

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 significantly 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.¹ 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.²

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

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

² 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.

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* 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.

The function of *dis-abled Justice II* is two-fold: we provide a detailed description of the problems arising from the fractured criminal justice system *vis-à-vis* disability and we also propose a (non-exhaustive) collection of complementary reforms directed towards addressing both the causes and casualties of this system. Our 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, we predominantly focus our attention on micro-reforms as it is the achievement of small yet significant improvements in key areas that will collectively generate an adequate level of baseline protection for people with disability and mental health issues.

To this end, we 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. We consider that relevant factors 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. We make 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.

We recognise 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 encountered at the disability/criminal justice interface will not only address some of the more severe problems which presently adversely impact on this already vulnerable and marginalised group, but will have broader ramifications for a flawed and struggling criminal justice system, positively impacting on all people who come into contact with this system – as suspects, offenders, defendants, victims and witnesses of crime.