared with 31.7 per cent amongst adults with intellectual disability.'

Morgan, V.A., Leonard, H., Bourke, J. and Jablensky A. (2008), Intellectual disability co-occurring with schizophrenia and other psychiatric illness: Population based study, *British Journal of Psychiatry*, 193(5).

Mental illness and mental disorders are poorly recognised and treated in people with intellectual disability and it is important to be alert to the possibility of mental illness being a factor for clients with intellectual disability. An assessment by a psychiatrist will help to clarify whether or not your client has a mental illness.

You should be alert to the possibility that your client may have a mental health problem as well as intellectual disability.

Check whether they take any medication for mental health conditions and whether they have a treating psychiatrist.

Ahmed: awareness of developmental disability

Ahmed, a young man with intellectual disability was before the court in relation to a shoplifting charge. Ahmed's lawyer indicated to the court that she intended to make a section 32 application and provided a copy of a psychological assessment to the prosecutor.

The prosecutor read the report indicating that Ahmed had a developmental disability but then pointed out to the lawyer that he would not be eligible for a section 32 because developmental disability is not mental illness. He was not aware of the availability of section 32 for people with developmental disability. The magistrate was more familiar with the section, cleared up the misapprehension and granted the application.

The availability of section 32 for people with intellectual disability is less widely understood than for mental illness.

Confusion between intellectual disability and mental illness

Confusion and misunderstanding about the difference between mental illness and intellectual disability is common in the justice system. Some people with intellectual disability may also experience mental illness but the two conditions are very different.

Differences between intellectual disability and mental illness

Intellectual disability	Mental illness
Thoughts are limited by cognitive ability and understanding.	Disturbances in thought processes and perception. May experience hallucinations and delusions.
Is lifelong and will not dissipate.	May be temporary, cyclical or episodic.
Onset occurs before 18 years of age.	Onset can occur at any stage of life.
Medication cannot restore cognitive ability.	Medication can be prescribed to control the symptoms.
Assessed by a psychologist.	Diagnosed by a psychiatrist.

Working with a client who has intellectual disability

Working with a client who has intellectual disability can be challenging. A few adjustments can facilitate a more effective working relationship with your client and help to reduce frustration levels for all concerned.

Communicating

- ✓ Minimise distractions. Try to avoid rushed interviews in busy court house settings.
- ✓ Relax, take some extra time and build rapport.
- ✓ Keep it simple. Use short sentences, and avoid jargon and abstract concepts. Raise only one topic at a time. Ask only one question at a time.
- ✓ Clearly signpost changes in topic to avoid confusion.
- ✓ Allow more time than usual for a response.
- ✓ Use the recount technique (that is, ask your client to repeat back in their own words) to check your client has understood the key points.

Strategies for working effectively with clients with intellectual disability

- **Take breaks.**

Your client is likely to have a poor concentration span. During interviews, allow for the possibility that they may need short breaks to rejuvenate.

- **Do not rely on written correspondence.**

Most people with intellectual disability have limited reading skills or cannot read at all. Your client may be able to read the words but comprehension may be limited therefore deliver information verbally. A simple letter using everyday language in dot point form can be useful to reinforce information already given to your client verbally. If your client agrees, send a copy of any correspondence to another person who can help them understand the content.

- **Be alert to the potential for misunderstanding.**

If your client's response doesn't make sense check that they have understood your question. Remember, your client may be very literal in their answers to questions. Your client may not see the relevance of important information so try to use open questions rather than rely on questions that only require a Yes/No response. Check that all the important information is understood. Don't assume knowledge. For example, one client breached their bail conditions to report to the police station. They had been going to the police station but no one had explained that they had to go inside, report to an officer and sign.

- **Be aware and responsive to your client's possible inclination to cover up their difficulties.**

A client with intellectual disability may be in the habit of covering up the difficulties they have in understanding and learning. Your client may, very reasonably, be uncomfortable wearing the label of intellectual disability. You may need to explain why, in the court proceedings, it is better to be open about their difficulties.

- **Prepare your client for court.**

Most people facing court experience a degree of anxiety. This is likely to be even greater for people with intellectual disability. It is important that you explain the court process to your client in simple language. A CJSN support person can be of assistance in this regard. (See below for more information on CJSN.)

- **Identify someone as a support person who can assist your client throughout the period of the court proceedings.**

This could be a trained volunteer support person from CJSN. If CJSN support is not possible, ask your client if there is someone who could help them at court. It could be a family member, friend, disability service worker who knows your client or an advocate from a local disability advocacy organisation. (See Part 12: Contacts and referral points for information on disability advocacy organisations.) Generally having a support person will be of assistance to both you and your client.

Criminal Justice Support Network (CJSN)

Support person at the court

CJSN is a service of IDRS that provides support for people with intellectual disability when they are involved in the criminal justice system as a witness, victim or defendant. CJSN support persons are trained volunteers who provide emotional and practical support. They will attend court and legal appointments with your client.

The contact numbers for CJSN are provided in Part 12: Contacts and referral points.

Working in collaboration with the lawyer, the support person can facilitate communication between the lawyer and client, assist your client to better understand and participate in the court proceedings, look after your client's needs and anxieties at court, and remind them to attend court and other appointments. CJSN makes every effort to provide the same support person throughout a matter. This provides consistency for your client if the lawyer changes from one hearing to the next.

Having a support person assists the lawyer as well as your client. A recent thank-you letter to CJSN from a Legal Aid lawyer commented:

[The CJSN support person] provided invaluable support to my client and assisted her in understanding the court proceedings which were complicated and traumatic for her. I really appreciated the assistance given as in the past I have been N's support person in court, which has made the dual roles – assisting her as well as looking after her legal problems – extremely difficult. I was freed up on this occasion to be her legal representative only, which was of great benefit to me.

CJSN volunteers are authorised to attend Audio Visual Link (AVL) proceedings at correctional centres. AVL proceedings can be very confusing events for your client so having a CJSN support person aiding them is invaluable.

Support person and legal advice at the police station

Someone with intellectual disability is classified as a vulnerable person and is therefore entitled to have a support person attend the police station if they are arrested under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA). In the experience of IDRS, however, it is common for clients not to have had a support person at the police station. CJSN provides support persons at police stations 24 hours a day, 7 days a week when people with intellectual disability are arrested. CJSN does not have established volunteers in all areas of NSW but will locate a support person whenever possible.

IDRS volunteer lawyers also provide telephone legal advice to people with intellectual disability in police custody throughout the state, 24 hours a day, 7 days a week.

The after hours number for support and legal advice is 1300 665 908.

Wallet cards are available for people with intellectual disability to carry on them to advise police that they are a vulnerable person and that CJSN or another support person should be contacted if arrested. Contact IDRS to obtain cards to provide to clients.

PART 5: INITIAL CONSIDERATIONS

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Before proceeding with a section 32 application there are some other avenues which you may wish to investigate to assist your client.

If your client wants to defend the matter

While a section 32 order is not a finding of guilt, nor does it amount to a finding of not guilty. Some clients will feel strongly about losing their right to an acquittal if their matter proceeds down the path of a section 32 application. In cases where your client's instructions are rational and soundly based, those instructions should be given full weight.

Fitness

While there is no requirement that fitness be determined prior to a section 32 application, there may be some instances where a lawyer will turn their mind to fitness issues prior to section 32. If a magistrate determines a person to be unfit, then proceedings should be discontinued (*Pioch v Lauder* (1976) 13 ALR 266).

Negotiations with police

Sometimes you may be involved with a client at the pre-charge stage. It may be possible to put your client's behaviour in context for police and to persuade them not to proceed to charges.

If charges have been laid, consider whether all of the elements of the offence have been made out. If not, you may want to set the matter down for hearing with the view to ultimately making a no prima facie case submission at court. It is important to note that you are not precluded from making a section 32 application in the event the court decides against your no case submission.

Alternatively consider writing representations to the police asking that the matter be withdrawn on the basis of the effect of your client's disability or the circumstances of the incident leading to charges. A factor to be weighed in making this decision is your assessment of whether or not police might remedy any deficiency in the case, if put on notice.

Police may take into account your client's disability when deciding whether or not to withdraw an offence. Charge negotiations with police occurring prior to the hearing date are generally conducted in writing and should, if police have carriage of the matter, be directed to the Local Area Commander.

(See the *NSW Young Lawyers' Practitioners Guide to Criminal Law* available online at <http://criminal.younglawyers.com.au> for information on charge negotiations generally.)

Tim: negotiations with police

Tim was a great fan of the cops and robbers TV genre and was picked up by police in a siege-type situation for attempting to hold up the local news agency with a replica pistol. Tim's behaviour was clearly naïve rather than criminal. He was acting out a game based on a favourite TV show rather than acting upon any intention to commit an armed robbery. After an interview with Tim's mother and hearing submissions from IDRS about the effects of his disability, the police exercised their discretion and decided not to lay charges. If charges had been laid, the matter may well have ended up in the District Court.

Charge negotiation

What could be regarded as naïve behaviour on the part of people with intellectual disability sometimes results in a criminal charge. Unfortunately, some of these charges will be headed for the higher courts unless the charge negotiation process can be successfully entered into. As of October 2011, there are no provisions for making section 32 applications in the higher courts, therefore keeping a matter in the Local Court will allow a section 32 application to be made for eligible clients.

It may be that your client's subjective features that flow from his or her disability will be a key element in the charge negotiation process. If you have supporting documentation of your client's disability, consider supplying a copy to the Director of Public Prosecutions (DPP).

In cases of more serious charges that are to be finalised in the District Courts, charge negotiation should be considered with a view to persuading the prosecution:

- to withdraw the charges
- to proceed on a less serious charge that can be finalised in the Local Court to allow potential diversion under section 32
- to not elect or to withdraw election for matters to be dealt with in the District Court.

Negotiations should begin before committal for trial or sentence but only after a thorough reading of all available materials such as the court attendance notice, the facts and the brief, if available.

Written applications for withdrawal of charges or charge negotiations should be prepared with reference to the Office of the Director of Public Prosecutions' Guidelines available at www.odpp.nsw.gov.au/guidelines/guidelines.html. Prosecution Guideline 4 sets out three tests as follows.

Test 1: Prima facie case test

Test 2: Whether or not 'it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law'.

Test 3: Consideration of many factors, including whether the offence is of a trivial nature, whether prosecution would be counterproductive, whether there are special circumstances that would prevent a fair trial from being conducted, the availability and efficacy of any alternatives to prosecution, the degree of culpability of the alleged offender in connection with the offence, and special disability of the alleged offender.

In some instances, a particular factual scenario may give rise to numerous potential charges. Often the most serious charge available will have been laid. It is important to consider the elements of each charge and to consider what alternative, less serious charges are available. If you have reports or support plans available, consider whether or not it would be of assistance to supply them to the prosecution as part of the charge negotiation process. Negotiations are most likely to be successful in cases where the objective seriousness of the alleged offence is low and there are strong subjective features of your client that point to the suitability of diversion, rather than charges being dealt with at law.

Table 1 and Table 2 are contained in Schedule 1 of the *Criminal Procedure Act 1986* (NSW). If the charge is a Table 1 or Table 2 offence, then negotiations should be conducted with a view to asking the prosecution not to elect to have the matter dealt with in the District Court, thereby having the matter finalised in the Local Court.

If the charge is a strictly indictable charge, then negotiations should be directed at persuading the DPP to substitute an alternative charge. (See Prosecution Guideline 20.)

(For more information generally on the topic of charge negotiation, see the *NSW Young Lawyers' Practitioners Guide to Criminal Law* available online at <http://criminal.younglawyers.com.au>. It is a valuable resource that is both clearly written and practical.)

Darren: a case for charge negotiation

Darren (18) is a young Aboriginal man who has a mild intellectual disability. He was travelling in a taxi with two others from the youth refuge where he had been residing. Unknown to Darren, two of these young people decided to rob the taxi driver. Darren was present, and was drawn into the robbery when the others demanded he ask for coins.

Darren did not have a criminal history and was a minor player in a serious offence. There is no doubt that his disability impaired his judgement, and his response to the situation. He was refused bail because of the seriousness of the offence, the strength of the prosecution case, the likely sentence and the fact that he had nowhere to live.

Darren spent 8 months in an adult gaol before he was released by the sentencing judge on a two-year good behaviour bond. His experience in custody was devastating. He was sexually assaulted and spoke about not sleeping during the night in case he wet his bed. He was terrified of the response by other prisoners who might discover this problem. It is our view that Darren's experience would have been dramatically different if section 32 of the MHFPA applied.

(IDRS thanks the Shopfront Youth Legal Centre for permission to use this case study.)

PART 6: OBTAINING EVIDENCE, SERVICES AND A SUPPORT PLAN

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The evidence required to support a section 32 application is directly linked to the decisions that the magistrate must make. That is, the jurisdictional question or finding of fact that your client is a person who is 'developmentally disabled' (or a person suffering from a mental illness or a mental condition for which treatment is available in a mental health facility), and the discretionary question of whether it is more appropriate that the person be dealt with under section 32 rather than according to law.

You will need to obtain evidence to satisfy the jurisdictional question. That is, to show that your client is a person with a developmental disability, such as intellectual disability, or another relevant condition.

Evidence relevant to the discretionary question of persuading the magistrate that it is more appropriate to deal with your client in accordance with section 32 may include showing that your client has appropriate supports or services to meet their needs and that with these supports the likelihood of further charges may be reduced. It may also be relevant to the exercise of discretion to show a link between your client's disability and the alleged offending conduct.

Support plan v treatment plan

In applications for people suffering from a mental illness, the term 'treatment plan' is frequently used. However, as intellectual disability is not a disease that can be medically treated, the term 'support plan' is more appropriate when making section 32 applications for people with intellectual disability. You should be alert to the fact that magistrates may be more familiar with the term 'treatment plan'.

