

# dis-**A**bled Justice

**Reforms to justice for persons with disability in Queensland**



**Queensland Advocacy Incorporated  
May 2015**



## Queensland Advocacy Incorporated

### About QAI

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and legal advocacy organisation for people with disability in Queensland, Australia.

QAI's mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland. QAI does this by engaging in systems advocacy work - through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this State.

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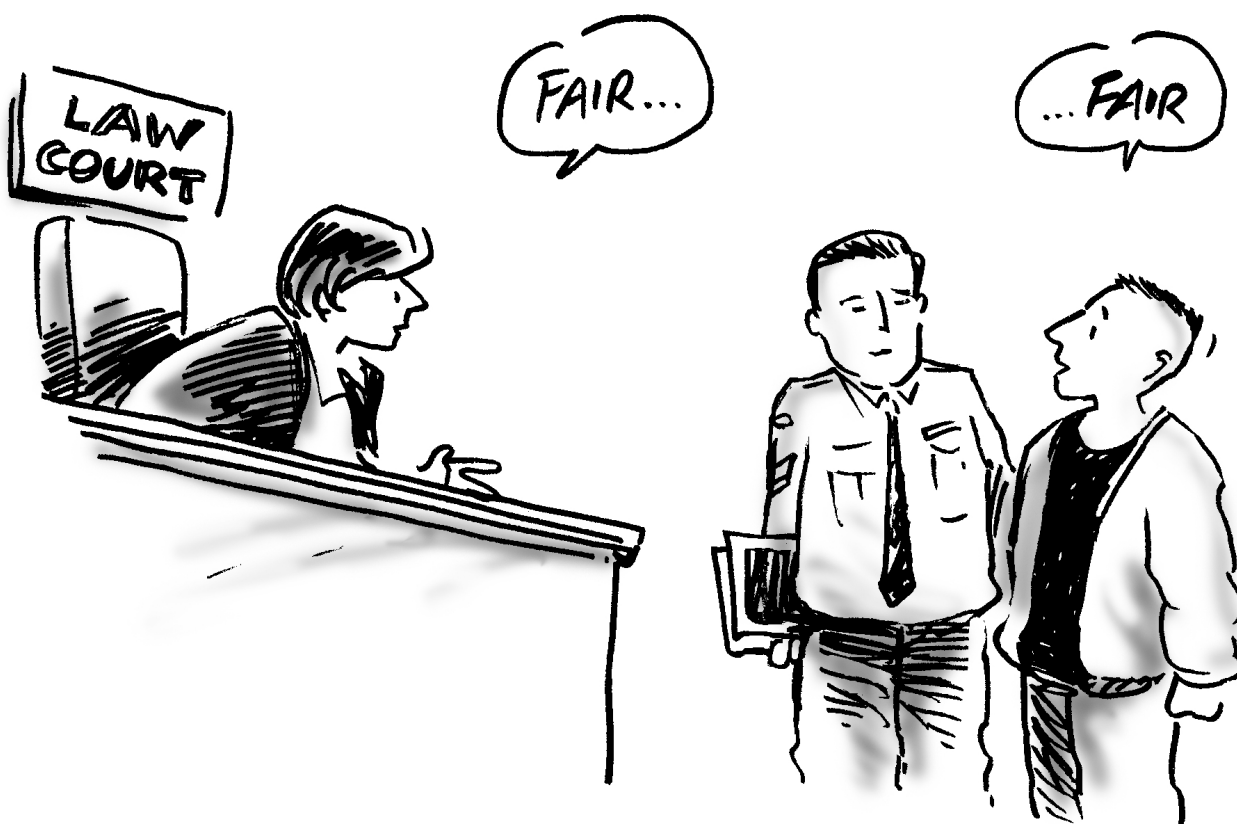
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# Foreword

'The Convention on the Rights of Persons with Disabilities (CRPD) has recognized that all persons with Disabilities have the right to legal capacity on an equal basis with others. It has also obligated States to provide to persons with disabilities whatever support they may need for the exercise of the right. The recognition of this right has thrown up two major challenges for State Parties: one of converting the abstract mandate of the right into concrete interventions and two to determine the beneficiaries of the support.

Due to the long standing legal disqualifications imposed against them, the right to legal capacity has special significance, in the realization of all their other rights to persons with mental illness and with intellectual impairments. Legal capacity requirements of the Convention would need to be determined vis a vis all other rights be it education, work or right to live independently and in the community. QAI in Disabled Justice II has determined the requirement of the right when the lives of persons with disabilities intersect with the criminal justice system. It spells out the manner in which the system should undertake its tasks of policing and investigation; adjudication and sentencing so that persons with disabilities are not discriminated by an ableist paradigm.

Most importantly, QAI have used the disability lens to humanize the criminal justice system for all and not just for persons with disabilities. The book makes an evidence based demonstration of the need to address the duty to provide support in universal terms. It has concentrated on the kinds of support that would be required to ensure fair and efficient policing and adjudication. It has also, with the aid of countless illustrations, brought home the inequity of making support an entitlement. Any categorization, be it by nature of impairment or on quotient of intelligence can result in the arbitrary denial of support to those who are in need of it. Such a consequence is in breach of both the letter and the spirit of the CRPD.

QAI with the aid of relevant real time illustrations conclusively bring home the injustice of imposing capacity impairments on any individual or group and in speaking for the rights of persons with disabilities make a strong case for a criminal justice system which is universally just and humane.'

**Amita Dhanda,**

Professor and Head, Centre for Disability Studies, NALSAR, Hyderabad, INDIA

'I support the attention that Queensland Advocacy Incorporated is giving to the problem of disability in the criminal justice system. The issues they raise are common throughout Australia and indeed beyond. In my role as patron of the Community Restorative Centre in New South Wales, I have come to understand the particular impact of intellectual disability on many people who end up with custodial sentences. I support the call that is being made to provide broader sentencing options to the courts and to address specifically issues of mental illness, intellectual impairment and brain injury amongst prisoners in Australia.'

**The Hon Michael Kirby AC CMG,**

Past Justice of the High Court of Australia

'The Australian Human Rights Commission is committed to promoting and protecting the rights of Australian's with disability. We also recognise the significant work undertaken by organisations such as QAI, in raising awareness of the barriers that exist in accessing justice for Australians with disability. Among the most vulnerable in our community, people with disability experience a variety of challenges when it comes to their interaction with the criminal justice system. These challenges manifest whether people with disability are victims, offenders or participants in the criminal justice system. The Commission is pleased that QAI has built on the experience of their previous report, with a second publication looking at the intersection of disability and the criminal justice system. It's through the proactive measures by community organisations such as QAI, that we take another step closer to realising the goal of an inclusive and non-discriminatory Australia.'

**Prof. Gillian Triggs,**

President of the Australian Human Rights Commission



# Position Statement

Queensland Advocacy Incorporated (QAI) believes that people with disability, like all people, are equally important and unique and of intrinsic value. People with disability should be treated with the same dignity and respect as any other human being. We aim towards a society where all people have full and equal access to society's resources and opportunities, including access to justice, and are accorded respect and fair treatment. We consider that equity is about positive discrimination – seeking to redress social injustice – and therefore that we must take a rights-based approach to help those who are currently disadvantaged to be elevated to equal status with others in society. People with disability often require additional support and this is particularly pronounced in the criminal justice context. Consistent with the supported decision-making approach which QAI endorses, we consider the provision of appropriate support essential.

People with disability and mental health conditions are adversely affected by labelling and negative stereotyping, which increase prejudicial responses and misconceptions. There is a pressing need to address the damaging, inaccurate and anachronistic language commonly used within the criminal justice system. The use of terms such as 'unsoundness of mind' and 'natural mental infirmity' and the conflation of intellectual disability and 'insanity', for example, are particularly inaccurate and misleading. By addressing our language, we can mitigate a tendency to prejudicial reactions that are reflected in our own behaviours and respond appropriately.

It is now widely acknowledged that people with disability are over-represented, and often adversely differentially treated, within the criminal justice system. This over-representation is not limited to offenders, but also includes over-representation as victims of crime. These are fundamental human rights concerns that require redress as a matter of urgent priority. Recent research has confirmed the systemic nature of the problems at the intersection of criminal culpability and disability.<sup>1</sup> Many people with intellectual or cognitive disability or mental health disorders are socio-economically and educationally disadvantaged and marginalised from an early age. This disadvantage compounds the effects of their disability or condition.<sup>2</sup>

The Queensland government has increased funding to police and prison-building, but has not invested in ways to address over-representation; it has invested in bricks and mortar for prisons while ignoring more remedial approaches to addressing support needs. It is of grave concern that people who are overlooked for support are among the most vulnerable, disempowered and marginalised members of our society.

The adoption by the United Nations of the *Convention on the Rights of Persons with Disabilities (CRPD)* in 2006 heralded a stronger emphasis on the interface between disability and law and justice. In ratifying the CRPD, the Australian government agreed to ensure that people with disability have effective access to justice. However, as the evidence presented in this publication will show, in the near-decade that has elapsed since Australia's signage and ratification of the Convention, the situation for people with disability in these realms has not noticeably improved; indeed, in many ways it has declined.

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<sup>1</sup> Department for Families and Communities. 2011. *Forensic Disability: The Tip of Another iceberg*. Government of South Australia, 10.

<sup>2</sup> LR Steele, L Dowse & J Trofimovs. 2013. *Section 32: A Report on the Human Service and Criminal Pathways of People Diagnosed with Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Under the Mental Health (Forensic Provisions) Act 1990 (NSW)*. University of New South Wales.

The function of *dis-**Abled Justice*** is two-fold: QAI provides a detailed description of the problems arising from the fractured criminal justice system vis-à-vis disability and proposes a (non-exhaustive) collection of complementary reforms directed towards addressing both the causes and casualties of this system. QAI's synthesis and analysis of problems and potential reforms are drawn from extensive theoretical and empirical research, which involved legal analysis, a review of relevant literature both within Queensland and in other Australian jurisdictions and qualitative interviews with practitioners and professionals working in the criminal justice system.

QAI considers that the government must develop a comprehensive, whole-of-systems response, engaging with the community and sector stakeholders to address the problems at the interface of disability and criminal justice. While this may seem a lofty (and difficult) goal, QAI predominantly focus attention on micro-reforms. Small yet significant improvements in key areas will collectively generate a baseline of protection for people with disability and mental health issues.

To this end, QAI propose a systemic plan aimed at improvement in key areas, including addressing support needs that have not been met and which correlate with potential involvement in crime. Matters to address include education, unemployment, poverty, limited life experiences and social marginalisation; the availability and adequacy of diversionary programs; the limitations of present sentencing options, including the inadequacy of imprisonment as a deterrent or rehabilitative option and its detrimental effects, both on prisoners and in terms of the costs to the wider economy; the need for post-prison supports and practical assistance; key problems with forensic processes; and the development of holistic responses towards reducing crime and individual vulnerability and marginalisation. QAI makes key recommendations including the provision of police training in conflict de-escalation and dealing with people with disabilities; decision-making support for defendants and jurors; bail-based diversion; the provision of professional support services and inclusive rehabilitation for prison inmates; capacity support for people determined unfit for trial; and the removal of the presumption of incapacity for people on Forensic Orders or Involuntary Treatment Orders.

QAI recognises that many of the problems encountered by people with disability in interacting with the criminal justice system are not unique to this group – there are critical problems endemic within the criminal justice system. Addressing the problems at the disability/criminal justice interface will have broader ramifications for a struggling criminal justice system, positively impacting on all people who come into contact with it – as suspects, offenders, defendants, victims and witnesses of crime.



# 1. Introduction

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# 1. Introduction

## 1.1 Summary and key recommendations

QAI has designed this work to complement Phillip French's influential *Disabled Justice*, published in 2007. The earlier report offered broad analysis and critique. Now, *dis-Abled Justice* focusses on micro-reforms at different stages of the criminal justice process: to the police service, courts, corrections, diversion, the forensic system, and to support during and after corrections.

The overrepresentation of people with disabilities as suspects, offenders and as victims of crime is one of the most striking features of the criminal justice system. The principal causes of overrepresentation lie outside the system, and are linked to lifelong exclusion, unemployment, poverty, limited community participation, and to the race and gender of people with disabilities. There is nevertheless an urgent need for criminal justice reform.

In recent years, the Government has allocated additional funds to the police service and to the building of jails, but cut funding to innovative diversion programs. Prisons and prisoner numbers have increased, but imprisonment is counterproductive. It is costly and rarely an effective deterrent. QAI argues that the scale of overrepresentation warrants the exploration and trialling of alternative approaches at every level of the system. The core argument in this chapter and throughout this work is that the overrepresentation of people with disabilities in the criminal justice system is indefensible and warrants urgent remedial action, and that the Queensland Government must continually refine and reform the system to reduce it.

### Key Recommendations

QAI recommends the Queensland government:

- Develop a Disability Justice Strategy<sup>1</sup> (Strategy) consistent with Australia's obligations as a states party to the *Convention on the Rights of Persons with Disabilities* (CRPD). People with disabilities, Parliament, the Department of Justice and Attorney-General, the Queensland Police Service, the judiciary, Corrective Services, Legal Aid, Community Legal Services and other stakeholders should develop the Strategy.
  - The Strategy should enunciate a core set of principles and actions that will guide appropriate communication, early intervention, diversion, training, accountability and monitoring.
  - Address anachronistic language in the Criminal Code. Terms such as 'unsoundness of mind',<sup>2</sup> 'natural mental infirmity'<sup>3</sup> and the conflation of intellectual disability<sup>4</sup> and 'insanity'<sup>5</sup> are inaccurate and misleading.

<sup>1</sup> In January 2014, the Australian Human Rights Commission's released its report *Equal Before the Law: Towards Disability Justice*, a principal recommendation of which was that states and territories should implement Justice Strategies.

<sup>2</sup> Sections 285, 647 and 678.

<sup>3</sup> Section 27.

<sup>4</sup> In the leading case *R v Rolph* [1962] Qd R 262 the term is 'mental retardation'.

<sup>5</sup> Sections 27, 590AA, 647 and 668.

## 1.2 Introduction

Any criminal defence lawyer will acknowledge what research confirms: many people who are charged with 'street offences' have intellectual or psychiatric impairments.<sup>6</sup> Evidence presented will demonstrate that people with disabilities are overrepresented across the offending spectrum and throughout the justice system, as victims, suspects, defendants and prisoners. Approximately 10% of people in Queensland prisons, for example, have intellectual disability,<sup>7</sup> and the National Prisoner Health Census 2010 determined that 33% of people in Australian prisons had a mental illness.<sup>8</sup>

People with intellectual and psychiatric impairments are in watch houses, courts, remand centres, jails and forensic facilities because they are disadvantaged in myriad ways. International<sup>9</sup> and Australian research<sup>10</sup> confirms that offenders with intellectual and psychiatric impairments are more likely to have experienced childhood neglect or abuse, to be unemployed (see text box), poor and/or from an indigenous minority, to have limited social and communication skills and behavioural and/or psychiatric conditions.

**Unemployment** for people with intellectual or psychological disabilities is high compared with other disability groups, regardless of severity, according to Australian Bureau of Statistics data. Those with moderate or mild intellectual disability (20%) or psychological disability (18.9%) had higher unemployment rates than those with moderate or mild physical disability (8.8%) or the general population (5.5%). These figures reflect the unique barriers that people with intellectual or psychological disabilities face in accessing education and work.

Australian Bureau of Statistics. *Australian Social Trends*. 4102.0; March Quarter 2012.

The circumstances in which people with disability become enmeshed in the criminal justice system are bound up with the ways in which *impairments* become *disabilities* in a competitive society that values and rewards excellence and high achievement and often has no place for people at the other end of the spectrum. Educational institutions are typical, rewarding those who succeed, while excluding and stigmatising those who do not.<sup>11</sup> Special education classes and special schools send a powerful message of exclusion and play a role in setting many people with intellectual or psychiatric impairments on a descending life path. Offending must be understood in that context.

Justice should be blind but the equal treatment of unequals may render injustice.<sup>12</sup> Prisoners with diminished capacity, for example, are by definition criminals *and* among the most vulnerable and disadvantaged groups in our society, yet the justice process tends to be systemically, if not deliberately,

6 For example, see Howard Posner, Assistant Director - Legal Aid Criminal Law Services. 2012. *Five Criminal Law Issues Raised By Recent Appellate CJS Cases*. Legal Aid Queensland, <https://elo.legalaid.qld.gov.au/webdocs/dbtextdocs/internal/irregseries/cle/2012/fivecriminal.pdf>. - and see Chapter 3, 'Overrepresentation'.

7 Based on figures from the most recent comprehensive survey Corrective Services Queensland. 2002. *Intellectual Disability Survey* and on comparable data from a number of NSW studies.

8 Australian Institute of Health and Welfare. 2011. *The Health of Australia's Prisoners 2010*. Australian Institute of Health and Welfare.

9 William Glaser & Kristen Deane. 1999. 'Normalisation in an Abnormal World: A Study of Prisoners with an Intellectual Disability' *International Journal of Offender Therapy and Comparative Criminology*. 43(3): 338.

10 See, for example, S Hayes. 2005. *Prison Services and offenders with intellectual disability - the current state of knowledge and future directions*. 4th International Conference on the Care and Treatment of Offenders with a Learning Disability, 2005 April 6-8, University of Central Lancashire, Preston, UK.

11 How many school mottos, for example, purport to value students for themselves, as opposed to extolling excellence, achievement, knowledge etc.?

12 '[T]here is no greater inequality than the equal treatment of unequals': Frankfurter J in dissent in *Dennis v United States* (1950) 339 US 162.

careless of the criminogenic<sup>13</sup> factors that lead to their imprisonment at more than five times the rate of the general population.<sup>14</sup>

Criminogenic factors include the totality of offenders' life circumstances from birth, and particularly living arrangements at the time of the offence. For example, people with intellectual impairment are at risk of offending because many lack adequate support to live in the community.<sup>15</sup> They are over-represented amongst the homeless and are more vulnerable than other homeless and unemployed populations; often 'invisible' to government services that rely on people to actively approach them;<sup>16</sup> have health needs that are often greater yet inadequately met;<sup>17</sup> and are more at risk for criminal victimisation than the general population.<sup>18</sup> In the course of this report, QAI identifies anomalies and shortcomings in the justice process. QAI outlines some of these briefly below.

### 1.2.1 Identification and determination of capacity

One of the problems commonly identified by advocate, academic and practitioner observers is the failure of criminal justice jurisdictions to identify particular classes of defendants with impaired capacity and subsequently divert those classes of defendants from the usual criminal justice processes.<sup>19</sup> In Queensland such identification and diversion into the forensic system is available for a limited class of offenders already subject to Involuntary Treatment Orders (ITOs) or Forensic Orders (FOs), and for those charged with indictable offences. While the Queensland process was ahead of its time and highly regarded by advocates from other jurisdictions whose clients have been detained indefinitely in adult prisons for many years, it has its limitations.<sup>20</sup> For example, it unnecessarily diverts some defendants charged with simple offences who would go through the customary judicial process more quickly and with fewer restrictions.

**"Without adequate ongoing support, most people with intellectual or other cognitive disabilities will experience bad outcomes and will potentially become victim, suspect, defendant or offender as they try to negotiate our society."**

Morrie O'Connor – Co-Ordinator of The Community Living Association, speaking at the launch of *Disabled Justice 1* - Disabled Justice Forum - Tuesday 19 June 2007. Royal On The Park Hotel, Brisbane, Queensland.

For the majority of defendants with intellectual impairment, support to exercise legal capacity is more consistent with human rights principles<sup>21</sup> than (needlessly) discriminatory identification and diversion, no matter how well-intentioned. Some defendants with severe impairments may not understand or meaningfully participate in court proceedings without considerable support, and when the courts give them no choice but to participate without support, they are denied fair process. This applies to many Queensland defendants appearing on summary charges.

13 Criminogenic means causing or likely to cause criminal behaviour.

14 People with intellectual disability make up approximately 2% of the population.

15 National Research Council. 2001. *Crime victims with developmental disabilities: report of a workshop*. Washington DC: National Academy Press.

16 M O'Connor & A Coleman. 1995. "'Particularly Vulnerable': Homeless Young People with an Intellectual Disability" *Interaction* 9(1): 8-14.

17 K Van Dooren, R Ware, K Brooker & N Lennox. 2012. *Out of sight, out of mind: People with intellectual disability in public health research*. 2012 IASSID World Congress, Halifax, Nova Scotia, 749.

18 T Nettlebeck & C Wilson. 2002. 'Personal vulnerability to victimization of people with mental retardation' *Trauma, Violence and Abuse* 3(4): 289-306.

19 For example, in many of her publications cited here Professor Susan Hayes advocates for the identification and diversion of people with intellectual disability.

20 See below at 1.1.3 and in Chapter 6 'Forensic Processes'.

21 See, for example, Article 12 of the CRPD, which mandates that people with disabilities should be provided with the support they need to exercise their capacity on an equal basis with others.

In its summary jurisdiction, the court will proceed with a matter involving a defendant who has substantially reduced capacity even though the nature and degree of their impairment may be critical to understanding their level of criminal responsibility. A defendant's capacity is a key legal presumption – all people are presumed to have capacity to make all decisions unless there is evidence to rebut this presumption – but in the interests of procedural fairness the court must also provide defendants with ready means by which to rebut it. Currently, some defendants proceed through to sentencing in the Magistrates Courts even though they did not understand what they did was wrong and even though they are not able to understand court proceedings.

Capacity for decision making is time, decision and domain-specific. In practical terms, this means that at any given time, a person may have capacity to make decisions about some matters within a particular category of subject-matter, but not others.<sup>22</sup> For example, they may have capacity to make simple decisions such as managing their disability pension payments but not for more complex decisions such as selling their house. Similarly, while a person may understand the principle that they should not damage property belonging to another person, this understanding may not extend to an awareness that marking a railway building with graffiti constitutes damage to public property.

The determination of fitness to enter a plea or to stand trial is dealt with under both the *Criminal Code* (Qld) and the *Mental Health Act 2000* (Qld). A determination of fitness is made only when there is doubt in relation to indictable offences, but no similar provision applies in relation to summary offences.<sup>23</sup> This is a deficiency noted by critics including the Court of Appeal in *R v AAM*,<sup>24</sup> and one that should be remedied given that the Magistrates Courts deal with the vast majority (approximately 97%<sup>25</sup>) of criminal matters in the state.

It is not sufficient for the legislature to mandate the unsupported determination of capacity in relation to simple offences. The bar set by *Presser*<sup>26</sup> is too high in QAI's view. To be fit for trial, a defendant must understand the nature of the charge, plead to the charge, understand the nature and follow the course of the proceedings, challenge jurors, understand the evidence and its implications and be able to make a defence or answer to the charge.<sup>27</sup>

The test of fitness to stand trial excludes some people with intellectual impairment from due process, pushing them into the more stigmatising and restrictive forensic system. *Presser* focusses primarily on a person's intellectual ability to understand specific aspects of legal proceedings rather than on the person's ability to function or to act — in effect a 'de facto' test for cognitive ability, it discriminates by impairment and is therefore inconsistent with both the Convention on the Rights of Persons with Disabilities and the general intent of anti-discrimination law.

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22 Queensland Advocacy Incorporated. *Queensland Handbook for Practitioners on Legal Capacity*, 17-20.

23 A reference to the Mental Health Court to determine fitness for trial can only be made in relation to indictable offences (s 256 *Mental Health Act 2000* (Qld)) or if a simple offence is related to indictable offences which are referred to the Mental Health Court (s 256 and s 257(3) *Mental Health Act 2000* (Qld)). Section 613 *Criminal Code* (Qld) provides for accused persons, when they are called on to plead to an indictment, to have a jury determine whether they are capable of understanding the proceedings at the trial so as to be able to make a proper defence (that is, the issue of fitness to plead). There is no corresponding section in the *Justices Act 1886* (Qld), nor in any other to allow for the determination of the issue of the accused person's fitness to plead to summary offences. The only exception is for defendants already on Involuntary Treatment or Forensic Orders.

24 *McMurdo J in R v AAM, Ex parte Attorney General (Qld)* [2002] QCA 305.

25 There were 188 524 criminal defendants in the magistrates courts in 2012-13, as compared with 5350 criminal matters finalised in the District Courts in 2011-12 and 1130 in the Supreme Court and Court of Appeal in the same year.

26 See *Smith J in R v Presser* [1958] VR 45 at 48.

27 A client may be fit to plead guilty and take part in sentence proceedings, but be unfit to plead not guilty and stand trial. Failure to make a defence or answer a charge does not make the client unfit to plead guilty. *Smith J in R v Presser* [1958] VR 45, 48.

Article 12 of the CRPD states that people with disability must be provided with the support they need to exercise their capacity on an equal basis with others. Instead of *Presser* QAI supports the Australian Law Reform Commission's recent recommendation that any test for fitness must take reasonable decision-making support into account.

### 1.2.2 The insanity defence

The *Criminal Code* (Qld) expressly sets out a presumption<sup>28</sup> that any defendant is of sound mind at the time of an alleged offence.<sup>29</sup> A defendant may rebut the presumption by invoking the anachronistically named insanity defence (or where the charge is murder by arguing diminished responsibility<sup>30</sup>) whether unsoundness of mind<sup>31</sup> was linked to mental disease or to natural mental infirmity.<sup>32</sup> This defence is nominally open but substantively inaccessible to many defendants who meet the legal benchmarks<sup>33</sup> because it requires the opinion of a psychiatrist, and Legal Aid Queensland does not fully fund such services, even for eligible applicants.

**The 'insanity' defence** - s 27 *Criminal Code* 1899 (Qld) - The use of the term 'insanity' is a legal anachronism that conflates congenital intellectual impairment with mental illness. This categorical confusion has devastating cumulative effects in the forensic system. People with intellectual disabilities are still placed in mental health facilities - whether or not they have a mental illness.

### 1.2.3 Stranded in the forensic system

The *Mental Health Act 2000* (Qld) reverses the presumption of capacity in relation to people who are currently subject to an Involuntary Treatment Order (ITO) or Forensic Order (FO). When people on such an order are charged with any offence, the matter must be assessed to consider referral to the Queensland Mental Health Court, statutorily established to determine whether a person had capacity at the time of an alleged offence (soundness of mind) or capacity to plead or stand trial (fitness) and to make appropriate orders if the accused is unsound or unfit.

The Mental Health Court may determine that a person with intellectual impairment, for example, is unfit for trial. It may order that they be detained for treatment or care in the Forensic Disability Service. The order may remain in place indefinitely, and potentially for a period much longer than the relevant term of a sentence had the person been found guilty of the offence. Since its opening in 2011, no person detained at the Forensic Disability Service has yet been released. It is likely that the longer people are detained the more their capacities will diminish, particularly given the limited opportunities to use those capacities. While the courts have a duty to the public to manage risk, the cost to the defendant is high. The indefinite detention of

28 The presumption operates except in relation to defendants who are already on a Forensic Order or Involuntary Treatment Order pursuant to the *Mental Health Act 2000* (Qld).

29 Section 26 *Criminal Code* (Qld). That longstanding code and common law presumption is similarly enshrined in Article 12 of the *Convention on the Rights of Persons with Disabilities*. Article 12: 'States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others'.

30 S 304A *Criminal Code* (Qld).

31 'Mental disease' and 'natural mental infirmity' are the relevant legal terms denoting a underlying pathological infirmity of the mind including in a number of established categories and intellectual or cognitive impairments respectively - see *Radford v The Queen* (1985) 42 SASR 266 & *R v Rolph* [1962] Qd R 262.

32 Both are anachronistic terms: see Section 27 *Criminal Code* (Qld). Insanity is a misnomer - see text box.

33 Section 27(1) *Criminal Code* (Qld) requires that the person was: 'in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission'.

those with intellectual impairments on the basis of a risk of harm to others is discriminatory. Those without mental or intellectual impairments are not, as a general rule, indefinitely detained on this basis.

These are just a few of the problems raised by the respondents to research and findings by QAI's own legal advocates. In the following pages, QAI elaborates on the preceding examples and provides others where, in QAI's view, the law makes insufficient or inappropriate provision in relation to people with disabilities - examples that demonstrate the need for lawmakers to continually refine the criminal justice system's legislative framework and balance the theoretical right to equality with the lived experience of impairment.

### 1.3 Objective

The following case study is one of many that prompted QAI to undertake the writing of this book.

#### **Summary offences: case scenario**

A young woman with an intellectual disability repeatedly stole a number of small items from a local retailer, and on a number of these occasions police attended and placed her under arrest. The offences were dealt with in the Magistrates courts.

The Mental Health Court (Mental Health Court) later determined that the young woman lacks the capacity to understand the wrongness of her actions, to enter a plea or otherwise participate in the court process - i.e. that she is permanently unfit for trial. But the young woman had already entered a guilty plea and had been fined in the Magistrates Court. She sought a Governor's pardon, and the Court of Appeal set her convictions aside, inferring from the Mental Health Court's findings that she was not fit to plead in relation to the Magistrates Court matters.

This report is designed to complement rather than repeat the broad critical analysis of *Disabled Justice*, published by QAI in 2007.<sup>34</sup> In its recommendations, the original work focussed on high-level managerial initiatives designed to address the whole complex of relationships between the criminal justice system and people with disabilities. The report made critical observations pertinent to criminal justice institutions in most Australian jurisdictions. It described a largely homogeneous disability identity interacting with generalised criminal justice institutions like the police, the courts and corrective services. That rhetorical homogenisation of disability was critical to that report's polemical intent and to its unprecedented success in galvanising action.<sup>35</sup>

Those recommendations remain as valid as ever,<sup>36</sup> but this subsequent publication sets out to complement the earlier work with a more narrow focus. QAI appreciates that disability is an evolving concept and offer specific suggestions for the reform of express legislative provisions, recognising that criminal justice solutions will be as varied as the innumerable ways impairment meshes with the system.

<sup>34</sup> P French & the Disability Studies and Research Institute. 2007. *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland*. Queensland: Queensland Advocacy Incorporated.

<sup>35</sup> *Disabled Justice* prompted the Queensland Government to formulate its own report in response.

<sup>36</sup> The Queensland government implemented a number of the recommendations. Relevant government departments and Legal Aid developed Disability Justice Plans.



*dis-Abled Justice* builds on earlier work by examining the relationship between criminal responsibility and various forms of impairment in detail, and illuminating the benefits to be gained by developing individualised strategies and identifying micro-reforms: small, manageable changes that address gaps and inequities in relation to the treatment of suspects, defendants, offenders, witnesses and victims with intellectual and cognitive impairments and mental health issues. QAI interviewed practitioners and professionals who work in the criminal justice system and gaps and inequities and proposed potential remedies. Appendix B outlines the method that was used/utilised in more detail. Our recommendations reflect the micro-analysis of the bulk of this report which, apart from an introductory chapter on overrepresentation, charts a similar linear pathway<sup>37</sup> through the system as that followed by suspects and offenders.

## 1.4 Themes

The key themes explored in *dis-Abled Justice* are:

- **Overrepresentation** - People with disabilities are consistently overrepresented in the criminal justice system as victims and offenders, notwithstanding a long-term state and national downward trend in crime rates.
- **Criminogenic factors** - Crimes by persons with disability are linked to unemployment, poverty, limited life experiences and marginalisation from the community.
- **Support and identification** - Mechanisms are needed to detect, identify and divert people with intellectual impairment and provide decision-making support to anyone who needs it so that they may exercise their capacity on an equal basis with others.
- **Sentencing options** - The courts, particularly magistrates, need more and qualitatively better sentencing options for people with impaired capacity.
- **Imprisonment is ineffective** - Imprisonment punishes and temporarily protects the community, but it neither deters nor rehabilitates.
- **Imprisonment is a training ground** - Prison exacerbates exploitation and abuse of people with disabilities and many will develop criminal behaviours in order to survive.
- **Imprisonment is costly** - Imprisonment costs more and achieves less than alternatives.
- **Prison services are inadequate** - Prison-based psychiatric and rehabilitative services are inadequate or inappropriate.
- **Need for post-prison supports** - Post-prison accommodation, education and training, employment and income support is critical to reducing recidivism.
- **Need for holistic responses** - Effective strategies for reducing crime by people with capacity impairments are strategies for increasing employment, supports, participation and well-being.

A brief description of each theme is provided below.

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<sup>37</sup> Although unfortunately this pathway is in reality often circular due to recidivism.



### 1.4.1 Overrepresentation

People with impaired capacity<sup>38</sup> are overrepresented at every stage in the criminal justice process, as victims, suspects, defendants, offenders, prisoners and repeat offenders. This overrepresentation is costly to people with disabilities and their families and costly to the community and taxpayer, who fund policing, judicial and corrective institutions.<sup>39</sup>

People with intellectual disabilities are imprisoned at approximately five times the rate of the general population. Queensland Corrective Services conducted a general survey of Queensland prisoners in 2002 and determined that 10% of the prison population at that time had IQs indicative of intellectual disability (below IQ 70) and that a further 29 per cent of prisoners were in the borderline range (IQ 70-79).<sup>40</sup> The significance of the overrepresentation is illustrated by these figures, when considering people with intellectual disability make up only 2% of the general population.

**Case study - Paul** is about 45 years old and has chosen to live in Brisbane's New Farm, initially for its proximity to a sheltered workshop and later because the suburb's many rooming houses were accessible without bond money. Gentrification reduced boarding house stock and Paul now alternates between rooming and 'sleeping rough'. After his most recent eviction he moved to a car park near Brunswick St where he has been physically attacked twice.

### 1.4.2 Crime is trending downward but overrepresentation is not

Police Commissioner Stewart noted in 2013<sup>41</sup> that the Queensland crime rate has trended downwards for a decade: "[it is] considerably lower than it was in 2000-1... a 25% decrease".<sup>42</sup> Offences against the person have decreased by 19% in the decade from 2002<sup>43</sup> and homicide by 40% over the same period.<sup>44</sup> Sexual offences, property, breaking and entering, arson, unlawful use of a motor vehicle and fraud offences have all decreased in varying degrees (fraud by nearly 60%).<sup>45</sup>

**Case Study - 'Robert' - summary offences, no diversion.** A man with an intellectual disability stole a chicken from a local butcher. He took the chicken to his local pub and asked the publican to cook it, but the publican told him to leave. The man walked to the school that he had once attended and there he ate the chicken raw. A teacher called the Toombul police and the man was apprehended, charged and released. Police later arrested him for an exposure offence at a different location. The Magistrate said he believed this was a case of 'complete lack of capacity' but the system did not allow him to recognise it as such. The Magistrate did not feel in a position to simply ignore the offences, but nor did he want to issue any kind of punitive or custodial sentence. The law does not provide for the determination of capacity in relation to minor offences.

38 Impaired capacity may be associated with intellectual disability, acquired brain injury, fetal alcohol spectrum disorders and mental illness.

39 See C Mason. 2007. *Pathways for People with a Disability in the Criminal Justice System: Using a benefit cost analysis to reframe the approach to policies and programs*, for comparative costings of early human services intervention vs criminal justice intervention for people with intellectual disabilities in Queensland, particularly at 33: 'when taken over the whole life of the individual who requires an ongoing response, without human service interventions, responses will likely shift to criminal justice responses which are most costly in client, social and resource allocation terms'.

40 Queensland Corrective Services. 2002. *Intellectual Disability Survey 2002*.

41 Queensland Police Service. 2013. *Annual Report 2012-2013*, 3.

42 There were, he said, '12 424 total offences per 100 000 population in 2000-1, compared to 9 561 per 100 000 population in 2012-13'.

43 From approximately 740 offences per 100 000 in 2002 to 600 offences per 100 000 in 2012: Queensland Police Service *Annual Crime Trends*, <http://www.police.qld.gov.au/Resources/Internet/services/reportsPublications/statisticalReview/1112/documents/AnnualCrimeTrend.pdf>.

44 Ibid. From 1.7 per 100 000 to 1.0 per 100 000 in 2012.

45 Ibid. From approximately 770 offences per 100 000 population to 330 offences per 100 000 population.

Long-term national trends are consistent with these figures: homicides<sup>46</sup> have decreased from 354 victims in 1996 to 274 in 2011. Adjusted per capita, the homicide rate has decreased by 37% since the early 1990s.<sup>47</sup> Crime rates are trending down in many other categories nationally too.<sup>48</sup>

Acknowledging that crime rates are down, the Police Commissioner Stewart noted that “vulnerable people remain overrepresented as victims, offenders, and repeat offenders”.<sup>49</sup> The report notes an anomaly between the general reduction in crime and the continued overrepresentation of people with disabilities. That observation begs the following question: if justice strategies can reduce crime, can they not reduce the criminal justice involvement and incarceration of people with disabilities?

### 1.4.3 Crimes are linked to unemployment, poverty and lack of support

Our interviewees repeatedly asserted that many people with intellectual disability and other capacity impairments offend because they do not have the life experience or sufficient support to know that a particular act is a crime, or because they commit crimes linked to their life circumstances such as poverty, homelessness and childhood institutionalisation. Money spent on programs aimed at reducing homelessness and poverty and on providing support to people with disability is much more likely to reduce crime and make communities safer than money spent on police, courts and prisons. Regardless of questions of morality or human rights, a simple cost-benefit analysis suggests that efforts and money should focus more on the causes than on the punishment of crime.<sup>50</sup> Research by McCausland, Johnson, Baldry and Cohen into the cost-benefit of early support and diversion, for example, suggests that every dollar spent in prevention saves approximately \$1.70 later on.<sup>51</sup>

#### Offenders and victims

In the criminal justice process the line between offender and victim of circumstance may be blurred.<sup>52</sup> The Queensland Police Service Annual Report 2011-2012 promises to tackle this anomaly, itemising it under ‘Challenges and Tasks’.<sup>53</sup>

It is a question particularly relevant to the treatment of people with capacity impairments, who are collectively one of the most vulnerable and disadvantaged groups in our society; more likely to be unemployed, poor, illiterate or less-educated, to have experienced childhood neglect or abuse, to have problems in social and communication skills or to have behavioural and/or psychiatric disorders.<sup>54</sup>

46 This includes manslaughter.

47 Australian Institute of Criminology. 2012. *Crime Facts 2012*, [http://www.aic.gov.au/media\\_library/publications/facts/2012/facts12.pdf](http://www.aic.gov.au/media_library/publications/facts/2012/facts12.pdf).

48 Ibid. Fraud, for example, has decreased from 500 to 374 offences reported per 100 000 population over the period from 1996 – 2011.

49 Queensland Police Service. 2013. *Annual Report 2012-2013*, 2.

50 The Honourable Wayne Martin AC1, Chief Justice of Western Australia. 2014. *The Cost of Homelessness - A Legal Perspective* presented at Homeless Persons Week Conference, Parmelia Hilton Hotel Wednesday, 6 August 2014

51 Eileen Baldry, Ruth McCausland, Anna Cohen & Sarah Johnson. 2013. *People with mental health disorders and cognitive impairment in the criminal justice system - cost-benefit analysis of early support and diversion*. UNSW and Price Waterhouse Coopers.

52 See, for example, Kathleen Daly. 2008. ‘Seeking Justice in the 21st Century: Towards an Intersectional Politics of Justice’. In H. E. Ventura Miller (ed.). *Restorative Justice: From Theory to Practice. Sociology of Crime, Law, and Deviance Series*, 11.

53 Ibid, 4.

54 William Glaser & Kristen Deane. 1999. ‘Normalisation in an Abnormal World: A Study of Prisoners with an Intellectual Disability’ *International Journal of Offender Therapy and Comparative Criminology* 43(3): 338; Susan Hayes. 2005. *Prison Services and offenders with intellectual disability – the current state of knowledge and future directions*. 4th International Conference on the Care and Treatment of Offenders with a Learning Disability, 2005 April 6-8, University of Central Lancashire, Preston, UK.

#### 1.4.4 Identification and support

Providing support so that people can exercise their legal capacity on an equal basis with others is no less important than identifying and diverting people who have intellectual impairment. Some experts have called for early testing so that the police or courts can divert people with intellectual disability away from the justice conveyor belt: the earlier the better, perhaps immediately post-arrest.<sup>55</sup> Others advocate for special court lists where magistrates exercise therapeutic jurisprudence.<sup>56</sup> Such problem-solving courts focus not on punishing defendants but on connecting them with accommodation, health, financial and drug support.

‘Identify and divert’ may be an appropriate strategy for those whose intellectual impairment places them beyond criminal responsibility, but these people are few. A disability exception is an endorsement of reverse discrimination, and tantamount to saying that people with disabilities should have the right to exercise their legal capacity on an equal basis with others and to participate fully in criminal justice processes except when that participation results in findings of criminal responsibility and subsequent incarceration and punishment.

Applied to the criminal law, the *Convention on the Rights of Persons with Disabilities* would have profound implications for court processes and criminal responsibility. A recent report by the Australian Law Reform Commission explored some of those implications in relation to Commonwealth law.<sup>57</sup> Persons with psychosocial disabilities should have a legally conferred right, for example, to supports and accommodations necessary to ensure access to justice and to conditions of punishment that are consistent with respect for human rights and dignity. QAI calls for reform on both ends of the court process: universally-available decision-making support for suspects and defendants, and a wider range of community-based rehabilitative options for offenders.

#### 1.4.5 Better sentencing options

Queensland trialled a version of therapeutic jurisprudence at the Roma Street arrest courts: the Special Circumstances Court was available to defendants who pleaded guilty to minor charges and were prepared to undertake court supervision over weeks and months. The court connected offenders to social services that could assist them with the underlying diversion social causes of their offending, such as housing, financial counselling and debt management, income support and addiction therapy. Defunded in 2012, the Special Circumstances Court was replaced by Queensland Courts Referral (QCR), a bail-based (pre-conviction) scheme for people in relation to simple offences, which similarly connects people to social services that may be able to assist them. These initiatives are discussed further in Chapter 4. Apart from QCR the Queensland’s lower courts have few options.

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55 Susan Hayes has developed the Hayes Ability Screening Index (HASI Test) for this purpose.

56 Queensland’s Special Circumstances Court focussed on homeless people and those with SPUR debts.

57 Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws* (DP 81).

### 1.4.6 Imprisonment not an effective deterrent

Some prisoners feel more secure and at home in jail. While this may well indicate how desperate living conditions for vulnerable people are on the outside, it also suggests that prison is not an effective deterrent. Objectively, prisoners get three meals a day, some exercise and are denied access to drugs and alcohol.<sup>58</sup> Many prisoners, especially those with impairments, have been in and out of institutions since childhood and lack the adaptive skills to function independently. Despite its dangers and the potential for abuse and exploitation, jail can be a place of belonging and security for people with disabilities.

Whatever a prison sentence does achieve, it does not prepare prisoners for thriving self-sufficiency on release. The majority of deaths in recently released prisoners are due to preventable causes such as drug overdose, injury and suicide.<sup>59</sup> Coordinated transitional care for people transitioning to the community can help to prevent their return to prison.<sup>60</sup>

### 1.4.7 Imprisonment is costly

Slightly fewer than 30 000 people reside in Australia's prisons<sup>61</sup> at an annual cost of approximately \$100 000 per annum per person.<sup>62</sup> There are no precise figures, but drawing on figures from studies on imprisonment and people with various forms of intellectual impairment<sup>63</sup> the proportion of prisoners with disabilities may be close to 30%,<sup>64</sup> costing the public \$1 billion annually to keep them in jail.

The placement of people with intellectual disability in prisons alone costs Australian taxpayers approximately \$300 million annually. This is the figure for accommodation and support only, but when lost productivity, the incalculable loss to children deprived of a parent and the ongoing costs of the cycle of post-prison rehabilitation and recidivism are factored in, the real costs are far greater.

Preventing people from entering prison and preventing recidivism by people with intellectual and cognitive disabilities could significantly reduce those proportions. A 10% decrease in the number of prisoners, for example, would result in savings of approximately \$300 million per annum.<sup>65</sup>

Studies comparing the public expenditure savings associated with early intervention and support strategies show a benefit-cost ratio ranging from 1.4 to 2.4. In other words, the cumulative savings from early intervention and proper support mean that every dollar spent early in a person's life saves taxpayers between \$1.40 and \$2.40 later on<sup>67</sup>, and those figures do not even begin to represent the benefits that accrue to those who have avoided a lifetime of cycling through prisons.

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58 These latter are of course prohibited.

59 S Kinner & ML Williams. 2006. *Post-release experience of prisoners in Queensland: implications for community and policy*. Centre for Social Change Research, School of Humanities and Human Services, QUT.

60 S Kinner. 2013. *The World Today*, <http://www.abc.net.au/worldtoday/content/2013/s3809843.htm>.

61 Australian Bureau of Statistics. 2010. *Prisoners in Australia*, Cat. no. 4517.0.

62 Steering Committee for the Review of Government Service Provision (SCRGSP). 2011. *Report on Government Services 2011*. Canberra: Productivity Commission.

63 After comprehensive neurological assessment (rather than self-reporting), in 2011 Corrections Victoria determined that 42% of men and 33% of women in prison had an ABI: Corrections Victoria. *Acquired Brain Injury in the Victorian Prison System*. Corrections Research Paper Series Paper No. 04; April 2011.

64 Australian Institute of Health and Welfare. 2011. *The Health of Australia's Prisoners 2010*. Australian Institute of Health and Welfare.

65 Price Waterhouse Coopers calculations, based on: Australian Bureau of Statistics. 2010. *Prisoners in Australia*, Cat. no. 4517.0.

66 Former Victorian Attorney-General Robert Hulls. *The Law Report*. Radio National. 16 Sept 2014.

67 Eileen Baldry, Ruth McCausland, Anna Cohen & Sarah Johnson. 2013. *People with mental health disorders and cognitive impairment in the criminal justice system - cost-benefit analysis of early support and diversion*. UNSW and Price Waterhouse Coopers.

### 1.4.8 Prison-based psychiatric services are inadequate

When asked about the most pressing post-sentencing gaps, respondents identified the following ‘urgent’ service needs:

- Psychiatric services for people with intellectual disability in prison
- Therapeutic options for people with substance use disorder
- Indigenous clinicians
- Culturally competent clinicians
- Services to assist with transition to community (to reduce costs, recidivism).

People working in the sector often use the term ‘dual diagnosis’ to denote people with both intellectual disability and a mental illness or substance use disorder. In prison the lack of services is such that, although a psychiatrist may identify a mental illness, they know that they will be unable to provide any subsequent therapy.

### 1.4.9 Post-prison support prevents recidivism

The Queensland Centre for Intellectual and Developmental Disability (QCIDD) has conducted a number of post-prison studies of former inmates with intellectual disabilities and has made recommendations aimed at preventing recidivism by this population, with recommendations including:

- Better detection of intellectual disability
- Targeted health assessments
- Tailored health interventions
- Informing transitional/post-release planning of health services and support pathways in the community
- Diversion programmes/schemes.<sup>68</sup>

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<sup>68</sup> See, for example, K van Dooren, S Dias, SA Kinner, R Ware, A Bhandari, N Lennox & Queensland Centre for Intellectual and Developmental Disability. 2013. *Health-related experiences of prisoners with intellectual disability*.

#### 1.4.10 Effective strategies: increasing employment, supports, participation

Baldry and Dowse's NSW study in 2012 established that the majority of persons with disability receive little disability support as children, young people and adults. Indigenous members of the study had the lowest levels of service and support. People with capacity impairments who are afforded disability support and housing support do better, with less involvement in the criminal justice system than those who do not.<sup>69</sup> Effective strategies include:

- Labour market programs that get people into paid work
- Improved community supports and facilities that encourage people to invest in their community
- Education, including civic education in appropriate behaviour, especially relationships and sexual behaviour
- Extra familial, friendship and social supports in the critical five week post-release period, where the mortality, morbidity and overall vulnerability of people with intellectual disability are high.

### 1.5 Conclusion

Having a capacity-related impairment predisposes persons who also experience other unfavourable social circumstances to a greater enmeshment with the criminal justice system early in life. Persons with capacity impairments and other disabilities are significantly more likely to have earlier, ongoing and more intense police, juvenile justice, court and corrections episodes and events.

Support, employment, housing, training and educational opportunities that integrate people with their communities and break down the barriers between 'them' and 'us' are the most effective way of breaking the criminal justice cycle. Early holistic supports are crucial for the development and well-being of children and young people with mental health disorders and cognitive impairment, particularly Aboriginal children, young people and others from disadvantaged backgrounds.

Without such early intervention and diversion the costs to individuals with mental health disorders and cognitive impairments, to their families and communities and to government are high. These costs increase over time as people with mental health disorders and cognitive impairment become entrenched in the criminal justice system and become further marginalised from the community. Case studies presented in Baldry's cost/benefit analysis of different life paths of NSW residents with capacity impairments, illustrate that the lifetime costs of prison and crisis supports can be as high as \$1 million per annum per person.

A number of small but successful initiatives appear to improve well-being and other outcomes for people with mental health disorders and cognitive impairment and result in diversion from the criminal justice system, with favourable cost-benefit ratios.<sup>70</sup>

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69 Eileen Baldry, Leanne Dowse & Melissa Clarence. 2012. *People with intellectual and other cognitive disability in the criminal justice system*. Report for NSW Family and Community Services Ageing, Disability and Home Care.

70 Ruth McCausland, Sarah Johnson, Eileen Baldry & Anna Cohen. 2013. *People with mental health disorders and cognitive impairment in the criminal justice system Cost-benefit analysis of early support and diversion*. University of New South Wales.

Having provided an overview of the scope of the problems that exist at the interface between disability and the criminal justice system, the remainder of the report will examine these issues in detail and propose recommendations for reform. The next chapter will begin this by looking at the issue of overrepresentation, noting the concerning evidence that people with intellectual and cognitive impairments and mental health disorders are overrepresented in every form of interaction with the criminal justice system as suspects, defendants, offenders, prisoners, repeat offenders and victims. The chapter will consider the reasons for this and propose some recommendations aimed at redressing this.

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## 2. Overrepresentation - Evidence and Reasons

### 2.1 Summary and key recommendations

The overrepresentation of people with disability in the criminal justice system is a symptom of the root problems facing people with disability in a society that rewards excellence and penalises non-normative behaviour. It has social, legal, economic and human consequences. It devastates the lives of offenders and victims and their families and supporters; strains the public purse with ever-increasing resource demands for police, legal aid, court facilities, prisons and other corrective services; contravenes the principles of anti-discrimination and equity and violates the human rights of people with disability. In this chapter we examine the extent of the overrepresentation and the reasons for it. We begin with a number of key recommendations.

#### Key recommendations

QAI recommends that the Queensland government:

- Develops a Disability Justice Strategy that:
  - aims to reduce overrepresentation
  - sets up trials for diversionary options
  - mandates high level cooperation between the Queensland Police Service, the Department of Justice and the Attorney-General, the Department of Communities and the National Disability Insurance Agency.

QAI recommends that the Department of Justice and Attorney-General:

- Funds Queensland research on overrepresentation of people with disability in the criminal justice system, in general and in particular as they interact with:
  - police
  - courts
  - corrections.

## 2.2 Overrepresentation – comparative data

<b>2%</b>	People with intellectual disability — general population <sup>1</sup>
<b>9.8%</b>	People with intellectual disability — Qld prisons <sup>2</sup>
<b>10%</b>	People with intellectual disability — Qld criminal justice system <sup>3</sup>
<b>30%</b>	People with intellectual disability — former prisoners <sup>4</sup>
<b>13.6%</b>	People with learning disability — general population <sup>5</sup>
<b>28.6%</b>	People with learning disability — Qld prisons <sup>6</sup>
<b>22.3%</b>	Women with a mental health disorder - Australia <sup>7</sup>
<b>57.1%</b>	Women with mental illness — Qld prisons (diagnosed) <sup>8</sup>
<b>9%</b>	Women in Qld prisons admitted to a psychiatric hospital <sup>9</sup>
<b>23%</b>	People with intellectual disability — NSW Local Courts <sup>10</sup>
<b>51.5%</b>	People with intellectual & learning disabilities — NSW local courts <sup>11</sup>
<b>9%</b>	Suspects with an intellectual disability interviewed by police — UK <sup>12</sup>
<b>42%</b>	Suspects with learning disabilities — UK <sup>13</sup>

- 1 The figure varies from ~1.5 – 3% depending on the source. In the DSM-V intellectual disability is defined as < IQ70 and deficits in adaptive functioning. IQ relative to a population, not absolute; and < IQ70 means that the test-taker's score is more than 2 standard deviations below the median score in the test-taker's age group. Unlike many physical disabilities, there is no bright line that divides people with intellectual impairments from those who do not. The important question is not 'What is this person's disability?' but 'What is this person's support need/s?'.
- 2 Queensland Department of Corrective Services. 2002. *Intellectual Disability Survey, 2002*.
- 3 This figure is an inference drawn from a collation of all studies: F Parton, A Day & J White. 2005. 'An Empirical Study on the Relationship Between Intellectual Ability and an Understanding of the Legal Process in Male Remand Prisoners', in *Disability and the Criminal Justice System: Achievements and Challenges*. Rydges Hotel, Melbourne.
- 4 In NSW: S Hayes & D McLwain. 1988. *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study*. Sydney.
- 5 Ibid.
- 6 Ibid. 'Learning disability' is roughly synonymous with 'mild' intellectual disability i.e. IQ in the 70-84 range.
- 7 4125.0 - Gender Indicators, Australia, Jan 2013- <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features3150Jan%202013>>
- 8 Reported by the women themselves. B Hockings et al. 2002. *Queensland Women Prisoners Health Survey*. Department of Corrective Services.
- 9 Ibid.
- 10 On criminal charges. New South Wales Law Reform Commission (NSWLRC).1993. *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts*. Research Report No 3.
- 11 New South Wales Law Reform Commission. 1996. *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts*. Research Report 5.
- 12 M Burton M, R Evans & A Sanders. 2006. *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies*. Online report 01/06. London: Home Office
- 13 M Lyall et al. 2002. 'Incidence of persons with a learning disability detained in Police Custody: A needs assessment for service development'. *Medicine, Science and Law*. 35(1): 61-71.

## 2.3 Overrepresentation as suspects, defendants and offenders

The statistics are overwhelming. Our collective failure to include and to provide appropriate supports to people with disabilities is clearly corroborated than in the overrepresentation of people with disabilities in the criminal justice system as suspects, defendants, offenders, prisoners, repeat offenders and victims of crime. The line between offender and victim blurs when the lived experience of impairment collides with a punitive rather than restorative and capacity-building justice system.

“While Queensland crime rates have trended downwards over the last decade, vulnerable people remain overrepresented as victims, offenders, and repeat offenders.”<sup>14</sup>

People with intellectual disability are imprisoned at five times the rate of the general population.<sup>15</sup> Almost half of Queensland prisoners have a disability, including intellectual disability, mental illness,<sup>16</sup> acquired brain injury, fetal alcohol spectrum disorder and other capacity impairments.<sup>17</sup> Amongst Queensland Aboriginal and Torres Strait Islander prisoners the proportion with disabilities is even higher; 73 percent of men and 86 percent of women in Queensland jails have mental health disorders.<sup>18</sup>

These figures challenge Australia’s egalitarian self-image and challenge our commitment to human rights, natural justice and systemic equity. Political and moral judgements aside, this overrepresentation is costly to people with disabilities and their families who cope with disruption, stigma, loss and separation; and costly to society in both human and dollar terms.<sup>19</sup>

Despite the fiscally conservative political climate and the steady decline in the crime rate we are building more jails and prisoner numbers are increasing at a rate faster than the population itself.<sup>20</sup> Queensland is currently spending \$61 million to expand its jails,<sup>21</sup> yet imprisonment is exponentially more costly than any other kind of response to offending. A fraction of this cost would support offenders to live in the community with appropriate safeguards and with less jail-induced loss of capacity and living skills. The substantial remainder could go to meeting the urgent need for affordable housing, inclusive schools and vocational education and training. Such measures would help to prevent people with disabilities from first coming into contact with the criminal justice system.

14 Queensland Police Service. *Queensland Police Service Strategic Plan 2012-2016*.

15 Corrective Services Queensland. 2002. *Intellectual Disability Survey 2002*.

16 About 33% of Australian prisoners have a mental illness (Australian Institute of Health and Welfare. 2011. *The Health of Australia's Prisoners 2010*) and 10% have an intellectual disability, of whom half have a mental illness – making a total of 38% of prisoners in these two categories alone.

17 I Heffernan, K Anderson & K Dev. 2012. *Inside Out - The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report*. Queensland Forensic Mental Health Service.

18 This is the 12 month prevalence: *ibid*.

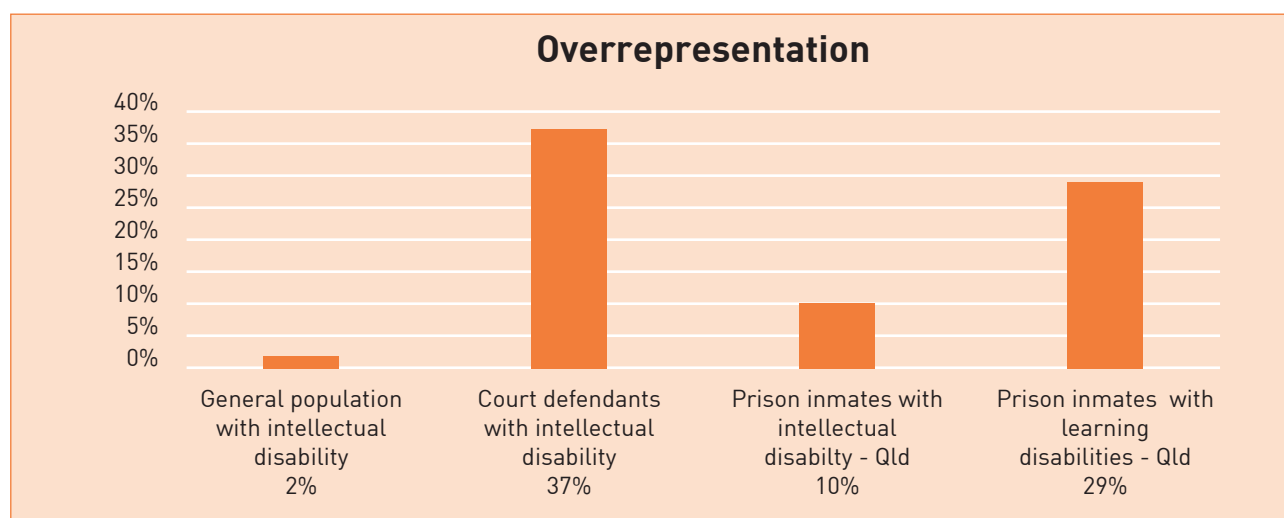
19 See C Mason & W Robb. 2010. *Preparing Pathways to Justice: Intervening early for vulnerable people with impaired capacity*. Queensland Advocacy Incorporated, for comparative costings of early human services intervention vs criminal justice intervention for people with intellectual disabilities in Queensland, particularly at 33: ‘when taken over the whole life of the individual who requires an ongoing response, without human service interventions, responses will likely shift to criminal justice responses which are most costly in client, social and resource allocation terms’.

