INTELLECTUAL DISABILITY IN THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM

WHAT EFFECT, IF ANY, DOES GENERAL AND SPECIFIC DETERRENCE PLAY IN SENTENCING OFFENDERS WITH AN INTELLECTUAL DISABILITY? HOW CAN THESE AND THE OTHER SENTENCING PRINCIPLES BE APPLIED WHEN SENTENCING NOEL?

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I INTRODUCTION

A Noel

Noel was born into a family of disability. Both his biological parents are intellectually disabled and as a consequence Noel himself is intellectually disabled. He is in receipt of a Disability Support Pension and is registered with the state based Disability Services Commission (DSC). Noel receives logistical and personal support from a non-government support agency funded by DSC. Notwithstanding Noel’s disability, he lives relatively independently with his maternal grandmother. He is employed with a registered Australian Disability Enterprise in a manufacturing environment and works full time. Noel is an avid computer gamer and has maintained close personal friendships from his time at mainstream public schools.

For those who do not know Noel, he presents as a normal young man, however could be described as being ‘simple’. In 2012 (when Noel was 19 years old) he was convicted in a superior court of sexual offences against a child. He used social media and mobile text messaging in lewd conversations with a 13 year old girl and attempted to make physical contact with her. His intention was to have a sexual relationship with the child. His

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1 Noel is a fictional character based upon a factual scenario known to the author.
convictions included attempting to procure the girl for sex and other offences related to child pornography. Noel received a community based sentence rather than imprisonment with the court taking into account his intellectual disability. In late 2013, Noel was again charged with offences of a strikingly similar nature which also breach his community based sentence. He has entered pleas of guilty and is awaiting sentence. He is facing the real possibility of an immediate prison term.

B Defining Intellectual Disability

1 Sociological Perspective

Defining intellectual disability is difficult, particularly when assessing a borderline case. For an individual to be assessed as entitled to Commonwealth financial support for an intellectual disability (in the form of a Disability Support Pension (DSP)), they must meet certain criteria. In assessing this criteria the legislation applies a test using an Impairment Table. The Impairment Table for ‘intellectual function’ is applied to persons of ‘low intellectual function ([intelligence quotient] score of 70 to 85) which results in functional impairment’. In assessing the level of impairment a person has, a further test is applied being an adaptive behaviour assessment. The levels of impairment are determined as being either no impairment, mild, moderate, severe or extreme.

2 Contrary to Criminal Code Act Compilation Act 1913 (WA) s 321.
3 Ibid s 220.
4 Social Security Act 1991 (Cth) s 94.
5 Ibid s 94(1)(b).
6 Minister for Families, Housing, Community Services and Indigenous Affairs (Cth), Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011, 6 December 2011 (‘Determination Tables’).
7 Ibid Table 9.
8 Ibid.
9 The Intelligence Quotation (IQ) is to be assessed using the Wechsler Adult Intelligence Scale IV or equivalent contemporary assessment.
10 Determination Tables, Table 9.
11 Ibid.
2 **Medical Perspective**

When looking at a medical model for definition of intellectual disability there are two popular and standardised diagnostic models. Using the American published Diagnostic and Statistical Manual of Mental Disorders fifth edition (DSM-V),\(^{12}\) the diagnostic criteria for intellectual disability has three elements.\(^{13}\) These elements are deficits in intellectual functions, deficits in adaptive behaviour and a presentation of these deficits during the developmental phase of a person’s life.\(^{14}\) The DSM-V does not place much weight upon an intelligence quotient (IQ) placing more emphasis on the adaptive behaviour as measured against unimpaired peers.\(^{15}\)

The other common used medical diagnostic tool is the International Classification of Diseases version 10 (ICD-10).\(^{16}\) The ICD-10 is published by the World Health Organisation.\(^{17}\) This tool refers to mental retardation rather than intellectual disability and places much more emphasis on overall intelligence rather than adaptive functioning.\(^{18}\) For example a person with an IQ between 50 and 69 would be diagnosed with mild mental retardation\(^{19}\) regardless of their ability to live independently.

3 **Legal Perspective**

It can be seen above there is a subjective and systematic test in defining intellectual disability when assessing for income support. Within the medical sense, there are similar tools to assess intellectual impairment. The same cannot be said for the assessment of intellectual disability in criminal law. In 1996 the New South Wales Law Reform Commission (NSWLRC)

\(^{12}\) American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5\(^{th}\) ed, 2013).

\(^{13}\) Ibid 33.

\(^{14}\) Ibid.

\(^{15}\) Ibid 37.


\(^{17}\) Ibid.


\(^{19}\) Ibid ‘mild mental retardation F70’.
released its report into intellectual disability in the criminal justice system. The Commission’s first recommendation was to legislate a uniform statutory definition of intellectual disability to be “intellectual disability” means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour. This would accord with the Commonwealth’s criteria for a DSP. To date NSW has not implemented this recommendation.

In Western Australia (WA) the legislative material does not define intellectual disability but does include this term in the definition of mental impairment. The situation is the same in the Northern Territory (NT). Interestingly for federal offences, the Crimes Act 1914 (Cth) allows for a reduction in criminal responsibility when the accused ‘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’. In this situation the Commonwealth allows for an intellectual disability to be considered regardless of the accused’s position at State or Territory law.

In determining if an accused may have been afflicted with a mental impairment in relation to their offending, the question is resolved as a matter of law rather than fact. The High Court in *Falconer* held:

> Under the Code, as well as under the common law, it is necessary for the trial judge to determine what is meant by the terms used to describe the mental condition of a person who is...

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21 Ibid ch 3.
22 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 8.
23 *Criminal Code Act 1983* (NT) s 43A.
24 *Crimes Act 1914* (Cth) s 20BQ (emphasis added).
of unsound mind or insane. The meaning of those terms is a question of law, not a question to be answered by medical witnesses.\textsuperscript{25}

This means a defence of mental impairment must be approved before being put to a jury. If a judge is satisfied there is a possibility an accused is not guilty of a crime due to mental impairment they will allow the defence to be raised and determined by the jury on the balance of probabilities.\textsuperscript{26}

The High Court has preferred the use of the term ‘mentally retarded’ as opposed to intellectual disability.\textsuperscript{27} This is because intellectual disability can often be referred to as ‘mild’ however even with a mild disability the effects upon a person’s criminal conduct can be profound. In Muldrock\textsuperscript{28} the Court stated:

The assessment that the appellant suffers from a ‘mild intellectual disability’ should not obscure the fact that he is mentally retarded. The condition of mental retardation is classified according to its severity as mild, moderate, severe or profound. Mental retardation is defined by reference to both significantly subaverage general intellectual functioning and significant limitations in adaptive functioning. ‘Significantly subaverage intellectual functioning’ is defined as an intelligence quotient (IQ or IQ-equivalent) of about 70 or below. The position is well explained in a discussion paper published by the New South Wales Law Reform Commission: ‘A person’s intellectual disability can be classified as “mild”, “moderate”, “severe” or “profound”, based upon certain IQ 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

