



## The indefinite detention of people with cognitive and psychiatric impairment in Australia

**Submission by Queensland Advocacy Incorporated**

**Senate Community Affairs References Committee**

**April 2016**

“Words have no power to impress the mind without the exquisite horror of their reality.”

Edgar Allan Poe

“The ache for home lives in all of us, the safe place where we can go as we are and not be questioned.”

Maya Angelou

“To deny people their human rights is to challenge their very humanity.”

Nelson Mandela

## About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual 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.

QAI also runs three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program. Our experiences in providing legal and advocacy services and support for individuals within these programs has provided us with a wealth of knowledge and understanding about the experiences, needs and concerns of individuals who are the focus of this inquiry.

QAI believes that all humans are equally important, unique and of intrinsic value and that all people should be seen and valued, first and foremost, as a whole person. Further, QAI believes that we should embrace difference and diversity, rather than aspiring to an ideal of uniformity of appearance and behaviour. Central to this, and consistent with our core values and beliefs, QAI will not perpetuate use of language that stereotypes or makes projections based on a particular feature or attribute of a person or detracts from the worth and status of a person with disability. We consider that the use of appropriate language and discourse is fundamental to protecting the rights and dignity, and elevating the status, of people with disability.

QAI welcomes the move by the Community Affairs References Committee to conduct an inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia. QAI thanks the Senate for the opportunity to make a submission to this important inquiry.

Relevantly for this inquiry, QAI has researched and published two important works that directly address many of the issues before the Committee. The first publication is *Disabled Justice: The barriers to justice for persons with disability in Queensland*.<sup>1</sup> This seminal work, released in 2007, examined the experience of persons with disability with the Queensland criminal justice system, from the perspectives of victims, suspects and offenders of crime.

The publication of *Disabled Justice* was received with much interest. One of the responses generated by its publication was the development of an official response by the Queensland Government.<sup>2</sup>

To further our important work in this area and attempt to generate a humanitarian response to the plight of those with an intellectual, cognitive or psychiatric disability and forensic needs, in

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<sup>1</sup> Philip French & Queensland Advocacy Incorporated. *Disabled Justice: The barriers to justice for persons with disability in Queensland*. May 2007.

<sup>2</sup> Queensland Government. *Response to the Queensland Advocacy Incorporated Report Disabled Justice: The barriers to justice for persons with a disability in Queensland*. November 2007. Available at <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0016/21625/response-to-qld-advocacy-report.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0016/21625/response-to-qld-advocacy-report.pdf)>.

2015 QAI published a sequel to *Disabled Justice*. This sequel is entitled *dis-Abled Justice: Reforms to Justice for Persons with Disability in Queensland*.<sup>3</sup> The core concern of this second publication was to channel the broad reform agenda developed in the first into concrete proposals for a host of micro-reforms that can transform the lives of these highly vulnerable and disempowered persons. This publication was favourably reviewed, including by Amita Dhanda,<sup>4</sup> former High Court Justice the Hon Michael Kirby AC CMG and Prof Gillian Triggs.<sup>5</sup> Since its recent release in May 2015 has generated much interest within relevant sections of the community, including from a Commonwealth Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings.<sup>6</sup>

In October 2014, QAI published a position statement and research paper titled: 'Conclusions on the Use of Restrictive Practices for People with an Intellectual or Cognitive Impairment'.

In October 2015, QAI published a research paper entitled: *The Queensland Forensic Disability Service: Shining light on a closed system through an examination of forensic disability orders for persons with an intellectual or cognitive disability*, with an accompanying position statement. We have presented on this topic widely, including at the ACSO 8<sup>th</sup> international criminal justice conference in October 2015.

QAI is committed to ensuring that these publications translate into pragmatic reforms that fundamentally alter the landscape in this area and address the multiple human rights violations and abuses perpetrated by the indefinite detention of persons with an intellectual, cognitive or psychiatric disability in Australia.

## Background

QAI endorses the broad approach taken by the Committee in exploring this issue, including the defining of 'indefinite detention' as including 'all forms of secure accommodation of a person without a specific date of release... [including] detention orders by a court, tribunal or under a disability or mental health act and detention orders that may be time limited but capable of extension by a court, tribunal or under a disability or mental health act prior to the end of the order.'

This starting point addresses one of our core concerns in making this submission – the incarceration of people with intellectual or cognitive disability and/or mental illness within the Forensic Disability Service Unit at Wacol or in Authorised Mental Health Institutions. The indefinite warehousing of people in such settings and circumstances is an issue that often flies under the radar.

While the terms of reference specifically refer to people with cognitive and psychiatric impairment, QAI submits that this focus must be broadened to include people with an intellectual disability. While intellectual and cognitive impairment are often conflated, they differ. An intellectual disability is:

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<sup>3</sup> Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. May 2015.

<sup>4</sup> Professor and Head, Centre for Disability Studies, NALSAR, Hyderabad, India.

<sup>5</sup> President of the Australian Human Rights Commission.

<sup>6</sup> Commonwealth of Australia. 25 November 2015. Report available at:

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report)>.

*A disability characterised by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behaviour, which covers a range of everyday social and practical skills. This disability originates before the age of 18.<sup>7</sup>*

A cognitive disability is:

*A disability that is attributable to cognitive impairment that results in a substantial reduction of the person's capacity for communication, social interaction, learning, mobility or self-care or management, and the person needing support. The impairment may result from an acquired brain injury, the disability must be permanent or likely to be permanent.<sup>8</sup>*

A psychiatric impairment is different again, and covers disorders relating to a mental illness or its treatment, which are quite distinct from both an intellectual or cognitive disability.

In this submission, QAI will consider the rights and needs of people with an intellectual impairment, a cognitive impairment and/or a psychiatric impairment.

## **The prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia**

### **Summary and key recommendations:**

- Persons with an intellectual, cognitive and/or psychiatric impairment are imprisoned and indefinitely detained in forensic disability service units and authorised mental health service units.
- This is highly concerning and is an important human rights issue.
- Vulnerability, disempowerment and marginalisation are strongly linked to imprisonment and indefinite detention for people with an intellectual, cognitive or psychiatric impairment.
- QAI recommends increasing understanding of the nature and effects of disability within the criminal justice system, to enable a more appropriate response to these vulnerable people.

The significant overrepresentation of people with an intellectual or cognitive impairment or mental illness within the Queensland criminal justice system, and ultimately within indefinite detention, is an issue of great concern to QAI. As QAI stated in *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*.<sup>9</sup>

<sup>7</sup> The definition is based on the definition from the American Association on Intellectual and Developmental Disability and on advice from the Centre of Excellence for Behaviour Support (Professor Karen Nankervis) and the clinical team (including Dr Jonathan Mason): Department of Communities, *Forensic Disability Service: Service Model*, 8.

<sup>8</sup> The definition has been advised by Professor Karen Nankervis, and is taken from the *Disability Services Act 2006*: Department of Communities, *Forensic Disability Service: Service Model*, 8.

<sup>9</sup> Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. May 2015, p 15.

*People with impaired capacity 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.*

Persons with an intellectual, cognitive or psychiatric impairment who are Aboriginal or Torres Strait Islander are doubly disadvantaged, with the significant overrepresentation of these people well recognised.

There has not been sufficient focus on the extent of the overrepresentation of people with intellectual, cognitive or psychiatric impairment who are indefinitely imprisoned or otherwise detained within Australia. However, the research that does exist provides a rough idea of the figures we are talking about:

- Approximately 10% of people in Queensland prisons have intellectual disability.<sup>10</sup> This is a rate of five times greater than average, when we consider that people with an intellectual disability comprise approximately 2% of the population.<sup>11</sup>
- 57.1% of female prisoners in Australia have a diagnosed mental illness.<sup>12</sup>
- 33% of people in Australian prisons have a mental illness.<sup>13</sup>

As noted below, the identification of impairment is not comprehensive so these figures are likely underestimates. Magistrate Spencer said in 2014:<sup>14</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.*

This overrepresentation of a highly vulnerable proportion of the Queensland population has remained consistent notwithstanding the general downward trend of crime rates.<sup>15</sup>

People with intellectual, cognitive or psychiatric impairment are often not identified as having an impairment at the relevant time, particularly at the first point of contact, which is usually with a police officer. This is particularly common where the disability is not readily apparent. Many people who come into contact with the criminal justice system have complex and multiple diagnoses, and there is significant variation in the different types of assessment tools and definitions that may pick up on impairment. We now know that it can be difficult for police, lawyers and other service providers to recognise that a person has a cognitive impairment and therefore to respond appropriately, including ensuring the person has the support they need at the relevant time. This can be because people do not think to mention

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<sup>10</sup> 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.

<sup>11</sup> Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. May 2015, p 15.

<sup>12</sup> B Hockings et al. 2002. Queensland Women Prisoners Health Survey. Department of Corrective Services.

<sup>13</sup> Australian Institute of Health and Welfare. 2011. The Health of Australia's Prisoners 2010. Australian Institute of Health and Welfare.

<sup>14</sup> Magistrate Pauline Spencer. Radio National. The Law Report; 16 September 2014.

<sup>15</sup> Queensland Police Service. Queensland Police Service Strategic Plan 2012-2016, in Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. May 2015, p 25.

that they have a disability or they may actively hide it or may not be aware they have a disability.

This can create significant problems for them: 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; are more likely to misunderstand basic legal terms such as 'guilty' and 'not guilty'; and are more likely to presume that a false confession is transparent and reversible.<sup>16</sup>

QAI does not support the introduction of overt tests designed to identify intellectual, cognitive and psychiatric impairment, as this may result in negative stereotyping and a limited view of the capacity of these people. Instead, we propose increasing understanding of the nature and effects of disability within the criminal justice system, to enable a more appropriate response.

The reasons for the overrepresentation, while not comprehensively documented, are well known. As QAI noted in *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*.<sup>17</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 and Australian research confirms that offenders with intellectual and psychiatric impairments are more likely to have experienced childhood neglect or abuse, to be unemployed, poor and/or from an indigenous minority, to have limited social and communication skills and behavioural and/or psychiatric conditions.*

Vulnerability, disempowerment and marginalisation – which translate into unemployment, homelessness, poverty and social isolation – are strongly linked to crime for people with an intellectual, cognitive or psychiatric impairment.

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 public order and minor offences.

Concerningly, a significant number of the people with intellectual, cognitive or psychiatric impairment who are indefinitely detained are deprived of their liberty for minor offences. A recent article in *The Conversation* mentioned recent cases involving persons deemed unfit to stand trial – one of whom was incarcerated for ten years for a crime he didn't commit and another who was detained for nearly two years for relatively minor driving offences. The article cites a current estimate that at least 100 people are currently detained in Australia in

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<sup>16</sup> Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. May 2015, p 60.

