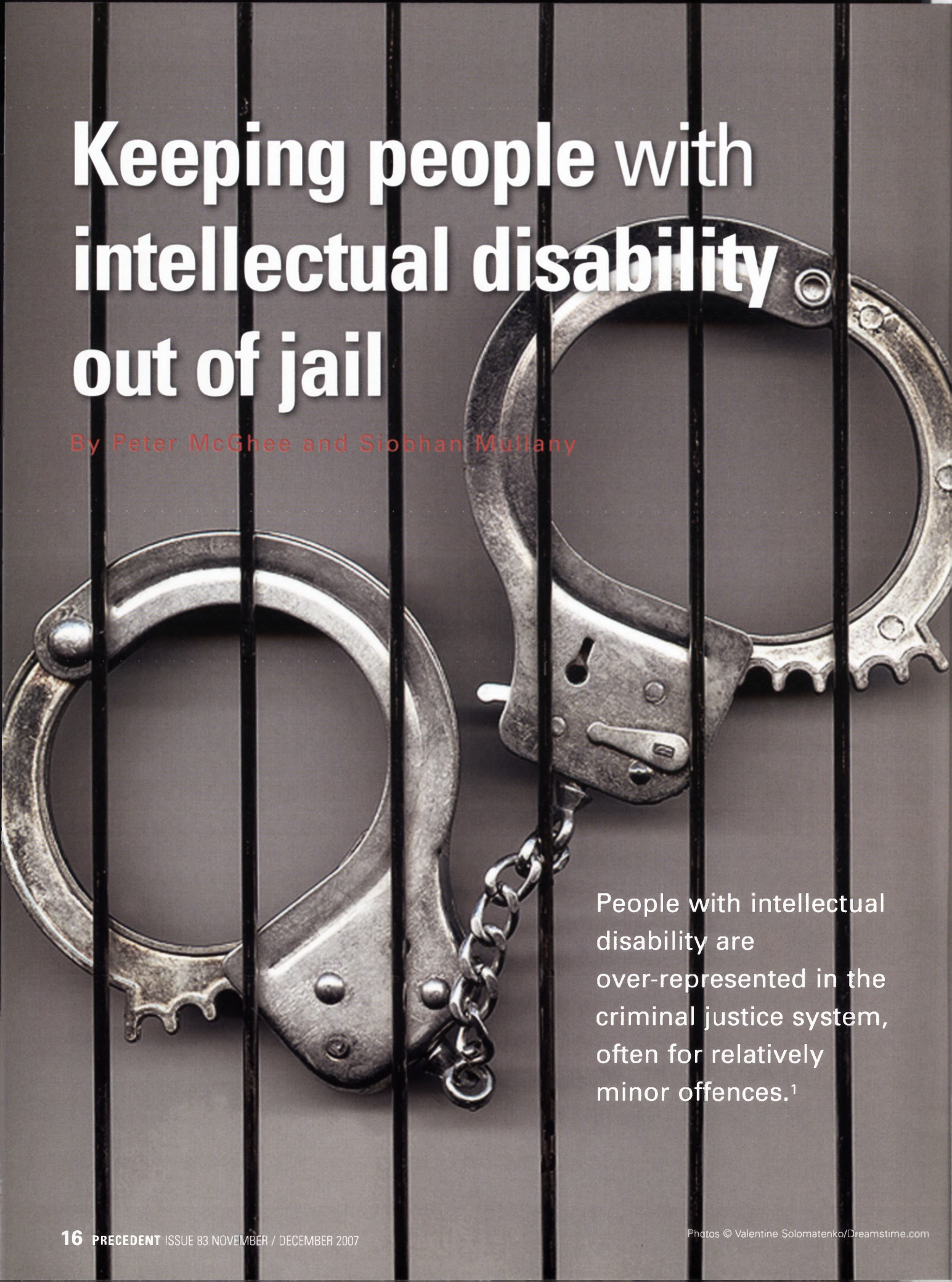
Keeping people with intellectual disability out of jail