\textsuperscript{25} R v Falconer (1990) 96 ALR 545, 557.
\textsuperscript{26} Criminal Code Act 1983 (NT) s 43E.
\textsuperscript{27} Muldrock v The Queen (2011) 244 CLR 120.
\textsuperscript{28} Ibid.
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.\footnote{Ibid 137 – 138 (footnotes omitted).}

C Prevalence of Intellectual Disability in Australia

As of 2012, in Australia 18 per cent of the population were living with a disability.\footnote{Australian Bureau of Statistics (ABS), \textit{Disability, Ageing and Carers, Australia: Summary of Findings, 2012} (ABS, Catalogue No 4430.0, 2013) data cube: Excel spreadsheet ‘Disability, Ageing and Carers, Australia: Disability tables’ Table 12.} Assuming the rates have remained static this equates to over 4 million people living with a disability.\footnote{Figure calculated from an estimation of population of 23,450,000 on 9 April 2014 available from the ABS \texttt{<http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca2568200192af2/1647509ef7e25faaca2568a900154b63?OpenDocument>} and then multiplying by 0.18 giving a result of 4 221 000.} Of these 4 million people, 5.6 per cent can be assumed as having an intellectual disability.\footnote{ABS, above n 30, Table 12.} This calculates to over 230 000 people living in Australia with an intellectual disability.\footnote{Figure calculated by using 4 221 000 from method above n 28, multiplying by 0.056 resulting in 236 736.} This group represents approximately one per cent of the population.\footnote{Using the population estimate from the ABS as found above n 31.} Of these people, the majority suffer from a mild disability.\footnote{NSWLRC, above n 20, Discussion Paper No 35 (1994) [2.29].} It is difficult to estimate the actual number of people living with an intellectual disability.\footnote{Susan Hayes and Gerard Craddock, \textit{Simply Criminal} (The Federation Press, 2\textsuperscript{nd} ed, 1992) 30 – 31.} It is believed the reported number is underestimated due to varying factors primarily related to many mildly intellectually disabled people accessing the same range of services as the rest of the community.\footnote{Ibid.}
D Intellectual Disability in the Criminal Justice System

It is estimated intellectually disabled persons are overrepresented in the prison population by a factor of three to four times. Current Australian data is lacking in accurately defining the rates of intellectual disability in custodial settings. A Canadian study in 2007 found:

Approximately one in five individuals in the sample fell into the probable [intellectual disability] (ID) range, a significantly higher rate than the 1% to 3% found in the general population. These results are similar to those found by Hayes (1997) in Australian local courts, and as would be expected, rates of probable ID were higher than those found in studies conducted among individuals who had already been sentenced.

The reason why rates of intellectual disability in custody are higher in persons prior to sentence is likely to be because the sentencing authority has not had the opportunity to fully consider the effect the person’s disability should have on their overall responsibility for the criminal conduct. The findings from this study suggest the overrepresentation of intellectual disability in pre-trial custody could be as high as 20 times when compared to unimpaired people.

II REDUCTION OF CRIMINAL RESPONSIBILITY

A Criminal Responsibility in Australia: Statutory Defences

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38 Ibid 46.
40 Ibid (references omitted).
41 Figure calculated using an assumed population of 23 million Australians, one percent being 230 000 (the estimated population of Australians living with an intellectual disability). One in five equals 20 per cent. Thus one per cent in the general population versus 20 per cent in pre-trial custody equates to an increase by a factor of 20.
It has long been held a person can only commit a crime if they have the capacity to know right from wrong. In *Haughton* the Latin maxim ‘*actus non facit reum nisi mens sit rea*’ was translated to mean ‘an act does not make a man guilty of a crime, unless his mind be also guilty’. This position at common law has been amended by statutory law in each Australian jurisdiction and applies prescriptively to children under the age of 10 and the mentally impaired fitting the criteria of each jurisdiction. When considering this in relation to people with an intellectual disability, it may be tempting for an advocate to argue a person could not know the wrongness of their conduct and thus evade criminal responsibility for the offending. Within the NT the defence is referred to as mental impairment whereas in WA the defence is referred to as insanity.

**B Establishing the Defence**

In WA a person can raise the defence of insanity if they assert at the time of the offence:

- they did not have the capacity to know what they were doing; or
- know what they were doing was wrong; or
- have the capacity to control their actions.

The accused is presumed to be sane thus the burden of proof rests with the party raising the defence. The standard of proof required is on the balance of probabilities. Within the NT,

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43 *Haughton v Smith* [1975] AC 476.
44 Ibid 491.
45 Criminal Code Act 1995 (Cth) div 7; Criminal Code 2002 (ACT) divs 2.3.1 – 2.3.2; Children (Criminal Proceedings) Act 1987 (NSW) s 5; Mental Health (Forensic Provisions) Act 1990 (NSW) pt 4; Criminal Code Act 1983 (NT) ss 43AP – 43AQ, 43C; Criminal Code Act 1899 (Qld) ss 27, 29; Criminal Consolidation Act 1935 (SA) s 269C; Young Offenders Act 1993 (SA) s 5; Criminal Code Act 1924 (Tas) ss 16, 18; Children, Youth and Families Act 2005 (Vic) s 344; Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 20; Criminal Code Act Compilation Act 1913 (WA) ss 27, 29.
46 Criminal Code Act 1983 (NT) s 43C.
47 Criminal Code Act Compilation Act 1913 (WA) s 27.
48 Ibid.
the defence is called ‘mental impairment’\textsuperscript{51} and includes the same elements as above.\textsuperscript{52} The definition of insanity (for WA) and mental impairment (for NT) includes intellectual disability.\textsuperscript{53}

At common law the insanity defence is assessed using the \textit{M’Naghten rules}.\textsuperscript{54} The rules assume a person is sane.\textsuperscript{55} A jury has to be satisfied that an accused was ‘labouring under such a defect of reason, from disease of the mind’ that the person did not know the conduct they were doing or that the conduct was wrong.\textsuperscript{56} If someone’s conduct is in response to a delusion, no matter how profound, the validity of the insanity defence lies with the person’s knowledge of the wrongness of their conduct.\textsuperscript{57}

\textbf{C  Sentencing Options When Defence Made Out}

In WA if an accused is successful in relying on the defence of insanity they are not convicted of the offence and a finding of not guilty is entered. If this occurs however, the accused may still be subject to further action from the courts. Some offences are prescribed to require an accused to be detained on a custody order.\textsuperscript{58} These are generally serious sexual or violent offences\textsuperscript{59} and only apply to matters before a superior court.\textsuperscript{60} In all other cases, including a court of summary jurisdiction, the court may make orders controlling the accused.\textsuperscript{61}

\textsuperscript{49} Ibid s 26.
\textsuperscript{50} \textit{R v Porter} (1933) 55 CLR 182.
\textsuperscript{51} \textit{Criminal Code Act 1983} (NT) s 43C.
\textsuperscript{52} Ibid.
\textsuperscript{53} \textit{Criminal Code Act 1983} (NT) s 43A (definition of ‘mental impairment’); \textit{Criminal Code Act Compilation Act 1913} (WA) s 1(1) (definition of ‘mental impairment’).
\textsuperscript{54} \textit{M’Naghten’s Case} (1843) 8 ER 718.
\textsuperscript{55} Ibid 722.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid 723.
\textsuperscript{58} \textit{Criminal Law (Mentally Impaired Accused) Act 1996} (WA) s 21(a).
\textsuperscript{59} Ibid sch 1.
\textsuperscript{60} Ibid s 21(a).
\textsuperscript{61} Ibid ss 20, 21(b).
A court may release an accused unconditionally but in doing so must consider the seriousness and circumstances of the offence, the accused’s character, mental condition and antecedents, and the public interest. The court may also impose a conditional release order or community order or make a custody order. The making of a custody order (which is mandatory for some offences) means the accused is detained in an authorised hospital, declared place, detention centre or prison and subject to the order until released by the Governor. The validity of such legislation which can see a person involuntarily detained indefinitely has been approved by the High Court.