<sup>17</sup> Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. May 2015, p 9.

similar circumstances, over half of which are Aboriginal or Torres Strait Islander.<sup>18</sup> The incarceration of these people, for a period that exceeds the length of time they would have been imprisoned even if convicted of the relevant offences, for reason of their deemed incapacity, is of great concern from a human rights perspective.

## **The experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely**

### **Summary and key recommendations:**

- There are a number of features that people imprisoned or indefinitely detained have in common, including:
  - They have a disability or mental illness that significantly impacts on their ability to understand the consequences of their behaviour;
  - They have experienced a lifetime of disempowerment and disadvantage and lack of support to overcome their life history;
  - They have heightened vulnerability and have lacked appropriate support throughout the continuum of contact with the criminal justice system;
  - They have usually been charged with a series of minor offences, rather than a very violent or serious offence.
  - The law breaking of people with intellectual impairments is inextricably linked to their disability and is determined by the social, historical and familial circumstances that shaped them - and, more urgently, by the person's present circumstances and behaviours that attract police attention.
- The FDS Unit at Wacol in Brisbane, Queensland, has been described as unfit for human habitation, resembling the harshest of prison-like settings. It is not an environment conducive to rehabilitation or ordinary living experiences. A negative cycle is perpetuated, where the capacity and ability of persons detained within the FDS continually declines and they become increasingly institutionalised, which in turn can erode the possibility that the Mental Health Review Tribunal will favourably consider their prospects of community re-integration
- It is inappropriate to indefinitely imprison any person with an intellectual, cognitive or psychiatric impairment. To do so, breaches their human rights and dignities, erodes their capacity and skills, enhances their vulnerabilities and makes them the target of violence, exploitation and abuse.

There has been little research on the experiences of persons with intellectual, cognitive or psychiatric impairment within prisons and detention facilities within Australia. This is an

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<sup>18</sup> <https://theconversation.com/what-making-a-murderer-tells-us-about-disability-and-disadvantage-in-criminal-law-53957>.

appalling omission, particularly given that the research that has been done paints a dismal picture of their experiences.

QAI has sought to address this lack of empirical research through the development and release of two publications, as detailed above – *Disabled Justice: The barriers to justice for persons with disability in Queensland* and *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. Both of these publications include stories told directly by people with an intellectual, cognitive or psychiatric impairment who have come into contact with the criminal justice system. QAI has also released a Position Statement and Research Paper on the Queensland Forensic Disability Service: *Shining light on a closed system through an examination of forensic disability orders for persons with an intellectual or cognitive disability* which includes direct stories of their experiences. QAI also has significant first-hand knowledge of the experiences of people in such circumstances through our individual advocacy services. The QAI Human Rights Legal Service, Mental Health Legal Service and Justice Support Program all provide individual legal advocacy for the most vulnerable persons with disability in Queensland.

Anecdotally, we are aware of many cases of those with disability indefinitely detained in the FDS Unit, an Authorised Mental Health Service or in prison. Invariably, these are tragic stories of wasted lives. They all share a number of similarities:

- The presence of a disability or mental illness that significantly impacts on the person's ability to understand the consequences of their behaviour;
- A lifetime of disempowerment and disadvantage and lack of support to overcome their life history;
- Vulnerability and lack of appropriate support throughout the continuum of contact with the criminal justice system;
- Generally the offences that led to the indefinite detention are not the 'horrific' offences that would be expected to result in indefinite imprisonment, but rather public order offences or offences of a minor or summary nature. The law breaking of people with intellectual impairments is inextricably linked to their disability and 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.

As Baldry has said, family life and broader circumstances collude to railroad people with intellectual disability from birth into criminality.<sup>19</sup> People with intellectual disability enter the criminal justice system at a comparative disadvantage and from there their chances to leave it diminish.

### **Experiences of individuals under a Forensic Order (Disability) in indefinite detention**

The FDS Unit is a purpose-built, medium secure, highly structured and supervised residential treatment and rehabilitation facility in Wacol, Brisbane, with the current capacity to accommodate and provide care for up to ten individuals. As a medium secure facility, there are security features in place, including fully fenced outdoor areas, locked doors, provision for search and seizure of items from residents, the requirement that all visitors be admitted

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<sup>19</sup> 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.



through central security and refusal of visitors where their visits 'were reported to result in a deterioration of behaviour following visit'. The unit opened on 18 July 2011. Since that time, as far as QAI is aware, no one has been released from the FDS Unit.

In Queensland, the former Chief Practitioner Disability described the FDS Unit as unfit for human habitation, with its stark environment resembling the harshest prison-like setting. The indefinite nature of the incarceration, in contrast to a sentence imposed by a criminal court which has an end date and prospects of parole, destroys hope. In QAI's experience, a negative cycle is perpetuated, where the capacity and ability of persons detained within the FDS continually declines and they become increasingly institutionalised, which in turn can erode the possibility that the Mental Health Review Tribunal will favourably consider their prospects of community re-integration. This treatment of people in this manner, because they have an intellectual or cognitive disability that impairs their capacity in a way that may result in inappropriate conduct, challenges the egalitarian Australian ethos. It also amounts to adverse discrimination on the basis of disability and contravenes basic human rights principles.

Further, and ironically, it also undermines the spirit of the rehabilitative programs offered by the FDS. The stated goal of the FDS is to rehabilitate people with disability and forensic issues – it is intended that each person will progress along an individualised development plan designed with input from the person and their family, professionals and supporters. The goal is readying them to live in the community again. However, the reality is starkly different and QAI understands that this is not the lived experience of those incarcerated within the FDS Unit – rather, the FDS Unit operates as a type of 'perpetual' holding facility.

Persons detained within the FDS Unit or an Authorised Mental Health Service (AMHS) receive very limited opportunities for social and community interaction and involvement. There is a reluctance to approve community involvement because of the risk assessment-based model that the FDS operates on, which places a heavy emphasis on the risk component. From this perspective, the prospect of community engagement is considered to pose unduly high levels of risk and, particularly for some residents, be excessively resource-intensive and difficult to arrange.

The use of risk as a primary means of determining the perpetuation of Forensic Orders (Disability) for people who have not been tried or convicted of an offence embeds the incorrect and damaging stereotype that persons with intellectual disability are violent and in need of control.<sup>20</sup> The sad irony of this stereotype is that people with intellectual disability are more likely to be victims of violence, or to self-harm, than perpetrators of a criminal offence.<sup>21</sup>

Data from the MHC shows that, on average, 28 people with an intellectual disability are referred to the MHC and approximately 11 Forensic Orders (Disability) are made each year, which includes both community-based and detention orders. Based on this data, the Department of Communities estimates that there will be three to four new referrals to the FDS Unit each year.<sup>22</sup> Given that the FDS is currently near capacity (nine of the 10 beds are presently occupied), and that no residents have yet been discharged from the FDS over the

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<sup>20</sup> 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>>.

<sup>21</sup> <http://www.sane.org/information/factsheets-podcasts/204-facts-and-figures>;  
<http://www.sane.org/information/factsheets-podcasts/209-violence-and-mental-illness>.

<sup>22</sup> Department of Communities, *Forensic Disability Service: Service Model*, 4.

four years of its operation, this will result in the inappropriate detention of more people with intellectual or cognitive impairment – and no co-existing mental illness – within an AMHS. There are significant problems that flow from the conflation of intellectual or cognitive disability and mental illness; these issues are aggravated by the incarceration of people under Forensic Orders (Disability) within the mental health service.

The MHRT is required to review Forensic Orders (Disability) within six months of the order being made and thereafter at intervals of not more than six months.<sup>23</sup> However, the reviews are open-ended, the MHRT can choose whether to comply with recommendations of a clinical team, including the FDS, to revoke a Forensic Order (Disability) and there are a number of variables – availability of treatment, calculus of risk – that are subjective. To try to assess the ‘risk’ posed by a person with an intellectual or cognitive disability, and to detain them for an unspecified time based on risk, is highly problematic having regard to the nature of intellectual and cognitive disabilities, which are not ‘curable’ or ‘treatable’. This is very different to the type of sentences imposed by criminal justice courts on people without disability, which have a designated end point and set criteria by which this end point may be moved forward. It is particularly concerning given that the “necessity” to protect the community is based on allegations of criminal misconduct only, which are never tested or substantiated and that there is also no proof that the increasing restrictions on persons subject to forensic orders over the past few years has increased community safety.

For a person to be released from detention into community treatment and, finally, to have the Forensic Order lifted, they must satisfy the MHRT that they are no longer a risk to the community and demonstrate sufficient supports for them to live in the community without the need for further surveillance. The MHRT tends to take a conservative approach to its assessment of risk and will renew orders by default, especially if there is no guarantee of funded supports for the person to successfully sustain life in the community. This is particularly problematic when we consider the interdependence of the two limbs – the more time that passes without satisfying the risk test, the more difficult it becomes to demonstrate the ability to successfully re-integrate into the community – increasing institutionalisation further erodes a person’s ability to live independently.<sup>24</sup> Furthermore, for some of the people within the FDS Unit their life history has been one of institutionalisation. This raises the concern that prolonged incarceration within the FDS Unit exacerbates the ingrained dependency and alien lifestyle a person experiences when removed from the community for such long periods. The most appropriate scenario would be for people to not enter the FDS Unit, but rather be placed immediately, or at the earliest possible opportunity, under the terms and conditions of a community forensic order that includes the required educational and rehabilitation programs to be completed. Disability Services and Queensland Health must fund such programs and the supports required by the person to ensure that they can meaningfully participate and engage in such programs.

The potential for indefinite detention is particularly concerning from a human rights perspective when we consider that no ‘clients’ of the FDS have been convicted of the offence with which they were originally charged. By its very definition, a finding of unfitness nullifies the possibility of criminal culpability. It is therefore quite extraordinary that persons who have been charged with an offence and yet have never had the opportunity to contest the allegations against them, and which may have been found by an arbiter of fact to not meet

<sup>23</sup> *Mental Health Act 2000 (Qld) Resource Guide*. 2014. ‘Chapter 7 – Forensic Order and Disability Forensic Order’, 7-15.

<sup>24</sup> Queensland Advocacy Incorporated. 2015. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*.

the requisite standard of proof had the matter proceeded to a trial within the criminal justice system, are deprived of their freedom and liberty.

