

***THE SENTENCING OF OFFENDERS WITH  
INTELLECTUAL DISABILITIES WHO DISPLAY  
DANGEROUS ANTI-SOCIAL BEHAVIOUR,  
WHAT OPTIONS DO OUR COURTS HAVE?***

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# 1. Introduction

The judicial function of imposing sentences on criminal offenders is not as straightforward as most people would think. As Justice Matthews of the Supreme Court of NSW recently said, ‘sentencing is a complex process and there are very many considerations which need to be taken into account’<sup>1</sup>. This is especially true in cases where the offender being sentenced suffers from an intellectual disability. Intellectual disability roughly means the concurrent existence of significant sub-average general intellectual functioning and significant deficits in adaptive behaviour<sup>2</sup>. People with intellectual disabilities are often overrepresented in the criminal justice system<sup>3</sup>, and have special needs which the prison system may be unable to meet. In response to these growing concerns, Parliament has given judges additional sentencing options in relation to these types of offenders. One of these additional options is the residential treatment order (“RTO”), which allows judges to send offenders with intellectual disabilities to a residential treatment facility (“RTF”).

But is the RTO really available to judges as a sentencing option? The Executive must be satisfied that a particular offender is suitable for admission into a RTF and that there are places available within a RTF before a judge can consider making a RTO. According to Judge Gaynor of the County Court of Victoria, there is ‘inadequate service provision’ within the current RTF and that the Department of Human Services (“DHS”) has no suitable places to put offenders with intellectual disabilities who display dangerous anti-social behaviour<sup>4</sup>. Judges will be unable to make a RTO if there are

inadequate places in a RTF, and they will have no other choice but to impose a sentence of imprisonment. This in turn gives rise to human rights issues.

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<sup>1</sup> ‘Brain injury punishment for killing’, *The Australian* (Sydney), 2 May 2008.

<sup>2</sup> *Disability Act 2006* (Vic), s 3.

<sup>3</sup> Interview with Principal Solicitor, West Heidelberg Community Legal Service (Melbourne, 22 May 2008).

<sup>4</sup> Jamie Berry, ‘Judge slams jailing of low-IQ man’, *The Age* (Melbourne), 22 May 2007.

## 2. Sentencing Options under the *Sentencing Act 1991 (Vic)*

The *Sentencing Act 1991 (Vic)* (“the Sentencing Act”) is the main piece of legislation which governs the sentencing of adult offenders in Victoria. Part 3 of the Sentencing Act outlines the types of sentences available to magistrates and judges, and includes the sentence of imprisonment<sup>5</sup>. In addition to this conventional penalty, the Sentencing Act allows judges to make specific orders in relation offenders who have intellectual disabilities. One of these is the residential treatment order (“RTO”)<sup>6</sup>.

### 2.1 Imprisonment

People who suffer from intellectual disabilities and are found guilty of offences that carry terms of imprisonment can be and in fact are imprisoned pursuant to the Sentencing Act. A sentence of imprisonment should only be used a last resort and only where the purpose for imposing a sentence cannot be achieved by the imposition of a lighter sentence<sup>7</sup>. The only purposes for which sentences may be imposed are<sup>8</sup>:

- to punish the offender
- to deter the offender and/or others from committing similar offences
- to rehabilitate the offender
- to denounce the offender’s conduct
- to protect the community

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<sup>5</sup> *Sentencing Act 1991 (Vic)*, Subdivision 1, Division 2, Part 3.

<sup>6</sup> See section 80.

<sup>7</sup> Section 5(4).

<sup>8</sup> Section 5(1).

A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed<sup>9</sup>, and must have regard to the offender's culpability and degree of responsibility for the offence when imposing a sentence<sup>10</sup>. Judges face a very difficult job when it comes to sentencing offenders with intellectual disabilities who display dangerous anti-social behaviour. On one hand they must protect the community from these people and this might demand a custodial penalty, but on the other, they will be imposing a severe penalty on someone who doesn't possess the level of culpability and responsibility that say an offender with normal cognitive functioning would have. As explained by King CJ, 'the problem is to find a solution which will enable the public to be protected, without imposing a harsh punishment upon a person whose subjective moral responsibility is seriously diminished'<sup>11</sup>.