20 As of 1 June 2014, the State’s prison population stood at 7222, and the incarceration rate at 189 per 100 000 putting the State just above the national average, and notably in excess of the State’s prison built-cell capacity which stood at 6,832 across a total of 13 correctional facilities. In 2013 the state saw a 9% increase in the number of prisoners to 6,076 overall, lifting the crude rate of incarceration from 159 per 100,000 in 2012 to 169 per 100,000 in 2013. During 2013-14 a further 1,000 prisoners were added. The number of people on remand or in jail rose by 16 percent over the twelve months to June 2014. From 168.8 to 194.6 prisoners per 100 000 people from June quarter 2013 to June quarter 2014: Australian Bureau of Statistics. *Corrective Services in Australia*. ABS 4512.0.; Steering Committee for the Review of Government Service Provision, ‘Table 8A.2, Correctional custodial facilities, at 30 June 2013 (number),’ Report on Government Services 2014, Volume C: Justice, Commonwealth of Australia: Melbourne, 2014, page 1 of Table 8A.2.

21 *Ibid*.

The Victorian government has explicitly recognised the systemic nature of the problem. According to their Department of Justice:

[t]he increased numbers of offenders with a disability in the forensic disability arena as a whole is testing the capacity of Corrections Victoria and Disability Services (Department of Human Services, Victoria) and highlights the fact that it is a ‘whole of systems’ problem, not solely a correctional issue.<sup>22</sup>



## 2.4 Police contact

Reliable data on the prevalence of people with intellectual disability and other capacity-related impairments comes disproportionately from prisons rather than from earlier stages in the criminal justice process. Absent Queensland research we make inferences based on data from other jurisdictions. Pre-conviction data from outside Queensland provide a picture undistorted by court filtering processes and help to inform decisions about appropriate early interventions.

The NSW Law Reform Commission investigated the experiences of people with intellectual disability in the criminal justice system in the mid - 1990s, commissioning local court studies led by Susan Hayes:

- 23.6 percent of defendants across six local courts had intellectual disability<sup>23</sup>
- 14.1 percent of defendants had learning difficulties or were in the borderline range<sup>24</sup>
- 40 percent of defendants had learning or intellectual impairments

The data challenged two-dimensional media stereotypes: instead of hardened career criminals many defendants are people who have intellectual impairment, come from low socio-economic backgrounds, did not complete school and are poor and often unemployed. Their crimes are usually non-violent and commonly involve some form of public nuisance, drug possession or opportunistic petty theft. Policy makers and legislators have based subsequent policy and legislative reform on these findings.

<sup>22</sup> Department of Justice. 2009. *Committing to the Challenges Corrections Victoria Disability Framework 2010–2012*.

<sup>23</sup> S Hayes. 1997. 'Prevalence of intellectual disability in local courts'. *Journal of Intellectual and Developmental Disability*. 22(2): 71-85.

<sup>24</sup> IQ 70-79.

Research commissioned by the NSW Law Reform Commission in 2012 examined defendants and mental health, finding that police in NSW spend approximately 10 percent of their time with people with mental health impairments.<sup>25</sup> A Victorian study showed that people with mental illnesses are overrepresented among those taken into police custody:

- More than half had prior contact with the public mental health system.
- One-third of detainees reported current psychiatric symptoms (most commonly anxiety and depression) at the time of detention.
- One-third of detainees were receiving psychiatric treatment in the community at the time of arrest.<sup>26</sup>

In a follow-up Victorian study the authors assessed 150 people in police cells to identify current and lifetime mental illness:

- Three-quarters of the detainees met diagnostic criteria for at least one mental disorder.
- Over half of the detainees had a history of contact with public mental health services.
- A quarter of detainees had been admitted to psychiatric hospitals on at least one occasion.
- The majority of detainees had committed non-violent offences.<sup>27</sup>

More recent research explored the relationship between offending, mental health and experiences of abuse among a sample of police detainees in New South Wales, Queensland, South Australia and Western Australia. It found high levels of mental illness symptoms, particularly among women.<sup>28</sup> The 2012 'Gateway study' established that:<sup>29</sup>

- 41 percent of detainees had been previously diagnosed with a mental health problem
- 64 percent of women and 46 percent of men were screened and identified as having a mental disorder

The figures demonstrate that police work is largely work with people with various forms of intellectual and mental health impairment. We discuss the implications in more detail in Chapter 3 but it is clear that police training must focus on how to interact with vulnerable people with mental health issues, intellectual disability and other capacity impairments.

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25 New South Wales Law Reform Commission. 2012. *People with cognitive and mental health impairments in the criminal justice system- Diversion*. Report 135. [www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc).

26 G Baksheev, S Thomas & J Ogloff. 2010. 'Psychiatric disorders and unmet needs in Australian police cells'. *Australian and New Zealand Journal of Psychiatry*. 44: 1043-1051. These results are an underestimate due to the nature of police screening and because the samples did not include those people with mental illnesses taken by the police to hospital.

27 G Baksheev, S Thomas & J Ogloff. 2011. 'Identification of mental illness in police cells: a comparison of police processes, the Brief Jail Mental Health Screen and the Jail Screening Assessment Tool'. *Psychology, Crime and Law*. 18(6): 529-542.

28 L Forsythe, K Adams. 2009. 'Mental health, abuse, drug use and crime: does gender matter?'. *Trends & issues in crime and criminal justice* No. 384. Australian Institute of Criminology.

29 L Forsythe & A Gaffney. 2012. 'Mental disorder prevalence at the gateway to the criminal justice system'. *Trends & issues in crime and criminal justice* No. 438. Canberra: Australian Institute of Criminology. In addition they found that:

43 percent of male detainees and 55 percent of female detainees self-reported as having been previously diagnosed with a mental disorder.

28 percent of male detainees and 42 percent of female detainees who had not previously been diagnosed met the criteria for a diagnosable mental illness.

## 2.5 Overrepresentation in courts- defendants

People with intellectual impairments, too, are overrepresented as defendants in courts. Hayes' early-1990s research determined that 23.6 percent of defendants had mild intellectual disability<sup>30</sup> and her follow-up work indicated little change in just over a decade: 10 percent of participants had intellectual disability and a further 20 percent were in the borderline range.<sup>31</sup>

"I would say most of the people who come before us have some issue, whether it's mental health issues, acquired brain injury... intellectual disability, learning disabilities, and then often obviously drug use."<sup>32</sup>

Of those, 46 percent were mentally ill compared to 36 percent of those without intellectual disabilities. The proportion of appearances by people with intellectual disabilities was more than three times the rate of the general population.<sup>33</sup> In rural jurisdictions with a high Aboriginal and Torres Strait Islander population more than half of the accused were likely to have intellectual disability.<sup>34</sup>

Baldry's 2012 research established that approximately 24 percent of all people (and 43 percent of Aboriginal and Torres Strait Islander defendants) appearing before a NSW court had an intellectual disability.<sup>35</sup> Victorian parliament's Law Reform Committee commissioned the inquiry *Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* in 2013.<sup>36</sup> The Magistrates Court of Victoria estimated that 55 percent of people coming before the Courts had intellectual impairment.

### 2.5.1 Defendants with learning disabilities

Many defendants have cognitive impairments, but not to the extent that they would meet the requirements for the label 'intellectual disability'. Some jurisdictions/researchers refer to this as 'borderline intellectual disability',<sup>37</sup> and in others, such as in Queensland, it may be used in a way roughly synonymous with 'learning disability'<sup>38</sup> or 'learning impairment'.

30 Hayes assessed defendants in four regional, two city magistrates' courts in NSW in 1992 and 1995. S Hayes. 1996. *People with an Intellectual Disability and the Criminal, Two Rural Courts*. NSW Law Reform Commission Report No 5. Sydney.

31 In four NSW magistrates' courts: K Vanny, M Levy, D Greenberg & S Hayes. 2008. 'Mental illness and intellectual disability in Magistrates Courts in New South Wales, Australia'. *Journal of Intellectual Disability Research*. 53(3):289-97.

32 Magistrate Pauline Spencer. Radio National. *The Law Report*; 16 September 2014.

33 Ibid.

34 S Hayes. 1997. 'Prevalence of intellectual disability in local courts. *Journal of Intellectual and Developmental Disability*' 22(2): 71-85.

35 E Baldry, L Dowse & M Clarence. 2012. *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*. University of New South Wales. Available from: [www.adhc.nsw.gov.au/about\\_us/research/completed\\_research](http://www.adhc.nsw.gov.au/about_us/research/completed_research).

36 Victorian Aboriginal Legal Services Co-operative Limited. 2013. Submission no. 39 to *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers. March 2013, p 18. [http://www.parliament.vic.gov.au/file\\_uploads/Law\\_Reform\\_Committee\\_-\\_Access\\_to\\_and\\_interaction\\_with\\_the\\_justice\\_system\\_by\\_people\\_with\\_an\\_intellectual\\_disability\\_and\\_their\\_families\\_and\\_carers\\_-\\_Final\\_report\\_76JG2vK1.pdf](http://www.parliament.vic.gov.au/file_uploads/Law_Reform_Committee_-_Access_to_and_interaction_with_the_justice_system_by_people_with_an_intellectual_disability_and_their_families_and_carers_-_Final_report_76JG2vK1.pdf).

37 NSW Law Reform Commission. 2012. *People with Cognitive and Mental Health Impairments in the Criminal Justice System*. Report 135. The Commission provides this definition: '[People with borderline intellectual disability are those] who do not meet formal diagnosis of intellectual disability but who have cognitive and adaptive deficits compared with the general population'.

38 It is not a perfect match, as 'Borderline' is IQ-defined and learning disability is not.

Research on behalf of the New South Wales Law Reform Commission identified 8.8 percent of defendants as having borderline intellectual disability. People with learning disabilities are less likely to be identified as having an intellectual impairment and as such are ineligible for supports and miss out on the protections and legal safeguards that otherwise would have been available .

### 2.5.2 Defendants with mental illness

Almost one third of defendants before NSW magistrates' courts in a twelve month period were documenting as having a mental health problem,<sup>39</sup> and in another NSW study more than half of the people sampled reported one or more psychiatric disorders, particularly depression and anxiety.<sup>40</sup> A recent bail and remand study in South Australia found that an alarming 50.3 percent of young people showed signs of mental health problems.<sup>41</sup> A Bureau of Crime Statistics and Research study of NSW court defendants found that approximately 55 percent of those surveyed had one or more psychiatric disorders in all categories of mental illness.<sup>42</sup>

## 2.6 Prison and other correctional orders

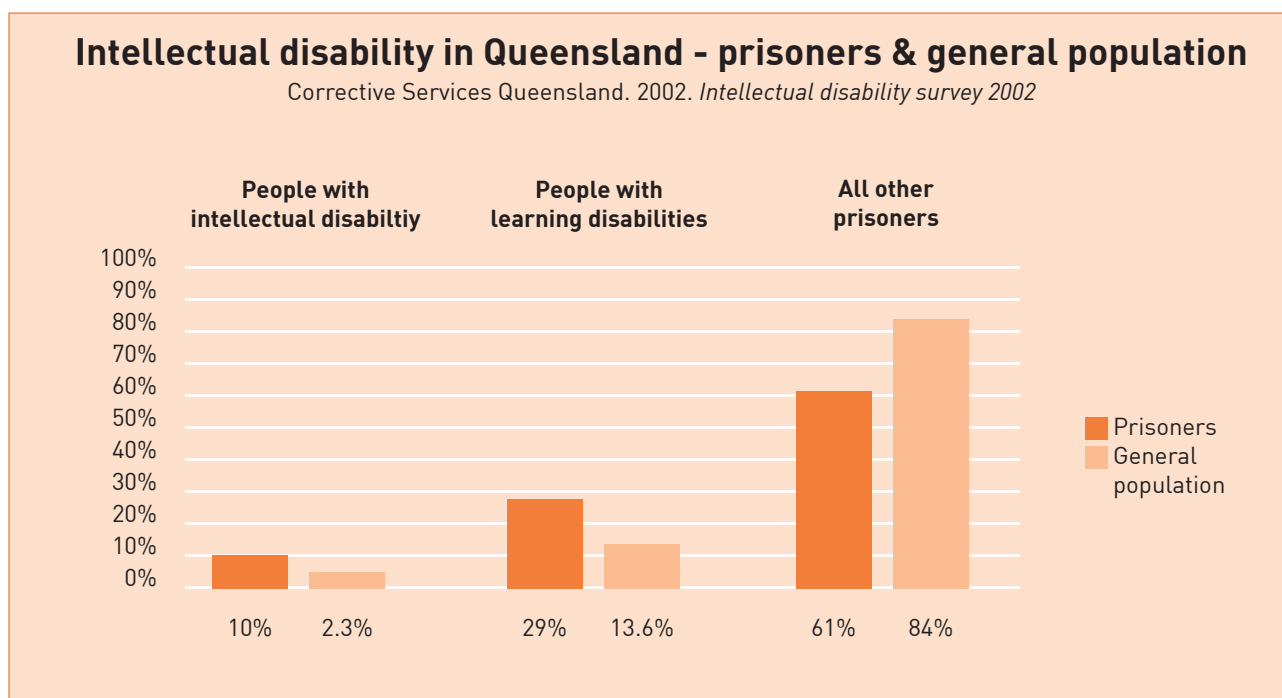
People with intellectual disability are jailed at three to four times the rate of the general population in common law jurisdictions.<sup>43</sup> Rates of overrepresentation in the UK, for example, are confused by the overlap between prisons and secure psychiatric facilities, but the combined rate of 16 percent (prisoners with intellectual disability) is consistent with other jurisdictions, including in the US<sup>44</sup> and Australia.<sup>45</sup>

**Case study one:** A client who was initially considered to have an intellectual disability was reassessed as having an IQ of 78 and therefore '[did] not have an intellectual disability' according to the DSM4/ ICD 10 and Disability Services Queensland. Consequently, DSQ withdrew the funding that enabled him to live in the community. As a consequence of the resulting lack of support, and because of his 'risk' (based on past offending behaviour) he was placed in an acute ward in a mental health facility.

- 39 S Hayes, M Levy, K Vanny & D Greenberg. 2008. 'The evidence from Magistrates Courts - the prevalence of accused persons with intellectual and cognitive disabilities'. Paper presented at the Australasian Society for the Study of Intellectual Disability 43rd Conference.
- 40 C Jones & S Crawford. 2007. *The Psychosocial Needs of NSW Court Defendants, Crime and Justice Bulletin No 108*. New South Wales Bureau of Crime Statistics and Research. The researchers did not apply a validated measurement scale so some of the participants might have over-diagnosed their health problems.
- 41 M G Sawyer *et al.* 2010. 'The Mental Health and Wellbeing of Adolescents on Remand in Australia'. *Australian and New Zealand Journal of Psychiatry* 44: 551.
- 42 Ibid. BOSCAR participants re: mental illness were self-selecting and self-reporting.
- 43 S Hayes & G Craddock. 1992. *Simply Criminal*. 2nd edition, p 46. An accurate estimate is difficult. In NSW prisons 12.9 percent of the inmate population were within the intellectual disability (IQ < 70 = 2.4 percent) or borderline (IQ 70-80 = 10.4 percent) ranges S Hayes & D McIlwain. 1988. *The prevalence of intellectual disability in the New South Wales prison population - An empirical study*. Report to the Criminology Research Council, Canberra. A later study confirmed that inmates with intellectual disability comprise up to 20 percent of the NSW prison population- S Hayes. 1996. 'Early intervention or early incarceration'. 44(3&4):311; J Tomasoni & E Arnold. 'The statewide forensic program - A treatment model for offenders with an intellectual disability'. Unpublished Manuscript; 1996. Given that approximately 1.85 percent of Australians have intellectual disability (W Xingyan. 1997. *The definition and prevalence of intellectual disability in Australia*. Canberra: Australian Institute of Health and Welfare), the rate of imprisonment is at least tenfold in NSW correctional facilities (NSW Law Reform Commission. 2001. *Sentencing young offenders- Sentencing by courts*. Issues Paper 19; [www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc)). Between 6 and 19 percent of probationees exhibit indications of intellectual disability yet few have had actual contact with intellectual disability services (A Crocker, G Cote, J Toupin & B St Onge. 2007. 'Rate and characteristics of men with an intellectual disability in pre-trial detention'. *Journal of Intellectual & Developmental Disability*. 32(2):143-152).
- 44 J Petersilia. 1997. 'Unequal Justice? Offenders with Mental Retardation in Prison'. *Corrections Management Quarterly*. 1(4):36-44. In the late 1990s Petersilia estimated the US figure at between 4 and 14 percent and noted a twofold increase in that proportion due to a range of factors, including de-institutionalization, inadequate options for diversion and an apparent increase in the prevalence of intellectual disability in low income populations.
- 45 P Taylor, *et al* 1998. 'Mental Disorder and Violence. A Special (High Security) Hospital Study'. *British Journal of Psychiatry*. 172:218-226.

## 2.6.1 Prison as a last resort

The courts sentence some people with intellectual disability to prison as a ‘last resort’ because there is no appropriate alternative<sup>46</sup> and community-based services, if they exist at all, have failed.<sup>47</sup> This is incarceration by default.<sup>48</sup> Corrections Queensland allocates some people with intellectual disabilities to maximum security prisons because of their vulnerability to other inmates, regardless of the nature of their conviction.<sup>49</sup>



The demographics of those with intellectual disability that enter prison resemble those of inmates without intellectual disability. Typically they come from lower socio-economic backgrounds, are unemployed at the time of conviction, are younger and male and may also have a history of disconnected family networks, institutional care, poor education, and drug and alcohol problems.<sup>50</sup> In Queensland, the most recently published general survey of prisoners suggested that about 10 percent of the prison population had IQ's indicative of intellectual disability and a further 29 percent of prisoners were in the borderline range.<sup>51</sup>

46 J Simpson. 1997. Options to imprisonment: Legal and related issues concerning the Department of Community Services providing restrictive services to alleged offenders with intellectual disabilities. Discussion paper. Unpublished.

47 B Bodna. 1987. 'People with intellectual disability in the criminal justice system' in D Challinger ed. *Intellectually disabled offenders: Proceedings of a seminar*, 22-24 April. Australian Institute of Criminology. Canberra.

48 L Byrnes. 1997. 'Locked in, locked out'. Paper presented at the forum on the difficulties facing people with intellectual disability in the criminal justice system. Community Services Commission, NSW Council for Intellectual Disability, Intellectual Disability Rights Service. State Library of NSW. Sydney.

49 S Hayes. 1991. 'Sex offenders'. *Australia and New Zealand Journal of Developmental Disabilities*. 17:221-227; J Petersilia. 1997. Justice for all? Offenders with mental retardation and the California corrections system. *The Prison Journal*. 77(4):355-381.

50 B Bodna. 1987. 'People with intellectual disability in the criminal justice system' in D Challinger (ed). *Intellectually disabled offenders*, Proceedings of a seminar held 22-24 April. Australian Institute of Criminology. Canberra; T Holland, I Clare & T Mukhopadhyay. 2002. 'Prevalence of 'criminal offending' by men and women with intellectual disability and the characteristics of 'offenders: Implications for research and service development. *Journal of Intellectual Disability Research*; 46 (Suppl 1): 6-20; G Murphy & J Mason. 1999. People with developmental disabilities who offend. In N Bouras (ed). *Psychiatric and behavioural disorders in developmental disabilities and mental retardation*. Cambridge: Cambridge University Press; J Simpson, M Martin & J Green. *The framework report: Appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending*. Sydney: NSW Council for Intellectual Disabilities.

51 Borderline range = (IQ 70-79). Queensland Corrective Services. 2002. *Intellectual Disability Survey 2002*.



## 2.6.2 Prisoners with intellectual disability

There is no causal link between disability and crime but there is a strong correlative link between disability and incarceration.<sup>52</sup> It is often counter-productive to place people with intellectual impairments in prison: imprisonment conditions all prisoners including those with intellectual impairments to a culture of criminality. Some may engage in exploitative behaviour in order to fit in.<sup>53</sup> Prisoners who have a disability are at greater risk of emotional, physical and sexual victimisation<sup>54</sup> and the additional risk of the latter can lead to increased risk for HIV/AIDS transmission.<sup>55</sup>

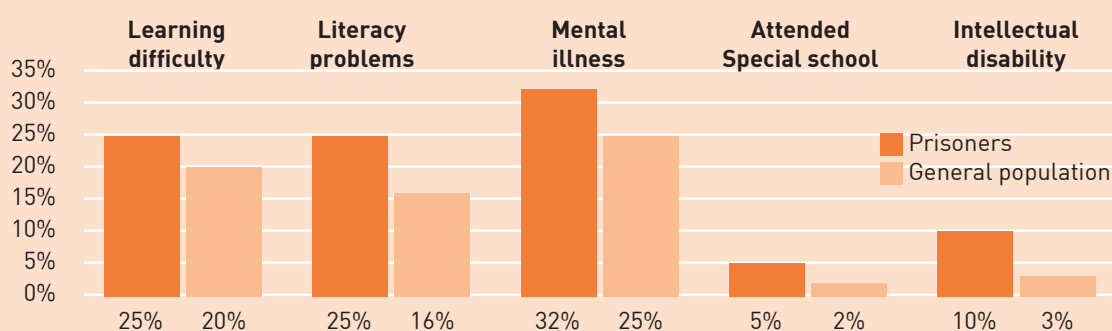
### Prisoners and disability<sup>56</sup>

- 34% were educated to less than Year 10 level at school
- 48% were unemployed in the 30 days prior to imprisonment
- 35% were homeless in the four weeks prior to imprisonment
- 21% had one or more of their parents imprisoned when they were a child
- 38% were told at some point by a doctor, psychologist or nurse that they have a mental health disorder including drug and alcohol dependence
- 31% had high or very high level of psychological distress, as measured by the Kessler 10 (K10)

Prisoners with intellectual disabilities tend to get fewer outside visitors because family and friendship networks outside prison may not be strong. They are more likely to be socially isolated and are an increased suicide risk.<sup>57</sup> About half of prisoners with intellectual disability also have a mental illness, but Queensland Corrective Services offers offenders with an intellectual disability no prison-based psychological services.<sup>58</sup> Adjustment on release is difficult for people with impaired adaptive skills. People with borderline intellectual disability face particular difficulties because they may not qualify for support. Lack of support and lack of accommodation prejudices parole applications and extends the term of imprisonment.

### Prisoners with intellectual impairments

Corrective Services Queensland. 2002. *Intellectual disability survey 2002*.



52 M Simpson & J Hogg. 2001. 'Patterns of offending among people with intellectual disability: a systemic review. Part 11: predisposing factors.' *Journal of Intellectual Disability*. 45(5): 397. S Henderson. 2003. Mental Illness and the Criminal Justice System Mental Health Coordinating Council. Accessed at [http://www.MentalHealthCourt.org.au/projects/Criminal\\_Justice/contents.html](http://www.MentalHealthCourt.org.au/projects/Criminal_Justice/contents.html)

53 J Cockram *et al* 1994, 'Intellectual disability and the law : noticing the negative and ignoring the obvious', *Psychiatry*, vol. *Psychology and Law*. 1(2): 161-70.

54 NSW Law Reform Commission. 1996. *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts. Research Report* p 5.

55 S Hayes. 1991. 'Sex offenders'. *Australia and New Zealand Journal of Developmental Disabilities*. 17:221-227.

56 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2012*, Cat. No. PHE 170, Australian Institute of Health and Welfare: Canberra, 2013, pages x-xv.

57 Ibid.

58 Personal communication from QAI interviewee.

### 2.6.3 Prisoners who have an acquired brain Injury

Up to 60 percent of people in prison report histories of Acquired Brain Injury,<sup>59</sup> accounting for approximately 17,900 of 29,700 adult prisoners in Australia.<sup>60</sup> Brain injury<sup>61</sup> is commonly caused by accidents, stroke, infection, alcohol and other drug use, neurological disease and assault,<sup>62</sup> and repeated confirmation of high levels of traumatic brain injury in prison populations<sup>63</sup> has prompted speculation that Traumatic Brain Injury (TBI) may cause offending. Whether or not this is true, jail staff and other prisoners are more likely to characterise those with Traumatic Brain Injury (TBI) as offensive and anti-authoritarian.<sup>64</sup> Prisoners with brain injury are more likely to suffer memory loss and to forget instructions from custodial officers, leading to an impression of defiance. They are more likely to be singled out by other prisoners and to become involved in inter-personal conflicts.<sup>65</sup>

People with Acquired Brain Injury may be reluctant to disclose their disability because of feelings of embarrassment, guilt or shame; a person with ABI will often show no outward signs of disability and common effects of ABI such as poor short-term memory, fatigue, or irritability may be misinterpreted, with the result that people with ABI may be wrongly perceived as drunk, uncooperative, unmotivated, aggressive and unpredictable. Australian awareness of ABI is 20 to 30 years behind that of other disabilities,<sup>66</sup> yet it is a common condition here: 2.2 percent of Australians have an ABI.<sup>67</sup>

### 2.6.4 Prisoners and mental health

Prisons are de facto mental institutions according to Australian Institute of Health and Welfare figures. An estimated one-third of Australian prisoners were already mentally ill when they entered prison - a rate 2.5 times that of the general population. 16 percent of the prison population was on medication for a mental health disorder; 14 percent of prison entrants experienced a high level of mental distress. Female prisoners were more likely to have a history of mental illness than men upon entering prison (41 percent of women compared to 30 percent of men) but this may be an underestimate as it does not account for prisoners with mental illness whose disability might not have been identified or recognised but who nevertheless require support and legal safeguards.<sup>68</sup>

Many would be better diverted into mental health services or out of the criminal justice system. While rates of major mental illnesses such as schizophrenia and depression are between three and five times higher in the prison population than in the general community, there is a troubling lack of recent institutional data available in Queensland.

59 A 2010 survey of ABI research on the prevalence of offender groups with head injury and traumatic brain injury (TBI) conducted in the US, UK, New Zealand and Australia suggests that around 60 percent of offenders have TBI: E Shiroma, *et al.* 2010. 'Prevalence of Traumatic Brain Injury in an Offender Population: A Meta-Analysis. *Journal of Correctional Health Care* 16:148. After comprehensive neurological assessment (rather than self-reporting) in 2011 Corrections Victoria determined that 42 percent of men and 33 percent of women in prison had an ABI: Corrections Victoria. 2011. *Acquired brain injury in the Victorian prison system*. Melbourne: Department of Justice. It is likely that the situation in Queensland prisons is similar.

60 N Rushworth. 2011. *Out of Sight, Out of Mind: People with an Acquired Brain Injury and the Criminal Justice System*. Prepared for the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs.

61 Disabilities Trust Foundation. 2012 cited in Martin Barrow. *Lonely Struggle against the Silent Epidemic*. Available from: <<https://www.headway.org.uk/news/lonely-struggle-against-the-silent-epidemic.aspx>> .

62 Victorian research indicates that drugs and alcohol are more likely to be the cause of prisoners' ABIs as opposed to those in the general population, and that prisoners with these ABIs require specific attention, support and assistance: Corrections Research Paper Series No 4. *Acquired Brain Injury in the Victorian Prison System*; 2004.

63 P Schofield *et al.* 2006. 'Traumatic Brain Injury among Australian Prisoners: Rates, Recurrence and Sequelae'. *Brain Injury*. 20:499.

64 P Schofield, *et al.* 2006. 'Traumatic Brain Injury Among Australian Prisoners: Rates, Recurrence and Sequelae'. *Brain Injury*. 20:499.

65 Ibid 505.

66 N Rushworth. 2011. *Out of Sight, Out of Mind*. Brain Injury Australia.

67 Australian Bureau of Statistics. 2003. *Survey of Disability, Carers and Aged*.

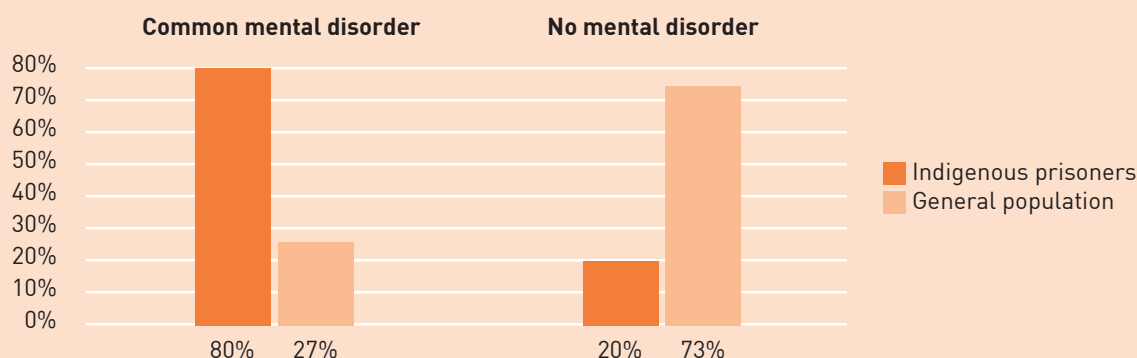
68 Australian Institute of Health and Welfare. 2011. *The Health of Australia's Prisoners 2010*. Australian Institute of Health and Welfare.

## 2.6.5 Aboriginal and Islander people in prisons and mental illness

### Twelve month prevalence of mental health impairment amongst Indigenous people in Queensland prisons

Heffernan, K Anderson & K Dev. 2012.

*Inside Out - The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report.*



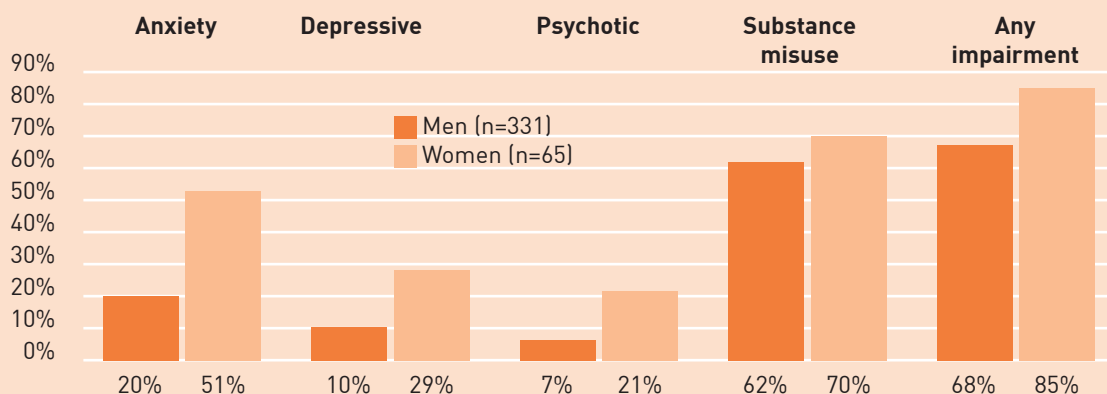
A Queensland sample of Aboriginal and Torres Strait Islander prisoners in nine prisons revealed that a staggering 72.8 percent of Aboriginal and Torres Strait Islander men and 86.1 percent of Aboriginal and Torres Strait Islander women had at least one mental health episode in the preceding twelve months, against a 20 percent rate in the general community.<sup>69</sup> The remand sample was even higher - 84.4 percent compared with 70.4 percent overall.

The graphs below show the respective 12 month prevalence of anxiety, psychotic, depressive and substance misuse disorders experienced by the general population and by Queensland Indigenous prisoners.<sup>70</sup>

### Twelve month prevalence of mental health impairment amongst Indigenous people in Queensland prisons (2008)

Heffernan, K Anderson & K Dev. 2012.

*Inside Out - The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report.*



<sup>69</sup> Queensland Forensic Mental Health Service. 2013.

<sup>70</sup> E Heffernan, K Andersen, A Dev, S Kinner. 2012. 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons'. *Medical Journal of Australia*. 197(1):37-41.

## 2.6.6 Young people

Overrepresentation of young people with intellectual disability facing custodial sentences is even greater than for adults. Victoria's Parole and Youth Residential Board noted that between 14 and 27 percent of young people who appeared before it for the 2010-11 year presented with an intellectual disability.<sup>71</sup>

Overrepresentation is likewise higher in youth facilities than in adult ones. A 2011 survey by Victoria's Department of Human Services found that 39 percent of youths in detention presented with issues concerning intellectual functioning, 22 percent were registered with the DHS and 40 percent had mental health issues.<sup>72</sup> Compared to prisoners without an intellectual disability, prisoners with an intellectual disability presented with more extensive criminal offending, ranging from involvement in youth detention centres to prison sentences.<sup>73</sup>

In Victoria 14-27 percent of young people dealt with by the Youth Parole and Residential Board had intellectual disability. Young people with mental health disorders and/or cognitive impairment are at least six times more likely to be in prison than young people without disability in the general NSW population.<sup>74</sup>

### 2.6.6.1 Young Aboriginal and Islander people and the juvenile justice system

We rely on NSW figures again. The *Young People in Custody Health Survey (YPCHS)*<sup>75</sup> and the *Young People on Community Orders Health Survey*<sup>76</sup> provided detailed health data, including cognitive disability/mental health status for young people in custodial facilities and on community based supervision orders in NSW. The researchers adopted a 'culture fair' approach to measuring cognitive impairment which aims to eliminate the cultural bias inherent in conventional testing. The YPCHS researchers compared the respondents' performance on the Wechsler Abbreviated Scale of Intelligence (WASI) against their performance on the Performance (non-verbal) IQ scale, finding that the 37 percent of indigenous detainees with intellectual disability result using the former test fell to around 10 percent with the culture fair measure - a figure that is more consistent with the proportion of non-indigenous detainees (~ 10 percent) with intellectual disability.<sup>77</sup>

On community based orders the culture fair estimate of Indigenous young people with an intellectual disability represents 8 percent of the sample, indicating that Indigenous young people in contact with the juvenile justice system are 3 to 4 times more likely to have an intellectual disability than the general population.

The *Young People in Custody Health Survey* and *Young People on Community Based Orders Health Survey* both found a high level of mental illness amongst their population sample:

- 88% reported mild, moderate or severe symptoms consistent with a clinical disorder<sup>78</sup>
- 8% of males and 12% of females in custody reported that they had attempted suicide.<sup>79</sup>

If anything these figures are likely to underrepresent the crisis, given what we know of adult Aboriginal and Islander overrepresentation from the work of Heffernan et al cited below.<sup>80</sup>

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71 Department of Human Services, Youth Parole Board and Youth Residential Board. Annual report 2010-11. Melbourne: DHS, 20.

72 Ibid, 12.

73 Ibid.

74 R McCausland, et al. 2013. People with mental health disorders and cognitive impairment in the criminal justice system Cost-benefit analysis of early support and diversion. University of NSW.

75 NSW Department of Juvenile Justice, 2003. *NSW Young People in Custody Health Survey Key Findings Report*, Haymarket,

76 D Kenny, P Nelson, T, Bulter: C Lennings, M Allerton & U Champion. 2006. *NSW Young People of Community Based Orders Health Survey 2003-2006: Key Findings Report*, University of Sydney.

77 NSW Department of Juvenile Justice, 2003. *NSW Young People in Custody Health Survey Key Findings Report*, Haymarket, p19.

78 NSW Department of Juvenile Justice, 2003. *NSW Young People in Custody Health Survey Key Findings Report*, Haymarket, p19.

79 Ibid. p 27.

80 I Heffernan, K Anderson & K Dev. 2012. *Inside Out - The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report*. Queensland Forensic Mental Health Service.

### 2.6.6.2 People with intellectual disability and sexual offending

People with intellectual disability are probably overrepresented for sexual offences<sup>81</sup> if we base our inferences on data from other jurisdictions, but this area is under-researched and valid generalisations are impossible when so many sorting factors distort the data. Prevalence of sex offenders with intellectual disabilities located in prison populations, for example, are not an accurate measure of the numbers of people with intellectual disabilities who have been charged with this type of offence, because the accused person who has an intellectual disability may be diverted out of the criminal justice system at many points prior to imprisonment. Those who remain in the system and receive a custodial sentence are likely to be unrepresentative of the totality of the individuals who actually engage in problematic behaviours, or who are charged but diverted out of the criminal justice system. There is no reliable recent Queensland data.

It must be noted that such offences committed by people with intellectual impairments tend to be low level and less serious, and in many instances more likely to be considered sexual harassment if perpetrated by a person without a disability. People with disabilities who engage in what are known as 'Problematic Sexual Behaviours' tend to engage in nuisance behaviours including public masturbation, exhibitionism, voyeurism and sexual threats whilst penetration of the victim and physical violence is less likely to occur when a person with an intellectual disability is the perpetrator.<sup>82</sup>

People with intellectual disability who have been convicted of sexual offences are more likely to have been victims of sexual and physical abuse, especially during childhood and in institutions.<sup>83</sup> A history of having been the victim of sexual abuse occurred in 44 percent of sexual recidivists with intellectual disability, compared with 17 percent of non-recidivists.<sup>84</sup> Another study revealed that more than a third of offenders with intellectual disability had previously been victims of sexual assault.<sup>85</sup> People with intellectual disabilities who exhibit Problematic Sexual Behaviours are likely to have been physically or sexually abused in institutional or group home settings, by family members or acquaintances, or by strangers.<sup>86</sup> The leading Australian case in relation to a non-parole period in the sentencing of a person with intellectual disability convicted of a sexual offence concerns a man who himself had been sexually abused at precisely the same age as his victim.<sup>87</sup>

About half of a sample of respondents with fetal alcohol syndrome had repeated problems with inappropriate sexual behaviour or had been sentenced to a sexual offender programme.<sup>88</sup> Contributing factors are complex and difficult to disentangle, but offending correlates with unstable family background, environmental trauma, cognitive impairments, learning difficulties, impulsivity, and social problems.<sup>89</sup> It is not uncommon for parents and institutions that operate in loco parentis to treat people with intellectual disability as perpetual children, denying them sex education and actively discouraging them from the pursuit of safe and appropriate sexual experiences.

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81 W Glaser. 1997. 'Assessing the Dangerousness and Treatability of Sex Offenders in the Community' Australian Institute of Criminology Conference. Sydney; April 1997; G Simon. 1987. 'A manual of practice' cited in M Little. 'Sport and recreation: Help for intellectually disabled offenders' in Challinger (ed.) 1987. *Intellectually Disabled Offenders*. Australian Institute of Criminology. Seminar Proceedings 19. Canberra.

82 Gilby *et al*. 1989. Mentally retarded adolescent sex offenders: A survey and pilot study. *Canadian Journal of Psychiatry*, 34(6), 542-548.

83 W Glaser. 1987. Assessing the Dangerousness and Treatability of Sex Offenders in the Community in Australian Institute of Criminology Conference. Sydney; S Hayes. 2001. The relationship between childhood abuse and subsequent sex offending. In: 12th World Congress of the International Association for the Scientific Study of Intellectual Disability. Montpellier; 2004; L Lindsay, J Law, K Quinn, N Smart & A Smith. 'A comparison of physical and sexual abuse: sexual and non-sexual offenders with intellectual disability'. *Child Abuse and Neglect*; 25: 989-995.

84 C Morrison. 2002. 'Characteristics of recidivist and non-recidivist sex offenders with an intellectual disability'. International Association for the Scientific Study of Intellectual Disability European Congress, Dublin.

85 Balogh *et al* 2001. Sexual abuse in children and adolescents with intellectual disability. *Journal of Intellectual Disability Research*, 45(Pt 3), 194-201.

86 Balogh *et al* 2001. 'Sexual abuse in children and adolescents with intellectual disability'. *Journal of Intellectual Disability Research*, 45(Pt 3), 194-201.

87 *Muldrock v The Queen*. [2011] HCA 39.

88 J Baumbach. 2000. Sexual offending behaviour in persons with fetal alcohol syndrome. Paper presented at the International Association for the Scientific Study of Intellectual Disability Congress, Seattle.

89 *Ibid*.

For people with intellectual disability this kind of offending often stems from a general lack of understanding of social norms and acceptable sexual behaviour, and may be attributable to segregated and restricted social lives.<sup>90</sup> This was a fact acknowledged by Mr Muldrock's sentencing judge when he imposed the condition that the defendant must reside at a residential treatment facility with a program designed to assist people with intellectual impairments to moderate sexually inappropriate behaviour.<sup>91</sup> The protective factors preventing sex offending include early recognition and intervention, stable home life and no experience of sexual violence.

Unlawful sexual behaviour by people with intellectual disability is responsive to, and effectively corrected by programs for habilitation and rehabilitation.<sup>92</sup> If in jail, people with intellectual disability and other cognitive impairments need tailored prison education/rehabilitation even if the benefits are mitigated by the negative effects of incarceration itself.

## 2.7 Why overrepresentation? policy and legislation

Knowing why people with capacity impairments are more likely to be suspects, defendants and prisoners is an essential first step for legislators and policy makers who seek to frame a rehabilitative response, devise proactive interventions, and reduce their involvement in the criminal justice system. A person with a 'substance use disorder', for example, will likely have different needs to one with moderate intellectual disability or mental illness, or who has any combination of the three.

Overrepresentation is not easily explained, and explanations have a long and complex history. They fall into three broad categories: the susceptibility hypothesis, the differential treatment hypothesis, and the psychological and socio-economic disadvantage model.

### 2.7.1 The susceptibility hypothesis

The eugenics movement last century reinforced public misconceptions that mental impairment produces vice and crime and that the public should fear people with intellectual and mental health impairments: it emphasised the inherent criminality of persons labelled 'feeble-minded'.<sup>93</sup> The idea that people with intellectual impairments are biologically predisposed to crime is no more plausible than the phrenologists' conviction that the contours of a person's skull determine their moral nature<sup>94</sup> but in the early 20th century these ideas were commonplace and influential.

Lewis Terman (co-creator of the Stanford-Binet IQ test in 1917) correctly observed that people with intellectual impairments constituted approximately one in four admissions to US state penitentiaries<sup>95</sup> but like many of his contemporaries, he mistakenly concluded that the criminal behaviour of people with intellectual impairments was biologically determined and that such people were 'a menace [...] to the social, economic and moral welfare of the state'.<sup>96</sup> Terman made a simple but fallacious link between correlation

90 S Hayes. 2004. 'The relationship between childhood abuse and subsequent sex offending'. 12th World Congress of the International Association for the Scientific Study of Intellectual Disability. Montpellier.

91 *Muldrock v The Queen*. [2011] HCA 39. <<http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca39-2011-10-05.pdf>>

92 Simon Wardale, Director Forensic Disability, Queensland.

93 H Goddard. 1912. *The Kalikak Family: A Study in the Hereditary of Feeble-mindedness*. New York: MacMillan.

94 J Davies. 1971. *Phrenology: Fad and Science: A 19th-Century American Crusade*. Hamden, Conn.: Archon Books.

95 L Terman. 1917. 'Feeble minded children in the schools' in F Nelles. Report of 1915 legislature committee on mental deficiency and the proposed institution for the care of feeble-minded and epileptic persons. Whittier, CA: Whittier State School, Department of Printing Instruction.

96 Ibid.

and causation. He wrongly inferred that people with intellectual disability are jailed because they have intellectual disability.

Eugenic science provided a 'scientific' foundation for social policy and legislation; and in 1920s America its social credibility was unimpeachable. In *Buck v Bell*,<sup>97</sup> for example, the US Supreme Court validated Virginia's 1924 Eugenic Sterilization Act which authorised the compulsory sterilization of 'mental defectives',<sup>98</sup> and a number of US states created special institutions to house and contain people with intellectual disabilities, purportedly for their own and the public's protection, and to train them in appropriate social behaviour.<sup>99</sup>

The post-1945 revelations of the Nazi death camps destroyed much of the credibility of the eugenics movement and undermined the idea of a underlying relationship between intellectual disability and crime.<sup>100</sup> Criminology as a social science discipline moved on from simplistic explanations of biological cause and effect towards economic, social and cultural explanations of criminal behaviour. Informed by criminological research, policy makers recognised the correlation of impairment and crime to be the product of inadequate supports, services and facilities rather than any inherent moral defects or innate drive to criminality of people with intellectual disability.<sup>101</sup>

### 2.7.2 Differential treatment hypothesis

This is the proposition that police, support workers, service providers, defence lawyers, prosecutors, the judiciary and corrective services personnel treat people with capacity impairments differently to the way they treat everyone else: that they all, to a greater or lesser degree, consciously and unconsciously discriminate to the disadvantage of people with intellectual disability and other impairments. Thomas suggests, for example, that for people with disability living in supported accommodation the decision by staff to report an incident may depend on who is the (alleged) offender and who is the (alleged) victim.<sup>102</sup> Similarly, when called to investigate an incident police may use their discretion when deciding whether to charge an offender - based on their own assessment as to whether a matter is serious enough to prosecute and the likelihood of gaining a conviction based on the competence of the victim and witnesses.

These sorts of explanations for overrepresentation are consistent with what is known as the differential treatment hypothesis: the idea that people with intellectual disability and other capacity impairments are be more likely to be apprehended, charged and hence convicted because their living circumstances make them more likely to attract police attention,<sup>103</sup> often in relation to minor infringements of public order law.<sup>104</sup> According to differential treatment the people in this group are:

- more likely to confess or to acquiesce to police accusations
- more likely to be captured by a prosecution policy to target abnormal or possibly dangerous offenders

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<sup>97</sup> 274 US 200, 1927.

<sup>98</sup> *Buck v Bell* 274 US 200, 1927.

<sup>99</sup> R Hahn-Rafter. 1997. *Creating Born Criminals*. Perth: Crime Research Centre, University of Western Australia.

<sup>100</sup> R Proctor. 1988. *Racial Hygiene: Medicine under the Nazis*. Harvard.

<sup>101</sup> K Deane & W Glaser. 1994. *The Characteristics and Prison Experience of Offenders with an Intellectual Disability: An Australian Study*. University of Melbourne, 1.

<sup>102</sup> S Thomas. 2013. 'At what point, and on what basis, does behaviour by people with intellectual disability become criminal?' Paper presented at Disability at the Margins: Vulnerability, Empowerment and the Criminal Law; University of Wollongong, November 2013.

<sup>103</sup> J Zimmerman, W D Rich, I Keilitz & P Broder. 1981. 'Some observations on the link between learning disabilities and juvenile delinquency'. *Journal of Criminal Justice*. 9(1): 10.

<sup>104</sup> New South Wales Anti-Discrimination Board. 1981. *Discrimination and Intellectual Handicap*, 320.



- more often refused bail for previous breaches of bail conditions, compounded by a lack of support and resources that would strengthen their application
- less likely to have rights such as the right to silence explained in a way they can understand<sup>105</sup>
- less likely to be able to afford quality representation and so more likely to be convicted
- more likely to receive a custodial sentence because of a lack of alternative placements in the community
- more likely to serve time in a maximum security for segregation and ‘protection’<sup>106</sup>
- more likely to serve a longer sentence before release on parole (in Queensland parole applications must be hand written)
- less likely to qualify for parole because of a want of appropriate support and accommodation.

Wolf Wolfensberger and other advocates of Social Role Valorisation<sup>107</sup> advance the possibility that people with intellectual disability or other capacity impairments are most prone to be negative stereotyping by police, prosecutors, defence lawyers and the courts. They may be thought of and subtly treated as deviants, social outcasts or needy dependents who are less capable of making their own decisions and who need management and control. People with capacity impairments may then internalise these assumptions, diminishing their self-confidence and self-reliance<sup>108</sup> and contributing to low expectations all around.

**A young man with an intellectual disability** was eligible for parole. His IQ was reassessed for Disability Services Queensland and determined to be above IQ 70. He therefore did not qualify for a support package that would allow him to live in the community and he remained in detention. Living with support outside of jail would be a better option.

### 2.7.3 Psychological and socio-economic disadvantage

This explanation works on two levels. At the macro level, cultural institutions passively and actively discriminate against and operate to the disadvantage of people with intellectual impairments. At the micro level, intellectual impairments may affect a person’s judgement, memory, literacy, skill acquisition, educational attainments, qualifications, communication skills, personal presentation, employability and earning capacity. These factors may affect a person’s self-perception, self-esteem, mental health and substance use and drastically increase the chances that a person will come into contact with the criminal justice system because of poverty, homelessness, alcohol and drug addiction, domestic violence, child abuse and neglect and so on.

As Baldry et al explain, having a cognitive impairment ‘may predispose people who also experience other

105 J Cockram, R Jackson & R Underwood. 1994. ‘People with an intellectual disability and the criminal justice system: The family perspective’. Paper presented at Partnerships for the Future, 6th Joint National Conference of the National Council of Intellectual Disability and the Australian Society for the Study of Intellectual Disability, 26-30 October 1994, Perth.

106 S Hayes & G Craddock. 1992. *Simply Criminal*. 2nd ed. Sydney: Federation Press, 34 referring to S C Hayes & D McIlwain. 1988. *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study*. Sydney, 144.

107 J Cockram, R Jackson & R Underwood. 1994. ‘Attitudes towards people with an intellectual disability: Is there justice?’ Paper presented at the First International Congress on Mental Retardation: The Mentally Retarded in the 2000’s Society. Rome. See also J Bright. 1989. ‘Intellectual disability and the criminal justice system: New developments’ *Law Institute Journal*. 63: 933.

108 W Wolfensberger. 1992. *A Brief Introduction to Social Role Valorisation as a High Order Concept for Structuring Human Services*. [Training Institute for Human Service Planning, Leadership and Change Agency, Syracuse University, Syracuse NY.



disadvantageous social circumstances to a greater enmeshment with the criminal justice system early in life [and those same people may] have experienced low rates of disability support as children, young people and adults, with Indigenous members [...] having the lowest levels of service [...]'.<sup>109</sup>

People with intellectual disability may also have had childhood experiences that normalise unlawful behaviour. People with intellectual disabilities convicted of sex offences are more likely to have been victims of sexual and physical abuse, especially in childhood and in institutional settings.<sup>110</sup>

Some offenders with intellectual disabilities have behaved inappropriately from ignorance of social relationships, sexuality and sexually normative behaviour reflecting a lack of desirable role models, limited life experiences in institutional and congregate accommodation and the absence of opportunities to pursue sexual interests in a safe and consensual way. Once in jail, 'peer abuse' by one inmate against another is widespread and not recognised or dealt with<sup>111</sup> and physical abuse, disciplinary problems and the likelihood of regression in prison leads many prisoners with intellectual disabilities to spend their time in maximum security.<sup>112</sup>

The contemporary focus is upon complex social and environmental factors and the individual's life-history:<sup>113</sup>

- A person's offending behaviour may be highly visible, impulsive and lack sufficient forethought and planning to avoid detection.<sup>114</sup>
- The person may have been scapegoated by her or his peers into acting as an accomplice to crimes and be left 'holding the bag'.<sup>115</sup>
- The person may have mental health issues which impact on behaviour.<sup>116</sup>
- The person's intentions may have been misinterpreted by others as threatening.<sup>117</sup>
- The person may express their sexuality inappropriately or have not had the opportunity to develop appropriate morality.<sup>118</sup>
- The person's level of social disadvantage, such as homelessness and unemployment, may inadvertently encourage criminal behaviour.<sup>119</sup>

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109 E Baldry, L Dowse & M Clarence. 2012. *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*. University of New South Wales. <[www.adhcnsw.gov.au/about\\_us/research/completed\\_research](http://www.adhcnsw.gov.au/about_us/research/completed_research)> .

110 W Glaser. 1997. 'Assessing the Dangerousness and Treatability of Sex Offenders in the Community'. Paper at Australian Institute of Criminology Conference. Sydney; S Hayes. 2009. 'The relationship between childhood abuse, psychological symptoms and subsequent sex offending'. *Journal of Applied Research in Intellectual Disabilities*. 22:96-101; S Hayes. 2005. 'A review of non-custodial interventions with offenders with intellectual disabilities'. *Current Issues in Criminal Justice*. 17(1):69-78.

111 Ibid.

112 J Cockram. 2005. *Equal Justice? The experience and needs of repeat offenders with intellectual disability in Western Australia*. Active Foundation Inc. <[http://www.correctiveservices.wa.gov.au/\\_files/about-us/statistics-publications/students-researchers/equal-justice.pdf](http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/students-researchers/equal-justice.pdf)> .

113 S Milnarcik. 2001. Behind bars, behind labels: experiences of offenders labeled mentally retarded in a prison's special treatment program. Doctor of Philosophy thesis, Syracuse University.

114 L Byrnes. 1995. 'People with an Intellectual Disability'. *Interaction*. 8(5):19-24; Standing Committee on Law and Justice. 1999. *Inquiry into crime prevention through social support*. NSW Government, Sydney.

115 J Porter. 2004. *Disability and the law: a training resource for the legal profession in Queensland*. Queensland Advocacy Incorporated, Brisbane.

116 G Jones & K Coombes. 1990. *The Prevalence of Intellectual Deficit among the Western Australian Prisoner Population*. Western Australia Department of Corrective Services, Perth.

117 T Holland, I Clare & T Mukhopadhyay. 2002. 'Prevalence of 'Criminal Offending' by Men and Women with Intellectual Disability and the Characteristics of 'Offenders': Implications for Research and Service Development'. *Journal of Intellectual Disability Research*. 46 [Suppl 1]:6-20.

118 S Hassan & R Gordon. 2003. *Developmental Disability, Crime, and Criminal Justice*. Criminology Research Centre, School of Criminology, Simon Fraser University, Burnaby, British Columbia.

119 J Cockram. 2005. Careers of offenders with an intellectual disability: the probabilities of research. *Journal of Intellectual Disability Research*; 49(7): 525-536; New South Wales Law Reform Commission. 1996. *People with an intellectual disability and the criminal justice system*. No 80 Law Reform Publications, New South Wales.

## 2.8 Preventative strategies

Importantly, the majority of research finds no inherent link between psychiatric disability or intellectual disability and *crime*, but a strong causal link between psychiatric disability and *incarceration* highlighting the impacts that social disadvantages such as homelessness, visibility, prejudice, fear and lack of support and services, and lack of family ability, capacity or will to assist may well be having on these people's life courses.<sup>120</sup>

It is trite to note the importance of preventative strategies designed to safeguard people from contact with the criminal justice system. In New South Wales, as in many other jurisdictions, legislative changes have increased the use of remand and the likelihood of re-incarceration, disproportionately affecting people with intellectual impairment or mental health disorders.

Victoria has developed a coordinated, collaborative response to targeting and assisting young people with a disability who are at risk of offending or are already in contact with the criminal justice system.<sup>121</sup> The *Protocol between Disability Services and Youth Justice and Guidelines for Workers*, developed in 2009 as a joint collaboration between Disability Services and Youth Justice,<sup>122</sup> provides a structure to ensure responsive and effective supports.<sup>123</sup>

Another collaborative, cross-departmental Victorian scheme is the Multiple and Complex Needs Initiative (MACNI), established under the authority of the *Human Services (Complex Needs) Act 2009* (Vic). This program provides support to people with multiple and complex needs, including those with combinations of mental illness, substance abuse issues, intellectual impairment and acquired brain injury. Supports assist people with stable accommodation, healthcare, community connections and personal safety. Participation is voluntary and the program is aimed at reducing the risks individuals with multiple and complex needs can pose to themselves and the community.<sup>124</sup>

The Victorian government utilises two new measurement tools targeting offenders with intellectual disability: the Assessment of Risk and Manageability of Intellectually Disabled Individuals who Offend (ARMIDILO); and the Dynamic Risk Assessment and Management System (DRAMS). These tools measure risk and enable planning to reduce re-offending behaviour.<sup>125</sup>

## 2.9 People with disability as victims of crime

*dis-Abled Justice* focuses on the interaction between the criminal justice system and people with disability as suspects and offenders, but the experience of victims with disabilities is also of grave concern. People with disabilities are more likely to become victims of crime. The Disability Council of NSW (DCNSW) reports that 'people with disabilities are over-represented as victims of crime, especially as victims of violence, fraud and sexual assault'.<sup>126</sup> The DCNSW attributes this vulnerability to dependence on other

120 E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*. Background Paper for the National Legal Aid Conference, Darwin.

121 Department for Families and Communities, Government of South Australia. 2011. *Forensic Disability: The Tip of Another iceberg*.

122 Ibid.

123 Ibid.

124 Ibid, 22-26.

125 Ibid.

126 Disability Council of NSW. A question of justice: access and participation for people with disabilities in contact with the justice system. Sydney. p 28. <http://www.disabilitycouncil.nsw.gov.au/archive/03/justice.pdf>.

people and services.<sup>127</sup> People with intellectual disability, for example, are 'twice as likely to be the victim of a crime directed against them [...] and one and a half times more likely to suffer property crimes [...].'<sup>128</sup> Most people with intellectual or psychosocial impairments are subject to sexual assault at some point in their lifetime.<sup>129</sup>

Women with disabilities are likely to live in poverty. They are often dependent on government pensions, may have limited access to education and to appropriate information on rights, may experience a lack of choice in housing and transport, may be dependent on others for self-care and may live restricted social lives. Deprivation of experience and opportunity and social and political discrimination render women with disabilities more vulnerable to violence, rather than any actual experience of impairment'.<sup>130</sup>

### 2.9.1 Barriers to reporting

People with a cognitive impairment are vulnerable to crime irrespective of the source of their impairment. Their vulnerability and exposure is environmental, not least because offences against them are not reported to or actioned by the police.<sup>131</sup> We briefly explored this when discussing the differential treatment hypothesis above.