The rationale of protecting the community in the calculus of risk that results in incarceration within the FDS Unit is not advanced by detaining innocent people. Indeed, this is not even consistent with the aims of the FDA, which emphasises ensuring that a person's liberty and rights can be adversely affected only if it is the *least restrictive way*, the *minimum necessary in the circumstances*, to protect the health and safety of that person and others.<sup>25</sup> This theoretical statement of rights is consistent with the human rights articulated in the CRPD; unfortunately, these principles are not appropriately translated into practice. Rather, and tragically, it would seem likely that the longer people are incarcerated with no hope of release, the more likely they are to eventually become a product of the system – 'created criminals'.

Furthermore, as noted above, there is a significant lack of impetus to help people to exit the FDS Unit at the earliest possible opportunity. There is no support currently provided by either the state or federal government that assists persons to transition out of the FDS Unit. Even in circumstances where the person is deemed ready to transition from the FDS Unit, there are significant resourcing problems blocking this transition. To be considered for release from the FDS, a person must be able to demonstrate the availability of appropriate accommodation. This requirement is not accompanied by a commitment from the Department of Housing or Disability Services Queensland to secure such housing or to provide funded supports aimed at avoiding recidivism. This requirement to demonstrate the availability of appropriate housing is therefore a significant hurdle for many people, particularly when we consider the disproportionately slim family and friendship support network available to many people with an intellectual or cognitive impairment. Support networks can also break down over time and thus the likelihood of maintaining a strong support network is decreased in proportion with time spent incarcerated within the FDS Unit.

The environment of the FDS is highly institutionalised. The description provided by QAI in *dis-Abled Justice: Reforms to justice for persons with disability in Queensland* summarises this experience:

*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...*

It is now well known that the conditions of institutional settings can give rise to incidents of violence, abuse and neglect of people with disability within them. The 'closed' nature of institutional settings makes it difficult to detect, investigate and prosecute acts of violence, and the lack of reporting of violence and 'cover ups' by staff and management of institutions can prevent adequate investigation and prosecution of offences of this nature.

In 2013, the United Nations made an urgent call for investigations into violence against women and girls with disability in institutional environments.<sup>26</sup> While these recommendations remained largely unaddressed for a significant period, a Senate inquiry into violence, abuse and neglect of people with disability in institutional and residential settings was recently instigated.<sup>27</sup> QAI made a detailed submission and appeared before this inquiry.

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<sup>25</sup> FDA, s 8.

<sup>26</sup> Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, UN Doc. CRPD/C/AUS/CO/1. (4 October 2013).

<sup>27</sup> See <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect)>. QAI has made a detailed submission to this inquiry. The Australian Parliament has initiated an inquiry in

QAI believes that the FDS Unit should be redesigned to operate as a resource centre offering training to specialised support staff to enable them to work effectively within the community and detention centres. Within the community, staff should be appropriately trained and resourced to deliver habilitative and educational services to assist people with an intellectual or cognitive disability and forensic issues to live within the community with appropriate support. The FDS should also provide prison in-reach services, delivering tailored, inclusive education and training to prisoners with intellectual or cognitive impairment to facilitate their habilitation and rehabilitation and ultimately help to facilitate their transition from detention and reduce the likelihood of recidivism.

**Case study:**

Mark (not his real name) was placed on a forensic order by the Mental Health Court for the alleged offences of breaching a domestic violence order and public nuisance, approximately three years ago. He has been diagnosed with schizophrenia. The public nuisance and breach of a domestic violence order charges did not involve violence against anyone.

Mark regrets that his charges were dealt with by the Mental Health Court as the forensic order has impacted on his freedom significantly. Mark feels that being on a forensic order is a disproportionate punishment for offences that would ordinarily receive low penalties. He is aware that if the same charges were dealt with in the Magistrates Court, he may have only received a fine or good behaviour bond. Under the forensic order he has been detained in hospital mental health wards and at the Park Centre for Mental Health in a secure setting for the past two to three years. While he has been able to spend some nights a week away from the Park recently, his freedom is still limited by the restrictions of the forensic order, such as reporting back to the Park by a certain time and undergoing drug tests. Being on a forensic order has made it more difficult for him to obtain employment, see his children or build new friendships.

Mark looks forward to the day when the forensic order will end and he can regain his freedom.

**Experiences of individuals indefinitely imprisoned**

QAI submits that prison is not an appropriate environment for any vulnerable person, but particularly not for persons with an intellectual, cognitive or psychiatric impairment. While some prisoners identify the vulnerability of other prisoners with intellectual impairments and offer them support, protection and assistance (this is particularly common amongst Aboriginal and Islander prisoners), many prisoners with intellectual, cognitive or psychiatric impairments are the target of physical and psychological abuse. 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. 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 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.

Almost one in four female prisoners and 15 per cent of males interviewed in the New South Wales Inmate Health Survey<sup>28</sup> reported that they were 'aware of sexual assaults in prison in the past twelve months'.<sup>29</sup> The Framework Report 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.<sup>30</sup>

Prison in general and seclusion in particular may harm prisoners who already suffer from a mental illness. 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>31</sup>

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>32</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.

Prisoners are more likely than the general public to have a mental health disorder before and during their incarceration, yet people in prison receive minimal mental health support. The absence of in-prison psychological/counselling services is one of the principal gaps identified by Eileen Baldry in 'Pathways into Prison',<sup>33</sup> particularly special supports for those with intellectual impairments and mental illness.

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<sup>28</sup> T Butler & M Milner. 2003, The 2001 New South Wales Inmate Health Survey. NSW Corrections Health Service, Sydney.

<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> 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.

<sup>32</sup> Prisoners Legal Service Annual Report 2011-2012, 8.

<sup>33</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'.

## **The differing needs of individuals with various types of cognitive and psychiatric impairments such as foetal alcohol syndrome, intellectual disability or acquired brain injury and mental health disorders**

### **Summary and key recommendations:**

- QAI does not support the labelling of persons with intellectual, cognitive or psychiatric impairment. All people should be valued as individuals, rather than grouped on the basis of certain characteristics.
- QAI does recognise that it is important for those who interact with vulnerable people with disability to have appropriate understanding and awareness of the impact of disability and their individual support needs, and of the difference between intellectual or cognitive disability and mental illness. This is particularly important for those working within the criminal justice system.
- All those who work with persons with an intellectual, cognitive or psychiatric impairment need to be trained to respond appropriately to persons with vulnerabilities, whether they self-identify as having an impairment or not.

The needs of people can significantly differ depending on their life experiences, history, type and degree of impairment. This can include:

- Their needs at different stages of the criminal justice system – for example, to ensure they are given a fair trial and do not make an inappropriate guilty confession and are not disadvantaged within the court system.
- Their ‘treatment’ vs care/support needs – it is recognised that while a mental illness may respond to appropriate ‘treatment’, an intellectual or cognitive impairment will not.
- Their needs regarding accommodation arrangements.

We will now discuss these issues in more detail.

There are some conditions that are not properly understood or consistently responded to. An example of this is Fetal Alcohol Syndrome Disorder (FASD). People with FASD have brain damage that affects their cognitive development. They may not have an intellectual disability or a mental illness.

### **‘Treatment’ vs care and/or support**

A key concern held by QAI is that intellectual or cognitive impairment is often confused with mental illness, in terms of the ‘treatment’ provided to persons who bear these labels applied to them by services and systems. This was an issue of concern noted by the Carter Report.<sup>34</sup> The Carter Report called for a different response to persons with a sole diagnosis of intellectual or cognitive disability (that is, persons who do not have a mental illness). Until this time, the accepted practice was to accommodate people with an intellectual or cognitive

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<sup>34</sup> The Hon Justice Carter QC. Challenging Behaviour and Disability: A Targeted Response. Report to Honourable Warren Pitt MP, Minister for Communities, Disability Services and Seniors, July 2006 (‘Carter Report’).

disability who were diverted from the criminal justice system in authorised mental health services (AMHS). However, while the Carter Report made this decisive call a decade ago, in Queensland we continue to conflate people with these types of impairment.

Persons with an intellectual or cognitive disability have a lifelong condition that cannot be 'treated'. Rather, their habilitation, rehabilitation and successful inclusion in society depends on a positive, supportive response that also focuses on helping others within society to understand their behaviours. Where a person has a dual diagnosis of an intellectual or cognitive disability and a mental illness, there is the potential for their need for support as a consequence of their disability to be overshadowed by a focus on clinically treating their mental illness. This makes it particularly important to distinguish between habilitation and education and Limited Community Treatment. It is important to ensure that we use appropriate language and terminology and avoid medicalising intellectual or cognitive disability and ensure that the focus is appropriately placed on habilitating and educating people with disability and forensic issues.

There is provision for the Mental Health Court to make two types of Forensic Orders: Forensic Orders (Mental Condition) (also referred to as general Forensic Orders) and Forensic Orders (Disability). General Forensic Orders can be made for persons with a mental health condition; Forensic Orders (Disability) can only be made for persons with an intellectual or cognitive disability. The type of order made is linked to the response provided to the person – in essence, the distinction between the two orders pertains to both the treatment and/or care of the person and the type of facility they are detained in. Persons under a Forensic Order (Disability) can be subjected to involuntary *care*, but not *treatment*, whilst persons under a general Forensic Order can be subjected to both involuntary *treatment and care* for their mental illness. The treatment and care under general Forensic Orders is provided through the mental health system and monitored and reviewed by the MHRT. The care provided under a Forensic Order (Disability) is coordinated between the disability and mental health systems, depending on whether the AMHS or the FDS is accountable for management of the order.

Where the person has a dual diagnosis – that is, they have a co-existing mental illness and an intellectual or cognitive disability, a general Forensic Order must be made and treatment provided in an AMHS, not the FDS.<sup>35</sup>

### **Where the impairment is not apparent**

While QAI does not support the labelling of persons with impairment, it is important to ensure that our criminal justice system is responsive to the needs of vulnerable and disempowered persons. Sometimes the impairment is not identified at the relevant time and this can be problematic. People with Acquired Brain Injury (ABI), for example, who comprise a high proportion of prison inmates (statistics have shown that over one third of prisoners in Australia have an ABI),<sup>36</sup> can sometimes not be identified as having an ABI initially. People with Acquired Brain Injury may be reluctant to disclose their disability because of feelings of embarrassment, guilt or shame; a person with ABI may 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,

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<sup>35</sup> Department of Communities, *Forensic Disability Service: Service Model*, 2.

<sup>36</sup> 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.

uncooperative, unmotivated, aggressive and unpredictable. This can have serious, negative consequences for them.

### **Those that fall through the gaps**

Concerningly, there are a number of people who are indefinitely detained simply because they have fallen through the gaps. A principal reason 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. 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.

#### **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 with the result that he is detained indefinitely in an acute ward.