Some evidence will be relevant to both satisfying the jurisdictional question and persuading the magistrate to exercise their discretion in your client's favour and deal with the matter under section 32.

Identifying services and supports may be the most difficult aspect of the preparation for a lawyer who is unfamiliar with disability services. Information is included about obtaining disability services and support plans. Mainstream services may well be an integral part of either existing or potentially beneficial supports for your client.

Often family members or disability or other workers involved with your client will be able to assist in the evidence gathering process. However, lawyers need to play an active role in this process, particularly in cases where your client has no one else to assist.

Level of evidence required

The best evidence of intellectual disability to satisfy both the jurisdictional question and to positively influence the magistrate to exercise discretion in favour of your client is a comprehensive psychological assessment that indicates your client's IQ, outlines and explains deficits in adaptive functioning and that the disability was present before the age of 18. It may also be of assistance in relation to the jurisdictional question if the report clearly states that intellectual disability is a developmental disability, so as to reflect the language of section 32.

Using an assessment prepared by a psychologist with expertise in intellectual disability is particularly important if the effects of your client's disability are not clear or if the disability is at the mild end of the scale. 'Mild' disability is frequently misunderstood as being minimal in effect and requires careful explanation in order for the court to understand its full impact. (See common misconceptions about 'mild' intellectual disability in Part 4: Clients with intellectual disability.)

For example, a client may have high-level verbal skills that mask their very limited understanding. A psychologist familiar with the effects of intellectual disability will be able to clearly explain the discrepancy between expressive and receptive language skills to the court and the effects of such a discrepancy on the person's daily life. Without such an explanation the court is unlikely to fully understand the impact of that person's disability.

Whether you need the best evidence in the form outlined above or whether a lesser form of evidence will suffice will be a matter of judgement. Every client and every matter will be different. Factors that may influence this judgement call include:

- the severity of your client's disability
- the apparentness of your client's disability
- the level of knowledge about disability on the part of the judicial officer
- the seriousness of the alleged offending behaviour
- the category of offence
- the number and type of entries on your client's criminal history.

A section 32 application for a client whose disability is evident charged with shoplifting with no previous history will require a lower level of evidence than an application for a client charged with assault who has a history of similar offences and who appears very independent.

If you find your assumptions about the level of evidence that the court will accept are incorrect, an adjournment should be sought to enable you to obtain the evidence required. Rejection of lower level evidence by the court would, on the face of it, appear to be good grounds for a grant of Legal Aid for a comprehensive, specialist report from an appropriately qualified and experienced psychologist.

Psychological or psychiatric assessment
Psychologists are best qualified to formally assess intellectual disability given their expertise in assessment of IQ and of adaptive functioning. For people with mental illness (or psychiatric disability) an assessment and report from a psychiatrist is more appropriate. In some cases, your client may have intellectual disability and a mental illness or disorder. Be sure that they are assessed by a professional who either has expertise in both intellectual disability and mental illness or, at a minimum, has an understanding and an awareness of the area that is outside of their area of expertise.

Obtaining evidence of intellectual disability

As stated above, a current comprehensive psychological assessment by an appropriately qualified and experienced psychologist is the best way to prove your client's intellectual disability. However, there may be existing assessments that will be sufficient in less complex matters. Intellectual disability is a life-long disability and does not usually change substantially over time, so existing assessments should be accepted as relevant to the question of disability. This point should be made to the magistrate if you are tendering existing reports.

Some magistrates may be unwilling to accept this line of reasoning and may require an updated report as proof of disability. If you have the opportunity, gauge the attitude of the bench in relation to accepting existing assessments prior to the presentation of the application to the court, and seek new assessments if indicated. If you are seeking a grant of Legal Aid for a report because the judicial officer has indicated that the available evidence is insufficient, it is important that you state this clearly in your grant application.

While intellectual disability is a permanent diagnosis, there may be some variation in the relative strengths and weaknesses demonstrated in the assessment of the various areas of adaptive functioning. For example, your client's home living skills may have improved if they have received training or may have declined if they have been homeless for some time. If you decide that possible changes in your client's adaptive function are relevant to the application, you should seek an updated assessment. Again, if you are seeking a grant of aid for this purpose, it is important to clearly state the reasons in your grant application.

Some agencies will already hold considerable information about your client in the form of existing assessments. We all have a right to access personal and health information held about us by government and other organisations. Alternatively a disability organisation that your client is involved with may be in a position to provide you with a more current assessment. **It is important to have your client's authority to obtain information from any organisation. Some organisations will require a specific authority rather than a general authority.**

Figure 1 (over) provides a summary of how to get evidence of your client's intellectual disability.

Figure 1: How to get evidence of your client's intellectual disability

Remember: ALWAYS get your client to sign a consent form. Organisations will not share information without one.

	Situation	Who to contact for evidence
NEW ASSESSMENT	Complex matter or inadequate existing evidence	Seek a new assessment from a psychologist and apply for a grant from Legal Aid NSW to cover the cost
ADHC	Client is an existing or past ADHC client	Contact ADHC and, if possible, the client's case worker
NGO	Client uses non-government disability service(s)	Contact the non-government disability service provider(s)
HEALTH	Client has a GP or treating specialist	Contact the GP or treating specialist
COURT RECORDS	Client has previous criminal history or section 32 applications	Contact the client's previous legal representatives and/or Legal Aid NSW
PRISON RECORDS	Client has previously been incarcerated	Contact Justice Health NSW or the Information Access and Privacy Unit at Corrective Services NSW
EDUCATION	Client has attended a special class or special school	Contact the school directly and/or the Information Access Unit at the Department of Education and Communities
CENTRELINK	Client receives a Disability Support Pension	Contact Centrelink

Ageing, Disability and Home Care (ADHC)

ADHC is the main agency that provides services to people with intellectual disability in NSW. If your client is an existing or a past ADHC client, there may be an existing psychologist's assessment or other reports on file. If your client is a current ADHC client, contact their case worker. If your client has been an ADHC client, contact the Information, Referral and Intake line for your region. (See Part 12: Contacts and referral points or the Ageing, Disability and Home Care website at http://www.adhc.nsw.gov.au/contact_us.)

Non-government disability services

A range of specialist services, including employment, drop-in home support, community access services and case management services are available to people with intellectual disability from non-government organisations (NGOs). Check to see if your client is involved with such services and whether the service has any assessments or is able to assess the client. If there is no formal assessment, the service may provide a report or letter confirming your client's disability. (See Part 12: Contacts and referral points for contact details for some of the major non-government disability service providers.)

GP or treating specialists

GPs, particularly those who have seen your client over an extended period of time, may have copies of existing reports or may be able to comment upon your client's intellectual disability. A short letter from a GP will not be strong evidence of your client's disability and should only be relied on in very limited circumstances.

Some treating specialists such as psychologists, neurologists or psychiatrists may be in a position to provide evidence of your client's disability. If you seek a new report from a treating specialist, it is likely to involve a fee. (See section on Legal Aid on page 26.)

Previous criminal history or section 32 applications

If your client has been sentenced at law or dealt with in accordance with section 32 previously, it may be that evidence by way of reports was tendered on their behalf. In addition to contacting your client's previous legal representatives for copies of the reports, it is also possible to access the court file and request any copies of documents contained in it. Contact the Local Court registry. Whether or not this course of action will be useful will depend upon how long ago the matter was before the courts and the quality of the materials originally tendered.

Previous incarceration

Information in relation to a client who has previously been incarcerated could possibly be held by either Justice Health or Corrective Services NSW. Justice Health is separate to Corrective Services. Information held by Justice Health is more likely to pertain to a person's mental and physical health than to a person's intellectual disability. If your client has mental illness, then this could be a useful source of evidence.

Justice Health will supply information upon receipt of a signed consent form. Requests should be as specific as possible, and at a minimum should include your client's full name, date of birth and details of the type of information sought. Inclusion of a MIN number is not essential, but would be helpful. If the information is not extensive, then no processing fee applies. Applications can be faxed to (02) 9289 5014.

Statewide Disability Services (SDS) is the part of Corrective Services NSW that assists inmates with a disability. SDS does not have an informal release of information system in place and all requests should be directed to the Manager of the Information Access and Privacy Unit at Corrective Services NSW. An application fee applies. An application form is available on the Corrective Services website at http://www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0014/202046/gipaa-application-form-v3.pdf.

Special class or special school

The Department of Education and Communities holds two types of records about its students. The first is school records and the second is counselling records. School records are held for either seven years after the student leaves school or until the student's 25th birthday, whichever occurs first. Counselling records are kept for up to 70 years. Sometimes counselling records will be held with school records. School records can sometimes be obtained informally directly from the school. Otherwise both sorts of records can be obtained from the Information Access Unit. (See <https://www.det.nsw.edu.au/about-us/information-access/how-to-access-information> for further details and an application form.) The relevant question to ask your client may be if they ever saw a counsellor at school.

Reports that are over seven years old should not be relied upon except in straightforward matters where the person's disability seems clear.

Disability Support Pension

All people who are in receipt of a DSP will have undergone some form of assessment. However, it may be that a person who has intellectual disability has been granted a DSP on the basis of another issue such as a physical disability. The assessment procedures for the DSP have become more rigorous in recent times. Sometimes updated assessments will take place. The more recent the assessment, the more detailed and useful it is likely to be.

All requests for copies of assessments must be in writing and can either be made online or to any Centrelink office. If the assessment is readily available in the office in which the application is made, the process will be straightforward. If not, the matter will be allocated to a Freedom of Information officer who will complete the request. You will receive notification of the name of the officer handling the request. (See <http://www.humanservices.gov.au/corporate/freedom-of-information/index> for further information.)

Arranging an assessment

If you cannot obtain sufficient evidence and your application may fail without it, an application should be made for a grant from Legal Aid NSW to cover the cost of getting an assessment from a psychologist who has experience in assessing intellectual disability. Aboriginal Legal Service lawyers should approach their supervising lawyer for approval for funds for reports when necessary.

Legal Aid NSW

Legal Aid NSW will fund assessments in the Local Court in some circumstances. It is important to explain to Legal Aid NSW all the relevant circumstances. This may include:

- any evidence of particular diagnosis or of the suspected diagnosis available to the lawyer (for example, past reports, instructions from family, the lawyer's own observations)
- the purpose for which the report is being sought (in cases of section 32 applications, proof of developmental disability to satisfy the jurisdictional question and/or for an outline of appropriate supports to reduce the risk of re-offending)
- why there is merit in seeking a report (for example, in section 32 matters: the type of offence; whether or not there are reasonable prospects of a support plan being able to be devised to reduce the risk of re-offending and persuade the magistrate to exercise their discretion to apply the section; whether or not the magistrate has rejected an older report and the application will fail on the jurisdictional question if no new report is forthcoming)
- who will complete the report (for example, a treating practitioner or another expert).

Continuity and Legal Aid NSW

IDRS has observed that lack of continuity in representation for clients with intellectual disability can be a great source of stress, results in additional adjournments and may have a negative impact on the outcome for the client.

If you are making an application for a grant of aid to represent a person with intellectual disability in criminal proceedings, it is important that you provide Legal Aid NSW with relevant information about why the matter should be re-assigned back to you. The rules at Legal Aid NSW require that every Legal Aid application lodged be offered in-house first unless there are exceptional circumstances. Intellectual disability may constitute exceptional circumstances that will allow lawyers to maintain carriage of a matter.

Extra work items

Legal Aid NSW acknowledges that sometimes extra work will be required on the part of the lawyer who is preparing a matter for a client with intellectual disability. Legal Aid NSW will consider granting extra work items, in particular extra conferences and preparation time, if such items are requested with an explanation as to why they are necessary.

Domingo: Continuity

Domingo was charged with a breach of an apprehended violence order.

On the first court date, the lawyer obtained an adjournment to allow information to be obtained from Domingo's ADHC case worker. On the second court date, another lawyer asked Domingo whether the first lawyer had recommended he plead guilty or not guilty. Unfortunately Domingo could not remember. The support person raised the possibility of a section 32 application but the lawyer decided Domingo should plead not guilty and adjournment was granted.

On the third court date, yet another lawyer appeared and decided a section 32 was the best way to proceed and again adjourned the matter for reports. On the fourth occasion, Domingo's matter was finalised by way of section 32 by the fourth lawyer.

The delays for Domingo could have been substantially reduced if he had continuity of representation.

Identifying a psychologist to conduct an assessment

The Australian Psychological Society website at www.psychology.org.au provides a database of qualified psychologists by location and specialities.

Ensure that the psychologist has experience working with people with intellectual disability before engaging them. This is particularly important if you will also want the psychologist to provide advice about appropriate treatment/support to assist your client. You can contact IDRS to get names of psychologists that our service has engaged for this purpose in the past.

Also ensure that the psychologist will assess the person's adaptive functioning as well as their intellectual function. Tests commonly used to assess adaptive functioning are the Vineland Adaptive Functioning Scale, the SIB-R or ABAS-11.

If you are considering referring your client to ADHC, it is best to request the psychologist to assess your client's intellectual function using the WAIS III. Less extensive assessments such as the Kaufman Brief Intelligence Test (KBIT2) will usually be acceptable to the court to establish intellectual disability but may not be sufficient for ADHC referral processes.

Obtaining disability services

Find out what services your client already has in place and consider any additional services or support that could be put in place. For example, a client may already attend a day program, have a case worker through a non-government disability service or participate in a supported employment program. Liaise with current service providers about additional assistance that may be available. Discuss options directly with your client.

Alternatively, your client may not have any services at all and no one to assist with linking in with appropriate providers. Often these people will not have had their intellectual disability properly assessed. In such cases you should seek funding for an assessment and make the appropriate referrals.

For people who have no services and no one to assist them, it is worth contacting a Disability Advocacy Service to ask for an advocate to work alongside your client to ensure that their needs are met. (See Part 12: Contacts and referral points.)

