Disabled Justice

The barriers to justice for persons with disability in Queensland

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for
Queensland Advocacy Incorporated
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Queensland Advocacy Incorporated

About QAI

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

QAI's mission is to promote, protect and defend the fundamental needs and rights of the most vulnerable people with disability in Queensland. QAI does this by engaging in systems advocacy directed to attitudinal, law and policy change.

Queensland Advocacy Inc is part of the Australian Network of Disability Advocacy Services funded by the Australian Government.

About this report

This report is the final outcome of a qualitative research project conducted during 2006 and 2007 that examined the experience of persons with disability in the criminal justice system in Queensland.

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IF IT WAS BLIND...
JUSTICE SYSTEM
—IT WOULD KNOW WHAT WE ARE UP AGAINST....

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Foreword

Persons with disability are significantly over-represented as both victims of crime, and as suspects, defendants and offenders in the criminal justice system. Although there isn't comprehensive and reliable quantitative evidence for these propositions available for Queensland specifically, there can be no doubt that the problems evident elsewhere in Australia and internationally are at least as severe in Queensland. The qualitative evidence drawn on for this report compellingly suggests that this is the case. Indeed, the absence of evolved quantitative evidence may merely reflect a relative delay in coming to terms with this issue in Queensland, and in this respect, the problems here may be even more serious than in other jurisdictions. The limited prevalence data is therefore no reason to avoid or delay measures to address this problem. Although better information about prevalence would, of course, provide assistance in planning preventative and remedial measures, it is not required to demonstrate that there are substantial problems to be addressed.

Nevertheless, there are some risks to be avoided in relying by analogy on prevalence statistics from other jurisdictions. Most particularly, this is because this evidence tends to be concentrated on persons with intellectual impairment, and more recently, and to a lesser extent, persons with psychosocial impairment. While these population groups certainly face significant problems in the criminal justice system and ought to be priorities for action, the pre-occupation with these groups to date must not be allowed to obscure the equally serious problems facing other impairment groups, including persons who are Deaf, Deafblind, persons with severe communication impairments, and persons with acquired brain injury.

On 13 December 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities. On the 30 March 2007, the Convention opened for signature, and Australia was among the first countries to sign it, indicating an intention to ratify in due course. The convention has been negotiated in record time, and on the day it opened, it enjoyed the highest number of initial signatures of any human rights convention in history. The Convention sets a new international standard for the promotion, protection, and fulfilment of the human rights of persons with disability.

Key focus areas of the Convention are law and justice. The Convention reaffirms that persons with disability have the right to recognition everywhere as persons before the law. However, it goes further, requiring states to ensure effective *access to justice* for persons with disability. This is a new, positive, obligation on states that recognises that the traditional formal veneer of equality before the law has done little, in fact, to secure the human rights of persons with disability. Among other things, the Convention will require the provision of reasonable accommodation to persons with disability in order to facilitate

their effective participation in the justice system in whatever role they encounter it. It will also require appropriate disability-related training of personnel responsible for the administration of the justice system. Many other aspects of the Convention will also have a direct bearing upon how the justice system interacts with persons with disability, including provisions related to the general accessibility of facilities and services, the recognition of alternative communication systems, the provision of accessible information, and the participation of persons with disability in policy setting and program development.

Of course, it would be incorrect to suggest that these imperatives fall on a blank page in the Australian and Queensland contexts. Australia and Queensland have already enacted, well in advance of the Convention on the Rights of Persons with Disabilities, laws prohibiting discrimination on the ground of disability in areas that encompass most aspects of the operation of the justice system. There is also a level of genuine concern at the serious inequities in justice system outcomes for persons with disability in Queensland, and an evolving consciousness that fundamental reforms are necessary in order to address these inequities. Indeed, some major steps have already been taken towards this goal by a number of agencies. Nevertheless, these inequities persist, and current reform efforts, however meritorious and promising, are fragmented and limited in scope. The passage of the Convention provides the opportunity to enliven a broader energy and commitment to reform and to renew and redouble our current efforts so as to achieve genuine structural change.

This report contributes to both objectives. It aims, first, to comprehensively state the case for reform and to outline the various dimensions of the reforms required. In doing so we hope to consolidate and extend awareness of the issues, and so build and fortify the constituency for change. Second, the report presents a series of recommendations for reform. These recommendations are not exhaustive. They do, however, attempt to approach the issues strategically, and in a manner likely to generate sustainable, continuing positive change. We appreciate that not all of the reforms required in this area can be achieved overnight, and that their realisation will in part depend on a progressive building of systemic capacity. In particular, it will depend upon the establishment and nurturing of effective partnerships across agencies and stakeholder groups, including especially with persons with disability and their representative organisations. Nevertheless, in spite of the undoubted challenges, substantial and intelligent steps must be taken immediately. Justice demands it. In this respect, it is important to note that there are many objectives that can be achieved relatively easily, and this will assist in building a culture of success.