## **The impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead**

#### **Summary and key recommendations:**

- Imprisonment or detention should be considered an option of last resort for all people, but particularly for vulnerable people with an intellectual, cognitive or psychiatric impairment.
- 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 FDS should be funded to provide habilitation, rehabilitation, education and training programs to prisoners with intellectual and or cognitive impairments.
- The FMHS or another service should 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) should 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) should provide funding support to people subject to custodial orders.

As a Queensland-based community legal organisation, QAI will confine our submission in respect of this issue to the impact of Queensland and Commonwealth legislation, of which we have direct knowledge and experience.

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 disabilities and other forms of diminished capacity found guilty of offences that carry terms of imprisonment are sentenced, like all other offenders, under the *Penalties and Sentences Act 1992* (Qld). QAI submits that imprisonment should be a last resort, used only where the purpose of imposing a sentence cannot be achieved by a lighter sentence with requisite funded habilitation and education or training. Wherever possible, 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.

It is now accepted that institutionalisation of people with disability is not consistent with basic human rights principles. The de-institutionalisation movement resulted in the dispersion of many people formerly housed in institutional accommodation to shared community housing. However, many highly institutionalised features remain. Many of the remaining institutions, including the FDS Unit at Wacol and many AHMSs, are highly institutionalised. There are many facilities in the Wacol precinct that are secure, severe and highly institutional, with high mesh and barbed wire fencing, furniture bolted to the floors, etc. These include the duplexes above the FDS and also, to a lesser degree, the Transitional Emergency Accommodation Support units further down the road.<sup>37</sup> Further, many of the shared accommodation arrangements imposed on people with disability, many of whom lack any choice or control with respect to where and with whom they live, are highly institutional in nature.

This can have a number of adverse consequences, both for the person and for society. It can erode their capacity to live independently, and this increases with the length of time spent institutionalised. It can generate anger over their lack of choice, particularly where they are exposed to unsatisfactory or unsafe living arrangements. It can translate into behaviours of concern as the only means of expressing dissatisfaction with their situation, which are inappropriately responded to by the application of Restrictive Practices.

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<sup>37</sup> See: [http://www.academia.edu/4730232/Complex\\_and\\_Challenging\\_Clients\\_in\\_Disability\\_-\\_The\\_QLD\\_Experience](http://www.academia.edu/4730232/Complex_and_Challenging_Clients_in_Disability_-_The_QLD_Experience).

## Pre-conditions to exiting prison

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>38</sup>
- are less likely to have accommodation and other supports ready and waiting for them when they leave prison<sup>39</sup>
- may not be sufficiently proficient in reading and writing to effectively fill out their parole applications
- do not have the same equitable access to parole-friendly programs and vocational training
- 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).

Participation in general criminogenic rehabilitation programs offered by Corrective Services requires that participants be 'responsive', 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.

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.

## Compliance with Australia's human rights obligations

### Summary and key recommendations:

- QAI considers that the indefinite detention of persons within the Forensic Disability Service Unit:

<sup>38</sup> NSW Law Reform Commission. 1994. People with Intellectual disability and the Criminal Justice System. Issues paper # 35. Courts and Sentencing Issues.

<sup>39</sup> Prisoner's Legal Service. 2013. Queensland Prison Report 2013.

1. contravenes our commitments under international humanitarian law, including under the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (UN CAT)
  2. contravenes the requirements of natural justice
  3. is not carried out in a way that is consistent with the spirit and intent of the relevant Queensland legislation
  4. violates the human rights and dignities of the persons subjected to incarceration within the FDS
  5. further marginalises and disempowers already highly vulnerable persons in our society.
- To comply with our international human rights obligations, Australia must:
- Specifically prohibit, and immediately cease, indefinite detention for **all** people with intellectual, cognitive or psychiatric impairment in Australia, with no exceptions.
  - This must be achieved by the enactment of state and federal legislation which specifically implements the obligations to which Australia has committed under the human rights conventions to which we are a party, relevantly: the *Convention on the Rights of Persons with Disabilities*, the *Convention Against Torture*, the *Convention on the Rights of the Child*, and the *International Bill of Rights*.
  - Enact Human Rights Acts or charters in all remaining Australian states and territories and at a federal level.

QAI unequivocally considers that the indefinite detention of persons with an intellectual, cognitive or psychiatric impairment is in breach of Australia's human rights obligations. Australia is a signatory to a number of international treaties and conventions that should provide specific protection against this.

Persons with an intellectual or cognitive disability are vulnerable and already significantly marginalised within our society. As a group, they face stigma and discrimination, lower rates of participation in the community and the workforce, adverse health outcomes with higher rates of chronic illness and lower life expectancy.<sup>40</sup>

This vulnerability is heightened when they come into contact with the criminal justice system. The same factors that increase their vulnerability and marginalisation also increase their chances of coming into contact with the criminal justice system, as victims, offenders and witnesses of crime. As noted above, these vulnerable people are significantly over-represented in the criminal justice system.

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<sup>40</sup> Including Aboriginal and Torres Strait Islander people, people with disability, people in rural and remote regions, refugees and asylum seekers (particularly those in detention), people from culturally and linguistically diverse backgrounds, LGBTI people, children and adolescents, prisoners, and people experiencing chronic disease, unemployment and homelessness: Joint NGO Submission to the 2015 Universal Periodic Review of Australia. Available from Human Rights Law Centre < <http://hrlc.org.au/upr/>>.

There is a significant body of international humanitarian law which places the practice of indefinitely detaining persons with an intellectual or cognitive impairment in breach of basic human rights. In particular, we note the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>41</sup> the *Universal Declaration of Human Rights*,<sup>42</sup> and the *Convention on the Rights of Persons with Disabilities*.<sup>43</sup>

The FDS Service Model explicitly incorporates key principles of the *Convention on the Rights of Persons with Disabilities* (CRPD) as integral to its core aim of 'safeguarding human rights', stating:<sup>44</sup>

*The FDS ensures all policies and practices adhere to the principles and obligations of the convention. Of particular importance are the obligations that protect people from violence and abuse, respect their privacy and respect their right to education, health, rehabilitation, and an adequate standard of living.*

There are a number of legislative and policy safeguards designed to protect the human rights and freedoms of persons detained within the FDS Unit. The stated guiding principles for the FDS are as follows:

- safeguarding human rights
- a person-centred approach
- evidence-based programs and support to develop life skills
- evidence-based programs to address offending behaviours
- building and maintaining family, natural and community support networks
- a well-planned and positive approach to risk
- multidisciplinary team model and collaboration across agencies
- high quality services, continuous improvement and continuous learning.

However, these principles are not effectively translated into practice. In the experience of at least one of the residents with whom QAI has been involved, the antithesis of these guiding principles has been the reality. Since admission to the FDS Unit, the person-centred approach has not been followed and the resident has been expected to perform tasks or meet certain standards of behaviour, even though it was apparent to FDS staff that this was not possible. As a result, the care provided to this person was considered punitive by the resident and family members.

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<sup>41</sup> Australian signed the UNCAT on 10 December 1985 and ratified it on 8 August 1989. Australia is yet to sign or ratify the Optional Protocol to the UNCAT.

<sup>42</sup> The UDHR (1948), along with International Covenant on Civil and Political Rights (1966), its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (1966), forms the International Bill of Human Rights.

<sup>43</sup> Australia signed the CRPD on 30 March 2007 and ratified it on 17 July 2008.

<sup>44</sup> Department of Communities, *Forensic Disability Service: Service Model*, 22.

## **The Convention on the Rights of Persons with Disabilities**

The general principles stated in the *Convention on the Rights of Persons with Disabilities*<sup>45</sup> include respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; and full and effective participation and inclusion in society.<sup>46</sup> The reality of detention in the FDS is not consistent with these general principles.

Article 12 of the CRPD requires that persons with disabilities are given equal recognition before the law. Safeguards that are prescribed to support the exercise of legal capacity and to prevent abuse include ensuring that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The indefinite detention of persons with an intellectual or cognitive impairment contravenes Article 12.

Article 13 of the CRPD seeks to facilitate equal access to justice for persons to disabilities. That a person with an intellectual or cognitive disability can be charged with an indictable offence yet not provided with the opportunity to answer this charge arguably does not amount to any access to justice and certainly falls short of equality of access. The failure to provide persons charged with an indictable offence with the opportunity to defend themselves against the charge also contravenes the right to equal integrity of person protected by Article 17 of the CRPD.

Further, the detention of individuals with intellectual disabilities purely on the basis that they may pose a risk to others raises substantial human rights concerns.<sup>47</sup> Article 14 of the CRPD 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.*

Article 14 also states that where persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to be treated in compliance with the objectives and principles of the CRPD, including by provision of reasonable accommodation. Article 19 of the CRPD, which covers the right to community living, is also relevant here, as by this provision persons with disability are to be accorded the equal right to live, participate and be included in the community, with choices equal to others regarding their place of residence and living arrangements.

Laws, policy and practices that involuntarily detain people with intellectual or cognitive disability limit their rights to liberty and security and equal recognition before the law. The involuntary detention of persons with an intellectual or cognitive disability 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.

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<sup>45</sup> 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).

<sup>46</sup> Article 3 of the *Convention on the Rights of Persons with Disabilities*.

<sup>47</sup> B McSherry. 2012. *The Involuntary Detention of People with Intellectual Disabilities*. Right Now: Human Rights in Australia.

Article 15 of the CRPD provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, with Article 16 prohibiting exploitation, violence and abuse against persons with disability. These Articles align with the United Nations' *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which prohibits such conduct against persons with disability.

Article 26 affirms the right to comprehensive habilitation and rehabilitation services, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.

Other provisions of the CRPD which are directly relevant include Article 22, which affirms respect for privacy (which is not available to persons incarcerated within the FDS), Article 25, which establishes the right to health and the non-discriminatory provision of services and Article 28, which requires that persons with disability be provided with access to an adequate standard of living and social protection.

The implementation of the CRPD is monitored by the United Nations Committee on the Rights of Persons with Disabilities. 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>48</sup> Responding to a similar scenario in Spain, the Committee stated 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>49</sup>

### **How to remedy human rights breaches**

There are many issues that must be addressed. Funding is a critical issue, which impacts on access to services (this is a particularly important issue in rural and regional areas, where availability of therapeutic services can be an issue). However, the issue of funding and resourcing is complex, as the establishment and operation of the FDS Unit was and is resource-intensive – this creates an obvious expectation that it will be fully utilised, in terms of maintaining maximum occupancy. This goal is obviously at odds with the goal of habilitating and transitioning people out of the FDS Unit and back into the community and may act as a disincentive for the Director – Forensic Disability (and also the Government) to seek to move people out of the Unit. Another relevant factor is that the heavy emphasis on minimising risk to the community means that resource-intensive safeguards are put in place to monitor and escort FDS 'clients' during periods of LCT, etc. For example, if a person is deemed to be 'oppositional defiant', it may be determined that they require as many as four FDS support staff to escort them to any activities, including routine medical appointments, to ensure community safety. The labelling of a person in this way is attributable to a fracture in the relationship between that person, their support staff and FDS personnel rather than an explicit risk to the public. However, the resulting imposition of conditions both erodes the beneficial effects of any period of absence from the FDS Unit (it is difficult to perceive that you are

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<sup>48</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>49</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/>.

exercising choice, liberty and autonomy when you are buffered by FDS personnel to this extent) and increases the cost, thus minimising the occurrence.