Ultimately it is likely that you will need to obtain reports from service providers about current and additional services. You can then tender this information to the court as a support plan or use it as a basis to write your own support plan.

Again the level of evidence needed will depend on the complexity of the matter.

(See Figure 2 and Part 12: Contacts and referral points.)

Figure 2: Obtaining a support plan and disability services

Remember: ALWAYS get your client to sign a consent form. Organisations will not share information without one.

STREAM 1	STREAM 2	STREAM 3	STREAM 4	STREAM 5
Receiving ADHC case management or other ADHC services	Receiving services from non-government disability service provider	Evidence of intellectual disability but not currently receiving services	Evidence of intellectual disability but not currently receiving services	Indicators of intellectual disability but no or inadequate evidence of intellectual disability
Contact ADHC case worker to discuss support needs and to request an updated support plan. For clients who have previously been in custody, discuss referral to ADHC's Community Justice Program (CJP) with case manager or if necessary, make application for CJP	Contact non-government disability service provider case worker to discuss support needs and to request a support plan or letter outlining current and proposed supports	Refer to ADHC and, if accepted, return to Stream 1 If not accepted, seek information and referral to non-government disability service provider from ADHC and consider internal review of ADHC's decision, return to Stream 2	Refer directly to non-government disability service provider	Arrange a psychological assessment and if receive evidence of intellectual disability, return to Stream 3

Adapted from Legal Aid NSW Resource

Referring a client to ADHC

With your client's consent, a referral can be made to ADHC for services. If your client is accepted, ADHC will complete a needs assessment and develop a detailed support plan. If there is no one else who can make a referral, the lawyer may need to do this. Clients with criminal justice issues should be given priority by ADHC.

To make a referral, phone and email the intake officer for the region where your client is based. Check whether the region has a specific form for referrals. (See Part 12: Contacts and referral points for the phone and email contacts for Information, Referral and Intake in each ADHC region.)

A referral to ADHC should be accompanied by some evidence of the person's intellectual disability. The more information you can give the intake officer the better the outcome and the quicker the process for intake will be. The best information would be a psychologist assessment. Ideally this will comment upon the age of onset of the disability. Sometimes letters from family may be needed to show that the disability occurred prior to the age of 18 years. If there is no assessment then evidence such as school reports, Department of Education and Communities counselling records, health records and Centrelink records could be included.

If your client has previously been an ADHC client, providing evidence of disability to ADHC should not be necessary.

Getting assistance from ADHC can be slow. However, ADHC policy provides that people with criminal justice issues and court matters pending should be regarded as high priority in terms of urgency.

Even if a client is unlikely to be eligible for ADHC direct services, it is worth contacting ADHC Information, Referral and Intake for information and referral to NGOs. ADHC funds NGOs to work with people with a broader range of disability than are served by ADHC directly.

The Community Justice Program (CJP) of ADHC is aimed at people with intellectual disability who are exiting custody or detention or have a history of incarceration and are at risk of re-offending. It offers a comprehensive and intensive range of supports that will vary according to a client's needs.

(Appendix 1: More about ADHC, for more detail on frequently asked questions.)

Non-government disability service providers

Disability services are also provided by NGOs. Services include supported employment and support to get open employment, case management, residential placement, community access assistance, drop-in home support and behaviour intervention. Note that referrals for accommodation will generally need to go through ADHC. (See Part 12: Contacts and referral points for some of the major non-government disability service providers and for Disability Information Services.)

Mainstream services

It is important to remember that some or all of the person's needs may be best met by mainstream rather than disability services. These could include specialist medical treatment to address health problems, drug and alcohol rehabilitation, housing services, relationship counselling, anger management counselling, or something as simple as participation in a local sporting team to foster greater social engagement. Youth services may provide the best options for a young person. Some clients will prefer mainstream services to disability support. Any support plan should take relevant mainstream services into account.

However, it is likely that your client will need assistance planning and accessing relevant mainstream services.

GP mental health care items

An important and often overlooked source of mainstream counselling is a referral by a client's GP to an appropriately trained psychologist under a GP mental health care plan for Medicare-subsidised therapy sessions. Up to 12 sessions are available in any calendar year, with an additional six sessions potentially available in exceptional circumstances. Such sessions may be of benefit to a client who needs assistance with anger management, grief, sexuality or relationships, among other things.

Does your client have an appointed guardian?

A guardian is a legally appointed substitute decision maker. Under the *Guardianship Act 1987 (NSW)*, the Guardianship Tribunal of NSW can appoint a guardian for a person who has a disability and is over the age of 16. The kinds of decisions the Tribunal can authorise a guardian to make include decisions about accommodation, what support services a person should receive, what medical and dental treatment and health care a person should receive, and whether restrictive practices are justified and necessary in the interests of the person.

The Tribunal may appoint a private person or the Public Guardian. The Tribunal also has jurisdiction to appoint a private person or the NSW Trustee and Guardian as a financial manager for a person who is incapable of managing their financial affairs.

Most adults with intellectual disability will not have an appointed guardian. A significant proportion of clients who are repeatedly charged with criminal offences have had a guardian appointed at some stage. It is important to establish whether or not your client does have a legal guardian. If your client is uncertain about this, you can contact the Guardianship Tribunal. (See Part 12: Contacts and referral points.) Depending on what decision-making authority the guardian has, it may be important to consult the guardian when preparing a section 32 application. The fact that your client has an appointed guardian may be considered relevant by the magistrate when considering the application. (See the *Guardianship Act 1987 (NSW)* or www.gt.nsw.gov.au for further information.)

Support plans

While there is no requirement under the MHFPA for a support plan, the court will generally require a plan when exercising its discretion and dealing with a matter by way of section 32. The support plan may address issues such as living skills, education, supported accommodation, drop-in support services in their independent accommodation, recreation, employment, day programs or behavioural therapy.

A support plan will outline current supports and additional support that is to be put in place with a view to assisting your client to avoid or reduce the likelihood of attracting similar charges in the future.

Ideally your client will commence some or all aspects of the support plan before the finalisation of the matter in court. This could be used as a tangible demonstration of your client's cooperation and the effectiveness of the plan.

Involving your client

The best support plan is one that your client is likely to stick to, so it is crucial that as far as possible they are involved in its preparation. Your client should also be willing to comply with the parts of the plan that could become conditions in a section 32 order. It is best not to have your client promise to do things that they cannot do or are vehemently opposed to. This should be a fundamental part of the process of developing a support plan for any disability organisation or professional. However, in the experience of IDRS, client participation in developing the plan cannot be assumed. It is important to ascertain your client's honest opinion of the plan and their willingness to accept it.

Types of support plans

1 Psychologist engaged to assess disability

If you are seeking a new assessment of your client's disability from a suitably qualified and experienced psychologist, consider also asking them to make recommendations about what services should be put in place to assist your client to minimise the risk of offending behaviour in the future. This is particularly important if your client has no current services and no one to help access services. However, the psychologist may not be able or willing to take the steps to link your client with the services.

In this case you will need to make sure mechanisms are in place for implementation to occur by either arranging for someone else to do it or by arranging the services yourself.

You should be prepared to explain to the court how the plan is to be implemented.

2 ADHC

ADHC support plans are based on an assessment of the client's needs and are extremely detailed and come in a standard format from ADHC case workers. They usually cover all areas of a person's life. They are particularly helpful in circumstances where your client has complex behavioural difficulties and requires a range of services.

It is important that you liaise with the ADHC worker preparing the plan and discuss which specific areas of support would be of greatest assistance to both your client and the court. There is a potential risk in including all aspects of a wide-ranging plan as conditions of a section 32 order as this may increase the likelihood of a breach. (See Appendix 1: More about ADHC.)

3 Non-government disability service providers

Your client may be receiving support from NGOs. These organisations may not be familiar with what is required when writing a support plan, so it is generally advisable to talk with them about the sorts of issues that should be covered and confirm this discussion in a letter. Specific supports that could assist the person that are typically offered by NGOs include drop-in accommodation support, employment, counselling, day programs, community access support and behaviour support.

Some clients with intellectual disability may be linked with mainstream services rather than disability services. If that is the case, then those are the agencies that might best be able to assist with compiling a support plan for your client.

4 Do-it-yourself plan

This is a sort of hybrid plan that you put together from all of the information that you have gathered about available services. It may be as simple as a few dot points on a page. This may be necessary if you are unable to engage the support of an organisation to put the various strategies together as a support plan. It will generally be backed up with information about the service, letters from service providers or more detailed proposals.

For example, the do-it-yourself support plan may rely upon acceptance to courses in anger management or relationship counselling, participation in sporting activities, drug and alcohol programs or any disability services that have been engaged.

Another reason for putting together a summary plan might be that the support plans supplied by other agencies are overly detailed and are not agreed to in full by your client.

Many magistrates may make compliance with the support plan a condition of the order so it is important that the plan is something that is both achievable and agreed to by your client.

Do-it-yourself support plan example A

Jean Brown agrees:

- To continue to accept support from Care Connect until ADHC services take effect. This service provides case management services to people with intellectual disability. Ms Brown is receiving assistance with budgeting and cooking lessons
- To continue to participate in the ADHC assessment process
- To accept ADHC services when they are offered to her.

Do-it-yourself support plan example B

I, Bill Jones, agree:

- To continue to accept psychological counselling and support from DSA (Disability Services Australia) or a similar organisation
- To continue to accept treatment and take medication for my mental health issues as directed by my doctors at Kiama Community Health Centre or by my treating GP
- To continue to go to XYZ Industries or a similar supported employment service as arranged in consultation with my cousin, Stephen Jones
- To continue to participate in structured leisure activities such as the multicultural outings organised by the Central Southern Neighborhood Centre or at a similar organisation
- To continue to accept assistance from my cousin, Stephen Jones, and to explore other options for support and social activities.

I have talked with my lawyer, Jane Smith, from IDRS and with my cousin, Stephen Jones, about this support plan. I think it is good.

Bill Jones

(Signed and dated)

I also agree to not approach the girl from the bus stop. (Hand written and added on the day, then signed and dated.)

PART 7: LEGAL PRINCIPLES

Following is a summary of the legal principles relevant to section 32 applications. The first section outlines some of the general principles that are relevant, while the second section covers principles relevant to the exercise of the magistrate's discretion. That is, that it is more appropriate to deal with the matter under the section rather than according to law.

General principles

No requirement for a plea

Under section 32(1), a section 32 application can be made at the commencement or at any time during the course of the proceedings. Section 32 has operation regardless of whether or not a plea has been entered (*Perry v Forbes* (Unreported, Supreme Court of NSW, Smart J, 21 May 1993) and *DPP v El Mawas* [2006] NSWCA 154 [62]). The requirement that a plea be entered before the determination of a section 32 application may amount to an appellable error. The Public Defender's Office is willing to advise solicitors considering Supreme Court appeal in section 32 matters where the client is, or could be, legally aided. Contact section32@idrs.org.au for further information.

Not necessary for fitness to plead to be determined prior to section 32 application

It is only when the court charges the defendant and requires a plea that the question of whether a defendant is fit to plead needs to be determined.

Mantell v Molyneux (2006) NSWSC 955 [16]

(See also *Mackie and Hunt* (1989) 19 NSWLR 130.)

Intellectual disability is eligible

Part 3 of the MHFPA is applicable to people with intellectual disability who do not suffer from a mental illness (*R v Mailes* [2001] NSWCCA 155). (See Part 2: Eligibility for section 32 for further discussion.)

Mild intellectual disability

In *Muldrock v The Queen* [2011] HCA 39, it was not contested that the appellant had a 'mild' intellectual disability. The High Court found that the District Court judge had aptly described the appellant's disability as 'significant'. The High Court, citing the New South Wales Law Reform Commission said,

'A person's intellectual disability can be classified as 'mild', 'moderate', 'severe' or 'profound', based upon certain IQ (intelligence 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 disability is inconsequential.'

(footnotes omitted) [50]

In relation to the specific circumstances of Mr Muldrock's case, the High Court said,

The fact that the appellant had engaged in some paid employment and that he held a driver's licence does not detract from the assessment of his retardation. The evidence was that he had 'enormous difficulty with employment'. He was unemployed at the time Ms Daniels assessed him. She recommended that he would benefit from 'a properly supervised sheltered workshop environment'. [51]

(See also Part 4: Clients with intellectual disability, subsection on common misconceptions about 'mild' intellectual disability.)

Acquired brain injury is a mental condition

ABI is a mental condition for the purposes of section 32 (*DPP v El Mawas* [2006] NSWCA 154). (See Part 3: Clients with acquired brain injury for further discussion on clients with ABI.)

Section 32 is available for traffic matters

The case of *Police v Deng* ([2008] NSWLC 2) involved a charge of negligent driving occasioning death. A successful section 32 application was made on Ms Deng's behalf. The magistrate wrote to the Road Traffic Authority and recommended that the applicant not be reissued with a learner's permit for a minimum number of years. This approach may satisfy magistrates who are reluctant to deal with traffic matters under section 32.

Procedural fairness

Powers in relation to section 32 are to be exercised with procedural fairness (*DPP v El Mawas* [2006] NSWCA 154 [74]). Not affording a lawyer the opportunity to make submissions in relation to section 32 may amount to a denial of procedural fairness and, as such, constitute an appellable error (*Khalil v His Honour, Magistrate Johnson* [2008] NSWSC 1092).

Principles relevant to the exercise of discretion

The court must be satisfied that it is more appropriate to deal with your client and their charges under the MHFPA than in accordance with the law. This is often more difficult to establish than the jurisdictional issue and is entirely at the discretion of the magistrate. It will require supporting evidence, advocacy and persuasive submissions from you.