D Effective Defence?

During the financial year of 2012 to 2013, the courts in WA made three custody orders. It is determined by the Mentally Impaired Accused Review Board (MIARB) where the person subject to a custody order should be detained. As at 30 June 2013, 37 people were subject to management by MIARB with 46 per cent being held in a prison rather than managed in the community or a hospital setting. Of the 37 people being managed, seven had been diagnosed with ‘intellectual impairment’ and six with a dual diagnosis of ‘combined intellectual impairment and mental illness.

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62 Ibid s 22(a).
63 Ibid s 22(a)(i).
64 Ibid s 22(a)(ii).
65 Ibid ss 22(a)(iii).
66 Ibid s 22(b).
67 Ibid s 22(c).
68 Ibid s 21(a).
69 Ibid s 24(1).
70 Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1, 28.
71 Mentally Impaired Accused Review Board (MIARB), Annual Report 2012 - 2013 (Government of Western Australia, 27 August 2013).
73 MIARB, above n 71, 19.
74 Ibid 15.
Although a successful application of the defence relieves an accused person of criminal responsibility, it can be seen from above the accused is still liable to a loss of liberty for an indefinite period of time. Within WA during 2013, of those accused in confinement, eight were in a hospital and 17 were in gaol.\textsuperscript{75}

### III  Sentencing Principles

#### A  Overview of Sentencing Principles

Once convicted of a crime an offender must be sentenced by a court.\textsuperscript{76} Each jurisdiction has a wide range of options available which include releasing an offender without penalty\textsuperscript{77} through to imprisonment.\textsuperscript{78} There are four general purposes in sentencing an offender.\textsuperscript{79} These are punishment, deterrence of the offender and others, rehabilitation and protection of the community.\textsuperscript{80} With the exception of WA, each jurisdiction has these (or similar) sentencing principles contained within their sentencing legislation.\textsuperscript{81} In WA the principles are still applied under common law.\textsuperscript{82}

When formulating a sentence the courts sometimes have difficulty in balancing the general purposes. The High Court has stated:

\textsuperscript{75} Ibid 19.
\textsuperscript{76} The time in which this should occur varies depending on the jurisdiction. For example in Western Australia an offender is to be sentenced within six months of conviction (Sentencing Act 1995 (WA) s 16(2)) whereas in Victoria a sentencing authority can adjourn sentence for up to five years (Sentencing Act 1991 (Vic) s 72(1)).
\textsuperscript{77} See, eg, Crimes Act 1914 (Cth) s 19B; Sentencing Act 1995 (NT) s 12; Sentencing Act 1995 (WA) s 46.
\textsuperscript{78} See, eg, Crimes Act 1914 (Cth) s 17A.
\textsuperscript{80} Ibid.
\textsuperscript{81} Crimes Act 1914 (Cth) s 16A; Crimes (Sentencing) Act 2005 (ACT) s 7; Crimes (Sentencing Procedure) Act 1999 (NSW) s 3A; Sentencing Act 1995 (NT) s 5; Penalties and Sentences Act 1992 (Qld) s 9; Criminal Law (Sentencing) Act 1988 (SA) s 10; Sentencing Act 1997 (Tas) s 3; Sentencing Act 1991 (Vic) s 5.
\textsuperscript{82} Lauritsen v The Queen (2000) 22 WAR 442, [53].
the purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.\(^{83}\)

### B  Punishment

One aim of sentencing is punishment. To punish someone is ‘to subject [them] to a penalty, … loss, … confinement, etc., for some offence, transgression, or fault’.\(^{84}\) There are two perceptions when imposing punishment that are useful in determining the sentence to be imposed. Firstly the punishment should be perceived by victims and the community that the offender ‘suffer[s] in proportion to the harm the he or she has done’.\(^{85}\) This is reflected within the sentencing legislation of all jurisdictions save WA.\(^{86}\) The second, and sometimes difficult aspect, is to ensure the offender themselves feels as though they have been punished.\(^{87}\) This is problematic as it relies on the offenders own perception of the sentence.\(^{88}\) Many offenders justify their criminal conduct and perceive themselves as the victims of the judicial system.\(^{89}\) The justification for punishment can be described as a ‘backward-looking approach’ to criminal conduct as it addresses past behaviour.\(^{90}\)

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83 Veen v The Queen (No 2) (1988) 164 CLR 465, 476.
84 Macquarie Dictionary, (Pan MacMillan Australia, 6th ed, 1 October 2013) (definition of ‘punish’).
86 See eg, Crimes Act 1914 (Cth) s 16A(2)(K) ‘the need to ensure that the person is adequately punished for the offence’.
88 Ibid.
C  Deterrence

Deterrence ‘can be described as the avoidance of a given action through fear of the perceived consequences’.\(^{91}\) It can be categorised as general and specific.\(^{92}\) General deterrence is that which effects society as a whole or a cohort of it whereas specific deterrence refers to an individual offender.\(^{93}\) Deterrence can be described as a ‘forward-looking approach’ to criminal conduct as its aim is to reduce future offending.\(^{94}\)

1  General Deterrence

General deterrence can be further categorised into two types: absolute and marginal.

(a)  Absolute General Deterrence

Absolute deterrence is the concept that the possibility of detection and punishment of a crime is a deterring factor for most people in society.\(^{95}\) The deterrence is based on any punishment, not just severe punishment. There is good evidence for an ‘inverse relationship’ between violent offences and the use of imprisonment.\(^{96}\) There is no correlation between the length of incarceration with that factor being irrelevant.\(^{97}\) There is an argument absolute deterrence has no effect upon crime because it only deters people who would not commit crime in any event.\(^{98}\) This has been disproved. During 1923 in Melbourne, police went on strike resulting in one in three police officers of the Victorian police being sacked.\(^{99}\) The result was a crime spree involving many normally law-abiding citizens that was allayed after two days of

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\(^{92}\) Ibid.

\(^{93}\) Ibid.

\(^{94}\) Amatrudo, above n 90, 71.


\(^{96}\) Ibid 62.