However, until we can address the inconsistency between core features of the FDS system and baseline human rights, progress in this area will be difficult, if not impossible, to achieve.

### ***The Convention Against Torture and other Cruel, Inhuman and Degrading Treatment***

The European Court of Human Rights (ECHR) has held 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. Australia is not a signatory to the European Convention Against Torture but is party 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>50</sup> Queensland needs a similar charter of rights so that concerned parties can call government to account for lapses such as these.

The International Bill of Rights, which is made up of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) (and two Optional Protocols) all provide protection for the rights of persons with disabilities to participate in an ordinary and inclusive life.

The Convention on the Rights of the Child protects all persons under 18 years of age from human rights breaches including the right not to be separated from their families (Article 9), the right to privacy (Article 16), to protection from violence, abuse and neglect (Article 19), to an education (Article 28) and leisure (Article 31), to be protected from activities that could harm their development (Article 36) and to not be treated cruelly if they break the law (Article 37). Article 37 expressly demands that children who break the law should not be put in prison with adults. The imprisonment of 17 year olds in Queensland is in breach of these human rights guaranteed in this convention.

QAI considers that the indefinite detention of persons within the Forensic Disability Service Unit:

6. contravenes our commitments under international humanitarian law, including under the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (UN CAT)
7. contravenes the requirements of natural justice
8. is not carried out in a way that is consistent with the spirit and intent of the relevant Queensland legislation

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<sup>50</sup> 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.

9. violates the human rights and dignities of the persons subjected to incarceration within the FDS
10. further marginalises and disempowers already highly vulnerable persons in our society.

QAI considers that the imposition of Forensic Orders (Disability) that are not time limited has many detrimental effects and is not consistent with our international obligations, whilst offering scant habilitative benefits. The imposition of an indefinite, restrictive order denies certainty for the future, is inconsistent with habilitation and keeps people enmeshed in the system beyond the point at which it is appropriate or beneficial.

As noted above, the FDS was not intended to operate on a retributive mandate, but as a transitional, rehabilitative program. Persons under a Forensic Order have been *charged* with an indictable offence but this charge has never been tested in a court of law and therefore whether in fact the offence was committed at all, and if so by the relevant person, has not been proven to the requisite standard (which is the criminal standard of proof – ‘beyond reasonable doubt’). Further, a person cannot be found criminally responsible for an offence committed while the person was of ‘unsound mind’. This means that even if the person did commit the offence, they cannot be held criminally culpable for it if their intellectual or cognitive impairment impairs their capacity to the requisite extent. From this viewpoint, indefinite restrictive orders and/or incarceration of persons with an intellectual or cognitive impairment within the FDS entails multiple breaches of their human rights.

### **The capacity of various Commonwealth, state and territory systems, including assessment and early intervention, appropriate accommodation, treatment evaluation, training and personnel and specialist support and programs**

#### **Summary and key recommendations:**

- There are insufficient specialist support programs that assist vulnerable persons with an intellectual, cognitive or psychiatric disability.
- QAI recommends the development, strengthening and expansion of further programs, such as the Independent Third Person program, the Justice Support Program, the Court Integrated Services Program, the Enforcement Review Program and the Mental Health Advocacy Service. These initiatives need to be rolled out on a national basis and available to all that need them.

Given the extent of the overrepresentation of persons with an intellectual, cognitive or psychiatric impairment within the criminal justice system and the significant disadvantages confronting these highly vulnerable people, there are not nearly enough programs designed to minimise the disadvantage.

The ‘Independent Third Person’ program, which operates in jurisdictions including Victoria, provides much needed support to persons with intellectual, cognitive or psychiatric impairment who come in contact with the criminal justice system, by giving them support to understand their rights and the proceedings in which they are involved and communicate



relevant information. It can be an important safeguard that can protect against the making of a guilty plea in circumstances where the person was not guilty.

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 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. Apart from QCR the Queensland's lower courts have few options.

The Justice Support Program run by QAI supports vulnerable people with disability by providing:

- 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.

This is a valuable service that is presently underfunded – increased funding would increase QAI's capacity to provide support to more of those requiring assistance in this area.

The Mental Health Legal Service run by QAI is a specialist legal service dedicated to providing free and independent information, advice, referrals and representation in relation to mental health law in Queensland.

There are some good initiatives being run in other states that could be rolled out on a national basis, including:

- Court Integrated Services Program, developed by the Magistrates Court of Victoria, which provides a co-ordinated, team-based approach to the assessment and treatment of defendants. 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. This program takes an individual approach to case management with the goal of reducing the likelihood of recidivism.
- Enforcement Review Program, also an initiative of the Magistrates Court of Victoria, 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.
- Mental Health Advocacy Service, a specialist service provided Legal Aid NSW that provides free legal information, advice and assistance about mental health law.

## **The interface between disability services, support systems, the courts and corrections systems, in relation to the management of cognitive and psychiatric impairment**

### **Summary and key recommendations:**

- QAI submits that Australia urgently needs, and is presently lacking, an adequate comprehensive regime for responding to the needs of people with intellectual, cognitive or psychiatric disabilities who have forensic or related issues.

As a starting point, we note that the notion, developed in this term of reference, that the disability services, support systems, the courts and corrections systems collectively ‘manage’ impairment is in itself problematic. Surely the purpose of systems is to support and respond to the needs of people, and to do this in a timely and appropriate manner?

QAI submits that Australia urgently needs, and is presently lacking, an adequate comprehensive regime for responding to the needs of people with intellectual, cognitive or psychiatric disabilities who have forensic or related issues.

The measures that presently exist in this area are patchy, incomplete and at times contradictory. The interface between the different systems is marred by gaps in consistency and relevant knowledge and this comes at a high cost to those with needs in this area.

The tendency for some service providers to overstate a person’s support needs, risk of harm to others, and/or self-harm in order to attain higher funding packages has led to people being wrongfully subjected to the use of Restrictive Practices, which had further exacerbated the impact of the person’s disability support needs due to trauma and duress. In several instances that QAI is aware of, this occurred while the level and quality of actual support and care provided to individuals was poor and often inappropriate. It is highly likely that the failure of some disability support services have contributed to, if not directly resulted in, the offending behaviour of people who have thus been incarcerated in one or many subsequent institutions indefinitely. The systems of government departments, guardianship, tribunals and courts with a deeply ingrained tradition of over-riding the rights, autonomy and integrity of people with disability have to accept and redress their own culpability in the status of people who are indefinitely detained or warehoused.

## **Access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants**

### **Summary and key recommendations:**

- Access to justice for people with intellectual, cognitive or psychiatric impairment in Australia is presently only illusory.
- QAI recommends that the *Evidence Act 1977* (Qld) and the *Criminal Code 1889* (Qld) should be amended to increase the protection available to vulnerable persons, including persons with an intellectual, cognitive or psychiatric disability, including by:

- increasing their entitlement to support at all stages of the criminal justice process;
  - expanding the scope of recognised ways of responding to police questioning and giving evidence.
- QAI also recommends that all police officers and court staff should be trained to understand and respond to the needs of persons with an intellectual, cognitive or psychiatric impairment.

QAI submits that access to justice for people with intellectual, cognitive or psychiatric impairment in Australia is presently only illusory. There is a complete lack of any real access to justice, and this translates into significant human rights abuses for these already disempowered people in our society.

People with an intellectual, cognitive or psychiatric impairment are vulnerable and often require support and assistance to understand, make and communicate their decisions. The availability of appropriate support can be the difference between empowerment and disempowerment for many. Empowerment is vital within an environment that, by the express terms of the current legislation and policies, creates many hurdles to justice. This is particularly concerning given that advocacy in Australia for people with disability, particularly systems advocacy, is presently under threat.

A primary human rights concern with respect to Forensic Orders (Disability) is that the persons under the orders are often unrepresented at the reviews of the orders by the Mental Health Review Tribunal. While the FDA does make provision for an 'allied person' to 'assist the client to represent the client's views, wishes and interests relating to his or her assessment, detention, care and support and protection',<sup>51</sup> the role of the allied person is often ineffective in the face of the powerfully resourced department. Further, there is no assumption that the allied person has legal training or adequate understanding of the processes pertaining to the making of Forensic Orders (Disability) and their reviews.

The lack of legal representation of many people with disability is directly counter to the recommendations of the CRPD, which places a strong emphasis on the importance of representation and advocacy for persons with disability. Article 12 of the CRPD demands that persons with disability be provided with the support they may require to exercise their legal capacity, while Article 13 requires that they be given effective and equal access to justice. The right to legal representation is critical, and therefore it is highly concerning that it is not translated from the CRPD into Australian law, policy or practice. It is also discriminatory, as it is less favourable treatment on the basis of impairment, when compared with the right to legal aid provided to those without disability facing potential incarceration or like orders.

While the right to legal representation is important for all persons, and particularly important for all vulnerable and disempowered persons, it is perhaps never more critical than in the context of the making and review of Forensic Orders (Disability). The unique features of these orders, including their displacement of the normative presumption of innocence with what effectively amounts to an assumption of guilt and the very real prospect of indefinite

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<sup>51</sup> FDA s 25 & 26; Jeffrey Chan, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.

detention, designates forensic disability as an area that should attract skilled legal representation as a matter of right.

In the context of reviews of Forensic Orders (Disability), legal representation and effective advocacy is critical to support persons under these orders to have a voice in a process in which they are otherwise completely disempowered. The Tribunal reviews of Forensic Orders (Disability) are intended to function as a 'critical safeguard' in the involuntary care processes,<sup>52</sup> yet in the absence of adequate representation, are reduced to purely bureaucratic processes that fail to heed the needs of the persons they are designed to support and care for.

Even presuming the adequacy of advocacy support, many features of the criminal justice system are presently unjust and inequitable for people with an intellectual, cognitive or psychiatric disability. The criminal justice system, which has many limitations for people without disability, treats people with disability in a disproportionately harsh and inequitable way, where this system should specifically include features for their protection.