I commend this report to you, and look forward to working with you to promote, protect and fulfil the human rights of persons with disability in the Queensland justice system.

Kevin Cocks
Director
Queensland Advocacy Incorporated

Recommendations

This is a summary report that of necessity deals with a vast array of issues each of which could be the subject of extensive recommendations for action. While we have noted various options for action in the body of this report, we have not opted to develop and present an encyclopaedic list of recommendations. We were concerned that such an approach could have had the opposite effect to that we sought to achieve by overwhelming policy and decision-makers, leading to disengagement with the issues we have sought to agitate, and to policy inertia.

We have preferred instead to take a more strategic approach to the formulation of our recommendations. In the main, the recommendations set out below focus on structural initiatives that have the potential to stimulate and sustain an ongoing process of reform. They do not necessarily arise from the specific issues discussed in the report; instead they attempt to set down a strategic approach to dealing with these issues. This is in recognition of the fact that many of the issues we confront in this area are complex and challenging and are not susceptible to quick and simple solutions. In our view it is more important at this point in time to focus on the forest rather than the trees, ensuring our overall perspective and orientation to the issues is right. Once this has been achieved, it will be much easier to plan and prioritise the detailed reforms required.

We recommend:

1. The Directors-General of the Department of Premier and Cabinet, the Department of Justice and Attorney General, the Department of Communities (Youth Justice Services), the Department of Corrective Services and the Commissioner of Police establish, resource and personally chair a disability advisory council. These councils would have the function of advising on disability issues arising within each portfolio. These advisory councils ought to be constituted by senior executive and operational staff, and experts across a broad spectrum of disability issues. The councils ought to comprise a majority of experts with disability.

2. The Directors-General of the Queensland Department of Justice and Attorney General, the Department of Communities (in relation to youth justice services), the Department of Corrective Services and the Commissioner of Police immediately develop (or revise) disability services plans to deal with disability issues arising in their portfolios, as required by s 215 of the *Disability Services Act* 2006 (Qld). These plans ought to be developed (or revised) in light of the issues raised in this report following broad based consultation with stakeholder groups. The development and monitoring of these plans ought to be a key function of the advisory councils referred to in recommendation 1.

3. The Department of Premier and Cabinet immediately develop and implement a whole of government access to justice strategy for persons with disability in light of the issues raised in this report, following broad based consultation with stakeholder groups.

4. The Department of Premier and Cabinet immediately develop and implement a whole of government crime prevention strategy in relation to persons with disability in light of the issues raised in this report, following broad based consultation with stakeholder groups.

5. The Directors-General of the Queensland Department of Justice and Attorney General, Legal Aid Queensland, the Department of Communities (Youth Justice Services), Department of Corrective Services and the Commissioner of Police immediately commission disability access audits of all facilities and services they provide directly or support through funded programs. Each authority ought to then develop a strategy and capital works program that will ensure all services and facilities are fully accessible to persons with disability (across all impairment groups) within a period of not more than five years.

6. The Queensland Department of Justice and Attorney General, Legal Aid Queensland, the Department of Corrective Services and Queensland Police adopt 'Flexible Service Delivery' as a core strategic policy framework for identifying and responding to the needs of persons with disability in contact with front-line services. All agency staff ought to receive comprehensive initial induction and ongoing professional development education in Flexible Service Delivery.

7. Queensland Police, Legal Aid Queensland, Department of Corrective Services and Department of Communities (Youth Justice Services) immediately institute a screening process for implementation in the initial contact or intake stage to assist in the identification of persons with disability. The purpose of identification will be to ensure the provision and tailoring of necessary services and supports to persons with disability.

8. Queensland Police, Legal Aid Queensland, the Department of Corrective Services and Department of Communities (Youth Justice Services) immediately institute a program for collecting, collating and reporting basic statistical information about persons with disability with whom they have contact to assist with policy and program development, monitoring and evaluation.

9. The Queensland Government develop a new legal policy framework to modernise its approach to dealing with persons with disability in contact with the youth and criminal justice systems. These reforms ought to include:

   → A clear policy and procedural framework for the determination of legal responsibility (capacity) based on the *International Classification of Functioning, Disability and Health;*

- → A framework for the diversion of persons with cognitive impairment accused of both prescribed and non-prescribed offences from the criminal justice system to the social service system in appropriate cases. Activation of this framework ought not require a plea or finding of guilty. This will also require the development of flexible sentencing options and community based custodial options;

- → Designation of social service agencies responsible for the provision (or arrangement) of social support to accused persons, and Court powers to order these designated agencies to provide support services;

- → A framework for the development, implementation and monitoring of 'justice plans' to coordinate justice and social service agency responses in relation to an accused person. This framework ought to provide for the approval and monitoring of justice plans by the Court. The Court ought to have the power to accept, reject, and require the amendment of any such plan.