\(^{97}\) Ibid 62 – 63.

\(^{98}\) Ibid.

\(^{99}\) Ibid.
intensive law enforcement. Comparable events occurred in England in 1919 and Denmark in 1944. The conclusion from these events was there appears to be ‘many citizens who would readily break the law if they could do so with impunity’.\(^{100}\) It has been found absolute deterrence is effective and alive and well within our community.\(^{101}\)

\((b)\)\hspace{1cm}Marginal General Deterrence

When courts address ‘general deterrence’, it is marginal general deterrence that they are speaking of, not absolute.\(^{102}\) General deterrence is given weight on the belief that ‘people are rational beings’ who make choices after calculating the possible consequences of their behaviour.\(^{103}\) It is very common for sentencing courts to address ‘general deterrence’ as sending a message to the community that certain criminal conduct will result in an imprisonment term of a certain length.\(^{104}\) The High Court has stated general deterrence is the primary purpose of the criminal law.\(^{105}\)

2 Specific Deterrence

Specific deterrence (also referred to as personal deterrence) aims to change an offender’s behaviour by imposing a punishment that the offender will ‘seek to avoid in the future’.\(^{106}\) It applies intensely on violent offences\(^{107}\) and recidivist offenders; where it can be said previous

\(^{100}\) Ibid.

\(^{101}\) Ibid 62.


\(^{103}\) Amatrudo, above n 90, 72.

\(^{104}\) See, eg, The State of Western Australia v Undalghumen [2014] WASCSR 77, [19] ‘this Court has repeatedly stated that sentences of imprisonment should be imposed in order to deter others’; The State of Western Australia v Meier [2014] WASCSR 78, [18] ‘the purpose of general deterrence is not to deter you, but others from committing similar crimes, and that remains a significant factor’; The State of Western Australia v Rimington [2014] WASCSR 92, [27] ‘General deterrence is the dominant sentencing factor in a case of arson’.


\(^{107}\) Ibid 162.
criminal sanctions have not had any consequent effect on criminal conduct.\textsuperscript{108} When specific deterrence comes into play it will generally see an increase in the severity of the punishment imposed.\textsuperscript{109}

D \textit{Protection of the Community}

Protection of the community is a sentencing objective in certain cases. In the most extreme of cases there are statutory sentencing regimes in some jurisdictions that allow for indefinite detention.\textsuperscript{110} These jurisdictions allow for some offenders to be incarcerated indefinitely because of the danger they pose to society. Under the common law, an indefinite preventative detention order is impermissible.\textsuperscript{111} In the case of \textit{Veen}\textsuperscript{112} it was held such a sentence would violate the principle of proportionality; that is a sentence must be proportionate to the crime.\textsuperscript{113} It was also stated in \textit{Veen} that a jurisdiction could legislate, as some of them have, for such a scheme which would not be unconstitutional.\textsuperscript{114} Notwithstanding the validity of such legislation, it is the opinion of the High Court that such a sentence must only be imposed ‘sparingly’ and in cases where it is obviously required.\textsuperscript{115} In finite sentences, protection of the community is a factor that can be considered as long as it does not increase the penalty beyond what is proportionate.\textsuperscript{116}

\begin{footnotes}
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
\textsuperscript{110} Sentencing Act 1995 (NT) s 65; Penalties and Sentences Act 1992 (Qld) s 163; Criminal Law (Sentencing) Act 1988 (SA) ss 22 – 23; Sentencing Act 1997 (Tas) s 19; Sentencing Act 1991 (Vic) s 18A; Sentencing Act 1995 (WA) s 98.
\textsuperscript{111} Veen \textit{v} The Queen (No 2) (1988) 164 CLR 465, 473.
\textsuperscript{112} Ibid.
\textsuperscript{113} Ibid 472.
\textsuperscript{114} Ibid 486.
\textsuperscript{115} Buckley \textit{v} The Queen (2006) 224 ALR 416, 427.
\textsuperscript{116} Veen \textit{v} The Queen (No 2) (1988) 164 CLR 465, 472.
\end{footnotes}
E Rehabilitation

Rehabilitation is another forward-looking consideration in sentencing. The aim is to effect change in an offender’s behaviour through addressing individual criminogenic needs. For example an offender may have an addiction to alcohol and their criminal conduct is in pursuit of obtaining that substance. An effective rehabilitation outcome for an offender of this type is one that addresses the alcohol use so it is no longer problematic. The primary issue with having rehabilitation as a sentencing consideration is there is little evidence to prove that it is achievable.

IV SPECIFIC DETERRENCE IN OFFENDERS WITH INTELLECTUAL DISABILITY

A Aim of Specific Deterrence

Specific deterrence is an attempt to effect change in an offender’s future behaviour. It is given more weight for recidivist offenders where it can be demonstrated from their criminal history the offence they are being sentenced for is not an aberration of their behaviour. In Veen the High Court stated:

It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.

Specific deterrence is not without its opponents. The judicial system has been criticised by other professionals for maintaining a sentencing system that has little evidence its principle of

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117 Amatrudo, above n 90, 71
119 Indermaur, above n 89, 15.
120 Veen v The Queen (No 2) (1988) 164 CLR 465, 477.
specific deterrence works.\textsuperscript{121} By following the doctrine of legal precedent this does little to evolve sentencing methods in line with the scientific evidence of what works.\textsuperscript{122}

**B Special Consideration for Intellectual Disability**

Recidivism of similar offences is likely to draw more attention of a sentencing authority towards specific deterrence.\textsuperscript{123} This raises a concern when a person’s repetitive behaviour may be significantly affected by an intellectual disability. Many people with an intellectual disability display increased impulsivity and subsequent repetitive behaviours.\textsuperscript{124} Comparing offenders that have an intellectual disability with those that do not, it has been found the disabled person is five times more likely to commit a violent offence.\textsuperscript{125} This requires sentencing authorities to consider the limited effect specific deterrence will have upon an intellectually disabled offender. In *Payne v The Queen*\textsuperscript{126} the WA Court of Criminal Appeal stated:

> The whole notion of personal deterrence assumes some rational analysis or reasoning in the course of comparing the likely gains from the crime against the prospect, and likely severity, of punishment. Where [an] illness affects the person’s ability to make that very analysis, there is no justification for affording the consideration of personal deterrence the same measure of significance as it might have in the case of a well person.\textsuperscript{127}

\textsuperscript{121} Indermaur, above n 89, 15.
\textsuperscript{122} Ibid.
\textsuperscript{123} Veen v The Queen (No 2) (1988) 164 CLR 465, 477.
\textsuperscript{125} Leam Craig and Roger Hutchinson, ‘Sexual Offenders with Learning Disabilities: Risk, Recidivism and Treatment’ (2005) 11 *Journal of Sexual Aggression* 289, 294.
\textsuperscript{126} Payne v The Queen (2002) 131 A Crim R 432.
\textsuperscript{127} Ibid 443.
C Conflict with Rehabilitation

