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NSW Sentencing Council
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RE: GOOD CHARACTER AT SENTENCING

About the Intellectual Disability Rights Service

The Intellectual Disability Rights Service (IDRS) is a community legal centre and disability advocacy service for people with cognitive impairment in NSW. IDRS is the only service of its kind in Australia, with two key service functions. Firstly, the IDRS Ability Rights Centre (ARC), offers free criminal and civil legal assistance to people living with a disability across NSW and supports on average 850 people per year. Secondly, the IDRS Justice Advocacy Service (JAS) provides 24/7 support across NSW to people with cognitive impairment who come in contact with the criminal justice system, whether as victims, defendants or witnesses. Each year, JAS supports on average 2,500 people with cognitive impairment, including approximately 2,250 people recorded as offenders and 200 people recorded as victims of crime.

Introduction

IDRS welcomes the opportunity to respond to the NSW Sentencing Council's *Good Character at Sentencing Consultation Paper* ('Consultation Paper'). With over 40 years' experience, we have seen first-hand how aspects of the criminal justice system can disadvantage and discriminate against people with cognitive impairment. In our view, good character in sentencing is one such aspect. As a matter of principle, IDRS considers that good character as a mitigating factor should be abolished for all offences and in all circumstances. Our broad position is that good character in sentencing undermines equality before the law and justice for people with disability. Our submission will not respond to all aspects of the consultation questions, instead, we will direct our focus to the use of good character generally and the risks it presents to both offenders and victims with disability.

IDRS RESPONSES TO THE CONSULTATION QUESTIONS

Question 5.1: Use of good character generally

(1) Should consideration of good character as a mitigating factor be abolished in all cases? Why or why not?

IDRS considers that consideration of good character as a mitigating factor should be abolished in all cases. The use of good character is, in our view, inequitable and undermines equality before the law. Assessing an offender favourably or otherwise because of their character is, or should be, immaterial to questions of culpability and sentencing. The use of good character evidence in sentencing is especially inimical to people with cognitive disability, including offenders and victims. We believe its continued use contributes to the systemic barriers faced by people with disability who come in contact with the criminal justice system. These points will be briefly considered below.

(A) Offenders with disability

People with disability have the same rights to equality before the law as the rest of the community.¹ Yet offenders with disability, particularly cognitive impairment, continue to face systemic barriers across all stages of the criminal justice system.² And while there is no inherent link between offending and disability, offenders with disability are grossly overrepresented among the prison population:³

- among individuals aged 25-34, 1 in 3 prison entrants reported a disability, compared to 1 in 14 in the general community;
- among individuals aged 35-44, 2 in 5 prison entrants reported a disability, compared to 1 in 11 in the general community;
- among individuals aged 45-51, half of prison entrants reported a disability, compared to 1 in 6 people in the general community.⁴

While limited, there is an emerging body of scholarly research examining the relationship between sentencing and over-representation among people with disability. A recent Australian study, 'Sentencing and the over-representation of people with cognitive disability in the Australian criminal justice system' ('Sentencing Study'), analysed this nexus and factors considered by judges in Queensland courts when sentencing people with cognitive disability.⁵ Based on a qualitative analysis of 34 sentencing remarks transcripts between 2019 and 2021 where a person with cognitive disability was sentenced, the study found that:

Closer scrutiny of [people with cognitive disability] who have offended can increase their likelihood of breaching conditions, leading to an increased frequency of sanctions and enmeshing them more deeply into the criminal justice net. We conclude that this is one way in which sentencing decisions may contribute to the over-representation of [people with cognitive disability] within the Australian criminal justice system.⁶

At present, there is limited research examining the relationship between good character as a mitigating factor during sentencing and offenders with disability. However, in the face of well-documented systemic barriers and the disproportionately high rates of imprisonment, we think it incumbent on both the government and the courts to consider the various ways in which good character in sentencing might contribute to structural barriers that adversely impact offenders with disability. Accordingly, the sections that follow will set out the various risks associated with good character in sentencing for people with disability. In so doing, we seek to highlight that dispensing with good character, in effect, would eliminate another barrier to achieving a fairer and more just outcome for people with disability.

Offenders with disability may not have access to good character references

Poverty and other forms of disadvantage are 'crucial factors in the criminalisation of people with disability', according to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People

¹ See *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). See also *Disability Discrimination Act 1992* (Cth) s 3(b).

² See *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 8.

³ Leanne Dowse, Simone Rowe, Eileen Baldry and Michael Baker, 'Police responses to people with disability' (Research Report, The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021) 4.

⁴ Australian Institute of Health and Welfare, 'Health conditions or disabilities that affect everyday activities', *The health of people in Australia's prisons 2022* (Web Page) < <https://www.aihw.gov.au/reports/prisoners/the-health-of-people-in-australias-prisons-2022/contents/human-function-and-disability/health-conditions-or-disabilities-that-affect-everyday-activities> >.