No exhaustive list of factors

It should be noted that there is no definitive, exhaustive list of relevant considerations for the magistrate. Section 36 allows the magistrate to inform him or herself as they see fit, on the proviso that they do not require the defendant to incriminate themselves. The powers are of 'an inquisitorial or administrative nature' and must be exercised in accordance with the requirements of procedural fairness (*DPP v El Mawas* [2006] NSWCA 154 [74]). What is relevant will depend on the particular circumstances of the case. In the words of Justice McColl in *El Mawas*:

... it involves a discretionary decision in which the magistrate is permitted latitude as to the decision which might be made, a latitude confined only by the subject matter and object of the Act.

at [76], citing *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*

Balancing public interest

The question of appropriateness is a discretionary judgement which requires balancing:

... the public interest in those charged with a criminal offence facing the full weight of the law against the public interest in treating, or regulating to the greatest extent practical, the conduct of individuals suffering from [the relevant disability] ... with the object of ensuring that the community is protected from the conduct of such persons ...

DPP v El Mawas [2006] NSWCA 154 [71]

Outline of facts

A consideration of an outline of the facts is part of the decision-making process in determining whether or not to apply the section. (See section 32(1)(b) and *Perry v Forbes* (Unreported, Supreme Court of NSW, Smart J, 21 May 1993).

The particular facts giving rise to the offence(s) for which the defendant is before the court is relevant, rather than the type of offence(s) (*Confos v DPP* [2004] NSWSC 1159 [21]). This means that magistrates may be falling into appellable error if they refuse to deal with a particular category of offence under section 32.

Seriousness

Due regard must be:

... paid to the seriousness of the offending conduct for which the defendant is before the court. Clearly the more serious the offending, the more important will be the public interest in punishment being imposed for the protection of the community and the less likely will it be appropriate to deal with the defendant in accordance with the provisions of the Act.

Confos v DPP [2004] NSWSC 1159 [17]

... the section 32 diversionary regime is available to serious offenders as long as it is regarded, in the magistrate's opinion, as more appropriate than the alternative. No doubt a magistrate considering that question will consider whether proceedings in accordance with s 32 will produce a better outcome both for the individual and the community.

DPP v El Mawas [2006] NSWCA 154 [79]

Link between the offending conduct and disability

There is no requirement in the legislation that a link between the offending conduct and the person's disability be established. In *DPP v El Mawas* [2006] NSWCA 154, the magistrate declined to grant a section 32 order for reasons including that the condition of the accused did not play a part in the commission of the offence. However, other cases do not explore such a link. (See, for example, *Police v Deng* [2008] NSWLC 2.)

(See Part 9: Link between disability and criminal charges for further information.)

Sentencing outcomes available at law

The magistrate may also have regard to the realistically available sentencing outcomes in the event of conviction. For example, if the magistrate considers that it is very likely that a non-custodial option would be appropriate, this can be taken into account (*Mantell v Molyneux* [2006] NSWSC 955)/

In *Police v Deng* [2008] NSWLC 2, the magistrate, when taking into account available sentencing outcomes at law, also considered that the at law option would necessarily include supervision by Parole Service in a situation where the applicant was already adequately supervised by appropriate professionals:

In my view to require the applicant to be subject to the supervision of the Probation Service would add a somewhat superfluous layer into the existing mix of treatments – such treatments having been developed by highly skilled and experienced professionals.

Deterrence

It is a well-established sentencing principle that people with mental disorders are not appropriate vehicles for general deterrence. In *Muldrock v The Queen* [2011] HCA 39, the High Court said,

A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community...

... The fact that the appellant possessed the superficial understanding of a mentally retarded adult that it was wrong to engage in sexual contact with a child and that he told childish lies in the hope of shifting the blame from himself were not reasons to assess his criminality as significant, much less to use him as a medium by which to deter others from offending.

Muldrock v The Queen [2011] HCA 39 [54–55]

See also: *Confos v DPP* [2004] NSWSC 1159 [20]

Support plan

There is no requirement in the legislation for a support or treatment plan to be presented as part of a section 32 application. However, very often a support plan will be required in order for the application to be successful. In the case of *Perry v Forbes* (Unreported, Supreme Court of NSW, Smart J, 21 May 1993), one of Ms Perry's difficulties was that she imagined she was an authorised bus driver and she took and drove a bus. It was said in the judgement:

The magistrate was confronted with an offence of some apparent gravity and he needed to know the circumstances surrounding the taking and driving of the bus and the mental condition of the defendant. Practically, he needed to have placed before him a clear and effective treatment plan and one which was likely to ensure that there would not be a repetition of the incident in question or the occurrence of some other unfavourable incident.

Perry v Forbes (Unreported, Supreme Court of NSW, Smart J, 21 May 1993) [16]

Weight given to a support plan

Judicial officers are not required to give substantial weight to the support plan when exercising their discretion (*DPP v El Mawas* [2006] NSWCA 154 [10].)

Support plan or responsible person

... before there can be an exercise of discretion under s32(3)(a) the court is obliged to arrange for there to be some evidence of some sort of plan, or to obtain evidence whereby some appropriate person, be it the Public Guardian, or evidence of some available institution, before an order can be made. This, of course, underlines the fact that in our society we do not make proper provisions for people such as the defendant ...

DPP v Albon [2000] NSWSC 896 [26]

Duration of final orders

A final order to a section 32(3) order may last for six months, but the case of *Mantell v Molyneux* (2006) 165 A Crim R 83 [42] notes that interlocutory orders pursuant to section 32(2) can considerably extend that period.

PART 8: MAKING THE APPLICATION AND SUBMISSIONS

Step 1: Getting instructions

It is always preferable to seek your client's instructions about making a section 32 application and every effort should be made to achieve this. However, it is not strictly required according to the wording of the MHFPA. Ideally, a section 32 application is made prior to entry of a plea, although a section 32 application can be made at any time during the course of the matter. Section 32 is available whether or not your client is fit to plead. (*Mackie v Hunt* (1989) 19 NSWLR 130.)

Your client cannot give instructions

If your client cannot give instructions, then one option you may want to consider is seeking leave to appear *amicus curiae*. As an *amicus*, you can only ensure that the court is aware of the information about your client that it should be aware of in making its decision. You cannot advocate for your client as such. Some practitioners are of the view that while the legislation may allow the lawyer to raise section 32 regardless, the legal professional rules would not.

Your client instructs you not to make a section 32 application

If your client gives you instructions that they do not want you to make a section 32 application and you are of the view that there are grounds for the making of such an order, it will be a matter of judgement as to whether or not the application should go ahead. In IDRS's view, if your client's instructions are rational and soundly based, then those instructions should be acted upon even if it means that your client will be dealt with according to law. However, IDRS stresses that it is important that you take adequate time to listen to your client and find out why your client does not want the application to be made. For example, it may be that your client is uncomfortable with acknowledging their disability and does not understand the reason for this. It could be that there is an aspect(s) of the proposed support plan that your client does not want to adhere to. In such cases, discussions with the service providers and re-drafting of the support plan might alleviate your client's hesitations. Often clear communication and effort to sort out issues will resolve the problem.

Step 2: Flagging the application with the court and the prosecutor

At the first (or next) court mention, inform the magistrate that you intend to make an application under section 32 of the MHFPA and, if necessary, apply for an adjournment to obtain reports and a support plan to assist the application. It may take eight or more weeks to source reports, so be realistic about the length of adjournment you seek.

It is not unheard of for some magistrates to indicate to lawyers at the time they initially flag the application with the court that the application will not be entertained favourably. All section 32 applications should be dealt with in accordance with the principles of procedural fairness and without bias. Such a comment is not indicative of either. IDRS suggests that it may be appropriate to ask the magistrate to disqualify him or herself from hearing the matter or to adjourn the matter and for you to seek advice from IDRS or the Public Defenders Office. (See Part 12: Contacts and referral points.)

Step 3: Minimising court appearances for your client

Often a section 32 application will involve numerous court appearances for your client, with not a lot happening on each occasion. It may be of benefit to your client to be excused if it is unlikely that the application will go ahead on the next occasion. This might be appropriate when you have referred your client to ADHC or another service provider and the purpose of returning to court is to inform the court of the status of the application rather than to finalise the matter.

Seeking markings

Consider seeking a marking such as 'not before 12 pm' or '2 pm' for your client's matter for the next court appearance. This will save your client the stress of having to wait around a busy courthouse with many other stressed people. A later time in the day for the hearing of the substantive application will also allow the magistrate to devote more time and attention to the details of your application.

Having your client and supporter on standby

Sometimes, in spite of your best efforts to minimise appearances for your client, things will not go according to plan. You may have an ever increasingly distressed client in the foyer of a busy court. In such instances we recommend your client and their supporter wait at a calmer location nearby such as a coffee shop or a park. They can be called by mobile phone and return to court at an appropriate time. Sometimes a brief walk outside the courthouse environment will be enough to settle someone down.

Step 4: Talking to the prosecution

It is always helpful to have the prosecution on side before you walk into court. Contact the prosecutor beforehand and explain your client's situation to them. Outline how you intend to prove your client's disability and what supports will be put in place. Discuss their concerns with them.

Amending the alleged facts

The magistrate must take into consideration an outline of the facts alleged by the prosecution. The prosecution may be amenable to amending the alleged facts to something that casts events in a more neutral light. It is best to seek any proposed amendments to the facts in advance of the court date rather than at the bar table.

Remember, you do not have to admit the facts so always refer to them as alleged facts.

Step 5: Tendering documents

Tender all documents before you make submissions. Some courts set a timetable for service of documents on the prosecution. If you are unable to comply with the timetable, you should notify the prosecution and explain why you cannot comply. If the magistrate has not made this order and you have a lot of material, it is a good idea to provide the prosecution with a copy in advance to allow them time to consider the material.

Some courts will require that practitioners provide the registry with a copy of any documents to be tendered in advance of the court date. If you have already provided the court with documents, you should still formally tender the documents in court so that a list of documents that have been tendered appears on the record.

The types of documents normally tendered in support of a section 32 application will be a psychological assessment or other document to prove that your client has the relevant disability, support plans and other documents from service providers, reports from any treatment providers such as counsellors or doctors, and in some cases documents from family members. (See Part 6: Obtaining evidence, services and a support plan.)

Consider preparing a chronology if it will be of assistance to the magistrate, particularly in cases where there are voluminous papers. Alternatively, you may choose to draw the magistrate's attention to the relevant sections of the documents by referring them to specific portions of important documents in submissions.

Allow the magistrate time to read the reports before embarking on your submissions.

Step 6: Calling evidence

Generally evidence in section 32 applications is by way of documentary evidence. However, there may be cases where it could be of assistance to call evidence from someone other than your client such as a family member. It may be useful if there is something about your client's circumstances that will not be covered in a report that could potentially link the offending behaviour to your client's disability.

Consider the example of a client in his fifties who approached a young girl at a bus stop who had a key ring attached to her backpack and said, 'Nice key ring. Can I play with it?'. Without knowledge of this client's disability and his social isolation resulting from the death of his parents, coupled with the fact that this client is an avid collector of key rings, these actions could be cast as predatory behaviour. Collecting key rings is something that is unlikely to be commented upon or known by a report writer. A case worker or family member may be best placed to give brief evidence on such habits.

They may even bring the key ring collection to court to show the magistrate. Providing the court with such information has the potential to recast the behaviour in a less sinister light.

Consider whether or not it may be helpful to have a key person involved in the support plan or a family member present in court to demonstrate that your client is supported regardless of whether or not they are required to give evidence.

Step 7: Making submissions

What you want to show

You will need to put before the court evidentiary material on the jurisdictional issue, that is that your client has a developmental disability, a mental condition or a mental illness, and on the question of why it is more appropriate that they be dealt with under the section rather than according to law. Your submissions should address both of these issues.

Persuading a magistrate that it is more appropriate to deal with your client under section 32 is often the more difficult step to establish in cases for people with intellectual disability. It will require skilful advocacy on your part.

You should walk into court knowing all your client's material, that is be familiar with reports, facts, criminal history and circumstances, and be prepared to explain them to the magistrate to convince them that the diversionary avenue is preferable, in particular that it is in the public interest, rather than dealing with your client according to law.

Common issues

Jurisdictional issue

Refer to the evidence that proves that your client has intellectual disability (or a mental condition or mental illness). Direct the magistrate to any sections or quotes in the report(s) that refer to your client's intellectual disability. Ensure that the magistrate is aware that intellectual disability is a developmental disability. (See Part 2: Eligibility for section 32 and Part 7: Legal principles for more information.)

What if the magistrate says your report is too old?

Point out to the magistrate that intellectual disability is a lifelong disability and does not substantially change. While adaptive functioning skills may vary over time, a person will always be affected by their intellectual disability. An old report should be accepted as evidence of intellectual disability. A current report is preferable if your client's matter is complex. (See for Part 4: Clients with intellectual disability.)

What if the only report about the client's intellectual disability is a short, hand-written note from a GP rather than a psychological assessment?

In section 32 matters, the magistrate can inform themselves in any manner they think fit. (See section 36 of the MHFPA.) If your client is an ADHC client, provide the magistrate information about ADHC eligibility criteria. (See Appendix 1: More about ADHC.) Also consider calling short evidence from a family member or a disability worker about your client and their disability.

If, in the end, the magistrate remains unsatisfied as to the existence of a developmental disability, then consider seeking an adjournment of the matter to organise a new report. If you require a Legal Aid grant to do so, the circumstances should be fully explained to Legal Aid NSW in your application. (See Part 6: Obtaining evidence, services and a support plan.)

Disability and the alleged incident

It is unclear whether it is necessary that there be a link between the person's disability and the alleged offence for a section 32 application to be successful. However, if there is a possible link it is helpful to raise it.