The decision by supported accommodation staff to report an incident may depend on who is the (alleged) offender and who is the (alleged) victim,<sup>132</sup> and when called to investigate an incident police may use their discretion when deciding whether to charge an offender. The recent scandal involving a Victorian disability service provider is indicative.<sup>133</sup> Some victims were too terrified and humiliated to report assaults to the police, and other support workers were uneasy about the offender's behaviour but reluctant to act on their suspicions.

Research confirms this pattern: of 550 reported incidents of abuse against people with an intellectual disability living in supported accommodation, police investigated or prosecuted 7 percent. More than half of the defendants were staff.<sup>134</sup> In another study people with a mental illness reported that they were afraid to complain about conditions in boarding houses because they feared further abuse or eviction.<sup>135</sup>

### 2.9.2 Vulnerability

People with impaired decision-making capacity may be among the most vulnerable in our communities.

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127 J Goodfellow & M Camilleri. 2003. 'Beyond belief, beyond justice: the difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice'. Disability Discrimination Legal Service, Melbourne, p 42. [http://www.aifs.gov.au/acssa/docs/BeyondBelief\\_03.pdf](http://www.aifs.gov.au/acssa/docs/BeyondBelief_03.pdf).

128 Dr Ian Freckleton QC. Public Lecture: *Mental Health Law Reform and Human Rights*. Queensland University of Technology; 5 May 2014.

129 P French. 2007. *Disabled Justice*. Queensland Advocacy Incorporated. p 18; Office of the Public Advocate (Victoria), Submission No 29 to Victorian Law Reform Committee, Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers; 13 September 2011.

130 C Jennings. 2003. Triple disadvantage: out of sight, out of mind. Violence Against Women with Disabilities Project Against Women with Disabilities Project. 2nd ed. Domestic Violence and Incest Resource Centre. Melbourne. <<http://www.dvirc.org.au/UpdateHub/Triplepercent20Disadvantagepercent20Reportpercent202003.pdf>>.

131 J Simpson & L Rogers. 2002. *Intellectual disability and criminal law*. Hot topics. 39:18.

132 S Thomas. 2013. 'At what point, and on what basis, does behaviour by people with intellectual disability become criminal?' Paper presented at Disability at the Margins: Vulnerability, Empowerment and the Criminal Law; University of Wollongong, November 2013.

133 R Baker & N McKenzie. 2014. 'New sex abuse scandal rocks Yooralla as senior employee charged'. *The Age*. May 23. <<http://www.theage.com.au/victoria/new-sex-abuse-scandal-rocks-yooralla-as-senior-employee-charged-20140523-38sip.html>>

134 S Robinson. 2003. *Bridging the divide: human rights and people with disability*. Southern Cross University Human Rights and Diversity Conference. Byron Bay.

135 M Karras, E McCarron, A Gray & S Ardasinski. *On the edge of justice: the legal needs of people with a mental illness in NSW. Access to justice and legal needs. Vol 4*. Sydney: Law and Justice Foundation of NSW.

In many cases they are unlikely to have the means to prevent crime or understand their rights,<sup>136</sup> have mobility issues which prevent them distancing themselves from an unsafe environment,<sup>137</sup> be unable or unsupported to communicate the details of physical or sexual assault, and may have insufficient financial or emotional resources to recover from crime.<sup>138</sup>

People with intellectual disability are more vulnerable to victimisation when living in supported residential settings, and the level of victimisation may depend on the willingness of service providers to respond quickly and decisively. Victims may not report a crime for fear that they will lose support services: when the person is dependent on the person about whom they are complaining, whether family member, carer or service provider, the fear of retribution or of losing access to the care or service can act as a barrier to lodging a complaint.<sup>139</sup> The capacity of a person with an intellectual disability to report a crime is diminished when the alleged perpetrator is also their carer. Between 40 and 70 percent of crimes against people with an intellectual disability go unreported for this reason.<sup>140</sup>

Some people with impaired capacity in supported and shared accommodation may exhibit behaviours of concern (aggression, self-harm etc) in response to adverse living circumstances, or to abuse. It is not uncommon for disability service providers to place people into group homes. People rarely get to choose their housemates. Some service providers will place a number of people known for ‘challenging behaviour’<sup>141</sup> into the same house and if the change in behaviour is not investigated adequately it may be misinterpreted and result in the victim being placed under restrictive practices – exacerbating the injury and harm.

### 2.9.3 Perceived inhumanity

Misconceptions persist that people with intellectual or cognitive disabilities experience less emotion and therefore less emotional damage than other people, making them less human. Ill-informed and stereotypical views such as this support a double standard, lead to abuse, and to service providers failing to properly acknowledge or even dismissing unacceptable conduct.

People with impaired decision-making capacity who have a high level of functioning are often not safe. Their perceived (as opposed to their actual) vulnerability can make them a target to opportunistic predators.

### 2.9.4 Lack of awareness of rights

Victims may not be aware that an offender’s actions were unlawful, have a legal remedy or warrant police involvement and so may not report them. Victims may not be supported by service providers or family to proceed when claiming remedies such as victim’s compensation.

People with disabilities report widespread confusion about their rights and how to exercise them, as well as a lack of knowledge about available resources and supports.<sup>142</sup> These are fundamental barriers. Community education about the justice system is essential for people to exercise their rights knowledgeably.

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136 New South Wales Law Reform Commission. 1996. *People with an Intellectual Disability and the Criminal Justice System Report 80*.

137 Ibid.

138 Ibid, [2.26].

139 Victorian Disability Advisory Council. Submission no. 44; 10 October 2011 to Victorian Law Reform Committee Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers; March 2013, 29. (citations omitted).

140 Ibid.

141 The term ‘challenging behaviour’ is a misleading one. Its use implies that the person’s behaviour is innate to them, and that the person will act in a challenging way in any context. QAI staff are aware of people whose behaviour is context specific. Behaviour of concern may be the person with disability’s response to living circumstances that none of us would accept willingly for ourselves. The behaviour of a person who is non-verbal may be their way of communicating their frustration.

142 A Gray, S Forell & S Clarke. 2009. ‘Cognitive impairment, legal need and access to justice’. Justice Issues Paper 10. *Law and Justice Foundation*; 2009.

Older people can lose certain human rights when they go into nursing homes, which leaves them vulnerable to abuse. For example, there are incidents in which older people are physically or sexually abused and, notwithstanding that they have bruises or wounds, the police are persuaded by the residential care staff not to pursue the matter on the grounds that the victims' complaints are not reliable because, for example, they have dementia.<sup>143</sup> Service providers may try to pass off a person's injuries as self-inflicted or accidental. *The Legal Needs of Older People* study reported that elder abuse often occurs in situations where the person abused is dependent on the abuser due to a disability such as dementia.<sup>144</sup>

People with cognitive impairments are often dependent on carers and others to address legal and other needs: an extra 'step' in the pathway to legal assistance. Some people with severe impairment may be denied the opportunity to participate in court processes unless a third party can gain standing to bring an action on their behalf.<sup>145</sup> Parties may not report matters or proceed with a complaint because they fear retribution, particularly when they are dependent upon family members, service providers or other aggravating parties.

### 2.9.5 Other risk factors

Criminal victimisation has been shown to be related to:

- the level of a person's impairment – generally, the higher the level of a person's impairment, the more likely they are to be a victim<sup>146</sup>
- residential status – those living with other people with a disability are exposed to a higher crime risk<sup>147</sup>
- absence of healthy bonds with family members, support networks and advocates<sup>148</sup>
- resident incompatibility
- the level of control the potential offender has over the person<sup>149</sup>
- exposure to a large number of support workers<sup>150</sup>
- lack of adequate training, supervision or clear policy for support workers<sup>151</sup>
- isolation from the community<sup>152</sup>
- money (in cases of financial exploitation).<sup>153</sup>

143 Ibid.

144 S Ellison, L Schetzer, J Mullins, J Perry & K Wong. 2004. 'The legal needs of older people in NSW needs of older people in NSW'. Law and Justice Foundation of NSW. Sydney. p 306. <<http://www.lawfoundation.net.au/report/older>> .

145 Ibid.

146 Carlene Wilson. 2009. 'The Incidence of Crime Victimization among Intellectually Disabled Adults' . p 11. Available from: <<http://www.acpr.gov.au/pdf/ACPR92.pdf>> [accessed 13 March 2009].

147 Ibid.

148 National Research Council (US), Commission on Behavioural and Social Sciences and Education. 2009. Crime Victims with Developmental Disabilities: Report of a Workshop. p 30. <[http://www.nap.edu/catalog.php?record\\_id=10042](http://www.nap.edu/catalog.php?record_id=10042)> ; M Sherry. 2009. *Hate Crimes Against People with Disabilities*. <[www.wvda.org.au/hate.htm](http://www.wvda.org.au/hate.htm)> .

149 Ibid.

150 Ibid, 30.

151 Ibid, 28.

152 Ibid, 30-31.

153 Ibid, 30-31.

## 2.9.6 Victim support services

Queensland provides two victim support services of present relevance: the Queensland Health Victim Support Service and the Queensland Homicide Victims' Support Group. The Queensland Health Victim Support Service is specifically directed at assisting victims of offences committed by perpetrators who have been identified as having a mental illness and diverted from the criminal justice system to the forensic mental health system.<sup>154</sup> Assistance is provided to the victim, family members of the victim and others who have been directly harmed by the offence, and takes the form of the provision of information and support in navigating the forensic mental health system; assistance preparing statements and submissions to the relevant Court or Tribunal; information about victims' rights; and counselling and referral to appropriate services.<sup>155</sup>

**Victims and offenders with disabilities** are often one and the same in the criminal justice system. They are vulnerable to self-harm while incarcerated.

## 2.10 Research limitations

Complex factors thwart accurate identification of persons with impairments generally, but particularly those with intellectual disability or acquired brain injury.<sup>157</sup> Social context shapes value judgments and the application of assessment tools. Personal and professional experiences and the theoretical assumptions of assessors determine the conclusions and consequences for the person who has been labelled.<sup>158</sup> Jurisdictions have different ways of counting victims, suspects, defendants, offenders and prisoners, and not all find the same rates of overrepresentation. A Western Australian longitudinal study conducted roughly contemporaneously with Hayes' landmark NSW work found no difference in charge and arrest rates between all persons and people with intellectual disability.<sup>159</sup>

A number of researchers have noted methodological problems with research in this field,<sup>160</sup> including sample selection bias and the lack of standardised definitions of some capacity-related disabilities. The latter is inevitable.

Other relevant factors to note are:

- A number of capacity-related impairments have been recognised only in the last few years.<sup>161</sup>
- Capacity is both innate and socially determined; disability is defined by reference to different standards.
- Disability itself is an emerging concept.<sup>162</sup>

154 Legal Aid Queensland. [http://www.legalaid.qld.gov.au/legalinformation/Pages/Organisations.aspx?index=9046&redirect=organisations\\_details.asp](http://www.legalaid.qld.gov.au/legalinformation/Pages/Organisations.aspx?index=9046&redirect=organisations_details.asp).

155 Ibid.

156 LR Steele, L Dowse & J Trofimovs. 2013. *Section 32: A Report on the Human Service and Criminal Pathways of People Diagnosed with Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Under the Mental Health (Forensic Provisions) Act 1990 (NSW)*. University of New South Wales.

157 S Hayes & G Craddock. 1992. *Simply Criminal*. 2nd ed. Sydney: The Federation Press.

158 M Andersen. 1994. 'The many and varied social constructions of intelligence' in T Sarbin & J Kitsuse (eds). *Constructing the social*. London: Sage, 119-38.

159 J Cockram, R Underwood. 2000. 'Offenders with an intellectual disability and the arrest process'. *Law in Context*; 17(1): 101-116.

160 C Holland & T Mukhopadhyay. 2002. 'Prevalence of "criminal offending" by men and women with intellectual disability and the characteristics of "offenders": Implications for research and service development'. *Journal of Intellectual disability Research* 46:6; W Lindsay. 2002. 'Research and literature on sex offenders with intellectual disability and developmental disabilities'. *Journal of Intellectual Disability Research*. p 46; M Simpson & J Hoff. 2001. 'Patterns of offending among people with intellectual disability: A systematic review. Part II: Predisposing factors'. *Journal of Intellectual Disability Research*. 45:397.

161 Department of the House of Representatives. 2012. *FASD: The Hidden Harm- Inquiry into the prevention diagnosis and management of Fetal Alcohol Spectrum Disorders*.

Some attribute the differences in rates of overrepresentation of people with intellectual disability to the array of methods and sizes of samples used to identify people with intellectual disability in such systems.<sup>163</sup> Some capacity-related disabilities have a wide range and intensity of indicators.

Medicos and researchers can misconstrue the physiological root of impairments. Fetal Alcohol Spectrum Disorder, for example, is notoriously difficult to pinpoint; brain injuries may be misidentified; mental illness is challenging to diagnose.<sup>164</sup>

Scholars generally agree about the definition of intellectual disability, most research studies adopting the DSM IV diagnostic definition discussed in the introduction to this report. However some studies focus only on intellectual disability, while others include data on learning disabilities or 'borderline' intellectual disability,<sup>165</sup> expanding the focus from approximately 10 percent to 30 percent of prisoners.

According to Simpson and Hogg, prevalence data for prison inmates with intellectual disability have proved inconclusive,<sup>166</sup> citing the problem of different definitions across jurisdictions, the difficulties in distinguishing intellectual disability and mental health impairments and differences in test types and administration.<sup>167</sup>

The widely adopted DSM definition of intellectual disability must be used circumspectly. As a measure of cognitive and adaptive function it is scientifically and medically valid but it differentiates real people by placing a bright line along the IQ continuum and seeks to quantify complex adaptive behaviours like communication, social interaction and the capacity for learning. IQ scores say little about a person's capacities in different situations at particular places and times; yet the courts use them to create artificial (and momentous) distinctions.<sup>168</sup>

Identifying and assessing people with other forms of intellectual impairment can be even more difficult. Brain injuries, for example, are often undiagnosed - one study found that many people in prison are unaware that they have an ABI, sometimes because the injury occurred early in life and sometimes because the injury itself caused memory loss. Some studies of brain injury in prison populations have relied on self-reporting, rather than on diagnostic technology.<sup>169</sup>

Fetal Alcohol Spectrum Disorder is not widely understood by health professionals. The indicators are complex and inconsistent and there is a lack of standardised national diagnostic tools and diagnostic

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162 *Convention on the Rights of Persons with Disabilities*.

163 J McBrien. 2003. The intellectually disabled offender: methodological problems in identification. *Journal of Applied Research in Intellectual Disabilities*. 16:95-105.

164 Department of the House of Representatives. 2012. *FASD: The Hidden Harm- Inquiry into the prevention diagnosis and management of Fetal Alcohol Spectrum Disorders*.

165 IQ 70-79.

166 M Simpson & J Hogg. 2001. 'Patterns of offending among people with intellectual disability: A systematic review: Part II. Predisposing Factors'. *Journal of Intellectual Disability Research* 45(5):397-406.

167 S Hayes & D McIlwain. 1988. 'The prevalence of intellectual disability in the New South Wales prison population - An empirical study'. Report to the Criminology Research Council, Canberra; T Holland, I Clare & T Mukhopadhyay. 2002. 'Prevalence of 'criminal offending' by men and women with intellectual disability and the characteristics of 'offenders': Implications for research and service development'. *Journal of Intellectual Disability Research*. 46 (Suppl 1): 6-20; W Lindsay. 2002. 'Research and literature on sex offenders with intellectual and developmental disabilities'. *Journal of Intellectual Disability Research*. 46 (Suppl 1):74-85; W Lindsay. 2002. 'Integration of recent reviews on offenders with intellectual disabilities'. *Journal of Applied Research in Intellectual Disabilities*. 15:111-119; A Webb. 1987. Mentally retarded offenders: Considerations for public policy. NYS Office of Mental Retardation and Developmental Disabilities. Unpublished manuscript.

168 The US Supreme Court recently recognised this in *Hall v Florida* 572 US (2014). The majority overruled Florida's decision to execute an offender because his IQ 71 exceeded the cut-off, the Full Court finding that the judge at first instance failed to take into account the defendant's adaptive behavior.

169 N Rushworth. 2011. *Out of Sight, Out of Mind: People with an Acquired Brain Injury and the Criminal Justice System*. Prepared for the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs.



clinics.<sup>170</sup> More than one Australian parliamentary standing committee has investigated Fetal Alcohol Spectrum Disorder and the link between it and involvement, especially by young people, with the criminal justice system in Australia.<sup>171</sup>

Mental illness too covers a huge range of conditions, and different studies bracket different diagnoses within and without this category. Some include 'substance use disorders' and 'anxiety disorders', for example,<sup>172</sup> and others do not.

The only population group for which we have detailed Queensland data on representation is Aboriginal and Torres Strait Islander People and mental health disorders in prisons.<sup>173</sup> For the rest we must rely on inferences based on data from other jurisdictions in Australia and overseas.

## 2.11 Conclusion

Intellectual or mental health impairment do not after law-breaking any more than intelligence instigates legal compliance. The relationships between impairment and criminality are complex. Most people with capacity-related disabilities rarely if ever break the law or come to the attention of police, yet a significant proportion cycles through the criminal justice system, moving from juvenile courts and detention through to adult experiences of watch-houses, courts, remand centres, jails, forensic detention or community-based supervision, their impairments attracting cumulative disadvantages and consequences at every stage.

**"He is 17 years old** with an intellectual disability and Asperger's Syndrome. He wants to be a good guy. His life has been full of rejection; it's been full of him being a bad guy. He is very energetic in seeking approval. Often his attempts go wrong. Recently this person got on a train with a concession ticket. He had his concession ticket, he had his concession card, and he was approached by the traffic Police. Three minutes later he was arrested on five counts. He was actually trying to do the right thing. He was arrested on five counts."

(Morrie O'Connor – Co-Ordinator of The Community Living Association, speaking at the launch of Disabled Justice I - Disabled Justice Forum- Tuesday 19 June 2007. Royal on the Park Hotel, Brisbane, Queensland.)

Offending is commonly a symptom or endpoint, the causes of which are to be found in a lifetime's experience of marginalisation, exclusion and discrimination. People with intellectual impairments are more likely to have experienced disadvantages in childhood and youth that subsequently increased the likelihood that they would have contact with the criminal justice system: family conflict, poor role models, interrupted and substandard education because schools have not been inclusive or failed to provide supports sufficient to

170 In their recent report, the House of Representatives Standing Committee on Social Policy and Legal Affairs suggested that legislating a clear and inclusive definition of disability would remove the confusion around the eligibility of individuals with Fetal Alcohol Spectrum Disorder for support services and ensure equity before the law for defendants with Fetal Alcohol Spectrum Disorder; House of Representatives Standing Committee on Social Policy and Legal Affairs. 2012. *Fetal Alcohol Spectrum Disorder: The Hidden Harm- Inquiry into The Prevention, Diagnosis And Management Of Fetal Alcohol Spectrum Disorders*. Parliament of Australia.

171 Ibid; Western Australian Parliamentary Education and Health Standing Committee. 2012. *Fetal Alcohol Spectrum Disorder: The Invisible Disability*. Parliament of Western Australia, Legislative Assembly, Report No 15; Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs. 2011. *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*; Australian data on this is patchy, but the US National Organization on Fetal Alcohol Syndrome claims that 61 percent of adolescents and 58 percent of adults with Fetal Alcohol Spectrum Disorder in the United States have been in trouble with the law and that 35 percent of those with the disorder aged over 12 had been incarcerated at some point in their lives.

172 I Heffernan, K Anderson & K Dev. 2012. *Inside Out - The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report*. Queensland Forensic Mental Health Service.

173 Ibid.



their needs, poor accommodation and healthcare and, later, marginal or un-employment also directly or indirectly linked to that history of exclusion and discrimination.<sup>174</sup> For every successful entrepreneur who has overcome stigma or disadvantage associated with learning disability, there are many others who have not. Impairments become disabilities unless we consciously design inclusive systems and institutions.

People with intellectual disabilities and other capacity impairments may have considerable difficulty in understanding court proceedings, but out of longstanding habit, resignation and a fear of stigma they may not seek explanation or assistance. People with intellectual disability may be inclined to simply agree with court directions, or say they understand things even when they do not, and have developed strong functional and 'survival' skills that mask their real difficulties. They may appear, and strongly want, to participate in regular activities and transactions but may not always understand their obligations or the consequences of failing to meet courts' expectations.

Many people with disabilities who have contact with the criminal justice system may lack confidence and communication skills and, where available, may depend on family or on other support people to assist them. People with intellectual disabilities may not appreciate the importance of personally attending court at a designated time, or may find court distressing and seek to avoid it. Procedural breaches by a person with an intellectual disability should be met with inquiry into the circumstances behind that breach rather than the immediate application of sanctions. That people with impaired capacity may lack understanding of those court processes is not a reason to exclude them; it is motivation to tailor court and ancillary procedures and to provide appropriate support to people with disability so that all people can exercise their legal capacity on an equal basis.

This chapter has discussed the substantial overrepresentation of persons with disability as victims, suspects, defendants and offenders in the criminal justice system.

The evidence base is not without its limitations. The Federation of Community Legal Centres (Vic) has observed that the lack of data is a 'significant impediment to understanding the interaction between cognitive disability and the justice system'.<sup>175</sup> The Victorian Aboriginal Legal Service has suggested that the way government departments and agencies respond to people with an intellectual disability 'is severely impaired by the lack of good quality data concerning the contact people with cognitive disabilities have with the justice system'.<sup>176</sup>

There is no doubt that the problem is real and that we must do more. It is encouraging that overrepresentation is acknowledged as a key challenge in the QPS Strategic Plan,<sup>177</sup> although perhaps less encouraging when consider that it has been on their agenda for a number of years with negligible evident improvement. What is needed now is a concerted, whole of government response that looks outside as well as inside the criminal justice system for solutions.

There is more to be gained by understanding an individual's history, environment, life experience and support needs arising from impairment than from the labels attributed to people or the tests applied to determine those labels.

174 J Simpson. 2013. *Participants or Policed: Guide to the Role of Disability Care Australia with People with Intellectual Disability who have contact with the Criminal Justice System*. Practical Design Fund Project, NSW Council for Intellectual Disability, p 6.

175 Federation of Community Legal Centres (Victoria) Inc. Submission no 40 to Parliament of Victoria. *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. March 2013 6 October 2011, 5.

176 Victorian Aboriginal Legal Services Co-operative Limited, Submission no 39 to Parliament of Victoria, 3 October 2011, 48.

177 *Queensland Police Service Strategic Plan 2013-17*. <<http://www.police.qld.gov.au/corporatedocs/reportsPublications/strategicPlan/Documents/QPSStrategicPlan201317FINALCoPapproved.pdf>> .

## 3. Police

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## 3. Police

### 3.1 Summary and key recommendations

For suspects, witnesses and victims, police are the first point of contact with the criminal justice system. The approach that the police adopt when questioning, apprehending or taking a complaint sets the tone for the person's experience of the criminal justice system. For police themselves, those first contacts can be stressful, dangerous and occasionally life-threatening, or they may require tact and sensitivity, so it is essential that police receive rigorous training in communication skills, conflict de-escalation and disability awareness.

#### Key recommendations

QAI recommends the Queensland Police Service (QPS) should:

- Assess and revise its *Disability Plan* so that it is consistent with the *Convention on the Rights of Persons with Disabilities* (CRPD), the *Convention Against Torture* (CAT) and current best practice in police mental health and disability service delivery, including:
  - the need for early and repeated police training in mental health awareness and crisis de-escalation
  - the need for communication between front-line services
  - conditions for the review, monitoring and reporting on the plan.
- Develop further its disability awareness training, as detailed in this chapter.
- Update its Vulnerable Persons Policy to include specific directions regarding the treatment of persons with intellectual impairments and other people with disability.
- Renew its focus on early and repeated police training in mental health awareness and crisis de-escalation.
- Amend its Operational Procedures Manual, with the assistance of Disability Services and the Office of the Public Advocate and in consultation with the Anti-Discrimination Commissioner, to provide enhanced guidance on how police can improve communications with people with an intellectual disability or cognitive impairment.
- Take a proactive and preventive approach in dealing with people with intellectual disability, on the basis that accommodation and support are more appropriate and successful than court and custodial sentences.

QAI recommends the Queensland Government must:

- Coordinate communication between front-line services.

## 3.2 Introduction

Police are system gatekeepers: their job is dangerous, often thankless and not primarily geared towards nurturing and supporting suspects. Their focus is upon applying the law, policies, procedures and their discretion to determine whether or not a person will begin or resume a journey through the criminal justice or forensic systems.

Police may do whatever they can, within the law,<sup>1</sup> to encourage, manipulate or persuade suspects into making admissions or confessions or otherwise reveal evidence that the suspect, accomplice or some other party committed an offence.<sup>2</sup> Their responsibility is to the Crown, the public and their fellow officers, and these duties often conflict with and prevail over the immediate interests of suspects and accused, many of whom will have disabilities that can be and often are exploited to extract confessions or admissions.

Police are not on the side of the suspect or the accused, nor trained or expected to help a suspect or act as a de facto social worker or psychologist. To the extent that they do act to support a suspect, the support will be subordinate to the detection and investigation of crime.

## 3.3 Training

Nevertheless, when a person is a victim, defendant or witness in a criminal matter, initial interactions regarding that matter are generally with a police officer, and this initial interaction can set the scene for the overall interaction with the criminal justice system. As far back as 1993, the *Burdekin Report* recognised that police need training in how to work with people who are mentally ill,<sup>3</sup> and training in cultural sensitivity towards the mental health needs of, for example, Aboriginal and Islander people, whose behaviour the police may misinterpret.<sup>4</sup>

It is important that police are trained appropriately to identify and accommodate the needs of persons with intellectual and mental health impairments, and while it is not their job to provide support, the police are best placed to notify others that legal and emotional support may be needed.

## 3.4 Safeguards

Legislators included provisions for protected and special witnesses in the *Evidence Act 1977* (Qld) to safeguard the vulnerability of persons with 'impairment of the mind' in court proceedings,<sup>5</sup> but there are few similar statutory or common law provisions specifically created to protect vulnerable suspects.

- Police must allow a person who they reasonably suspect of having impaired capacity to have a support

1 Subject to, for example, provisions of the *Criminal Law Amendment Act 1894* (Qld), *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) and the *Police Powers and Responsibilities Regulation 2012* (Qld) (PPRR).

2 Legal limits include, for example, the PPRA, especially Chapter 15 (investigations and questioning). Police action will be circumscribed by the inadmissibility of any confession induced by threat or promise by a person in authority. The onus is on the party that tenders the confession to show it was not induced: s 10 *Criminal Law Amendment Act 1894* (Qld). For indictable offences, a confession is not voluntary where it is induced by a threat or promise: s 416 PPRA.

3 Human Rights and Equal Opportunity Commission. 1993. *Human Rights and Mental Illness: Report of the national inquiry into the human rights of people with mental illness. 'the Burdekin Report' Volume 1.* p 196-197.

4 Ibid- see Chapter 23.

5 See s 21 *Evidence Act 1977* (Qld) and Appendix C of this work.

person present while questioning takes place,<sup>6</sup> or when they wish to conduct a forensic procedure.<sup>7</sup>

- Police are required to caution a suspect about their right to silence in a way they understand.<sup>8</sup>
- If a suspect believes he has to participate in a police interview, any subsequent confession is invalid: it will be involuntary and subject to exclusion.<sup>10</sup>

Beyond these safeguards there is little in the law or in police policies to mitigate the police approach and protect vulnerable suspects.

### 3.5 Disability awareness

According to the 'differential treatment hypothesis' police may (usually unconsciously) view persons with disability as inherently prone to crime, focussing inappropriately on people with intellectual impairments to the exclusion of other potential explanations and suspects. The lack of appropriate services and less-than-ideal police responses to the needs of vulnerable people with disability together with the recurring cycle of arrest, processing, conviction, sentencing and correction only reinforces the association between impairment and criminality, becoming a self-fulfilling prophecy.

A person may be both vulnerable and an overrepresented offender, as the QPS acknowledges in their Strategic Plan.<sup>11</sup>

One consequence of unsatisfactory police training in impairment awareness and disability issues is the inability of some police officers to identify that suspects have relevant intellectual impairments in the first place.<sup>12</sup> This can have flow-on effects: coerced confessions and other violations of rights, including the right to remain silent and the right of a vulnerable suspect to have a third party present during the police interview, and unsuccessful prosecutions because of faulty questioning. Given their strategic commitment to reducing overrepresentation,<sup>13</sup> police must receive training in how to interact with people with different kinds of impairment that are relevant to and impact upon police procedures. QPS officers do receive training in the identification of and interaction with people with disabilities. For example, the QPS Education Services Branch guide *Contemporary Issues: Disability, Policing Services and the Community* (2nd edition, 3rd revision) contains descriptions of many common forms of intellectual impairment, and advice on appropriate police interaction with suspects, witnesses and victims. Nevertheless, QAI's Justice Support Program work with suspects suggests that the training provided to police in the area of disabilities, if not inadequate, is sometimes ignored.<sup>14</sup>

Police need to implement comprehensive policy guidance that provides them with alternative ways of interacting with people with various forms of intellectual impairment. To better serve the public, and to

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<sup>6</sup> PPRA s 422.

<sup>7</sup> PPRA s 452.

<sup>8</sup> PPRA s 431.

<sup>9</sup> *Tipler v The Queen* [2009] QDC 240.

<sup>10</sup> *Foster* (1993) 67 ALJR 550 allows the court to exclude a confession on grounds of fairness and public policy.

<sup>11</sup> QPS Strategic Plan 2012-2016.

<sup>12</sup> This important issue is discussed at length later in this chapter.

<sup>13</sup> Ibid.

<sup>14</sup> Police actively sought to question a client with an obvious intellectual impairment was questioned

interrupt suspects' cycling through the system, police must develop practices that allow them to fulfil both their duty to investigate crime and their obligations to people with disability in accordance with to the *Convention on the Rights of Persons with Disabilities*.

QAI recommends that the QPS makes available to police officers regular revision training on issues surrounding interaction with people with an intellectual disability or cognitive impairment. Training should encompass:

- techniques to improve identification of people with an intellectual disability, mental illness or cognitive impairment
- techniques to encourage effective communication with people with an intellectual disability, mental illness or cognitive impairment
- a component to raise awareness of challenges experienced by people with an intellectual disability, mental illness or cognitive impairment when they become involved in the justice system
- a component outlining the support needs of and referral to services available for people who have an intellectual disability, mental illness or cognitive impairment
- a component outlining the operational procedures that aim to provide support to people with an intellectual disability, mental illness or cognitive impairment during police interviews.

### 3.6 Public space policing

Police take an oath to keep the peace, and the street is the focus of police activity. This focus places people with intellectual impairments who are more likely to live in public spaces at a disadvantage.

Evidence suggests that people with intellectual impairments are:<sup>15</sup>

- more likely to be arrested, detained and questioned for minor public order infringements
- disproportionately affected by police powers around public order behaviour
- more easily persuaded to confess
- more likely to misunderstand their rights, such as the right to silence.<sup>16</sup>

QAI has provided evidence that people with capacity impairments tend to be clustered at the lower end of the socio-economic scale, are more likely to live in private rentals and group homes, in boarding houses and hostels, or on the street. They can be caught up in the petty criminality associated with poverty and drug addiction, and are particularly susceptible to prosecution for public nuisance offences (also referred to as public space offences) such as begging, trespass and failure to follow a police direction. People's

<sup>15</sup> See, for example, NSW Law Reform Commission. 1996. *Report 80: People with an Intellectual Disability and the Criminal Justice System*.

<sup>16</sup> A police officer must caution a suspect that they have a right to silence before questioning: *PPRA* s 431; *PPRR* Sch 9, 26(1). If the police officer suspects the relevant person does not understand the caution, the officer may ask the person to explain the meaning of the caution in their own words: *PPRR* Sch 9, 26(2).

impairments or disabilities, coupled with associated psychological and environmental factors can make them more visible and less tolerated by others in public spaces.

- In Queensland, the likelihood that police would charge persons with intellectual impairments with public space offences increased with the passage of the *Summary Offences Act 2005* (Qld), which also increased the range and scope of public nuisance offences. The typical consequence of a public nuisance offence is the imposition of a fine which may carry a default period of imprisonment.
- Persons with intellectual impairments are subject to a higher level of police surveillance and suspicion than others. Members of the public are more likely to experience discomfort in the presence of people who are perceived as different or dangerous and may seek police assistance in moving them on. Persons with disability are therefore particularly susceptible to being charged by Police with public nuisance offences, whether or not there has been wrongdoing.
- Public space policing typically involves verbal directions to take certain action, such as to move on. Persons with disability may find it difficult to comprehend directions, remember them or act in accordance with them, leading to an escalation in law enforcement interventions based on the perception that the person is wilfully disobeying a police instruction. For some people with cognitive impairment or mental illness, talking loudly or calling out is a communication tool and not necessarily intended to offend or annoy anyone. 'Resisting arrest' can simply be being loud or yelling out - something that a person with cognitive impairment or mental illness may do when apprehended by more than one officer.
- Persons with intellectual impairments may find it difficult to comply with legal obligations such as a requirement to pay a fine: they may not be able to afford to do so or may find it difficult to organise themselves to do so and are therefore much more likely to end up serving a default period of imprisonment. Because their underlying living situation is unlikely to change, they may be charged repeatedly with the same or a similar public nuisance offence. This may result in an accumulation of undischarged fines and an escalation in sanctions imposed not only for the nuisance behaviour but because of their failure to deal with legal consequences. Public nuisance offences are generally victimless crimes with disproportionate impact on persons with disability and other socially disadvantaged groups.

Police may be drawn into situations where a person is disoriented and in distress, for example, during an acute psychotic episode or, in the case of persons with intellectual impairment or brain injury, when their attempts to communicate go unanswered. These situations present specific dangers and may trigger police deployment of 'command and control' tactics to subdue the person, a serious escalation of the incident and the deployment of lethal force.

QAI recommends that:

- Police powers around public nuisance and order offences must be used judiciously and in some instances curtailed.
- It is essential that police are trained and given incentives to act with discretion, particularly in relation to minor public space offences.
- QAI supports a more therapeutic approach to these offences, in which police can play a major role. The chapter 'Court Processes' discusses therapeutic jurisprudence in more detail.

### 3.7 People with mental health issues

Police officers encounter people with mental illness every day - as suspects, victims and witnesses of crime, or because the police have been called for assistance by concerned members of the public. A survey of Sydney police officers determined that police on average spend around ten percent of their time dealing with people who appear to be mentally ill.<sup>17</sup>

Qualitative data from interviews with mental health consumers uncovered a perception that police fear this group, and fear prompts police to pre-emptively escalate conflict.<sup>18</sup> Like the general community, those with mental health issues are also likely aware, through the extensive media coverage of this issue, that police have been involved in (if not responsible for) a number of gunshot and Taser deaths. Despite the Coroner's exoneration of the police officers involved in the deaths of Scott Taylor, Antonio Galeano, Alan Dyer and others, the perception amongst some mental health consumers is that police are afraid of them and that this fear can lead to pre-emptive aggressive/defence responses by police officers in crisis situations. That police can lawfully kill in self-defence when they have a reasonable apprehension of death or grievous bodily harm<sup>19</sup> is no consolation for people who feel vulnerable to deadly force.

Victorian police reported that around one-fifth of potential offenders they encountered appeared to have a mental illness.<sup>20</sup> In 2013 alone, NSW police responded to more than 40 000 mental health incidents,<sup>21</sup> while in Victoria, the police apprehend an average of one person every two hours and take them to hospital for assessment.

Surprisingly few police are provided with knowledge and skills to deal with mentally ill people in crisis - fewer than 10 percent of frontline officers in New South Wales, for example, have had mental health training. The findings of these studies are broadly consistent with comparative studies internationally.<sup>22</sup> The Police Federation of Australia (PFA) has encouraged better mental health incident training for police but has also expressed concern that training will be counter-productive if mental health professionals defer incidents to better-trained police.<sup>23</sup> According to the PFA, the public might take the view that the police were thoroughly trained when in fact they could not be expected to be mental health experts.

Government allocation of more resources including beds in hospitals, better trained mental health staff and more responsive community programs would relieve police of responsibility for the mentally ill and divert it to where it best can be managed - by family members and mental health professionals.

QAI recommends:

→ early and repeated police training in mental health awareness and crisis de-escalation

17 Godfredson JW, Ogloff JP, Thomas SDM & Luebbers S. 2010. 'Police discretion and encounters with people experiencing mental illness'. *Criminal Justice and Behaviour* 37(12): 1392. Three-quarters of police participants reported that they had dealt with people in this category in the past month.

18 V Herrington *et al* 2009. 'The Impact of the NSW Police Force Mental Health Intervention Team: Final Evaluation Report' Charles Sturt University Centre for Inland Health Australian Graduate School of Policing. [http://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0006/174246/MHIT\\_Evaluation\\_Final\\_Report\\_241209.pdf](http://www.police.nsw.gov.au/__data/assets/pdf_file/0006/174246/MHIT_Evaluation_Final_Report_241209.pdf)

19 *Criminal Code 1899* (Qld) s 271.

20 Kesic D, Thomas SDM & Ogloff JP. 2010. 'Mental illness among police fatalities in Victoria 1982-2007: Case linkage study'. *Australian and New Zealand Journal of Psychiatrists* 44(5): 463.

21 LR Steele, L Dowse & J Trofimovs. 2013. *Section 32: A Report on the Human Service and Criminal Pathways of People Diagnosed with Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Under the Mental Health (Forensic Provisions) Act 1990 (NSW)*.

22 Kesic D, Thomas SDM & Ogloff JP. 2010. 'Mental illness among police fatalities in Victoria 1982-2007: Case linkage study'. *Australian and New Zealand Journal of Psychiatrists* 44(5): 463.

23 PFA reporting to The Senate, Select Committee on Mental Health. 2006. *A national approach to mental health - from crisis to community First Report. A national approach to mental health - from crisis to community. First Report.* 30 March 2006. Commonwealth of Australia.



→ communication between front-line services.

### 3.7.1 Transporting mental health patients

Police regularly have contact with people who are experiencing psychiatric crisis and who require a mental health transfer. The average transfer consumes 2.5 hours of police time, confirming anecdotal evidence from police citing lengthy involvement with people experiencing mental illness.<sup>24</sup> Unplanned calls for assistance trigger the overwhelming majority of mental health transfers, and although police frequently request assistance from other services, assistance is often not available.<sup>25</sup>

Police spend hours sitting in hospitals with individuals awaiting mental health assessments, only to find that the patient does not qualify for further medical assistance under the provisions of the relevant legislation. Police may have little choice but to detain the patient in watch-house cells to ensure the person's and the public's safety.

### 3.7.2 Mental health crisis intervention

The Queensland Government established Mental Health Crisis Intervention Teams - emergency services personnel acting together to de-escalate crisis situations with a view to resolving situations safely and humanely. In 2014, the QPS and the Department of Health, including the Queensland Ambulance Service and Queensland Hospital and Health Services, signed an agreement<sup>26</sup> that outlines processes for transporting mental health patients which:

- defines a state-wide interagency approach to the safe transport of people with a known or suspected mental illness who require, or may require, mental health assessment, treatment or care
- clarifies the roles and responsibilities of each agency involved
- provides a broad framework to guide the development of local interagency agreements
- facilitates collaboration and coordination between key agencies in providing transport and treatment/care that address the safety of individuals, service providers and the community.

Police are more confident about de-escalation techniques following the Mental Health Intervention (Project) training.<sup>27</sup>

QAI is not aware of any independent assessment of its effectiveness, but an evaluation of the NSW Police Force Mental Health Intervention Team's four-day and one-day training programs reports that the strategy, in place since 2008, has been successful in:

- improving the risk awareness of frontline police
- reducing the risk of injury to police and people they attended during crisis events
- improving collaboration with government and non-government agencies

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<sup>24</sup> S Thomas. 2012. 'The nature of police involvement in mental health transfers'. *Police, Practice and Research: An International Journal*. 14(4).

<sup>25</sup> T Short *et al* 2014. 'The nature of police involvement in mental health transfers'. *Police Practice and Research: an international journal*. 15 (4) 336-348.

<sup>26</sup> June 2014

<sup>27</sup> Ibid.

- reducing the police time consumed in mental health transfers
- increasing police use of de-escalation techniques and greater police confidence when communicating with people experiencing mental health crisis and drug induced psychosis.

The literature and anecdotal evidence overwhelmingly stresses the need for early, more comprehensive and repeated police training in mental health awareness and crisis de-escalation, together with the need for communication between front-line services, in that order.

QAI recommends:

- that all frontline police receive regularly updated training in mental health first aid such as that provided through the Mental Health Intervention Project (MHIT), and in the de-escalation of conflict situations involving people manifesting acute psychosis<sup>28</sup>
- that the QPS assesses and revises its *Disability Plan* for consistency with and improvement of current best practice in police mental health and disability service delivery, including:
  - the need for early and repeated police training in mental health awareness and crisis de-escalation
  - the need for communication between front-line services.

### 3.8 People with borderline personality disorders

Too often police are the only first responders available to support people with acute personality disorders. Recent Victorian research suggests that medical emergency services refuse to take people who are not manifesting full-blown psychosis or posing a risk to themselves or to others. In Queensland, anecdotal evidence suggests that police must act as caretakers for mentally ill people in crisis who do not fit into a category that will ordinarily get quick attention from other services.

People with borderline personality disorder are systemically overlooked and unsupported and experience prejudice and misconceptions about their behaviour. They were described by police, according to one study, as people behaving badly (which suggests a police response) and as not rational (suggesting a mental health response).<sup>29</sup> Such behaviour does not always qualify for mental health services, exacerbating the 'revolving door' phenomenon.<sup>30</sup>

Queensland police expressed their frustration that hospital policies prohibit hospital staff from admitting people who manifest psychotic behaviour when staff believe the person may be under the influence of alcohol or other intoxicants.<sup>31</sup> Hospitals have a duty of care to staff, other patients and visitors, and do not have the security resources to manage unpredictable and potentially violent behaviour. When no other option is available police will lay an assault charge simply so a difficult person is kept in a cell overnight, liberating police to other business.

28 See, for example, the coronial findings into the death of Carmelo Galeano, released in November 2012: [http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0003/168357/cif-galeano-ac-20121114.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0003/168357/cif-galeano-ac-20121114.pdf).

29 S Thomas & T Martin. 2013. 'Police officers' views of their encounters with people with personality disorder'. *Journal of Psychiatric Mental Health Nursing*.

30 See, for example, the coronial findings into the death of Carmelo Galeano, released in November 2012: Stuart Thomas & T Martin. 2013. 'Police officers' views of their encounters with people with personality disorder'. *Journal of Psychiatric Mental Health Nursing* 21: 20-29.

31 Personal communication; police also express frustration that they do not have access to forensic records that might assist their handling of a suspect.

### 3.8.1 Information sharing

The *Hospital and Health Boards Act 2011* (Qld) sets out the grounds on which clinicians may share information about patients' mental health and other personal details. Clinicians are required to disclose information to protect the health, safety and well-being of consumers, carers or the community, and as far as possible clinicians must respect the consumer's preferences regarding release of information.

Anecdotal evidence suggests that some clients are not keen to share their personal information without knowing who may eventually access it. Clinicians may disclose past incidents and treatment details to the police.

**Case study** - Police were asked to check on a young man who was known to have a history of contact with mental health services. Six officers attended the man's home and entered without his consent. Terrified, the young man backed into a table, dislodging an object that fell on a policeman's foot. The young man was charged with assaulting the police officer.

All Queensland Health staff have a duty of care to disclose any relevant information about a consumer to avert a serious risk to the life, health or safety of the consumer, carer or others in the community, provided the Director-General has given written authority for the disclosure. The *Hospital and Health Boards Act 2011* (Qld) also allows the disclosure of information under an agreement between Queensland Health and another State or Commonwealth department. It is critical that a person's confidential information is not used in a way that effectively puts them at a disadvantage vis-à-vis the police. There is no point in police having extra information about a person's forensic experiences or mental health condition if that information only serves to strengthen existing prejudices about people with mental illness.

#### **Police (NSW) and Persons with intellectual disability**

Qualitative research from NSW reports that each of the five individuals interviewed stated that the police did not understand their disability and that they were treated badly by the police. One individual stated that the '*coppers treat me and my friends like dirt*', whilst another stated that '*a police woman threatened to break my leg so I threatened her back and was given an AVO*'. Further, all of the participants stated that the courts were much better to deal with than the police and that if they were granted a Section 32 order, the courts were responsive to helping them without placing them in jail.

QAI recommends that:

- police not use people's confidential information in a way that puts them at a disadvantage vis-à-vis the police. The information should be used to inform the allocation of appropriately trained police responders.

32 Lee-Anne Whitten, Speak Out Consulting, cited in Jim Simpson (NSWCID). 2013. *Participants or Just Policed? Guide to the role of Disability Care Australia with people with intellectual disability who have contact with the criminal justice system*. Jim Simpson Practical Design Fund Project for the National Disability Insurance Scheme, May 2013.

### 3.9 Police and people with intellectual disability

A NSW study of the profiles and pathways of a large sample of adult prisoners with cognitive disability<sup>33</sup> determined that the average age of first police contact was 16.5 years – significantly lower for those with complex needs. Almost all had high levels of police contact, both as victims and as offenders.<sup>34</sup> Contact data on police identification of people with intellectual disability compared to all police contacts is harder to come by than that for people with mental illness. According to the Victorian ‘Prevalence of Police Encounter with People with Intellectual Disability’ study,<sup>35</sup> police reported coming into contact with people they believed to have an intellectual disability on average 2.89 times per week and for a wide variety of reasons. However, given established evidence regarding the high proportion of suspects who do in fact have intellectual disability (from ~ 10 percent up to ~ 30 percent when including people with borderline intellectual disability) those figures should be much higher, and suggest that police appear to be missing identification cues.

Police base their knowledge of intellectual disability on job-related experiences,<sup>36</sup> identifying individuals by physical appearance and behaviour. While police consider themselves competent in their interactions with people with intellectual disability, those who self-identified as most in need of training reported lower confidence in how to respond in encounters.<sup>37</sup>

#### 3.9.1 Identification of people with disabilities

One of the most significant challenges to arise at the interface between people with disability and the criminal justice system is of timely identification of the disability by the relevant officer of the criminal justice system (usually the police as the first point of contact). This is particularly pertinent where the disability is an intellectual or cognitive impairment or a mental illness that may not be readily apparent. Many individuals coming in contact with the criminal justice system have complex and multiple diagnoses, which can be problematic where the legislative requirement imposes a condition that the individual is categorised within a discrete diagnostic category.<sup>38</sup> The difficulties are compounded by the different assessment tools, methodologies and definitions of intellectual disability used in different jurisdictions.<sup>39</sup>

A number of reports have highlighted that it can often be difficult for police, lawyers and other legal service providers to identify that a person has a cognitive impairment and consequently some people do not get appropriate support.<sup>40</sup> People may not think to mention that they have a disability or may actively try to hide their disability – others may not be aware that they have a disability.

33 Defined as having an IQ below 80.

34 E Baldry, L Dowse & M Clarence. 2012. ‘People with intellectual and other cognitive disability in the criminal justice system’. Sydney, University of New South Wales. <[www.adhc.nsw.gov.au/about\\_us/research/completed\\_research](http://www.adhc.nsw.gov.au/about_us/research/completed_research)>

35 M Henshaw and S Thomas. 2012. ‘Police encounters with people with intellectual disability: prevalence, characteristics and challenges’. *Journal of intellectual disability Research* 56: 620.

36 Ibid.

37 Ibid.

38 This is the requirement, for example, imposed by s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). See LR Steele, L Dowse & J Trofimovs. 2013. *Section 32: A Report on the Human Service and Criminal Pathways of People Diagnosed with Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Under the Mental Health (Forensic Provisions) Act 1990* (NSW). University of New South Wales, for a detailed discussion of this issue.

39 K Vanny, M Levy & S Hayes. 2008. ‘People with an Intellectual Disability in the Australian Criminal Justice System’. *Psychiatry, Psychology and Law*. 15(2): 261, 263.

40 S Hayes. 2005. ‘A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities’. *Current Issues in Criminal Justice* 69.

**'Brett'** is an Indigenous man with an intellectual disability. He also has a mental illness and substance dependence. He began to have regular contact with police after leaving school. In his late teens he was alleged to have sexually assaulted a young woman. The Mental Health Court pronounced him unfit and for four years he has moved between a series of institutions. His mother is his principal support but she has not been in a financial position to visit Brett on a regular basis.

Some offenders with intellectual impairments have become effective at hiding their lack of understanding, motivated by feelings of shame about their disability, habitual behaviour learned in school, and fear of being exposed.<sup>41</sup> Most people in general prefer to promote their strengths rather than their weaknesses and this is true for people with mild cognitive impairments. Legal service providers do not always ask clients if they have a disability and do not have consistent practices for collecting information about disability.

In Queensland, under the *Police Powers and Responsibilities Act 2000* (Qld), police are prescribed special requirements when interviewing particular persons, including Aboriginal or Torres Strait Islanders<sup>42</sup> and children.<sup>43</sup> The additional requirements include the duty to notify a representative of a legal aid organisation<sup>44</sup> and to allow the person access to a support person, both before and during the questioning. Within the category of people recognised as warranting assistance from a support person are people with a mental impairment. Where the police officer 'reasonably suspects' that the person has impaired capacity, the police must allow the person to speak to a support person prior to questioning and have the support person<sup>45</sup> present for the duration of the interview, but only where this is 'practicable'.<sup>46</sup> The small number of cases where this right has been considered suggests that judges may take a conservative approach and permit police officers significant latitude in failing to recognise the need for such supports.<sup>47</sup>

### Other Jurisdictions

Research in NSW has found that police and other service personnel frequently conflate mental health issues and cognitive disability, with the result that individuals diagnosed with an intellectual or cognitive disability are misdirected into the mental health system. It is unclear whether this is due to a misconception that cognitive disability is a mental health disorder or because there is no coercive civil legal framework to divert people diagnosed with a cognitive disability who come into contact with the criminal justice system.

<sup>41</sup> Simpson et al., *The Framework Report*, 41.

<sup>42</sup> *Police Powers and Responsibilities Act 2000* (Qld), s 420.

<sup>43</sup> *Ibid*, s 421.

<sup>44</sup> This is only applicable to Aboriginal and Torres Strait Islanders: see s 420(2) of the *Police Powers and Responsibilities Act 2000* (Qld).

<sup>45</sup> A 'support person' is defined by Schedule 6 to the Act in the context of a person with impaired capacity, as 'a parent or another adult who provides or is able to provide support necessary to help care for the person by looking after or managing the person's interests.'

<sup>46</sup> See s 422 of the *Police Powers and Responsibilities Act 2000* (Qld).

<sup>47</sup> For example, in *R v Hudson* [2009] QDC 418 (30 September 2009, Judge Deardon noted that the purpose of s 422 of the *Police Powers and Responsibilities Act 2000* (Qld) is 'clearly to provide safeguards for persons with impaired capacity'.

### Other Jurisdictions cont.

Dixon and Travis' 2007 research study, which analysed 262 electronically recorded interviews between police and suspects of criminal offences in NSW, concluded that police appear to be insufficiently aware of the need to caution when interviewing mentally ill suspects. They also documented that suspects do not independently communicate their disability or illness to police.<sup>48</sup>

The NSW Law Reform Commission has declared that the definitions of cognitive and mental health impairment utilised in the criminal law are dated and inconsistent:<sup>49</sup>

Taken as a whole the law lacks a consistent and clear approach to defining cognitive and mental health impairment and this gives rise to unnecessary confusion and complexity. Further, many legal definitions reflect understandings of behavioural science that are no longer current.

They recommend developing updated, relevant definitions of cognitive and mental health impairment, which they propose could be used at different stages throughout the criminal justice program, including in diversionary provisions, in bail applications, in pre-court diversion and potentially in sentencing.<sup>50</sup> QAI supports this process and considers that.

#### 3.9.1.1 Test, or no test?

The research literature on the identification of intellectual or cognitive impairment in persons who are suspected or alleged to have contravened the law is not controversial - there is general agreement that:

- It is important to identify the presence of an intellectual or cognitive impairment earlier, rather than later
- It is imperative that those working in the criminal justice system with alleged offenders and victims of crime have a basic understanding of the common disabilities that they will encounter and be prepared to respond to these within the custodial interview process<sup>51</sup>
- There is generally limited understanding by corrections department officers of the prevalence of hidden disabilities, including Acquired Brain Injury and hearing impairment.<sup>52</sup>

People with intellectual impairment are more likely to be suggestible and to acquiesce to statements made to them in interrogative-style (yes/no) police interviews;<sup>53</sup> are more likely to misunderstand basic legal terms such as 'guilty' and 'not guilty';<sup>54</sup> and are more likely to presume that a false confession is transparent and reversible.<sup>55</sup> These vulnerabilities prompt a question: should there be a mechanism such

48 D Dixon & G Travis. 2007. *Interrogating images: Audio-visually recorded police questioning of suspects*. Sydney: Institute of Criminology Press.

49 New South Wales Law Reform Commission. *Fact sheet: People with cognitive and mental health impairments in the criminal justice system: Diversion*.

50 New South Wales Law Reform Commission. *Fact sheet: People with cognitive and mental health impairments in the criminal justice system: Diversion*.

51 T Ochoa & J Rome. 2009. 'Considerations for arrests and interrogations of suspects with hearing, cognitive and behavioural disorders'. *Law Enforcement Executive Forum Journal*. 9(5): 131.

52 Department for Families and Communities, Government of South Australia. 2011. *Forensic Disability: The Tip of Another iceberg*.

53 G Gudjonsson. 1990. 'The relationship of intellectual skills to suggestibility, compliance and acquiescence'. *Personality and Individual Differences*. 11: 227.

54 S Smith. 1993. 'Confusing the terms "guilty" and "not guilty". Implications for alleged offenders with mental retardation'. *Psychological Reports*. 73(2): 675.

55 G Gudjonsson. 1995. 'I'll help you boys as much as I can: How eagerness to please can result in a false confession'. *Journal of Forensic Psychiatry*. 6: 333.

as a test that helps police to identify people with intellectual disability as soon as possible after first police contact? Identification could alert police to the need to call in a support person, or to adopt interviewing protocols that avoid interrogative or leading questioning.

Two views emerged in our interviews. Some expressed the view that people with intellectual disability should be identified early in the criminal justice process so that police can adapt their interviewing techniques accordingly, divert the suspect into an alternative process, or arrange for special supports.<sup>56</sup> Professor Susan Hayes developed the simple-to-administer 'HASI' test (trialled by Legal Aid Queensland) for this purpose. Non-psychologists can administer the test in 5-10 minutes, it correctly screens for intellectual disability in 82 percent of cases, and correctly excludes respondents who do not have intellectual disability in 72 percent of cases. The speed of administration and the accuracy of the test may save police time and resources,<sup>57</sup> and police in a number of jurisdictions in Australia have adopted the test.<sup>58</sup> Proponents of the HASI and similar tests suggest that accused persons with intellectual disability who are not identified as such are denied:

- options for diversion
- legal safeguards
- referral to full-scale diagnostic assessment
- appropriate community services.

For principled or practical reasons our respondents also expressed the view that police should not test for intellectual disability. People with intellectual or cognitive disabilities should not be arrested, charged or processed differently based on impairment alone: to do so would be discriminatory. In particular, mechanisms to determine the question of criminal responsibility should apply to everyone.

- The impact of intellectual disability on a person's capacity to engage with police depends on their type of disability and degree of impairment. A clearly defined rule says nothing about the person's degree of criminal responsibility.
- The administrative burden on a police force (or court system) of testing more than 150,000 suspects annually<sup>59</sup> is disproportionate to any benefit.
- A 'thumb-nail' test such as the HASI<sup>60</sup> must be followed by a more accurate, expensive and time-consuming test.
- A person with an intellectual disability may not wish to identify as such, for example, out of concern that others will exploit perceived weakness or vulnerability,<sup>61</sup> and a test should not be forced upon people.

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56 Among them Professor Susan Hayes.

57 See <http://sydney.edu.au/medicine/bsim/hasi/> for more information about the HASI.

58 According to the HASI site at University of Sydney School of Medicine the test has been adopted in many jurisdictions. <http://sydney.edu.au/medicine/bsim/hasi/>

59 The number of suspects exceeds the number of defendants. Queensland had 150,622 defendants finalised in Magistrates' Courts in 2012-13: Australian Institute of Criminology- <http://www.qgso.qld.gov.au/products/briefs/criminal-courts-aus/criminal-courts-aus-2012-13.pdf>.

60 'Hayes Ability Screening Index'.

61 Law Reform Committee. 2013. Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers, 2. Available at <[http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05\\_Access\\_to\\_justice\\_intellectually\\_disabled\\_-\\_Final\\_Report.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf)>



**Freddie Hall** is a Florida man who was arrested for murder in 1978 and lived on death row until early in 2014 when the US Supreme Court ruled that Florida could no longer execute him. How this eventuated illustrates the danger of mandating a clear dividing line between those with intellectual disability and not, and the complexity of the relationship between intellectual disability and criminal justice.

Twelve years ago the US Supreme Court said that it is unconstitutional to execute a person with an intellectual disability. The 8th Amendment prohibits 'cruel and unusual punishment', and in the words of the court, 'no legitimate penological purpose is served' by executing a person with intellectual disability. The court left the definition of intellectual disability up to states themselves. Florida legislated an IQ 70 cut-off and Freddie Hall's IQ tested at 71, so he was scheduled for execution.

Mr Hall appealed to the Supreme Court on constitutional grounds. A 5:4 majority found:

- The state failed to take into account standard errors in measurement
- Intellectual disability is more than an IQ score. 'Intellectual disability is a condition, not a number'.<sup>62</sup>

**Conclusion:** A standard approach to intellectual disability in any context has the potential to create inequities between those who fall within a definition and those who don't.