⁵ Calum A. F Henderson and Melissa Bull, 'Sentencing and the over-representation of people with cognitive disability in the Australian criminal justice system' (2024) 36 (1) *Current Issues in Criminal Justice* ('Sentencing Study').

⁶ *Ibid* 95-96.

with Disability (Disability Royal Commission).⁷ Indeed, if we accept that justice outcomes are largely determined by systemic and social factors,⁸ allowing offenders to furnish the court with good character references is, in our view, highly inequitable.

IDRS believes offenders with intellectual disability are significantly less likely to be able to provide character references and may not, as a result, benefit from ‘the same quantity and quality of mitigation as other individuals’.⁹ Generally, adducing good character references rests largely on an offender’s access to social and community networks. Of course, it bears emphasis that not all Australians have access to such networks. And we believe people with intellectual disability, in particular, may be especially disadvantaged due to a range of socio-economic factors. Data from the Australian Institute of Health and Welfare, for instance, indicates that compared to those without a disability, people with disability have lower rates of employment, incomes, educational attainment, and life participation rates.¹⁰ In 2018, 38% of households with a person with disability had a low level of household income, compared with 18% of households without disability.¹¹ This data is broadly consistent with the experiences of IDRS clients, who are typically low-income and with often limited access to sustained employment. Rarely have IDRS clients relied on good character references and received a reduced sentence as a result.

Assumptions about ‘good’ and ‘bad’ character may disadvantage people with disability

Despite being ‘a well-established principle at common law’, good character in sentencing remains ill-defined. And it is this very imprecision that affords judicial officers scope to apply, whether consciously or otherwise, shared assumptions during the sentencing task. We note that character has been described as ‘vague and incoherent’, and ‘[lacking] any settled definition or empirical foundation’.¹² At 2.41, the Consultation Paper itself acknowledges that good character, as an expression, is:

... widely used in law, but seldom if ever fully defined ... people may recognise when they see it. But this requires some shared assumptions.

IDRS believes the ‘shared assumptions’ about what constitutes good character is likely to disadvantage people with disability due to widespread misconceptions, attitudinal barriers and negative assumptions about people with disability within the criminal justice system. In its Final Report, the Disability Royal Commission indicated that people working in the criminal justice system, such as police, can focus on and interpret certain attributes or behaviours of people with disability as non-compliant (such as speaking loudly or yelling in a public space). This can, in turn, draw the individual into the criminal justice system.¹³ From that first point of contact, institutional discrimination continues across all stages of the criminal justice system. For example, according to the Australian Human Rights Commission, people with disability ‘are at increased risk of being disrespected and disbelieved’, whether as a victim of crime, a person accused of a crime or as a witness.¹⁴ People with cognitive impairment can also be looked upon as ‘dangerous’ or ‘other’. The Sentencing Study previously discussed, for instance, assessed the othering of

⁷ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 8, 41 (‘*Disability Royal Commission*’).

⁸ Ruth McCausland and Eileen Baldry, ‘Who does Australia Lock Up? The Social Determinants of Justice’ (2023) 12 (3) *International Journal for Crime, Justice and Social Democracy* 37.

⁹ Katie Kronick, ‘Intellectual Disability, Mitigation and Punishment’ (2024) 65 *Boston College Law Review* 1582.

¹⁰ Australian Institute of Health and Welfare, ‘Human function and disability’, *The health of people in Australia’s prisons 2022* (Web Page) <www.aihw.gov.au/reports/prisoners/the-health-of-people-in-australias-prisons-2022/contents/human-function-and-disability>.

¹¹ Australian Institute of Health and Welfare, ‘Income’, *People with disability in Australia* (Web Page)

<<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/income-and-finance/income>>.

¹² Gabrielle Wolf and Mirko Bagaric, ‘Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals’ Disciplinary Proceedings’ (2018) 44 (3) *Monash University Law Review* 567.

¹³ *Disability Royal Commission* (n 7) 39.

¹⁴ Australian Human Rights Commission, ‘Barriers’, *Disability Justice Strategies – an introduction* (Web Page) <<https://humanrights.gov.au/our-work/1-disability-justice-strategies-introduction>>.

people with cognitive impairment, noting that ‘some defendants were constructed as a danger to the community due directly to their intellectual or cognitive impairments’.¹⁵

From the point of arrest to sentencing, IDRS is the only organisation funded to provide in-person support for our clients at all stages of their engagement with the criminal justice system. We have closely observed how the criminal justice system engages offenders with disability. Most often, we observe negative assumptions, including where the behaviour of people with disability, particularly cognitive impairment, has been interpreted as ‘bad’ or ‘dangerous’. Many of our clients report being unfairly targeted and mistreated by police, verbally and physically, even in circumstances where police are aware of their disability. Other clients report not being informed of their rights during police questioning.