Think about the nature of your client's intellectual disability and how it may be linked to the type of behaviour alleged by the prosecution. A comprehensive psychological assessment will outline deficits in adaptive functioning and help both you and the magistrate understand the links. Disability workers and family members are also useful sources of information on how your client's disability affects their interactions with the world. Draw the magistrate's attention to any relevant sections of relevant reports.

It can sometimes be difficult for a lawyer to identify possible links. (See Part 9: Link between disability and criminal charges for further information.)

Seriousness

Consider the circumstances of the offence in relation to specific aspects of your client's disability. Consider the following questions.

- Was there a degree of naivety in your client's behaviour because of their intellectual disability?
- Was your client led by others?
- Was your client's behaviour a spontaneous reaction rather than a planned activity?

Background

Consider aspects of your client's background that you can highlight to the magistrate that may assist them to exercise their discretion in favour of a section 32 application. Ask yourself the following questions.

- What is your client's family history?
For example, if they are a ward of the state who grew up in an institutional setting they may not have had the benefit of developing appropriate interpersonal relationships.
- Was your client bullied at school and as a consequence craves acceptance by a peer group and is easily led?
- Is your client socially isolated and interacts with members of the public in a manner that may be misunderstood?

Criminal history

- **Significant criminal history but no previous section 32 orders**

Some clients may not have previously been identified as having a disability and may not have been linked in with appropriate support services in the past. A consequence of this may be that they have not had relevant supports to help them stay out of trouble. If your client has now been linked in and will consequently receive appropriate assistance, then you have an opportunity to make a powerful submission. It may also be that your client's previous legal representatives did not consider a section 32 application or that your client did not have the application adequately explained to them.

- **Numerous section 32 orders**

Consider making submissions about how intellectual disability may impact upon a client's ability to learn. Learning and behavioural change is a slower process for people with intellectual disability and it requires persistence over a lengthy period.

People with intellectual disability who have developed challenging behaviour may need a great deal of assistance, often specialist assistance, to analyse the cause of the behaviour and assist them to change that behaviour. The behaviour patterns may be fundamental to their way of coping and are unlikely to be resolved quickly. However, over time and with planning, adequate support, persistence and patience, the problem behaviour will usually reduce in frequency and intensity and eventually may become a rare occurrence or cease altogether. Progress may seem slow but this is the norm and it is important not to give up when further incidents occur. **Further incidents do not mean that the section 32 order has been a failure or that section 32 should be ruled out in the future.**

If there has been a longer gap between charges than previously, point this out to the magistrate and emphasise that is an indicator of progress. The service providers or psychologist consulted may be willing to give evidence to this effect.

If the previous support plan was never fully implemented then tell the magistrate. It may be that previously planned services, support or behaviour management strategies had not been fully implemented before further alleged offending behaviour occurred. This is usually the result of slowness or poor follow-up by service providers rather than the fault of your client. It is important that the court is advised if this is the case.

Point out any new aspects of the support plan compared with past plans that may lead to a reduction in offending behaviour. It may be that the previous support plan was inadequate. For example, an increase in support hours, a new activity or changes in medication may all be of relevance to the court.

Has there been some trigger for the new problems, for example a change in routine, a change in medication, some traumatic event? Has this now resolved? Is the problem being addressed?

Look at the criminal history to examine the type of offences on your client's record and try to distinguish from previous offences.

- **No previous involvement with criminal justice system**

If your client has no previous involvement with the criminal justice system you should consider if something significant has changed or taken place for your client in the lead up to the alleged offence. For example, your client's parents could have died or moved.

Sentencing according to law would be inappropriate or ineffective

Where gaol is an option, draw to the magistrate's attention that gaol is unlikely to reduce your client's risk of re-offending and note that the interests and protection of the community may be better served by providing appropriate supports in the community.

People with intellectual disability are often highly vulnerable in custody and incarceration will most likely have a detrimental effect on the individual. Stress the deleterious effect gaol would have on your client - their vulnerability to exploitation, the lack of resources for people with intellectual disability in gaol and the likely negative outcomes of the experience for your client. Furthermore, people with intellectual disability are inappropriate vehicles for general deterrence. As such, a custodial sentence is less likely to serve the community's interests.

In cases where a non-custodial option is the likely alternative to section 32, let the court know if your client is unable to pay a fine by outlining their income and expenses, the difficulties your client would face trying to complete a community service order because of particular features of their disability and how the support of service providers is likely to be more effective than supervision by Probation and Parole in the case of a bond.

Step 8: Outlining the proposed support plan

The existence and the contents of a support plan may form a part of the magistrate's deliberations on whether or not it is more appropriate to deal with the matter under section 32.

Highlight the key aspects of the support plan and why the support plan will be effective in assisting your client to avoid or reduce future incidents and to learn the boundaries of being a law-abiding citizen. You may choose to refer to the level of support/supervision that your client will receive and their willingness to accept the services.

There is evidence that for some people with intellectual disability, behaviour that results in charges stems to some extent from boredom and isolation and that simply increasing their positive activities and contacts could have a positive effect on avoiding or reducing contact with the police.

Step 9: Proposed orders

Do not forget that section 32 orders can be made without conditions. If this is appropriate in the circumstances of the case and in light of your client's subjective circumstances, then this is what you should ask for.

Section 32 orders should not incorporate every element of very detailed support plans. IDRS recommends that nothing beyond what is necessary to satisfy the court be included as a condition of the order. It is important to be sure that your client is willing to comply with the conditions of any proposed orders.

Support plans should be flexible to enable supporting organisations to be responsive to their client's needs. Service providers will review and change support plans over time. If a magistrate is looking to incorporate a support plan into the conditions of a section 32 order, it may be more appropriate to request that the magistrate make orders that take into account greater flexibility of supports. For example, a proposed order may be written as 'To continue to accept services from ADHC (or xxx service provider)', rather than 'To comply with the support plan of John Smith, dated 26 February 2011'. This is of particular relevance if the support plan is very detailed.

If there is a specific feature of your client's behaviour that is likely to be of concern to the court, it may be appropriate to suggest a condition that specifically addresses the aspect of your client's behaviour that is of concern such as drug and alcohol counselling or sexuality counselling.

John: Multiple section 32 orders

John is a man in his forties who attended a special school as a young person. His home life was marred by domestic violence. His mother had mental health issues and ultimately left the family after attempting to burn the house down.

John developed substance abuse issues, mental health issues and endured many periods of homelessness. Since turning 18 years of age, he has spent short periods in gaol for minor offences almost every year up until 2009. He has over 150 entries on his criminal history, all in relation to minor offending behaviour. He has not received any significant support from disability services. IDRS made the first of numerous section 32 applications for John in 2009.

After further charges an application was made for ADHC services. That application was declined but John was successfully referred to an NGO who provided a few hours of case management each month. The NGO helped John to successfully apply for public housing in the form of a bedsit. The section 32 application was successful on the basis of support services from the NGO.

Five months later John returned seeking assistance with a goods in custody matter. IDRS lodged an internal appeal of the previous ADHC decision after seeking out additional information to help establish the onset of John's disability prior to the age of 18 years. No documents could be located but evidence in the form of social history from the client's long estranged brother and uncle were submitted in support of the appeal against the original ADHC decision. ADHC found that John was eligible for ADHC services.

In the period between the first mention of the matter and when it was ultimately finalised seven months later, John accrued an additional seven sets of charges, the most serious of which was an assault police charge. He was also the victim of assaults on two occasions and witnessed a violent event during this time. This underlines the high volume of traumatic events often experienced by people who are involved with the criminal justice system and that it is often the same people who are both victims and defendants in criminal matters.

The ADHC Support Plan ultimately developed proposed that John required 35 hours a week of face-to-face support, along with extensive assistance in almost all adaptive functioning areas. He will receive assistance in many areas, including health care, counselling in anger management and for depression, and training in everyday life skills such as cooking, budgeting and how to use public transport.

Submissions addressed the issue of previous inadequate levels of support and, despite John's lengthy criminal history and several previous section 32 orders, the magistrate exercised his discretion and applied the section to all eight sets of charges.

Within three months of the finalisation of his matters, John's father died. He had tentatively restarted some contact with his brother through IDRS's contact with her. Unfortunately after the death of the father, the relationship with the brother soured and John's offending recommenced.

IDRS is in the process of preparing a further section 32 application for him. The psychologist assisting John with anger management has identified that his mental health is more of a current difficulty for him than his intellectual disability. He has been referred to a treating psychiatrist. John has also decided to tackle his substance abuse issues with the assistance of the methadone clinic and has started attending a gym three times a week.

This further increase in services will be the focus of the next section 32 application. Submissions will also point out that for many people with intellectual disability, improvements may be slow, but that there is overall progress in John's situation.



PART 9: LINK BETWEEN DISABILITY AND CRIMINAL CHARGES

32

One possible consideration in the exercise of judicial discretion

... what weight is given to various factors that touch upon that judgment will be very much a matter for the particular magistrate.

Confos v DPP [2004] NSWSC 1159 [18]

MHFPA does not specifically require that there be a causal link between the offending conduct and the defendant's disability. The case law does not offer clear guidance. (See, for example, the cases of *DPP v El Mawas* [2006] NSWCA 154 and, on the other hand, the case of *Police v Deng* [2008] NSWLC 2.)

IDRS suggests that submissions about links are generally helpful. We have prepared a table outlining some common difficulties arising from intellectual disability to assist lawyers. We stress that not all difficulties will be faced by every person with intellectual disability but present it as an overview of the types of difficulties that may be faced by your client. It may be useful to ask any disability professional providing evidence about a client's disability to comment on possible links between their disability and the charges incurred.

Every adult or child with intellectual disability is unique. The following effects of intellectual disability are generalisations but are provided to give an understanding of the difficulties that many people with intellectual disability will be struggling with to a greater or lesser degree.

Your client's needs and difficulties will be as much affected by their personality, family circumstances, the support (or lack of support) they receive in their daily lives and the opportunities they have had to learn, as they will be by their disability. Many people with intellectual disability who come into contact with the criminal justice system are disadvantaged by a history of lack of support and poor opportunities to learn.

As the person's lawyer it is important that you reflect on whether any of these difficulties, which are common for people with intellectual disability, have contributed to the charges your client faces.

It is also important to realise that while these difficulties are likely to continue to be present for your client, with support the negative impact can be reduced. With assistance your client may well be able to learn new information and skills, develop ways to better cope with anxiety, change the problem behaviour that has led to charges or learn more appropriate ways to behave, become involved in positive activities to avoid boredom, and understand their emotions and needs better through counselling. They are unlikely to achieve this without assistance.

Possible links between effects of intellectual disability and criminal charges

Common effects	Possible link
<p>Difficulty learning or lack of opportunity to learn effectively</p>	<p>In the case of a person with intellectual disability the breaking of a law may be due to ignorance. Many people with intellectual disability will require specialist teaching to learn what others learn easily. Your client may not have had the opportunity to learn that the behaviour leading to their charge is against the law.</p> <p>There may be a naivety about a person's actions. Many people with intellectual disability have had restricted opportunity to learn and lack age appropriate life experience. For example, some people with intellectual disability may not have learnt the generally accepted rules of social engagement. They may initiate overly friendly or inappropriate contact with strangers, which may lead to criminal charges.</p> <p>People with intellectual disability cannot always be expected to automatically learn from past experience without assistance. This should be pointed out to a magistrate.</p> <p>It is essential to understand that people with intellectual disability can and do learn but they will require teaching to be individually tailored. This is why a section 32 order can be very effective.</p>
<p>Difficulty reading and writing</p>	<p>A person with intellectual disability may inadvertently break the law because they cannot read or comprehend what they read. Many people with intellectual disability are ashamed that they cannot read and will try to conceal this. They may agree to what is in a document that they have not been able to read or understand.</p> <p>Many people with a mild intellectual disability who are under the age of 30 may have learned to read to a limited extent but this is usually only to a Year 4 level. That is, a document with no more than 100-150 words to a page supported by visual images. An older person with mild intellectual disability is unlikely to have learned to read even to this level. Even where the person can recognise simple words, they may not comprehend the meaning.</p>
<p>Misinterpreting cues</p>	<p>People with intellectual disability often find themselves in trouble because they have difficulty in interpreting the verbal and non-verbal cues of others as well as the unspoken cues that govern social interactions.</p> <p>A person with intellectual disability may interpret friendliness on the part of another as something more and respond inappropriately or with frustration when their advances are unwelcome. They may not understand expected boundaries in relation to children and be overly friendly or familiar.</p>

Continues >

Common effects	Possible link
Misinterpreting cues (cont.)	A person with intellectual disability may misinterpret actions or instructions of the police. People with intellectual disability often attract charges of resisting arrest/assaulting police because they do not understand the context of what is happening and may attempt to flee or defend themselves as a result.
Difficulty with realising the effect of their actions	A person with intellectual disability may not be able to see or anticipate the effect of their actions. For example, they may not anticipate that trying to get out of a crowd by pushing and hitting people may cause damage to others.
Difficulty weighing up options and making choices	A person with intellectual disability may find it hard to make a reasonable judgment. For example, they may have been caught up in a situation without recognising that is risky and unlawful.
Difficulty understanding questions	<p>People with intellectual disability have a tendency to agree when not really understanding the question. If they have been interviewed by the police they may not have understood their rights or the questions the police asked. They may not have had a support person present for 'vulnerable persons' as required by LEPR.</p> <p>If charged with an offence, they may not see the relevance of important information and so may have not mentioned information to their lawyer that would support their case.</p>
Difficulty understanding abstract concepts such as time, relationships, value of money	People with intellectual disability tend to be concrete thinkers. They tend to think and frame things in the here and now. They may be unable to give an accurate account of time frames and other abstract ideas.
Difficulty adapting to new or unfamiliar situations	<p>Changes can impact upon the coping ability of people with intellectual disability in a far greater way than upon others. It could be a decrease in support services, death or illness of a family member or friend, change of home, change to their normal routine, harassment by a neighbour or a change in medication.</p> <p>A person with intellectual disability usually learns in a very specific way and often cannot generalise learning to unfamiliar situations. Unexpected change may result in panic, anxiety and problematic behaviour. Examples of how such panic and anxiety may manifest itself include calling 000 unnecessarily or repeatedly calling or approaching a neighbour inappropriately.</p>