Broadly speaking the critical issues at criminal law when the courts seek to establish criminal responsibility are:

1. the person's capacity in a particular place and at a particular time (when the alleged offence was committed)
2. their current capacity to enter a plea or to stand trial.

The defendant's guilt or innocence does not turn on a defendant's capacity in the abstract, even when established accurately. A test will create a false dichotomy - see the Freddie Hall example in the text box - when applied by police as a sorting mechanism, drawing a 'bright line' but not meaningfully differentiating people in terms of either their criminal responsibility or their needs as a defendant or prisoner. Finally, defendants will have other types of impairments that may be just as relevant to their progress through the system, such as mental illness or Acquired Brain Injury, that do not register in a test for intellectual disability.<sup>63</sup> Rather than focus on particular types of impairment, in our view it is better to focus on relevant legal capacity and on a person's support needs as they move through the system.

Everyone is entitled to and must be provided with the supports they need to exercise their legal capacity on an equal basis with others, and to enforce their legal rights as effectively as any other.<sup>64</sup> The possibility that a person who has an intellectual disability may be more quiescent and vulnerable to manipulation in

<sup>62</sup> Kennedy J in *Hall v Florida* 572 US (2014).

<sup>63</sup> Edward B Heffernan, Kimina C Andersen, Abhilash Dev and Stuart Kinner, 2012. 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons'. *Medical Journal of Australia* 197(1): 37-41.

<sup>64</sup> Article 12 *Convention on the Rights of Persons with Disabilities*.



an interview is no reason to deny them legal process. This includes the determination of facts in court, particularly when the alternative is to divert them into a forensic system that may infringe their liberty even more than the criminal justice system. It is a reason for police to use caution in their interview technique lest the interview be ruled inadmissible by on grounds of unfairness,<sup>65</sup> and for appropriate support to be available to ensure that the person is subject to fair legal process and that they be provided with support as soon as practicable.

This principle applies not only to people with capacity impairments but to everyone with a disability. Watch houses and police stations must be accessible to all including those with physical disabilities - AUSLAN interpreters must be as available as other language interpreters.

→ QAI proposes increasing understanding of the nature and effects of disability within the criminal justice system, to enable a more appropriate response.

At present there is a generally low level of support provided to people with intellectual or cognitive impairment or mental health concerns who come into contact with the criminal justice system. We recommend developing a strong, core level of support and assistance for this group.

→ QAI does not support measures aimed at overt identification of intellectual impairment or mental

### Police questioning

Janelle is a 19 year old woman known by police to have an intellectual disability. Police charged her with a serious offence. After her release on bail detectives approached Janelle for follow-up interviews in relation to the alleged offence. The police have an obligation to allow a support person to be present during questioning pursuant to section 422 of the *PPRA*, the QPS Vulnerable Persons Policy and the QPS Disability Services Plan. Nevertheless the investigating police actively avoided opportunities to interview Janelle when her support was available, seeking instead to interview her alone. The charges were later dropped.

illness, as this may result in negative stereotyping and a limited view of the capabilities of many people. Instead, we support measures aimed at increasing knowledge and awareness of mental illness and disability, coupled with a blanket increase in the supports available to all vulnerable people. For example, the provision for enabling a person with impaired capacity to have a support person present before and during questioning should be extended to all people who come before the police for questioning. This acknowledges the inherent vulnerabilities of this group and removes the need for a distinction to be drawn between those with disability and mental illness and those without.

→ QAI recommends that QPS should further develop disability awareness training that:

- enables police to appreciate the distinction (and potential interrelationship) between intellectual disability and mental illness
- improves the ability of its front line officers to intervene safely and least restrictively in situations involving persons whose behaviour appears to be psychotic, or whose cognitive functioning is otherwise adversely affected

<sup>65</sup> *Tipler v The Queen* [2009] QDC 240; *Foster* [1993] 67 ALJR 550.

- raises police awareness of the possibility that a person with an intellectual impairment may not want an officer to know that they have an intellectual impairment or may wish to hide the effects of impairment
  - includes hands-on, scenario-based role-playing
  - enables police to identify indicators of intellectual disability through careful questioning and attentive listening, for example, through questions about school (school history, number of schools attended, special education placement, school attendance, teaching and learning outcomes) and (disability) income support
  - enhances police awareness of possible indicators of intellectual impairment such as:
    - slow or repetitive speech, poor memory, poor sequencing of events
    - childhood history of hospitalisation or other institutional placement.
- QAI recommends that others working within the criminal justice system, including criminal lawyers, social workers and magistrates, should receive additional training directed at identifying, understanding and responding to people in need of additional support.
- QAI considers that the focus should move from identification to responding appropriately to all people who may require support within the criminal justice system. Research by Steele and associates highlights the importance of looking beyond a diagnosis of mental illness or intellectual or cognitive impairment to recognise the 'significance of dynamics of social marginalisation approaching the criminalisation of people with cognitive disability and mental health disorder in the criminal justice system'.<sup>66</sup>
- We need to shift the focus from trying to help police officers and magistrates identify intellectual disability and mental illness to helping them to:
- develop knowledge of the different types of disability and mental illness
  - understand the way this may affect their responses (for example, their ability to verbally respond to questioning; understand processes; sustain eye contact)
  - provide increased support to all vulnerable, disempowered people that come into contact with the system.

<sup>66</sup> LR Steele, L Dowse & J Trofimovs. 2013. *Section 32: A Report on the Human Service and Criminal Pathways of People Diagnosed with Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Under the Mental Health (Forensic Provisions) Act 1990 (NSW)*. University of New South Wales. Their research found that individuals with complex diagnoses within the section 32 cohort largely experience greater levels of criminalisation, marginalisation and are more highly represented as victims of crime than those with a single diagnosis. This finding is important in recognising the need for those working within the criminal justice system to not only recognise the presence of an intellectual disability or mental illness, but to have a more in-depth understanding of the complexities of individual conditions.

### 3.10 Engagement with and questioning people with impairments

The quest for truth in the criminal justice process tests participants' communication skills<sup>67</sup> and can render false positives, particularly in relation to people with intellectual impairments<sup>68</sup> who may not be aware of their right to remain silent,<sup>69</sup> or who in trying to appear competent may acquiesce, confabulate, respond with false memories or with false but not deliberately misleading statements prompted by suggestion.

- QAI recommends that the QPS Operational Procedures Manual be amended with the assistance of Disability Services, the Office of the Public Advocate and the Anti-Discrimination Commissioner to provide enhanced guidance on how to improve communications with people with an intellectual disability or cognitive impairment. That guidance could cover:
- the necessity to pitch language and concepts at a level that is universally accessible and can be understood
  - the need to take extra time and care in interviewing procedures
  - the risks associated with the person's susceptibility to authority figures, including:
    - a tendency to give answers that the person believes are expected
    - the dangers of leading or repetitive questions
    - the need to allow the person to use their own words
  - the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers
  - the prerequisite to ask the person to explain back what was said at frequent intervals.

Parliament and the police service have created a number of legislative and policy safeguards designed to ensure a fair process. When a person with 'impaired capacity'<sup>70</sup> is suspected of committing an offence, police must comply with legislative and procedural requirements in relation to questioning.<sup>71</sup> The QPS *Operational Policies Manual*, for example, guides the interviewing of people with 'special needs': those who have 'reduced capacity to look after or manage their own interests', the non-exhaustive list of which

67 Thomas and Fernandez. 1993. In M Brennan & R Brennan. 1994. *Cleartalk: Police Responding to Intellectual Disability*. Brennan, Wagga Wagga.

68 Office of the Public Advocate. 2005. *Issues for people with a cognitive disability in the corrections system*. Office of the Public Advocate, Brisbane.

69 R Brennan & R Brennan. 1994. *Cleartalk: Police Responding to Intellectual Disability*. Wagga Wagga; J Cockram & R Underwood. 2000. 'Offenders with an Intellectual Disability and the Arrest Process'. *Law in Context* 17(2): 101-119; G Murphy & I Clare. 1998. 'People with learning disabilities as offenders or alleged offenders in the UK criminal justice system'. *Journal of the Royal Society of Medicine* 91: 178-182; J Porter. 2004. *Disability and the law: a training resource for the legal profession in Queensland*. Queensland Advocacy Incorporated, Brisbane.

70 Defined in *PPRA Schedule 6*: a person whose capacity to look after or manage his or her own interests is impaired because of either of the following—  
(a) an obvious loss or partial loss of the person's mental functions;  
(b) an obvious disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or which results in disturbed behaviour.

71 For example, Section 431 of the Police Powers and Responsibilities Regulation 2012 (Qld); QPS 'Vulnerable Persons Policy'.

includes people with mental illness, intellectual disability and people with impaired capacity,<sup>72</sup> and the *Police Powers and Responsibilities Act 2012* provides that an officer must not start to question a person with impaired capacity until they have, if practicable, allowed the person to speak to a support person privately, and that the support person is present whilst questioning takes place.<sup>73</sup>

Nevertheless, as alluded to above, police officers' subjective identification of persons with intellectual disability does not tally with known numbers of defendants with intellectual disability going through the system: if the police do not suspect that a person has an 'impaired capacity' they may not activate the relevant protocols. The protocols are not a perfect safeguard whether or not a person has an intellectual impairment.

For example, a police officer may interview a suspect with disability without effectively advising them of his or her right to silence - police are not required to caution a suspect about the right to silence unless they want to question them about their involvement in an indictable offence.<sup>74</sup> Although police may formally issue this advice they may not do so in a way that the suspect can understand and use the information - nor is there a standard procedure for officers and their supervisors to ensure that the person with disability has understood this advice.

Without being aware of a relevant intellectual impairment police may misinterpret a person's normal communication as evasive, suspicious and indicative of guilt. Police interviews may be long and expansive or rambling and persons with intellectual impairments may have limited receptive and expressive language, poor concentration, poor memory, be more easily confused or prone to rapid stress and fatigue. A person with intellectual impairment may have great difficulty understanding and following scenarios put to them in the police interview, and in explaining their version of events in response. Some people will lose focus and not listen; others will acquiesce just to please an authority figure.

- In comparison to the general population, a person with an intellectual disability or cognitive impairment is more likely to provide a response to leading questions.<sup>75</sup>
- A person with an intellectual disability or cognitive impairment may have a poor understanding of questions they are asked and may not understand the implications of answers they give.<sup>76</sup>
- Communication difficulties experienced by people with an intellectual disability or cognitive impairment can mean that the use of unfamiliar language and concepts during police interviews can exacerbate their confusion.<sup>77</sup>

People with intellectual disability may be eager to please, passive and easily confounded or mislead and therefore vulnerable to verballing: An investigation of 30 cases of miscarriage of justice demonstrated that people with impaired decision-making capacity are susceptible to false confessions.<sup>78</sup> Approximately two-

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72 Chapter 6.3.1 - Queensland Police Operational Procedures Manual No 46 <http://www.police.qld.gov.au/CorporateDocs/OperationalPolicies/opm.htm>.

73 *PPRA* s 422.

74 Section 431 *PPRA* and Part 5 of Schedule 10 (the Responsibilities Code) of the *PPRR*.

75 See for example Queensland Advocacy Incorporated. 2001. *Justice for all: People with an intellectual disability and the criminal justice system*, QAI, Brisbane, p. 27.

76 Intellectual Disability Rights Service, *Enabling Justice: A report on problems and solutions in relation to diversion of alleged offenders with intellectual disabilities from the New South Wales court system*, IDRS, Sydney, 2008, p. 74

77 Office of the Public Advocate, *Silent victims: A study of people with intellectual disabilities as victims of crime*, OPA, Melbourne, Report prepared by Kelley Johnson, Ruth Andrew and Vivienne Topp, 1988, p. 52.

78 G Gudjonsson. 2005. 'Disputed Confessions and Miscarriages of Justice in Britain: Expert Psychological and Psychiatric Evidence in the Court of Appeal'. *Manitoba Law Journal* 31, 490.

thirds (67%) of the people wrongly convicted were ‘psychologically vulnerable’ – the researchers concluding that false confessions may be linked to that vulnerability.

In Queensland the voluntariness of a confession is a question of fact for the judge,<sup>79</sup> and the onus of proof is upon the Crown to show that on the balance of probabilities the confession was voluntary. A confession is not voluntary where induced by a threat or promise,<sup>80</sup> and *Tipler*<sup>81</sup> established that an interview will be involuntary and subject to exclusion where a person who is ‘intellectually disadvantaged’ was told to participate.

### 3.10.1 Independent persons

Everyone has the right to have a lawyer or friend with them during questioning.<sup>82</sup> The QPS *Operational Procedures Manual* provides that when a person with a ‘special need’ is to be interviewed an independent person should be present to assist that person in overcoming the condition or circumstance that is creating the special need.

An independent person includes a support person,<sup>83</sup> but can be anyone nominated by the person with special need. Each police station is required to maintain a list of people who are competent and willing to act as an independent person, including relevant service providers, agencies and support groups.<sup>84</sup>

These requirements are valuable but they provide limited protection if police officers are unable to identify that a person has an intellectual or mental health impairment. The relevant legislation and policies define the term ‘impaired capacity’<sup>85</sup> but none provides guidance in the form of indicators or identifiers of impaired capacity (although it is acknowledged that these may be drawn from other sources, such as the Vulnerable Persons Policy). Additionally, these procedures only apply to indictable offences,<sup>86</sup> a tiny minority of all offences. The potential for unfair or inappropriate interviewing exists, and it would be highly probable that some defendants are unfairly convicted on the basis of admissions or confessions unlawfully induced.

These independent person requirements will also provide limited protection if a support person is not trained or skilled in dealing with the criminal justice system. An unskilled support person may unintentionally undermine a person’s legal rights by encouraging a person to talk to the police or to give their account of events.<sup>87</sup> The option to be supported by a skilled volunteer could help limit such problems and result in a more favourable outcome for the person in question. This is the approach taken in Victoria and NSW, where persons with intellectual disability are also offered the opportunity to be supported by a trained volunteer,<sup>88</sup> although this is not without its own problems given that people may not be comfortable with, or may be suspicious of an unfamiliar, albeit trained, support person. A successful model of support is QAI’s own Justice Support Program, discussed later in this chapter.

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<sup>79</sup> To be decided in a *voir dire*.

<sup>80</sup> PPRA s 416. *Criminal Law Amendment Act 1894* (Qld) s 10.

<sup>81</sup> *Tipler v The Queen* [2009] QDC 240.

<sup>82</sup> PPRA ss 418–419.

<sup>83</sup> PPRA Schedule 6.

<sup>84</sup> Queensland Police Service Operational Procedures Manual (Public Copy). <<http://archive.sclqld.org.au/qps-manuals/opm/current-issue/>> 6.3.4.

<sup>85</sup> The PPRA Schedule 6 definition of impaired capacity quoted above at note 48 begs the question, telling officers nothing about how to identify a person with impaired capacity.

<sup>86</sup> PPRA s 414.

<sup>87</sup> P French. 2007. *Disabled Justice: The Barriers to justice for Persons with Disability in Queensland*. Queensland Advocacy Incorporated, 70.

<sup>88</sup> Victorian Law Reform Committee. 2013. *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*. Parliamentary paper No 216, 138–139.

## Other Jurisdictions

### ***Independent Third Person Program***

In Victoria, police have standing orders that if it is clear that an interviewee has an intellectual disability, mental illness, ABI or dementia, an independent person should be present for the interview. The Independent Third Person can be a relative, close friend or a trained volunteer from OPA. Between June 2011 and June 2012, 2,237 ITPs attended interviews. A large number of interviewees were found to be repeat users of the ITP Program.

The Independent Third Person Program provides assistance in contacting lawyers, friends or relatives; ensures persons understand the questions asked by police; and requests police to rephrase questions if the interviewee is encountering difficulty understanding the questions being asked. If evidence is later utilised in court that originated from an interview of a suspect who was eligible to have an ITP present, this must be taken into consideration and the court may deem admissions made inadmissible.

In order to implement the program police officers are required to attend a one hour training session which covers the requirement to call an ITP, the benefits of having an ITP present, ways to get an ITP to attend an interview, the role of the ITP and the consequences of not calling an ITP. The training seeks to dispel the belief within the police force that having an ITP present will negatively impact on the investigation in some way. The identification of individuals that require an ITP remains the greatest hurdle to successful implementation of the program.

### **3.10.2 Vulnerable persons policy**

The QPS' Vulnerable Persons Policy<sup>89</sup> includes within its scope people with disability as victims and witnesses of crime, and as suspects, defendants and offenders. The policy includes these relevant commitments:

- Reduce crime against vulnerable people and hold offenders accountable for their actions.
- Support vulnerable people to understand and participate in criminal justice system processes.
- Treat vulnerable people with dignity, respecting their individual needs, challenges and circumstances.
- Facilitate access by vulnerable people to appropriate support services, including support persons and victim assistance.

The focus is on witnesses and victims but the policy does refer to defendants, noting that while they must be held accountable it is 'equally important that they receive fair treatment' and be guaranteed procedural fairness or natural justice. Every suspect is to be presumed innocent and defendants with impairments deserve the same supports as vulnerable victims and witnesses. They should be afforded the opportunity to have a fair trial: to participate in the defence of the charges brought against them, to understand what is happening and to have the opportunity to be heard and to present a defence.

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<sup>89</sup> <https://www.police.qld.gov.au/rti/published/policies/Documents/QPSVulnerablePersonsPolicy.pdf>

QAI recommends that the police Vulnerable Persons Policy includes:

- recommendations that police where appropriate, contact guardians or other decision-makers quickly post-arrest, and
- clearer and more specific directions regarding the treatment, and support of persons with impaired capacity and other people with disability, whether they are victims, witnesses, or suspects.

### 3.11 Alternatives for police

#### 3.11.1 Support link

This is a voluntary e-referral program developed by and for the QPS. It operates state wide and links to more than 200 registered local, state and national service agencies that provide support in relation to domestic violence, substance dependence, crime prevention, justice support, elder abuse and neglect, interpreting, Aboriginal and Torres Strait Islander support, counselling, trauma and suicide prevention. Referral and service are available as early in intervention for people who are or at risk of being victims or witnesses of crime, sexual abuse, neglect or violence or becoming involved in criminal behaviour.

Support Link recently celebrated its 100,000th referral from the QPS since its establishment in 2011. The referral service works with the Australian Federal Police and the Victoria and Northern Territory Police and its most common reasons for referral are domestic violence, parenting support, support for youth, relationship counselling and non-crisis mental health support.

#### 3.11.2 Justice Support Program (JSP)

The original *Disabled Justice* report made a number of recommendations in relation to the criminal justice system. One such recommendation was that the Queensland Department of Justice and the Attorney-General or Disability Services Queensland fund the establishment and operation of a State-wide Police Support and Court Support Service for persons with disability who are required to participate in a police interview or attend Court, whether as victims, suspects or other witnesses.

The current Justice Support Program is a result of that recommendation. It operates out of Queensland Advocacy Incorporated, a community membership-based non-profit disability advocacy organisation in South Brisbane. JSP was set up as a response to a need for non-legal support for people with impaired capacity at risk of or enmeshed in the criminal justice system.

The JSP team provides:

- assistance to obtain legal advice or representation
- referrals to appropriate and responsive supports (counselling, personal assistance, housing, employment)
- assistance enabling compliance with Court processes such as bail conditions, listing dates and the Duty Lawyer Service.

### 3.11.3 Mental Health Intervention project

Since 2005 the QPS has been collaborating with Queensland Health and other agencies in the Mental Health Intervention (MHI) Project. An important part of the project is the training of first response officers in de-escalation of mental health incidents through enhanced tactical communication skills. It is anticipated these officers will have the ability to identify, provide support and effectively intervene in situations which may otherwise result in mental health incidents. It also provides for the appointment of more intensively trained regional and district MHI Coordinators and the dissemination of medical information from Queensland Health that may assist in resolving crises involving persons experiencing mental illness.

The Project also aims to provide follow-up coordination between agencies, including case management, communication, collaboration, community development, training and evaluation.

#### Other Jurisdictions

##### ***Court Integrated Services Program***

This initiative was developed by the Magistrates Court of Victoria and provides a co-ordinated, team-based approach to the assessment and treatment of defendants.<sup>90</sup> Defendants are assessed with a view to linking them to an appropriate support service, which can include disability services or other services, such as drug and alcohol programs.<sup>91</sup> This program takes an individual approach to case management with the goal of reducing the likelihood of recidivism.<sup>92</sup>

##### ***Enforcement Review Program***

This is another initiative of the Magistrates Court of Victoria and is designed to help people with 'special needs', which are defined to include intellectual disability, who have outstanding fines that are registered with the Infringements Court. The Court is vested with discretion to impose an outcome that reflects the circumstances of the case.<sup>93</sup>

##### ***Mental Health Advocacy Service***

In New South Wales, the Mental Health Advocacy Service is a specialist service provided by Legal Aid NSW that provides free legal information, advice and assistance about mental health law.<sup>94</sup>

90 K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry, Psychology and Law*. 15(2): 261, 267.

91 Magistrates Court of Victoria. < <https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/court-integrated-services-program-cisp>>; K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry, Psychology and Law*. 15(2): 261, 267.

92 Magistrates Court of Victoria. < <https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/court-integrated-services-program-cisp>>.

93 Magistrates Court of Victoria. Guide to court support and diversion services. <[http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Parallel\\_Services\\_Docs/\\$file/Guide\\_to\\_Court\\_Support\\_Services.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Parallel_Services_Docs/$file/Guide_to_Court_Support_Services.pdf)>; K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry, Psychology and Law*. 15(2): 261, 267.

94 Mental Health Advocacy Service, NSW. <<http://www.legalaid.nsw.gov.au/what-we-do/civil-law/mental-health-advice>>.



### 3.12 People with disability as victims of crime - decision to charge

The same behaviours that police sometimes misinterpret as signs of guilt in persons with cognitive disability can also undermine police confidence in the evidence of people with an intellectual disability or cognitive impairment when they are victims of crime. Defensiveness, failure to make eye-contact or acquiescence, if misunderstood, may lead officers to consider the victim's testimony to be unreliable, untrustworthy, or incredible.

Police may abandon an investigation because they assume, incorrectly, that a person with an intellectual disability or cognitive impairment will not provide reliable evidence, or police may be slow to act when a person with a cognitive impairment alleges a crime has been committed against them. As recent media attention uncovered crimes against people with disability living in a Victorian institution it is vitally important that police are diligent in their investigations about allegations of abuse

### 3.13 Conclusion

Police training and policies must include guidance as to appropriate and supportive responses for people with disability and/or impaired decision-making capacity. The QPS hierarchy must ensure that police implement those policies and that training. If they do not the consequences may be serious: witnesses and victims will go unheard, and suspects will be wrongly convicted. Because trials are so expensive there is overwhelming pressure on defendants to plead to minor charges. Once a charge is laid the system takes over and conviction is all but inevitable, yet police may lay charges because they wrongly interpret the behaviour of a person with impairment as a sign of guilt.

Police are categorically not the cause, however, of overrepresentation. Improved access to education and training, support for families, more and more accessible diversion programmes and improved targeting of employment services will assist people with impaired decision-making capacity to be active, rewarded and rewarding citizens, reducing the likelihood that they will come into contact with the criminal justice system.

## 4. Courts and Court Processes

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## 4. Courts and Court Processes

### 4.1 Summary and key recommendations

People with disabilities who come in contact with the criminal justice system have a right to:

- substantive access to justice via procedural accommodations<sup>1</sup>
- the supports they need to exercise their legal capacity on an equal basis with others.<sup>2</sup>

Queensland courts need legislation to mandate the provision of appropriate supports and assistance for people with disabilities as witnesses, victims, jurors, suspects and defendants.

In this chapter we advocate the introduction of supports to enable people with disability to better participate in jury service. QAI considers interaction with the court system from the perspective of victims and witnesses of crime: the giving of evidence and the training of legal service providers, practitioners and court staff in supporting and appropriately assisting victims and witnesses with disabilities.

QIA addresses capacity and fitness to plead and to stand trial. The right to a fair trial is a central tenet of the Australian legal system. A fundamental prerequisite is ensuring those required to plead to or stand trial for an offence are fit to do so. The courts' determination of fitness must be situation-specific and take into account available decision-making assistance. The final part of this chapter covers other matters that are of relevance to suspects and defendants with disabilities: unsoundness, bail and sentencing.

#### Key Recommendations

- QAI recommends the training and placement at courts of liaison officers who will provide the courts with an initial assessment of the person's capacity when relevant to criminal responsibility.
- QAI recommends the continued refinement, wherever possible, of evidentiary provisions so that they remain consistent with Articles 12 and 13 of the *Convention on the Rights of Persons with Disabilities*. Evidentiary provisions must guarantee people with disabilities equal recognition before the law and equal access to justice, both formally and substantively.
- QAI recommends that the Queensland government amends the *Evidence Act 1977* (Qld) to provide that a witness who needs support has the right to have a support person present while giving evidence, who may:
  - act as a communication assistant

<sup>1</sup> This obligation flows from Articles 12 & 13 of the *Convention on the Rights of Persons with Disabilities*.

<sup>2</sup> Ibid.

- assist the person with any difficulty in giving evidence
  - provide the person with other support.
- Any test for fitness to plead or to stand trial should be based on a person's decision-making ability in the context of the particular criminal proceedings which he or she faces. Any test should take into account the supports mandated by Article 12 of the *Convention on the Rights of Persons with Disabilities*.
- QAI recommends that parliament passes the Mental Health Bill 2014 or a bill with similar provisions — particularly those provisions that create court-based liaison officers who can assist with reports about defendants' capacity.

## 4.2 Introduction

Despite recent reforms, there are few public institutions that exclude people on the basis of intellectual impairment (however necessary or well-intentioned that exclusion may be) more than the criminal justice system.<sup>3</sup> Positive recent developments include changes to the *Evidence Act 1977* (Qld) designed to protect vulnerable witnesses and clearer judicial guidance on court conduct and sentencing: parliament has created 'special'<sup>4</sup> and 'protected'<sup>5</sup> categories of witnesses to whom particular rules in relation to court procedure and the soliciting of evidence apply.<sup>6</sup> The Supreme and District Court's *Equal Treatment Benchbook*<sup>7</sup> has a chapter devoted to disability issues, guiding in-court treatment of victims, witnesses and defendants with disabilities.

Nevertheless the historical exclusion of people with intellectual impairment from important court processes continues, for example-

- Jury participation is open only to enrolled electors. People of 'unsound mind' may be excluded from the electoral rolls (Commonwealth and Queensland).
- The courts sanction evidence only:
  - from competent<sup>8</sup> persons
  - when delivered orally

3 See for example: Criminal Justice Commission (Qld). 1996. *Report: Aboriginal Witnesses in Queensland's Criminal Courts*, Chapter 4; Queensland Law Reform Commission. 2000. *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 2). Queensland Crime and Misconduct Commission. 2003. *Seeking Justice: An Inquiry into how Sexual Offences are Handled by the Queensland Criminal Justice System*. <http://www.cmc.qld.gov.au/library/CMCWEBSITE/SeekingJustice.pdf>; Supreme Court of Queensland. 2005. *Equal Treatment Benchbook*. <http://www.courts.qld.gov.au/practice/etbb/default.htm> <<http://www.courts.qld.gov.au/practice/etbb/default.htm>> .

4 See s 21A *Evidence Act 1977* (Qld) for definition.

5 See section 21M(1) *Evidence Act 1977* (Qld) for definition.

6 See, for example, the changes to the *Evidence Act 1977* (Qld) regarding 'intellectually impaired persons', improper questions & 'special witnesses' brought about by the *Criminal Law Amendment Act 2000* (Qld). Section 21 of the *Evidence Act 1977* (Qld) allows the court to disallow a question put to a witness in cross-examination or inform a witness a question need not be answered if the court considers the question is improper. Section 93A of the *Evidence Act 1977* (Qld) allows a statement contained in a document to be admissible as an exception to the hearsay rule where the maker of the statement is an intellectually impaired person who had personal knowledge of the matters in the statement and is available to give evidence. See Appendix C 'Disability Framework' for more information on evidence exceptions in relation to persons with impairment of the mind.

7 Supreme Court of Queensland. 2005. *Equal Treatment Benchbook*. • [http://www.courts.qld.gov.au/\\_assets/pdf\\_file/004/94054/5-etbb.pdf](http://www.courts.qld.gov.au/_assets/pdf_file/004/94054/5-etbb.pdf).

8 *Evidence Act 1977* (Qld) s 9.

- without the support of intermediaries.
- The test for (un)fitness for trial shunts some people with intellectual impairments into a forensic system that:
  - may detain people indefinitely without conviction
  - offers little prospect of rehabilitation.
- The absence of capacity determination in relation to summary matters:
  - fails to appropriately address or accommodate the special needs or circumstances of people with impairments
  - results in unnecessary convictions.

In this chapter we examine these shortcomings in more detail and make recommendations for reform.

### 4.3 Jurors

#### **‘Deaf woman cannot serve on Queensland jury due to disability, judge says’**

A woman with a hearing impairment was recently excluded from jury service in Brisbane when she asked for an AUSLAN interpreter. Douglas J ruled that allowing the woman to lip read may put the trial process at risk and that Queensland legislation does not currently allow a 13th (or 14th, etc) person in the jury room to support any juror in the deliberative process. Nance Haxton. 30 May 2014.

‘Deaf woman cannot serve on Queensland jury due to disability, judge says’. The World Today. <http://www.abc.net.au/news/2014-05-30/deaf-woman-cannot-sit-on-jury-qld-judge-rules/5489778>

Jury service is a litmus test for participatory citizenship. Article 12 of the *Convention on the Rights of Persons with Disabilities* proposes that persons with disabilities should be provided with the supports they need to exercise their legal capacity on an equal basis with others. The Australian Law Reform Commission’s recent discussion paper *Equality, Capacity and Disability in Commonwealth Laws*<sup>9</sup> has proposed new decision-making principles that include the proposition that ‘[p]ersons who may require decision-making support should be supported to participate in and contribute to all aspects of life’.<sup>10</sup> Given the overrepresentation in the criminal justice system of people with disability as defendants and offenders, it is ironic that people with diminished capacity may for that reason be denied a place in the jury room, which is both symbolically and substantively the key public contribution to the determination of criminal responsibility and the administration of criminal justice.

Every Australian has the right to a fair trial<sup>11</sup> or, more accurately, a right not to be tried unfairly.<sup>12</sup> Consistent with that right is an expectation that jurors will conscientiously sift, analyse and weigh evidence in discussion with other jurors. That expectation is not incompatible with the inclusion of jurors with diminished capacity

<sup>9</sup> Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws*.

<sup>10</sup> Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws*, 9.

<sup>11</sup> *R v Dashwood* (1943) 1 KB 1 at 4.

<sup>12</sup> Deane J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56 – 57.

or a sensory, communication or other kind of disability.

There are two filters that currently operate to exclude people with disabilities:

- Only persons enrolled as electors are eligible for jury service.<sup>13</sup> People of ‘unsound mind’ may be excluded from the electoral roll.<sup>14</sup>
- A person who has a ‘physical or mental disability’ that makes them incapable of effectively performing the functions of a juror is not eligible for jury service in Queensland.<sup>15</sup>
- QAI recommends that the *Jury Act 1995* (Qld) be amended to provide that a person is qualified to serve on a jury if the person can (with appropriate support if required) in the circumstances for which that person is summoned:
  - understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations
  - retain that information to the extent necessary to make these decisions
  - use or weigh that information as part of the jury’s decision-making process
  - communicate the person’s decisions to the other members of the jury and to the court.
- The legislation should be amended to provide that communication assistants or decision-making supporters allowed by the trial judge to assist a juror should:
  - swear an oath faithfully to communicate the proceedings or jury deliberations
  - be permitted in the jury room during deliberations, provided they are subject to and comply with requirements for the secrecy of jury deliberations
  - be exposed to offences in relation to the soliciting by third parties of communication assistants for
    - the provision of information about the jury deliberations
    - the disclosure of information by communication assistants or decision-making assistants about the jury deliberations.<sup>16</sup>
- The legislation should provide that decision-making support be taken into account in determining whether a person is qualified to serve on a jury.

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<sup>13</sup> Section 4(1)(a) of the *Jury Act 1995* (Qld)

<sup>14</sup> *Electoral Act 1992* (Qld) s 64(1)(a)(i); Commonwealth Electoral Act 1918 (Cth) s 93(8)(a). The Commonwealth Electoral Act 1918 (Electoral Act) currently prevents a person who ‘by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting’ from enrolling and voting in any Senate or House of Representatives Election (the unsound mind exclusion).

<sup>15</sup> *Jury Act 1995* (Qld) s 4(3)(l).

<sup>16</sup> We recommend that they be in similar terms to those arising under s 70 of the *Jury Act 1995* (Qld) and ss 58AK and 58AL of the *Federal Court of Australia Act 1976* (Cth).

- The legislation should be amended to provide that the trial judge may order that a communication assistant or decision-making supporter be allowed to assist a juror to understand the proceedings and contribute to jury deliberations.<sup>17</sup>

## 4.4 Victims and witnesses

People with disability are exposed to particular kinds of offending because they do not have sufficient supports to enable them to live independently in the community. Disability-specific housing, health and employment arrangements that congregate people with capacity impairments increase the likelihood that people with disability subject to those arrangements are more likely to be victims of crime.

Many people with capacity impairments live in co-tenancy arrangements with other people with capacity impairments. Current state and Commonwealth housing policies continues to sanction these arrangements because they allow government to accommodate more people for less capital outlay. Queensland Housing and Brisbane Housing Company's support for the construction of multiple dwellings for people on the One Social Housing list, for example, has resulted in high concentrations of people with disabilities who have high support needs. Private market and community housing boarding houses and other multiple dwellings such as these are known to the police as 'hot spots' for crime and targeted as such.

Many people with intellectual and mental health impairments also live in other forms of institutional accommodation: in state-run hospital-style accommodation like The Park at Wacol and Baillie Henderson Hospital at Toowoomba, in group homes operated by not-for-profits with two, three, four or sometimes many more occupants, or in hostels or boarding houses operated like mini-institutions, some of which house several hundred people. The tenants have little choice about these arrangements.

Service providers may congregate people with impairments as a cost-saving measure, or because they receive 'block' funding. Such arrangements are contrary to Article 19 of the *Convention on the Rights of Persons with Disabilities*. This practice does not enable people with disability to live independently. The residential, health or employment-based co-location of people with impairments is a source of conflict, exposing people with disabilities to abuse by other frustrated residents, and by support workers who take advantage of their vulnerability. There is a long list of prosecutions of Queensland support workers and their ancillaries, for example, who have sexually exploited people with disability,<sup>18</sup> and service providers and community visitors report physical assaults between persons with capacity impairments<sup>19</sup> - often triggered by the stresses associated with inappropriate congregate accommodation.

Yet others are not prosecuted for want of witnesses who are competent<sup>20</sup> and whose evidence the court will deem admissible – police and prosecutors pre-empt the process, knowing that the courts will reject the evidence of some victims, or that of the victim's co-tenants who are witness to the crimes.

17 Our recommendations here are consistent with those of the Australian Law Reform Commission in its report: *Equality, Capacity and Disability in Commonwealth Laws* (2014).

18 For example, *R v Murphy* [2003] QCA 234; *R v DaSilva* [1992] QCA 486; *R v S* [2002] QCA 106; *R v Mrzljak* [2004] QCA 420; *R v Delgado-Guerra; ex parte A-G* [2001] QCA 266; *R v Raphael* [2009] QCA 145; *Libke v The Queen* [2007] HCA 30.

19 Personal communication and see, for example, Office of the Public Advocate. 2014. *Community Visitors Annual Report 2013–2014*, 39. Available from: <http://www.publicadvocate.vic.gov.au/file/file/Report/2014/Community%20Visitors%20Annual%20Report%202013-14.pdf>

20 See Division 1A of the *Evidence Act 1977* (Qld). Competence is a presumption (s9 EAQ). A person is not competent if they are not able to give 'an intelligible account of events which he or she has observed or experienced': 9C(1)(a).

## 4.5 Giving evidence

The emphasis on oral evidence in court proceedings operates to the disadvantage of witnesses who have oral communication impairments. If a party places reliance on the evidence-in-chief of a witness with communication difficulties, for example, the witness typically must be made available for cross-examination or face an adverse inference. The hostility of cross-examination, the use of coercive questioning strategies and the delay between the event and subsequent court proceedings disproportionately impact on the testimony of witnesses with disabilities.

Prejudicial assessments of competence based on personal observation are not uncommon.<sup>21</sup> A Queensland disability service provider indicated to us that police/DPP have in some instances decided not to proceed with investigations/prosecutions into assaults, including sexual assaults, because they were of the view that the alleged victim was not competent to give evidence.

This sort of observation is commonplace in reports and inquiries into access to justice.<sup>22</sup> The Judicial Commission of NSW, for example, notes the following.<sup>23</sup>

People with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views regarding a person with an intellectual disability. For example they may fail to attach adequate credence to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.

QAI takes the view that every person with disability has a right to the supports they need to exercise their legal capacity on an equal basis with others, and that this applies to the provision of evidence as much as it does to voting or fitness for trial- indeed research suggests that most people with intellectual disabilities are no different from the rest of the population in their ability to give reliable evidence<sup>24</sup> provided that the courts use communication techniques appropriate to the particular person. The key is for the court to make reasonable adjustments to accommodate the testimony of all persons with intellectual impairments.

### 4.5.1 Competence and compellability

In Queensland, everyone is presumed to be competent to give evidence on oath.<sup>25</sup> However, if a party raises an issue in relation to a person's competence the court's discretion is enlivened. Whether the court will admit the testimony depends on factors including:

21 Personal communication from respondent & Australian Human Rights Commission. 2014. *Equal before the Law: Towards Disability Justice Strategies*. p 21; Law Reform Committee, (Parliament of Victoria). 2013. *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. pp 29-30. March 2013. Available from: <[http://www.parliament.vic.gov.au/file\\_uploads/Law\\_Reform\\_Committee\\_-\\_Access\\_to\\_and\\_interaction\\_with\\_the\\_justice\\_system\\_by\\_people\\_with\\_an\\_intellectual\\_disability\\_and\\_their\\_families\\_and\\_carers\\_-\\_Final\\_report\\_76JG2vK1.pdf](http://www.parliament.vic.gov.au/file_uploads/Law_Reform_Committee_-_Access_to_and_interaction_with_the_justice_system_by_people_with_an_intellectual_disability_and_their_families_and_carers_-_Final_report_76JG2vK1.pdf)>

22 See for example, Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws*. Discussion Paper 81, Chapter 7: 'Access to Justice'; Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 71.

23 Judicial Commission of New South Wales. 2006. *Equality before the Law Bench Book*. Judicial Commission of New South Wales, 5301.

24 M Kebbell, C Hatton & S Johnson. 2004. 'Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?' 9 *Legal and Criminological Psychology* 9:23.

25 See s 9 of the *Evidence Act 1977* (Qld).

26 Section 9A(2) *Evidence Act 1977* (Qld).



- whether the person is able to give an coherent account of events they have observed or experienced<sup>26</sup>
- (for sworn evidence or evidence given on affirmation) whether they understand that the giving of evidence is a serious matter and that they have an obligation to tell the truth over and above the ordinary duty to do so.<sup>27</sup>

The court may permit a person with an intellectual or other disability who does not understand the nature of an oath to give unsworn evidence,<sup>28</sup> the probative value of which will not be diminished merely because the evidence is not given on oath.<sup>29</sup>

These provisions apply consistently to those with and without disabilities; people with intellectual or communication impairments are not automatically presumed to be incompetent and unable to give evidence.<sup>30</sup> Section 9 is consistent with the framework of Articles 12 and 13 of the *Convention on the Rights of People with Disabilities* in a formal sense. In practice, however, courts can make prejudicial assessments precluding testimony by persons with disability<sup>31</sup> or may permit the giving of evidence but diminish its probative value.

### 4.5.2 Need for support

The law defines a person by their need for support but denies them that support. The *Evidence Act 1977* (Qld) defines a person with ‘impairment of the mind’ as one who has an impairment that results in a substantially reduced capacity for communication, social interaction and learning and a need for support,<sup>32</sup> yet denies the person support in the process of giving evidence.

A witness who has a sensory or intellectual impairment may need technological, moral or other support and should be allowed the assistance of a supporter who can help explain court processes and provide reassurance. That supporter may be a friend, or family member, advocate or a third party provided by the court itself if the witness is not familiar with court processes. Currently in Queensland, the court may order the State to provide an interpreter for a complainant, defendant or witness if the court is satisfied that it is in the interests of justice to do so.<sup>33</sup> Queensland’s Public Advocate is of the view that an argument can be made that section 131A of the *Evidence Act 1977* (Qld) is broad enough for the court to permit an interpreter for the use of persons with impaired capacity.<sup>34</sup>

### 4.5.3 Witness intermediaries

People with intellectual disability or other forms of intellectual impairment may have difficulty understanding or responding to questions, may need to respond in non-standard English or use a variety of communication means from communication boards, laptops and computer software or a combination of speech, gestures and other non-verbal indicators. According to a Victorian public prosecutor:<sup>35</sup>

27 Section 9B(2) *Evidence Act 1977* (Qld).

28 The court must explain to the person the duty of speaking the truth: s 9B(3) *Evidence Act 1977* (Qld).

29 Section 9D(2)(a) *Evidence Act 1977* (Qld).

30 *R v Hill* (1851) 169 ER 495.

31 Law Reform Committee. 2013. *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. [http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05\\_Access\\_to\\_justice\\_intellectually\\_disabled\\_-\\_Final\\_Report.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf) <[http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05\\_Access\\_to\\_justice\\_intellectually\\_disabled\\_-\\_Final\\_Report.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf)> .

32 See s 3 and Schedule 3 *Evidence Act 1977* (Qld).

33 EAQ s131A.

34 Office of the Public Advocate Queensland. 2014. *Access to Justice in the criminal Justice System for People with Disability*. P 11.

35 Matthew Anderson, Senior Solicitor, Office of Public Prosecutions. 2013. *Transcript of evidence*; Law Reform Committee. *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. Victorian Parliament, Melbourne; 30 April 2012, 6.

[Involvement of] a witness intermediary could mean the difference between a prosecution proceeding or the charges simply being withdrawn. One of the main barriers... may be a perception by those involved in the process that [a person with disability may] lack credibility, and it may be that an intermediary could overcome that barrier.

Some people may require an intermediary who is familiar with their speech patterns or gestures to 'translate' to the court. In the UK, witness intermediaries assist people with intellectual disability and cognitive impairment.<sup>36</sup>

Intermediaries can be trained by accredited speech and language therapists, clinical psychologists, mental health professionals and special needs education professionals,<sup>37</sup> but QAI asserts that an intermediary's prime qualification should be that they know the witness and their communication means best – it may be a family member or advocate.

- QAI recommends that the Queensland government amends the *Evidence Act 1977* (Qld) to require that, in assessing competence pursuant to Division 1A, the courts take into account the availability of communication and other forms of support.
- QAI recommends that the Queensland government amends the *Evidence Act 1977* (Qld) to include provisions similar to the *Crimes Act 1914* (Cth) Part IAD, which provides guidance in relation to the provision of support that protects 'vulnerable persons' in their interactions with the justice system. This includes provisions that allow vulnerable persons to choose someone to accompany them while giving evidence in a proceeding.
- QAI recommends that the Queensland Government considers providing greater witness support in general, particularly by facilitating the giving of evidence by 'allowing questions to be explained and assistance to be given in communicating the answers'.<sup>38</sup>
- QAI recommends that the Queensland government amends s 9 of the *Evidence Act 1977* (Qld) to provide that:
  - a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers
  - the court may give directions with regard to this.
- QAI recommends that the Queensland government amends the *Evidence Act 1977* (Qld) to provide that a witness who needs support has the right to have a support person present while giving evidence, who may:
  - act as a communication assistant
  - assist the person with any difficulty in giving evidence
  - provide the person with other support.
- The court should be empowered to give directions with regard to the provision of support.

36 The *Youth Justice and Criminal Evidence Act 1999* (UK) sets out intermediary functions, namely to communicate questions to the witness and answers given by the witness in reply and to explain such questions so far as necessary to enable them to be understood by the witness or person in question.

37 The Intermediary Registration Board oversees standards: Ministry of Justice, UK. 2012. *Registered intermediary procedural guidance manual*. Ministry of Justice, London.

38 Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws*. Interim Report No 81, 7.117.

In addition there are other ways the courts can facilitate the evidence of people with capacity and communication impairments, for example, by using a communication book with pictures and allowing the victim to point to the perpetrator and provide their account in response to this stimulus.<sup>39</sup>

## 4.6 Training legal service providers, legal practitioners and court staff

More broadly than issues of competence or communication support, the intimidating and alienating atmosphere of the courtroom is a barrier to effective participation in the legal process for people with an intellectual disability and other capacity impairments, who may find giving evidence stressful and difficult particularly when faced with tactics used to undermine their evidence. People may become flustered during cross-examination and the cross-examiner's questioning technique may emphasize the person's disability. The *Evidence Act 1977* (Qld) offers some protection, allowing the court to disallow language that is inappropriate, misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive in the cross-examination of a witness who has a mental, intellectual or physical impairment.<sup>40</sup>

The Queensland Supreme and District Courts Benchbook offers guidance on the treatment of people with capacity impairments as witnesses and quotes research that suggests that an intellectual disability does not necessarily prevent a person from being a reliable witness.<sup>41</sup>

The questions to which individuals with intellectual disabilities provide the most accurate answers (i.e. where the proportion of correct to incorrect information is greatest) are open, free recall questions (e.g. 'what happened?'). For these questions eyewitnesses with intellectual disabilities provide accounts with accuracy rates broadly similar to those of the general population. Although people with intellectual disabilities provide less information overall, they do appear to include the most important details.

Research suggests that people with intellectual disabilities may have more difficulty with leading or closed questioning of the type used in cross-examination. They may be more likely to acquiesce, particularly if they do not understand the question.

The Western Australian Disability Services Commission's practice guidelines to court officers<sup>42</sup> and the *Equal Treatment Bench Book* compiled by the Judicial Studies Board in the United Kingdom make a number of recommendations with regard to taking evidence from witnesses with capacity impairments:<sup>43</sup>

- It is important for people with an intellectual disability to familiarise themselves with the courtroom before appearing in court as an accused, witness or party to the proceedings.
- People with an intellectual disability who have no counsel, accompanying friend or support staff need the outcome of the trial carefully and clearly explained to them.

39 Law Reform Committee. 2013. *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. Victorian Parliament; Lynne Coulson Barr, Deputy Disability Services Commissioner, Office of the Disability Services Commissioner. Law Reform Committee. Transcript of evidence, Melbourne; 24 October 2011, 15.

40 Section 21.

41 M Kebbell, C Hatton & S Johnson. 2004. 'Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?' *Legal and Criminological Psychology* 9:24.

42 Disability Services Commission (WA). 2001. *Guidelines to support people with an Intellectual Disability through the Court system: Guidelines for Clerks of Court, Court Officers including Security Officers and Volunteers* Perth, 8. Available from: [http://www.dsc.wa.gov.au/cproot/622/2/80\\_Courts\\_Guidelines.pdf](http://www.dsc.wa.gov.au/cproot/622/2/80_Courts_Guidelines.pdf).

43 Judicial Studies Board. 2013. *Equal Treatment Bench Book*, 102.

- People with psychiatric disabilities may need:
  - to have information repeated
  - to have questions rephrased
  - to be provided with regular breaks because of shorter concentration spans
  - to become familiarized with the courtroom.
- Speak more slowly, use simple words and sentences and do not go on too long without a break.
- Avoid 'yes/no' answers and questions suggesting the answer or containing a choice of answers which may not include the correct one.
- Do not keep repeating questions as this may suggest that the answers are not believed and by itself encourage a change, but the same question may be asked at a later stage to check that consistent answers are being given.
- Do not move to new topics without explanation (e.g. 'can we now talk about') or ask abstract questions (e.g. ask 'was it after breakfast' rather than 'was it after 9.00 am').
- Do not make assumptions about timing and lifestyles – a tag to link the question may be helpful (e.g. a TV programme or phone call).
- Allow a witness to tell their own story and do not ignore information which does not fit in with assumptions as there may be a valid explanation for any apparent confusion (e.g. the witness may be telling the correct story but using one or more words in a different context at a different level of understanding).
- Always ensure that witnesses are treated with due respect and are not ridiculed if they are unable to understand the way questions are being asked.
- People with an intellectual disability will need additional special instruction in the use of the closed circuit television in order to participate.
- When swearing in a person with an intellectual disability as witnesses, administer the oath or affirmation courteously and slowly.
- QAI recommends that the Queensland *Equal Treatment Benchbook* be updated to include more specific guidance (such as the above) to the courts.

## 4.7 Suspects and defendants

### 4.7.1 Criminal responsibility and legal capacity

Legal capacity and its bearing on criminal responsibility are complex matters that depend on a variety of factors including:

- the characteristics of the individual<sup>44</sup>
- a person's soundness of mind at the time of the alleged offence<sup>45</sup>
- the nature of the charges<sup>46</sup>
- the person's fitness to plead<sup>47</sup>
- if found guilty, whether the person's intellectual impairment impacts upon their moral culpability and the weight allotted to specific and general deterrence, retribution, rehabilitation and other relevant sentencing factors<sup>48</sup> and legislative provisions.<sup>49</sup>

**People with Fetal Alcohol Spectrum Disorders** have brain damage that affects their cognitive development. They may not have an intellectual disability or a mental illness. As defendants under Commonwealth law, they are 'precluded from having their lesser culpability taken into account in the lower courts when charged with a federal offence'.<sup>50</sup> Similar inconsistencies occur in state and territory criminal law systems.<sup>51</sup> In Queensland, defence counsel can raise FASD in mitigation but the same cost problems associated with securing a report on capacity exists with FASD as it does with other forms of capacity impairment, and is compounded by the newness and limited understanding of the condition.

Respondents identified a number of problems with the current arrangements:

- All but a few criminal defendants proceed through the criminal justice process without the courts having considered their capacity in any formal way.
- The courts therefore convict and sentence some defendants who would better be diverted into a process in which the emphasis is more on supportive and developmental goals rather than on retributive ones.
- Although intended to provide precisely that support and nurturing, with an emphasis on achieving the person's maximum potential and self-reliance<sup>52</sup> and with the minimum necessary adverse effect on the person's liberty and rights<sup>53</sup> the *Mental Health Act 2000* (Qld) forensic process<sup>54</sup> is imperfect. The Chapter 7 Part 2 process denies some people with disability their day in court, diverting them into a forensic system that (from the point of view of the 'patient') is still retributive. Forensic Orders may

44 In Queensland, for example, a person with severe intellectual disability may not be charged in the first place. There is no determination of capacity in relation to simple offences. People charged with an indictable offence may be referred to the Mental Health Court, which will make a determination about fitness for trial informed by a psychiatric report that does take into account the DSM IV/V criteria and utilizes the fitness criteria established in *R v Presser* [1958] VR 45.

45 This depends on a person's knowledge of right from wrong in relation to an alleged offence, their understanding of what they were doing and their capacity to control what they were doing: the first two elements were established in *M'Naghten's Case* [1843] All ER Rep 229; the final in *R v Falconer* [1990] HCA 49. A defendant can invoke an insanity defence (s 27 Criminal Code 1899 (Qld) or where the charge is murder, diminished responsibility (*Criminal Code* 1899 (Qld)).

46 There is no provision for the courts to determine capacity in relation to simple offences in Queensland - see *R v AM ex parte A-G* 2010 QCA 305.

47 A person is fit to plead (or to stand trial) or they are not. The current test is *R v Presser* [1958] VR 45.

48 This is discussed in more detail in the relevant section below.

49 For example, s 9(2)(e) of the *Penalties and Sentences Act 1992* (Qld) that requires the court, in sentencing, to have regard to the offender's intellectual capacity.

50 Ashurst Australia. 2012. *FASD: The Hidden Harm*. Submission 49 to the Australian House of Representatives Standing Committee on Social Policy and Legal Affairs, Canberra, 24.

51 Ibid.

52 Section 8(d) *Mental Health Act 2000* (Qld).

53 Section 9(b) *Mental Health Act 2000* (Qld).

54 Set out in Chapter 7 Part 2 of the *Mental Health Act 2000* (Qld).

infringe a person's liberties more than the criminal justice process, detaining some indefinitely and carrying as much if not more stigma.<sup>55</sup>

- Although Legal Aid, duty lawyers and court-based Mental Health Liaison Officers do as much as they can to support clients with disabilities, there are no other formal provisions to support people with disability to exercise their legal capacity on an equal basis with others. In particular, there is no formal support to boost any defendant's fitness to plea.

For the purposes of the following discussion we break down the determination of criminal responsibility into three subject areas.

1. Fitness to plead
2. Soundness of mind at the time of the alleged offence/s
3. Sentencing

## 4.8 Fitness

QAI promotes the following principles:

- Every defendant has a right to decision-making support.
- The court should assess a defendant's fitness in the context of available supports.

### 4.8.1 Fitness - rationale

The common law presumption is that everyone is capable of entering a plea or standing trial unless proven otherwise, and the great majority of defendants with intellectual impairments stand trial in the same way as every other accused. Apart from the *Mental Health Act 2000* (Qld) diversionary process,<sup>56</sup> there is no 'disability exemption' from the determination of guilt,<sup>57</sup> although in its sentencing calculus the court may find that an offender's impairment reduces their moral culpability and the relative weight it assigns to the retributive and deterrent components.<sup>58</sup>

An accused is not entirely passive in the trial process: they must instruct the counsel they engage, enter a plea, follow proceedings, instruct or conduct a defence, and consider evidence if there is a trial. Even if they plead guilty, the accused must decide the plea and participate in sentencing.

<sup>55</sup> We deal with those processes in Chapter Six. It is somewhat artificial to separate criminal justice from forensic processes but we have done so here in order to highlight the key features of each in terms of their impact on people with disability.

<sup>56</sup> The diversion scheme under Ch 7, Pt 2 of the *Mental Health Act 2000* (Qld) 'presumes incapacity' in relation to people on existing Forensic Orders or Involuntary Treatment Orders and therefore discriminates against people with mental illness and intellectual disability. This is discussed in the Chapter on Forensic Processes. This is discussed in the next chapter.

<sup>57</sup> Petrella's research in the US is 22 years old and in a different common law jurisdiction so it should be treated with caution, but it showed that, of criminal defendants with intellectual disability, 90% with mild retardation and 67% with moderate retardation were criminally responsible. Few people with more severe intellectual disability were charged, let alone be found criminally responsible. Anecdotally, in Queensland a person with intellectual disability charged with an indictable offence is more likely to be found unfit for trial than of unsound mind (which is linked to the person's understanding of the alleged offence): R Petrella. Defendants with mental retardation in the forensic services system. R Conley et al. 1992. *The Criminal Justice System and Mental Retardation*. Baltimore: Paul Brookes.

<sup>58</sup> Capacity may be relevant, however, because the courts try to tailor sentences according to a person's degree of moral culpability, according to the likely effectiveness of specific and general deterrence, retributive purpose, likely effect of incarceration on the person (if relevant) and prospects of rehabilitation: see *R v Verdins* [2007] VSCA 102 and *Muldrock v The Queen* [2011] HCA 39, in which the High Court held that sentencing principles of punishment and denunciation did not require significant emphasis in light of Mr Muldrock's limited moral culpability for his offence.

Despite the common law presumption of fitness,<sup>59</sup> in some circumstances it may be necessary for a party or for the court itself to raise the question of the defendant's fitness. Some defendants may not be fit to plead or to stand trial.<sup>60</sup> *Smith J in Presser* set down the definitive test.<sup>61</sup> An accused<sup>62</sup> must be able to-

1. understand the nature of the charge
2. plead to the charge
3. understand the nature and follow the course of the proceedings
4. challenge jurors
5. understand the evidence and its implications
6. make a defence or answer to the charge.<sup>63</sup>

The accused is not fit for trial if they do not satisfy one or more of these conditions. If they satisfy all but the last condition they may still be fit to enter a guilty plea. The courts have developed the fitness exclusion to:

- avoid inaccurate verdicts and unfairness to the accused<sup>64</sup>
- maintain the moral dignity of the process.

It would be an abuse of legal process to subject someone to a trial when he or she is unable to participate in that trial'.<sup>65</sup> The court must exclude people as a protective measure<sup>66</sup> to ensure that a person cannot be tried for a crime unless they are capable of defending themselves'.<sup>67</sup>

#### 4.8.2 Fitness - focus on cognition

The test focuses on the accused's cognitive abilities: comprehension, analysis, synthesis, understanding, communication skills and knowledge. The emphasis, as the Law Commission of the UK points out,<sup>68</sup> in relation to their similar fitness text, is on the person's ability to understand rather than their ability to function or to do something - in other words, the emphasis is on the defendant's mental capacity. The test, as we explain below, is unfairly discriminatory.

The *Convention on the Rights of Persons with Disabilities* sets out a rights-based rather than welfare-based approach to government provision in relation to impairment. Article 12 mandates that people with disabilities must be able to exercise their legal capacity on an equal basis with others and that they are provided with the supports they need to do so.

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59 Except when the defendant is already on a Forensic or Involuntary Treatment Order, in which case the law reverses the presumption and the matter, whether summary or indictable, goes to the Mental Health Court.

60 Those few charged with indictable offences will be diverted to the forensic system

61 *R v Presser* [1958] VR 45.

62 There is an additional proviso set out in the *Mental Health Act 2000* (Qld), namely that the person must have the ability to endure a trial without serious adverse consequences to the defendant's mental condition becoming likely.

63 *Smith J in R v Presser* [1958] VR 45, 48.

64 Thomson Reuters, *The Laws of Australia* [9.3.1950].

65 Law Commission of England and Wales. 2010. *Unfitness to Plead*. Consultation Paper No 197, 4.

66 Thomson Reuters. *The Laws of Australia*. 9.3.1950.

67 Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws*, 159.