Given that the moral culpability of an offender with an intellectual disability is significantly lower, the imposition of a sentence which aims to punish, deter or denounce the offender's conduct is inappropriate. In fact, 'the offender's state of mental impairment may permit rehabilitation to override the sentence purposes otherwise indicated by the

objective circumstances of the instant offence'<sup>12</sup>. Are judges then fulfilling this purpose of rehabilitation by imposing terms of imprisonment on these particular offenders? Corrections Victoria has made the following findings with respect to prisoners in Victorian prisons:<sup>13</sup>

- Prisoners with an intellectual disability were assessed as higher risk of re-offending on average than non-intellectually disabled prisoners
- Attempted suicide and self-harm incidents were significantly higher for prisoners with an intellectual disability than for non-intellectually disabled prisoners

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<sup>9</sup> Section 5(3).

<sup>10</sup> Section 5(2)(d).

<sup>11</sup> *R v Mason-Stuart* (1993) 61 SASR 204.

<sup>12</sup> Judicial College of Victoria, *Victorian Sentencing Manual* (2005) [10.9.1.3] Department of Justice <<http://www.justice.vic.gov.au/emanuals/VSM/default.htm>> at 17 May 2008.

<sup>13</sup> Victorian Department of Justice, Corrections Victoria, *Intellectual Disability in the Victorian Prison System: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Melbourne, 2007, 26.

According to a solicitor at the West Heidelberg Community Legal Service (“WHCLS”), the prison environment exposes these vulnerable offenders to new criminal behaviours and that this manifests itself in higher rates of re-offending<sup>14</sup>. However the writer has also been informed in another interview that prisoners with intellectual disabilities end up participating in educational programs and activities which they otherwise would not engage in on the outside, and that these experiences help contribute to their rehabilitation<sup>15</sup>.

The position adopted by the writer is that prisons do not provide those with intellectual disabilities the appropriate treatment or support necessary to rehabilitate them. Programs currently endorsed in prisons to rehabilitate prisoners and to reduce the risk of re-offending may have no impact (or very little impact) on these prisoners. Although there are prison programs which are intended to cater for the special needs of prisoners with intellectual disabilities<sup>16</sup>, we can reasonably conclude that sentencing an offender with an intellectual disability to a term of imprisonment will not fulfil any rehabilitation objective a sentencing judge might have.

## **2.2 Residential Treatment Order**

Under the Sentencing Act, an offender with an intellectual disability can only be admitted to a RTF if a RTO is made<sup>17</sup>. The Intensive Residential Treatment Program (“IRTP”) of the Statewide Forensic Service (“SFS”) is proclaimed as a short-term RTF and its purpose is to provide compulsory treatment to persons with an intellectual disability<sup>18</sup>. The IRTP has three stages of accommodation, with Stage 1 as the most restrictive and Stage 3 as the least restrictive. Stage 1 is a secure unit which can only accommodate a maximum of five clients<sup>19</sup>. Stage 1 focuses on increasing skills, developing internal control and self-understanding of the persons’ offending

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<sup>14</sup> Interview with, solicitor West Heidelberg Community Legal Service (Melbourne, 20 May 2008).

<sup>15</sup> Interview, above n 3.

<sup>16</sup> For example, the Joint Treatment Program at Port Phillip Prison and the Corridor Program at Loddon Prison.

<sup>17</sup> *Disability Act 2006* (Vic), s 152(2).

<sup>18</sup> Section 151.

<sup>19</sup> Victorian Department of Human Services, Disability Services Division, *Statewide Forensic Service Policy and Guidelines*, Melbourne, 1997, 15.

behaviour<sup>20</sup>. Offenders for whom a RTO has been made would initially be admitted to Stage 1 of the IRTP<sup>21</sup>, so this paper will only be concerned with availability of positions within this stage.

A court must receive and consider the following before it can make a RTO<sup>22</sup>:

- A statement from the Secretary to the DHS (“the Secretary”) saying that an offender has an intellectual disability
- A plan of available services (“a Justice Plan”)
- A pre-sentence report prepared in accordance with Division 2 of Part 6 of the Sentencing Act

A Justice Plan recommending treatment in a RTF must be submitted to the court before a judge can make a RTO<sup>23</sup>. Before such a recommendation is made, the Executive engages in a lengthy and complex process of assessing the suitability of an offender for admission into a RTF. This task is undertaken by the SFS, in particular its Forensic Assessment and Intervention Team (“FAIT”) and the Intake/Exit Committee (“IEC”). The FAIT consist of psychologists and psycho-educational trainers<sup>24</sup>, and the IEC consists of the SFS Manager and two Client Services Managers<sup>25</sup>.

Firstly, the FAIT conducts a three stage process of assessment. The criteria in each stage must be met before the assessment can proceed to the next stage.