Continues >

Common effects	Possible link
<p>Difficulty coping with changes in routine</p>	<p>Some people with intellectual disability are very dependent on routine and may become anxious and behave uncharacteristically if routine is disturbed even in minor ways.</p> <p>For example, there will be an agreed upon protocol (sometimes called a Care Plan) for staff who are interacting with a person with intellectual disability in group homes. A new staff member who does not comply with the protocol could trigger reactive behaviour.</p>
<p>Difficulty with planning ahead or translating an intention into action</p>	<p>Many people with intellectual disability have difficulty in identifying the necessary practical steps to carry out their intention. For example the person may have agreed to certain bail conditions or conditions of an Apprehended Violence Order (AVO). However, due to their disability, the person may not have been able to identify what they need to change about their usual routine in order to comply with the conditions.</p> <p>The person may have had a bail condition not to go within 50 metres of a particular premises next door to their bank. Even if the person understood the bail condition in the first place, they may not realise that this means they will now have to go to a different bank. Even if they realise that, they may not be able to identify an alternative bank or how to get there.</p> <p>A person's inability to make a plan or to carry out a plan could contribute to their charge. With assistance a person with intellectual disability will usually be able to arrive at a plan to avoid trouble and can be assisted to stick to the plan.</p>
<p>Anxiety and poor impulse control</p>	<p>Many people with intellectual disability have problems with managing anxiety. This may result in over-reaction to situations which to them feel threatening but which others may not see as threatening. A person with intellectual disability is likely to react instinctively and will be less likely to be able to exercise restraint.</p>
<p>Easily led and suggestible</p>	<p>People with intellectual disability are more likely to adopt the plans of valued peers without being able to assess risks or consequences for themselves. This may be exacerbated by a desire to please and a heightened need for acceptance.</p>
<p>Social isolation, lack of activity and boredom</p>	<p>Many people with intellectual disability are socially isolated and do not have the ability to seek out activities or social contact without assistance. Isolation and boredom may have contributed to the circumstances of their offence.</p> <p>Becoming involved in any activity that the person chooses and finds motivating - sport, art, recreation, volunteering or work - may well decrease the likelihood of further charges. The activity may be a very simple activity that will positively contribute to the person's life.</p>

Francesca: Links to disability

Francesca is a young adult with intellectual disability and acquired brain injury. She is anxious about lifts and loud noises. She lives with her parents and is very reliant on them. She has certain obsessive compulsive traits such as washing her hands repeatedly and making repeated calls to emergency services when stressed or anxious.

Francesca's parents decided to leave her with a respite carer in the family home while they attended a family wedding in Perth. Francesca would not have coped well with the unfamiliar environment and her parents needed a break.

Francesca was upset about her parents' departure and became highly anxious. The home phone was generally kept locked because of Francesca's history. The respite carer did not stick to the plan about the telephone and Francesca used the phone to make several false reports to emergency services including one to the fire brigade about her neighbour's house being on fire.

In addition to being charged in relation to the nuisance calls, Francesca was also charged with three counts of assaulting police.

Submissions in support of the application focused on the link between Francesca's disability and the charges, the subjective circumstances of Francesca and her family, the potential adverse effects of incarceration, an explanation of the phone protocol and further assistance for the family from ADHC with behaviour management strategies. The application was successful.

PART 10: POSSIBLE OUTCOMES

If an application under section 32 is successful, then no conviction will be recorded against your client as there is no finding that the charge(s) have been proven.

Section 32 of the MHFPA provides that if it appears to the magistrate that the defendant is 'developmentally disabled' and that, on the facts and other evidence as the magistrate may consider relevant, it would be more appropriate to deal with the defendant under section 32, the magistrate may do one of the following:

- adjourn the proceedings: section 32(2)(a)
- grant the defendant bail: section 32(2)(b)
- make any other order: section 32(2)(c)
- dismiss the charge and discharge the defendant into the care of a responsible person, unconditionally or subject to conditions: section 32(3)(a)
- dismiss the charge and discharge the defendant on the condition that the defendant attends an assessment of their mental condition or treatment or both: section 32(3)(b)
- dismiss the charge and discharge the defendant unconditionally: section 32(3)(c).

Duration

Final orders made under section 32 can be for up to six months. If a person breaches any one of the conditions within those six months (and it is reported to the court) then they can be brought back before the court.

A magistrate may also take action under section 32(2) to adjourn the proceeding, grant bail - with or without conditions - or make any other order that the magistrate considers appropriate. Such a course has the effect of potentially lengthening the process beyond six months. This may be a relevant course to suggest if the magistrate is concerned about the six-month duration of a section 32 order.

Responsible person

Magistrates may make an order discharging the defendant into the care of a responsible person either unconditionally or subject to conditions. (See section 32(3)(a) of the MHFPA.) This may be done in lieu of a support or treatment plan. In IDRS's experience, it is the exception rather than the rule that magistrates require the nomination of a responsible person. The legal obligations of any person nominated as a responsible person are not clear. The court cannot bind persons who are not parties to a proceeding to comply with section 32 orders.

It is IDRS's suggestion that the nomination of a responsible person be avoided, if possible. If a family member is nominated it may place additional strain on already difficult relationships. In the case of organisations such as ADHC or non-government organisations, it may be that they have a policy of not agreeing to be nominated. The naming of particular individuals from an organisation should be avoided. An alternative is to suggest to the court that a section 32 order be written as: 'To continue to accept assistance from Ageing, Disability and Home Care (or other organisation)' rather than the nomination of a responsible person.

PART 11: AFTER THE APPLICATION

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Whether you are successful or unsuccessful in your application, there are particular considerations for you to understand given the intellectual disability of your client.

Successful application

If your application is successful it is most important that you effectively explain the orders to your client and their family and supporters. Explain the orders as clearly and simply as possible. A CJSN support person may be able to assist you in this regard. (See page 19 for more information about CJSN or Part 12: Contacts and referral points.)

It is important to explain to your client that the magistrate did not say they are 'not guilty'. The magistrate has ruled your client must stick to the agreement in the order. It is a promise to the magistrate. Make it clear to your client that they might have to come back to court about the charges if they do not do what the order says.

Explain the order to other people who can help your client to stick to the conditions of the order.

Unsuccessful application

If your application is unsuccessful there are a number of options you may wish to explore. These include making a second application, exploring whether or not your client has the capacity to enter a plea, and appealing to the District or Supreme Court.

Client entering custody

If your client has either been sentenced to a period of imprisonment or has been refused bail, we suggest, with your client's permission, that you immediately notify Corrective Services of your client's disability by speaking with the senior Corrective Services officer at the court complex. Statewide Disability Services is the part of Corrective Services that assists people in custody who have disabilities. You should email them to advise that your client has intellectual disability and is entering a correctional facility. They can then follow up your client and assess whether or not your client is eligible for the Additional Support Units in some Correctional Centres. Contact them by email on sds@dcs.nsw.gov.au.

Second application

The legislation does not prohibit the making of a second section 32 application. If your initial application is unsuccessful, you may want to consider an adjournment to seek additional supports for your client. Then additional elements could be incorporated into a revised support plan.

Capacity to plead

After an unsuccessful application, the question of whether or not your client has capacity to enter a plea to the charge should be considered. If your client has capacity then the normal procedures in the Local Court will follow, with the matter to proceed to either hearing or sentence. If the matter is to be for sentence, then relevant material and submissions made in support of the section 32 application can be relied upon in most circumstances.

Capacity issue/stay application

At the conclusion of a section 32 application, if the defendant is not fit to plead because of their intellectual disability, an application for a discharge on that basis should be made (*Mantell v Molyneux* (2006) 165 A Crim R 83). Unlike the higher courts, there is no statutory enactment as the law currently stands about what to do with people unfit to plead in the Local Court.

Appeal to the District Court

If your client's section 32 application was unsuccessful and your client has been convicted, then an appeal against sentence or conviction could be made to the District Court. Appeal is by way of rehearing on the basis of the evidence given in the Local Court. Generally, fresh evidence can only be admitted with leave. A further section 32 application could then be made to the District Court.

Appeal to the Supreme Court

If a magistrate errs in the exercise of their discretion, then an appeal to the Supreme Court by way of summons under section 52 of the *Crimes (Appeal and Review) Act 2001* (NSW) should be considered. If the error is one of both law and fact, then an appeal to the Supreme Court under section 53 of the *Crimes (Appeal and Review) Act 2001* (NSW) should be considered. IDRS appreciates the complexity and significant resources that may be involved in any Supreme Court appeal but encourages practitioners to consider this course, particularly in cases where such appeals may have wider application. The Public Defenders Office is willing to advise lawyers considering a Supreme Court appeal where your client is, or could be, legally aided.

Breaches

If a magistrate makes an order dismissing the charge under section 32(3), the matter may be brought back before a magistrate for breaches of a discharge during the six-month period after making the order. (See section 32(3A)-(3D) of the MHFPA and *Mantell v Molyneux* (2006) 165 A Crim R 83.)

Some magistrates, under section 32A of the MHFPA, may ask service providers to agree to notify Community Offender Services (formerly Probation and Parole) if your client breaches any of the conditions of the section 32. The form for reporting breaches allows the 'treatment provider' to report the suspected breach and also to make a recommendation as to what action the court should take. The options listed include that your client be brought before the court, that treatment conditions be deleted or that no action be taken. Once this form is completed by the treatment provider they will send it to the court for consideration by the magistrate. As a consequence of the ability of the treatment provider to recommend actions, not all reported breaches necessarily result in your client being called to appear before the court. In fact breach proceedings in section 32 matters are very rare.

If the court is advised that a person who is the subject of a section 32 order may have failed to comply with a condition of the order, the magistrate may decide to compel that person to appear before the court. Under section 32(3D) of the MHFPA, the magistrate can then deal with your client as if they had not been previously discharged. In effect, your client is then in the position they were in before the section 32 order was made. Alternatively, the magistrate may direct that no action be taken on the breach, delete certain conditions or simply continue the order after your client has appeared.

It should be noted that committing a further offence does not necessarily mean an order has been breached, unless it was a condition of a previous section 32 order that your client be of good behaviour. In any breach proceedings, you should ask the court for access to the papers so that the orders that are the subject of the breach proceedings can be viewed to check the conditions of the order.

Conclusion

Please look at our website at www.s32.idrs.org.au for updates, links and further information on this topic.

Please feel free to contact IDRS about any queries regarding section 32 applications for clients with intellectual disability. Either phone us on (02) 9318 0144 or email us at section32@idrs.org.au. We will answer your queries as quickly as possible, but please note that this project is staffed on a part-time basis.

We wish you all the best in your applications and thank you for your efforts on behalf of this very vulnerable group of clients. We hope that with your assistance, the number of people with intellectual disability who end up in prison will be reduced and that people with intellectual and other relevant disabilities will get the support and encouragement needed to reduce and avoid criminal charges.

Good luck!

PART 12: CONTACTS AND REFERRAL POINTS

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Intellectual Disability Rights Service (IDRS)

CONTACT Sydney: (02) 9318 0144 Freecall: 1800 666 611 www.idrs.org.au	SERVICE PROVIDED IDRS is a community legal centre in NSW, working with people with intellectual disability to exercise and advance their rights. It provides: <ul style="list-style-type: none">> legal advice to people with intellectual disability and their associates> legal representation in select legal matters> 24-hour legal advice for people with intellectual disability who have been arrested> advice and assistance to legal representatives of people with intellectual disability in relation to the preparation of section 32 applications. Phone or email section32@idrs.org.au with specific queries or see www.s32.idrs.org.au for further information on s32 applications> policy and law reform> education, information, training and resources> Criminal Justice Support Network (CJSN) see below.
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Criminal Justice Support Network (CJSN)

CONTACT (02) 9318 0144 1800 666 611 Greater Sydney Region: (02) 9318 0144 Central Coast/Gosford: (02) 4324 2355 Newcastle/Hunter/Taree: (02) 4926 5643 Wollongong/Shoalhaven/ Bateman's Bay: (02) 4228 4040 Mid-North Coast/Riverina and other regional areas: (02) 9318 0144 or 1800 666 611 24-hour police station support and legal advice if a person with intellectual disability has been arrested: 1300 665 908 www.idrs.org.au	SERVICE PROVIDED CJSN is a service of IDRS that provides trained volunteer support persons for people with intellectual disability who are involved with the criminal justice system as accused, victims or witnesses. Includes support at: <ul style="list-style-type: none">> police stations (available 24 hours if arrested)> court> legal appointments> youth justice or forum sentencing conferences. Areas covered: <ul style="list-style-type: none">> Greater Sydney Region> Central Coast/Gosford> Newcastle/Hunter/Taree> Wollongong/Shoalhaven/Bateman's Bay> Mid-North Coast> Riverina. A support person can often be located in other areas as well.
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Disability information services

Information on Disability and Education Awareness Services (IDEAS)

CONTACT 1800 029 904 (02) 6947 3377 SMS: 0458 296 602 www.ideas.org.au	SERVICE PROVIDED IDEAS collects and maintains up-to-date information on support services available for people with disability, families and carers in NSW. Information is available online or over the phone to people with disabilities, families, carers and professionals.
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NSW Council for Intellectual Disability (CID)

CONTACT (02) 9211 1611 1800 424 065 www.nswcid.org.au	SERVICE PROVIDED ASK CID is the information database of CID. It provides an information service specific to people with intellectual disability in a variety of formats. Access is by phone or website. It also provides systemic advocacy, and lobbies governments on issues relating to accommodation, health, employment and criminal justice for people with intellectual disability.
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Local councils (many will have a disability officer)

CONTACT Contact local council	SERVICE PROVIDED Local councils often have a disability officer on the Community Services staff who can provide information about local services.
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Ageing Disability and Home Care (ADHC) – information, referral and intake lines

CONTACT See phone numbers below for each ADHC region www.adhc.nsw.gov.au	SERVICE PROVIDED ADHC can provide information about local disability services.
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Autism Spectrum Australia (ASPECT)

CONTACT: 1800 069 978 www.autismspectrum.org.au	SERVICE PROVIDED: ASPECT provides information and advice about autism, assessment and services.
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Disability information services (continued)

Mental Health Information Service


<p>CONTACT (02) 9816 5688 1300 794 991 info@mentalhealth.asn.au www.mentalhealth.asn.au</p>	<p>SERVICE PROVIDED The service provides an anonymous and free telephone and email information hotline during business hours. Qualified staff assist by tapping into a specialised database to help locate appropriate services, such as treatment, support and advocacy.</p>
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Brain Injury Association of NSW

<p>CONTACT (02) 9868 5261 1800 802 840 www.biansw.org.au</p>	<p>SERVICE PROVIDED The association provides an online database of services for people with ABI across NSW. See map of NSW on their home page to locate services. It offers support and guidance to people with ABI, including advocacy, information and referral service, self-help support groups, and fact sheets in a number of languages other than English.</p>
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Ageing, Disability and Home Care (ADHC) – Department of Family and Community Service

The numbers below are the numbers to contact to refer a client to ADHC for services or to get information and referral to other services.