68 Law Commission of England and Wales. 2010. *Unfitness to Plead*. Consultation Paper No 197, 29.



The Australian Law Reform Commission's (ALRC) recent discussion paper on access to justice<sup>69</sup> activates that mandate in relation to the status of defendants with intellectual impairments in the courtroom, ALRC notes the common law's undue emphasis on a person's intellectual ability to understand specific aspects of legal proceedings and trial process and its lack of emphasis on a person's decision-making ability.<sup>70</sup> Ignorance of legal process in no way undermines their ability to make judgements about their own interests. Who is better placed to make those judgements?

Few non-lawyers can claim to have a clear grasp of court processes but the courts do not forbid their participation on that basis. The state already financially supports the duty lawyer service in order to ensure that criminal defendants get basic advice and support in relation to often unfamiliar legal processes, and defendants accept that support without forfeiting their right to due process or to decide their plea.

People with intellectual impairments are no less capable of making decisions about their own lives even if they are sometimes less capable of understanding the law. Impairment on its own, however defined, is not nor should be a basis on which to deny anyone participation in criminal proceedings. Article 12 mandates that people with disability have a right to the supports they need to exercise their legal capacity on an equal basis with others. With appropriate legal support, and if necessary, decision-making support, all people with intellectual impairments are capable of participating in a process that is so critical to their future liberty. The courts, in QAI's view, should assess fitness with the provision of support taken into account.

→ Any test for (un)fitness to stand trial should be based on a person's decision-making ability in the context of the particular criminal proceedings which he or she faces. Any test should take into account the supports that Article 12 of the *Convention on the Rights of Persons with Disabilities* mandates.

### 4.8.3 Lack of fitness - the consequences

A finding of unfitness is no 'get out of jail free card'. Failure to fulfil the protective Presser criteria may have devastating consequences for the accused, who may languish in forensic detention for longer than they may have had they been found fit and steered through the usual criminal court process. Once found unfit, it is plausible that the person may find their liberty more constrained than had they entered a guilty plea and been sentenced accordingly.

In their submission to the ALRC Inquiry into *Equality, Capacity and Disability in Commonwealth Laws*,<sup>71</sup> the Tasmanian Anti-Discrimination Commissioner observed that if determined unfit to stand trial, a person may 'end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts'. They 'will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed'.

Queensland's Mental Health Court determines (and the Mental Health Review Tribunal reviews) a term of forensic detention or other Forensic Order according to a therapeutic and risk calculus rather than punishment. A criminal sentence is finite, but a Forensic Order is open-ended, its termination depending on whether the person can later show fitness, or whether the person can show themselves to be sufficiently low risk. If risk endures so does the order. The Mental Health Court and the Mental Health Review Tribunal

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<sup>69</sup> Ibid, 159.

<sup>70</sup> Ibid, 7:14.

<sup>71</sup> See, for the final report, <[https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc\\_124\\_whole\\_pdf\\_file.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf)>



adjust their risk calculus to the person's known behaviour, to their compliance with the original order and with the rules of the detention centre.

According to anecdotal evidence, the funding for the Forensic Disability Service is not sufficient to provide optimal habilitation, rehabilitation, education and training, and the artificial, hierarchical, structured living arrangements atrophies detainee's capacities and living skills. The longer a person stays in detention the less likely it is that they will ever emerge from it. No-one detained at FDS has yet been released. Extraneous factors play on risk too. No matter how accurately the Court/Tribunal predicts risk the calculation is dependent upon the availability of accommodation and support outside forensic detention.

#### 4.8.4 Fitness - summary matters - introduction

The seriousness of the charge/s determines the way Queensland courts deal with the question of fitness. Summary matters constitute the vast majority of criminal matters. There is no provision that empowers magistrates to determine fitness to plead (and where appropriate divert the few defendants who cannot fairly participate in criminal process into extra-criminal proceedings). There is no 'free-pass' that releases people with intellectual impairments<sup>72</sup> subject to summary charges from criminal responsibility and its consequences, except the rarely-used insanity defence<sup>73</sup> or the partial defence of diminished responsibility,<sup>74</sup> or the rarely used discharge of an unfit defendant under common law.

In QAI's view Article 12 affects both sides of the issue equally. It demands that no door be closed to a person with intellectual impairment on the basis of that impairment alone, even if they find punishment on the other side. A person's participation in the criminal justice process is consistent with their Article 12 right to exercise their legal capacity. There should be no presumption that people with intellectual impairments should not be held criminally responsible simply because of those impairments.

That is not to say that people with intellectual impairments may not be more vulnerable to abuses in the correctional system; and it is all the more important that magistrates have a broad range of sentencing options open to them in all parts of the State.

#### 4.8.5 Fitness - summary charges - discussion

Defendants in criminal proceedings have an established right not to be tried unfairly.<sup>75</sup> The courts deal with the majority of criminal matters summarily and most defendants enter a guilty plea. Fitness in this context is different to fitness for trial; the accused need only enter the plea and competently take part in sentencing proceedings— a less onerous process than a trial. The sixth *Presser* criteria (above) does not apply.

Legal Aid's *Criminal Law Duty Lawyer Handbook* advises that if the defence, commonly a duty lawyer, is not confident that a defendant meets the *Presser* conditions they should inform the magistrate.<sup>76</sup> If the magistrate finds the defendant unfit the common law applies and the magistrate may discharge the defendant. For a number of reasons magistrates rarely do so.

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72 The exception is that people on Forensic Orders or Involuntary Treatment Orders are automatically diverted to a process under Chapter 7 Part 2 of the *Mental Health Act 2000* (Qld).

73 Section 27 *Criminal Code 1899* (Qld).

74 Section 304A *Criminal Code 1899* (Qld).

75 *Dietrich v The Queen* (1992) 177 CLR 292 per Mason CJ and McHugh J, affirming *Jago v District Court (NSW)* (1989) 168 CLR 23.

76 Legal Aid Queensland. 2012. *Criminal Law Duty Lawyer Handbook*. 5th edition.

Some magistrates may not be aware of the relevant common law that entitles them to dismiss;<sup>77</sup> and some may be reluctant to take this option because they do not consider it to be a constructive response to the behaviour in question. In the text boxed case scenario in Chapter One the magistrate was reluctant to dismiss a defendant whose nominally unlawful if not malicious behaviour had been the subject of public complaints.

We have no accurate data, but extrapolating from research results cited in Chapter 2, people with intellectual disability moving through the criminal jurisdiction of the Magistrates, District and Supreme Courts account for about 10% of the combined courts' total of ~343 000 criminal matters,<sup>78</sup> or approximately 34,000 matters per year. As Melissa Avery's widely discussed experiences in the Toowoomba Magistrates Court indicate, a person with intellectual disability who is unfit to plead may still be prosecuted and convicted in relation to summary matters.<sup>79</sup> Former Supreme Court Judge Bill Carter<sup>80</sup> and McMurdo J of the Court of Appeal have commented on the absence of statutory mandate in relation to the determination of fitness.

It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system.<sup>81</sup>

If the summary defendant is not already subject to an Involuntary Treatment Order or Forensic Order, magistrates have no discretionary statutory powers available to them. Parliament must improve on the current arrangements. Duty lawyers work under pressure, advising and presenting dozens of clients each morning. Many of the clients are aware of these constraints and have their own reasons for proceeding quickly with a guilty plea rather than opting for an insanity defence.<sup>82</sup> Some will enter a guilty plea just to get a matter over and done with and without a clear understanding that they could go to jail. Magistrates require more assistance to determine capacity in relation to defendants who appear on summary charges, and magistrates need options to divert or dismiss where intellectual impairment significantly diminishes criminal responsibility.

QAI recommends:

- that parliament passes the Mental Health Bill 2014 or a bill with similar provisions, particularly those provisions that create court-based liaison officers who can assist with reports about defendants' capacity
- that the courts provide defendants with intellectual impairments with supports to exercise their legal capacity
- that any test of fitness will focus on a defendant's ability to understand, weight and retain information relevant to trial decisions, and their ability to communicate those decisions

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77 See the case example in the text box above and see also *R v AAM ex parte Attorney-General of Queensland* [2010] QCA 305. See also the discussion in Legal Aid Queensland. *The Duty Lawyer Handbook*, 209.

78 These figures are calculated as the sum of figures obtained from the *Supreme Court of Queensland Annual Report 2011-2012*, 25; *District Court of Queensland Annual report 2011 – 2012*, 14; and *Magistrates Courts of Queensland Annual report 2012 – 2013*, 42.

79 See D Toombs. 2012. *Disability and the Queensland Criminal Justice System*.

80 Reported by C Van Extel. *Low IQ and in Jail*. ABC Radio National; 17 April 2011. Available from: <http://www.abc.net.au/radionational/programs/backgroundbriefing/low-iq-and-in-jail/3004730>.

81 McMurdo J in *R v AAM; ex parte A-G (Qld)* [2010] QCA 305, [9].

82 Section 27 *Criminal Code 1899* (Qld).

- That the test for fitness should take into account support measures that would potentially increase the level of fitness of an accused person.

#### 4.8.5.1 Indictable matters

The Mental Health Court determines fitness when an alleged offence is indictable and fitness is relevant. It disposed of 232 matters in the 2011-2012 year;<sup>83</sup> in 25 of which the Court considered fitness.<sup>84</sup> The common law test for unfitness to stand trial is based primarily on a person's cognitive understanding in relation to specific aspects of the legal proceedings. Proposals for reform must balance:

- the defendant's right to fair criminal process including determination of facts
- the defendant's right to an alternative process if their impairment prevents fair process
- the public interest.

Article 12 of the *Convention on the Rights of Persons with Disabilities* establishes every person's right to the support they need to exercise legal capacity on an equal basis with others. No-one with an intellectual impairment should be denied the opportunity to contest criminal charges laid against them, or the decision-making support and legal expertise they need to do so. In *R v M*,<sup>85</sup> de Jersey CJ said:

To deny a person like this appellant a trial would, having regard to both his interest in responding to the charge and possibly having his name cleared [...] and the interest of the community in ensuring that criminal charges are properly pursued, be frankly inconsistent with the rule of law [...].

Under the current MHA, if the Mental Health Court finds a person unfit for trial, they are denied a determination of the facts and if the incapacity is not permanent, must be placed on a Forensic Order, often requiring forensic detention.<sup>86</sup> Whatever chance they ever had of meeting the *Presser* criteria is lost as their cognitive skills atrophy in unstimulating institutional environments. The Mental Health Court excludes them from criminal process because the common law places undue emphasis on a person's intellectual ability to understand the specifics of legal proceedings and not enough emphasis on the person's decision-making ability.<sup>87</sup>

Not all people with capacity impairments are unfit to plead or have an 'unsoundness of mind' defence available to them. A person with significant intellectual disability, for example, may still have legal capacity to plead to and to defend a charge. Others with capacity impairments would be fit for trial if they had sufficient support, but the current approach is diversion to the Mental Health Court<sup>88</sup> and, if unfit or unsound, placement on Forensic Orders without the scrutiny of fact characteristic of criminal trials.

The right to support to exercise legal capacity on an equal basis with others is not only a question of principle:

- Forensic Orders (Disability) can largely place responsibility on Mental Health Services to provide care to people who have no mental illness, with no obligation on stakeholders who might conceivably

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83 This is the most recently available report online.

84 Mental Health Court. *Annual Report 2011 – 2012*, 2.

85 [2002] QCA 464.

86 Section 7 Mental Health Act 2000 (Qld)

7 Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws*. Discussion Paper 81, 7.14.

88 When charged with an indictable offence (or if they are already on an Involuntary Treatment Order or Forensic Order under the *Mental Health Act 2000* (Qld) Chapter 7 Part 2).

provide the habilitation, care and other services needed to address future offending behaviour.

- Diversion into the Mental Health Court and the forensic system may have even more serious and long-lasting impacts on a person's liberty and autonomy than criminal justice proceedings.
- Forensic detention and other constraints frequently last for longer than time served by those under criminal sanction for the same act.
- Forensic Orders can carry a heavier burden of stigma than criminal history.
- The desire to avoid the above may precipitate guilty pleas.

QAI does not suggest that a jail sentence is more desirable or appropriate. Community Forensic Orders that require habilitation, education and or training and regular reporting may be more appropriate and effective.

#### 4.8.6 Fitness recommendations

- QAI proposes that a provision similar to s 11(1)(a) of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA) forms the framework for a legislative amendment. This section provides that fitness to plead can be raised in the Magistrates Court at any time prior to, or during, the trial.
  - The amendment should also provide that if a person's fitness to plead is raised and there are reasonable grounds to suspect the person is unfit to plead, the court is required to adjourn the matter and conduct an investigation via its powers under the *Justices Act 1886* (Qld).
  - In a practical sense, this section may be broad enough to allow Magistrates to hear relevant evidence and representations from the prosecution and defence and allow Magistrates to call evidence, order the defendants to undergo psychiatric or psychological assessment and inform him/herself of the support arrangements for the defendant within the community.
  - This would provide a legislative mechanism for referral of persons with previous mental health histories (but not on a current Involuntary Treatment Order) to the Mental Health Court for determination, based on current medical report/s indicating a mental health involvement at the time of the offence.
- The *Criminal Code* should be amended to provide that a person is unfit to stand trial only if the person cannot:
  - understand the information relevant to the decisions that they will have to make in the course of the proceedings
  - retain that information to the extent necessary to make decisions in the course of the proceedings
  - use or weigh that information as part of the process of making decisions
  - communicate decisions in some way.
- The *Criminal Code* should be amended to provide that available decision-making assistance and support should be taken into account in determining whether a person is unfit to stand trial.

- QAI recommends legislative amendments that specify how Magistrates will determine fitness in relation to summary matters, including provisions:
- equivalent to s 32 of the Mental Health (Forensic Procedure) Act 1990 (NSW), which allows Magistrates to:
    - adjourn
    - grant bail
    - dismiss a charge and discharge a defendant on conditions, but does not require the accused to make a plea (as did the former special circumstances court).

## 4.9 Unsoundness

While fitness concerns the defendant's capacity to participate in court proceedings relating to the alleged offence, soundness concerns the defendant's capacity in relation to a finding of guilt for the alleged offence itself. The presumption at common law and pursuant to the *Criminal Code* s 26 is that every person is of 'sound mind' at the time of an alleged offence. This presumption is rebuttable in Queensland with the insanity defence.<sup>89</sup>

A successful insanity defence results in a qualified acquittal. The person may then be placed on a Forensic Order. Our concerns in this regard have been noted, but in short, a Forensic Order may not be a more favourable alternative.

Where there is cause to believe that, at the time of an alleged offence, a defendant was mentally ill or deprived<sup>90</sup> of their capacity to understand what they were doing, control their actions, or know right from wrong in relation to their actions, the following options are available:

- A defendant on an ITO or FO will automatically be diverted for assessment of their mental state which may result in, for indictable matters, referral to the Mental Health Court or, for simple offences, discontinuance of proceedings.
- Other defendants charged with a summary offence must proceed through the lower court process and may offer an 'insanity' defence.<sup>91</sup> [diminished responsibility is not available eg: murder is not a summary offence.]
- Often defendants charged with an indictable offence may:
  - Offer an 'insanity' defence<sup>92</sup> or diminished responsibility at trial;
  - Be referred to the Mental Health Court for determination of their capacity at the time of the alleged offence, or their fitness to plea.

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<sup>89</sup> Section 27 *Criminal Code Act 1889* (Qld).

<sup>90</sup> Or substantially deprived: s 304A *Criminal Code Act 1899* (Qld).

<sup>91</sup> Section 27 *Criminal Code Act 1899* (Qld).

<sup>92</sup> Ibid.

## 4.10 Bail Procedure

Defendants with impaired decision-making capacity are often disadvantaged on bail applications:<sup>93</sup>

- suitable arrangements for accommodation and support may not be available
- magistrates may not be satisfied that there is not an unacceptable risk of re-offending or later non-appearance.

This can result in some vulnerable people being remanded in custody, sometimes for longer than they would be if sentenced after an early guilty plea. The problem is exacerbated by long delays waiting for psychiatric reports.<sup>94</sup> The *Bail Act 1980* (Qld)<sup>95</sup> makes provision for the release of a person with a mental impairment, independently or into the care of the person's usual carer or cohabitant in circumstances where the person would otherwise be eligible for bail.<sup>96</sup>

→ QAI recommends the Queensland-wide extension of Queensland Courts Referral.

## 4.11 Duty and other lawyers

Lawyers who represent defendants with impaired decision-making capacity may be unintentional contributors to their client's disadvantage. Duty lawyers in Magistrates Courts struggle with large volumes of cases and may:

- not identify a person's impaired capacity
- if they suspect it, may not explore it
- if they explore it, may not have access to sufficient time and funds to commission an expert opinion, such as a social worker or psychiatric report.

Even with more time at their disposal, lawyers may not recognise the impairment and consider alternatives. Legal aid is prioritised for the more serious offences and legal representation may not be available to vulnerable defendants who do not wish to plead guilty to less serious offences.<sup>97</sup>

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93 Office of the Public Advocate. 2005. *Issues for People with a Cognitive Disability in the Corrections System*. [http://www.justice.qld.gov.au/files/Guardianship/ip\\_0505.pdf](http://www.justice.qld.gov.au/files/Guardianship/ip_0505.pdf).

94 This is pursuant to the process prescribed by the *Mental Health Act 2000* (Qld) Chapter 7 Part 2.

95 As amended by the *Criminal Law Amendment Act 2000* (Qld).

96 See section 11A *Bail Act 1980* (Qld). This mechanism is only considered if the person would otherwise be released on bail but the person does not, or appears not to, understand the nature and effect of the terms of bail so that the making of a bail order would be inappropriate. Failure to appear in court in accordance with a release notice may result in the court issuing a warrant for the arrest of the person, directing that the person be brought before the court but unlike a breach of a bail undertaking, no offence is committed by the failure to appear.

97 Legal Aid Queensland. 2008. *Can I get legal aid?* <http://www.legalaid.qld.gov.au/NR/rdonlyres/DA2552AB-5235-478C-8E27-5562C96E0ABB/0/fsmeanstestjuly08.pdf>.

## Other Jurisdictions

### ***Mental Health Court Liaison Services***

Mental Health Court Liaison Services are presently operative in Victoria, New South Wales and Tasmania. Queensland does not presently have an equivalent service, although a similar service is proposed for Queensland under the Mental Health Bill.

Court Liaison Officers provide assistance for people with mental health issues required to attend court. The scope of their work can include:

- providing assistance and support for individuals and family members
- explaining court processes
- providing advice on contacting a lawyer
- undertaking psychiatric assessments upon request by magistrates and judges
- providing assessments and recommendations to the court.

In Victoria, the Mental Health Court Liaison Service provides assessment and advice to persons with a mental illness at the court, aimed at diverting appropriate offenders into mental health treatment programs, reducing recidivism and reducing the frequency and length of custodial remands.<sup>98</sup> The service seeks to identify and assess people suspected of suffering from a mental illness and put them in contact with appropriate treatment and support, as well as determining their capacity for the purposes of the court proceedings.<sup>99</sup>

Select local districts within New South Wales also offer court liaison services for people with mental health issues, with the objective of providing assistance to people who have, or have had, mental illness and for conducting urgent mental health assessments for individuals before court.<sup>100</sup>

Judges and Magistrates may often have no opportunity to realise the person before them has impaired decision-making capacity unless they are told.

- QAI recommends that the Queensland government expand the current court liaison service to include support for people with intellectual and cognitive impairment.
- QAI recommends that in Queensland, the role of assessing and reporting on the defendant's capacity could be delegated to Court Liaison Officers, who could:
  - be based at the courthouses, making assessment efficient and convenient
  - be trained as experts in supporting people with diminished capacity.

98 Magistrates Court of Victoria. *Mental Health Court Liaison Service*. <<https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/mental-health-court-liaison-service>>.

99 Ibid.

100 New South Wales Department of Health. <<http://www.hnehealth.nsw.gov.au/mh/services/mhsf/prs/courtliasonservice>>.

- QAI recommends that magistrates receive support from a dedicated court liaison officer or case coordinator who:
  - screens and identifies people as they come into contact with the court processes
  - refers to on-call psychiatrist to undertakes capacity assessments
  - provides case management services
  - refers individuals to appropriate services.

## 4.12 Sentencing

People with intellectual disabilities and other forms of diminished capacity found guilty of offences that carry terms of imprisonment are sentenced, like all other offenders, pursuant to the *Penalties and Sentences Act 1992 (Qld)*. Imprisonment should be a last resort, used only where the purpose of imposing a sentence cannot be achieved by a lighter sentence. Wherever possible<sup>101</sup> the courts must look to non-custodial options when sentencing people with intellectual disability and other capacity-related impairments. Other Australian jurisdictions have implemented sentencing alternatives such as residential treatment orders when a person with a capacity impairment is convicted of a serious offence.

- QAI recommends that the Queensland Government amends the *Penalties and Sentences Act 1992 (Qld)* to enable the courts to impose residential treatment orders for 'serious offences' and that the *Penalties and Sentences Act 1992 (Qld)* is also amended to specify the place of such orders within the sentencing hierarchy.
- No court can make an appropriate decision about sentencing without having adequate information about the defendant at their disposal. At present, there is no formal mechanism for the court to be informed of the ways in which a person's impairment may be relevant to their life history. We recommend that the Queensland Government mandates the preparation of pre-sentence reports by the relevant state government department (Disability Services) and that the Queensland Government liaises with the National Disability Insurance Agency to prepare pre-sentence reports in a timely and efficient manner for people with an intellectual disability, cognitive impairment or mental illness.
- QAI recommends that the Queensland Government considers amending the *Penalties and Sentences Act 1992 (Qld)* to allow the court to impose a justice plan when sentencing any offender with a 'disability' within the meaning of the *Disability Services Act 2006 (Qld)*.
- QAI recommends that the Queensland Government continues to support Queensland Corrective Services in providing education, training, and resource programs for Corrections staff working with people with an intellectual disability, cognitive impairment or mental illness.
- QAI recommends that the Queensland Government continues to support Queensland Corrective Services to deliver and develop programs specifically tailored to meet the needs of offenders with an intellectual disability, cognitive impairment or mental illness.

<sup>101</sup> As Brennan J observed in *Channon v The Queen*: (1978) 20 ALR 1, 4-5, cited in *R v Neumann; ex parte A-G (Qld)* [2007] 1 Qd R 53, 61- An abnormality may reduce the moral culpability of the offender ... yet it may mark him as a more intractable subject for reform ... or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe.



- QAI recommends that the Queensland Government ensure resources are provided for programs and services directed toward reintegration and rehabilitation of offenders with an intellectual disability or cognitive impairment into the community.

#### 4.12.1 Magistrates sentencing

Ideally, the defence would appear equipped with the Queensland Police Form (QP9), the person's criminal history, the Police Court Brief, letters from treating doctors and private psychiatric reports. The Magistrate would then be able to frame a sentence that takes into account the whole circumstances of the person's offending behaviour, if the defendant is found guilty. Where the offence is trivial or there are extenuating circumstances, the Magistrate would have the option of discharging a convicted person pursuant to s 19 of the Penalties and Sentences Act 1992 (Qld) but anecdotal evidence suggests that this option is rarely used by Magistrates. In fact, people with intellectual disabilities and other capacity-reducing conditions often appear without the benefit of a well-prepared defence and the Magistrate has very few sentencing options open to them, especially in rural and remote areas.

- QAI recommends adoption of a legislative provision similar to s 15 of the Criminal Law (Sentencing) Act 1988 (SA), which empowers magistrates to discharge defendants where:
  - the offence is summary
  - the charge was connected with the defendant's decision-making capacity
  - a sentence would have no punitive or rehabilitation value.
- QAI recommends that the Attorney-General convenes a taskforce to recommend appropriate sentencing options and changes to the Penalties and Sentences Act 1992 (Qld) similar to provisions such as those in the Criminal Procedure Act 1986 (NSW) ss 345-352 and the Crimes (Sentencing Procedure) Act 1999 (NSW) s 11. Those provisions allow the courts to adjourn proceedings if the magistrate is of the opinion that they should be deferred in the interests of the offender and to order that defendants:
  - participate in specified treatment or rehabilitation programs and:
  - there be a correlative responsibility on the relevant government department to provide such programs
  - attend or report to the court after a specified time.

##### Melissa's case

The Queensland Court of Appeal overturned the decision to imprison her for minor offences because they found she did not have capacity to understand the relevant charges and their implications:

'It seems satisfactory that the laws of this state make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences.'

*R v AAM; ex parte A-G (Qld) [2010] QCA 305 at [9]*

## Problems Identified by Magistrates

The courts do not formally identify that a person has an intellectual impairment. The Duty Lawyer might appreciate that a person has an intellectual disability, or they may not. As noted above, duty lawyers are constrained by operational limits. The magistrate will try to do his or her own assessment of a person's capacity but, as one Magistrate observed, they generally do so with no special training or expertise. It is an *ad hoc*, lay assessment based on a single conversation at each appearance in court. Magistrates may ask questions about the person's living arrangements, financial support and how he or she manages his or her life. The magistrate may recognise intellectual disability or other incapacity based on a person's responses and demeanour, but no concrete screening exists.

Magistrates have the option to adjourn a matter for reassessment in two or three weeks' time if the duty lawyer (who can also only make a lay assessment) has identified signs of intellectual disability or other incapacity. Some magistrates, however, will proceed even when the duty lawyer declines to take instructions because the person is not able to meet the requisite capacity standard.<sup>102</sup>

One Magistrate said that he 'practically adopted his own special circumstances court' in cases where penalty was not an option, and looked at offenders' pressing basic needs for accommodation and support: 'usually people commit property offences from need rather than greed'. Anecdotal evidence suggests that Magistrates will look at alternatives to the usual fine options, suspended sentences, community service and jail, but there is very little available to them.

Often it is clear to magistrates that the prisoner lacks capacity and needs support rather than incarceration, but sometimes a custodial sentence is perceived as the only option. Magistrates also face significant political and or societal pressure to incarcerate.

- QAI supports the proposal contained in the Mental Health Bill 2015 Section 22 that allows a magistrate to discharge a person if they are reasonably satisfied, on the balance of probabilities, that the person was unsound or unfit, or pursuant to section 172 of the Mental Health Bill 2015, the magistrate may adjourn proceedings if the court is reasonably satisfied, on the balance of probabilities, that the person is unfit for trial but likely to become so within 6 months.
- QAI supports the proposal under sections 175 of the Mental Health Bill 2015 for magistrates to refer a person to the disability services department, to health, or to another entity for care.

One Magistrate said that the options available varied enormously depending on geography: 'In the city I have some - not many - alternative sentencing options available to me. Out at Charleville? Nothing.'

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<sup>102</sup> The requisite standard is that set out by the court in *R v Presser* [1958] VR 45.

## 4.13 Conclusion

Approximately one in three people appearing as defendants in Queensland's criminal courts have a degree of intellectual disability, yet little is done to adjust court processes to their needs. People with intellectual disabilities and others with diminished capacity may have considerable difficulty understanding court proceedings, yet out of longstanding habit, resignation and a fear of stigma they may not seek explanation or assistance.

People with intellectual disability may be inclined to simply agree with court directions or say they understand things even when they do not. People with intellectual disabilities may have some strong functional skills and 'survival' skills that mask their real difficulties. They may appear and may strongly want to participate in regular activities and transactions but may not always understand their obligations or the consequences of failing to meet courts' expectations. They may lack confidence and communication skills and, where available, may depend on family or on other support people to assist them.

Lack of understanding is not a reason to exclude people from those processes, but a reason to tailor court and ancillary procedures to people with such disabilities and to provide appropriate support so that all people can exercise their legal capacity on an equal basis. That is the intent of Article 12 of the *Convention on the Rights of Persons with Disabilities*.

→ QAI recommends that court procedures be adapted in the following ways:

- regular rest breaks during trials and other extended hearings
- priority listings
- excusing a person with capacity impairment from attending administrative mentions or directions hearings where he or she is represented
- the use of clear and plain and simple (rather than esoteric) language
- judges sitting at the bar table with the parties to reduce formality and intimidation where appropriate
- opportunities for lawyers to explain and clarify understanding during proceedings (akin to the additional time given to language-based interpreters to interpret proceedings).<sup>103</sup>

People with intellectual disabilities may not appreciate the importance of personally attending court at a designated time. They may, on the other hand, find court distressing and avoid it.

→ Procedural breaches by a person with an intellectual disability should be met with inquiry into the circumstances behind that breach, and support mechanisms in place to ensure they attend court in future, rather than the immediate application of sanctions.

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<sup>103</sup> Legal Aid Victoria. Submission to the Australian Law Reform Commission. Issues Paper on Equality, Capacity and Disability in Commonwealth Laws. Available from: [http://www.alrc.gov.au/sites/default/files/subs/65\\_org\\_victoria\\_legal\\_aid.pdf](http://www.alrc.gov.au/sites/default/files/subs/65_org_victoria_legal_aid.pdf).

## 5. Diversion and Therapeutic Jurisprudence

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## 5. Diversion and Therapeutic Jurisprudence

### 5.1 Summary and key recommendations

This chapter considers the availability and efficacy of court diversion programs, both in Queensland and in other Australian jurisdictions. Queensland has limited diversion in relation to some minor offences. For minor drug offenders, the Court Diversion Program offers information and education rather than the traditional fine or probation order. Queensland Courts Referral (more referral than diversion) offers bail-based diversion in relation to minor offences in some Magistrates Courts. Diversion programs in other jurisdictions can be diverse, addressing behaviours or propensities linked to offending, including drug and alcohol use, sexual behaviours, financial management, relationships and abuse and family violence prevention. This chapter canvasses the best of those programs and suggests how they could be adopted here.

#### Key Recommendations

- QAI recommends that diversion always be preferred to incarceration for people with capacity impairments, subject to ensuring the safety of the person and the community.
- QAI recommends more magistrate diversion programs which:
  - are available to all and do not set out to identify defendants with mental health and intellectual and cognitive disabilities
  - divert from Criminal Justice System
  - expedite early intervention by establishing:
    - day programs to support court orders
    - community-based programs emphasising prevention and rehabilitation.<sup>1</sup>
- QAI recommends that the Queensland Government explores problem-solving court models and that the Department of Justice provides targeted funding for trialling such courts.
- QAI recommends that the Attorney-general tasks the Queensland Law Reform Commission to make recommendations on a framework for problem-solving courts which outlines:
  - practices and procedures
  - sentencing options, and
  - a commitment to therapeutic jurisprudence.<sup>2</sup>
- QAI recommends strengthening and streamlining diversion programs.

1 Compare K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System' *Psychiatry, Psychology and Law* 15(2):261-271.

2 These recommendations are drawn from the work of T Walsh. 2011. *A Special Court for Special Cases*. TC Bierne School of Law, University of Queensland, 2. <http://www.aija.org.au/online/Pub%20no90.pdf>.

## 5.2 Introduction

From time immemorial criminal justice has focussed on deterrence, retribution, community protection and expiation— publicly punish the offender, place them under surveillance, mollify the victim, and, in the last instance, rehabilitate the offender.<sup>3</sup> Criminal justice achieves all but the last of these goals in the short term, but does so at a cost. Prisons are expensive<sup>4</sup> and they reinforce a cycle that leads back to more offending.<sup>5</sup>

'In a number of jurisdictions, the lower courts have that power of assessment or diversion. Queensland's one of the jurisdictions that doesn't and it's certainly something that needs reform'.

Patrick Keyzer. ABC Lateline. 'Make Allowances'. 3 September 2014 <http://www.abc.net.au/lateline/content/2014/s4080567.htm>

Diversion programs aim to interrupt that cycle. The courts postpone punishment, creating an opportunity for social services to step in and address circumstances that drive the offender to offend, while reducing the burden of minor or petty crime on an overtaxed criminal justice system.

QAI supports diversion as a preferred option to incarceration for people with capacity impairments. In this chapter, QAI considers the current options available and explore some of the features of diversionary programs in different Australian jurisdictions.

## 5.3 The rationale for diversion

Governments have established court diversion programs based in therapeutic jurisprudence: the notion that the law is a therapeutic agent, the legal rules, practices and actors of which influence the mental health and emotional well-being of those affected. Court diversion aims to maintain justice values, while minimizing the adverse effects of legal intervention and maximizing its therapeutic potential.<sup>6</sup>

The establishment of diversionary programs was driven by both humanitarian and financial concerns. Proponents of diversion argue that:

- People with mental impairment receive better care outside of prison
- It is unjust to incarcerate people whose behaviour is a consequence of their mental impairment

3 All these factors, and more, have weighed differently depending on the offender, the offence and the particular historical period. See, for example, J Briggs, CJS Harrison, A McInnes and D Vincent. 1996. *Crime and Punishment in England: An introductory history*. London: UCL Press; D Garland. 1985. *Punishment and welfare: a history of penal strategies*. Aldershot.

4 Imprisonment of people with intellectual disability in Australia costs about \$300 m *per annum* according to calculations by Price Waterhouse Coopers, based on: Australian Bureau of Statistics. 2010. *Prisoners in Australia*, Cat. no. 4517.0.

5 Recidivism here in Queensland runs at about 32.2% (prisoner returns to corrections) compared to the national average of 24.1%: A Sandy & R Ironside. 2013. 'Queensland has highest rate of prisoners reoffending while on parole in Australia' in *The Courier Mail*. 1 August 2013. < <http://www.couriermail.com.au/news/queensland/queensland-has-highest-rate-of-prisoners-reoffending-while-on-parole-in-australia/story-fnihsrf2-1226689007062> >

6 K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry, Psychology and Law*. 15(2): 261, 263.

- Vulnerable people, such as those with intellectual disability, can be exploited in prison
- Prison has very limited therapeutic and rehabilitation potential
- A cost-benefit analysis for government favours treatment and intervention programs over incarceration.<sup>7</sup>

### Conditions for effective diversion

Most Australian states and territories have diversion programs: they vary significantly and not all are effective.<sup>8</sup> Researchers have examined a range of court-based mental health diversion programs, creating a 'best practice guide' which has the following elements:<sup>9</sup>

- Integrated services
- Regular meetings of key agency representatives
- Strong leadership
- Clearly defined and realistic target population
- Clear terms of participation
- Participant informed consent
- Client confidentiality
- Dedicated court team
- Early identification
- Judicial monitoring
- Sustainability.

QAI adds the following:

- Eligibility criteria for participation should be broadly defined by offender and offences.
- Program eligibility should not depend on a guilty plea, or a presumption of guilt.
- Government must provide practical supports that allow the program to be effective. For example, day programs to support court orders are crucial, giving judges and magistrates the confidence they need to grant diversionary orders.<sup>10</sup>

<sup>7</sup> Ibid, 270.

<sup>8</sup> For example, it has been found that for individuals in New South Wales with complex diagnoses, diversion from mainstream court processes under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) was not of assistance when compared with those individuals that did not receive a section 32 order. Due to the limited research on this issue, there are many possible explanations for this result.

<sup>9</sup> This guide has been developed by scholars, including: H Steadman, S Morris & D Dennis. 1995. 'The diversion of mentally ill persons from jails to community-based services: A profile of programs'. *American Journal of Public Health*. 85(12): 1630 and M Thompson, F Osher & D Tomasini-Joshi. 2007. *Improving responses to people with mental illnesses: Essential elements of a mental health court*. New York: Council of State Governments Justice Centre, summarised by the Australian Institute of Criminology. 2011. *Court-based mental health diversion programs: Tipsheet no.20*. Canberra.

<sup>10</sup> K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry, Psychology and Law*. 15(2): 261, 269.

To properly accommodate many people with impaired decision-making capacity there must be the means to divert the person from traditional criminal justice responses and toward alternative and therapeutic approaches that are aimed at addressing the underlying causes of the offending behaviour. The over-representation of people with intellectual disability and/or mental illness in the criminal justice system suggests that traditional criminal justice responses may not be as effective with this offender group.

Specialist courts and diversion programs are proven alternatives to traditional criminal justice. Queensland has an opportunity to utilize and expand upon hard won learnings from other jurisdictions that have invested in alternative processes, some successful, and some not. They have implemented therapeutic diversion trials for particular groups of vulnerable people, the aim of which is to offer a more effective alternative to standard court process by accommodating offenders' specific needs. Diversion schemes have the capacity to deliver better outcomes for offenders and community both by reducing reoffending and by reducing costs associated with 'hard' options such as imprisonment.

Therapeutic justice demands that the courts take an holistic approach to criminal responsibility. The courts must know of and take into account underlying issues such as mental illness, intellectual impairment, homelessness and addiction, so that sentencing dispositions can promote the offender's engagement with health, accommodation, detox and rehabilitation services for the long-term benefit of both the offender and community. A defendant's criminal future depends in part on the courts' ability to address underlying causes.

## **5.4 Some examples of diversionary programs**

### **5.4.1 Special Circumstances Court**

In Brisbane, Magistrate Christine Roney conducted a trial of a 'Special Circumstances Court' from 2006-2012. It was based on Victoria's Special Circumstances Court (established in 2002) and other 'problem-solving' courts such as 'drug courts', 'neighbourhood justice courts' and 'homelessness courts' in the US.

The Special Circumstances Court was a special court list for defendants experiencing or at risk of homelessness or who had impaired decision-making capacity. The list was administered within the Brisbane Magistrates Court and was aimed at rehabilitating adult defendants who had committed low level criminal offences. Each charge must have arisen in circumstances connected to the defendants homelessness or impaired capacity. To be eligible, defendants were required to plead guilty or to have indicated a willingness to plead guilty to the offences charged.<sup>11</sup>

The Special Circumstances Court Diversion Program was defunded; no similar alternative is presently available to magistrates when sentencing a person they suspect may have impaired capacity, mental illness, cognitive impairment or intellectual disability linked to their commission of the summary offence.

### **5.4.2 Homeless Persons Court Diversion and Special Circumstances Lists**

The Homeless Persons Court Diversion Program was a two-year pilot program which operated in Brisbane

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11 T Walsh. 2011. *A Special Court for Special Cases*. TC Bierne School of Law, University of Queensland, 2. <http://www.aija.org.au/online/Pub%20no90.pdf>.



Magistrates Court under the State Government's 'Responding to Homelessness' initiatives. It targeted homeless people and referred them to appropriate mental health, housing and other services for support and treatment as required. Their progress following the referral was reported regularly to the court, which considered the results of the person's court diversion process when finalising the matter. The pilot ended on 30 June 2008 and the subsequent evaluation, not publicly released, considered that the pilot's objectives were likely to be achieved.<sup>12</sup>

The Special Circumstances List was part of the Homeless Persons Court Diversion Program and an initiative of the Magistrates Court. The assessment of the program found that the List enabled magistrates to gain a more complete understanding of defendants' circumstances and the underlying causes of the offending behaviour with the assistance of professionals.<sup>13</sup>

A case management approach allowed defendants to attempt an individualised program in order to stabilise their lifestyle and avoid punishment. The defendant was referred to medical treatment or suitable programs to address behavioural problems in consultation with the defendant, prosecutor and professionals supporting the court. The SCL required that participants must enter a guilty plea first.

Drug Courts currently operate in the Beenleigh, Southport, Ipswich, Townsville and Cairns Magistrates Courts and sentence people who have pleaded guilty to certain drug-related offences in the Magistrates Court. Adults with impaired decision-making capacity may self-medicate with legal and illegal substances. The Drug Courts offer vulnerable people an opportunity to be placed on an Intensive Drug Rehabilitation Order as an alternative to prison. Such orders usually involve supervised drug rehabilitation treatment programs, the breach of which will result in resentencing.

Last year the Australian Institute of Criminology released its findings on the evaluation of the Drug Courts,<sup>14</sup> finding that graduates of the Drug Courts committed 80% less offences after their graduation compared to the 12 months prior to their entry into the Drug Courts program. These recidivism findings confirmed that Drug Courts are highly successful in other jurisdictions; graduates from the program have significantly improved criminal justice outcomes compared to people who were imprisoned.

Three pilot programs which are currently underway provide the opportunity for some people with impaired decision-making capacity charged with an offence to postpone making a plea and address offending behaviour or behaviour which contributes to offending.

### 5.4.3 Queensland Courts Referral (QCR)

Queensland Courts Referral, which commenced in April 2013,<sup>15</sup> operates with similar goals to, and some of the same functions of, the Special Circumstances Court, although it maintains a clearer separation between judicial and social work. It operates out of the Brisbane, Beenleigh, Mount Isa and Southport Magistrates Courts.

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12 M Howard & J O'Brien. 2009. *Criminal injustice for vulnerable people Australian Guardianship and Administration Council Social Inclusion: The Future of Ageing, Disability and Substituted Decision-Making*. The Hilton Brisbane; 20 March 2009.

13 T Walsh. 2011. *A Special Court for Special Cases*. TC Bierne School of Law, University of Queensland, 2. <http://www.aija.org.au/online/Pub%20no90.pdf>.

14 Australian Institute of Criminology. 2008. *The Queensland Drug Court: a recidivism study of the first 100 graduates*. No. 83. Available from: <http://www.aic.gov.au/publications/rpp/83/rpp83.pdf>.

15 QCR commenced operations in April 2013 at the Roma Street Arrest Courts, but is planned for Beenleigh, Southport, Ipswich, Mt Isa and Townsville Magistrates Courts.

### Queensland Courts Referral:

- is a 12-week, bail-based referral process offered to people charged with summary offences, or with indictable offences that can be heard summarily
- is not available for matters proceeding by way of indictment<sup>16</sup>
- links defendants with social welfare services and government agencies with a view to addressing immediate health, legal and accommodation needs as well as the causes of offending behaviour
- is available for defendants with drug and/or alcohol dependency, mental illness, intellectual disability, cognitive impairment and homeless people or those at risk of homelessness
- is not a support or case-management service
- accepts referral from duty lawyers, magistrates, self-referral, police
- refers to agencies providing services in relation to health, drug and alcohol, mental health, cognitive impairment and homelessness and convenes weekly case meetings with the major social services to whom they refer
- reports back to magistrates<sup>17</sup>
- does not require the defendant to enter a guilty plea.

While the QCR program aims to therapeutically assist eligible defendants by addressing some of their higher level needs and reducing the likelihood they will re-offend, it still ends with sentencing. In determining the appropriate sentence, the Magistrate will take into account the person's engagement with the therapeutic services offered to them and may determine that it is appropriate to not incarcerate or fine the person or to otherwise impose a lesser sentence.

Social services may continue to work with the person afterwards, although it is typically only a 12-week program. As such, QCR does not ultimately divert people from the criminal justice system; rather, it seeks to address the underlying causes of criminality, lessen the severity of the sentence and reduce the likelihood of recidivism.

## 5.5 Lessons from other jurisdictions

There is significant variation between the approaches taken by different Australian states and territories with respect to the development of diversion programs aiming to identify and respond to defendants with intellectual disability.<sup>18</sup> It is therefore both interesting and useful to consider the approaches taken by other Australian jurisdictions to this issue and the outcomes of these measures.

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<sup>16</sup> Under the *Bail Act* s 11(2) or s 11(9), a magistrate may however impose conditions that defendants participate in rehabilitation, treatment or other intervention.

<sup>17</sup> Two reports are provided – a progress and final report – that tell magistrates how the accused is engaging with services.

<sup>18</sup> K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry, Psychology and Law*. 15(2): 261.

### 5.5.1 New South Wales' diversion into community treatment

In New South Wales, sections 32 and 33 of *Mental Health (Forensic Provisions) Act 1990* (NSW) allow magistrates to divert mentally ill and intellectually disabled offenders with summary or minor indictable offences from the criminal justice system and into community treatment.

Key points to note about this system are as follows:

- The diversion scheme is applicable to individuals that are developmentally disabled, suffering from mental illness, or suffering from a mental condition for which there is treatment available in a mental health facility.<sup>19</sup> However, the individual must not be a mentally ill person.<sup>20</sup>
- The Magistrate has discretion to decide whether diversion is appropriate.
- Where the Magistrate is of the view that diversion is appropriate, the Magistrate has broad powers, including to:
  - dismiss the defendant into the care of a responsible person (either unconditionally or subject to conditions)
  - refer the defendant for assessment or treatment
  - dismiss the charge and discharge the defendant unconditionally
  - make any other order the magistrate considers appropriate.<sup>21</sup>
- If an offender is released on the condition that they attend treatment and the Magistrate suspects that the offender is not complying with this order, the Magistrate may, within six months of making the order, call on the defendant to appear before the Magistrate.<sup>22</sup> If the defendant has failed to comply with the condition, the Magistrate may then deal with the charge as though the defendant has not been discharged.<sup>23</sup>

The NSW Law Reform Commission report has found that the availability of diversion has not solved the problem of the significant over-representation of people with cognitive and mental health impairments in the criminal justice system. Whether this is due to the underutilisation of diversionary powers,<sup>24</sup> that it is not more widely available<sup>25</sup> or that appropriate supportive services are not identified<sup>26</sup> is unclear.

A pilot program, Court Referral of Eligible Defendants into Treatment (CREDIT), is attempting to address some of these issues, but it presently only operates in two NSW Local Courts.<sup>27</sup>

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19 Section 32(1) of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

20 A 'mental illness' is defined by s 4 of the Act in the following terms: 'Serious impairment (temporary or permanent) of mental functioning and characterised by delusions, hallucinations, serious disorder of thought form, severe disturbance of mood, sustained or repeated irrational behaviour'.

21 See s 32(2) and (3) of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

22 Ibid, s 32(3A).

23 Ibid, 32(3D).

24 New South Wales Law Reform Commission. *Fact sheet: People with cognitive and mental health impairments in the criminal justice system: Diversion*.

25 The power to divert pursuant to section 32 is only applicable to matters within the jurisdiction of the Magistrates Court; there is no legislative power to divert matters in the District or Supreme Courts.

26 The diversionary power vested in the court under section 32 is ineffective in circumstances where there has been a failure to identify the right services.

27 New South Wales Law Reform Commission. *Fact sheet: People with cognitive and mental health impairments in the criminal justice system: Diversion*.

The District Court and Supreme Courts have jurisdiction to refer defendants deemed unfit for trial to the Mental Health Review Tribunal, where the criteria for a person to be deemed unfit for trial is that they are:

- unable to understand the nature of the trial proceedings;<sup>28</sup>
- unable to understand the meaning of entering a plea of guilty or not guilty; or
- incapable of instructing their legal representatives and participating effectively in their own defence.<sup>29</sup>

### 5.5.2 South Australia's Magistrates Court Diversion Program

South Australia has a magistrate diversion program that lasts for six months. Offenders above the age of 18 who have an intellectual impairment or reduced mental functioning arising from mental illness or intellectual disability are eligible to take part in the program.

The South Australian Magistrates' Court Diversion Program (MCDP) has been in operation since 1999 and was Australia's first specialised court for people with a mental impairment.<sup>30</sup> The program was established following a review of amendments to the state's mental health legislation, which had resulted in growing numbers of people relying on the costly and resource-intensive defence of mental illness for minor charges. The review recommended that a diversion program be created within the Magistrates' Court to provide an alternative avenue for those charged with minor offences.

The program, which usually runs for six months, is open to people with a mental illness, an intellectual disability, a brain injury, dementia or a personality disorder who commit summary and certain minor indictable offences. The program operates as follows:

1. The person is assessed upon referral to ensure they are suitable for the program (this includes an assessment of the person's motivation to participate).
2. The court case is adjourned.
3. An individual intervention plan is created, referring the person to appropriate treatment program(s).

Throughout the program, progress is monitored by a program team. If the person fails to fully participate in the program, their court case may be reconvened; if the program is successfully completed, the charges may be withdrawn or if a sentence is deemed appropriate, it may be reduced in recognition of participation in the program.

Evaluations of the program have been mixed. While there have been positive results recorded in terms of fewer participants re-offending following participation in the program, the majority of participants who partake in the program still leave with a criminal record and the majority still receive a traditional sentence.<sup>31</sup>

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28 However, a developmental disability of mind is deemed not to constitute a mental illness or mental disorder: *Mental Health Act 1990* (NSW), s 11.

29 D Toombs. *Rough justice: The collision between the disabled and the Queensland Criminal Justice System*. <[http://www.dantoombs.com/Rough\\_Justice\\_Dan\\_Toombs.pdf](http://www.dantoombs.com/Rough_Justice_Dan_Toombs.pdf)>.

30 G Skrzypiec, J Wundersitz & H McRostie. 2004. *South Australian Magistrates Court Diversion Program: An analysis of post-program offending*. South Australia: Office of Crime Statistics and Research.

31 RD Schneider. 2010. 'Mental Health Courts and Diversion Programs: A Global Survey'. *International Journal of Law and Psychiatry*. 33: 201.

Positive features of the program include increased understanding of the needs of people with different types of intellectual and cognitive impairments in the criminal justice system, including the difficulties some people may have comprehending criminal proceedings and the aids to understanding they may require. Overall, the program appears to have bolstered awareness within the criminal justice system of the importance of a systemic, individualised response.<sup>32</sup>

### 5.5.3 Tasmania's Mental Health Diversion List

Tasmania's Mental Health Diversion List was established in 2007, and now operates within the Hobart and Launceston registries of the Magistrates Court. It uses existing provisions in the *Bail Act 1994* (Tas) and the *Sentencing Act 1997* (Tas) to divert offenders into treatment.

The list is open to defendants who have impaired intellectual or mental functioning as a result of a mental illness. People with intellectual disabilities will only be accepted if they also have a mental illness.<sup>33</sup>

The list is open to people charged with summary offences, or offences capable of being tried summarily, with the exception of sexual offences and serious offences to the person, such as grievous bodily harm or murder.

There are many similarities with the South Australian program, for example, the preparation of a personalised treatment plan, monitoring of progress and the implications of non-compliance. Yet unlike the South Australian program, in the first 12 months of operation, the majority of participants left the program without a conviction.

Early evaluations provide preliminary support for the conclusion that participation in the program leads to a reduction in reoffending rates in the first six months after participating in the program, and anecdotal evidence is that participants have higher levels of engagement with treatment.<sup>34</sup>

Under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), mental illness, dysfunction or intellectual disability is determined as a fitness-to-be-tried issue in courts of summary jurisdiction.<sup>35</sup> Since February 2006, the Forensic Tribunal has dealt with all forensic matters (these were previously within the jurisdiction of the Mental Health Tribunal), including reviewing orders made under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) relating to persons who have been found mentally unfit to stand trial.<sup>36</sup>

### 5.5.4 Western Australia's Mental Health Diversion Program

In their 2009 report on court intervention programs, the Law Reform Commission of Western Australia (WALRC) recommended that a mental impairment court intervention program should be established at the earliest opportunity. WALRC recommended that the program be voluntary and that it should not include a requirement to plead guilty. In relation to defendants with a cognitive impairment, it was recommended that only those with a primary diagnosis of mental illness or personality disorder should be eligible. In recognition

32 See K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry, Psychology and Law*. 15(2): 261, for a further discussion of these issues.

33 Magistrates Court of Tasmania. 2007. *Magistrates Court Mental Health Diversion Program*. <[http://www.magistratescourt.tas.gov.au/divisions/criminal\\_and\\_general/mental\\_health\\_diversion](http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/mental_health_diversion)>. Mental illness is defined by the Act.

34 H Graham. 2007. *A foot in the (revolving) door? A preliminary evaluation of Tasmania's mental health diversion list*. Hobart: University of Tasmania. <[http://eprints.utas.edu.au/7186/1/Mental\\_Health\\_Court\\_T\\_Thesis\\_MC\\_Report\\_Version.pdf](http://eprints.utas.edu.au/7186/1/Mental_Health_Court_T_Thesis_MC_Report_Version.pdf)>.

35 Law Society of New South Wales. 2007. *NSW Young Lawyers Criminal Law Committee Submission relating to the determination of Fitness to be Tried in the Local Court and Children's Court*. <[http://www.lawsociety.com.au/uploads/filelibrary/1060046713640\\_0.4795290956364408.pdf](http://www.lawsociety.com.au/uploads/filelibrary/1060046713640_0.4795290956364408.pdf)>.

36 Department of Justice. *The forensic tribunal*. 2007. <[http://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/0006/80934/FT.pdf](http://www.justice.tas.gov.au/_data/assets/pdf_file/0006/80934/FT.pdf)>.

of the different needs of those with cognitive impairments, the WALRC considered that an expanded version of the Intellectual Disability Diversion Program (discussed below) should deal with defendants with a primary diagnosis of intellectual disability or other cognitive impairment. The WALRC's recommendations were subsequently raised in the Legislative Council in September 2010 and debated in May 2011.

In May 2012, the Western Australian government announced that it would introduce a Mental Health Court Diversion Program at Perth Magistrates' Court and Children's Court, aimed at diverting people with mental illness facing criminal charges into treatment and services. This project is presently being piloted in collaboration between the Mental Health Commission and the Department of the Attorney General.

The information provided by the Western Australian Mental Health Commission states:<sup>37</sup>

Both the adult and children's diversion services involve placing mental health specialist teams in the court to provide assessments, reports for the court, liaison with community services and develop individualised plans to support people with mental illness who are also in the criminal justice system. Families and carers will be encouraged and welcomed to be involved, and consumer and carer representatives will be on the steering committees. NGOs will also be involved in providing support to participants and assisting them to access services.

This exciting new project will focus on providing more options for people in court with mental illness, and more capacity for the court to respond in ways that support people and also address offending behaviour.

### **5.5.5 Western Australia's Intellectual Disability Diversion Program**

The Intellectual Disability Diversion Program (IDDP) was established in Western Australia in 2003 as a specialist list at the Perth Magistrates Court. It takes a 'problem-solving approach' to people with an intellectual disability, aiming to:

- reduce recidivism
- reduce rate of imprisonment of persons with intellectual disability
- improve justice system's response to intellectual disability.

To be eligible, the accused must plead guilty and consent to being involved in the program.

The IDDP program coordinator develops a plan designed to address offending behaviour, which is monitored through the court. The ordinary duration of the program is six months. Compliance with the program can result in a discount on sentencing. In circumstances where the defendant fails to comply with the plan, the defendant may either be called before the court for encouragement to continue with the program, or may be taken off the program and placed on the general court list.

While there have been no long-term conclusions drawn about the efficacy of the program, the indications to date are positive. Problems identified with the program include the requirement to plead guilty and the eligibility criteria, which significantly limits the number and type of offenders that can be accepted into the program.

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<sup>37</sup> Mental Health Commission. Government of Western Australia. <[http://www.mentalhealth.wa.gov.au/mentalhealth\\_changes/Mental\\_Health\\_Court\\_Diversion.aspx](http://www.mentalhealth.wa.gov.au/mentalhealth_changes/Mental_Health_Court_Diversion.aspx)>.

### 5.5.6 Victoria's approach to diversion

In Victoria, the Criminal Justice Diversion Program operates pursuant to section 59 of the *Criminal Procedure Act 2009* (Vic). This section applies to proceedings in the Magistrates Court, and vests the Magistrate with discretion to adjourn the proceedings for up to 12 months to allow the person to participate in a diversion program.

Furthermore, offenders charged with, or convicted of, serious sex offences, including sexual offending behaviour and assault, can be diverted into an intensive residential treatment program comprised of four stages of security, supervision, program intensity and community access.<sup>38</sup>

In Victoria the Assessment and Referral Court List operates out of the Melbourne Magistrates' Court on two days each week. Participation is voluntary and defendants may withdraw from the list at any time, in which case they will return to the ordinary list. Successful completion may result in discharge without a finding of guilt. However, magistrates retain the full range of sentencing options. Participation in the program to the satisfaction of the court can be taken into account to the benefit of the accused, but unsatisfactory performance cannot be taken into account to their detriment. The list is not open to defendants who are charged with serious sexual or violent offences. To be eligible for entry to the list, the accused must:<sup>39</sup>

- Be diagnosed with:
  - a mental illness
  - an intellectual disability<sup>40</sup>
  - an acquired brain injury
  - autism spectrum disorder; or
  - a neurological impairment, including, but not limited to dementia.
- Meet the following functional criteria:
  - substantially reduced capacity in at least one of the following areas:
    - self-care
    - self-management
    - social interaction
    - communication.
  - There must also be a potential benefit to the accused from receiving coordinated services in accordance with an individual support plan that may include psychological assessment, welfare services; health services; mental health services; disability services; drug treatment services or alcohol treatment

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38 Department for Families and Communities. 2011. *Forensic Disability: The Tip of Another iceberg*. Government of South Australia.

39 Section 4T of the *Magistrates' Court Act 1989* (Vic).

40 Unlike the Tasmanian list, the Victorian list accepts participants with a sole diagnosis of intellectual disability.

services; housing and support services; or other services that aim to reduce the risk of offending or reoffending.

This initiative aims to address underlying factors that contribute to criminal behaviour and to improve the health and wellbeing of accused persons with a mental impairment by: facilitating access to appropriate treatment and support; increasing the options available to the courts when responding to accused persons with a mental impairment; and reducing the proportion of the prison population with a mental impairment.<sup>41</sup> It is intended that the program will reduce costs of imprisonment and correctional services. Evaluation of the list is in progress.

### 5.5.7 Other Jurisdictions

Neither the Australian Capital Territory nor the Northern Territory has a magistrates court diversion program. In the ACT, magistrates have jurisdiction to refer people with a mental illness or dysfunction, which is defined to include an intellectual disability, to the Mental Health Tribunal. In the Northern Territory, the court can dismiss a charge unconditionally.<sup>42</sup> However, a person with an intellectual disability is not considered to have a mental illness.

## 5.6 Conclusion

This chapter has considered the availability and efficacy of court diversion programs and other similar therapeutic measures, both in Queensland and in other Australian jurisdictions. From this analysis, we have identified the core features we consider an appropriate and effective diversionary process should have and made recommendations accordingly.

The next chapter will move beyond the journey through court or an alternative pathway to examine post-sentencing considerations, including the effect of the prison experience and factors impacting on rates of recidivism.

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41 Magistrates Court of Victoria. *Assessment and Referral Court List*. <<http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/assessment-and-referral-court-list-arc>>.