Specific deterrence calls for an increase in an offender’s sentence with a view to effect a change to their future behaviour. This may conflict with another forward-looking consideration being rehabilitation. For offenders with an intellectual disability rehabilitation is already at a disadvantage dependent upon the offender’s level of disability.\textsuperscript{128} They may have problems with comprehension requiring the rehabilitative material to be in clear simple language.\textsuperscript{129} Memory recall could also be a barrier requiring material to be repeated and provided over frequent short periods.\textsuperscript{130} Perception may be an issue along with the attentive ability of individual offenders.\textsuperscript{131} All these factors make it more difficult to provide rehabilitation in a custodial setting due to the increased adverse effects upon a person with an intellectual disability.\textsuperscript{132}

D Does Imprisonment Deter

Deterrence theory, whether it is specific or general, relies on the economic theory of rational choice.\textsuperscript{133} Bagaric and Alexander explain it is a ‘persuasive theory’ as ‘it relies upon a series of seemingly sound premises’.\textsuperscript{134} The premises were outlined as:

- Humans have a strong desire to avoid hardships or pain.
- Criminal sanctions normally involve the imposition of hardships or pain.
- Imposing pain on offenders illustrates to people the adverse consequences stemming from criminal conduct.

\textsuperscript{128} Craig, above n 125, 296.  
\textsuperscript{129} Ibid.  
\textsuperscript{130} Ibid.  
\textsuperscript{131} Ibid.  
\textsuperscript{133} Amatrudo, above n 90, 72.  
\textsuperscript{134} Bagaric, ‘Deterrence Doesn’t Work’, above n 102, 269.
People will avoid engaging in conduct that risks pain being imposed on them.

The greater the potential pain, the stronger the desire to avoid being subjected to it.\textsuperscript{135}

The authors of the foregoing state it is a reasonable conclusion to determine deterrence is a justifiable consideration in sentencing.\textsuperscript{136} Using this logical form of argument it would be expected that imprisonment, specifically a term of significant length, would have a cogent effect upon recidivism of offenders.

In a review of the evidence regarding the deterrent effect of imprisonment, the Sentencing Advisory Council in Victoria determined there was a minimal general deterrent effect from imprisonment.\textsuperscript{137} When analysing the ‘effectiveness of imprisonment as a specific deterrent’ the Council concluded ‘[t]he available research suggests that imprisonment has either no effect upon reoffending or a criminogenic effect’.\textsuperscript{138} The Council’s review did not discern between any offender cohort other than adults and young offenders. Given the lack of efficacy that imprisonment provides for specific deterrence in all offenders, its application to offenders with an intellectual disability could be seen as inappropriate.

V \textbf{(MARGINAL) GENERAL DETERRENCE IN OFFENDERS WITH INTELLECTUAL DISABILITY}

There is good evidence absolute general deterrence works.\textsuperscript{139} However when courts consider general deterrence they are talking of marginal general deterrence. This section of the paper will refer to marginal general deterrence only.

\textsuperscript{135} Ibid.
\textsuperscript{136} Ibid.
\textsuperscript{137} Ritchie, above n 91, 23.
\textsuperscript{138} Ibid 22.
\textsuperscript{139} Edney, above n 95, 62 – 63.
A Requirement for General Deterrence

General deterrence is enshrined in all jurisdictions in Australia as being a relevant sentencing consideration. In the NT the sentencing legislation outlines ‘[t]he only purposes for which sentences may be imposed’\(^{140}\) includes ‘to discourage … other persons from committing the same or a similar offence’.\(^{141}\) In WA the same consideration is required under the common law.\(^{142}\) Invariably in most sentencing remarks there is an express acknowledgement from the sentencing authority regarding general deterrence and its application. This is because the High Court has stated ‘what is required is that the sentencer must take into account all relevant considerations … in forming the conclusion reached’.\(^{143}\) A failure to express a relevant consideration in a sentencing decision leaves that decision open to appeal.\(^{144}\)

B A Good Case for General Deterrence?

There are some categories of offences where general deterrence is a particularly important factor. This includes offences that are especially prevalent within society.\(^{145}\) In offences that threaten public safety general deterrence plays a pivotal role in sentencing.\(^{146}\) One such case occurred in 1985 when an offender with very strong moral views placed a number of imitation bombs in schools. On the unsuccessful appeal by the offender of the sentence imposed the Court stated:

The most compelling factor in sentencing the applicant was the question of general deterrence. It may be conceded it is extremely unlikely that the applicant would commit this type of offence again. … There are large groups in present day society … [that] will stop at nothing in order to

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\(^{140}\) Sentencing Act 1995 (NT) s 5(1).
\(^{141}\) Ibid s (5)(1)(c).
\(^{142}\) Lauritsen v The Queen (2000) 22 WAR 442, [53].
\(^{143}\) Markarian v The Queen (2005) 228 CLR 357, 371.
\(^{144}\) R v Miria [2009] NSWCCA 68 (13 February 2009).
\(^{146}\) R v Dixon-Jenkins (1985) 14 A Crim R 379.
impose [their] views on the community, and this, in my opinion, just like hijacking, is calculated to become contagious, and if at the first step the courts do not show that such conduct, however well intended, will not be tolerated in this community, then it is unlikely that such behaviour will be stopped in its tracks. … [T]his is just the case where general deterrence has an overriding effect on the resulting sentence.\(^{147}\)

A further area where general deterrence can be an overarching sentencing principle is in offences against vulnerable victims.\(^{148}\) One such category of victims are offences involving child pornography where in a recent decision the Victorian Court of Appeal stated; ‘the prevalence and ready availability of pornographic material involving children, particularly on the internet, demands that general deterrence must be a paramount consideration’.\(^{149}\) Arson cases also draw the particular attention of general deterrence, an example of which is found in a decision by the WA Court of Appeal where the court stated ‘[t]he dominant sentencing consideration in relation to arson is one of deterrence’.\(^{150}\)

C Criticism from Within

In 1985 the Attorney-General of South Australia (SA) appealed the sentence given to a young man convicted of causing death by dangerous driving.\(^{151}\) Alcohol was also involved with the offenders blood alcohol concentration calculated to be 0.21 per cent at the time of the offence. He had been sentenced in the SA District Court to a term of imprisonment of two years with parole eligibility after one year.\(^{152}\) The Crown Prosecutor submitted the ‘current sentences for this offence are not providing a sufficient deterrent and that sentences should be increased’.\(^{153}\)

\(^{147}\) Ibid 379.
\(^{148}\) \textit{DPP (Cth) v D’Alessandro} (2010) 26 VR 477.
\(^{149}\) Ibid 483.
\(^{151}\) \textit{R v Johnston} (1985) 38 SASR 582.
\(^{152}\) Ibid 582 – 583.
\(^{153}\) Ibid 584.
King CJ disagreed with the submission. His judgement reinforced the limited effect of marginal general deterrence but acknowledged absolute general deterrence when he stated:

If a driver is not deterred from a dangerous course of driving by the threat of imprisonment for eighteen months or two years, is it realistic to suppose that he will be deterred by the prospect of two and a half or three and a half years imprisonment? The truth is that in the great majority of cases, he simply does not expect to be involved in a serious accident. If he thinks about it at all, it is the prospect of the prison gates clanging behind him rather than the duration of his incarceration which operates as the deterrent.154

Former NSW District Court Judge John Nicholson SC wrote an article in 2012 where he heavily criticised the validity of general deterrence.155 He stated ‘[g]eneral deterrence is a threatening message aimed at unidentified would-be offenders somewhere out in the vast community who otherwise play no part in the proceedings’.156 So how does the ‘threatening message’ get transmitted to ‘the vast community’? It is exactly this point Mr Nicholson believes is a cogent flaw in the principle. He wrote:

For general deterrence to be effective two essential steps must need to be in place. First, the sentence quantum constituting the deterrent message must reach the would-be offender. He must know about it. Secondly, the would-be offender must understand not only that the sentence imposed is meant to inform him of a penalty appropriate for the specific kind of offending conduct and offender, but also that, even though his personal circumstances are likely different, he too will be liable to a penalty of that order if he commits a like offence.157

154 Ibid 586.
156 Ibid 213.
The distribution of the message was described as ‘the ultimate media disaster’\textsuperscript{158} so why do sentencing authorities continue to express ‘I have taken general deterrence into account’? It is opined by Mr Nicholson the statement is not intended for ‘third parties’ but rather for the parties to the action and appeal courts.\textsuperscript{159} It was further stated ‘[q]uite frequently the nature of the punishment selected by the sentencing tribunal will have been reached without any consideration of general deterrence.’\textsuperscript{160} This was exactly the case in \textit{R v Miria}.\textsuperscript{161} The appellate court upheld an appeal against sentence partly because the sentencing judge ‘did not incorporate any reflection of general deterrence among the elements constituting [the] sentence assessment. Such [an] omission was erroneous’.\textsuperscript{162}

D \textit{Intellectual Disability and General Deterrence}

General deterrence relies on the economic theory of rational choice as earlier described by the five propositions.\textsuperscript{163} It assumes the individual is capable of making rational choices based on sound logical information. This obviously presents difficulties when applying the deterrent principles on offenders who have impairment in rational decision making. It is part of the diagnostic criteria for intellectual disability that the individual has a lower than normal intellectual functioning coupled with impairment in adaptive behaviour. Naturally this effects the ability to make rational decisions. The common law has mollified the application of general deterrence applied to intellectually disabled offenders.

\textsuperscript{158} Ibid 214.
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid.
\textsuperscript{161} [2009] NSWCCA 68 (13 February 2009).
\textsuperscript{162} Ibid [8].
\textsuperscript{163} Bagaric, ‘Deterrence Doesn’t Work’, above n 102, 269.
1 Muldrock

The leading authority on general deterrence and intellectually disabled offenders is *Muldrock v The Queen.* In that case the appellant had pleaded guilty to a sexual offence against a child. The appellant was intellectually disabled. At first instance he was sentenced to a term of nine years imprisonment but released to parole on the day he was sentenced (taking into account 96 days already served). The Crown appealed the sentence. The Court of Criminal Appeal, in allowing the appeal, substituted the non-parole period of 96 days to one of six years and eight months. Mr Muldrock appealed to the High Court where the Court unanimously allowed the appeal and remitted the matter back to the Court of Criminal Appeal for sentence.

The High Court determined people with intellectual disabilities are an inappropriate vehicle for general deterrence. In citing Young CJ in *R v Mooney* the Court approved the statement:

‘General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others.’

Citing Lush J from the same case the Court also approved the statement ‘[a] sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community’.

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164 (2011) 244 CLR 120.
165 Ibid 120 – 121.
166 Ibid 142.
167 (unreported, Court of Criminal Appeal (Vic) 21 June 1978) 5.
168 *R v Muldrock* (2011) 244 CLR 120, 138.
169 Ibid 139.
It is noted Mr Muldrock was resentenced in the Court of Criminal Appeal consistent with the findings of the High Court. Given he had been in custody for some time before the matter was finally decided, the effect of his resentencing was he was released from custody to freedom without the requirement for parole.\footnote{R v Muldrock; Muldrock v The Queen [2012] NSWCCA 108 (18 May 2012).}

2 \textit{Naysmith}

A recent example of the application of \textit{Muldrock} is the case of \textit{Naysmith v The Queen}.\footnote{[2013] WASCA 32 (8 February 2013).} The appellant had been convicted of possession of child pornography. He was intellectually disabled. In passing sentence in the WA District Court, Birmingham DCJ stated:

These offences result in significant weight being given to general deterrence, and accordingly, less weight to personal factors such as yours. … The benefit to the community from the rehabilitation of an offender cannot be ignored. However, in my opinion, the community interest in that regard, and in respect of the individual, must give way to the very significant weight to be given to general deterrence, and reflect that in a sentence of immediate imprisonment.\footnote{Ibid [20].}

Part of the reasons for the judge’s sentence also included his doubt the offender was suffering an intellectual disability of significance to his offending.\footnote{Ibid [18].} In applying \textit{Muldrock} the Court of Appeal held the sentencing judge erred in applying such weight to general deterrence. The court stated:
The appellant's intellectual disability is such as to require that little weight be given to general deterrence, particularly as his disability was accompanied by significant social and environmental deprivation.\textsuperscript{174}

VI SENTENCING OPTIONS IN WA

Sentencing in WA is regulated by the \textit{Sentencing Act 1995}. The statutory framework does not include the deterrence principles however they are applied through the common law.\textsuperscript{175} The underlying principle is ‘[a] sentence imposed on an offender must be commensurate with the seriousness of the offence’.\textsuperscript{176} When determining the seriousness of the offence the court is to take into account the penalty, the circumstances surrounding the commission of the offence, and any aggravating and or mitigating factors.\textsuperscript{177}

A Non-Custodial Sentences

1 No Sentence, Conditional Release Order and Fines

At the lowest end of the scale a court can impose no sentence upon an offender with or without recording a spent conviction.\textsuperscript{178} This can only be imposed by a court when the offence is ‘trivial or technical’.\textsuperscript{179} Another option the court has is a conditional release order, formerly known as a good behaviour bond.\textsuperscript{180} A court imposing a conditional release order can ‘impose any requirements on the offender it decides are necessary to secure the good behaviour of the offender’.\textsuperscript{181} The order may also have a sum of money attached to it which is required to be forfeited by the offender if they do not comply with the order.\textsuperscript{182} A conditional

\textsuperscript{174} Ibid [26].
\textsuperscript{175} \textit{Lauritsen v The Queen} (2000) 22 WAR 459, [53].
\textsuperscript{176} \textit{Sentencing Act 1995} (WA) s 6(1).
\textsuperscript{177} Ibid s 6(2).
\textsuperscript{178} Ibid ss 39(2)(a), 46.
\textsuperscript{179} Ibid s 46(1).
\textsuperscript{180} Ibid ss 39(2)(b), 47.
\textsuperscript{181} Ibid s 49(1).
\textsuperscript{182} Ibid s 51(c).
release order is not supervised by any authority.\textsuperscript{183} If an offender breaches the order by reoffending during its term (which can be for a maximum of two years)\textsuperscript{184} or by failing to comply with a condition of the order then they become liable to pay money attached to it.\textsuperscript{185}