<p>CONTACT</p> <p>Metro North (02) 9841 9350 MetroNorth.Intake@facns.nsw.gov.au</p> <p>Metro South (02) 9334 3700 Information.Referral@facns.nsw.gov.au</p> <p>Hunter 1300 205 268 or (02) 4978 6222 Fax: (02) 4978 6299 DisabilityIntake-Newcastle@facns.nsw.gov.au</p> <p>Southern NSW 1300 841 566 or (02) 6128 9200 Fax: (02) 6128 9211 Southern-Intake@facns.nsw.gov.au</p> <p>Northern NSW 1300 364 563 or (02) 6621 1400 Fax: (02) 6621 1450 Disability.Intake-Western@facns.nsw.gov.au</p> <p>Western NSW 1300 134 450 or (02) 6841 1500 Fax: (02) 6841 1555</p>	<p>SERVICE PROVIDED</p> <p>ADHC provides and funds services for people with disability in NSW.</p> <p>Services include case management, accommodation, respite, behaviour support and services to people with disabilities and their carers in NSW to provide opportunities to participate in community life.</p> <p>To get information about services and referral to ADHC funded services call the information, referral and intake team at your local ADHC regional office.</p> 
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Community Justice Program (CJP)

CONTACT (02) 9841 9214	SERVICE PROVIDED CJP is a specialist forensic service for people with intellectual disability involved in the criminal justice system. It can provide accommodation, case management, and clinical and behavioural assessment and support services to people with intellectual disability who are exiting custody or to those who have a history of incarceration. It also targets individuals identified as requiring specialist support on re-entering the community.
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Disability advocacy services

Disability advocacy services provide assistance to people with disability. Individual advocacy involves directly advocating on behalf of a person in relation to a particular issue or to achieve fair treatment. Advocacy services do not provide accommodation, employment, case management or behaviour support services. Advocacy services are good contacts and a helpful source of local information and assistance.

People with Disability Australia

CONTACT (02) 9370 3100 1800 422 015 www.pwd.org.au	SERVICE PROVIDED Provides individual advocacy throughout NSW to people with disability: <ul style="list-style-type: none">> living anywhere in NSW with advocates based in Redfern;> living in three regions of NSW with locally based advocates in Queanbeyan, Sutherland and the Southern Tablelands and Southern Highlands.
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Ability Inc

CONTACT (02) 6628 8188 1800 657 961 www.abilityincorporated.org.au admin@abilityincorporated.org.au	SERVICE PROVIDED Provides individual advocacy to people with disability living in the Far North Coast of NSW.
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Action for People with Disability Inc

CONTACT (02) 9449 5355 www.actionadvocacy.org.au Action-for-people@swiftdsl.com.au	SERVICE PROVIDED Provides individual advocacy to people with disability living in North Sydney Local Planning Area.
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Disability advocacy services (continued)

Central Coast Disability Network

<p>CONTACT (02) 4324 2355 ccdn@bigpond.com www.ccdn.org.au</p>	<p>SERVICE PROVIDED Provides individual advocacy to people with disability living in the Central Coast Region.</p>
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Side by Side Advocacy

<p>CONTACT (02) 9808 5500 sbso@bigpond.net.au www.sidebysideadvocacy.org.au http://www.mdaa.org.au/ciwda/</p>	<p>SERVICE PROVIDED Provides individual advocacy to people with disability living in Ryde, Hunters Hill, Lane Cove, Hornsby, Willoughby, North Sydney, Northern Beaches.</p>
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City and Inner West Disability Advocacy

<p>CONTACT (02) 9281 8699 www.ciwda@mdaa.org.au</p>	<p>SERVICE PROVIDED Provides individual advocacy to people with disability living in Ashfield, Canada Bay, Leichhardt, Marrickville, City of Sydney.</p>
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Disability Advocacy Network (DAN)

<p>CONTACT (02) 6921 9225 1800 250 292 www.dan-inc.net.au dan_inc@bigpond.com</p>	<p>SERVICE PROVIDED Provides individual advocacy to people with disability living in Riverina, Murray, S/West Slopes, Southern Tablelands and Central Murrumbidgee.</p>
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Disability Advocacy NSW Inc (DA)

<p>CONTACT 1300 365 085 da@da.org.au www.da.org.au</p>	<p>SERVICE PROVIDED Provides individual advocacy to people with disability living in Newcastle, Hunter, Tamworth, Armidale, Coffs Harbour, Taree and Port Macquarie.</p>
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Disability Advocacy and Information Service (DAIS)

<p>CONTACT: (02) 6056 2420 1300 886 388 www.disability-advocacy.com.au admin@disability-advocacy.com.au</p>	<p>SERVICE PROVIDED: Provides individual advocacy to people with disability living in southern NSW and north-eastern Victoria (located in Wodonga). Provides court support for people with disability in Albury.</p>
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South East Advocacy (SEA)

CONTACT (02) 6492 0200 sea@mdaa.org.au www.mdaa.org.au/sea	SERVICE PROVIDED Provides individual advocacy to people with disability living in the Bega Valley Shire.
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Disability Information Advocacy Service Inc (DIAS)

CONTACT (02) 6332 2100 dias@binc.org.au www.binc.org.au/dias.htm	SERVICE PROVIDED Provides individual advocacy to people with disability living in Central West NSW Office located in Bathurst.
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Newell Advocacy Inc

CONTACT (02) 6792 3195 Narrabri (02) 6752 1215 Moree newell.narrabri@westnet.com.au newell.moree@westnet.com.au	SERVICE PROVIDED Provides individual advocacy to people with disability in Shires of Narrabri, Moree, Gwydir, Coonamble, Warrumbungle and Walgett.
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Illawarra Citizen Advocacy

CONTACT (02) 4229 4064 illawarraca@bigpond.com	SERVICE PROVIDED Matches people with disability in the Illawarra region with volunteer personal advocates who take on an advocacy role with an individual based on a 'friendship' relationship.
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Indigenous Disability Advocacy Service (IDAS)

CONTACT (02) 4722 3524 idas@idas.org.au www.idas.org.au	SERVICE PROVIDED Provides advocacy assistance to Indigenous people with disability, their families and carers in Western Sydney and regional centres of NSW.
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Multicultural Disability Advocacy Association of NSW (MDAA)

CONTACT (02) 9891 6400 1800 629 072 mdaa@mdaa.org.au www.mdaa.org.au	SERVICE PROVIDED Provides services for people with disability aged 0-65 from non-English speaking background, and for their carers and families.
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Some major non-government disability service providers

Below are contacts for some of the largest non-government disability service providers. There are many other non-government providers. Contact disability information services above for further information.

Disability Services Australia (DSA)

<p>CONTACT 1300 372 121 serviceaccess@dsa.org.au www.dsa.org.au</p>	<p>SERVICE PROVIDED DSA services include employment, work training, shared accommodation and drop-in living support, community participation and day programs, and transition to work programs.</p>
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Disability Services Australia Specialist Intervention Service

<p>CONTACT 1300 372 747 sisadmin@dsa.org.au www.interventionservices.com.au</p>	<p>SERVICE PROVIDED Offers a Specialist Intervention Service for people with a disability who have behaviour that is causing concern. Provides psychological assessment, behaviour intervention and support, interventions and therapy for anxiety and depression, skills training, and psycho-education (for example, sexual knowledge programs). Sydney only.</p>
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House with No Steps

<p>CONTACT Sydney: (02) 9451 1511 Northern NSW: (02) 6628 0610 Southern NSW: (02) 4221 0300 Western NSW: (02) 6852 2399 www.hwns.com.au</p>	<p>SERVICE PROVIDED Provides services, including employment, accommodation, independent living, drop-in support, day programs, community participation and respite care. There are regional offices throughout NSW.</p>
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Interaction Disability Services

<p>CONTACT 1300 668 123 www.interactiondisability.com email via website</p>	<p>SERVICE PROVIDED Services include needs assessment, case management, respite care, support and training services, supported accommodation services. Services in Local Government Areas of Baulkham Hills, Blacktown, Holroyd, Parramatta and Penrith.</p>
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Lifestyle Solutions

<p>CONTACT: General enquiries: (02) 4014 7800 Sydney regional office: (02) 8801 3200 www.lifestylesolutions.org.au</p>	<p>SERVICE PROVIDED: Offers services, including community participation, housing and support services, and day programs. Provides the Leisure Link program for teenagers with disability and challenging behaviour who are at risk of suspension or expulsion from school.</p>
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Life Without Barriers

CONTACT Has an online enquiry form Local contact numbers available from website under Locations tab www.lwb.org.au	SERVICE PROVIDED Life Without Barriers have locations throughout NSW and other states. Their disability services include community participation, in-home support and supported accommodation.
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Ability Options

CONTACT Head office: (02) 88 111 777 Community Lifestyle: (02) 88 111 777 Independent Living: Newcastle: (02) 4961 2979 Mittagong: (02) 4871 1661 Local contacts for employment services on website www.abilityoptions.org.au	SERVICE PROVIDED Ability Options provides services, including case management (Penrith area only), community access, training and recreation, supported living and respite.
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Acquired brain injury contacts

Brain Injury Association of NSW

CONTACT (02) 9868 5261 1800 802 840 www.biansw.org.au	SERVICE PROVIDED Online database of services for people with ABI across NSW. See map of NSW on the home page to locate services. Provides support and guidance to people with ABI, including advocacy, information and referral service, self-help, support groups, and fact sheets in a number of languages other than English.
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ARBIAS

CONTACT (02) 9708 0027 www.arbias.org.au Click on NSW services	SERVICE PROVIDED Offers services, including neurobehavioural assessment, specialised case management, referral and information.
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NSW Brain Injury Rehabilitation Program

CONTACT Network Manager: (02) 9828 6133 www.health.nsw.gov.au/initiatives/birp/servicesindex.asp	SERVICE PROVIDED A list of brain injury rehabilitation services located throughout NSW is available on their website.
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Aboriginal Disability contacts

Indigenous Disability Advocacy Service (IDAS)

CONTACT (02) 4722 3524 idas@idas.org.au www.idas.org.au	SERVICE PROVIDED Provides advocacy assistance to Indigenous people with disability, their families and carers in Western Sydney and regional centres of NSW.
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Aboriginal Disability Network NSW

CONTACT (02) 9319 1422 www.idas.org.au	SERVICE PROVIDED An Aboriginal disability advocacy organisation that provides information, assistance and referral.
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ADHC Services

CONTACT Enquire through regional information, referral and intake numbers above; also Aboriginal Service Development and Delivery Directorate of ADHC: (02) 4978 6200	SERVICE PROVIDED ADHC have some Aboriginal specialist positions in their regions. Contact regional information, referral and intake numbers. The Aboriginal Service Development and Delivery Directorate can be contacted for assistance but does not provide a direct service.
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Other useful contacts

Legal Aid NSW – Client Assessment and Referral Unit

CONTACT Community Liaison and Referral Officer: (02) 9219 5044	SERVICE PROVIDED Criminal law lawyers employed by Legal Aid should contact the Client Assessment and Referral Unit of Legal Aid for assistance with preparing treatment and support plans when making section 32 applications.
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Sexuality/Relationship counselling and training

CONTACT Family Planning NSW Healthline: 1300 658 886	SERVICE PROVIDED Family Planning NSW can provide contacts for psychologists and counsellors who work with people with intellectual disability on sexuality issues.
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Alcohol and Drug Information Service (ADIS)

CONTACT (02) 9361 8000 1800 422 599 www.aodservices.net.au	SERVICE PROVIDED A 24-hour and confidential information, advice and referral service. The Directory provides a central point of access to updated information on government-funded alcohol and other drug treatment.
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Mental Health and Drug and Alcohol Office, NSW Health

CONTACT www.health.nsw.gov.au/mhdao/ index/asp Click on Contact a Service.	SERVICE PROVIDED The website provides contact numbers for area intake services, consumer publications and information about court-linked and other drug programs. There are no specialist drug and alcohol services for people with intellectual disability. Drug and alcohol services should adapt their treatment programs, if necessary, to cater for an individual with intellectual disability.
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Guardianship Tribunal of NSW