While our preference is to dispense with good character altogether, if good character in sentencing is retained, guidelines or benchmarks on character may be instructive. Importantly, any guidelines should highlight that good character may present differently for people with cognitive impairment (for example, attending training programs or assisting the family).

(B) Victims with disability

People with disability are especially vulnerable to experiencing crime. Compared to the total NSW population, rates of victimisation in the disability cohort for any type of incident were between 1.47 to 1.71 times higher for the period 2009 to 2018.¹⁶ Of the victims aged between 10 to 74 years from 2014 to 2018, people with disability accounted for 18% of victims of crime.¹⁷ For people with disability, being younger, female and/or First Nations has been associated with an increased risk of being victims of violent and domestic violence-related crime.¹⁸

Good character evidence may lead to secondary victimisation for victims with disability

In our view, allowing an offender to adduce good character evidence during sentencing has the potential to retraumatise victims of crime with disability who are likely to have experienced institutional discrimination leading up to sentencing. For example, victims with a disability are often not recognised as victims and experience barriers to accessing victim services and systems. *Police responses to people with disability* noted that:

Negative attitudes, assumptions and stereotypes occur in the context of the dynamics and extreme power differentials experienced by people with disability when reporting ... For members of this group, negative police attitudes and discrimination frequently results in police viewing people with disability as lacking credibility and/or reliability. For victims with disability in particular, this often means that police do not proceed with charges.¹⁹

Accepting an offender as a person of good character at the sentencing stage risks misdefining the perpetrator as the person of good character while promoting their value and ‘believability’. At the same time, it may retraumatise the victim, erode the victim’s sense of agency and credibility, or diminish their self-esteem and value. This may be especially acute for victims of crime with cognitive impairment, who often face additional barriers.

¹⁵ *Sentencing Study* (n 5) 94.

¹⁶ NSW Bureau of Crime Statistics and Research, *Victimisation of people with disability* (Web Page) <<https://bocsar.nsw.gov.au/topic-areas/disability/victimisation-and-people-with-disability.html>>.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Leanne Dowse, Simone Rowe, Eileen Baldry and Michael Baker, ‘Police responses to people with disability’ (Research Report, The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021) 9.

Question 5.2: Use of lack of previous convictions generally

(1) Should consideration of lack of previous convictions also be abolished as a mitigating factor in all cases? Why or why not?

In IDRS's view, judicial officers should exercise caution when considering lack of previous convictions as a mitigating factor because offenders with disability are likely to be unfairly disadvantaged.

As discussed above, people with disability are more likely to have contact with the criminal justice system, whether as victims or offenders. Further, offenders with disability are more likely than adult offenders without disability to have a history of previous offences. According to the NSW Bureau of Crime Statistics and Research, compared to the total NSW population, individuals in the disability cohort were three times as likely to have committed violent and property offences for the period 2009 to 2018.²⁰ The most common offences were violent offences (11.2% of all adult offenders compared to 41.1% of all adult offenders with disability) and domestic violence-related offences (7.4% of all adult offenders compared to 27.3% of all adult offenders with disability).²¹ Relatedly, in the Sentencing Study, nearly three-quarters of people with cognitive disability (74%) in the sample of transcripts analysed had a criminal history.²² Over half had engaged in offending behaviour relevant to the current offending; the majority had previously been in custody or imprisoned and half had previously been victims of crime.²³

Questions 5.3 – 5.5

See above. Our preference is to dispense with good character altogether.

Question 5.6: Extending the special rule to sexual offences against other vulnerable groups

(1) What other vulnerable groups or offences against vulnerable groups could be subject to the special rule?

As previously discussed, our preference is to dispense with good character altogether. However, if good character in sentencing is retained, IDRS believes that the special rule should extend to offences against people with diminished capacity, including people with cognitive disability, any form of dementia and any significant episode of mental illness.

(2) How could they be identified?

Should an individual present without a diagnosis, it may require those working in the criminal justice system – for example police, the individual's lawyer or victim services – to identify the cognitive impairment. Alternatively, the court may order an assessment.

Evidently, robust education and training for people working in the criminal justice system is critical. Cognitive impairment is not always 'visible' and those working in the criminal justice system must exercise caution so as not to dismiss the possibility of assessment.

²⁰ NSW Bureau of Crime Statistics and Research, 'Offending contact for people with disability' (Web Page) <<https://bocsar.nsw.gov.au/topic-areas/disability/offending-and-people-with-disability.html>>.

²¹ Ibid.

²² *Sentencing Study* (n 5) 88.

²³ Ibid.

Questions 5.7 – 5.15

See above. Our preference is to dispense with good character altogether.

Thank you for considering our submission. We welcome the opportunity to discuss our feedback with you further.

Yours sincerely

Joanne Yates
Chief Executive Officer