The criminal justice system is not designed to properly respond to people with intellectual, cognitive or psychiatric impairment or their support needs, notwithstanding their significant overrepresentation. A number of factors, including police procedures and the rules and requirements of court proceedings, actively disadvantage these already disadvantaged persons.

The way in which the criminal justice system responds to the needs of people with disability is highly relevant, as the initial interaction with the criminal justice system often progresses into incarceration, often indefinitely, within a prison, the FDS Unit or an AHMS. QAI holds particular concerns with respect to the following issues:

- The lack of appropriate training of police aimed at identifying and understanding intellectual, cognitive and psychiatric impairment and responding appropriately. This includes ensuring that relevant entitlements are actioned (such as the right to a support person) and also understanding the differing responses (for example, that avoiding eye contact should not be presumed to be indicative of guilt where the person has an intellectual impairment or mental illness). In 1990, the Queensland Police Force was officially renamed the Queensland Police Service and the old motto of 'Firmness with Courtesy' was changed to 'With Honour We Serve'. Yet the Police Service in the past few years have become more removed from community connectedness, bear an abundance of tools and weapons, and by mere presence impose a threat to many ordinary citizens.
- The QPS needs a complete cultural shift and that police induction and training begin with support and connection to the vulnerable people in community first and foremost. Police officers who have been trained to respond to threat, yet have no real skills or opportunities in community development/connections, may experience deep suspicion and or fear every day. This may be exacerbated by any training that perpetuates myths about people with mental illness or disability, which can result in tragedy, bullying of individuals and maybe even unlawful conduct.
- The formality of court proceedings, with its emphasis on direct questioning, oral testimony and leading questions in cross-examination can disadvantage persons with

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<sup>52</sup> *Mental Health Act 2000 (Qld) Resource Guide*. 2014. 'Chapter 7 – Forensic Order and Disability Forensic Order', 7-18.

disability, who may lack comprehension skills and oral communication skills and may be susceptible to suggestion.

- The inconsistency of provisions relating to fitness, or capacity, to stand trial or be found guilty of an offence. In Queensland, fitness can only become an issue when a person is charged with an indictable offence. For simple offences, which comprise the significant majority of offences, there is no scope to argue that the person did not have capacity to understand what he/she was doing and/or that it was contrary to law. For many people with intellectual or cognitive disability, the culmination of many simple or minor offences can result in significant implications (such as imprisonment due to failure to pay compounding parking fines or for public nuisance offences).

QAI acknowledges that there are some safeguards in the *Criminal Code 1889* (Qld) and the *Evidence Act 1977* (Qld) designed to protect vulnerable witnesses. For example, we note the entitlement for a support person and a witness intermediary in certain situations. However, in practice, this is mainly utilised for witnesses who are victims of crime. Further, these safeguards are underutilised and inadequate – the grossly disproportionate rates of imprisonment and incarceration of persons with disability is indicative of their failure.

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.

In Queensland, the Mental Health Court is responsible for determining issues relating to the capacity of persons charged with an indictable offence. As noted above, the majority of offences are simple or minor in nature and are dealt with in Magistrates Courts, where Magistrates lack power to make any findings regarding the capacity of an accused person, even in circumstances where capacity is clearly a relevant issue. With the introduction of the new *Mental Health Act 2016* (Qld) later this year, there will be improvement in this area insofar as the scope of powers of Magistrates when determining matters involving a person who appears to have been of ‘unsound mind’ at the time of an offence or who is deemed unfit for trial, and QAI welcomes this progress. Magistrates will be empowered to dismiss matters, to refer the person to an AMHS or the MHC or for community-based rehabilitation or education and will be supported by a revised Court Liaison Service within Queensland Health. The practical effect of the reform is yet to be seen (at the time of the drafting of this submission, the *Mental Health Act 2016* (Qld) has been passed by is yet to be proclaimed). QAI submits that the impact of this reform, including its various impact on persons with an intellectual, cognitive or psychiatric impairment, will depend to a large extent on the available funding, and the quality of implementation.

In South Australia, Magistrates do have this type of power – they can discharge an alleged offender where the offence is summary, the charge is connected with the defendant’s

decision-making capacity and it is considered that a sentence would have no punitive or rehabilitative value.<sup>53</sup> This initiative should be replicated on a national basis.

## **The role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system**

### **Summary and key recommendations:**

- QAI recommends that diversion should always be preferred to incarceration for people with capacity impairments, subject to ensuring the safety of the person and the community.
- QAI supports the development of 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.
- The Queensland Government must explore problem-solving court models and that the Department of Justice provides targeted funding for trialling such courts.
- The Attorney-General should task the Queensland Law Reform Commission to make recommendations on a framework for problem-solving courts which outlines:
  - practices and procedures
  - sentencing options
  - a commitment to therapeutic jurisprudence.
- Diversion programs should be strengthened and streamlined, through the development of a national framework of diversionary protocols and initiatives.
- Funding is critical. QAI recommends that the Queensland Government be compelled to adequately fund the programs to which the person is ordered to undertake.

In 2000, the 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 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 establishment of diversionary programs was driven by both humanitarian and financial concerns. Those in favour of diversion argue that:

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<sup>53</sup> Section 15 of the *Criminal Law (Sentencing) Act 1988* (SA).

- 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;
- 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.

The provisions for diversion under the *Mental Health Act 2000* (Qld) allow a person charged with an indictable offence to be diverted from the criminal justice system to the Mental Health Court (MHC), with the MHC able to make orders including diversion to non-custodial, community-based treatment and detention for involuntary treatment and/or care.<sup>54</sup>

Researchers have examined a range of court-based mental health diversion programs. creating a 'best practice guide' which has the following elements:

- 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 to this list:

- 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.

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<sup>54</sup> Department of Communities, *Forensic Disability Service: Service Model*, 4.

- Government must provide practical supports that allow the program to be effective. For example, well-funded day programs to support court orders are crucial, giving judges and magistrates the confidence they need to grant diversionary orders.<sup>55</sup>

Funding is critical. QAI recommends that the Queensland Government be compelled to adequately fund the programs to which the person is ordered to undertake.

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.

#### **Case study: 'Robert's' story**

Robert has an intellectual disability. He stole a chicken from a local butcher and took the chicken to his local pub, asking the publican to cook it, but the publican told him to leave.

Robert then walked to the school that he had once attended and there he ate the chicken raw. A teacher called the Toombul police and Robert 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.

This illustrates the limited options available under the law, due to the lack of diversionary options for simple offences, in circumstances where the law does not provide for the determination of capacity in relation to minor offences.

While there are some good diversionary initiatives operating in Australia, there is significant inconsistency between different Australian states and territories.

The trial of the 'Special Circumstances Court' from 2006-2012 in Queensland, which 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, showed promise. However, it was defunded and there is presently no similar alternative in Queensland 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.

An evaluation of the Special Circumstances Court conducted by the Australian Institute of Criminology (AIC) from 2010-2012, which involved a detailed analysis of the operation of the program to identify aspects that were working well and where improvements could be made, found that the SCC had been important mechanism for engaging a hard to reach client group and delivered important outcomes for offenders with a mental illness or intellectual disability

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<sup>55</sup> Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. May 2015, p 101.



and/or who were homeless and for the criminal justice system more broadly.<sup>56</sup> The review also noted positive outcomes in terms of improved health and wellbeing of participants, securing accommodation, helping defendants address their problematic drug use and dependency issues, and helping to address the mental health problems (and health more broadly) of participants and reduced recidivism.<sup>57</sup>

Similarly, the Homeless Persons Court Diversion Program – a two-year pilot program which operated in Brisbane – 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 was subsequently evaluated highly.<sup>58</sup>

Happily the Queensland Government announced on 14 July 2015 its intention to carry out an election promise and reinstate specialist courts such the Murri Court, Drug Court and the Special Circumstances Court Diversion Program. Consultation on this issue is currently underway.<sup>59</sup>

The diversionary process in New South Wales, whereby Magistrates can divert offenders charged with a summary or minor indictable offence with an intellectual or psychiatric impairment from the criminal justice system into community treatment<sup>60</sup> has some benefits, although is reported not to have solved the problem of overrepresentation.

The South Australian Magistrates' Court Diversion Program (MCDP), which has been in operation since 1999 and was Australia's first specialised court for people with a mental impairment, is reported to have 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>61</sup> and has resulted in reduced recidivism, with broader outcomes anticipated but yet to be seen. However, the program is presently only operating in select regional courts.

Tasmania's Mental Health Diversion List, Western Australia's Mental Health Diversion Program, Western Australia's Intellectual Disability Diversion Program and Victoria's Criminal Justice Diversion Program have all received positive feedback. A consistent and comprehensive national framework would build upon these separate initiatives.

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<sup>56</sup> Queensland Government. Discussion Paper: *Reinstatement of the Special Circumstances Court Diversion Program*. November 2015.

<sup>57</sup> Queensland Government. Discussion Paper: *Reinstatement of the Special Circumstances Court Diversion Program*. November 2015.

<sup>58</sup> Queensland Government. Discussion Paper: *Reinstatement of the Special Circumstances Court Diversion Program*. November 2015.

<sup>59</sup> See: <https://www.qcoss.org.au/reinstatement-special-circumstances-court-diversion-program>.

<sup>60</sup> Sections 32 and 33 of *Mental Health (Forensic Provisions) Act 1990* (NSW).

<sup>61</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.

## The availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment

### Summary and key recommendations:

- Persons with an intellectual, cognitive or psychiatric impairment are particularly vulnerable to becoming indefinitely detained within the criminal justice system.
- Some of the hurdles to release include:
  - lack of support
  - lack of appropriate accommodation
  - lack of therapeutic and educative programs that equip people to release.
- Adequate therapeutic and rehabilitative programs are vital to help people to maintain and develop their capacity and to successfully reintegrate into the community following a period of incarceration.
- QAI strongly opposes the proposed cessation of payment of the Disability Support Pension (DSP) to persons incarcerated or confined in a psychiatric institution. Having access to financial resources is a necessary pre-condition to exiting the criminal justice system and to deny the DSP to people who require DSP funds to participate in habilitation and education is unjust and will compound the issues of incarceration and inhibit rehabilitation.

In 2006, one of the urgent recommendations of the Carter Report was for the planned development of a range of accommodation options which respond to the need for secure care, transitional accommodation arrangements and community living.<sup>62</sup> A decade later, we are yet to see these reforms translated in a way that provides an authentic rehabilitative environment. Rather, we have essentially seen a continuation of the same. The entire Wacol precinct, including The Park, the TEAS, the old Basil Stafford Institution, the FDS and the duplexes, cumulatively amount to a deliberately created ghetto of disability and mental health outcasts. Despite the years of abuse, neglect and horror inflicted upon people at the Wolston Park Hospital (Wolston Park Asylum) and Basil Stafford, which should have been a trigger for a complete change in our response, our continuing detention, incarceration and institutionalisation of people with disability, our continuing use of Restrictive Practices and our continuing discriminatory treatment all clearly point to the deep seated devaluation of people with disabilities that has not yet been eliminated from our culture and society, particularly in the mindsets of our law and policy makers. Despite the advent of the NDIS, the employment of these practices and laws on a selection of the population of people with disability is a sure sign that our prejudices are still only thinly veiled.