By Peter McGhee and Siobhan Mullany



People with intellectual disability are over-represented in the criminal justice system, often for relatively minor offences.[1]

For example, offensive language charges are very common with acquired brain injury clients. Often the matters are admitted, and a small penalty is imposed. In some cases, the conviction can be defended.[2]

If a client is convicted, jail is a harsh option for someone with intellectual disability. It is estimated that 5% to 12% of the NSW prison population has an intellectual disability. In jail, those with intellectual disability are extremely vulnerable to assaults, particularly of a sexual nature. They are often housed in ' protection' with paedophiles and police informants. The conditions in 'protection' often include being confined for approximately 23 hours per day to a small cell and having no access to treatment for prolonged periods. Those with intellectual disability often have a poor understanding of what or why this is happening.

A punitive approach to sentencing is useless for those whose memory and cognitive function are grossly affected by disability, and who depend on support for living skills. Considerations such as personal deterrence and rehabilitation are not relevant.

The *Mental Health (Criminal Procedure) Act* 1990 (NSW) (MHCPA) allows the court to adopt a therapeutic rather than punitive approach to an offender with intellectual disability. To achieve the desired result under the Act, the legal representative has special legal responsibilities: to act as an advocate for the client and to case-manage the proceedings.

These roles involve requesting assistance from community and family disability services, treatment or supervision, and to provide therapeutic options for the court. The key treatments are anger management, stress management, AA, drug treatment, behaviour intervention, supported employment, recreation, and a responsible person to supervise the defendant in the community. Ongoing support is necessary to prevent re-offending.

The representative must submit a treatment plan to the court to show that the client with intellectual disability is better dealt with therapeutically rather than punitively. The submissions need to show that the person should be given another chance. (An alternative submission, if the person is found not guilty because of mental illness, is that the matter should be discharged unconditionally.)

DIVERSION RATHER THAN PUNISHMENT

Under s32 of the MHCPA, a magistrate in a Local Court has the discretion to send a defendant along a diversionary humanitarian route or to deal with the defendant in accordance with law.

Section 32 requires the magistrate to make three decisions:

1. Is the defendant eligible to be dealt with under s32? Do they have a developmental disability, mental illness (but are not a mentally ill person, for whom chapter 3 applies), or are suffering from a mental condition for which treatment is available in hospital (but does not need to be admitted to hospital)?;
2. Considering all the evidence, would it be more appropriate to deal with the defendant in accordance with the provisions of this part than otherwise in accordance with law. This decision – whether to use the diversionary regime – is discretionary, even for serious offenders;[3] and
3. Which subsections of 2 or 3 should be applied – that is, to adjourn the proceedings, grant bail, or any order the magistrate thinks appropriate; or dismiss the charge and discharge the defendant into the care of a responsible person, unconditionally or subject to conditions; or discharge the defendant on a condition to comply with treatment; or discharge the defendant unconditionally.[4]

IDENTIFYING INTELLECTUAL DISABILITY

The disastrous outcomes that many people with intellectual disability have suffered at the hands of the criminal >>

Prisoners with intellectual disability (an estimated 5-12% of the NSW prison population) are extremely vulnerable to assaults, particularly of a sexual nature.

justice system are often preventable. It is the lawyer's responsibility to identify a client's disability and social circumstances. Early referral for diagnosis is an essential part of the legal role. This requires being able to identify the full range of intellectual disability, from obvious to subtle.

Identifying intellectual disability includes looking for signs in the police factsheets. For example, it may include words such as 'the person was acting in a childlike manner' or 'has a disregard for the law'. Lawyers should also be aware of mannerisms, marked inattentiveness or absent-mindedness, and/or a scar or deformity on the head (in the case of an acquired brain injury).

Aside from asking a client directly, social circumstances can also be informative. For example, the client may be on a disability pension, have attended a special school, work in a supported employment environment, be under the care of the Officer of Protective Commission or have a guardian to handle their finances or life decisions, have a record of hospital or psychiatric institution admittance, or is being treated by a doctor or psychiatrist. Previous psychology reports may include the results of intellectual disability tests, including levels of literacy and numeracy.