- *Stage One – Identification.* At this initial stage, the FAIT confirms if the offender has an intellectual disability within the meaning of the *Disability Act 2006* (Vic) (“the

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<sup>20</sup> Victorian Department of Human Services, Disability Services Division, *Report of the Review Panel Appointed to Consider the Operation of the Disability Services Statewide Forensic Service*, Melbourne, 2001, 5.

<sup>21</sup> DHS, above n 19, 15.

<sup>22</sup> *Sentencing Act 1991* (Vic), s 80(1) and (2).

<sup>23</sup> Victorian Department of Human Services, Disability Services Division, *Residential Treatment Facilities Implementation Guide*, Melbourne, 2007, Appendix 2.

<sup>24</sup> DHS, above n 19, 4.

<sup>25</sup> *Ibid* 12.

Disability Act”) and a regional client service worker<sup>26</sup>. Whether the offender has displayed dangerous anti-social behaviour on more than one occasion and their propensity to continue to engage in this type of behaviour are the primary considerations at this stage<sup>27</sup>. Dangerous anti-social behaviour is defined as acts of violence and indecency towards others<sup>28</sup>. If the offender does not meet these criteria, then the SFS will not work directly with the offender<sup>29</sup>.

- *Stage Two – Prioritisation.* Whether the offender would be amenable to any treatment offered by the SFS is considered at this stage. Indicators of willingness to receive treatment include the offender’s criminal history, the extent of violence present in his crimes, and any empathy shown to the victim. If the offender is considered to be “low priority”, then the SFS will not work directly with the offender.<sup>30</sup>
  
- *Stage Three – Allocation.* A senior psychologist will conduct interviews with the offender and significant others. The offender’s family and social background will be explored. The senior psychologist may also liaise with general practitioners and psychiatrists at this stage<sup>31</sup>. After these investigations have been carried out, the FAIT will make one of three recommendations<sup>32</sup>:
  - i. SFS will not work directly with the offender and only provide a secondary consultation to the offender’s region
  
  - ii. SFS will directly work with the offender but the offender will remain in the community

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<sup>26</sup> Ibid 8.

<sup>27</sup> Ibid 9.

<sup>28</sup> Ibid 1.

<sup>29</sup> Ibid 9.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid 10.

<sup>32</sup> Ibid 11.

iii. SFS will directly work with the offender in the IRTP.

The IEC then considers the recommendations of the FAIT and makes a final decision. The following are just some of the factors the IEC considers when making its final decision<sup>33</sup>:

- The level of risk and danger posed by the offender to themselves or others in the community
- The level of support required to reduce the likelihood of re-offending
- The degree of internal control the offender displays

If the IEC decides that an offender is suitable for admission in the IRTP, a Justice Plan can recommend placement in a RTF<sup>34</sup>.

The Justice Plan recommending placement in a RTF needs to be approved by the Secretary before it is submitted to the court<sup>35</sup>. A judge must be satisfied that the Secretary has specified, in the Justice Plan, that the offender is suitable for admission to a RTF<sup>36</sup> and that services are available in a RTF<sup>37</sup> before it makes RTO. In other words, a court must be satisfied that the Secretary has approved placement in the IRTP.

In determining suitability for admission, the Secretary is guided by section 152 of the Disability Act. An offender can only be admitted to a RTF if the Secretary is satisfied that:

- The offender has an intellectual disability
- The offender presents a serious risk of violence to others
- All less restrictive options have been tried or considered but are not suitable

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<sup>33</sup> Ibid 12.

<sup>34</sup> DHS, above n 23, Appendix 2.

<sup>35</sup> Ibid.

<sup>36</sup> *Sentencing Act 1991* (Vic), s 80(2A)(b)(i).

<sup>37</sup> Section 80(2A)(b)(ii).

- The RTF can provide the offender with treatment they need or require

Finally, before a court can make a RTO, the offender must be found guilty of a serious offence<sup>38</sup>.

Given that approval from the Secretary is a precondition to the making of a RTO, the Secretary should be held accountable to Parliament and the judiciary. Presently, neither the Sentencing Act nor the Disability Act compels the Secretary to explain or justify their decision with respect to an offender, and they are not expected to give an explanation to the court<sup>39</sup>. The following provision should be inserted into section 80 of the Sentencing Act<sup>40</sup>:

(4)

*(1) If the Secretary to the Department of Human Services decides -*

*(a) that a person is not suitable for admission to a residential treatment facility; or*

*(b) that services are not available in a residential treatment facility*

*the Secretary must explain to the sentencing judge why that person is unsuitable for admission or why there are no available services.*

*(2) In addition to paragraph 1 of sub-section 4, the Secretary to the Department of Human Services must, in an annual report to be tabled before Parliament, identify the number of times they have decided a person was not suitable for admission to a*

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<sup>38</sup> Section 80(2A)(a) and (2B). 'Serious offence' is defined in section 3 of the *Sentencing Act 1991* (Vic).