42 Section 78 of the *Mental Health and Related Services Act* (NT).



## 6. Post-sentencing and Corrective Services

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## 6. Post-sentencing and Corrective Services

### 6.1 Summary and key recommendations

If rates of recidivism are indicative, the correctional experience is not a positive one for people with disabilities. Corrective interventions fail to achieve their rehabilitative objectives. Recidivism of people with intellectual impairments stands at nearly twice the average rate.

Correction has a number of purposes, but principal among them are punishment and the immediate protection of victims and the community. Correction's great contradiction is that these important goals are achieved at the prisoner's (and their family's) expense, and in the long-term, at the expense of the communities into which prisoners eventually will be released.

In our view, correction can successfully combine all four aims, particularly in prisons, because prison gives government an opportunity to offer prisoners with intellectual impairments habilitation, skills and services that would be more difficult to deliver once detention is over. This chapter examines the services and supports for people with intellectual impairments and mental illness in prison and on other corrective orders. QAI offers suggestions on how government can best meet critical post-release needs for income, accommodation, employment and relationship supports.

#### Key Recommendations

- Corrections staff need more training in working with people with an intellectual disability, cognitive impairment or mental illness.
- Corrective Services should acquire inclusive offender programs that are designed to cater to people with all levels of ability.
- Queensland Corrective Services should increase its commitment to:
  - culturally appropriate prevention
  - indigenous staff
  - models that acknowledge cultural values
  - non-indigenous awareness of Aboriginal and Torres Strait Islander needs.

Further detailed recommendations are made at relevant points throughout the chapter.

## 6.2 Introduction

The offending patterns of people with intellectual impairments are to a surprising degree predictable at birth.<sup>1</sup> People with intellectual impairments do not fall through the social security net and only then turn to crime— in Baldry's view, family life and broader circumstances collude to railroad people with intellectual disability from birth into criminality.<sup>2</sup> People with intellectual disability enter the criminal justice system at a comparative disadvantage and from there their chances to leave it diminish.

People with intellectual impairments represent up to 30% of the Queensland prison population,<sup>3</sup> and that percentage is much higher for minorities such as Aboriginal and Torres Strait Islander persons.<sup>4</sup> People with intellectual impairments are in prison because they committed crimes *and* because they were born into and continue to live in particular life circumstances— homelessness, unemployment, reliance on Commonwealth income support, and addiction to drugs, alcohol and/or gambling.<sup>5</sup>

### Key areas for further research:

- Which program and service features work best for prisoners with intellectual impairments?
- What are the patterns and causes of recidivism? Is recidivism linked to impairment, given that ex-prisoners with intellectual disability have almost twice the risk of re-offending?
- What is the relationship between environmental circumstances and re-offending, especially post-release housing, employment and income support?
- What are the specific needs of Aboriginal and Islander prisoners with intellectual impairments and the issues in developing and delivering programs and services to them?
- What are the experiences of offenders serving community correctional orders and what are their supervision and support needs in non-custodial settings?

Queensland Corrective Services' *'Strategic Research Agenda 2010-2015'* aims to answer some of these questions and includes three priority research areas: <sup>6</sup>

1. understanding and responding to the offender population
2. diverting offenders from the criminal justice system
3. effective and efficient service delivery.

1 E Baldry et al. 2013. *People with mental health disorders and cognitive impairment in the criminal justice system Cost-benefit analysis of early support and diversion*. University of NSW.

2 Ibid.

3 See Chapter 2.

4 Three-quarters [73 per cent] of Aboriginal men in Queensland prisons and an even greater proportion of Aboriginal women [86 per cent] have mental health disorders. The term 'mental health disorder' is used to describe both mental illnesses such as depressive, anxiety and psychotic disorders and substance use disorders by Heffernan et al. 2012. *The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report*. Queensland Government, 11.

5 T Walsh. 2007. *No Vagrancy: An examination of the impact of the criminal justice system on people living in poverty in Queensland*, 7.

6 See <[http://www.correctiveservices.qld.gov.au/About\\_Us/The\\_Department/Research/2028QCS\\_Strategic\\_Research\\_Agenda.pdf](http://www.correctiveservices.qld.gov.au/About_Us/The_Department/Research/2028QCS_Strategic_Research_Agenda.pdf)>.

Were they sufficiently supported, people with intellectual impairments would avoid imprisonment in the first place. Given a suitable range of options, the courts would divert them from prisons, which are expensive to run and promote recidivism.

Rehabilitation is a primary sentencing goal.<sup>7</sup> A fundamental function of corrective services is 'crime prevention through humane containment, supervision and rehabilitation of offenders'. Rehabilitation is nevertheless subordinate to punishment and community safety. Prisons do not prioritise psychological support, therapy, the development of prisoner social skills and prisoner employability on release.<sup>8</sup> In this chapter we offer suggestions for more effective rehabilitation.

### 6.2.1 Recidivism

People with intellectual impairments are vulnerable to extended and repeated incarceration. Few statistics are more indicative of the failure of in-prison rehabilitation than high rates of recidivism. People with an intellectual disability, for example, have higher rates of recidivism and, once imprisoned, a person with impaired capacity is more likely than not to return. More than half of prisoners with disabilities have been jailed before.<sup>9</sup>

'It can be theorised that many in these groups with complex needs become locked, early in their lives, into cycling around in a liminal, marginalised community/criminal justice space, a space that is neither fully in the community or fully in the prison. They do not fall through cracks, they are directed into the criminal justice conveyor belt. This suggests it is important to recognise the different space and need for different disability and rehabilitative interventions and supports at many points along these persons' pathways.'

E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*, page 16.

In NSW, for example, general recidivism stands at 38%, but 68% of prisoners with intellectual disability return to jail.<sup>10</sup> The recidivism rate for prisoners with intellectual impairments with no prior convictions is more than twice that of the total inmate population rate (60%: 25%).<sup>11</sup> For inmates with prior convictions, the rate for inmates with intellectual disability is still 1.48 times higher than that of the total inmate population (72%: 49%).<sup>12</sup>

Inmates with and without intellectual disabilities have higher recidivism rates if they have a prior conviction.

<sup>7</sup> *Penalties and Sentences Act 1992* (Qld), s 9(1)(b).

<sup>8</sup> Office of the Public Advocate. 2005. *Issues for People with a Cognitive Disability in the Corrections System*. <[http://www.justice.qld.gov.au/files/Guardianship/ip\\_0505.pdf](http://www.justice.qld.gov.au/files/Guardianship/ip_0505.pdf)>, 12. See also *Corrective Services Act 2006* (Qld), ss 20(1), 33(2), 36(1), 39(1), 48(1), 52(4), 53(1), 60(2), 62(2), 111(4), 135(1), 136(5), 138(1), 154(2), 156, 163(1), 265(4), 268(1), 280(1), 306(2), 336(3), 341(4).

<sup>9</sup> M Borzycki. 2005. *Interventions for prisoners returning to the community: a report prepared by the Australian Institute of Criminology for the Community Safety and Justice Branch of the Australian Government A-G's Department*. Community Safety and Justice Branch, 55.

<sup>10</sup> A Langford. 2002. *Setting the scene. Forging the links: A symposium on making the difference for offenders with a disability*. Joint initiative of NSW Department of Corrective Services & the Commonwealth Department of Family and Community Services, Sydney, February 27–28.

<sup>11</sup> *Ibid*

<sup>12</sup> NSW Department of Corrective Services. 2002. *Recidivism and offences of prisoners with and without intellectual disability*. Data supplied to CDDs by the Department of Corrective Services for the period 1990–1998. Sydney.

Those with an intellectual disability and no prior convictions have a significantly higher recidivism rate than any other inmate group. Prison itself appears to have little deterrent effect. Prisons protect victims and the community, punish offenders and (sometimes) deter others, but clearly the prison experience encourages further offending.

Nevertheless, Queensland is building more prisons and imprisoning more people despite ever-decreasing crime rates. Each new prisoner costs ~\$150 per day. A better strategy is to identify prisoners' needs and provide in-prison and post-prison supports that reduce the likelihood of offending,<sup>13</sup> the costs of which would be recovered by a reduction in recidivism and a consequent reduction in expenditure.<sup>14</sup>

A person's socio-economic circumstances after release are more indicative of reoffending than the prison term itself.<sup>15</sup> More than one of our interviewees noted the 'critical six weeks from release' pattern: that the ex-prisoner's success in securing accommodation and supportive social relationships in the first six weeks after release will determine whether they reoffend.

## 6.2.2 Incarceration erodes skills and causes further trauma

The high rate of return to prison of people with disability demonstrates the failure of imprisonment as a mechanism for individual rehabilitation or social protection.

- Prison and forensic detention erode everyday communication and living skills and self-esteem.
- Incarceration increases prisoners' and forensic patients' feelings of alienation and fosters their identification with prison and outlaw subcultures.
- Prison is a training ground for anti-social behaviour.
- Inadequate monitoring and lack of support contribute to re-offending.
- Offender programs delivered in a community setting are more successful in reducing reoffending in contrast to those delivered in a custodial setting, partly because prison programs are not always suitable for people with limited literacy and other learning skills.<sup>16</sup>
- Peer abuse is widespread and under-recognised.<sup>17</sup>
- Mental and physical abuse, disciplinary problems and the likelihood of regression in prison leads many prisoners with intellectual disabilities to spend their time in maximum security.<sup>18</sup>

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13 *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System*. 2008.

14 Law Reform Commission Discussion Paper 35. 1994. *People with an Intellectual Disability in the Criminal Justice System: Courts and Sentencing issues*.

15 A Allan & D Dawson. 2004. *Trends and Issues in Crime and Criminal Justice*. Canberra: Australian Institute of Criminology.

16 S Hayes S. 2005. 'A review of non-custodial interventions with offenders with intellectual disabilities'. *Current Issues in Criminal Justice* 17: 69-78.

17 *Ibid*

18 J Cockram. 2005. 'Equal Justice? The experience and needs of repeat offenders with intellectual disability in Western Australia'. Activitv Foundation Inc. <[http://www.correctiveservices.wa.gov.au/\\_files/about-us/statistics-publications/students-researchers/equal-justice.pdf](http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/students-researchers/equal-justice.pdf)>

## 6.3 Custodial orders & corrections

*Taking justice into custody*<sup>19</sup> suggests that people with an intellectual disability are less likely to be placed on probation as an alternative to incarceration.

### 6.3.1 Identifying people with disability

Prisoners face a double bind when they consider whether to declare impaired capacity. They may require extra services but in disclosing any impairment they run the risk of stigma, lowered expectations and the possibility that prison staff or other prisoners may exploit their vulnerability - a culture of hierarchy and coercion can dominate the structure of correctional systems and be mirrored in the subculture of prisoners themselves.<sup>20</sup> Ex-prisoners commonly express the view that it is not in their interests to disclose their intellectual disability to anyone while in jail. One of the researchers QAI approached for this publication noted that some prospective survey respondents, former prisoners, lost interest once she mentioned a test to establish intellectual disability.<sup>21</sup>

Corrective Services needs to be clear about why they would test for any particular intellectual impairment. QAI's position, stated elsewhere in this publication, is that impairment labels such as intellectual disability, Fetal Alcohol Spectrum Disorder or Acquired Brain Injury are generally unhelpful, and with respect to rehabilitative prison programs, counter-productive. The question of early identification of conditions such as acquired brain injury is a vexed one. Some support it, while others support the intent but not the strategy.

If you don't pick up the ABI you put a person through [mainstream] prison programs that have no benefit. You get them in prison, have resources thrown at them and it's a complete waste of time. It's futile.<sup>22</sup>

Unless you address those [criminal] behaviours while the person is in custody, releasing them back into the community exposes them to the risks of reoffending and re-incarceration.<sup>23</sup>

QAI opposes intellectual impairment-specific programs in prisons, favouring inclusive curricula and program delivery. Acquired Brain Injury is endemic to prison populations,<sup>24</sup> and many prisoners have other forms of intellectual impairment. Corrective management will not waste money or resources by purchasing inclusive rehabilitation programs - designers should adapt curricula that cater to the spectrum of cognitive capabilities, so that prisons do not need to single out people with intellectual impairments. QAI understands that a prisoner with an intellectual disability has successfully argued against an IQ cut-off for rehabilitation programs.<sup>25</sup> People with intellectual impairments can participate without prison authorities singling them out.<sup>26</sup>

19 A Grunseit, S. Forell & E. McCarron. 2008. *Taking justice into custody: the legal needs of prisoners*. Law and Justice Foundation of NSW, Sydney, <<http://www.lawfoundation.net.au/report/prisoners>>, 128.

20 PE Mullen. 2001. *A review of the relationships between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services*. Criminology Research Council. <<http://www.aic.gov.au/crc/reports/mullen.html>>; G Denkowski & K Denkowski. 1985. 'The Mentally Retarded Offender in the State Prison System: Identification, Prevalence, Adjustment, and Rehabilitation'. *Criminal Justice and Behavior*. 12(1): 55-70.

21 She was referring to a test such as the HASI (Hayes Ability Screening Index)- Personal communication, Kate Van Doren Queensland Centre for Intellectual and Developmental Disability.

22 Danny Sullivan. 2014. 'Every Second Prisoner has a brain Injury'. *The Age*. 29 June. <http://www.theage.com.au/victoria/every-second-prisoner-has-brain-injury-20140629-zsq2q.html>.

23 Nick Rushworth, quoted in *ibid*.

24 At least 42 percent of Victoria's male prisoners have an Acquired Brain Injury: *Ibid*.

25 Corrective Services responded by adapting an existing sex offender program: Matilda Alexander. Prisoners Legal Service. <http://www.sistersinside.com.au/media/matildaalexander.pdf>

26 People may of course need targeted one-off services in prison, such as assistance with parole applications.

## Inclusive Rehabilitation

QAI supports the modification of existing prison programs so that they are all-inclusive and delivered as effectively to the mainstream as to people with physical, sensory or intellectual impairments no matter whether they are linked to Acquired Brain Injury or intellectual disability or mental illness and so on.

Any program may be geared to a broad spectrum of learning styles and capabilities. This is no different to inclusive primary education. QAI is opposed to special education in schools and to special-schools because they perpetuate the notion that people with intellectual impairments are different, 'other', 'less-than'. Such separations are also often painful and discouraging for people with intellectual impairments themselves.

Any curriculum and its delivery can be tailored so that no-one, no matter what their level of skill, knowledge, capacity or cognition is excluded from the learning process. There is more to education and training than learning. They are social processes that generate community. Exclusion on any basis is discriminatory, breeding misunderstanding, stereotyping and stigma.

## 6.4 Remand

On remand a person receives no rehabilitation or education services. When a remand prisoner is already subject to a Forensic or Involuntary Treatment Order the administrator of their treating health service must arrange for their examination by a psychiatrist<sup>27</sup> who will produce a report as to the person's capacity. Tardy reports have delayed proceedings for ~18 months.<sup>28</sup>

### 6.4.1 Vulnerability in prison

Prisoners identify the vulnerability of other prisoners with intellectual impairments and will offer them support, protection and assistance, especially if first-timers. Prisoner peer support is common, particularly amongst Aboriginal and Islander prisoners; and is in general a positive part of the prison experience rarely discussed in the research literature.

Prisoners may also offer physical and psychological abuse to prisoners with intellectual impairments who may be perceived to be easy targets, including bullying, humiliation, harassment and intimidation. This victimisation may lead to or exacerbate mental illness and contribute to social withdrawal, anti-social behaviour and feelings of alienation.

Offenders may use those with intellectual impairments to violate institutional rules or carry out illegal activities such as drug dealing.<sup>29</sup> It is difficult to determine the extent of victimisation of prisoners with capacity impairments as official prison records are not likely to cover all incidents and victims may be

27 Section 238 Mental Health Act 2000.

28 Anna Fanelli, Sarah Fouhy and Mai-Ning Wu. 2013. *Delays within the Mental Health Act in Queensland: section 238 reports*. UQ Pro Bono Centre - Manning St Project T.C. Beirne School of Law University of Queensland.

29 G Denkowski & K Denkowski. 1985. 'The Mentally Retarded Offender in the State Prison System: Identification, Prevalence, Adjustment, and Rehabilitation'. *Criminal Justice and Behavior* 12(1): 55-70.

reluctant to report abuse for fear of retribution from other prisoners or placement in protective custody. People with capacity impairments may not have the verbal or written skills to complain, may not have the endurance to persist with a complaint when faced with questioning and the possibility of exposure or may not be aware that their experiences form the basis of a complaint in the first place.<sup>30</sup>

Almost one in four female prisoners and 15 per cent of males interviewed in the *New South Wales Inmate Health Survey*<sup>31</sup> reported that they were 'aware of sexual assaults in prison in the past twelve months'.<sup>32</sup> The *Framework Report*<sup>33</sup> examined the needs of offenders with intellectual disability in NSW prisons, and described threatened and actual physical and sexual violence as one of the main issues of concern to prisoners with intellectual disabilities. An earlier survey of NSW prisoners aged 18–25 identified a high incidence of sexual (and other) forms of abuse, especially amongst male respondents in NSW prisons.<sup>34</sup>

### Council of Australian Governments

#### Principles to determine the responsibilities of the NDIS and other service systems<sup>35</sup>

1. The criminal justice system (and relevant elements of the civil justice system) will continue to be responsible for meeting the needs of people with disability in line with the National Disability Strategy and existing legal obligations, including making reasonable adjustments in accordance with the *Disability Discrimination Act 1992* (Cth) [...].
2. Other parties and systems will be responsible for supports for people subject to a custodial sentence or other custodial order imposed by a court [...].
3. The health system, mental health system and other parties will be responsible for operating secure mental health facilities which are primarily clinical in nature.
4. The NDIS will continue to fund the full range of supports related to the impact of a person's disability in a person's support package where the person is not serving a custodial sentence or other custodial order imposed by a court. [...]
5. The NDIS will fund specialised supports to assist people with disability live independently in the community, including supports delivered in custodial settings aimed at improving transitions from custodial settings to the community. [...]
6. For people in a custodial setting the only supports funded by the NDIS are those which are additional to the needs of the general population and relate to a person's functional impairment and are limited to:

30 S Hayes & G Craddock. 1992. *Simply Criminal*. 2nd ed. Sydney: Federation Press.

31 T Butler & M Milner. 2003, *The 2001 New South Wales Inmate Health Survey*. NSW Corrections Health Service, Sydney.

32 However, as the question was deliberately asked so as not to relate to their own personal experiences, it is possible that a number of inmates' responses may be describing the same incidents (Butler & Milner, 2003, p. 134) and therefore these statistics may be subject to (at least) double counting.

33 J Simpson, M Martin & J Green. 2001. *The framework report: appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending*, NSW Council for Intellectual Disability, Sydney.

34 D Heilpern. 1998. *Fear or favour: sexual assault of young prisoners*, Southern Cross University Press, Lismore.

35 COAG, 2013. Available at: <<http://www.coag.gov.au/sites/default/files/NDIS-Principles-Determine-Responsibilities-NDIS-Other-Service-Systems.docx>>



- a. aids and equipment;
- b. disability specific capacity and skills building supports which relate to a person's ability to live in the community post-release; and
- c. supports to enable people to successfully re-enter the community, including accommodation supports.

People in remand will continue to be eligible for their individual support package, noting that there may be some restrictions on the delivery of these supports imposed by the justice system [...].

Prison authorities may not recognise, acknowledge or take steps to prevent peer abuse, or they may do so by infringing the liberties of the people they seek to protect. Some prison authorities respond to evidence of mental and physical mistreatment, disciplinary problems, and exposure to brutality and violence, even when directed at other prisoners, by isolating prisoners with intellectual impairments in segregated custody or maximum security.

#### 6.4.2 Health risks

People with intellectual disability or other capacity impairments may lack support with personal care and hygiene,<sup>36</sup> exacerbating the already high risk of contracting blood-borne diseases. Prison populations are already more likely to be infected with viruses like Hepatitis B & C (19% and 22% of prison entrants test positively to these viruses) and to HIV - all of which are spread by high-risk activities such as sharing equipment for intravenous drug-use, hair clipping, tattooing, piercing and unprotected sex.

Sharing cells, the high turnover of inmates and limited facilities also increase the spread of disease, particularly blood-borne viruses. Research by the Australian Institute of Health and Welfare suggests that approximately 33 percent of injecting drug users continue to inject in prison and 90 percent of them report sharing the equipment to do so.<sup>37</sup>

#### 6.4.3 On the withdrawal of disability support

Few would agree that it is reasonable to deprive a prisoner of their hearing aid, walking cane, wheel chair or prosthetic leg when they enter prison, yet for a person with capacity impairments other forms of support may be no less indispensable than prosthesis is to a person with a physical impairment. Disability Services Queensland funding support stops when a person enters prison and it appears that the National Disability Insurance Agency will take the same approach - a lost opportunity.

People with capacity impairments represent a substantial proportion of inmates: as far as prison-based correction is concerned they are 'core business'.

→ It is timely to address the 'them and us' corrections approach that counter-productively revokes citizens' rights once they step through the prison door. The introduction of the National Disability

<sup>36</sup> S Hayes & G Craddock. 1992. *Simply Criminal*. 2nd ed. Sydney: The Federation Press.

<sup>37</sup> Australian Institute of Health and Welfare. 2012. *The Health of Australia's Prisoners - 2012*.

Insurance Scheme is an opportunity to abandon that approach and begin to provide specialist disability supports for people with impaired decision-making capacity.

- Support that is relevant to the prison context should continue for the duration of the person's jail term.
- There is a need for further research – one of our respondents suggested a pilot that compares prison-based support against prison without support.

#### **6.4.4 In-jail and community-based services and rehabilitation**

Prison programs are fragmented: they operate around the demands of the prison environment, undermining prisoners' basic rights to receive a rehabilitative response to their offending. Corrective Services Queensland offers a range of rehabilitation, behaviour modification and recovery programs listed and briefly described in Appendix C. They are available both in prison and community corrections.

Some of the programs are generic: proprietary programs devised for use in other jurisdictions, primarily in the US. We know of no local evaluations of these programs or whether they were devised to be accessible to people with intellectual impairments or people who are Aboriginal or Torres Strait Islander.

The Queensland government's Forensic Mental Health Service is responsible for forensic services in and out of jails. They are not funded to provide professional psychological services to prisoners: a missed opportunity, for prison is an effective, if not ideal, location for therapeutic intervention.

For prisoners, the programs are a means to earlier release: willing completion strengthens a parole application. Of the approximately 10,000 people released from Queensland prisons each year, just 35 percent will have completed an intervention or transitions program prior to release.<sup>38</sup>

It is not uncommon for prisoners with intellectual impairment to find it impossible to complete mainstream programs, yet a prisoner who has not been seen to address their offending behaviour is less likely to be granted parole.

#### **6.4.5 Prison Mental Health Services**

Prisoners are more likely than the general public to have a mental health disorder before and during their incarceration,<sup>39</sup> yet people in prison receive minimal mental health support. The absence of in-prison psychological/counselling services<sup>40</sup> is one of the principal gaps identified by our respondents, and by Eileen Baldry in 'Pathways into Prison',<sup>41</sup> particularly special supports for those with intellectual impairments<sup>42</sup> and mental illness.<sup>43</sup>

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38 Prisoners Legal Service *Annual Report 2011-2012*, 8.

39 P Mullen. 2001. 'A Review of the relationship between mental disorders and offending behaviours on the management of mentally abnormal offenders in the health and criminal justice system'. Criminology Research Council. Canberra; T Butler & S Allnut. 2003. 'Mental Health among NSW prisoners'. Corrections Health Service. Sydney.

40 S Hayes. 2005. 'Prison Services and offenders with intellectual disability – the current state of knowledge and future directions'. Paper presented at the 4th International Conference on the Care and Treatment of Offenders with a Learning Disability, 6-8 April 2005, University of Central Lancashire, Preston, UK.

41 E Baldry, L Dowse & M Clarence. 2011. 'Background Paper for the National Legal Aid Conference Darwin 2011 People with mental and cognitive disabilities: pathways into prison'.

42 IDRS 2008, *op cit*.

43 Hayes et al 2007 *op cit*.

The European Court of Human Rights (ECHR) has held<sup>44</sup> that a failure to provide adequate mental health care to prisoners in circumstances which do not adequately accommodate, or result in the deterioration of, a person's mental health, may amount to a violation of the prohibition on torture and ill-treatment.<sup>45</sup> Australia is not a signatory to the European Convention Against Torture but is to the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *Convention Against Torture*, all of which provide that no-one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment in Articles #5, #7 and #16 respectively.

The *Convention Against Torture* implies that all prisoners have a right to adequate treatment and support, and this applies in principle if not substantively to Queensland prisoners with intellectual impairments. There is scant Queensland case law on this issue. A Victorian court has ruled in a way that is consistent with the ECHR, warning that the imprisonment of a person with a severe psychiatric illness may be contrary to the spirit, if not the letter, of the Victorian Charter of Human Rights.<sup>46</sup> Queensland needs a similar charter of rights so that concerned parties can call government to account for lapses such as these.

**Parole** - A prisoner with an intellectual disability struggled to file a Judicial Review application with the assistance of other inmates. Prisoners Legal Service obtained instructions to act. The matter was heard by Fryberg J and resulted in the prisoner's release on parole.

#### 6.4.6 Effects of incarceration

Prison in general and seclusion in particular may harm prisoners who already suffer from a mental illness.<sup>47</sup> Institutionalisation and the control mechanisms such as segregation units and safe cells adversely affect inmates' mental health. Solitary confinement is a known cause of psychotic behaviour. The experience of solitary confinement is 'psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term emotional and even physical damage'.<sup>48</sup>

#### 6.4.7 Prison - parole applications

Prisoners with intellectual disability and other capacity impairments are less likely to be eligible for parole and therefore are likely to serve longer sentences. They:

- may be subject to prejudicial assumptions regarding their propensity to offending behaviour<sup>49</sup>
- are less likely to have accommodation and other supports ready and waiting for them when they leave prison<sup>50</sup>

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

45 Violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights.

46 *R v White* [2007] VSC 142. There Bongiorno J had no choice but to send a man with a severe psychiatric disability to prison because there was no room for him in a psychiatric unit.

47 Michelle Tanin. 2005. *Committee Hansard*, 4 August 2005, 77-87 reporting to The Senate, Select Committee on Mental Health> 2006. A national approach to mental health - from crisis to community. First Report. Commonwealth of Australia.

48 CJS Haney & M Lynch. 1997. 'Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement'. *New York University Review of Law and Social Change*> 23: 477-570.

49 NSW Law Reform Commission. 1994. *People with Intellectual disability and the Criminal Justice System*. Issues paper # 35. Courts and Sentencing Issues.

50 Prisoner's Legal Service. 2013. *Queensland Prison Report 2013*.

- may not be sufficiently proficient in reading and writing to effectively fill out their parole applications<sup>51</sup>
- do not have the same equitable access to parole-friendly programs and vocational training<sup>52</sup>
- are more likely to be placed in separate maximum security units for their protection, denying them the opportunity to have the least restrictive environment and the opportunity to participate in rehabilitation programs (as would happen in a lower grade security setting).<sup>53</sup>

Participation in general criminogenic rehabilitation programs offered by Corrective Services requires that participants be 'responsive',<sup>54</sup> making it difficult for some prisoners with intellectual impairments to take part in those programs, gain early release and transition back to the community when they are released. It is up to Corrective Services to modify those programs, or adopt inclusive programs, so that people across the spectrum of intellectual capability can participate equitably.

#### **6.4.8 Parole applications (Illiteracy affects preparation)**

Parole applications must be written in the prisoner's own hand. As established in Chapter 2, approximately 25 percent of Queensland prisoners have learning difficulties and 25 percent have 'literacy problems'.<sup>55</sup> Many prisoners are simply incapable of applying successfully for parole without support. The Prisoner's Legal Service operates a volunteer program, 'Safe Way Home', that assists prisoners with their applications and also provides them with access to a supervised gradual release into the community in accordance with best practice release strategies.

- QAI recommends that government increase support to PLS to provide this service

#### **6.4.9 Parole and post-parole options (denial of parole – lack of suitable accommodation, support)**

The major problem, however, is the absence of affordable and secure post-prison accommodation. Persons with mental illness or intellectual disability are often segregated from the rest of the prison population or are under protection and may therefore have restricted access to programs and services. The parole board may be disinclined to release people with an intellectual disability because they have not participated in appropriate prison programs.

Parole authorities often will not release offenders unless they are convinced that the person is not a threat to the community – a problem for persons with a mental illness in respect of whom psychiatrists are reluctant to make conclusive prognoses. People with intellectual disability and other capacity impairments tend to have fewer social supports than most, and what supports they do have are likely to drop away through the course of a term of imprisonment.

51 Ibid.

52 S Garcia & H Steele. 1988. 'The mentally retarded in the criminal justice system'. *Arkansas Law Review* 41: 809-59; S Hayes & G Craddock. 1992. *Simply Criminal*. 2nd ed. Sydney: Federation Press.

53 W Glaser & W Deane. 1999. 'Normalisation in an Abnormal World: A Study of Prisoners with an Intellectual Disability'. *International Journal of Offender Therapy and Comparative Criminology* 43(3): 338-56.

54 T Walsh. 2004. *Incorrections: Investigating prison release practice and policy in Queensland and its impact on community safety*. Brisbane: Queensland University of Technology.

55 Corrective Services Queensland. 2002. *Intellectual disability in Prison*.

People with intellectual disability face unique barriers when seeking parole. As one NSW study found:

There's no support for them to come out to, so they don't get considered for parole... I couldn't tell you the last time a person with an intellectual disability came up for parole. It just doesn't happen. They always serve their full sentences.<sup>56</sup>

The same NSW study identified that people with cognitive impairment were more likely to have problems understanding and adhering to the terms of their parole when it was granted and were more vulnerable to breaching parole and being returned to jail to complete their sentence.<sup>57</sup>

#### 6.4.10 Recommendations pertaining to in-prison services

→ QAI recommends that:

- Programs for rehabilitation should be tailored to be inclusive of persons with disabilities.
- The Forensic Mental Health Service (FMHS) should be funded to provide additional psychological services, including therapeutic services to people with intellectual disability and other capacity impairments with mental illness in prison.
- The Forensic Disability Service must be funded to provide habilitation, rehabilitation, education and training programs to prisoners with intellectual and or cognitive impairments.
- The FMHS or another service be funded to provide addiction treatment services in prisons and to others subject to correctional orders.
- Corrective Services and the National Disability Insurance Agency (NDIA) establish prison-based support and conduct a pilot project to compare prison-based support against prison without support.
- Disability Services Queensland (and later the NDIA) continues to provide funding support to people subject to custodial orders.

### 6.5 Leaving prison

Upon release, offenders with intellectual disability re-entering the community face a number of prejudices to community placement that may result in re-institutionalisation.<sup>58</sup> The critical time is at about six weeks out, as noted above. One source has described prison release as comparable to the soldier returning from battle.<sup>59</sup> Reintegration is more challenging for ex-prisoners with intellectual disability. Barriers include poverty, inferior levels of education, unemployment, homelessness and personal issues including drug or alcohol dependency, lack of social support or loss of family ties.<sup>60</sup> The risk of recidivism increases when

<sup>56</sup> Law and Justice Foundation. 2008. *Taking Justice into Custody: the legal needs of prisoners*.

<sup>57</sup> A Grunseit, S Forell & E McCarron. 2008. *Taking justice into custody: the legal needs of prisoners*. Sydney: Law and Justice Foundation of NSW. <<http://www.lawfoundation.net.au/report/prisoners>>, 128.

<sup>58</sup> J Cleur & D Coyne. 1994. *Behaviour, crime and life: Issues for people with an intellectual disability in contact with the criminal justice system in NSW*. Paper presented to the Third Inter jurisdictional Conference on Guardianship and Administration. Western Australia.

<sup>59</sup> E Ogilvie. 2001. *Post-release: the current predicament and the potential strategies*. Canberra: Criminology Research Council. <http://www.aic.gov.au/crc/reports/ogilvie-html.html>.

<sup>60</sup> E Baldry & M Borzycki. 2003. *Promoting integration: the provision of prisoner post-release services. trends and issues in crime and criminal justice*. Canberra: Australian Institute of Criminology.

services are not available. Commonwealth and state government services are difficult to access, in part because they are poorly coordinated at the policy level.<sup>61</sup>

Positive developments include Interact's offender reintegration services 'Bridging the Gap', which involves working with offenders and ex-offenders with cognitive impairments for up to six months while in custody and then up to another nine months post-release on establishing social supports, housing, legal, financial and personal support systems.

- QAI recommends that as part of a Disability Justice Plan a coordinating body investigates and makes proposals for the coordination of post-release services for ex-prisoners with disabilities.

### 6.5.1 The need for a coordinated approach to exit

The work of the Prisoners' Legal Service, the Catholic Prison Ministry<sup>62</sup> and the Queensland Centre for Intellectual and Developmental Disability demonstrates that ex-prisoners are most likely to reoffend in the first fraught weeks out of jail. Ex-prisoners often have nowhere to live, little money, few friends or supporters and scant prospects. For some, a return to prison is an alternative to poverty, loneliness and homelessness.

- Piecemeal changes are not enough: the first step is for government to initiate a coordinated cross-government approach to post-release services to ex-offenders with disabilities so that they are better equipped to reintegrate and live fulfilling lives.

### 6.5.2 Post-release income

The immediate payment from Centrelink on release from prison is equivalent to two weeks of the eligible payment, usually the 'Newstart' Allowance, or if the ex-prisoner has a diagnosed disability, possibly the Disability Support Pension. (Rent assistance is available if the prisoner is able to secure accommodation.) From that the ex-prisoner must pay for accommodation, food, medication, clothing and sundry expenses.

### 6.5.3 Post-release accommodation

*'Up to 28 per cent of exiting prisoners find themselves on the street'.<sup>63</sup>*

The most serious problem for ex-prisoners with disability is the lack of adequate accommodation on release.<sup>64</sup> For people with intellectual disability the lack of accommodation 'makes their chances of integration slim'.<sup>65</sup> Ex-prisoners have disproportionately high rates of homelessness – about one per cent of the general population is homeless yet for ex-prisoners the figure is around 28 per cent.<sup>66</sup> A visit to any of the larger men's homeless shelters in Brisbane will confirm that people with intellectual disability and other capacity impairments are disproportionately represented amongst homeless ex-prisoners.

61 V Catherine Riches, T Parmenter, M Wiese & R Stancliffe. 2006. 'Intellectual disability and mental illness in the NSW criminal justice system'. *International Journal of Law and Psychiatry* 29: 386–396.

62 M Alexander & D Martin. 2013. *Queensland Prison Report 2013*. Prisoners' Legal Service & Catholic Prison Ministry.

63 E Baldry & Australian Housing Urban Research Institute. 2003. *Ex-prisoners, and accommodation what bearing do different forms of housing have on social reintegration?* Canberra.

64 V Catherine Riches, T Parmenter, M Wiese & R Stancliffe. 2006. 'Intellectual disability and mental illness in the NSW criminal justice system'. *International Journal of Law and Psychiatry* 29: 386–396.

65 E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*. Background Paper for the National Legal Aid Conference, Darwin, 6–7.

66 E Baldry & M Borzycki. 2003. *Promoting integration: the provision of prisoner post-release services: Trends and issues in crime and criminal justice*. Canberra: Australian Institute of Criminology.

Australian governments have a responsibility to provide 'appropriate and affordable accommodation to all individuals'.<sup>67</sup> In order to gain parole, the prisoner must provide the Parole Board with an address which the Board then assesses for suitability. Many prisoners with capacity impairments simply have no home to go to.

Many do not own their own homes and cannot afford the up-front cost to get into the private rental market. Housing is not just a necessity for its own sake: it is the foundation for the ex-prisoner's future prospects. Private rentals and even mortgages rarely survive a prison term. Prior to February 2014 a person could retain their Department of Housing property if they were absent for up to 12 months on the condition they continued to pay a reduced amount of rent. This is no longer the case.<sup>68</sup>

The private rental market is difficult to access for those without employment and references. Defaulting private tenants, such as prisoners whose lease was interrupted by jail, will usually be 'blacklisted' on the TICA database. The listings are permanent and the majority of agents Australia-wide will not accept an offer from an applicant on the TICA database. The only solution is to move into state or non-government housing, to purchase if this is financially feasible, to stay with friends or family or to move into a boarding house.

Anyone seeking to enter a residential tenancy agreement must be able to afford a bond and two weeks rent in advance— amounting to six weeks' rent. That is beyond most, so the alternative is rooming accommodation— hardly a suitable alternative for a person wanting to avoid old habits vis-à-vis drugs and alcohol. Recent research confirms a correlation between persons who struggle to find accommodation or who are homeless upon their release and the likelihood that they will later commit another crime.<sup>69</sup> For those without a job or money the only options are boarding houses, hostels and the street, where they are likely encounter other ex-prisoners and drug users, making it difficult for them to avoid further offending.

Ozcare Supported Parole Program has two facilities that accept male ex-prisoners in South Brisbane and in Townsville, but supply does not approach demand.<sup>70</sup> It is not uncommon for parole applications to be approved but not activated until a vacancy arises at an Ozcare facility – which can sometimes be a matter of years.<sup>71</sup> If Ozcare is deemed unsuitable as a release address, either by the parole board or by Ozcare itself, the prisoner is left with no options. For someone serving a long sentence it may result in years being spent in prison instead of being outside and supervised on parole. Ozcare does not accept women prisoners and lack of appropriate housing options results in prisoners remaining imprisoned past their possible release date.

→ QAI recommends:

- QCS and Department of Housing and Public Works (DHPW) cooperate to pilot a comprehensive program of housing and support for exiting prisoners with disabilities (The NSW Justice Support Program may provide a useful example.)

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<sup>67</sup> Ibid.

<sup>68</sup> Prisoners Legal Service. 2014. *Queensland Prisons Report 2013*.

<sup>69</sup> A Mills, D Gofkovic, R Meek & D Mullins. 2013. 'Housing Ex-Prisoners: The Role of the Third Sector'. *Safer Communities* 12: 38-49.

<sup>70</sup> Prisoners Legal Service and Catholic Prisons Ministry. 2013. *Queensland Prisons Report*.

<sup>71</sup> Ibid.



- Prisoners who apply for public or community housing must be eligible for priority housing on release from prison.
- QCS and DHPW should cooperate to give prisoners the option to maintain public or community housing for a reasonable time while they serve in prison.

### Other Jurisdictions

Difficulties associated with obtaining appropriate accommodation upon release from prison is common across Australia. NSW trialled a case management approach to supporting offenders with intellectual disability upon release from prison and established that obtaining adequate accommodation was the most serious issue.<sup>72</sup> As the NSW Council for Intellectual Disability notes in the Framework Plus 5 Report:

It is a sad indictment of the community services available in this state that people with intellectual disabilities who come into contact with the criminal justice system often end up in jail for want of other appropriate facilities in which to house them.<sup>73</sup>

It was noted at the National Legal Aid Conference in Darwin that in many Australian jurisdictions, the lack of appropriate accommodation for released prisoners with mental health disorders and cognitive disability 'makes their chances of integration slim'.<sup>74</sup> In Victoria, the Department of Human Services is vested with responsibility for providing emergency accommodation<sup>75</sup> for 'people with a disability who are in crisis associated with offending behaviour'.<sup>76</sup> This normally involves the provision of short-term accommodation for people whilst on bail.<sup>77</sup> Further measures are provided by Victorian non-governmental organisations for post-release accommodation, which includes short-term and permanent accommodation. Assistance is provided by the Victorian Department of Housing in securing permanent accommodation for this group.<sup>78</sup>

### 6.5.4 Post-release employment

There is a well-established link between unemployment and recidivism,<sup>79</sup> but for ex-prisoners with capacity impairments the need to get a job is as urgent as the prospect is low.

The interruption to a person's life that results from their incarceration is abrupt and absolute, presenting challenges to inmates who had responsibilities to an employer. For those remanded in custody there may be no opportunity to tie up loose ends or part on amicable terms with an employer.

<sup>72</sup> VC Riches, TR Parmenter, M Wiese & RJ Stancliffe. 2006. 'Intellectual disability and mental illness in the NSW criminal justice system'. *International Journal of Law and Psychiatry*. 29(5): 386.

<sup>73</sup> G Salier. 2007. 'Law Society Journal December 2004'. In New South Wales Council for Intellectual Disability. *Framework Plus 5: Human Services in NSW for Offenders with Intellectual Disabilities – Five years on from the Framework Report*.

<sup>74</sup> E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*. Background Paper for the National Legal Aid Conference, Darwin, 6-7.

<sup>75</sup> Accommodation can be provided for a period of up to three months.

<sup>76</sup> Department for Families and Communities. 2011. *Forensic Disability: The Tip of Another iceberg*. Government of South Australia.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> L Gideon. 2010. *Substance Abusing Inmates: Experiences of Recovering Drug Addicts on their Way Back Home*.



...which made it hard for me to do things like get a job and all that, because you know, once they find out who I am they think, 'no, hang on, aren't you the fellow that was busted for that cocaine?' And I go, 'yeah, I was'.

Gareth, male ex-prisoner, 25-34 years, non-Aboriginal, rural prison

Prison impacts on the ability of an ex-prisoner to secure employment once released. Prisoners who disclose their prison history are acutely aware that it will likely have a negative impact on their employment prospects, but also know that failing to explain their absence from the workforce will be counterproductive too. For some ex-prisoners, disclosing their criminal history is both a condition of their parole and a condition of job applications.

Discrimination on the basis of a prior criminal record is a major cause of unemployment among ex-prisoners in the UK.<sup>80</sup> Almost 60 percent of British employers would 'probably not' employ a person with a criminal history; another survey established that only 12 percent of employers would knowingly hire ex-prisoners.<sup>81</sup> This is particularly true in small towns, even if a job application form does not require that an ex-prisoner discloses their record. (Under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), a person is not required to disclose a conviction once the rehabilitation period of ten years<sup>82</sup> has passed).<sup>83</sup>

Ex-prisoners face numerous contradictory challenges. They cannot secure accommodation because they have no employment and they cannot get a job because they have no fixed address (and cannot explain their absence from the workforce). Exiting prisoners are of course unemployed and there are few programs to assist ex-prisoners to find work.

Ex-prisoners are Centrelink-assessed 'Stream 4' clients. They are entitled to the highest level of jobseeker support. Catholic Prison Ministry's 'Reintegration Support Program' has shown that about 30 percent of its clients have achieved an 'employment outcome' compared to 12% of other ex-prison jobseekers. We have no statistical information about persons with intellectual disability or other capacity impairments within that group. Given that the overall labour force participation rate for persons with intellectual disability was 40.9 percent in 2009, compared with 78.6 percent for all people, the participation rate for ex-prisoners with intellectual disability and other capacity impairments is likely to be proportionately low.

### 6.5.5 Post-release other - health and drug dependency

Drug dependency is as common amongst prisoners with intellectual disability or other capacity impairments as amongst the general population. Baldry's NSW study established that more than a third of prisoners

80 H Metcalf, T Anderson & Rolfe. 2001. *Barriers to Employment for Offenders and Ex-offenders*. Department of Work and Pensions Report No. 155. Leeds: CDS.

81 C Visher, S Debus-Sherrill & J Yahner. 2010. 'Employment After Prison: A Longitudinal Study of Former Prisoners'. *Justice Quarterly* 28: 698-718; J Graffam, A Shinkfield & L Hardcastle. 2008. 'The Perceived Employability of Ex-Prisoners and Offenders'. *International Journal of Offender Therapy And Comparative Criminology* 52: 673-685.

82 Section 3 of the Act defines rehabilitation period, in relation to a conviction upon indictment recorded against a person who in relation to that conviction was not dealt with as a child:

(i) a period of 10 years commencing on the date the conviction is recorded; or

(ii) where an order of a court made in relation to the conviction has not been satisfied within that period of 10 years—a period terminating on the date the order is satisfied; whichever period is the later.

83 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s 6. Discrimination on the basis of a criminal record is unlawful under the *Australian Human Rights Commission Act 1986* (Cth). The *Australian Human Rights Commission Regulations 1989* (Cth) extended the definition of discrimination in the Act to include criminal record [reg. 4(a)(iii)].

with intellectual disability or borderline intellectual disability had a history of substance use.<sup>84</sup> Between 34 and 52 percent of male prisoners used illegal drugs prior to imprisonment; approximately 10 percent of prisoners have committed drug-related offences.<sup>85</sup>

Drug use is common post-release.<sup>86</sup> An Australian study determined that of 372 post-prison deaths, 50.8 percent were caused by drug overdoses within 12 months of release. Homelessness or housing transience, domestic violence, unemployment and loss of social opportunities are associated with drug use soon after exiting prison. Ex-prisoners who died of drug-related causes commonly experienced social and economic disadvantage: most were unemployed (81.8 percent) and one-third were homeless (33.8 percent). According to coronial records, 25.1 percent had a general health condition and 32.6 percent had a mental health problem.<sup>87</sup>

If prisoners are not supported to radically change their pre-prison lifestyle they are likely to resume that lifestyle.<sup>88</sup> Life stresses such as homelessness or housing transience, domestic violence, poverty, unemployment and a loss of other 'social opportunities' can all be precursors to drug abuse.

In 2012 drug courts were closed in Queensland after 12 years of diverting people from prison. The courts operated under the *Drug Rehabilitation (Court Diversion) Act 2000*. Drug court participants had their sentencing suspended for up to eighteen months while they were given intensive drug treatment. Completion of the program was taken into account at sentencing. Drug Courts have saved resources equivalent to 588 years of actual prison time.<sup>89</sup>

→ QAI recommends the reinstatement of the Drug Court.

## 6.6 Conclusion

This chapter has explored issues relating to the experience of imprisonment for people with disability, as well as relevant considerations for this group following release. We have documented key issues of concern for people with disability in prison and considered the support and assistance available to them, if any. We then identified a number of areas where there is a pressing need for a significant improvement in the supports available to people with disability who have been incarcerated, including in the areas of financial support, accommodation, employment and a social support network.

The next chapter will consider forensic processes, exploring the role and appropriateness of Forensic Orders and contrasting the Queensland approach to the approach taken by other Australian jurisdictions.

84 E Baldry. 2011. *Background paper for the national legal aid conference Darwin 2011: People with mental and cognitive disabilities: Pathways into prison*. UNSW Arts and Social Sciences.

85 E Ogilvie. 2001. *Post-release: the current predicament and the potential strategies*. Canberra: Criminology Research Council. <http://www.aic.gov.au/crc/reports/ogilvie-html.html>.

86 CJS Carcach, & Australian Institute Of Criminology. 1999. *Imprisonment In Australia: Trends in Populations & Imprisonment Rates 1982-1998*.

87 J Andrews & S Kinner. 2012. *Understanding drug-related mortality in released prisoners: a review of national coronial records*. <http://www.biomedcentral.com/1471-2458/12/270>.

88 E Ogilvie. 2001. *Post-release: the current predicament and the potential strategies*. Canberra: Criminology Research Council. <http://www.aic.gov.au/crc/reports/ogilvie-html.html>.

89 B Butler. 2011. *Magistrate Courts of Queensland Annual Report*. Queensland Courts.

## 7. Forensic Processes

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## 7. Forensic Processes

### 7.1 Summary and recommendations

The Mental Health Court is empowered to hear matters on reference and to make Forensic Orders for the involuntary detention and treatment or care of persons deemed to be of unsound mind,<sup>1</sup> unfit for trial.<sup>2</sup> The 'of unsound mind' provisions<sup>3</sup> generally capture persons who lacked capacity (and therefore were not criminally responsible) at the time of an alleged offence due to an underlying mental illness or intellectual disability or cognitive impairment, while lack of provisions capture people whose impairment prevents them from participating in legal proceedings, either temporarily or permanently. In deciding the terms of Forensic Orders, the Mental Health Court weighs three sometimes competing factors: the seriousness of the offence, the protection of the community and/or victim, and the treatment or care needs of the accused.<sup>4</sup>

Although community safety is paramount, every person has a right to treatment or re/habilitation, and with appropriate support that treatment or habilitation is best provided in the community rather than while in detention. In our view, the services available to provide such support falls short of what is needed, when the surest guarantee of community and victim's interests above the interests of the accused or those of the community in the long term, when the surest guarantee of community safety is that each accused is given the treatment or support they need to live as free citizens. The net effect is that forensic detention tends to work as a *de facto* prison, except that the prisoners there can be, and many are, detained indefinitely.

Parliament did not intend Forensic Orders to be punitive,<sup>5</sup> yet people subject to them frequently find that the order restricts their liberties more severely and for longer than a criminal sentence.<sup>6</sup> A convicted party will have a reasonable idea of the nature and the length of their term of punishment from the day a court passes sentence, but a Forensic Order under the *Mental Health Act 2000* (Qld) is open ended, its duration determined on an unknown future date by a tribunal that weighs factors including the person's recovery or re/habilitation, the availability of supports and the risk the person might pose to the community. The system in general and the (Mental Health Review) Tribunal in particular are risk-averse. Some people prefer to forgo critical treatment and take their chances in the criminal justice system because a finite criminal sentence is better than the known restrictions and possibility of indefinite detention under a Forensic Order.

Any system that has the power to restrict citizens' liberties as does the forensic system must be subject to corresponding human rights protections. This chapter begins with some key recommendations directed at ensuring those protections and then proceeds to discuss substantive problems including reviews, risk management, limiting terms, forensic disability and indefinite detention.

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1 See discussion below for an explanation of this term.

2 See *Mental Health Act 2000* (Qld) Ch 7, Part 2.

3 See, for example, section 240, *Mental Health Act 2000* (Qld).

4 Section 288 (4) *Mental Health Act 2000* (Qld).

5 Hansard does not record any such statement in the second reading debate, but we infer the absence of punitive intent and note that, for example, Forensic Orders are not subject to 'non-revoke' periods. See also - State of Queensland. 2014. *Review of the Mental Health Act 2000: Discussion Paper*, May 2014', 3.

6 State of Queensland. 2014. *Review of the Mental Health Act 2000: Discussion Paper*, May 2014, 4 states, There is a widespread view among patients that a Forensic Order is a form of punishment, and a lengthy Forensic Order can lead to hopelessness and malaise in patients, with a deleterious effect on their mental health and, perversely, increased risk to the community: Personal Communication from solicitor who represents clients on Forensic Order reviews in the Mental Health Review Tribunal.

### Key recommendations:

- Forensic measures in relation to people with intellectual disability and other cognitive impairments should be discrete from forensic measures for people with mental illness.
- Fitness to enter a plea or to stand trial must be assessed only after the provision of decision-making support (where desired).
- Habilitation, rehabilitation, education and training should be the focus of provisions for people with intellectual impairment.
- Detention must be a last resort and the court should only impose the least restrictive option suited to the person's circumstances.
- The Mental Health Court or Tribunal must embed judicial or administrative orders for restriction in a plan for the removal of that restriction.
- In recognition of the unique and abiding nature of mental impairment, which is distinct from mental illness, there shall be a rebuttable statutory presumption that at review, a person shall transition to a less restrictive order.
- A non-punitive, rights-based and recovery-oriented approach should be taken for people with mental illness.
- There should be representation as of right, whether in the criminal courts, the Mental Health Court or the Mental Health Review Tribunal.
- Consistent with natural justice, forensic and Involuntary Treatment Orders must be revocable. Any conditions imposed by the Mental Health Court should be in the form of reviewable recommendations, and review should be mandatory.
- The Mental Health Court should only be permitted to impose monitoring conditions where research first establishes that such conditions reduce risk, and can be imposed in a way that is consistent with both recovery principles and the *Convention on the Rights of Persons with Disabilities*.
- The principles stated in sections 8 and 9 of the *Mental Health Act 2000* (Qld) should not be merely aspirational. They should apply to all decisions made and powers exercised under the MHA.

## 7.2 Introduction

It is a fundamental principle of law that the courts will not apportion criminal responsibility to a person who was of unsound mind at the time of allegedly committing an offence or who presently is unfit to face trial.<sup>7</sup>

<sup>7</sup> For common law principles in relation to an insanity defence, see the rules in *M'Naughten* [1843] 8 ER 718 and *R v Porter* [1933] 55 CLR 182. While there are differences in terminology, the *M'Naughten* rules are essentially the same as the defence of insanity under s 27 of the *Criminal Code 1899* (Qld) except that the latter includes the control test; cf *The Queen v Falconer* [1990] 171 CLR 30 per Mason CJ, Brennan and McHugh JJ at 46. In relation to fitness to plead, see *R v Presser* [1958] VR 45.

Forensic Orders provide a mechanism by which a person who may fall within this category can be detained, treated, habilitated or rehabilitated, reducing the risk of reoffending and the risk of harm to others.

The purpose of a Forensic Order is treatment or training and habilitation of the person and the protection of others; the system's ultimate goal is to reintegrate the person into the community. Properly implemented, a Forensic Order can have many benefits for an individual with complex needs. Those benefits must be weighed, however, against the restrictions imposed by Forensic Orders, restrictions that for many QAI clients have lasted for many years more than a criminal sentence in relation to a similar fact scenario.

When considering the term or extension of Forensic Orders, the Mental Health Court and the Mental Health Review Tribunal weigh a number of factors more heavily than the criminal courts and parole boards, including the person's mental health, their response to treatment, the risk of harm to self and others and their likely social circumstances including the availability of accommodation or support.<sup>8</sup> The MHRT is reluctant to release a person who has limited living skills, housing or support.

There is no retributive dimension to a Forensic Order, but nor is there a complementary notion of atonement that warrants a person's eventual release. Its calculus, instead, focusses on risk: for a person to move from detention to community treatment and, finally, to release from an order, they must satisfy the Tribunal that they are no longer a risk to the community and demonstrate supports sufficient for them to live in the community without need for further surveillance. It is a high burden to satisfy, particularly for someone who has already been assessed as having impaired capacity and will likely appear before the Mental Health Review Tribunal unrepresented. Meanwhile, every day in an institution further erodes that person's ability to live independently. Some people become so institutionalised that their prospects for reintegration fade altogether.

Although the disposition of punishment is not one of the court's purposes, people subject to Forensic Orders often view and experience them as such. They resent the system for it and the result is therapeutically counterproductive: an order can impede a person's recovery, and the prospect of interminable and onerous restrictions deters some from entering the forensic system in the first place, reducing the chance that they will get necessary treatment, care and support.

While community protection is necessary, there is no proof that the increasing restrictions on people subject to Forensic Orders over the last few years<sup>9</sup> is either improving the rehabilitation of people with intellectual disability or increasing community safety. A certain result is the extra expense of prolonged detention and surveillance.

Current forensic provisions do little to challenge stereotypes, such as the not uncommon belief that offenders with mental illness or intellectual disability are violent, unpredictable and need control.<sup>10</sup> People receiving treatment for a mental illness are no more violent or dangerous than the general population.<sup>11</sup> Ironically, they and people with intellectual disability are more likely to be victims of violence, or to self-harm.<sup>12</sup>

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8 Note that the *Mental Health Act 2000* (Qld) was undergoing review in 2014. This process was halted by the calling of a general state election and the resulting cessation of the Health and Community Services Committee that was conducting the inquiry into the *Mental Health Act 2014* (Qld). Whether a further bill to amend this legislation will be introduced was unknown at the time of publication.

9 Electronic monitoring is one such restriction.

10 See, for example, the Melbourne Herald Sun's article and associated comments 'Sex fiends from a secret facility in Melbourne suburb Fairfield released to strike again'. 28 October 2013. <<http://www.heraldsun.com.au/news/law-order/sex-fiends-from-a-secret-facility-in-melbourne-suburb-of-fairfield-released-to-strike-again/story-fni0fee2-1226747880040>>.

11 Heather Stuart. 2003. 'Violence and mental illness: an overview' *World Psychiatry*. 2(2): 121–124.

12 <http://www.sane.org/information/factsheets-podcasts/204-facts-and-figures>; <http://www.sane.org/information/factsheets-podcasts/209-violence-and-mental-illness>.

As in other chapters, this chapter considers evidence and strategies from other jurisdictions.<sup>13</sup> In particular QAI commends the New South Wales Law Reform Commission's *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*.<sup>14</sup>

### 7.3 The forensic system

The law recognises that a person may not be criminally responsible for an otherwise unlawful act if the person has a pre-existing condition that affects their mental functioning<sup>15</sup> and the person could not understand or control what they were doing or know that it was wrong.<sup>16</sup> The law also recognises that some accused cannot be tried fairly because they lack the capacity to understand and participate in court processes.

**Case study** – the terms of a young man's Forensic Order allow him to live in the community provided that he has appropriate (disability) supports. A psychiatric (re)assessment determines that his IQ is 78, and not the <IQ70 determined formerly. He therefore does not have an intellectual disability, and DSQ consequently withdraws the funding support that enabled him to live in the community. The Mental Health Review Tribunal determines that without support his 'risk' of offending (based on past offending behaviour) is too high. His order is varied to place him in an acute ward.

The former tend to have a mental illness or some other pre-existing condition; the latter tend to be people who have some form of intellectual impairment. Queensland's Mental Health Court is statutorily mandated to identify, assess and make dispositions in relation to these accused on a case-by-case basis; the Mental Health Review Tribunal is mandated to review the orders that the Mental Health Court has made. The Mental Health Court is not bound by the normal rules of evidence.<sup>17</sup> If, on expert advice, the Mental Health Court finds that the accused lacks capacity, and it is satisfied on the balance of probabilities<sup>18</sup> that the person committed the alleged offence (and not where there is a reasonable doubt<sup>19</sup>), it will place the person on a Forensic Order— one that requires that the 'patient' resides in a secure mental health facility, at the Forensic Disability Service or in the community.

The Court may approve limited community treatment if it is satisfied that the patient does not represent an unacceptable risk to the safety of the patient or to others.<sup>20</sup> The Court will outline an appropriate plan of therapy or habilitation: therapy for those with a mental illness, and habilitation for those who have an intellectual impairment. Except for persons detained at the FDS, the state government's Forensic Mental Health Service is responsible for oversight of the orders.

13 To that end we provide a summary of different approaches to key issues in Appendix D.

14 New South Wales Law Reform Commission. *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*. Report 138 (May 2013), chapter 8. <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report%20138.pdf>.