EXPERT REPORT

For an application under s32 of the MHCPA, the lawyer must ask a psychologist (or other relevant expert) for a report. The lawyer must show the necessity of a report for Legal Aid funding. The client must sign a release form for the lawyer to obtain their medical history (s32).

Where a community caseworker is involved – for example, from the Department of Ageing, Disability and Home Care (DADHC) – a psychologist's report usually exists because the department requires that its clients fit the standard criteria for intellectual disability[5] to be eligible for this service in NSW. The caseworker can also provide a treatment plan.

TREATMENT PLANS

A successful s32 diversionary application depends on establishing a link between the offence and the intellectual disability or mental illness, including consideration of the client's prior record, the effectiveness of criminal law for the client, and an effective treatment plan.

Currently, there is a huge gap in service provision. Lobbying on behalf of the client for services makes a marked difference. Obtaining a report is not enough, particularly in serious offences, such as inappropriate sexual behaviour or malicious wounding. Having a psychiatrist or psychologist see a client and obtaining proper ongoing treatment from a relevant mental health professional should be sought, if a client is to be diverted from jail.

WHERE TO OBTAIN TREATMENT PLANS

If the client is an existing client of the DADHC or a disability service, their assigned caseworker prepares a court report and treatment plan.

If the client is not a disability service client, refer them to a psychologist for an assessment. This may take six weeks. The lawyer can also ask DADHC for a referral to non-government organisations (NGO) for a similar service; the disability services can then refer the client to an advocate; investigate available community services; and make a special request to the family and friends of the accused to be the client's responsible person.

CASE STUDIES

Barry: DADHC involved

Barry[6] was 40 years of age with autism, intellectual disability, and epilepsy. He was heavily medicated. He had been institutionalised for most of his life, but currently lived alone in Department of Housing accommodation.

He was charged with making repeated hoax calls – specifically bomb threats – and he provided his phone number when asked.

He had been in jail for many years. His strong obsessive traits were linked to an autistic spectrum disorder. A previous DADHC treatment intervention had resulted in no offences for three years (with one regression – a bomb threat from home to five regional areas, making ridiculous demands).

He was arrested and charged under the *Crimes Act* 1900, 'Demand property by force with intent to steal' and *Criminal Code Act* 1995, 'Use carriage service to make hoax threat'.

The following legal action was taken by Barry's representatives.

1. DADHC or NGO or service-provider were contacted; signed authorities for the release of information were obtained (warning of the privacy concerns) and a letter was sent to the court providing details of behaviour requiring intervention and requesting a court report.
2. There was negotiation to keep the matter in the Local Court, where the diversionary application was available, and for the Commonwealth DPP to prosecute the case. The court was served with the following material:
   - psychiatric and/or medical reports from DADHC, which contained the recommendation that psychological and emotional support was needed to prevent reoccurrence, rather than a custodial sentence;
   - references, including the valuable contribution to the community of people with intellectual disability; and
   - a letter containing the intervention strategy, including referral for a series of stress and anger management courses, disconnection of the home phone, and increased access to behaviour intervention programs that would not be available were a custodial sentence to be handed down.

Submissions to the magistrate proposed suitable conditions for dismissing the charges under s32, including the following matters:

1. a need for caution because there were no admissions of offences in the report;
2. a conclusion that the client was suffering from an intellectual disability or mental illness at the time of criminal offence;
3. provisions to ensure that the client would comply with the treatment plan, including stress management, peer/social network, accommodation and living skills programs under DADHC/ psychiatrist, etc, for the set period;
4. nomination of a responsible support person and advocate for the client, who will be instrumental in the phone disconnection and ensure no landline for two years;
5. an assurance of effective communication to the client of the serious consequences of a breach; and
6. the treatment-providers were obliged to report any failure on the client's part to comply.

Steven: DADHC not involved

Steven was 18 years old, autistic, had mild intellectual disability, lived with his family, walked his younger sister home from kindergarten, and was locally known.

The offences were an act of indecency on a child under 16 and aggravated indecent assault.