<sup>39</sup> Interview, above n 14.

<sup>40</sup> The Clinical Legal Education Supervisor at the West Heidelberg Community Legal Service should be acknowledged for her ongoing assistance in helping to develop this accountability measure.

*residential treatment facility or that services were not available in a residential treatment facility.*

It has also been suggested that legal practitioners who represent people with intellectual disabilities and judges themselves be made more aware of alternative sentencing options such as the RTO<sup>41</sup>.

### **3. Human Rights Issues**

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“the Charter”) became fully operation on 1 January 2008<sup>42</sup>. All persons have the human rights set out in the Charter<sup>43</sup>, and the Charter applies to public authorities<sup>44</sup>. A

public authority can be an individual such as a Secretary or Minister of a government department, or it can be an institution such a prison.<sup>45</sup> It is unlawful for a public authority to act in a way that is incompatible with a human right<sup>46</sup>; however, a person is not entitled to be awarded damages simply because the Charter has been breached<sup>47</sup>. A cause of action cannot be mounted in court merely because a human right has been breached, but the breach itself can be used to support an existing cause of action at law<sup>48</sup>.

The following human rights are relevant to the matters raised in this paper:

- A person must not be subjected to torture or treated or punished in a cruel, inhuman or degrading way<sup>49</sup>

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<sup>41</sup> Interview, above n 14.

<sup>42</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 2.

<sup>43</sup> Section 6(1).

<sup>44</sup> Section 6(2)(c).

<sup>45</sup> Section 4(1).

<sup>46</sup> Section 38(1).

<sup>47</sup> Section 39(3).

<sup>48</sup> Section 39(1).

<sup>49</sup> Section 10(a) and (b).

- All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person<sup>50</sup>.

The European Court of Human Rights (“the ECHR”) has held that a failure to provide adequate mental health care to prisoners in circumstances which do not adequately accommodate, or which result in the deterioration of, a person’s mental health, may amount to a violation of the prohibition on torture and ill-treatment<sup>51</sup>. *Bongiorno J* has made findings consistent with those of the ECHR, warning that the continued incarceration in prison of person with a severe psychiatric illness may be contrary to the spirit, if not the letter of the Charter<sup>52</sup>. There is no sound basis in law why this line of reasoning should not extend to the imprisonment of offenders with intellectual disabilities. So by failing to provide adequate treatment and support for prisoners with intellectual disabilities, prison authorities may well be in breach of the Charter. The Executive might argue that it lacks the resources to provide the necessary treatment or facilities to these prisoners, but ‘scarce resources or logistical difficulty will not be legitimate excuses for failing to offer this support’<sup>53</sup>.

## 4. Conclusion

When it comes to sentencing offenders with intellectual disabilities who display dangerous anti-social behaviour our courts are left with no option but to send these people to prison. The newly enacted Disability Act has amended the Sentencing Act and added a new sentencing option for judges, the RTO. The RTO can permit a judge to send these offenders to a RTF where they can receive the necessary treatment and support to help reduce re-offending. But the availability of the RTO as a sentencing option to judges is highly contingent on the outcome of tedious and non-transparent Executive decision making.

The Executive should be held accountable to the judiciary and Parliament for its inability or unwillingness to treat these particular people in a RTF. Further, there needs to be an early,

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<sup>50</sup> Section 22(1).

<sup>51</sup> *Dybeku v Albania* [2007] ECHR 41153/06.

<sup>52</sup> *R v White* [2007] VSC 142.

<sup>53</sup> *Mamedova v Russia* [2007] ECHR 7064/5.

effective and humane intervention by the government<sup>54</sup>. Educational and recreational programs aimed at increasing social skills and developing internal control should be provided to these people at an early age by the government<sup>55</sup>.

The Executive must take immediate and appropriate action in relation to this unsatisfactory state of affairs, and the construction of new prisons is clearly an inadequate response to such a convoluted problem.

## **5. Recommendations**

### **Recommendation 1**

Section 80 of the Sentencing Act should be amended to include an accountability provision that compels the Secretary to provide an explanation to the sentencing judge as to why an offender with an intellectual disability has been refused treatment in a RTF.