### Indefinite imprisonment and detention

As noted above, prisoners with an intellectual, cognitive or psychiatric impairment face many hurdles seeking parole.

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<sup>62</sup> Department of Communities, *Forensic Disability Service: Service Model*, 3-4.

Another significant problem is recidivism – these people, already overrepresented within the criminal justice system, are highly susceptible to reoffending and reincarceration following release.

The key reasons for this relate to the lack of supports many have. It is vital that funding is invested in holistically addressing the multiple disadvantages faced by many people with intellectual or cognitive impairment. Significant issues in this regard include housing and employment. The link between unemployment and offending is well known. It can be more difficult for people with disability to obtain and maintain appropriate employment so there is a need to invest in support in this regard. Appropriate housing that does not congregate or segregate people from desirable role models and community connections is also a key safeguard against becoming re-enmeshed within the criminal justice system. Some people may need intentional assistance in developing appropriate relationships to support and reinforce the lessons from their community-based education and rehabilitation programs. Addressing health issues, including drug dependency, is also vital.

### **The importance of ongoing support**

Support post-release is vital. Post-prison support has been identified as a key ingredient in preventing recidivism. This is particularly true for vulnerable persons, such as those with an intellectual, cognitive or psychiatric impairment. As Morrie O'Connor stated:<sup>63</sup>

*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.*

In researching *dis-Abled Justice*, QAI spoke with a broad range of people about the problems with the system. When asked about the most pressing post-sentencing gaps, respondents identified the following 'urgent' service needs:

- Psychiatric services for people with intellectual disability
- Therapeutic options for people with substance use disorders
- Indigenous clinicians
- Culturally competent clinicians
- Services to assist with transition to the community.

Following release from prison, identified 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

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<sup>63</sup> 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.

- 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.

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.

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, may 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 approximately \$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, the costs of which would be recovered by a reduction in recidivism and a consequent reduction in expenditure.

A person's socio-economic circumstances after release are more indicative of reoffending than the prison term itself. During the research QAI undertook for *dis-Abled Justice: Reforms to Justice for Persons with Disability in Queensland*, we found that several 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. This is particularly problematic given that incarceration erodes skills and capacity for persons with intellectual disability.

The Federal Government has recently proposed amending the *Social Security Act* to, among other things, cease payment of the Disability Support Pension (DSP) to persons incarcerated or confined in a psychiatric institution under state or territory law due to serious criminal charges because they were considered unfit to stand trial or were not convicted due to mental impairment.<sup>64</sup> If passed, this amendment will have a significant adverse impact on persons under Forensic Orders (Disability) incarcerated in psychiatric institutions (notwithstanding that they do not suffer from a mental health condition). People with an intellectual or cognitive disability can be subject to mental impairment legislation and, since 2013, have been formally identified in Social Security Regulations pertaining to people with psychiatric disabilities under the same regime. QAI considers that the cessation of the DSP is a punitive measure that is inappropriate in light of the lack of trial or conviction of FDS 'clients'. It also has grave consequences for already marginalised and vulnerable persons that disproportionately experiences poverty and social exclusion, adversely impacting their ability to ultimately reintegrate into the community following their detention by leaving them without any funding to obtain or maintain appropriate housing, therapeutic and disability support options. DSP funds are utilised in conjunction with therapeutic and educational programs aimed at supporting the learning, development and rehabilitation of persons with an intellectual or cognitive disability. Therefore, cutting off the DSP effectively stymies rehabilitation. It is a

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<sup>64</sup> Mid-Year Economic and Fiscal Outlook 2014-15 DECEMBER 2014 Statement by The Honourable J. B. Hockey MP Treasurer of the Commonwealth of Australia and Senator the Honourable Mathias Cormann Minister for Finance of the Commonwealth of Australia For the information of honourable members, p 193.

harsh measure that also penalises any family members, who may depend on some of the DSP funds.

## **Accessibility and efficacy of treatment for people who are a risk of harm to others**

### **Summary and key recommendations:**

- The laws and policies emphasise the importance of therapeutic rehabilitation within the community, and maintaining community ties.
- In practice there is a lack of appropriate therapeutic options for persons with an intellectual, cognitive or psychiatric disability.

In theory, persons incarcerated within the FDS are given appropriate therapeutic rehabilitation. The FDA recognises the need for persons within the FDS to have access to individualised, therapeutic rehabilitation. This is meant to be done through individualised development plans and what is termed Limited Community Treatment (LCT), which enables the person to go into the community for a period of time (which can range from a brief period during the day to a number of days or longer). QAI reiterates that the term Limited Community 'Treatment' is an inappropriate and confusing term, which reinforces the conflation of people with mental illness and their related 'treatments' with people who have an intellectual or cognitive impairment and the care, support and educational programs that are more suitably designed for their habilitation/rehabilitation. However as this is the language that is referred to in the legislation we shall refer to it as such to avoid confusion.

LCT is aimed at helping people to learn skills in the actual environment in which they'll use them, helping supportive relationships and community connections to be maintained and fostering the person's development of their potential and their physical, mental, social and vocational ability.

Access to LCT is the *only* means by which an FDS client is able to access community 'treatment' and rehabilitation. The entitlement to LCT is therefore critical from a therapeutic perspective. However, while the right to LCT is based on the principle that persons on Forensic Orders (Disability) have the same human rights as other people, this principle rarely translates into practice as again the calculus of LCT falls on risk in a highly risk-adverse culture, where a person's right to LCT is balanced with the management of community safety. Is it unsurprising then that persons within the FDS rarely leave the Unit? In reality, there are very limited therapeutic opportunities for persons detained in the FDS Unit.

Granting or revoking LCT by personnel at the FDS is often seen by the residents as a reward/punishment mechanism. QAI maintains that LCT as the main tool for rehabilitation and transition to the community is a human right that should be routinely adhered to without fault or favour. This will in some small way reduce the power imbalance, and also resolve issues where some 'inmates' refuse to access LCT in an attempt to regain some of that power.

## **The use and regulation of restrictive practices and their impact on individuals with cognitive and psychiatric impairment**

### **Summary and key recommendations:**

- QAI demands the unequivocal and unqualified prohibition on the use of Restrictive

Practices on persons with disability in Australia.

- The use of RPs breach the human rights and dignities of people. They are tantamount to assault, drugging and false imprisonment and would not be tolerated if done on people without disability.
- RPs are never a solution. Where a person exhibits behaviours of concern, the application of RPs generally escalates, rather than calms, this behaviour.
- A more humane and appropriate response is to support people to communicate where required, respect their right to exercise choice and control over their lives and to avoid medicalising and disempowering them.

The use and regulation of Restrictive Practices in Queensland for persons with an intellectual or cognitive impairment or mental illness is an issue that QAI has explored indepth. QAI holds significant concern about the application of Restrictive Practices on vulnerable people with disabilities and with the permissive legislative framework in Queensland which sanctions this application. As a starting point, QAI asserts that the focus must be on the prevention of the application of Restrictive Practices on persons with disability in any setting, whether it be by service providers operating under the *Disability Services Act 2006* (Qld) or the *Mental Health Act 2000* (Qld) (soon to be the *Mental Health Act 2016* (Qld)) or on children and youths within the educational system.

The legislation for the use of Restrictive Practices in Queensland is the most robust and longstanding in Australia, yet it has been amended several times, with each amendment imposing more constraints on individuals while creating greater ease for service providers.

QAI wishes to make the following points about the use of RPs on vulnerable persons with an intellectual, cognitive or psychiatric impairment:

1. The use of Restrictive Practices on people with an intellectual, cognitive or psychiatric impairment involves the application of abusive practices or deprivation of liberty on highly vulnerable, marginalised and disempowered people in our society.
2. Restrictive Practices are imposed upon vulnerable people by those who abuse their power and exert domination over the person.
3. A holistic approach should be taken to any consideration of the use of Restrictive Practices, situating this issue within an understanding of the many relevant issues, including the statutory framework, policies and resources impacting upon service providers, the history of treatment of the person with disability, the communicative strategies used by the person with disability and the relative power and vulnerability of those applying and subject to RPs. These factors must be considered, along with the behaviour purported to result in the application of the Restrictive Practice, as they are highly relevant to the outcome. Experience has shown that the adoption of a narrow perspective that focusses only on the behaviour at hand predominantly results in the inappropriate, disproportionately high and ineffective use of Restrictive Practices.
4. To attempt to understand a person's behaviour, we must start by understanding their life experiences, any difficulties they may face in communicating and the situations in which they may feel unsafe, threatened or disempowered. In many circumstances, behaviour can be interpreted out of context and can be incorrectly labelled as unprovoked aggression or lack of cooperation justifying seclusion, containment or mechanical or

chemical restraint (including chemical castration and sterilisation) when in fact, the use of Restrictive Practices is associated with an escalation in the manifestation of behaviours of concern, rather than a reduction.

5. QAI endorses a supported decision-making approach for people with an intellectual or cognitive disability. By this approach, the role of the supporter is to assist in scaffolding or *maintaining* the adult's capacity for longer than would otherwise be the case. This decision-making approach, by helping to develop decision-making capacity and respecting autonomous choice, decreases the incidence of communicative behaviours that may lead to the application of a Restrictive Practice.
6. QAI is firmly committed to the values of autonomy and self-determination for people with a disability and considers that, for people with an intellectual or cognitive disability, true informed consent requires that they are presented with real choices, enabled to express their views and preferences and have their autonomy and right to make decisions respected (irrespective of whether their choices may be objectively considered to be 'good' or 'bad'). It is critical that those who care for or assist people with disability take all reasonable steps to identify and understand possible catalysts for communicative behaviours, including historical and current life experiences, environmental, relationship, sensory, mental health and physical factors that may be relevant.
7. QAI acknowledges the significant value of informal supports for a person with a disability and calls for informal supporters to be accorded greater respect and status, as well as formal recognition within bureaucratic guardianship processes.
8. Statutory safeguards, such as the need for the implementation of a positive behaviour support plan and approval of the Restrictive Practice by the relevant decision-maker, have been implemented to regulate the use of Restrictive Practices on people with a disability who exhibit behaviours of concern. However, the legislation focuses on procedural, rather than substantive, safeguards and fails to examine issues of power and inadequate supports or provide tangible protection.
9. The anti-discrimination legislative framework also offers theoretical safeguards against the inappropriate use of Restrictive Practices, as the use of Restrictive Practices is potentially in contravention of the statutory prohibitions against discrimination in state, federal and international law, constituting practices and treatments that would be unlawful if done to others without the disability. While it is difficult to argue that there exist grounds that justify such adverse, differential treatment, the anti-discrimination jurisdiction has not provided an effective cause of action to date in this context, primarily as a consequence of endemic problems inherent in that jurisdiction.
10. There is a significant and concerning disparity between the theoretical position which mandates minimisation of the use of Restrictive Practices and the practice of excessive use of Restrictive Practices on people with a disability who exhibit behaviours of concern.
11. Mindsets and preconceptions about people with a disability and their behaviour have a significant impact on their treatment. This is an issue that is relevant to the entire trajectory, from the initial interaction between a person with a disability and a service provider to the application of a Restrictive Practice. A change in mindset is required to deconstruct not only the relevant legislative scheme, but just as importantly the mindsets of the service provision system.