The treatment plan provided:

1. area health service psychological counselling;
2. relationship and sexuality counsellor (six sessions with a report);
3. Autistic Spectrum Society Support and Boundaries (four sessions);
4. an advocate appointed from People With Disability; and
5. Disability Services Australia found supported employment, as recommended by a psychologist.

Steven's case was not dismissed under s32. He then pleaded guilty; and complying with the treatment plan formed part of the conditions for a 12-month good behaviour bond.

Julie Anne: DADHC not involved

Julie Anne had motor vehicle-induced acquired brain injury when she was 21 years old. Thus she did not fit the DADHC criteria. She was unemployed, but had been a nurse before the accident. She lived alone in Housing Commission accommodation.

She was charged with making over 60 false phonecalls to emergency services. They were made when she was intoxicated and suffering anxiety attacks. She was also charged with resisting arrest and police assault. She had numerous prior court appearances and had been jailed twice for three months.

Julie Anne's treatment plan included:

1. education in alternative numbers to ring during anxiety attacks;
2. referral to alcohol counselling and self-help groups, with attendance to be recorded;
3. referral to a life-skills program run by a charity organisation;
4. referral to a 10-week counselling course and psychologist for depression, anxiety, drug and alcohol abuse, and life skills;
5. referral to a psychiatrist for medication and anxiety review;
6. application to the Guardianship Tribunal for a guardian to control her finances to control alcohol purchase; and
7. a support person – a friend – appointed to implement the treatment plan.

As a result, the case was dismissed under s32 of the MHCPA, conditional upon compliance with the treatment plan.

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Sherrie: DADHC not involved

Sherrie was 24 years old and lived alone in Housing Commission accommodation. Her lack of self-recognition of her intellectual disability became apparent during a legal conference.

The offence was a social security prosecution for non-disclosure of income of several thousand dollars. She had worked in a childcare centre.

There were no expert reports, but an assessment confirmed her intellectual disability. The report found she was in the borderline range of abilities, with an IQ greater than 70. She had suicidal tendencies, with previous hospitalised attempted suicides.

An application was made under the Commonwealth legislation – s20BQ of the *Crimes Act*, which is similar to s32 of the MHCPA. The application was refused, as no intellectual disability was diagnosed and the mental illness disclosures were denied.

A second application under s20BQ, supported by argument to demonstrate that Sherrie's IQ was greater than 70, did not prevent the application. A subpoena issued to the hospital that had provided previous treatment for her mental illness provided additional evidence to demonstrate intellectual disability with a mental illness, therefore satisfying the first component of s20BQ.

Sherrie's treatment plan included:

1. financial counselling from a charity organisation, six sessions and ongoing consultations with medication reviews by her GP;
2. referral to a psychologist;
3. referral to an advocacy service to assist with forms and income disclosure; and
4. the written submissions.

As a result, the matter was dismissed, conditional upon compliance with the treatment plan.

Neville: the consequences of no treatment plan

Neville was 26 years old, with autism and an intellectual disability. He was a DADHC client. He was good looking, had a childlike innocence, was bullied both at school and as an adult. He was sexually assaulted at school. He had no criminal record.

He was charged with a behavioural incident – a physical assault – towards a male school teacher, who required one stitch to his head.

No representations were made to maintain the matter in the Local Court. No s32 application was made. No treatment plan was organised.

The result was an 18-month jail sentence. Neville was confined to a cell for 23 hours a day. He suffered great hardship in jail. He sustained a deep scar in his forehead, lost his front teeth and suffered a significant deterioration in his mental health.

> A successful s32 diversionary application depends on a link between the offence and the intellectual disability or mental illness.

OPTIONS IF s32 IS DEEMED INAPPROPRIATE

Adjourn the matter under s32(2)(a) to strengthen the treatment plan and apply again with further evidence and a better treatment plan.

Plead guilty with a treatment plan ('a Claytons' s32). Seek an adjournment for three to six months, with a compliance treatment plan as a bail condition. Use the adjournment time to show the plan's effectiveness.