The next form of punishment a court can impose is a pecuniary penalty in the form of a fine.\textsuperscript{186} When imposing a fine the court must consider the means of the offender to service a fine and the ‘extent to which payment of the fine will burden the offender.’\textsuperscript{187}

2 Community Orders

A community order is defined as being either a Community Based Order (CBO) or an Intensive Supervision Order (ISO).\textsuperscript{188} Community orders must be made for a period of time between six months and two years.\textsuperscript{189} A CBO must have at least one primary requirement of community service, supervision or programme.\textsuperscript{190} An ISO includes supervision as a mandatory requirement\textsuperscript{191} and may include a curfew requirement.\textsuperscript{192} Any curfew requirement cannot exceed a continuous period of six months.\textsuperscript{193} An ISO can also impose a community service and or programme requirement.\textsuperscript{194}

Community service is a requirement the offender must complete a set number of hours (specified by the court) of unpaid work in order to punish or rehabilitate them.\textsuperscript{195} A supervision requirement is imposed for the purpose of ‘regularly monitoring’ the offender.
whilst in the community and to receive ‘regular counselling’.\textsuperscript{196} Supervision is conducted by a Community Corrections Officer (CCO).\textsuperscript{197} A programme requirement is a requirement an offender must follow the directions of a CCO regarding assessment and or treatment ‘by a medical practitioner, a psychiatrist, a psychologist or a social worker’ or to have an assessment and, if necessary, treatment for substance abuse issues.\textsuperscript{198} A CCO can order an offender to reside at a specific place to facilitate assessment and or treatment.\textsuperscript{199}

3 \textit{Pre-Sentence Order}

A pre-sentence order (PSO) can be seen as a quasi-community order. It is an order of the court that an offender be subject to certain conditions before the court sentences the offender. It can only be imposed when a court believes the appropriate sentence is one of immediate imprisonment the imposition of a PSO ‘would allow the offender to address his or her criminal behaviour and any factors which contributed to the behaviour’ and ‘that if the offender were to comply with a PSO the court might not impose a term of imprisonment … for the offence.’\textsuperscript{200} A PSO can have supervision, programme and curfew requirements and must have at least one of those.\textsuperscript{201} The court can regularly review the PSO by requiring the offender to return to court with the benefit of a report from a CCO advising the court of the offender’s progress on the order.\textsuperscript{202} A PSO can be for a period of up to two years\textsuperscript{203} however it can be cancelled at any time during that period and the offender sentenced.\textsuperscript{204}

B \textit{Custodial Sentences}
Imprisonment can only be imposed by a court when ‘the seriousness of the offence is such that only imprisonment can be justified; or the protection of the community requires it’.\(^{205}\) This has been held as a principle that immediate imprisonment is the sentence of last resort.\(^{206}\) The principle is also applicable at common law.\(^{207}\)

1  **Suspended Imprisonment**

Once a court has determined the only suitable sentence is one of imprisonment it is then required to turn its mind to whether it is suitable to suspend the term.\(^{208}\) A term of imprisonment can be suspended when the aggregate term is no more than five years.\(^{209}\) The term of suspension cannot exceed two years.\(^{210}\) The effect of a suspended term means if an offender commits another offence during the term of suspension they may be liable to serve the whole of the suspended term or part of it.\(^{211}\)

2  **Conditional Suspended Imprisonment**

The same conditions and qualifying factors apply to a conditional suspended imprisonment order (CSIO) as does a suspended imprisonment order.\(^{212}\) It can be said a CSIO is a melding of a suspended imprisonment order and a community order. This is because the court has the power to attach requirements of supervision, programme and curfew and any CSIO must have at least one of these requirements.\(^{213}\) The requirements are worded in the legislation in

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\(^{205}\) Ibid s (6)(4).
\(^{206}\) *Hull v The State of WA* [2005] WASCA 194 (11 October 2005), [20].
\(^{208}\) *Sentencing Act 1995* (WA) s 39(3).
\(^{209}\) Ibid s 76(1).
\(^{210}\) Ibid.
\(^{211}\) Ibid s 80.
\(^{212}\) Ibid s 81.
\(^{213}\) Ibid s 84.
identical terms as those are for an ISO. Only a prescribed court can impose a CSIO and this means only a superior court or speciality court can impose a CSIO.

3 Immediate Imprisonment

A term of immediate imprisonment can only be imposed when no other sentencing option, including suspension of the term, is suitable. Any term of imprisonment imposed on a person must not be six months or less except if the total aggregate term exceeds six months or the offender is already serving a custodial term. Thus the minimum term of immediate imprisonment is six months and one day. Once the court has decided an immediate term is the only suitable sentence, it must then determine if a parole eligibility order should be made.

(a) Parole

The power to deny making a parole eligibility order is not absolute, rather it is enlivened by certain conditions. If the power is enlivened there is no presumption an order should not be made. The power to not make a parole eligibility order is only enlivened when at least two factors are present being either:

- the offence is serious;
- the offender has a significant criminal record;
- the offender, when released from custody under a release order made previously, did not comply with the order; and
- any other reason the court considers relevant.

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214 Ibid ss 84A – 84C.
215 Ibid s 81(1).
216 Sentencing Regulations 1996 (WA) reg 6B.
218 Ibid s 86.
219 Ibid s 89.
220 Penny v The State of WA [2006] WASCA 173 (31 August 2006), [68].
221 Ibid.
222 Sentencing Act 1995 (WA) s 89(4).
(b) **Indefinite Detention**

A superior court that imposes a term of imprisonment for an indictable offence that is served immediately and for which no parole eligibility order is made may also order the offender be imprisoned indefinitely.\(^{223}\) In making an indefinite detention order the court must be satisfied the offender would be a danger to society.\(^{224}\) Indefinite detention should only be made in ‘very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm’.\(^{225}\)

C  **Breaches of Community Orders**

If a person subject to a community order reoffends during the term of the order, they can be subject to further sanction.\(^{226}\) The court may amend, confirm or cancel the community order.\(^{227}\) If the court cancels a community order then the offender can be resentedenced for the original matter ‘in any manner the court could have if it had just convicted the person of that offence’.\(^{228}\) If an offender fails to comply with any of their order requirements, for example failing to attend for assessment or treatment pursuant to a programme requirement, the court can also amend, confirm or cancel the community order.\(^{229}\) Similarly with the way a court can deal with the matter by way of reoffending, if the court cancels the order due to the offender breaching it they can resentence the offender.\(^{230}\)

\(^{223}\) Ibid s 98.
\(^{224}\) Ibid s 98(2).
\(^{225}\) Chester v R (1988) 165 CLR 611, 618.
\(^{227}\) Ibid s 130.
\(^{228}\) Ibid s 130(1)(a)(iii).
\(^{229}\) Ibid s 133.
\(^{230}\) Ibid s 133(1)(a)(iii).
VII SENTENCING NOEL