### **Recommendation 2**

Legal practitioners who represent people with intellectual disabilities and judges themselves be made more aware of alternative sentencing options such as the RTO.

### **Recommendation 3**

The government should invest further money in educational and recreational programs for children with intellectual disabilities. The aim of these programs should be to assist in the development of social skills and internal control.

### **Recommendation 4**

The government should invest further money in its health system and create more RTFs and increase the client intake capacity of the IRTP.

## **6. Appendix (Questionnaire)**

Dear [interviewee],

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<sup>54</sup> Interview, above n 14.

<sup>55</sup> Interview, above n 3.

My name is Tom Cagorski and I am a final year law student at La Trobe University. Currently I am undertaking a clinical placement at the West Heidelberg Community Legal Service as part of my studies. As an added component to my placement, I am required to complete a law reform project.

'The law reform project is designed to assist students in having dealings with a range of external bodies and the political, legislative, executive and parliamentary processes that operate in law-making. The law reform project may be used, with the student's consent, later by the legal centre as a formal submission to a Statutory or Government body if it is of a sufficiently high standard. This would be at the discretion of the lecturer/legal centre'.

My law reform topic is:

**“The sentencing of offenders with intellectual disabilities who display dangerous anti-social behaviour, what options do our courts have?”**

To enhance the quality and credibility of my law reform project, I plan to ask you a few questions relevant to my law reform topic in a telephone interview.

*Please note the following:*

1. The purpose of the interview will be to discuss the relatively new sentencing option given to judges under *Sentencing Act 1991* (Vic) in relation to offenders with intellectual disabilities (“the Residential Treatment Order”).
2. Your involvement and participation in an interview is completely voluntary and you do not have to agree to have an interview with me, nor are you compelled to provide responses to my questions. If you do consent to being interviewed, your consent must be in writing.
3. Your identity will be kept anonymous in my law reform project. I plan to refer to you as “an expert in the field” or by a similar de-identifier.
4. My questionnaire will be properly destroyed after my law reform project is complete.

**\*\*\*\*\*Please email me in writing your consent to be interviewed\*\*\*\*\***

### **Scenario**

In *R v White* [2007] VSC 142, Bongiorno J said that “the incarceration in prison of a person with a severe psychiatric illness may amount to a violation of the Victorian *Charter of Human Rights*”. In that case, Bongiorno J had no choice but to send the defendant to prison as there was no room for him at the Thomas Embling Hospital. Justice Bongiorno went on to say that “this state of affairs is unsatisfactory and ought to be looked to by the executive as a matter of some urgency”.

Currently in Victoria there is only one short-term residential treatment facility (“RTF”) which houses offenders with intellectual disabilities who display dangerous anti-social behaviour: the Intensive Residential Treatment Program (“IRTP”) of the Statewide Forensic Service (“SFS”). Like the Thomas Embling Hospital, the IRTP is also full and has no available positions. Faced with this state affairs; judges are left with no option but to send these offenders to prison.

## Questions

1. Have you had experience with offenders with intellectual disabilities being sentenced to prison because there was no where to put them?
1. Do you know of any cases where a prison environment has been successful in rehabilitating an offender with an intellectual disability?
2. Do you agree that keeping offenders with intellectual disabilities in prisons instead of places where they can receive proper treatment (such as a RTF) may constitute a breach of the *Victorian Charter on Human Rights* (in particular sections 10 and 22)?
3. Should the Executive be held accountable by disclosing to Parliament its reason/s why a particular offender is unsuitable for placement in a RTF and/or why positions/services are unavailable in a RTF?
4. If a judge is unable to make a “residential treatment order” under section 80 of the *Sentencing Act 1991* (Vic) because the Secretary to the Department Human Services decides that a particular offender is not suitable for admission into a RTF and/or because there are no available positions in a RTF; the Secretary should disclose its reasons for so deciding. As a suggestion for law reform, I propose the following addition to section 80:

**(4)** *If the Secretary to the Department of Human Services decides -*

*(a) that a person is not suitable for admission to a residential treatment facility; or*

*(b) that services are not available in a residential treatment facility*

*the Secretary must make known the reasons for unsuitability or unavailability and cause these reasons to be tabled before Parliament during its next sitting date.*

What is your opinion on this suggestion?

5. Do you have any other suggestions for law reform?

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### ii. Case Law

*Dybeku v Albania* [2007] ECHR 41153/06

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*R v White* [2007] VSC 142

### iii. Legislation

*Charter of Human Rights and Responsibilities Act 2006* (Vic)

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