15 This refers to 1. a disease of the mind, a legal rather than medical term meaning a mental state not encountered in normal persons (Gaudron J in *R v Falconer* (1990) 171 CLR 30) or 2. where the person has a natural mental infirmity, meaning mental retardation to such a degree that it affects at least one of the three capacities (*R v Rolph* [1962] Qd R 262).

16 *R v Presser* [1958] VR 45.

17 Unless it decides it is in the interests of justice that it be bound for the hearing or a part of the hearing – section 404 *Mental Health Act 2000* (Qld).

18 Section 405 (2) *Mental Health Act 2000* (Qld).

19 Section 268 *Mental Health Act 2000* (Qld).

20 Section 275 *Mental Health Act 2000* (Qld).

## 7.4 Defining an overarching principle

More than two decades ago the Burdekin Report<sup>21</sup> established a human rights platform in relation to mentally ill people in the criminal justice system, linking their treatment to various *international instruments* including the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*. The Commonwealth Government has recently clarified:<sup>22</sup>

The *Principles for the Protection of Persons with Mental Illness* specifically apply to prisoners. Principle 20 stipulates that they are entitled to the best available mental health care, and to all the rights specified in the Principles, 'with only such limited modifications and exceptions as are necessary in the circumstances'.

**The forensic process<sup>23</sup>** is for people who:

- a. may be of unsound mind<sup>24</sup> or who had substantially impaired capacity<sup>25</sup> at the time of an alleged offence;
- b. have allegedly offended but who may not be fit to enter a plea or to stand trial; or
- c. are already subject to a Forensic Order or Involuntary Treatment Order.

This process is mandated by a legislative framework including:

- the *Mental Health Act 2000* (Qld)
- the *Forensic Disability Act 2011* (Qld)
- the *Criminal Code 1899* (Qld).

Since then, the health authorities of the Commonwealth, states and territories have developed a National Statement of Principles for Forensic Mental Health (NSPFMH).<sup>26</sup> Principle 12 requires that decisions pertaining to detention or release should accord not only with applicable legislation and legal principles but with the best practice principles contained in the NSPFMH statement.

The Australian Health Minister's Council endorsed those principles back in 2002, yet in 2015 Queensland's Mental Health Court lacks any clearly defined overarching principles when deliberating Forensic Orders.

21 Human Rights & Equal Opportunities Commission. 1993. *Report of the National Inquiry into the Human Rights of People with Mental Illness*. Canberra.

22 Ibid, 753.

23 This is a simplified explanation.

24 'Of unsound mind' refers to a disease of the mind - see *R v Falconer* [1990] 171 CLR 30 - or natural mental infirmity - see *R v Rolph* [1962] Qd R 262 - such that the accused was deprived of one or more of the following three capacities: 1: the capacity to understand what they were doing, 2. the capacity to understand that they ought not do the act or omission/s (the *M'Naghten Rules*) or 3. the capacity to control their actions - see *The Queen v Falconer* [1990] 171 CLR 30.

25 The Mental Health Court can determine whether there was diminished responsibility when the charge is murder [s304A *Criminal Code 1899* (Qld)].

26 [http://www.health.gov.au/internet/mhsc/publishing.nsf/Content/EA8277CBEE4D16B2CA257A5A0081C323/\\$File/forens.pdf](http://www.health.gov.au/internet/mhsc/publishing.nsf/Content/EA8277CBEE4D16B2CA257A5A0081C323/$File/forens.pdf).



Legislation in Victoria, South Australia, Tasmania and the Northern Territory includes such principles, and they are stated in similar terms. Victoria's is typical:

In deciding whether to make, vary or revoke a supervision order or to remand a person in custody under this Act, the court must apply the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.<sup>27</sup>

**In 2011-2012, the Queensland Mental Health Court:<sup>28</sup>**

- had 80.5 sitting days
- heard 335 matters
- made 191 findings, 81 of which were dismissed.

Compared with:

- 1130 finalised matters in the criminal jurisdiction of the Supreme Court<sup>29</sup>
- 5350 finalised matters in District Courts<sup>30</sup>
- 336 726 matters in Queensland magistrates' courts.<sup>31</sup>

When determining whether to place someone on a Forensic Order, the Queensland Mental Health Court must have regard to:

- the seriousness of the offence;
- the person's treatment needs;
- the protection of the community.<sup>32</sup>

It has been QAI's observation that there have been cases where the court has made Forensic Orders, despite expert evidence that an order was not necessary and in fact counterproductive to treatment, care and protection. Orders have damaged therapeutic alliances and increased community risk by unnecessarily restricting patients who have had negative reactions to constraint, particularly when considerable time has elapsed since the index offence and the Mental Health Court's determination. An overarching principle would force the Court to take a 'bottom-line' when called upon to weigh disparate factors.

27 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 39.

28 *Mental Health Court- Annual Report 2011 – 2012*, p 2

29 *Supreme Court of Queensland Annual Report 2011-2012*, p 25

30 *District Court of Queensland Annual report 2011 – 2012*, p 14

31 *Magistrates Courts of Queensland Annual report 2012 – 2013*, p 42

32 *Mental Health Act 2000* (Qld), s 288(4).

## 7.5 Factors to take into account when reviewing a Forensic Order

In reviewing a Forensic Order the Tribunal must have regard to:

- the patient's mental state and psychiatric history
- the index offences
- the patient's social circumstances
- the patient's response to treatment and willingness to continue treatment<sup>33</sup>
- For Forensic Orders (Disability), the Tribunal must also take into account the patient's intellectual disability, treatment plan, the patient's behaviour in response to that plan and any report from the Director (Forensic Disability).<sup>34</sup>

QAI recommends:

- Reviews of Forensic Orders based on lack of fitness should examine strategies to enhance the person's fitness
- A patient's treatment plan and the patient's behaviour in response to that plan is also an appropriate consideration for the Tribunal in reviewing all Forensic Orders
- Legal advice and representation must be available for Forensic Order reviews.

## 7.6 Revocation and limited community treatment

The Tribunal must not revoke a Forensic Order (or approve limited community treatment) unless satisfied that the patient does not represent an unacceptable risk to the safety of the patient or others, having regard to the patient's mental illness or intellectual disability.<sup>35</sup> Some of the relevant issues to consider in this context are:

- onus of proof
- risk to self
- unacceptable risk
- testing criminal responsibility
- limiting term
- interstate transfers.

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<sup>33</sup> Section 203(6)

<sup>34</sup> Section 204(6A)

<sup>35</sup> Section 204(1)(a)

### 7.6.1 Onus of proof

By default, the Tribunal must keep a patient on a Forensic Order (and in detention) unless and until he or she can convince the Tribunal otherwise, placing the burden of proof for release on the patient in a system where restriction under a Forensic Order is indefinite.

#### Other jurisdictions

State and territory approaches vary:

- **Constraint on release** - The starting position is a continuation of the order/detention unless a test regarding safety is satisfied in Qld, NSW, Vic (during nominal term only) and the Commonwealth.
- **Constraint on detention** - The starting position is discontinuation of the order/detention unless satisfied that risk justifies ongoing detention in the Northern Territory and Victoria (from custodial to non-custodial after nominal term).
- **Relevant considerations** - There is no constraint in either direction. Legislation directs the decision-maker to make any order it considers appropriate having regard to a list of relevant considerations (Victoria, South Australia, Western Australia, Tasmania and the ACT).

Jurisdictions that share Queensland's approach (NSW and the Commonwealth) have a 'limiting term' after which a person can no longer be kept under a Forensic Order or its equivalent. In Victoria, the test changes at the end of a nominal term.

- QAI recommends legislative amendment so that the overarching purpose of Forensic Orders is achieved and the fundamental human rights of the patient are maintained.<sup>36</sup>
- Revocation of the order or the approval of limited community treatment should be the starting position - unless the court or tribunal is satisfied that the risk justifies ongoing restriction (as in the Northern Territory).
- The test should not provide for constraint in either direction but rather provide a list of relevant considerations, reflecting a neutral evidentiary approach
- The onus of proof should be reversed after a pre-determined period (as in Victoria).

### 7.6.2 Consideration of risk to self

Risk to self is not an appropriate criterion for Forensic Orders.

- A person who harms themselves or places their own (but not other's) safety at risk is not guilty of a criminal offence and no court should detain them for this reason alone.

By the current protocol, both the person and the community see Forensic Orders as penalties against criminals. The current test 'criminalises' self-harm. Some may argue that the Forensic Order is prophylactic against self-harm triggered by guilt associated with the original act, but the Mental Health Court may not issue an order for months or years, obviating that purpose. Some patients find Forensic Orders limiting and even detrimental to their progress and rehabilitation: such orders are not fulfilling either purpose of

<sup>36</sup> This would require review and amendment of s 204 of the *Mental Health Act 2000* (Qld).

treatment or protection of the community. The argument that a Forensic Order ensures treatment in a system which would otherwise fail that person should not be given weight. The Act should not be making up for failures in the health system.

### 7.6.3 'Unacceptable risk'

Queensland is presently the only jurisdiction that uses 'unacceptable risk' as the relevant threshold.<sup>37</sup> In other jurisdictions, the test is whether the person is 'likely to endanger another person'<sup>38</sup> or whether the person or the public 'will not be seriously endangered as a result'.<sup>39</sup>

- QAI considers that 'unacceptable risk' is too vague and incorporates too many subjective factors.
- A more appropriate test would consider whether there is *likely* to be a *serious or imminent risk*, drawing on language already used in relation to Involuntary Treatment Orders in this jurisdiction.

**In Re XYZ [2013] QMental Health Court 5** the Mental Health Court overturned a Tribunal decision to revoke a Forensic Order on the basis that the patient did not pose an unacceptable risk to her own safety.

No party raised evidence regarding the patient's risk to others. The patient has expressed the view that the forensic order is limiting her progress and recovery.

### 7.6.4 Testing criminal responsibility

If the Mental Health Court has reasonable doubt that the person committed the alleged offence<sup>40</sup> or there is a dispute relating to a substantially material fact,<sup>41</sup> the criminal charges must be continued according to law. These provisions were designed to ensure that a person cannot exercise a mental health defence and be placed by the court on a Forensic Order for a crime they potentially did not commit.

#### Other jurisdictions

In both NSW and Tasmania, a person found unfit for trial has a special hearing which determines whether on the limited evidence available they committed the offence.<sup>42</sup> The High Court in *Subramaniam v The Queen*<sup>43</sup> explained the purposes of a special hearing:

The first is to see that justice is done, as best it can be in the circumstances, to the accused person and the prosecution. [The accused] is put on trial so that a determination can be made of the case against [the accused]. The prosecution representing the community has an interest also in seeing that justice is done. A special hearing gives an accused person an opportunity of being found not guilty in which event the charge will cease to hang over [the accused's] head, and if the accused requires further treatment that it may be given ...outside the criminal justice system.

37 It is also noted that 'unacceptable risk' is not terminology used in the making or continuation of civil orders in Queensland. See Appendix D for a comparative analysis of approaches taken by different Australian jurisdictions.

38 This is the approach taken in South Australia and Tasmania.

39 This is the approach taken in Victoria.

40 *Mental Health Act 2000* (Qld), s 268.

41 *Mental Health Act 2000* (Qld), s 269.

42 See *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 19 – 30; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 15.

43 *Subramaniam v The Queen* [2004] HCA 51.

No such safeguards exist for a person who is not fit for trial: they cannot have their charges continued according to law and they can only be placed on a Forensic Order. The facts of the charges remain untested, travelling with the patient and impacting on their treatment and conditions under the Forensic Order.

- QAI recommends that provisions for special hearings should be implemented in Queensland. Persons who are found not fit for trial should be able to opt for a 'special hearing' to test the facts in relation to criminal charges.

### 7.6.5 Limiting term

In Queensland, there is a presumption in favour of detention when determining the release of forensic 'patients', effectively placing an onus on the patient to show why she or he should not be detained. The presumption is that the person is a danger to society and will continue to be so.

The Mental Health Review Tribunal can defer indefinitely any decision to end a Forensic Order.

The current open-ended arrangement creates an incentive to complacency for both the detainee and their carers - an inducement to maintain the *status quo* rather implement strategies calculated to ensure that the detainee is ready for freedom. A limiting term would:

- reverse the current onus in Queensland
  - set-up a presumption in favour of release at the end of the nominal term
  - place the onus on those seeking to keep a forensic patient in detention to satisfy the MHRT that the patient is a serious risk to public safety
  - encourage goal-setting for both the patient/detainee and for those who oversee them.
- QAI recommends that the *Mental Health Act 2000* (Qld) should be amended to include a 'limiting term' type system which promotes release into the community and provides both staff and patients/detainees with a timeframe.
  - QAI recommends that if Magistrates are to be given the power to impose non-revoke periods on orders in relation to people with mental health or intellectual impairment, as proposed by the Mental Health Bill, the criteria for non-revoke periods imposed in the Magistrates Court should be the same as those in the Mental Health Court, namely that the Magistrate must consider whether the community requires protection from 'serious harm to other individuals, serious property damage or repeat offending'.

#### Other jurisdictions

In the Commonwealth, NSW, ACT, and South Australian jurisdictions a 'limiting term' caps the period that a person can remain under a Forensic Order or equivalent, although a person can be released from detention earlier on a revocable (if breached) 'parole'.

In Victoria a patient cannot be released from detention unless the court is satisfied on the evidence that the safety of the patient or members of the public would not be seriously endangered, but after the expiry of a nominal term the person must be transferred to a non-custodial order unless risk justifies continued detention.

### 7.6.6 Interstate transfers

Many people on Forensic Orders are from out-of-state. Queensland detains forensic patients whose index offence was committed here, and the rules effectively prohibit anyone from out-of-state returning home to supportive networks.<sup>44</sup>

Economically and therapeutically the prohibition is counter-productive. The more supports a person has around them the more likely it is that they will successfully function without the (costly) Forensic Order.

Patients under a Forensic Order cannot move outside of Queensland unless the Tribunal has, upon application, approved the move.<sup>45</sup> The Tribunal may approve the application only if it is satisfied appropriate arrangements exist for the patient's treatment or care at the place where the patient is to move.

The move of the patient therefore depends on:

- the Queensland treating team's willingness to make arrangements with the receiving hospital or mental health service (patient has no recourse to policies nor appeal)
- the home state treating team's willingness to assume the risk and responsibility
- the legal requirements of the receiving state
- Queensland's reporting requirements.

#### Chapter 7 Part 2 processes

If a defendant is:

- already on a Forensic Order or an Involuntary Treatment Order,
  - the MHA Chapter 7 Part 2 process requires an AMHS to arrange an examination and report by a psychiatrist pursuant to MHA section 238 (a 'section 238 report').
  - the report includes the psychiatrists opinion regarding the person's mental capacity at the time of the alleged offence, and their fitness for trial
  - on the basis of the report the Director of Mental Health may either -
    - refer the matter to the Mental Health Court (for indictable offences)
    - refer the matter to the Director of Public Prosecutions (for simple offences) or where there is no mental health defence

The process is unduly complex and bureaucratic. It varies from state to state and requires advocacy both

<sup>44</sup> Forensic patients are not 'transferred'. They remain on the Queensland Forensic Order and, depending on the law of the other state, they may be put on an equivalent order there. The Queensland tribunal may agree to revoke the order after two years if it is satisfied that the patient is not likely to move back to Queensland and does not represent an unacceptable risk as required under s 204(1). Until then the receiving service is obliged to report back to the Queensland service.

<sup>45</sup> This can be done under ss 171-175 of the Act.

in Queensland and in the destination state. The transfer process can take many years, if it happens at all, and may impact negatively on the person's recovery.

Returning to country and to family is particularly significant for Indigenous people.

- Their transfers should be arranged in the least restrictive way,<sup>46</sup> directed towards the achievement of maximum potential and self-reliance, maintenance of supportive relationships and community participation.<sup>47</sup>
- Government should take a culturally appropriate approach to forensic services, including:
  - employment of Indigenous staff
  - use of therapeutic models that acknowledge cultural value and recognise that Indigenous people have different views about mental illness and intellectual impairment<sup>48</sup>
  - support during the transition period important from custody to community
  - enhancing non-indigenous people's cultural awareness.

## **7.7 Accused subject to FO or ITO – the *Mental Health Act (2000)* Ch 7 Part 2 process**

Queensland's *Mental Health Act 2000* (Qld), Chapter 7 Part 2 reverses the common law presumption of capacity in criminal matters. A person already subject to an Involuntary Treatment Order or Forensic Order is referred automatically for a capacity assessment, regardless of the seriousness of the offence.

### **7.7.1 Current position**

The Chapter 7.2 process seeks to avoid improper conviction by taking people who are subject to an ITO or Forensic Order out of the criminal justice process so that the mental condition can be examined. It also provides a pathway for people charged solely with a simple offence to have their proceedings discontinued by the DPP.

When any person on is accused of an indictable offence, the Director of Mental Health, their legal representative, or another<sup>49</sup> can refer the matter to the Mental Health Court. The Mental Health Court in Queensland involves a Supreme Court Justice sitting with two psychiatrists who together assess a person's capacity.

If the defendant wishes to rely on a defence of unsoundness of mind or argue that they are unfit for trial they must provide evidence of this to the Mental Health Court, usually an expert's report.<sup>50</sup> The Mental Health Court may either determine the matter on the evidence provided or, as it often does, seek a second opinion by way of a court-ordered assessment.

<sup>46</sup> Consistent with the principle of least restrictive practice in s 9 of the *Mental Health Act 2000* (Qld).

<sup>47</sup> Consistent with *Mental Health Act 2000* (Qld) s 8 principles.

<sup>48</sup> See Royal Commission reports about aboriginal deaths in custody: Austlii. *Indigenous Law Resources*. Available from: < <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.

<sup>49</sup> Another person is defined by the *Mental Health Act* to include 'the Director of Forensic Disability, Director of Public Prosecutions, a Court of Law, the Attorney General or the accused themselves.

<sup>50</sup> *Mental Health Act 2000* (Qld), s 238.

The defendant who raises a section 27<sup>51</sup> insanity defence must commission their own psychiatric report/s. Legal Aid may be available, depending on eligibility. Preparation of these reports usually takes time, and the Legal Aid contribution may not purchase the best possible report. Some defendants may opt for a quicker resolution through the normal criminal justice process rather than wait and run the risk of prolonged surveillance and the possibility of incarceration in the forensic system. The practice helps to explain the overrepresentation of prisoners with mental illness.<sup>52</sup>

QAI recommends, as an alternative to Chapter 7 Part 2:

- Where a person intends to pursue a section 27<sup>53</sup> defence the Magistrate should have the option to suspend proceedings while a report is prepared assessing the defendant's soundness of mind.
- Magistrates should use the report to decide the next step, whether it be diversion or progression through the criminal justice process.
- The relevant legislation should include a requirement that Magistrates receive a report about a person with mental illness or intellectual disability to inform their decision about whether a person is likely to be, or appears, unfit for trial or of unsound mind.
- The proposed restriction under the Mental Health Bill of the provision of mandatory psychiatric reports (where a person is already subject to a Forensic Order or Involuntary Treatment Order) to situations where a person is charged with an offence that must be heard on indictment and where they, or their representative requests a report, should be broadened to include:
  - those matters referred to the Mental Health Court by a Magistrate
  - those matters where a person intends to pursue a defence of unsoundness or unfitness in the Magistrates Court.
- Mental health legislation should include a requirement that Magistrates receive a timely report about a person with mental illness or intellectual disability to inform their decision about whether a person is likely, or appears, to be unfit for trial or of unsound mind.
- The threshold for unconditional or conditional discharge by a Magistrate should be reconsidered for people with intellectual disability and cognitive impairment.

### 7.7.2 Overall problems with Chapter 7 Part 2

Chapter 7.2 is mandatory for people on Involuntary Treatment Orders or Forensic Orders and therefore (some would argue positively) discriminates against people with mental illness and intellectual disability.

Chapter 7.2 presumes incapacity, in breach of Article 12 of the CRPD which provides that 'State Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.

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51 *Criminal Code 1899* (Qld).

52 Department of Health. 2014. *Review of the Mental Health Act 2000 Background Paper 3: Assessment of Individuals Charged with an Offence*. Queensland.

53 *Criminal Code 1899* (Qld).



The law already provides a defence for people who are of unsound mind or unfit for trial. Chapter 7.2 seeks to add a layer of protection, on the assumption that a person on an ITO or Forensic Order is more likely to be found to be of unsound mind or unfit for trial. It does not capture the many other people not on involuntary mental health orders who equally should not be held criminally accountable for their actions. In those cases, a person is reliant on their legal representation, the Attorney-General, the prosecution, the Director of Mental Health or the courts to ensure that the matter is appropriately dealt with.

Chapter 7 Part 2 delays the progress of criminal proceedings. A report that must be prepared by a psychiatrist commenting on the person's mental condition, known as a 'section 238 report'. There are a number of problems with this process. **NOTE FROM EDITOR sentence is not complete**

- The legislated timeframe for such a report is 21 days. In 2011-12, this timeframe was only adhered to in 12% of matters. The vast majority (48%) of reports were provided between 43 and 180 days and an alarming 22% took more than 180 days.<sup>54</sup> This is a serious denial of natural justice that perpetuates despite the implementation of recommendations made by the Butler Report in 2006<sup>55</sup> to address this problem. It is particularly concerning where the waiting period for the report is spent in a remand centre with no rehabilitation or treatment programs and/or where the person ultimately successfully pleads not guilty and has no recourse for the time served.
- The quality of the reports is often sub-optimal. About 50% of reports are returned to the psychiatrist by the administrator. Specific flaws include:
  - The lack of Aboriginal liaison people to explain matters. It is not uncommon for Aboriginal people to say they 'hear the voices of their ancestors', but more than one psychiatrist has interpreted this as 'hearing voices'.
  - The workload of psychiatrists at prison is excessive. Some seem not to like/want to write the reports and the fees are too low to be deemed worthwhile by many psychiatrists in private practice.
  - Most importantly, there is no mechanism to enforce the making of the report. It is arguably unethical for a treating psychiatrist to make the report, because that is a conflict of interest, but other available psychiatrists are few and insistence on a different psychiatrist will increase delays.
- Delay can impact adversely on the person charged by increasing the time held on remand, and by delaying treatment and causing prolonged stress, all which hinder recovery. Delay also impacts on victims, who have to wait longer to obtain relief.
- For simple and non-violent offences in particular, this delay is unacceptable.
- Clients have no access to programs while on remand and are usually placed in high security. Excessive remand is also an issue when there is no ITO.
- Sometimes ITOs are revoked and the report is no longer required, but in the meantime the person has been left waiting for their court date.

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<sup>54</sup> Director of Mental Health, *Annual report 2011-12*.

<sup>55</sup> Brendan Butler SC. 2006. *Promoting balance in the forensic mental health system: Final report: Review of the Mental Health Act 2000*. This report addressed and made recommendations about the s 238 process, and those recommendations were implemented by the relevant departments and authorities - the Queensland Police Service, the DPP, Queensland Health, Attorney-General's Department and the Director of Mental Health.

Two options that warrant consideration:

- Option 1: Discontinue mandatory psychiatric reports for individuals subject to Forensic Orders or Involuntary Treatment Orders for offences that can be heard summarily or must be heard on indictment.
- Option 2: Discontinue mandatory psychiatric reports, but provide them on the request of a person who was on an ITO or Forensic Order at the time of, or since, the alleged offence, or if the person cannot consent, on the request of the person's representative, such as a personal guardian or attorney. As an additional safeguard, the Director (Mental Health) could direct a report for a matter that must be heard on indictment (or another prescribed indictable offence) where the Director of Mental Health believes this is in the public interest.

### **Section 238 Delay Case Study One**

X was serving time in prison for convictions in armed robbery. While in prison he was placed on an ITO. After release on parole he was charged with numerous offences (outstanding charges) and brought back to prison for breach. For six months X was admitted to a mental health service as a classified patient because of a serious deterioration in his mental health. He was returned to prison after displaying challenging, aggressive and threatening behaviour towards another patient. X was recently eligible for full-time release, but he continues to be detained in prison on remand for his outstanding charges. X was a Chapter 7.2 patient for his outstanding criminal charges, which were committed in 2009. The section 238 report was completed after advocacy in 2013. The matter has now gone to the DPP and at least some of the matters will be continued according to law. At present, no application has been made by his criminal lawyers for bail.

QAI recommends:

- A request for a psychiatric report should also be able to be made by the person's representative, such as a personal guardian or attorney, if the person is unable to consent.
- The Director of Mental Health should have authority to direct a psychiatric assessment of a person who may have been of unsound mind at the time of an alleged offence or unfit for trial where the alleged offence must be heard on indictment (or other prescribed indictable offences) if the Director believes it is in the public interest.
- The Director of Mental Health should have the authority to refer a person to the Mental Health Court where the psychiatric assessment directed by the Director of Mental Health indicates that a person may have been of unsound mind at the time of the alleged offence or unfit for trial.

### Section 238 delay Case Study Two

In Townsville an Aboriginal woman on an ITO accumulated a number of charges, went to court on those charges and was refused bail because of the risk of re-offending. She waited six months on remand for a s 238 report and was released on bail. Her matters eventually went to court and she was convicted and released with time served. By then she had accumulated more charges, and again she was remanded into custody pending another s 238 report so that matters could proceed. The cycle continues. Anecdotally, Townsville has the longest delays. Perhaps not coincidentally, Townsville also has a higher than average proportion of Aboriginal people. According to research by Baldry *et al* there is a synergistic effect that pushes forensic overrepresentation of Aboriginal people with mental health or cognitive disabilities into the stratosphere.<sup>56</sup>

## 7.8 Forensic disability provisions

In 2006 Brendan Butler QC noted that ‘there are no alternative legislative or service arrangements for people with an intellectual disability who require secure care’.<sup>57</sup> The state government has addressed but by no means remedied this deficiency by constructing a forensic disability unit at Wacol and enacting the *Forensic Disability Act 2011* (Qld) to regulate its operation. If the success of the Forensic Disability Service is measured by its ability to habilitate or rehabilitate and then integrate people back into the community, then there is more to do. No inmate has yet left the Wacol facility; it has become, in essence, a warehouse.

- We recommend that, instead of forensic detention, people should remain in the community where possible and be provided with community-based support and guidance.

### The Forensic Disability Service (FDS)

A disability advocate has two clients who started out at The Park (Centre for Mental Health) and were later transferred to FDS when it opened. They have been in these institutions for 18 and 35 years respectively. ‘It is unlikely’ said the advocate ‘that the latter client would have been imprisoned for his actions 35 years ago, more likely community service or a fine’.

He has not gained the support he needs to live in the community, and after so many years his capacity and living skills have deteriorated.

He has become institutionalised, but had he originally appeared in a criminal court it is probable that he would not have received a custodial sentence.

The physically sterile and stimulus-free environment of the Wacol unit erodes whatever living skills detainees may have once had. They are subject to wrap-around control: everything is done for detainees; words and actions monitored, recorded and judged. The stigma is self-perpetuating: the person is placed

<sup>56</sup> E Baldry, L Dowse & M Clarence. 2011. *Background Paper for the National Legal Aid Conference Darwin 2011. People with mental and cognitive disabilities: pathways into prison*. School of Social Sciences and International Studies.

<sup>57</sup> B Butler, SC. 2006. *Promoting Balance in the Forensic Mental Health System: Final Report of the Review of the Queensland Mental Health Act 2000*, 101.

in the facility because their behaviour was wrong, but now all behaviour is interpreted through a forensic lens. Behaviour is 'wrong' because it is the behaviour of someone in a forensic facility.

Provisions for the involuntary diversion of people with intellectual disability are currently fragmented over four pieces of legislation,<sup>58</sup> a confusing set of arrangements that 'leaves gaps and often results in sub-optimal responses to people with intellectual disability who come into contact with the criminal justice system'.<sup>59</sup> As alluded to above, meeting the needs of offenders with intellectual disabilities all too often appears to be an afterthought; one authority has noted that the focus of the MHA Chapter 7 Part 2 process<sup>60</sup> is upon extra-judicial procedures for people with mental illness; people with intellectual disability are captured only by default.<sup>61</sup>

QAI recommends that:

- Queensland experiment with alternative support mechanisms without sacrificing safety. An obvious but sometimes overlooked fact is that people with cognitive or intellectual impairments do not have illnesses that may respond to treatment. Those who have offended may need habilitation or rehabilitation so that they can integrate as independently as possible into the community. They may need support, and consistent with a rights based approach they have a right to support to exercise their capacity on an equal basis with others.

Neither the public nor people with these impairments themselves derive clear benefits from incarceration in a forensic facility. Behaviour that is a natural reaction to confinement and control may be misconstrued as 'acting out', 'difficult', 'challenging', 'aggressive' or 'angry' - *sui generis* conduct rather than a product of oppressive and unnatural conditions of detention. Locking people away only feeds the public misperception that all people with intellectual disability are fundamentally not like the rest of us.

A principal reason for the prolongation of that detention is the person's lack of fitness to plead - a sticking point that is far more common in relation to people with intellectual disability than to people with mental illness. Lack of fitness to plead is the principal ground for the diversion of people with intellectual disability into the forensic system. The natural justice reasoning behind it is that a person who cannot understand court processes cannot be fairly tried.

They must be diverted from the criminal process into the forensic system - an appropriate and compassionate alternative. The result, however, is that some people with intellectual disability do not get their day in court, and those who have committed serious offences may be locked away indefinitely rather than given the supports and training they need that would allow them to have their day in court. This is discussed in the next section.

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58 *Mental Health Act 2000* (Qld); *Disability Services Act 2006* (Qld); *Forensic Disability Act 2011* (Qld); *Guardianship and Administration Act 2000* (Qld).

59 Office of the Public Advocate. 2014. *Submission to the Review of the Mental Health Act 2000* (Qld).

60 *Mental Health Act 2000* (Qld).

61 D Toombs. 2012. *Disability and the Queensland criminal justice system*. Reuters.

## 7.9 Indefinite Detention

Queensland's *Forensic Disability Act 2011* establishes a regime 'to provide for the involuntary detention, and the care and support and protection, of forensic disability clients'.<sup>62</sup> A 'forensic disability client' is defined as a person with an intellectual or cognitive disability who has been ordered by the Queensland Mental Health Court to be detained for treatment or care in the forensic disability service.<sup>63</sup> When this regime was introduced, it was envisaged that there would be one 10-bed facility at Wacol in Brisbane intended to be declared as an authorised forensic disability service.

The individuals who may be detained under this regime are generally subject to a Forensic Order made by the Mental Health Court. Those subject to a Forensic Order have not been convicted of an offence, but are considered to be of unsound mind or unfit for trial. If a person is found permanently unfit the Forensic Order may remain in place indefinitely, or for a period much longer than the relevant term of a sentence had the person been found guilty of the alleged offence.

The *Convention on the Rights of Persons with Disabilities*<sup>64</sup> requires States Parties to ensure that persons with disabilities:

..are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability alone shall in no case justify a deprivation of liberty.

Queensland's *Forensic Disability Act 2011* (Qld) expressly mandates 'care' at the Forensic Disability Unit. In practice the Unit operates as a holding facility and inmates have little prospect of leaving. Of the 10 people placed there when it opened in 2011, none has yet left the facility. Even if the 'existence of a disability alone' does not, in Queensland, justify detention, but 'dangerousness' does, detention without treatment or habilitation is still punishment - and Forensic Orders were not meant to be punitive.

Risk assessment is problematic, as is indefinite detention based on risk. QAI is aware of at least one person for whom a single and relatively minor criminal act led to decades of forensic detention. This is not a group of people who attract much public sympathy or outrage, as the indefinite detention of people with intellectual disability in other jurisdictions, too, demonstrates. Marlon Noble's ten years in a WA jail without conviction for a crime he probably did not commit is an egregious example, and the evidence at Gregory Yates' sentencing hearing in WA<sup>65</sup> would today be considered inadequate for the purposes of indefinite detention.<sup>66</sup>

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62 Section 3

63 Section 10

64 Australia ratified the *Convention on the Rights of Persons with Disabilities* on 17 July 2008: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=iv-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en).

65 B McSherry. 2013. *Unfit to plead: Why does the law jail those with intellectual disability indefinitely?*

<http://theconversation.com/unfit-to-plead-why-does-the-law-jail-those-with-intellectual-disabilities-indefinitely-15504>.

66 In 1987, Gregory Yates, a 27-year-old man with an intellectual disability, was sentenced to seven years imprisonment in WA for the sexual assault of a young girl. He served his time for the offence, but due to a judicial order under section 662 of the *Criminal Code Act 1913* (WA) - a section that has since been repealed - Yates was detained 'at the Governor's pleasure'. He remained in prison for 25 years. Earlier this year, the High Court put an end to the ongoing imprisonment of Yates, after evidence brought before the sentencing judge that suggested he posed a 'danger' to the public was held to be insufficient.

**Case study-** A person at the Forensic Disability Unit has spent 35 years of his life there and at a secure mental health facility (The Park). He committed no original 'offence'. His continued incarceration is partly a response to an escape attempt, and partly because he has nowhere to go and no prospect of getting the support he would need if released. He is institutionalized: lost in the system. There is no formal process for finding housing for exiting residents at Forensic Disability Service.

The United Nations Committee on the Rights of Persons with Disabilities monitors the implementation of the CRPD. In response to a Tunisian report the Committee recommended that Tunisia 'repeal legislative provisions which allow for the deprivation of liberty on the basis of disability, including a psychosocial or intellectual disability'.<sup>68</sup> The Committee stated in a similar report that Spain must:

... repeal provisions that authorize involuntary internment linked to an apparent or diagnosed disability; and adopt measures to ensure that health-care services, including all mental-health-care services, are based on the informed consent of the person concerned.<sup>69</sup>

The involuntary detention of those with intellectual disabilities on the basis of a risk of harm to others is discriminatory because those without mental or intellectual disabilities are not, as a general rule, indefinitely detained on this basis in the absence of a criminal conviction.

Even if the High Court finds that such schemes are constitutional, there is a need to consider the human rights implications of indefinite detention on the basis of a possible risk to others and explore alternative options to ensure those with intellectual disabilities are treated on an equal basis with others. Criteria for limited community treatment must be expanded to incorporate factors relevant to people with intellectual disability or cognitive impairment.

## 7.10 Adequate care and support

At the Mental Health Court there is a presumption that the facts of the matter are substantially correct. If the person wants to enter a plea of not guilty they must go through the usual criminal justice process in a court of law. In the Mental Health Court there is no scrutiny of the facts, and the focus instead is on a therapeutic jurisprudence. The person may be placed on a Forensic Order and detained to receive treatment or to minimize risk to themselves and the community, or they may be placed on an order for Limited Community Treatment. For the first 12 months a person's fitness for trial will be reviewed every three months. Forensic Orders are then reviewed every six months in the Mental Health Review Tribunal.

People on Forensic Orders are being detained in forensic units and health care facilities when community treatment is often a better option for both the person and the community. While detained, a person's living skills and their ability to function as law abiding citizens in the community diminishes. The following examples illustrate the need to provide more and better supports in the community, as an alternative to detention.

<sup>68</sup> B McSherry. 2012. *The Involuntary Detention of People with Intellectual Disabilities*. <http://rightnow.org.au/topics/disability/the-involuntary-detention-of-people-with-intellectual-disabilities/>.

<sup>69</sup> Ibid.

**Case Study One – *Inappropriate Detention***– A forensic client was originally assessed as having an intellectual disability according to the DSM4/ICD 10 and Disability Services Queensland. He qualified for a support package and community release. Recently he was reassessed as having an IQ just above the cut-off and was therefore no longer eligible. DSQ withdrew the support funding that enabled him to live in the community. His 'risk' (based on past offending behaviour) therefore required that he be confined in a forensic unit.

**Case Study Two – *Situational Offending – Permanent Branding***– X has intellectual disability. He and a young girl were invited to a secluded place by an older boy (without an intellectual disability). The older boy directed him to expose himself, and the girl to touch the younger boy's penis. The girl's parents complained to police. This was the boy's first and only offence. The risk to the community from this young man with an intellectual disability is low, but he is now a registered sex offender and detained in an institution. X needs training in appropriate sexual behaviour. This is true for many offenders with intellectual disabilities, who often come from dysfunctional backgrounds and who may have learned inappropriate behaviour from parents and peers. Detention in an institutional setting will cost more and often rehabilitation is not provided. In the community setting people such as X can build capacity, and by building capacity will get to a point where they are no risk to the community and no longer need high level support.

At times the Mental Health Act (2000) leaves people with primarily intellectual disability in the care of Mental Health Services. Mental Health Services are ill equipped, both in knowledge and resources, to properly support a person with a primary diagnosis of intellectual disability or cognitive impairment. Yet they are given primary responsibility for their care and rehabilitation, and the management of their risks to themselves and the community. The inability for Mental Health Services to, firstly, properly identify their needs, and secondly, supply the resources to address their needs leaves people with intellectual disability with limited prospect of ever coming off the Forensic Orders or reaching their full potential.

## 7.11 Conclusion

In 2000 Queensland Parliament established the Mental Health Court as the centrepiece of a humane and punishment-free alternative to mainstream criminal justice. It introduced the Chapter 7 Part II<sup>70</sup> diversion for alleged offenders already subject to Forensic Orders or Involuntary Treatment Orders. In 2011 the state government refined the alternative when it established the Forensic Disability Service at Wacol, under the *Forensic Disabilities Act 2011* (Qld).

Fifteen years of testing has exposed a number of weaknesses in Queensland's forensic diversion. The Court's strength lies in its concentration of expertise. Chapter 7 Part II spares people who are already subject to Forensic or Involuntary Treatment Orders from onerous criminal proceedings. The Forensic Disability Service provides accommodation to people who otherwise would be held in prison or psychiatric detention.

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<sup>70</sup> *Mental Health Act 2000* (Qld).



## Conclusion

Almost one in three prisoners has some degree of intellectual impairment. A similar ratio applies to apprehended suspects and defendants in the courts. The proportion of Aboriginal and Islander people with disabilities is even higher. The overrepresentation of people with disabilities in the criminal justice system is untenable and warrants explanation and action.

Understanding the 'why' of overrepresentation is the first step in formulating a cross-departmental disability justice plan. Everybody's story is different, but common themes emerge from both anecdotal evidence and the research literature on overrepresentation.

Foremost is the absence of a cause and effect relationship between disability (or Aboriginality) and law-breaking. Overrepresentation is linked to the ways in which the instruments of government administer criminal justice, to the historical and political relationships that determine both government spending and priorities in law enforcement and to the kinds of activities that have become criminalised.

A majority of the offences with which people with disability are charged are public order offences or offences of a summary nature. The law breaking of people with intellectual impairments is determined by the social and familial circumstances that shaped them - and, more urgently, by the person's present circumstances and behaviours that attract police attention.

A chief cause of overrepresentation is our individual and systemic failure to value, include, and provide opportunities for the participation of people with different abilities in education, employment, health-care, housing and other fields of endeavour or opportunity. Where it exists at all, the distinct criminality of persons with disability tends to be linked to exclusion across the social spectrum: exclusion from education, training and skills acquisition; from the labour market and the economic and social benefits associated with it; and from secure and affordable housing. The link is obvious: a person who has no home, no job and little money will spend more time in public spaces, and is more likely to be linked to the public order and minor offences mentioned above.

Until recently, segregation was the norm, but even now it continues blatantly and in subtle ways. State government policies support the placement of children with disabilities into special education programs or special schools. Lack of experience, skills and qualifications limits vocational opportunities and earning capacity, placing people with intellectual impairments at a disadvantage in a labour market that financially rewards qualities that not everyone shares in equal measure.

Australian Bureau of Statistics data on the underrepresentation of people with disability across major social indicators confirms their marginal position. Workforce participation, for example, stood at 53% in 2012, against 83% for those without disabilities,<sup>1</sup> and people with disabilities similarly experience lower rates of social and community participation, poorer health and higher levels of housing stress.

Exclusion has cumulative effects that manifest in lower incomes, welfare dependence, poverty and further marginalisation. As some of the examples provided throughout *"dis-**A**bled Justice"* demonstrate, the segregation of people with impairment contributes to a lack of experience in and ignorance of social

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1 Australian Bureau of Statistics. 2012. *4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings*, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E82EBA276AB693E5CA257C21000E5013?opendocument>>



expectations with regard to some types of social and sexual relationships and interactions. That ignorance of social norms is at the root of some unlawful behaviour.

The scale of overrepresentation is the most pressing reason for the Queensland government to initiate immediate criminal justice reforms. The State's crime rates have been dropping for two decades. In 2015 there is less crime and there are fewer victims of crime per capita than in the 1990s, yet there is no evidence that the proportion of people with disabilities defending criminal matters has diminished, despite the state government having spent significantly increased its expenditure on law enforcement and the imprisonment of people who commit crimes. We have more police and more prisons, including a state of the art forensic disability facility at Wacol, but little to demonstrate positive, qualitative changes in enforcement and administration of criminal justice.

Criminal justice reformers should rethink this misdirected focus. Government must acknowledge and prioritise the reduction of overrepresentation and must commit to qualitative improvements in law enforcement. The urgency of these problems demands a willingness to implement proven alternatives adopted in other jurisdictions, and to trial new ones at every level of the system.

Recent responses by police when interacting with distressed and or mentally unwell people has illustrated the urgent requirement for the comprehensive education and training of all police officers in de-escalation of conflict and less forceful means of response. Australian Institute of Criminology data show that in 42 percent of Australian fatal police shootings the person shot was mentally ill. At least two of the six Queensland shooting victims in 2014 had intellectual impairments. Working with people with intellectual impairments and mental illness is not peripheral to law enforcement. It is integral to everyday police work, and must be a major focus of QPS training.

People with intellectual impairments and mental illness need appropriate support when questioned by the police. A person with intellectual impairment may have difficulty understanding and following scenarios put to them in police interviews and difficulty explaining their version of events. QAI's Justice Support Program (JSP) provides that kind of support successfully. There have been minimal instances of reoffending by clients once they have received support, and it is a model for similar programs in other parts of Queensland.

QAI does not endorse, in principle, measures that single out people with disability at any stage of the criminal justice process. Even 'positive' discrimination can have unforeseen negative consequences, and many suspects, defendants, prisoners, victims and witnesses are reluctant to identify themselves as a 'person with a disability'. Police, the courts and corrective services should frame policies to cater to all people, with a focus on meeting broad support needs through flexible service delivery rather than merely upon on the identification of people with disability.

Magistrates and judges would benefit from extra diversionary options that provide pathways out of the criminal justice system. The Special Circumstances Court (defunded since 2012), for example, was an instructive Queensland experiment in therapeutic jurisprudence, addressing the disproportionate representation of people with intellectual impairments in relation to public nuisance and other petty offences. Queensland Courts Referral now provides a similar, cost-effective mechanism for bail-based diversion, but its geographical spread is limited.

Building more jails is not a solution and will perpetuate generational criminality. Prisons are a mechanism for punishment, and for individual and community protection, but at what cost? The statistics on recidivism of people with intellectual impairments show that one prison term will likely be followed by another.

The Queensland Government should consider reallocating money earmarked for new jails and detention units towards crime prevention and alternative justice strategies. There are lessons to be learned from successful programs in other Australian jurisdictions. Victoria has led the way in appropriate and comprehensive police training in the de-escalation of conflict. Defendants with intellectual impairments need sufficient appropriate court support. Magistrates need assistance with the determination of impairment, when relevant. Magistrates and Judges would be best equipped with a range of community-based options for diversion. Prisoners require forensic disability services to reach out to them in jails. Offenders with intellectual impairments need more intensive support as they exit the criminal justice system, particularly in the critical months post-release.

*dis-**Abled Justice*** makes a number of suggestions for reform in relation to suspects and offenders, including these key recommendations:

- Broad support needs are better met through flexible service delivery rather than the approach based around the identification of people with disability as they enter the criminal justice system.
- Police training should emphasize de-escalation and conflict resolution.
- QAI recommends that government funds additional appropriate court-based supports, including provision for the determination of capacity in the lower courts in relation to simple offences, so that the courts have a clear basis on which to decide a person's criminal responsibility, plan diversion or mitigate sentence.
- Any test for fitness to plea or to stand trial should be based on a person's decision-making ability in the context of the particular criminal proceedings which he or she faces. Any test should take into account the supports mandated by Article 12 of the Convention on the Rights of Persons with Disabilities.
- QAI recommends liberalisation of the fitness test that currently streams people into a forensic system that is qualitatively similar to imprisonment or court-based non-custodial orders, and more punitive when judged by the duration of restriction.
- QAI recommends an end to the presumption of incapacity for people who are imposed with Involuntary Treatment Orders or Forensic Orders.
- QAI recommends legislative provisions that create court-based liaison officers who can assist the Courts with reports about defendants' capacity..
- QAI recommends—
  - A process for the appointment of separate representatives for Forensic Order reviews;
  - Prison in-reach by psychologists and support workers to people with intellectual impairments; and
  - A Disability Justice Plan.

People with disabilities are overrepresented as victims of crime, particularly people who live in congregate care and institutional settings. Anecdotal evidence suggests that one direct source of these crimes is the placement of people with disability in inappropriate institutional accommodation. Additionally, anecdotal evidence suggests that crimes against people with disability tend to be under-reported by service providers and under-investigated by police. This occurs in some instances because victims with disability are

considered not to be reliable witnesses, or because police take the view that they could not participate meaningfully in an interview and other aspects of an investigation. Significant improvement would flow from ending congregate and shared care.

Recent reforms in relation to taking evidence have delivered positive outcomes for people with disabilities. Court procedures are less intimidating. The 'protected'<sup>2</sup> witness provisions of the *Evidence Act 1977* (Qld) shield witnesses with impairments from aggressive cross examination. The 'special'<sup>3</sup> witness provisions of the *EAQ* accommodate the needs of witnesses with impairments in relation to court procedure and the giving of evidence.

The *Convention on the Rights of Persons with Disabilities* mandates continual refinement of legal processes so that people with disability can exercise legal capacity on an equal basis with others.<sup>4</sup> QAI recommends that the legislature reviews provisions in relation to witnesses and victims of crime with disabilities. Anecdotal evidence suggests that some people with disability are not reporting crime because the reporting process is too onerous or they are too scared to follow through. In addition, people with intellectual disability or other forms of intellectual impairment may have difficulty understanding or responding to questions and may require an intermediary who is familiar with their speech patterns or gestures to 'translate' to investigators or to the court.

QAI urges the Queensland government to support research on the need for further special witness provisions. The government may consider:

- amending the *Evidence Act 1977* (Qld) to require that, in assessing competence pursuant to Division 1A, the courts take into account the availability of communication and other forms of support;
- amending the *Evidence Act 1977* (Qld) to include provisions similar to the *Crimes Act 1914* (Cth) Part IAD, which provides guidance in relation to the provision of support that protects 'vulnerable persons' in their interactions with the justice system. This includes provisions that allow vulnerable persons to choose someone to accompany them while giving evidence in a proceeding; and
- amending s 9 of the *Evidence Act 1977* (Qld) to provide that:
  - a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers, and that the courts may give directions in relation to this.
- QAI recommends that the Queensland Government considers providing greater witness support in general.

Reforming criminal justice processes is positive for people with disability and for all members of the community. Research and analysis on the rates, causes and remedies of overrepresentation is a good starting point. The information gained will inform strategic and operational policy development and planning, the foundation for a Disability Justice Plan. By addressing structural problems, and particularly by building inter-agency and inter-departmental cooperation, government can improve outcomes for people with disability and reduce the public costs associated with overrepresentation.

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<sup>2</sup> Section 21 *Evidence Act 1977* (Qld).

<sup>3</sup> Section 21A *Evidence Act 1977* (Qld).

<sup>4</sup> Article 12.

# Appendix A - Definitions

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## Appendix A - Definitions

This section provides definitions of some key terms used in *dis-Abled Justice*, with a focus on terms that are controversial and/or commonly employed in the criminal justice literature. It is not a disability primer. QAI endeavours to activate a social model of disability: the focus is not on the nature of impairment, but on the identification of appropriate supports, the reduction of barriers to citizenship and the full participation of people with disabilities in everything the world has to offer.

### 1.1 Disability

#### 1.1.1 Common usage

The word ‘disability’ has two principal usages. It can be synonymous with ‘impairment’, referring to physical, sensory, intellectual, developmental or mental health-related impairments; and it can indicate the consequences of impairment— the interaction of impairment and the environment that reduces the person’s quality of life in a way not experienced by those without that impairment. The latter is consistent with a social model of disability. An underlying presumption of the social model is that societies have an obligation to ensure that environments do not actively or passively create disabilities for people who have impairments. In *dis-Abled Justice* QAI principally uses disability in the latter sense, except where disability is a signifier of identity, as in ‘people with disability are overrepresented in the criminal justice system’.

#### 1.1.2 The Disability Services Act 2006 (Qld) definition

The *Disability Services Act 2006* (Qld) adopts the terminology of a social model, defining disability as a condition attributable to an intellectual, psychiatric, cognitive, neurological, sensory or physical impairment or combination of impairments that results in a substantial and permanent or episodic reduction in the person’s capacity for communication, social interaction, learning, mobility or self-care or management, and in the person needing support.<sup>1</sup> The *Criminal Code 1899* (Qld) uses a similar capacity-related social model approach.<sup>2</sup>

#### 1.1.3 The UN Convention on the Rights of Persons with Disabilities

The States Parties to the *Convention on the Rights of Persons with Disabilities* agree to recognize that disability is an evolving concept and that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.’<sup>3</sup> That definition distinguishes (innate) impairments on the one hand and (social) disabilities on the other. People can be born with a disability in the sense that some impairments manifest as disabilities in predictable ways. An infant who is entirely blind will experience many of the same barriers and have the same disabilities as other people with the same condition. The danger is the tendency to assume that the person’s disability manifests in everything that they do.

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1 *Disability Services Act 2006* (Qld) s 11.

2 Section 1 defines a person with an impairment of the mind as a person with a disability that:

- (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
- (b) results in—
  - (i) a substantial reduction of the person’s capacity for communication, social interaction or learning; and
  - (ii) the person needing support.

3 Preamble, paragraph (e), *Convention on the Rights of Persons with Disabilities*.

### 1.1.4 dis-Abled Justice

In this report QAI uses terms in a way that is consistent with these approaches. Any measure that defines disability according to a person's innate characteristics can be misleading: a person's physiological and mental qualities *may* become disabilities by virtue of their interaction with physical and social circumstances.

Where possible, QAI's terminology here is consistent with the social model of disability, except where conventional usage demands otherwise. For example, QAI adopts the term 'intellectual *disability*' even though 'intellectual *impairment*' would be more accurate.

QAI seeks to retain a distinction between the innate and the social, impairment and disability, because failing to do so tends to internalize the disability, pre-empting the belief that people cannot do certain things or achieve certain goals because their disability is innate.

### 1.1.5 People with disability

There is a range of impairments and disabilities, and identities associated with disabilities. Some people with disabilities, for example, identify strongly with their impairment: just as some African-Americans use 'negro', some people with impairments use 'crip', adopting as a self-identifier a term that in the past had a pejorative connotation. Others identify as persons with an impairment that may or may not be a disability depending on the social context, while others who have similar mental or physical aptitudes ('impairments') may not identify as having a disability at all.

Consistent with the social model, QAI uses disability here as a shorthand expression for an array of fluctuating relationships between person, environment and self and others' perceptions; a point that is particularly relevant when talking about people with disability in the criminal justice system, many of whom may nominally have impairments and experience disabilities but who may not identify as a 'person with a disability'.

For example, people who are discussed in the literature as having borderline intellectual disability have an 'impairment' that may or may not amount to a 'disability'. Their impairment may mean that they did not excel at school. In a domino effect their school record may reduce their chance of gaining employment, affordable housing or of enjoying the same life chances or life outcomes as others who do not have their impairment. They may or may not wish to identify as a person with a disability because by acknowledging that status they put themselves at a disadvantage— or they may not acknowledge their impairment because disability is for them subsidiary to other identity markers like gender, sexuality, religion, cultural background or sexual orientation.<sup>4</sup>

Nevertheless, and as the chapter on overrepresentation shows, whether or not they identify as having an impairment or a disability, people who have borderline intellectual disability are in aggregate scandalously overrepresented in the criminal justice system. They are also more likely to be illiterate, have had little formal education, be unemployed, rely on social welfare and public health providers and be in receipt of Commonwealth income support.<sup>5</sup> QAI's aim here is to highlight their circumstances and advocate for their human rights in the criminal justice system regardless of how they identify themselves and regardless of the degree of their criminal responsibility.

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4 As noted in the *Strong Voices* report (Government of South Australia Social Inclusion Board. 2011. *Strong Voices: A Blueprint to Enhance Life and Claim the Rights of People with Disability in South Australia, 2012-2020*), for example, disability is understood and experienced differently by Aboriginal people.

5 'The 'typical' offender with an intellectual disability is disadvantaged by a wide range of psychological and social difficulties: nearly always a young male, he is more likely than his non-disabled counterpart to be single, belong to a minority group, to have been imprisoned previously, to have experienced institutionalisation, abuse and neglect as a child, to have come from a disrupted family, to have been segregated in a special school, to have needed supported accommodation and generally led a somewhat chaotic lifestyle'. W Glaser & D Florio. 2004. 'Beyond specialist programmes: a study of the disability needs of offenders with intellectual disabilities requiring psychiatric attention'. *Journal of Intellectual Disability Research* 48(6): 591.

### 1.1.3 Specific impairments

#### 1.1.3.1 Intellectual disability

The term 'intellectual disability' is used often in criminal justice literature, although the fact that a person has intellectual disability says nothing useful about their level of criminal responsibility, or their ability to give evidence. For example, it is merely a signpost that may (or may not) indicate, for example, a diminished level of criminal responsibility, if that is relevant, or may indicate that the person is less capable of giving sworn evidence.

Intellectual disability refers to a group of conditions commonly caused by various genetic disorders or infections that may result in a limitation or slowness in an individual's general ability to learn and difficulties in communicating and retaining information. For the purpose of proving to a court that a person has an intellectual disability, however, the person may provide evidence from a qualified medical professional who uses a widely accepted medical definition.

Intellectual disability is not a unified or clearly defined category across Queensland criminal law.

'Impairment of the mind' is the closest term in the *Criminal Code 1899* (Qld) but it covers more ground.

A person with impairment of the mind is a person with a disability that—

- (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
- (b) results in—
  - (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and
  - (ii) the person needing support.<sup>6</sup>

Impairment of the mind is an umbrella term in the *Criminal Code 1899* (Qld). The definition is consistent with the social model of disability and not strictly a matter of impairment. It covers a range of disabilities associated with a person's ability to understand and process information.

The American Psychiatric Association *Diagnostic and Statistical Manual of Disorders* [DSM-V] provides diagnostic criteria for mental disorders. It is used by clinicians, researchers, psychiatrists, drug-regulation agencies, health insurance companies, pharmaceutical companies, policy makers and the Courts as the authority for categorising mental disorders. The DSM-V has since updated the term 'mental retardation' and now uses the term 'intellectual disability (intellectual developmental disorder)'.

Intellectual disability involves impairments of general mental abilities that impact adaptive functioning in three domains associated with how well an individual copes with everyday tasks. The conceptual domain includes skills in language, reading, writing, mathematics, reasoning, knowledge and memory; the social domain refers to empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships and similar capacities; and the practical domain centres on self-management in areas such as personal care, job responsibilities, money management, recreation and organizing school and work tasks.<sup>7</sup>

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<sup>6</sup> Section 1, Schedule One, *Criminal Code 1899* (Qld).

<sup>7</sup> American Psychiatric Association. 2013. *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V). <<http://www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pdf>>



Its prevalence is estimated to be about 1–2% of the population and about 85% of these individuals have IQs within the mild intellectual disability range<sup>8</sup>. The diagnosis of intellectual disability is made regardless of a co-existing behavioural or mental disorder, although the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) supports a differential diagnosis, noting that ‘individuals with intellectual disabilities have a prevalence of mental disorders that is three to four times greater than the general population’<sup>9</sup>. Developmental disability means a severe, chronic disability of a person that is attributed to an intellectual or physical impairment or combination of intellectual and/or physical impairment.

### 1.1.3.2 Psychiatric disability/mental illness

‘Psychiatric disability’ is a term that refers to disabilities that result from a number of underlying medical conditions, such as schizophrenia, bipolar disorder, phobias and neuroses. Section 12(1) of the *Mental Health Act 2000* (Qld) defines mental illness as ‘a condition characterised by a clinically significant disturbance of thought, mood, perception or memory’. Section 27 of the *Criminal Code 1899* (Qld) provides an ‘insanity’ defence to defendants.

### 1.1.3.3 Fetal Alcohol Spectrum Disorders

Fetal Alcohol Spectrum Disorders (FASD) lie on a continuum of permanent birth defects caused by the mother’s consumption of alcohol during pregnancy. FASD includes Fetal Alcohol Syndrome (FAS). FASD is not a clinical diagnosis. It describes the range of disabilities that may result from prenatal alcohol exposure. Genetic examinations reveal a continuum of long-lasting molecular effects that are timing and dosage specific.<sup>10</sup>

Persons with Fetal Alcohol Spectrum Disorder may be highly suggestible and anxious to please, but have trouble understanding consequences and difficulty in connecting cause and effect.<sup>11</sup> They may wrongly prejudice their position when questioned by figures of authority such as the police. These behaviours can impact upon the feasibility of conventional rehabilitative methods.

FASD may be associated with reduced fetal growth or weight, facial stigmata and damage to neurons and brain structures, and with behaviours including:

- lack of impulse control
- explosive mood swings
- poor judgement
- trouble identifying future consequences of behaviour
- difficulty connecting cause and effect
- lack of empathy

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<sup>8</sup> W Xingyan, 1997. ‘The definition and prevalence of intellectual disability in Australia’. *Canberra: Australian Institute of Health and Welfare*.

<sup>9</sup> See the American Psychiatric Association. 2013. *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV).