Obtain reports as to the defendant's fitness. If the report suggests the client is unfit, submit the report to the magistrate, who must discontinue the proceedings, because the alternatives under the MHCPA do not apply in the Local Court. Part 4 MHCP does not apply in the Local Court; therefore, no special verdict is available.

INSANITY DEFENCE

There is no provision for the mental illness defence – also known as the 'McNaughten Defence' – in the Local Court.

This defence is made out if, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as to not know the quality of the act s/he was doing or, if s/he did know it, did not know that what s/he was doing was wrong.

As part 4 MHCPA does not apply in the Local Court – that is, no special verdict is available if the insanity defence succeeds – the magistrate would not be able to make orders that can be made in the District and Supreme Courts. Nor does the Mental Health Review Tribunal have jurisdiction in the Local Courts. Thus, an acquittal on the basis of mental illness in the Local Court allows no option but to discharge the defendant. The NSW Law Reform Commission Report No. 80[7] acknowledges this, and a proposal to deal with the problem has not yet been adopted. Accordingly, a person would have to be released.

DIVERSIONARY PROBLEMS IN THE DISTRICT COURT

District Court matters can be dealt with under s10(4) MHCPA:

> 'If in respect of a person charged with an offence, the court is of the opinion that it is inappropriate to inflict any further punishment, having regard to the trivial nature of the charge or offence, the nature of the person's disability or any other matter which the Court thinks fit to consider, to inflict any punishment, the Court may determine not to conduct an enquiry and may dismiss the charge and order that the person may be released.'

It is poorly worded and its scope has not been settled. The application must

be heard prior to a fitness enquiry.[8]

Points to remember on an application made under s10(4) are that, under s39 MHCPA, custody is not regarded as punishment: nothing is trivial in the District Court; it is an executive discretion and the District Court has the option of limiting a term if the defendant is found unfit and responsible after a special hearing.[9]

In summary, when dealing with a client who has an intellectual disability on a criminal charge:

- link up services and support asap;
- request that a disability service caseworker write a report;
- request a psychologist's assessment, if the client is not already a client of a disability service;
- make representations to keep the matter in the Local Court;
- use s32 exhaustively; and
- remember the McNaughten defence. Acquittal on the basis of mental illness allows the court no option other than to discharge the defendant unconditionally. ■

Notes: **1** For definitions of intellectual disability and mental illness, see L Steele, 'Ensuring Meaningful Access to Justice: Representing Clients with Intellectual Disability', in this edition of *Precedent*, pp10-14. **2** The details of the circumstances of offensive language are imperative to ensure the case is established; for example, *McNamera v Freeburn* (1988) (Supreme Court) where the prosecution failed to establish a *prima facie* case because there was no evidence that persons in the public area were offended. Also see *May v O'Sullivan* (1955) 92 CLR (Common Law Division Supreme Court of NSW) where there was reasonable doubt about whether offence was taken. **3** See *El Mawas* (2006) NSWCA 154. **4** The defendant is in breach if non-compliance occurs within six months from date of s32 order, s32(3A). **5** An IQ of less than 70, with two deficits in living skills acquired before the age of 18. **6** Names have been changed to protect confidentiality. **7** Para 6.46. **8** A fitness enquiry is an enquiry by the court to determine if the person charged is capable of understanding the proceedings and of giving instructions to their legal representative. If the person charged is not capable of either one or both, s/he is unfit to be tried. **9** After a person is found unfit, the court conducts an enquiry into the person's responsibility for the offence on the limited evidence available – that is, on the evidence available without the person charged being able to give an explanation for what happened. The court's enquiry into responsibility is called a 'special hearing'. If the court determines that the person is responsible, it can impose a 'limiting term', which is the maximum term for which a person can be held in custody in relation to that offence. This is not a sentence. If the person becomes fit, which does not occur with an intellectual disability but may occur with a mentally ill person who responds to medication, the court can then hold a normal trial. While the person remains unfit, they are under the care of the Mental Health Review Tribunal. The procedure is set out under the provisions of the MHCPA.

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