#### **Case studies:**

##### ***Case Study 1 – Tina, a 23 year old female***

Tina was being supported by a service provider who regularly sought to increase the range of

Restrictive Practices they could use around Tina. As a baseline, Tina was contained (physically prevented – such as by locked doors and gates – from freely exiting the premises where she received disability services) for 16 hours per day and secluded (physically confined, alone, in circumstances where she was not free to leave) for eight hours overnight. During the day she would also be placed in seclusion or have behaviour controlling medication applied in order to control her behaviour.

Tina's behaviour arose because neither she nor her family were listened to. Tina was bored, had little meaningful activity in her life and had been isolated from the community in which she lived. The service provider showed little interest in addressing these issues when they were raised by the family. Instead, they attempted to restrict Tina's access to her family and on several occasions applied to QCAT to have the public guardian appointed, as opposed to the family member. The service provider refused to acknowledge that Tina's behaviour was a form of communication (expressing dissatisfaction) and labelled Tina as difficult and prone to 'challenging behaviours'.

Tina really wanted to move to her own place and be closer to her family. The service provider discouraged this dream. Rather, they made application to QCAT submitting that Tina could never live on her own, was unsafe to be in the community and needed high level use of Restrictive Practices. The service secured from the Department a very large funding package to enable the resource-intensive requirements of such frequent and ongoing use of RPs. The family continued their strong advocacy for Tina and contacted QAI for assistance.

Eventually Tina was moved into her own residence, closer to her family and to a service provider who never used any form of Restrictive Practices. Tina now has a part-time job and has become part of her local community. The 'challenging behaviours' have drastically reduced, as has the level of funding required to provide her support, now only about one quarter of that previously required.

### ***Case Study 2 – Frances, a 22 year old female***

Frances was living in the community, however due to inadequate funding and inappropriate supports Frances' needs were unmet. As a result she started to display behaviours which were seen by the service provider as challenging, so much so that they withdrew from providing support. A decision was made by Disability Services to place Frances in a secure facility, contrary to the appointed guardian's requests. This meant that Frances was contained 24 hours per day, seven days a week.

Subsequent to the move all activities that Frances had previously enjoyed were ceased, as was her personal mobility and freedom. Due to boredom and an inability to move around freely, Frances began to self-harm and strike out at staff. Additional Restrictive Practices such as seclusion and chemical restraint were applied yet, unfortunately, positive strategies were not as rigorously applied. Frances began to spend large amounts of time in seclusion.

It was 18 months before activities pleasurable to Frances were re-introduced into her daily routine. This was only achieved through the strong advocacy of her family and QAI's involvement. Some 12 months later Frances remains at this facility and continues to have Restrictive Practices applied, albeit the frequency of use is decreasing.



The question to be pondered is: would any of this have occurred if appropriate funding and supports were available to Frances in the first instance?

**Case study 3 – Michael, a 50 year old male**

Michael was living happily with his sister in a Department of Housing house. However due to a bureaucratic policy around department of housing tenancies a third person was moved in with them. This occurred without discussion or consultation with either Michael or his sister.

The co-tenant became abusive to Michael's sister. This naturally resulted in Michael becoming protective of her and beginning to hit out at the co-tenant. Eventually Michael became subject to Restrictive Practices, in particular physical restraint. Michael's 'behaviour' was not explored and he was labelled an aggressor. By placing this label on Michael, no additional support was provided to prevent the escalation, nor was any consideration given to removal of the co-tenant. Rather, there was a reliance on using Restrictive Practices to manage the situation.

Michael's advocate contacted QAI for assistance when the service provider requested ongoing approval to use Restrictive Practices. The Restrictive Practice order was revoked and additional supports were placed in the house to manage the situation. However, the co-tenant remains and the situation remains conflictual.

## **The impact of the introduction and application of the National Disability Insurance Scheme, including the ability of individuals with cognitive and psychiatric impairment to receive support under the National Disability Insurance Scheme while in detention**

**Summary and key recommendations:**

- The introduction of the NDIS offers an opportunity to provide specialist disability supports for people with impaired decision-making capacity in detention.
- The NDIS cannot ignore the significantly vulnerable people with intellectual, cognitive or psychiatric impairment who are in detention, but should embrace and work with these people so that they have a pathway out of the system.

In 2013, the Council of Australian Governments agreed up the following principles to determine the responsibilities of the NDIS and other service systems:<sup>65</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) [..].

<sup>65</sup> COAG, 2013. Available at: <<http://www.coag.gov.au/sites/default/files/NDIS-Principles-Determine-Responsibilities-NDIS-Other-Service-Systems.docx>>.

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:
  - 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.
7. 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 [...].

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 Insurance Scheme is an opportunity to abandon that approach and begin to provide specialist disability supports for people with impaired decision-making capacity.

It has been noted that the conflation of intellectual disability and mental health may be further complicated with the transition to the NDIS from July 2016, as the Queensland Government will cease to provide specialist disability services to people with disability who become funded under the NDIS.<sup>66</sup> Under the NDIS, people with disability will receive funding for their disability-related support needs. People with mental illness will also be eligible for funded supports and/or services that are not provided under the existing state funded health systems. However, this is likely to be assessed according to their primary disability support

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<sup>66</sup> Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014.

needs and therefore it is vital that careful planning ensues. Pursuant to the current NDIS agenda, which is still being refined as trials progress in preparation for the progressive roll-out of the NDIS from July 2016, persons in forensic detention will not be eligible for NDIS funded support. QAI considers that this is inappropriate and that all people should be funded by the NDIS according to their support needs without distinction.

People who have been indefinitely detained have potential for immense gains and improved quality of life if they have access to NDIS-funded supports and services, including such measures under the ILC framework as capacity building, decision support, linkages, support coordination, etc. The NDIS will fail the most vulnerable of all if it abdicates its responsibility and compounds discrimination against people who are almost without hope while remaining incarcerated without conviction.

### **The prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses**

#### **Summary and key recommendations:**

- Persons with intellectual, cognitive or psychiatric impairment from Aboriginal and Torres Strait Islander and CALD backgrounds are particularly vulnerable and disadvantaged, both in Australia generally and in prisons and detention centres, where they are significantly over-represented.
- QAI recommends the development of culturally appropriate measures designed to specifically assist people from these indigenous and/or culturally or linguistically diverse backgrounds.

Persons with an intellectual, cognitive or psychiatric impairment and Aboriginal, Torres Strait Islander or CALD heritage are a particularly vulnerable and disadvantaged group in Australia.

Many people with disability face significant challenges in communicating effectively, which may be due in part to their cultural or linguistic background, the impact of their disability, or unmet support needs which results in the manifestation of behaviours of concern. These diverse people are united by the common theme of communication. While cultural diversity can add additional communication challenges, it is important that we dismantle the mindset whereby we blame people when we do not understand their communication methods and styles. Unless we overcome our disregard for our responsibility to learn to understand different methods of communication, learn to interpret, and communicate meaningfully with these people, then we commit them to perpetuity a life of injustice, discrimination and unwittingly collude in their disenfranchisement.

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>67</sup> The remand sample was even higher - 84.4 percent compared with 70.4 percent overall.

## Conclusion

The indefinite detention of persons with an intellectual, cognitive or psychiatric impairment in Australia is a grave human rights concern. That we as a society can sanction locking up a person from an already wounded and disadvantaged group in society for an indefinite amount of time is contrary to many basic tenets of international human rights law and also challenges our national identity as a fair and humane country.

Imprisoning and detaining people with an intellectual, cognitive or psychiatric impairment in prisons, forensic and mental health service units is a costly business. It is incalculably costly from the perspective of the human rights violations and lost lives of those subjected to this. But even from a pure economic analysis, it is too costly – the government can better spend its resources than on indefinitely detaining its vulnerable. 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.<sup>68</sup>

A key barrier to improvement in the area of forensic disability is the lack of transparency endemic to forensic disability services. Since its inception, the FDS has functioned as a closed system. Sadly, it is trite to note that the marginalisation and disempowerment of vulnerable people, such as those with intellectual or cognitive impairment and forensic needs, is heightened by isolating them from the community. The decline in functional familial and social support networks and consequent lack of access to a supporter with the knowledge and ability to effectively advocate for their rights is a predictable result. These are also people who are seldom accorded sufficient attention in the popular press and therefore their plight continues largely unnoticed.

There are some developments in the area of forensic disability in other jurisdictions, both within Queensland and overseas, from which Queensland can learn.<sup>69</sup> By its establishment of the MHC, Queensland is sometimes seen as leading the way in the provision of forensic services, yet this is not predominantly the lived experiences of those with an intellectual or cognitive disability within the Queensland system.<sup>70</sup>

The introduction of the NDIS in Queensland also presents a significant opportunity to amend and redesign the forensic disability system and this opportunity should be embraced by supporters and advocates of people with an intellectual or cognitive disability.

There is much work to be done to bring the FDS up to meet the requirements stipulated by international humanitarian law and indeed, even those prescribed by Queensland legislation. In the intervening period, the human rights and dignities of the persons indefinitely subjected to forensic orders and/or incarcerated within the FDS Unit for a crime which, even if they did commit it, was so inextricably linked to their intellectual disability that the law cannot find them criminally responsible for their conduct, remain crushed.

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<sup>67</sup> Queensland Forensic Mental Health Service. 2013.

<sup>68</sup> Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*. May 2015, p 18.

<sup>69</sup> Simon Wardale. *People with intellectual impairment and forensics*. Paper given at *dis-Abled Justice: Reforms to justice for persons with disability in Queensland* forum. Brisbane, 28 May 2015.

<sup>70</sup> Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40, 52.