<sup>10</sup> B Laufer *et al.* 2013. ‘Long-lasting alterations to DNA methylation and ncRNAs could underlie the effects of foetal alcohol exposure in mice’. *Disease Models & Mechanisms*. 6(4).

<sup>11</sup> Freckleton. 2013. ‘Foetal Alcohol Spectrum and the Law in Australia: the Need for Awareness and Concern to Translate into Urgent Action’. *Journal of Law and Medicine*. 20: 481, 491.



- difficulty delaying gratification or making good judgments
- vulnerability to social influences and peer pressure
- criminality<sup>12</sup>
- false confessions.<sup>13</sup>

There is no Queensland research on the proportion of suspects or offenders who have Foetal Alcohol Spectrum Disorders, but Canadian research has shown that Canadian children with Fetal Alcohol Spectrum Disorders are 19 times more likely to go to prison than those not affected.<sup>14</sup>

Australia's House of Representatives Standing Committee on Social Policy and Legal Affairs (the Standing Committee) has conducted an inquiry into FASD, reporting in 2012.<sup>15</sup> The Standing Committee observed that judicial officers do not always take into account the disability of persons with Fetal Alcohol Spectrum Disorder; that persons with Fetal Alcohol Spectrum Disorder are more likely than the norm to behave impulsively; and linked those behaviours to theft and other crimes. Diversion can address this criminal conduct reasonably effectively and therapeutically, but effective diversion may not be possible in remote locations, or when the Court fails to identify that the offender has the condition.

The Standing Committee concluded that there were many advantages to the formal incorporation Fetal Alcohol Spectrum Disorder's within the category of recognised disabilities. It recommended that the Commonwealth Government develop educational material to raise awareness about these disorders and that it include them in the List of Recognised Disabilities and the Better Start for Children with a Disability initiative. The Committee proposed that the Commonwealth Government should formally recognise that people with Fetal Alcohol Spectrum Disorder have, among other disabilities, a cognitive impairment, and that the Commonwealth should therefore amend eligibility criteria so that people with the condition can access support services and diversionary laws.<sup>16</sup>

#### 1.1.3.4 Cognitive disability or cognitive impairment

Cognitive impairment is a broad term that describes a wide variety of brain function impairments relating to the ability of a person to think, concentrate, react to emotions, formulate ideas, problem solve, reason and remember. It is distinct from an intellectual disability (or learning disability) insofar as it may have been acquired later in life as a result of an accident or illness.

Acquired brain injury has been described as a hidden disability.<sup>17</sup> Acquired brain injury (ABI) refers to any damage to the brain that occurs after birth. Common causes of ABI include accidents, stroke, infection, alcohol and other drug abuse and neurological disease. Traumatic brain injury (TBI) is an ABI caused by

12 L Burd, DK Fast, J Conry & A Williams. 2011. 'Foetal Alcohol Spectrum Disorders as a Marker for Increased Risk of Involvement with Correction Systems'. *The Journal of Psychiatry and Law*, 38.

13 Royal Australian and New Zealand College of Psychiatrists. 2013. *The value of a justice reinvestment approach to criminal justice*. RANZCP submission to the Senate Standing Committee on Legal and Constitutional Affairs.

14 C Kyskan & T Moore. 2005. 'Global Perspectives on Foetal Alcohol Syndrome – Assessing Practices, Policies, and, Campaigns in Four English Speaking Countries'. *Canadian Psychology/Psychologie Canadienne* 3: 153-165.

15 House of Representatives Standing Committee on Social Policy and Legal Affairs. 2012. *FASD: The Hidden Harm Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum disorders*. Canberra.

16 Ian Freckleton. 2013. 'Editorial: Fetal alcohol spectrum disorder and the law in Australia: The need for awareness and concern to translate into urgent action'. *Journal of Law and Medicine* 20: 481, 486.

17 Nick Rushworth. 2011. *Out of Sight, Out of Mind: People with an Acquired Brain Injury and the Criminal Justice System*. Policy Paper, Brain Injury Australia, Prepared for the Department of Families, Housing, Community Services and Indigenous Affairs, 4.

external force applied to the head from, for example, an assault, a fall or a motor vehicle accident. ABI is common in Australia, with statistics documenting:

- 432,700 people (2.2% of the population) have an ABI with activity limitations or participation restrictions
- 162,800 children have physical/diverse disabilities, an estimated 22,800 of whom are children with an ABI.<sup>18</sup>

Importantly, a recent Victorian study has shown that 42 per cent of male prisoners and 33 per cent of female prisoners have an ABI.<sup>19</sup> The documented effects of having an ABI that may explain the over-representation of prisoners with an ABI include:

- the documented correlation between acquired brain injury, substance use and the effects the condition can have on behaviour, including 'disordered behaviour, poor organisation, propensity towards substance use'<sup>20</sup>
- the unpredictability and short fuse sometimes associated with ABI, which can escalate conflict and exacerbate the behaviour that led to the person coming into contact with the justice system in the first place
- the potential for co-existing mental illness, alcohol or drug dependence, health complaints, breakdown of the family unit or unstable accommodation,<sup>21</sup> and
- some of the cognitive-behavioural changes that commonly occur with an ABI can increase the risk of a person's contact with the criminal justice system: disinhibition and impaired impulse control, poor social judgement, low-frustration tolerance, anger and aggression.<sup>22</sup>

### 1.1.3.5 Dual Diagnosis/Dual Disability – mental illness and intellectual disability

The same person may have both mental illness and intellectual disability.<sup>23</sup> People who have an intellectual disability have an increased risk of mental illness compared with the general population, with up to 50% of people with an intellectual disability having a coexisting psychiatric disorder.<sup>24</sup>

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18 The Australian Bureau of Statistics' *Survey of Disability, Ageing and Carers (SDAC)* systematically underestimates the number of people living with an ABI, according to Brain Injury Australia's 2011 report (ibid). 2009's SDAC sample comprised 27,600 private dwellings and 200 non-private dwellings- as well as 1,100 cared-accommodation establishments. The scope of the SDAC did not include persons living in very remote areas, where around one in five Indigenous Australians lives. Indigenous ABI prevalence rates are up to three times that of non-Indigenous Australians. For operational reasons, neither did the SDAC's coverage include persons living in Indigenous communities in non-very remote areas. It also excluded the nearly 30,000 persons living in jails or correctional institutions.

19 Department of Justice. 2011. *Acquired Brain Injury in the Victorian Prison System*. Corrections Research Paper Series. Paper No 4. Department of Justice, April 2011, 22.

20 Jane Lee. 2013. 'One in Two Inmates has Brain Injury'. *The Age* (Melbourne), 25 March 2013.

21 S Brown & G Kelly. 2012. *Issues and Inequities Facing People with Acquired Brain Injury in the Criminal Justice System*. Victorian Coalition of ABI Service Providers Inc.

22 Edgar Miller. 1999. 'Head Injury and Offending'. *Journal of Forensic Psychiatry and Psychology* 10(1): 157.

23 In other contexts it may mean substance addiction and mental illness.

24 Villamanta Intellectual Disability Rights Legal Service Inc. 2012. *People who have an Intellectual Disability and the Criminal Justice System*. Prevalence studies of the overall rate of psychopathology within the intellectual disability population have varied according to the different methodologies, diagnoses and constructs employed. Nevertheless, the general consensus is that people with intellectual disabilities do experience high rates of the full range of mental disorders with the prevalence rate at nearly 50% in people with severe or profound intellectual disabilities and about 20% to 25% in people with milder intellectual disabilities. Overall, results showed high prevalence rates across a range of disorders, such that four in ten young people with intellectual disability have significant mental health needs while one in ten young people with mental health needs also have an intellectual disability.

People who have an intellectual disability and other developmental disabilities frequently have predispositions and stressors that contribute to the development of mental illness, including:

- early childhood physical and sexual abuse
- genetic and biochemical factors
- brain damage
- adverse effects of drugs
- institutional upbringing
- restricted and disadvantaged lifestyles
- vulnerability to abuse, stigmatization and social marginalization, and
- low self-esteem and confidence
- few opportunities to control and influence the direction of their lives
- limited coping skills and social networks to draw upon.

In a recent report to the World Health Organisation, the Mental Health Special Interest Research Group of the International Association for the Scientific Study of Intellectual Disabilities noted that intellectual disability itself is a risk factor for the development of both mental ill-health and behaviour disorder.<sup>25</sup> Recognition of mental disorders in people with intellectual disability is challenging, partly because of linguistic limitations which may make it difficult for the individual to describe mental symptoms, and partly as a result of diagnostic overshadowing, which is the ascription of the symptoms of mental illness to the person's life-long intellectual or developmental disability.

Families, carers and service providers often identify the behaviour of people with intellectual disabilities as 'challenging'. QAI prefers the term 'behaviours of concern'. They may be caused or exacerbated by a co-existing psychiatric disorder.<sup>26</sup>

The rate of depression, schizophrenia and bipolar disorder experienced by people with an intellectual disability is twice that of the general population.<sup>27</sup> Psychiatrists may find it difficult to identify mental illness experienced by people who have an intellectual disability because people with intellectual disability may not have the understanding or vocabulary to articulate their feelings and thoughts. An accurate assessment may need to include observations of daily living and information from family, carers, teachers and significant others.

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25 A Holland & J Jacobson. Eds. 2001. *Mental health and intellectual disabilities: Addressing the mental health needs of people with intellectual disabilities. Final report by the Mental Health Special Interest Research Group of the International Association for the Scientific Study of Intellectual Disabilities (IASSID) to the World Health Organisation: IASSID*

26 S Moss, E Emerson & C Kiernan, 2000. 'Psychiatric symptoms in adults with learning disabilities and challenging behaviour'. *British Journal of Psychiatry* 177: 453-456.

27 K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry Psychology and Law* 15(2): 261-271.

### 1.1.3.6 Autism/Autistic Spectrum Disorder (ASD) and Asperger's Syndrome

People with Autism Spectrum Disorder (ASD) have a neuro-developmental condition that may affect their social interaction, communication, interests and behaviour. ASD includes Asperger's syndrome and childhood autism. Some people also use the term Autism Spectrum Condition or 'neuro-diverse' (as opposed to 'neuro-typical' for people without autism). The main features of ASD typically start to develop in childhood, although the impact of these may not be apparent until there is a significant change in the person's life. In the UK, it is estimated that about one in every 100 people has ASD. There is no 'cure' for ASD but there is a wide range of treatments, including education and behaviour support.<sup>28</sup> Like other impairments, ASD will have no direct bearing on criminal responsibility, but may indirectly affect a person's capacity in relation to an alleged offence, and may influence the court in sentencing.

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<sup>28</sup> The National Autistic Society, 2012. *How many people have autism spectrum disorders?* available at <<http://www.autism.org.uk/about-autism/myths-facts-and-statistics/statistics-how-many-people-have-autism-spectrum-disorders.aspx>>

## Appendix B - Methodology

### Methodological Approach

1. In order to canvas a range of views about the operation of the criminal justice system vis-à-vis people with disability, QAI approached and carried out a series of face-to-face and telephone interviews with key legal practitioners, magistrates, service providers, advocates, parents and academics.
2. QAI structured the interviews by beginning with the following series of set questions designed to solicit respondents' views on problems, gaps and solutions.
  - (a) In to your area of practice, what laws, programs, policies or procedures directly or indirectly target people with intellectual, cognitive or other capacity-related impairments?
  - (b) Are you aware of gaps in provision in relation to people with intellectual, cognitive or other capacity-related impairments?
  - (c) How would you change the current arrangements/laws/procedures to address those gaps in the system of provision?

### Interviewees

QAI thanks the interviewees for their participation. Unless otherwise acknowledged, the views expressed in this work are those of QAI.

#### Interviewee

Kimina Anderson, Indigenous Service

John & Collein Avery

Kevin Cocks AM

Professor Heather Douglas

Dr Leanne Dowse

Jim Gibney  
(Senior Legal Officer, Civil Justice Division)

Sue Gordon

Nancy Grevis-James

Professor Susan Hayes

#### Organisation

Queensland Forensic Mental Health Service

Parents of Melissa Avery

Queensland Anti-Discrimination Commissioner

T C Bierne Law School - University of Queensland

University of NSW

Legal Aid Queensland

Toowoomba Advocacy Service (TASC)

Queensland University of Technology

University of Sydney

## Interviewee

Dr Edward Heffernan

Nagadeva Higgins, Acting Manager  
Complaints & Incident Management Unit

Melanie Keating

Rebekah Leong

Dr Donna Lockyer

Rudo Mahomva

Patrick McGee

Senior Sergeant Michael Mitchell

Dr Betheli O'Carroll

Mark Reimers, Manager -  
Community & Advocacy Support Unit

Tina Riveros, Solicitor

Magistrate Christine Roney

Jim Simpson, Senior Advocate

Dr Tamara Smith

Dr Linda Steele

Magistrate Colin Strohfield

Dr Kate Van Doren

Professor Tamara Walsh

Dr Simon Wardale

Elissa Waterson, Operations Manager

Lex Weddell,  
Principal Lawyer, Woodridge

Janet Wight

## Organisation

Queensland Forensic Mental Health Service

Endeavour Foundation

Queensland Courts Referral

Principal Solicitor, Mental Health Legal Service at  
Queensland Advocacy Incorporated

Forensic Disability Service

Prisoners Legal Service

Coordinator, Aboriginal Disability Justice Campaign

Queensland Police Service

University of Queensland

Endeavour Foundation

Bayside Community Legal Service

Magistrates Court Division

NSW Council for Intellectual Disability

Forensic Mental Health Service

University of Wollongong

Magistrates Court Division

Queensland Centre for Intellectual Disability

University of Queensland

Forensic Disability Service

Queensland Forensic Mental Health Service

Legal Aid Queensland

Youth Advocacy Service

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Carin Mattar

David Manwaring

Natalia Nash née Smyth

Dr Betheli Lynn O'Carroll

Michelle O'Flynn

Ari Pavlou

Dr Emma Phillips (report author)

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Fiona Toohey

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# Appendix C – The Disability Framework

## 1.1 Introduction

This Appendix is a general overview of the legislation, policies and institutions that structure the criminal justice system at both a state and federal level, along with the government and non-government services that provide support or advocacy to people with disabilities.

## 1.2 Overview

The Queensland criminal justice system is structurally similar to those in other Australian jurisdictions. Queensland's criminal courts are arranged hierarchically: they include the Magistrates, District, and Supreme Courts, and the Court of Appeal. The High Court sits atop all Australian Courts. The Magistrates Courts deal with about 95 percent of offences (primarily summary offences). The higher courts hear serious or 'indictable' matters and minor offences on appeal. The forensic system includes a Mental Health Court (MHC) presided over by a Supreme Court judge, and the Mental Health Review Tribunal (Mental Health Review Tribunal). The primary functions of the former are the determination of capacity and the disposition of forensic orders. The Mental Health Review Tribunal reviews Forensic Orders. The forensic system also includes numerous mental health facilities, a Forensic Mental Health Service that supervises Forensic Orders, and a Forensic Disability Service that supervises Forensic Orders (Disability) and operates a number of detention units designed to securely accommodate people on those orders.

Overlaying the system are human rights principles such as those adopted by the Commonwealth when it ratified the *UN Convention on the Rights of Persons with Disabilities*. The CRPD has no direct effect on domestic law<sup>1</sup> in the absence of implementation by Commonwealth legislation. Nor can the CRPD displace or override domestic legislation which may be inconsistent with it.<sup>2</sup> No Queensland legislation yet incorporates the CRPD. Human rights have more moral than substantive force in Australia, but they provide a useful lens through which to see and evaluate criminal justice processes.

## 1.3 Legislation

### 1.3.1 Commonwealth legislation

#### 1.3.1.1 *Crimes Act 1914* (Cth)

This Act includes provisions aimed at the protection of vulnerable persons<sup>3</sup> - creating the 'special witness',<sup>4</sup> forbidding inappropriate or aggressive cross-examination of vulnerable persons,<sup>5</sup> establishing special

<sup>1</sup> *Bradley v Commonwealth* (1973) 128 CLR 557.

<sup>2</sup> *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

<sup>3</sup> Part IAD *Crimes Act 1914* (Cth).

<sup>4</sup> 15YAB *Crimes Act 1914* (Cth).

<sup>5</sup> Part IAD Division 3 *Crimes Act 1914* (Cth).

facilities for vulnerable persons giving evidence,<sup>6</sup> establishing circumstances where vulnerable persons are not required to give further evidence,<sup>7</sup> and stipulating that warnings are not to be given in relation to evidence of vulnerable persons' at later trials.<sup>8</sup> It contains provisions regarding unfitness to be tried,<sup>9</sup> acquittal because of mental illness<sup>10</sup> and sentencing alternatives for persons 'suffering from mental illness or intellectual disability'.<sup>11</sup>

### **1.3.1.2 Evidence Act 1995 (Cth)**

The *Evidence Act 1995* (Cth) governs procedures for giving evidence and provides various methods to address particular inequalities inherent in trial processes, including practical, procedural ways to facilitate the giving of evidence for witnesses whose evidence may be compromised by normal evidentiary procedure. These mechanisms are only as effective as the court will allow. Much depends on the willingness of the court to adopt flexible procedures.

### **1.3.1.3 Disability Discrimination Act 1992 (Cth) (DDA)**

The DDA makes disability discrimination unlawful and promotes equal opportunity for people with disabilities in many aspects of public life such as employment, education and access to premises. The DDA prohibits direct and indirect discrimination which may include instances where the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with disability.<sup>12</sup>

The DDA applies to people who perform a function under a Commonwealth law or administer a Commonwealth law. It explicitly prohibits such persons from discriminating against another person on the ground of the other person's disability in the performance of that function, the exercise of that power, or the fulfilment of that responsibility. This protection is limited and would likely not apply to the physical aspects of ensuring access, such as the provision of hearing loops and ramps into the court, but it could apply by allowing flexibility in the way a judicial officer asks questions of people with disability.

## **1.3.2 Queensland legislation**

### **1.3.2.1 The Anti-Discrimination Act 1991 (Qld)**

This act prohibits discrimination on the basis of impairment<sup>13</sup> in areas including employment, education and public life.

### **1.3.2.2 Bail Act 1990 (Qld)**

This legislation allows the court or police officer to release a person with 'impairment of the mind' without bail by releasing them independently or into the care of another.<sup>14</sup>

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6 Part IAD Division 4 *Crimes Act 1914* (Cth).

7 Part IAD 15YNC *Crimes Act 1914* (Cth).

8 Part IAD 15YNE *Crimes Act 1914* (Cth).

9 Division 6 *Crimes Act 1914* (Cth).

10 Division 7 *Crimes Act 1914* (Cth).

11 Division 9 *Crimes Act 1914* (Cth).

12 Sections 5 and 6 *Disability Discrimination Act 1992* (Cth).

13 Section 7(h) *Anti-Discrimination Act 1991* (Qld) . See the definition of 'impairment' in the Schedule to the Act

14 Section 11A *Bail Act 1991* (Qld).

### 1.3.2.3 Carers (Recognition) Act 2008 (Qld)

This act recognises and considers the contribution and interests of carers and establishes the Carers Advisory Council.

### 1.3.2.4 Criminal Code 1899 (Qld)

The Queensland *Criminal Code* has a number of provisions that can be used to limit or preclude criminal responsibility where the person has a 'mental disease' or 'natural mental infirmity' and provisions which provide protection to persons with 'impairment of the mind'.<sup>15</sup>

Relevant defences include insanity<sup>16</sup> and diminished responsibility.<sup>17</sup> The Act creates a statutory duty to provide the necessities of life where there is a situation of dependency, including where the dependent is one who is unable to provide for him or herself the necessities of life by reason of 'unsoundness of mind'.<sup>18</sup> The Act controversially creates the offence of unlawful carnal knowledge of a person with an 'impairment of the mind'.<sup>19</sup>

### 1.3.2.5 Criminal Offence Victims Act 1995 (Qld) (COVA)

The COVA was influenced by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

In Part 3, COVA provides two means for granting compensation to victims.

- A court may make an order compensating someone injured by a personal offence if the offender is convicted in a higher court. In these instances, it is the offender themselves who is expected to pay the compensation.<sup>20</sup>
- The Department of Justice and Attorney-General can be asked to make the payment (due to the limited financial means of the offender).

### 1.3.2.6 Disability Services Act 2006 (Qld) (DSA)

The DSA contains provisions governing the delivery of state-funded disability services, particularly in relation to the use of 'restrictive practices'. It also sets out Service Delivery Principles,<sup>21</sup> Disability Service Standards and Human Rights Principles for the delivery of disability services.

### 1.3.2.7 Evidence Act 1977 (Qld) (EAQ)

The EAQ governs the procedures for giving evidence, providing various methods to address particular

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15 Section 1 *Criminal Code 1899* (Qld) includes the following definition: Person with an impairment of the mind means a person with a disability that—

(a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and

(b) results in—

(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and

(ii) the person needing support.

16 Section 27(1) *Criminal Code 1899* (Qld) .

17 Section 304. This defence is only available for murder charges.

18 Section 285 *Criminal Code 1899* (Qld) .

19 Section 216 *Criminal Code 1899* (Qld) .

20 Section 24 *Evidence Act 1977* (Qld).

21 Part 2 Division 2 *Evidence Act 1977* (Qld).

inequalities inherent in trial processes, including practical, procedural ways to facilitate the giving of evidence by witnesses whose evidence may be compromised by normal evidentiary procedure. These mechanisms are only as effective as the court will allow. Much depends on the willingness of the court to adopt flexible procedures.<sup>22</sup>

A few issues pertaining to the giving of evidence warrant closer consideration – competence and compellability, special and protected witnesses and the cross-examination of vulnerable witnesses. Each of these matters will now briefly be discussed.

#### **1.3.2.7.1 Competence and compellability**

The general rule is that every person is presumed to be competent to give evidence if they can give an intelligible account of events observed or perceived.<sup>23</sup> Whether a person can go one step further and give sworn evidence (evidence on oath) will depend on whether they understand:

- i. that giving evidence is a serious matter, and
- ii. that they have an obligation to tell the truth that is over and above the ordinary duty to tell the truth.<sup>24</sup>

#### **1.3.2.7.2 Special witnesses**

A special witness is a person who may be disadvantaged, suffer severe emotional trauma or be intimidated because of a mental, intellectual or physical impairment.<sup>25</sup> Special witnesses are afforded protections not otherwise available to witnesses. Two examples follow.

- A judge can order that the special witness give evidence by closed circuit video, one way screen, court companion or in a closed court.<sup>26</sup>
- A judge can direct those questioning the witness to allow for breaks, ask simple questions and limit the duration of the questioning.<sup>27</sup>

See section 21A (2) of the *Evidence Act 1977* (Qld) for further examples. A statement made in a proceeding by a person with a mental impairment can be admissible provided that the maker of the statement is available to give evidence in court.<sup>28</sup>

#### **1.3.2.7.3 Protected witnesses**

A person with an intellectual disability may be determined to be a protected witness<sup>29</sup> and entitled to provide pre-recorded evidence. Pre-recorded evidence is used to address the problems faced by witnesses with disability who need communication supports or who have complex and multiple support needs.

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<sup>22</sup> See relevantly s 21 (Improper Question); 93A (Statement made before proceeding by child or person with impairment of the mind); Division 4 (Evidence of Special Witnesses); Division 6 (Cross Examination of Special Witnesses); Schedule 3 (Person with an Impairment of the Mind).

<sup>23</sup> Section 9 *Evidence Act 1977* (Qld).

<sup>24</sup> Section 9 *Evidence Act 1977* (Qld). Note that witnesses are able to give sworn evidence (given on oath and sworn on the Bible) or an 'affirmation' (a non-religious declaration to tell the truth): s 33 *Oaths Act 1867* (Qld). Witnesses can also give unsworn evidence (the court must explain to the person the duty to speak the truth): s 9B(3) *Evidence Act 1977* (Qld).

<sup>25</sup> Section 21A(1)(b)(i) *Evidence Act 1977* (Qld).

<sup>26</sup> Section 21A(2) *Evidence Act 1977* (Qld).

<sup>27</sup> Section 21A(2)(f) *Evidence Act 1977* (Qld).

<sup>28</sup> Section 93A *Evidence Act 1977* (Qld).

<sup>29</sup> See s 21M *Evidence Act 1977* (Qld).

All Australian jurisdictions except New South Wales and Tasmania have a provision for the entirety of a witnesses' evidence (evidence in chief, cross examination and re-examination) to be given and recorded in pre-trial proceedings in the absence of the jury. This recording can then be replayed at trial.

Pre-recorded evidence can have a variety of benefits for the administration of justice:

- it can benefit the court by enhancing the quality of a witness' account by capturing it at the earliest opportunity;<sup>30</sup>
- it can also allow witnesses to give evidence without having to experience the stress of testifying during a trial;
- it allows for greater judicial intervention in cross-examination because recordings can be edited and any inappropriate questions can be deleted.<sup>31</sup>

This flexibility in the criminal justice systems goes some way to addressing Article 12 of the CRPD by recognising some of the disadvantages faced by requiring people with disability to give evidence in a traditional adversarial setting.<sup>32</sup> In Queensland, audio visual records of police interviews of a person with an intellectual disability are admissible as evidence either in addition to or in place of examination-in-chief.<sup>33</sup>

#### 1.3.2.7.4 Questioning and cross examination of vulnerable witnesses

The EAQ provides that a court must disallow an improper question in cross-examination. A question that is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive may be disallowed by the court<sup>34</sup> This decision can be made by reference to the witness' mental, intellectual or physical disability.<sup>35</sup> The EAQ also restricts the cross-examination of vulnerable witnesses by unrepresented defendants.<sup>36</sup>

DLA Piper<sup>37</sup> offers the following critical analysis of special measures:

Despite [...] legislative changes [...] relating to witnesses with disability who need communication supports or who have complex and multiple support needs, it appears that in practice, courts tend to use only those basic measures specifically listed in the legislation.<sup>38</sup>

Courts are generally reluctant to use their general powers under the legislation and without judicial officers exercising their discretion in disallowing improper questions and intervening in the cross-examination of witnesses, such provisions will not assist those with disabilities.<sup>39</sup>

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30 P Bowden, D Plater & T Henning. 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

31 Ibid.

32 UN Declaration of the Rights of Persons with Disability (CRPD), signed by Australia on 30 March 2007, Article 12

33 See for example *Criminal Procedure Act 1986* (NSW) s 306M; *Evidence Act 1906* (WA) s 106HA

34 See s 21 *Evidence Act 1977* (Qld).

35 Section 21 *Evidence Act 1977* (Qld).

36 Section 21N *Evidence Act 1977* (Qld).

37 Background Paper on Access to Justice for People with Disability in the Criminal Justice System

38 P Bowden, D Plater & T Henning. 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

39 See P Bowden, D Plater & T Henning. 2014. 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?' and The Victorian Parliament Law Reform Committee. *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers*, available at [http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05\\_Access\\_to\\_justice\\_intellectually\\_disabled\\_-\\_Final\\_Report.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf) p 221-222

Problems are exacerbated by the duty of the defence lawyer to represent their client fearlessly. This is often characterised by attempts to make opposing counsel's witnesses appear to be unreliable. Witnesses who are vulnerable, who need communication supports or who have complex and multiple support needs are often faced with confusing questions that may contain double negatives or leading questions which directly or indirectly suggest a particular answer to a question.

The Queensland Supreme Court's *Equal Treatment Bench Book* aims to ensure that questions asked of witnesses are in an appropriate style. It assists judicial officers to use their discretion regarding the questioning of witnesses. Such educational materials also address requirements outlined in Article 13 of the CRPD. Nevertheless, the ingrained adversarial culture still remains and can potentially negate the value of such guidelines.

### **1.3.2.8 Forensic Disability Act 2011 (Qld) (FDA)**

The FDA provides for the involuntary detention, care, support and protection of a person with an intellectual or cognitive disability who has been ordered by the Queensland Mental Health Court to be detained for treatment or care in the forensic disability service.<sup>40</sup>

The FDA purports to:

- safeguard their rights and freedoms
- balance their rights and freedoms with those of other people
- promote their individual development and enhancing their opportunities for quality of life, and
- maximise their opportunities for reintegration into the community.<sup>41</sup>

People subject to a forensic order have not been convicted of an offence, but the forensic order may remain in place indefinitely, and potentially for a period much longer than the relevant sentence had the person been found guilty of the alleged offence.

### **1.3.2.9 The Guardianship and Administration Act 2000 (Qld) and the Powers of Attorney Act 1998 (Qld)**

These Acts provide a comprehensive scheme to facilitate the exercise of power for financial matters and personal matters by or for an adult who needs, or may need, another person to exercise power for the adult. They state principles to be observed by anyone performing functions or exercising a power under the scheme, encourage involvement in decision-making of the members of the adult's existing support network, confer jurisdiction on the Tribunal to administer particular aspects of the scheme, recognise the public trustee is available as a possible administrator for an adult with impaired capacity and provide for the appointment of the public advocate for systemic advocacy.

The GAA was enacted in response to a report<sup>42</sup> by the Queensland Law Reform Commission that inquired into assisted and substituted decision-making for people with decision-making disabilities. The GAA

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<sup>40</sup> Section 10

<sup>41</sup> Section 3

<sup>42</sup> Queensland Law Reform Commission Assisted and Substituted Decisions Report No 49, 1996

acknowledges:<sup>43</sup>

- an adult's right to make decisions is fundamental to the adult's inherent dignity
- the right to make decisions includes the right to make decisions with which others may not agree
- the capacity of an adult with impaired capacity to make decisions may differ according to nature and extent of the impairment, the type of decision and the availability of support
- the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent, and
- a right to adequate and appropriate support for decision making.

Schedule 1 of the GAA sets out a number of general principles that must be applied by any person or entity acting on behalf of someone with impaired decision-making capacity.<sup>44</sup>

### **1.3.2.10      *Mental Health Act 2000 (Qld) (MHA)***

The MHA sets out provisions for the involuntary assessment, treatment and protection of persons who have mental illness, while safeguarding their freedoms and balancing those freedoms with the rights of other persons.<sup>45</sup> The MHA also sets out the jurisdiction of the Mental Health Court which, together with the Mental Health Review Tribunal, constitutes the forensic jurisdiction.

### **1.3.2.11      *Procedural and ancillary legislation***

Other pieces of state legislation prescribe duties and entitlements relevant for people with disabilities who come into contact with the criminal justice system.

- The *Jury Act 1995* (Qld) prescribes that a person is not eligible for jury service if a person has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror.
- The *Police Powers and Responsibilities Act 2000* (Qld): creates the entitlement for a person with a physical disability that prevents them from speaking with reasonable fluency to have a support person present during questioning<sup>46</sup> or before a forensic procedure under a forensic procedure consent or a forensic procedure order is performed on them<sup>47</sup>
- The *Summary Offences Act 2005* (Qld): regulates the use of public space and as such sets out many of the minor offences disproportionately linked with people with capacity impairments
- The *Uniform Civil Procedure Rules 1999* (Qld): prescribes rules for the involvement of 'litigation guardians' and the Public Trustee in legal proceedings and settlements concerning persons without legal capacity.

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<sup>43</sup> Section 5

<sup>44</sup> Section 11

<sup>45</sup> Section 4

<sup>46</sup> See s 433

<sup>47</sup> Section 512



### 1.3.3 Other resources - the Equal Treatment Bench Book

This reference provides judges with guidance on how best to ensure that persons with disabilities have full involvement in court processes, covering topics including competence to give evidence; witnesses with intellectual disabilities; witnesses with psychiatric disabilities; witnesses with physical disabilities; witnesses with vision impairment; witnesses with hearing impairment; technology in the supreme court; real time transcript; audio reporting; sound reinforcement; and video conferencing.

## 1.4 Policy

Relevant policies pertaining to people with disability who come into contact with the criminal justice system exist at both a state and federal level throughout Australia. Here, we briefly outline key policies of note.

### 1.4.1 Commonwealth policy

#### 1.4.1.1 National Disability Strategy 2010-2020 (NDS)

The National Disability Strategy 2010-20, implemented by the Council of Australian Governments, sets out six key policy areas and six key outcomes.

- Inclusive and accessible communities
- Rights protection, justice and legislation - statutory protections such as anti-discrimination measures, complaints mechanisms, advocacy, the electoral and justice systems, including Court diversion programs for people with disability, designed to address the mental health or disability needs of defendants and their offending behaviour
- Economic security - jobs, business opportunities, financial independence, adequate income support for those not able to work and housing.
- Personal and community support - inclusion and participation in the community, person-centred care and support provided by specialist disability services and mainstream services; informal care and support.
- Learning and skills - early childhood education and care, schools, further education, vocational education; transitions from education to employment; life-long learning.
- Health and wellbeing - health services, health promotion and the interaction between health and disability systems; wellbeing and enjoyment of life.

### 1.4.2 Queensland state policy

Queensland's Disability Plan is designed to align with, and deliver on, Queensland's commitments under the *National Disability Strategy 2010-2020*.

Queensland's most recent comprehensive disability policy was *Absolutely Everybody 2011-2014 – whole of government action plan*. But like other states and territories Queensland is now transitioning towards full implementation of the National Disability Insurance Scheme in 2018. There is currently no disability justice

strategy in this state, although the Disability Discrimination Commissioner Graeme Innes called for all states and territories to implement such a strategy, modelled on that of South Australia.

#### **1.4.2.1 Queensland Police Service Disability Service Plan 2011 - 2014**

The Queensland Police Service (QPS) follows section 221 of the *Disability Services Act 2000* (Qld), which requires every Queensland Government department to develop a Disability Service Plan that identifies and addresses issues regarding service delivery to people with a disability. The Act requires Government departments to review their Disability Service Plans every three years.

The *Disability Services Act 2006* (Qld) took effect on 1 July 2006 and continues to provide a strong foundation for promoting the rights of people with a disability and encouraging their participation in the community. In addition to highlighting progress in the QPS Annual Report, QPS undertakes to provide annual reports on our performance against specific actions to the Department of Communities, for collation into an annual whole-of-Government progress report.

#### **1.4.2.2 Queensland Corrective Services Offenders with Specific Needs Policy and Action Plan 2006 – 2009**

This policy was developed following a 2004 review that noted the increasing proportion of offenders with, *inter alia*, an intellectual or cognitive impairment or mental health disorder amongst the offender population and the need to prioritise the development of policy that highlights the specific needs of this group.<sup>48</sup>

The stated aim of the policy is to manage and address the specific needs of this group of offenders, as part of the QCS' duty of care to improve:

- the offenders' response to the correctional system
- the safety of the community, staff and offenders.

#### **1.4.2.3 Queensland Mental Health, Drug and Alcohol Strategic Plan 2014-2019**

The policy provides a launching pad for Government and non-government services to work together to support people that experience issues related to substance use to access quality care and support.

### **1.5 Human rights framework**

#### **1.5.1 The Convention on the Rights of Persons with Disabilities**

International human rights treaties provide useful standards against which to analyse Australia's current legislation and practices. Australia ratified the *Convention on the Rights of Persons with Disabilities* in 2008.

Article 12 of the CRPD mandates a right to 'recognition as persons before the law' and that people with disability 'enjoy legal capacity on an equal basis with others in all aspects of life'. Most importantly for criminal justice, parties are required to take appropriate measures to ensure that persons with disabilities

<sup>48</sup> Queensland Corrective Services Offenders with specific needs Policy and Action Plan 2006 – 2009. Available from: <[http://www.correctiveservices.qld.gov.au/Publications/Corporate\\_Publications/Strategic\\_Documents/Specific\\_Needs\\_Action\\_Plan.pdf](http://www.correctiveservices.qld.gov.au/Publications/Corporate_Publications/Strategic_Documents/Specific_Needs_Action_Plan.pdf)>

have access to the supports they need to exercise their legal capacity. This provision has profound implications for legal procedures, rights and standards in relation to jury duty, acting as a witness, victims of crime, supports to exercise capacity in relation to fitness for trial and the test for soundness of mind. Article 13 of the CRPD mandates effective access to justice for persons with disabilities on an equal basis with others, including the provision of procedural and age-appropriate accommodations in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings.

### **1.5.2 The Australian Human Rights Commission (AHRC)**

The AHRC is a statutory body set up by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). It is a national human rights institution funded by the Australian government, but it operates independently. The Commission has responsibility for investigating alleged infringements under federal anti-discrimination legislation, including the *Disability Discrimination Act 1992* (Cth).

### **1.5.3 The Anti-Discrimination Commission Queensland (ADCQ)**

The ADCQ was established by the *Anti-Discrimination Act 1991* (Qld). It is an independent statutory body headed by the Anti-Discrimination Commissioner. The work of the Commission fits within the framework of established international human rights instruments. The Commission has a responsibility under the *Anti-Discrimination Act 1991* (Qld) to promote the understanding, acceptance and public discussion of human rights in this state.

## **1.6 Services and Supports**

### **1.6.1 State Government services**

#### **1.6.1.1 Disability Services Queensland**

The Department of Communities, Child Safety and Disability Services provides information about supports and services available to children and adults with a disability and their families and carers. It also funds non-government service organisations to provide a range of services, including early intervention and therapy, support to families, respite, aids and equipment, accommodation support and community access.

The National Disability Insurance Scheme will launch in Queensland on 1 July 2016 and following the transitional period Disability Services will be subsumed by the Commonwealth's National Disability Insurance Agency.

#### **1.6.1.2 Mental Health Commission**

The Mental Health Commission was created by statute in 2013. Its functions include strategic planning, monitoring and reporting on the plan and on the mental health and 'substance misuse' system, supporting and promoting strategies to prevent mental illness, encouraging social inclusion and recovery of people with mental illness and promoting community awareness of mental health and substance misuse matters.

#### **1.6.1.3 The Public Guardian**

The Public (formerly 'Adult') Guardian is a statutory appointment under the *Guardianship and Administration*

*Act 2000* (Qld) tasked to facilitate the exercise of power for financial and personal matters by or for an adult who needs, or may need, another person to do so.

The Public Guardian is a decision-maker of last resort in relation to matters for which the Guardian has been appointed, including legal, personal and accommodation matters and restrictive practices.

The Guardianship and Administration Tribunal (GAAT) was established on 1 July 2000 and replaced the Intellectually Disabled Citizens Council of Queensland. The Tribunal has the authority to appoint guardians and administrators for adults with impaired decision-making capacity.

## **1.6.2 Commonwealth Government Services**

### **1.6.2.1 The National Disability Insurance Scheme**

Once fully operational, the National Disability Insurance Scheme will provide three tiers of support to people with disabilities, their families and supporters and to the broader community. The objects of the *National Disability Insurance Scheme Act 2013* (Cth) include:

- giving effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities
- supporting the independence and social and economic participation of people with disability
- giving reasonable and necessary supports to people with disability
- enabling people with disability to exercise choice and control in the pursuit of their supports.<sup>49</sup>

The scheme commences on 1 July 2016 in Queensland.

In 2013, the Council of Australian Governments (COAG) developed and endorsed the *NDIS - Principles to Determine the Responsibilities of the NDIS and Other Service Systems*,<sup>50</sup> which sets out the principles to be applied when determine the funding and delivery responsibilities of the NDIS. This includes agreement on the principles for justice to be applied when meeting the needs of people with disability who come in contact with the criminal justice system, which essentially retains the present status quo, providing that 'the criminal justice system (and relevant elements of the civil justice system) will continue to be responsible for meeting the needs of people with disability in line with the National Disability Strategy and existing legal obligations'.<sup>51</sup>

### **1.6.2.2 Federal Mental Health Commission**

A federal Mental Health Commission was established in 2012. This is a specialist body established to report, advise and collaborate between different mental health organisations, both governmental and not. Its stated mission is systemic advocacy and change – like its state counterparts,<sup>52</sup> the Commission does not engage in individual advocacy or provide assistance to an individual.<sup>53</sup>

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<sup>49</sup> Section 3

<sup>50</sup> Council of Australian Governments. 13 April 2013. *NDIS - Principles to Determine the Responsibilities of the NDIS and Other Service Systems*. Available from < <https://www.coag.gov.au/node/497> >.

<sup>51</sup> Ibi

<sup>52</sup> In addition to the Queensland Mental Health Commission, there are also similar state commissions in New South Wales and Western Australia.

<sup>53</sup> Queensland Mental Health Commission. < <http://www.qmhc.qld.gov.au/> >; Mental Health Commission of New South Wales, <<http://nswmentalhealthcommission.com.au/about-us>>; Government of Western Australia Mental Health Commission, <<http://www.mentalhealth.wa.gov.au/>>; Australian Government National Mental Health Commission, <<http://www.mentalhealthcommission.gov.au/>>.

## 1.6.3 Police, Courts and Corrections

### 1.6.3.1 Forensic Proceedings

The forensic system provides an alternative to the criminal justice process for people who lack (or may lack) capacity.

#### 1.6.3.1.1 Mental Health Court (MHC)

Established by the *Mental Health Act 2000* (Qld) (MHA),<sup>54</sup> the Mental Health Court is constituted by a Supreme Court judge sitting alone, assisted by two psychiatrists.<sup>55</sup>

The Queensland Mental Health Court is unique. It is the only dedicated mental health court in Australia. The Court sits for 12 weeks of each calendar year, and there are delays.

The primary function of the Mental Health Court is to determine the state of mind of people charged with criminal offences. For a criminal matter to be referred to the MHC, it must be considered that the alleged offender is or was mentally ill or has an intellectual disability and, at the relevant time, was deprived of a relevant capacity.<sup>56</sup>

The relevant 'mental health defences' are that the person was:

- of unsound mind at the time of the offence<sup>57</sup>
- not fit for trial because of mental illness or intellectual disability<sup>58</sup>
- of diminished responsibility when the alleged offence of murder was committed.<sup>59</sup>

Other functions of the MHC are to hear and determine appeals from the Mental Health Review Tribunal and to institute inquiries into the lawfulness of person's detention in authorised mental health facilities.<sup>60</sup>

This Court has been praised for demonstrating a multi-disciplinary, multi-agency problem-solving approach, with the court acting as the intermediary in helping to solve the underlying problems that lead to contact with the criminal justice system by people with a disability.<sup>61</sup>

##### 1.6.3.1.1.1 Jurisdiction

A person's mental condition in relation to an offence may be referred to the Mental Health Court by:

- the person
- their legal representative

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<sup>54</sup> Section 381

<sup>55</sup> Section 382

<sup>56</sup> *Criminal Code Act 1889* (Qld), s 27.

<sup>57</sup> Section 267(a) – that is, suffering mental illness or intellectual disability to such a degree as to not be able to be held responsible for their actions.

<sup>58</sup> Section 270. The court may find a person temporarily or permanently unfit: s 271.

<sup>59</sup> Section 267(b)

<sup>60</sup> Queensland Courts. *Mental Health Court*. <<http://www.courts.qld.gov.au/courts/mental-health-court>>.

<sup>61</sup> Phillip French. 2007. *Disabled Justice: The barriers to justice for persons with disability in Queensland*. Queensland Advocacy Incorporated, 98.

- the Attorney-General
- the DPP, or
- the Director of Mental Health.<sup>62</sup>

Provision is made for the preparation of psychiatric reports pertaining to a person's mental condition at the relevant time and their fitness for trial.

#### **1.6.3.1.1.2 Victim impact**

The court may take into account sworn material submitted by a victim or another person who is not a party to the hearing of the reference (concerned person).<sup>63</sup>

#### **1.6.3.1.1.3 Reasonable doubt person committed offence**

The MHC must not make a decision whether the person was of unsound mind or is unfit for trial if the court is satisfied:

- that there is reasonable doubt that the person committed the alleged offence<sup>64</sup>
- that a fact that is substantially material to the opinion of an expert witness is so in dispute it would be unsafe to make the decision.<sup>65</sup>

#### **1.6.3.1.1.4 Forensic orders**

The court may make a forensic order<sup>66</sup> requiring the involuntary treatment of the patient,<sup>67</sup> having regard to:

- the seriousness of the offence
- the person's treatment or care needs
- the protection of the community.<sup>68</sup>

The court may order that a person whose unsoundness or unfitness is a consequence of intellectual disability may be detained for care in the forensic disability service.<sup>69</sup>

#### **1.6.3.1.1.5 Other functions**

The Mental Health Court may also:

- hear appeals against decisions of the Mental Health Review Tribunal<sup>70</sup>

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<sup>62</sup> Section 257

<sup>63</sup> Section 284

<sup>64</sup> Section 268(1)

<sup>65</sup> Section 269. A substantially material fact may be—

(a) something that happened before, at the same time as, or after the alleged offence was committed; or (b) something about the person's past or present medical or psychiatric treatment- 269(2).

<sup>66</sup> Section 288(3) - viz. a forensic order (Mental Health Court) or a forensic order (Mental Health Court—disability).

<sup>67</sup> Section 288

<sup>68</sup> Section 288(4)

<sup>69</sup> Section 288

- investigate the detention of patients in authorized mental health services<sup>71</sup>
- approve, subject to a 'treatment plan'<sup>72</sup> that may include monitoring by a device,<sup>73</sup> limited community treatment provided the 'patient' does not represent an unacceptable risk to their or another person's safety.<sup>74</sup>

### 1.6.3.1.2 Mental Health Review Tribunal (MHRT)

In distinction to the Mental Health Commission, the Mental Health Review Tribunal operates on an individual case basis, reviewing Involuntary Treatment Orders, Forensic Orders and Fitness for Trial, as well as applications involving young persons with mental illness who are detained in high security for treatment.<sup>75</sup>

A forensic order made by the Mental Health Court authorises a person to be treated on an involuntary basis by a mental health service. When a forensic order is made the person is called a forensic patient. A forensic order can only be revoked by the Mental Health Review Tribunal or the Mental Health Court on appeal against a Mental Health Review Tribunal decision.

The MHRT reviews forensic orders according to the statutory timeframes prescribed by the *Mental Health Act 2000* (Qld). The bulk of its work consists of the making and review of Involuntary Treatment Orders but it is also responsible for the review of Forensic Orders.

### 1.6.3.1.3 Forensic Disability Service

This is a statutory body set up by the *Forensic Disability Act 2011* (Qld). The service is overseen by an administrator who is responsible to ensure that forensic orders (disability) are given effect. The service included a 10-bed facility at Wacol in Brisbane.

### 1.6.3.1.4 Forensic Mental Health Service

The FMHS provides support and monitoring of forensic 'patients', operating the following programs:

1. Inpatient
2. Community
3. In-reach into prison
4. Court liaison officer.

### 1.6.3.1.5 Queensland Health Victim Support Service

The Queensland Health Victim Support Service is a state-wide service providing support and information from the victim information register to victims of offences committed by offenders with a mental illness or an intellectual disability. The service provides assistance to the direct victims of an offence, the parents or guardians of a young victim or a victim with legal incapacity, family members of a victim and other people directly harmed by the offence.

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70 Chapter 8 Part 1

71 Chapter 14 Part 6

72 Section 131

73 Section 131A(3)

74 Sections 275 & 283

75 Queensland Government, Mental Health Review Tribunal. <<http://www.mhrt.qld.gov.au/>>.

## **1.6.4 Non-government support**

### **1.6.4.1 Legal services**

Legal Aid Queensland is the single largest provider of criminal defence services.

The Queensland Public Interest Law Clearing House (QPILCH) and Queensland Advocacy Incorporated provide legal advice and representation for Forensic Order reviews in the Mental Health Review Tribunal.

Some 25 Community Legal Services throughout Queensland provide legal advice in relation to criminal matters.

The Prisoners Legal Service provides free legal advice, information, assistance and referrals to Queensland prisoners and their families on matters relating to their imprisonment.

Sisters Inside Inc. is a community organisation that advocates for the human rights of women in the criminal justice system and aims to address gaps in the services available to them.

Aboriginal and Torres Strait Islander Legal Service (ATSILS) provides legal advice to Aboriginal and Torres Strait Islander people throughout Queensland.

### **1.6.4.2 Other advocacy**

Queensland Advocacy Incorporated's Justice Support Program provides non-legal support to persons with disabilities in the criminal justice system.

WWILD Sexual Violence Prevention Association works with people with intellectual or learning disabilities who have been victims of sexual violence, other crime or exploitation. WWILD provides groups, support, information and referral, community education and training.

Catholic Prison Ministry provides a range of services to people in the criminal justice system.

## **1.6.5 External monitors**

### **1.6.5.1 The Public Advocate**

This is a statutory office created pursuant to Chapter 9 of the Guardianship and Administration Act 2000 (Qld). Its functions include:

- promoting and protecting the rights of adults with impaired capacity for a matter
- promoting the protection of the adults from neglect, exploitation or abuse
- encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy
- promoting the provision of services and facilities for the adults
- monitoring and reviewing the delivery of services and facilities to the adults.

### **1.6.5.2 Queensland Disability Advisory Council**

The Queensland and regional disability advisory councils advise the Minister on a range of regional, state and national disability and related matters that affect the broader community.



## APPENDIX D – Other Jurisdictions

**Table 1: Summary of forensic order provisions in other jurisdictions**

Jurisdiction	Limiting term	Test	Overarching principle	Consideration of safety of the patient
Cth	Yes	Constraint on release	No	Yes
NSW	Yes	Constraint on release	No	Yes
ACT	Yes	Relevant considerations	No	Yes
NT	No	Constraint on continued detention / supervision	Yes	Yes
Qld	No	Constraint on release	No	Yes
SA	Yes	Relevant considerations	Yes	No
Tas	No	Relevant considerations	Yes	No
Vic	No	During nominal term: Constraint on release After nominal term: Constraint on continued detention; otherwise, relevant considerations	Yes	Yes
WA	No	Relevant considerations	No	No

**Table 2: Test for release in other jurisdictions:<sup>1</sup>**

Jurisdiction	Test for release	Legislation
Cth	Not unless the Attorney-General is satisfied that the person is not a threat or danger either to himself or herself or to the community.	<i>Crimes Act 1914</i> (Cth) s 20BL(2)
NSW	The Tribunal must be satisfied that: (a) the safety of the patient or any member of the public will not be seriously endangered by the patient's release; and (b) other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care	<i>Mental Health (Forensic Provisions) Act 1990</i> s 43

<sup>1</sup> Taken from New South Wales Law Reform Commission Report 138 entitled 'People with cognitive and mental health impairments in the criminal justice system; Criminal responsibility and consequences' (May 2013), chapter 8 at pp 209-120: <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report%20138.pdf>.

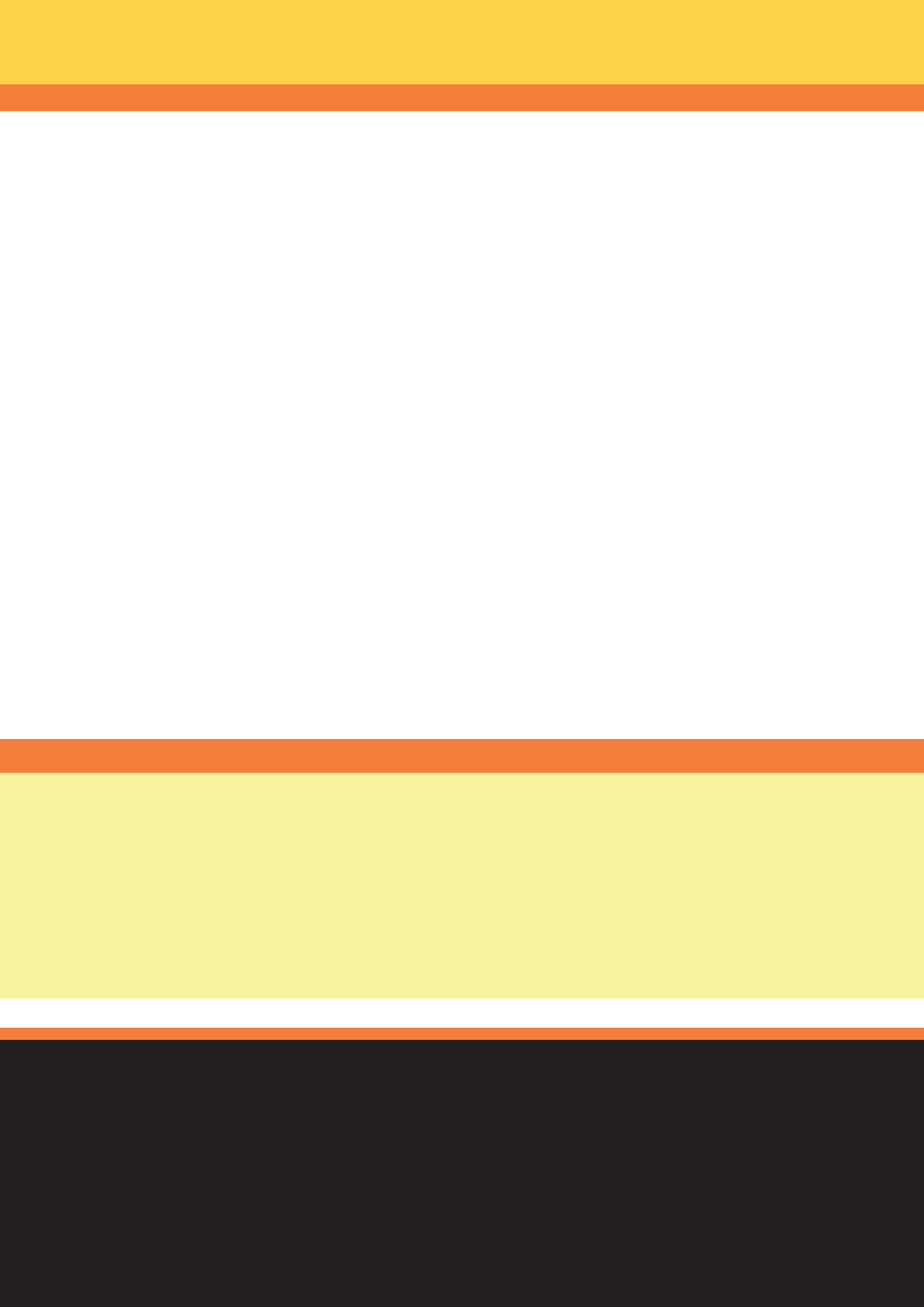
Jurisdiction	Test for release	Legislation
ACT	<p>In making a decision which could include an order for detention, the Supreme Court or Magistrates Court shall consider the following criteria:</p> <p>(a) whether or not, if released—</p> <p>(i) the accused's health and safety is likely to be substantially impaired; or</p> <p>(ii) the accused is likely to be a danger to the community.</p>	<i>Crimes Act 1900</i> (ACT) s 308
	<p>In considering whether or not to order the release of a person, the ACT Civil and Administrative Tribunal (ACAT) shall have regard to the following:</p> <p>(b) whether or not, if released—</p> <p>(i) the person's health or safety would be, or would be likely to be, substantially impaired; or</p> <p>(ii) the person would be likely to do serious harm to others.</p>	<i>Mental Health (Treatment and Care) Act 1994</i> (ACT) s 72(3)
NT	On completing the review under subsection (5), unless the court considers that the safety of the supervised person or the public will or is likely to be seriously at risk if the supervised person is released, the court must release the supervised person unconditionally	<i>Criminal Code (NT)</i> s 43ZG(6)
	<p>On completing the review of a custodial supervision order, the court must:</p> <p>(a) vary the supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order.</p>	<i>Criminal Code (NT)</i> s 43ZH(2)
	<p>In determining whether to make an order under this Part, the court must have regard to the following matters:</p> <p>(a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability.</p>	<i>Criminal Code (NT)</i> s 43ZN(1)
Qld	<p>The tribunal must not do either of the following unless it is satisfied the patient does not represent an unacceptable risk to the safety of the patient or others, having regard to the patient's mental illness or intellectual disability—</p> <p>(a) revoke the forensic order for the patient;</p> <p>(b) order or approve limited community treatment for the patient</p>	<i>Mental Health Act 2000</i> (Qld) s 204

<b>Jurisdiction</b>	<b>Test for release</b>	<b>Legislation</b>
SA	In deciding proceedings, the court should have regard to: (a) whether the defendant is, or would if released be, likely to endanger another person, or other persons generally.	<i>Criminal Law Consolidation Act 1935</i> (SA) s 269T
Tas	In determining proceedings under this Part, the court must ... have regard to- (a) whether the defendant is, or would if released be, likely to endanger another person or other persons generally.	<i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) s 35(1)
Vic	The court must not vary a custodial supervision order to a non-custodial supervision order during the nominal term unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will not be seriously endangered as a result of the release of the person on a non-custodial supervision order.	<i>Impairment and Unfitness to be Tried) Act 1997</i> (Vic) s 32(2)
	On a major review, the court— (a) if the supervision order is a custodial supervision order— (b) must vary the order to a non-custodial supervision order, unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will be seriously endangered as a result of the release of the person on a noncustodial supervision order.	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic) s 35(3)
	In deciding whether or not to make, vary or revoke an order under Part 3, 4 or 5 in relation to a person, to grant extended leave to a person or to revoke a grant of extended leave, the court must have regard to— (c) whether the person is, or would if released be, likely to endanger themselves, another person, or other people generally because of his or her mental impairment.	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic) s 40(1)
WA	In deciding whether to recommend the release of a mentally impaired accused, the [Mentally Impaired Accused] Board is to have regard to these factors — (a) the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community.	<i>Criminal Law (Mentally Impaired Accused) Act 1996</i> (WA) s 33(5)









“QAI with the aid of relevant real time illustrations conclusively bring home the injustice of imposing capacity impairments on any individual or group and in speaking for the rights of persons with disabilities make a strong case for a criminal justice system which is universally just and humane.”

Amita Dhanda, Professor and Head, Centre for Disability Studies, NALSAR, Hyderabad, INDIA

“The Commission is pleased that QAI has built on the experience of their previous report, with a second publication looking at the intersection of disability and the criminal justice system. It’s through the proactive measures by community organisations such as QAI, that we take another step closer to realising the goal of an inclusive and non-discriminatory Australia.”

Prof. Gillian Triggs, President of the Australian Human Rights Commission

“I support the attention that Queensland Advocacy Incorporated is giving to the problem of disability in the criminal justice system. The issues they raise are common throughout Australia and indeed beyond.”

The Hon Michael Kirby AC CMG, Past Justice of the High Court of Australia