CONTACT (02) 9556 7600 1800 463 928 Fax: (02) 9555 9049 gt@gt.nsw.gov.au Locked Bag 9 Balmain NSW 2041 www.gt.nsw.gov.au	SERVICE PROVIDED The Guardianship Tribunal has jurisdiction in NSW to appoint a guardian or financial manager for a person (16 years and over) who has a disability which affects their decision-making capacity. Lawyers representing a person with disability in a criminal matter can contact the Guardianship Tribunal to establish whether or not their client has an appointed guardian and to get a copy of current orders. This should be done in writing to the Registrar of the Tribunal. The request would have to include identification details of the person, for example, date of birth, as well as a statement that the lawyer is acting under instructions. Wherever possible a consent form would also be necessary.
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Office of the Public Guardian

CONTACT Head office and Western Team: (02) 8688 2650 Toll free within NSW: 1800 451 510 Southern Team: (02) 9287 7660 or 1800 451 428 Northern Team: (02) 4320 4888 or 1800 451 694 www.lawlink.nsw.gov.au/opg	SERVICE PROVIDED The NSW Public Guardian is a public official who can be appointed by the NSW Guardianship Tribunal to be the guardian of a person (16 years and over) with decision-making incapacity due to disability such as dementia, intellectual disability, brain injury or mental illness. The Public Guardian is usually appointed when there is no other person suitable or able to be the guardian.
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NSW Trustee and Guardian

CONTACT Head office: (02) 8688 2600 Outside Sydney: 1300 360 466 Locked Bag 5115 Parramatta 2124 www.tag.nsw.gov.au	SERVICE PROVIDED The NSW Trustee and Guardian is an independent statutory authority legally appointed to protect and administer the financial affairs and property of people unable to make financial decisions for themselves (where there is no other suitable person to be appointed to this role). The NSW Trustee and Guardian also oversees the operation of orders appointing private persons as financial managers in NSW.
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Public Defenders Office

<p>CONTACT (02) 9268 3111 Fax: 9268 3168 DX 11545 Sydney Downtown</p>	<p>SERVICE PROVIDED The Public Defenders Office is willing to advise lawyers considering a Supreme Court appeal in section 32 matters where the client is, or could be, legally aided.</p>
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Statewide Disability Services (SDS) Corrective Services

<p>CONTACT (02) 9289 2136 SDS@dcs.nsw.gov.au</p>	<p>SERVICE PROVIDED SDS is a multidisciplinary team that works with all offenders with a disability who are under the management of Corrective Services NSW. If you have a client who is either entering or in custody, or under the management of Community Offender Services, and would benefit from specialist assistance, please contact SDS. SDS also focuses on the pre-release planning of offenders with intellectual disability, which includes making referrals to ADHC, including the CJP.</p>
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Justice Health

<p>CONTACT Tel (02) 9700 3000 Fax (02) 9700 3493 jhadmin@justicehealth.nsw.gov.au</p>	<p>SERVICE PROVIDED Health care, including mental health care, to people in the adult correctional system, to those in courts and police cells, to juvenile detainees and to those within the NSW forensic mental health system and in the community. The Statewide Court Liaison Service provides mentally ill offenders with court-based diversion options from the criminal justice system towards treatment in mental health facilities. There are Justice Health mental health practitioners in 17 courts across NSW.</p>
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Homeless Persons Information Centre

<p>CONTACT 1800 234 566 www.homelessnessnsw.org.au</p>	<p>SERVICE PROVIDED The Homeless Persons Information Centre is a telephone service that can provide referrals to accommodation providers for people in NSW who are homeless or at risk of homelessness. It operates seven days a week: 9am to 10pm (closed each day between 1 and 2 pm).</p>
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APPENDIX 1: MORE ABOUT ADHC

ADHC provides several types of direct services as well as funding for NGOs supporting clients with cognitive impairments, including intellectual disability. ADHC is the major service provider to people with intellectual disability in NSW. ADHC also provides information about and referral to non-government services.

What makes my client eligible?

- An IQ of two standard deviations below the mean (70 or below, but note that a confidence interval of plus or minus 5 applies, so effectively an IQ of 74 may be accepted).
- Significant deficits in adaptive behaviour functioning (in two or more areas).
- Evidence of onset of developmental delay or intellectual disability prior to the age of 18 years. Please note that this includes people with ABI which occurred before the age of 18 years.

What is the best way to refer a person to ADHC?

- Phone and then email the intake officer for the region where your client is based. The ADHC website lists the contact details for each regional information, referral and intake officer. They are also listed in Part 12: Contacts and referral points.
- With the consent of your client, ask the intake officer if your client is already a client or has been a past client of ADHC.
- Make sure you address the eligibility criteria in any application to make it easier for ADHC to say yes!

What information does ADHC require to demonstrate eligibility?

- The more information you can give the intake officer the better the outcome and the quicker the process for intake will be. The best information is a psychologist's assessment. If there is no assessment then provide evidence such as school reports, Department of Education and Communities counselling records, health records and Centrelink records.

If you have no documentary evidence such as assessments that demonstrate that your client's disability was present before the age of 18 years, consider supplying ADHC with letters from relatives who knew the person at that time. It is often difficult to supply more formal evidence in matters where your client is now over 30 years of age.

What if I do not have evidence of disability to provide to ADHC?

- If there is no assessment then ADHC is theoretically able to undertake its own assessment and should be asked to do so. However, limited resources for assessments in ADHC mean that this is often not practicable in a limited time frame. If you are seeking an assessment for court, use this also to support referral to ADHC. Be prepared for this to take time.
- If your client does not have an assessment but there are indicators of intellectual disability, point these indicators out to ADHC in the referral.

Is it worth contacting ADHC even if I think my client will not meet the criteria?

- Yes. The job of an intake officer is **Information, Referral and Intake**. Even if your client is unlikely to be eligible for ADHC direct services, it is worth contacting ADHC intake for that client's region so that they can assist with referrals. Many NGOs are funded to work with people with a broader range of disability than ADHC and may be able to provide your client with assistance.

Will my client get any priority as a result of their involvement with the criminal justice system?

- The *ADHC Criminal Justice Resource Manual* outlines the circumstances that get priority and require ADHC to provide an 'immediate response'. The manual is available on the Ageing, Disability and Home Care website. www.adhc.nsw.gov.au. Use the search feature to find *Criminal Justice Resource Manual*.
- Situations classified as needing an 'immediate response' can be found in the ADHC Prioritisation and Allocation Policy.

- Some of the relevant priority circumstances for clients with criminal justice issues include:
 - violence or abuse resulting in the client, family or carer or member of the community being at risk of injury
 - homelessness - as soon as it can be determined that the client has nowhere to live (could be blocking a respite bed, or delaying parole/release)
 - client displaying challenging behaviour such that they are at risk of becoming involved in the juvenile or criminal justice system or who have already been involved in the juvenile or criminal justice system
 - client whose continued living in the community is contingent on receiving services as a condition of bail, bond, parole etc.
 - client who is at imminent risk of entering a more restrictive option and/or whose carer is likely to be at risk unless entry into the service is facilitated. (This may include clients who are at risk of incarceration or re-incarceration. It also may apply to young people who have been or are at risk of being inappropriately placed in an aged care nursing home.)
- When making a request to an intake officer it is important to highlight how your client fits within these categories in order for them to be identified as a priority.
- Use the terminology in the policy as this may make the identification of these clients quicker.
- The term 'immediate' is ADHC's highest priority. However, all responses need to occur within the competing demands. 'Immediate' means that ADHC can assist a client **before or while your client is being assessed for ADHC intake and ADHC eligibility**. ADHC can start looking at needs or the client and also possible referrals straight away.
- The 'response' might entail a client being allocated to a case worker, undertaking a needs assessment, organising court documents, or looking at eligibility or referral.

My client used to receive services from ADHC, but no longer does. How do I check with ADHC to see if they have any reports for my client?

- Contact the information, referral and intake officer in your client's region and supply them with the appropriate authority to release any assessments on file. Check how long this process may take.

Is it necessary to go through ADHC to get non-government case management?

- Many NGOs can accept clients directly for some services.
- An NGO may be better suited to your client. ADHC direct is not always the best option for a particular client.
- Accommodation services will usually need to go through ADHC.
- Ask the intake officer at the time of referral what other services might be available to your client.

How can behaviour support services be accessed for a client?

- Behaviour Support Services can be accessed by both ADHC direct clients and NGO serviced clients.
- A referral to Behaviour Support Services usually comes from your client's case manager.
- There may be circumstances where your client does not have a case manager, but they can still receive Behaviour Support Services.
- When referring a client you can request that they be referred to Behaviour Support Services.
- Sometimes lawyers may not know what to request for their client. In such circumstances, it may be appropriate to ask either for a needs assessment to be carried out or to request that your client is allocated a case manager who can make appropriate referrals for them.

What can I do if my client's application for ADHC services is knocked back?

- Request an internal appeal of the decision. This should generally be directed to the Manager of Information, Referral and Intake.
- Ask ADHC to provide full written reasons as to why your client is ineligible.
- Sometimes it may be appropriate to request that the Office of the Senior Practitioner be consulted in relation to the appeal.
- Within ADHC, the Office of the Senior Practitioner provides practice leadership for therapy, nursing, psychological and behaviour support services, and delivers a range of specialist services and practice improvement for clients with complex needs and challenging behaviour.
- You can also request, particularly in relation to matters where your client's psychological assessment seems to support eligibility, that the materials be reviewed by the Practice Leader of Psychology. This person is based in the Office of the Senior Practitioner.

Some ADHC decisions may be reviewable by the Administrative Decisions Tribunal.

How do I request services for a client, accelerate services or organise a referral to behaviour intervention etc.?

- You should request either specific services or an assessment of your client's current needs at the intake office.

How can ADHC assist if my client is referred to a drug and alcohol or rehabilitation program?

- An ADHC case manager may be able to work with a service or program to assist in making adjustments for a client with intellectual disability.

Community Justice Program

Community Justice Program (CJP) is aimed at people with intellectual disability who are exiting custody or detention or have a history of incarceration and are at risk of re-offending. It offers a comprehensive and intensive range of supports to assist people to live in the community. Supports offered will vary according to a client's needs but may include supported accommodation.

Eligibility

- Clients must be eligible for ADHC services.
- Clients must have ongoing contact with the criminal justice system, resulting in time spent in custody.
- Clients must be at continuing risk of re-offending.
- Client's needs must be outside the scope of what ADHC Regional service can provide.

Contact CJP Intake Officer: (02) 9841 9214

APPENDIX 2: LETTER TO PSYCHOLOGIST

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Date

Name of Psychologist

Address

Dear NAME

RE: Stephen Jones

Request for psychological assessment

Court date: 13 December 2011 at Croydon Local Court

Thank you for seeing Mr Jones and for agreeing to prepare your assessment in accordance with the Legal Aid scale fee.

We seek a psychological assessment of Mr Jones's disability for the purposes of making an application under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). Section 32 is a mechanism to divert certain categories of people charged with criminal offences away from the criminal justice system and into support and, where appropriate, treatment to address the issues that led to their alleged offending.

We **enclose** a copy of the following documents:

- Copy of the police facts and antecedents
- Copy of section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW)
- Expert Witness Code of Conduct contained in Schedule 7 of the Uniform Civil Procedure Rules 2005 which you must read and by which you must agree to be bound when preparing your report and support plan
- Copy of section 14 of the *Mental Health Act 2007* (NSW)

[Include any other documents that may be of assistance such as previous reports etc.]

Please provide us with a report addressing the following:

- Your qualifications
- That you have read the Expert Witness Code of Content and agree to be held by the code in the preparation of this report
- When you saw my client for the purpose of your assessment
- Any relevant history obtained during the course of your assessment
- The outcome of any assessments undertaken

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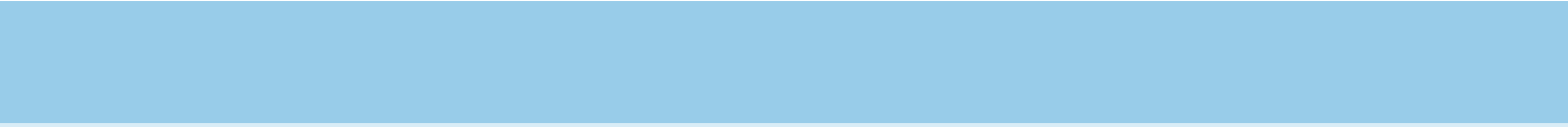
- Whether or not my client is:
 - 'developmentally disabled', but is not a 'mentally ill person' for the purposes of Chapter 3 of the *Mental Health Act 2007* (NSW)
 - 'suffering from mental illness', but is not a 'mentally ill person' for the purposes of Chapter 3 of the *Mental Health Act 2007* (NSW)
 - suffering from a 'mental condition for which treatment is available in a mental health facility' but is not a 'mentally ill person' for the purposes of Chapter 3 of the *Mental Health Act 2007* (NSW)

Attached to this letter is section 14 of the *Mental Health Act 2007* (NSW), which defines a 'mentally ill person' for your assistance. Please note that 'mentally ill persons' are not eligible for section 32.
- The extent and effect of any disability, including deficits in cognitive and adaptive functioning (for example, short-term memory difficulties, a lack of impulse control, difficulties with personal care and motivation, etc.) and the impact upon his daily life
- Any link between my client's disability and the alleged offence
- Any link between my client's disability and the circumstances surrounding the alleged offence
- The supports which are and/or should be in place which would help to reduce the risk of further offending behaviour
- Anything else that, in your view, may be of assistance to the court in determining whether or not to divert Mr Jones away from the criminal justice system and into appropriate supports.

We would be pleased to receive a copy of your report three business days prior to the next court date, which is indicated in the subject line of this letter. Please do not hesitate to contact the writer should you require any further information or have any queries about our request.

Yours faithfully

Samuel Smith
Solicitor
Encl.



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SECTION