In 2012 Noel was sentenced to an ISO for sexual offences against a child. He attempted to procure a 13 year old girl for sex through social media and mobile phone messaging. He and the child also swapped lewd images of themselves which resulted in Noel being convicted and sentenced for charges relating to child pornography. During the term of his ISO in late 2013, Noel committed another three counts of attempting to procure a child for sex. The victim was a 14 year old girl and the medium chosen by Noel was through social media. He is awaiting sentence for the latter charges which carry a maximum penalty of 14 years imprisonment.231

A Current Options

Because of Noel’s intellectual disability it may then be tempting for his counsel to argue he does not have the capacity to know his conduct was wrong. This may be a risky argument for Noel to put forward. Should he be successful he faces a possible custody order.232 It is almost certain he would not be released unconditionally under such a defence given his antecedents and the seriousness of the offence.233

Child sex offences is a class of case that normally see the principle of general deterrence being applied strongly.234 In applying Muldrock,235 which was a case where a physical sexual assault occurred against a nine year old boy by an intellectually disabled man, it can be clearly stated general deterrence should not carry much weight in sentencing Noel due to his intellectual disability. Because Noel’s offending could be classed a recidivistic in nature, he may attract the principle of specific deterrence more than he did before.236 Given specific

232 Criminal Law (Mentally Impaired Accused) Act 1996 (WA) s 22.
233 Ibid.
234 DPP (Ch) v D’Alessandro (2010) 26 VR 477.
235 Muldrock v The Queen (2011) 244 CLR 120.
deterrence is aimed at changing behaviour and effecting behaviour change is inherently difficult with an intellectually disabled person, it would seem logical to seek a professional psychological opinion on the best way to manage Noel. A court can do this by requesting a pre-sentence report addressing such a situation.

Given Noel was previously sentenced to an ISO and has reoffended during its term in a like manner, this is cogent evidence such a sentence is unsuitable. If the court were to cancel his current ISO it could also resentence him on his original matters. Imprisonment is an available sentence and unfortunately for Noel it may be the determination of the court that it is the only suitable sentence. It would then bring into question whether to suspend the term conditionally or otherwise. In dealing with the breach of the ISO, the court is required to take into account Noel’s responsivity to his obligations and the length of time he has been on the order. If Noel’s compliance other than the reoffending has been satisfactory, this may be the tipping point for the court to impose a suspended term of imprisonment. Should the court determine an immediate term of imprisonment is not the only option, given Noel’s offences and the fact he has not served a previous term of imprisonment it is highly likely he would be made eligible for parole. He is also not going to be subject to indefinite detention as his situation does not fit the exceptional criteria.

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237 Indermaur, above n 89, 15.
239 Ibid s 130(1)(a)(iii).
240 Ibid s 135(2).
B Alternative Options

John Nicholson SC wrote:

Prosecutors, almost invariably, and defence counsel too commonly, accept that punishment is a most effective – and too frequently, the only – mechanism for reform of the offender, as well as the only method of justifiable accountability.241

The sentencing principles applied in each jurisdiction which have long rooted histories in the common law focus on punitive regimes. Given Noel is not a suitable vehicle for general deterrence and specific deterrence is difficult to achieve, how is the community going to be best protected if he is not rehabilitated? What would happen if he was sent to gaol? In answering the latter question the evidence suggests he would come out of gaol with a higher risk of recidivism than before he went in.242

It seems then the best outcome for Noel and the community is his successful rehabilitation. This is resource dependant in the sense he needs to have access to appropriate intervention. In WA the cost to the taxpayer if Noel was incarcerated for one year would be $125,925.243 If it were possible to divert some of this funding into a suitable community based programme for intellectually disabled offenders this would go a long way to achieving the ultimate aim of long term community protection. It would certainly be a better outcome than increasing his recidivism risk by a gaol term.

241 Nicholson, above n 155, 207.
243 Western Australia, 2014-15 Budget Paper No 2, Presented to the Legislative Assembly 8 May 2014, vol 2, 749 (calculated using the budget figure of ‘Cost per Day’ for an offender in custody of $345 x 365 = $125 925).
Encouragingly a 2005 study from the United Kingdom identified in roads were being made in community based sex offender programmes for intellectually disabled sex offenders. The study reported the formulation of a group which analysed and evaluated community programmes. One programme favourably assessed had been tailored specifically for intellectually disabled men in which the ‘[p]ost-course assessment revealed significant improvements in victim empathy, sexual attitudes and knowledge and a decrease in cognitive distortions’. If such a programme were available for Noel and sufficient resources made available for him to attend, this is something that could be managed with a community order under the current sentencing regime. Unfortunately such programmes are not available in WA.

VIII CONCLUSION

Intellectual disability is prevalent in the community at a rate of approximately one percent of the Australian population. For intellectually disabled people in contact with the criminal justice system it is estimated there is an overrepresentation in the pre-trial custody setting of 20 times and in the sentenced prisoner population of three to four times. This overrepresentation is a concern and highlights the importance in addressing the criminality of this cohort of offenders. No doubt it could be argued that some intellectually disabled people currently in gaol could have submitted a not guilty plea by using an insanity or mental impairment defence. This is undesirable given the legislation allows for indefinite custody orders to be made in such cases with the end result the accused will likely serve their custody order in a gaol in any event.

244 Craig, above n 125.
245 Ibid 299.
246 Ibid.
The principles of sentencing being punishment, deterrence of the offender and others, rehabilitation and protection of the community are firmly rooted in our judicial system whether by statute or at common law. The evidence is clear that absolute general deterrence is effective however its level of effectiveness is directly correlated to the likelihood of an offender getting caught. The same cannot be said for marginal general or specific deterrence. On the surface it seems like a logical concept however there is very little, if any, evidence to support it as effective. When attempting to apply the principles to each offender the determined sentence is often very difficult. The High Court has stated the principles are ‘guideposts to the appropriate sentence but sometimes they point in different directions’.  

Even more so with intellectually disabled offenders do the principles of deterrence have no sound basis. Deterrence is predicated on the rational being theory which some, if not most intellectually disabled offenders may have difficulty reconciling. When analysing Noel’s possible sentencing options it can be seen he is facing a term of immediate imprisonment. Given the sentencing principles of deterrence can be discounted as baseless this leaves punishment, protection of the community and rehabilitation. Too much emphasis on punishment would have a detrimental effect on the remaining two. Noel is an intellectually disabled man who needs appropriate treatment and rehabilitation to assist him in learning appropriate relationships and sexual behaviours. There is evidence to support community based interventions which would assist Noel and achieve the sentencing principles of rehabilitation and long term community protection. The sentencing legislation in its current form, albeit not perfect, would be able to accommodate such a sentence however it is up to the executive to start diverting some of the $125 925 it would cost to keep an intellectually disabled offender behind bars each and every year they are sentenced.

\(^{247}\) *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476.
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