10. The Queensland Attorney-General refer to the Law Reform Commission an inquiry into appropriate legal arrangements, if any, under which disability services may restrict the liberty of persons with cognitive disability who are found unfit to be tried, or who are formally assessed as presenting an unreasonable risk of serious offending behaviour prior to or on initial contact with, or post-release from, the criminal justice system.

11. The Queensland Government establish a cross-portfolio standing committee of senior executives to resolve and coordinate agency responsibility in relation to the support of persons with disability in contact, or at risk of contact, with the criminal justice system. This committee ought to be chaired by the director of the Social Policy Unit of the Department of Premier and Cabinet, and be constituted by executives from the Departments of Communities (Disability Services Queensland and Youth Justice Services), Department of Corrective Services, Queensland Health, Probation and Parole and the Public Guardian.

12. The Queensland Government establish an 'emergency response' funding capacity within the Department of Communities (Disability Services Queensland) and Queensland Health (Mental Health Services) to facilitate immediate provision of accommodation, intensive support coordination, clinical services and developmental day program options for persons with disability requiring diversion from the criminal justice system or post-release support. This emergency response fund ought to be financed on a 'deficit' basis by Queensland Treasury.

13. The Queensland Department of Communities (Disability Services Queensland) and Queensland Health (Mental Health Services) establish eligibility criteria for service delivery to persons with disability in contact with the criminal justice system based on the *International Classification of Functioning, Disability and Health* to ensure that eligibility is based on the person's level of *disability* rather than a clinical measure

of impairment alone. Each agency ought also to identify persons with disability in contact with the criminal justice system, or at risk of such contact, as priorities for social assistance.

14. The Queensland Government develop performance indictors for incorporation into contracts of relevant senior executive staff that deal with the following matters:

    - Access to justice and crime prevention in relation to persons with disability;
    - Effective diversion of persons with disability from the criminal and youth justice systems;
    - Timely and integrated service delivery to persons with disability in contact with the criminal justice system across government.

15. The Queensland Government establish under statute the following additional institutional arrangements to assist in the prevention, investigation and redress of crimes and other harms against persons with disability. These new institutional arrangements ought to be entirely independent of existing policy and service delivery agencies:

    - A vulnerable adult protection agency (which would have compulsory powers enabling the investigation of allegations of harm against persons with disability wherever the harm is alleged to have occurred, and the capacity to request compulsory assistance from social service agencies to ensure the safety of the person);
    - A Disability Services Commission (which would have royal commission powers to provide independent oversight of the disability services system (both funded and licensed services), including power to investigate consumer complaints, review the circumstances of persons receiving services, review avoidable deaths of persons receiving services, and undertake thematic inquiries into issues of concern);
    - A Disability Services Accreditation Agency (which would have responsibility for quality assurance and quality improvement of disability services (both funded and licensed services);

16. Queensland Police, the Department of Communities (Disability Services Queensland and Youth Justice Services), and the Department of Corrective Services establish specialist functional units in relation to persons with disability and criminal justice issues. These functional units would have both a central policy and direct service delivery function, and ought to provide for the development, consolidation and effective deployment of specialised disciplinary expertise in relation to disability and criminal justice issues.

17. The Department of Justice and the Attorney General and Queensland Legal Aid establish an executive-support-level specialist policy function in relation to disability and access to justice issues. This function would be responsible for coordinating strategic policy and program development, its monitoring and evaluation, and stakeholder liaison.

18. The Department of Justice and the Attorney General and Queensland Legal Aid develop and distribute customer service information in a range of accessible formats for persons with disability that explain how impairment and disability related assistance can be obtained in relation each agency's facilities, programs and services.

19. The Queensland Legal Aid Commission in association with the Queensland Director of Public Prosecutions, the Queensland Law Society and the Queensland Bar Association develop continuing legal education, practice guidelines and resources to support the provision of legal services to persons with disability. These practice guidelines resources ought to deal with the following matters at a minimum:

    - Human rights and access to justice for people with disability;
    - Identification of persons with cognitive disability;
    - Obtaining instructions from persons with cognitive disability;
    - Dealing with circumstances where it is not possible to obtain instructions from a person with disability;
    - Fittness to be tried;
    - Flexible Service delivery;
    - Communicating with persons with disability – including the use of alternative modes and formats for communication required by persons with disability;
    - Interviewing persons with disability;
    - Modification of court procedures and practices to accommodate the needs of persons with disability, including the use of alternative technology;
    - Working with the Police Support Service and Court Support Service for persons with cognitive disability;
    - Specialist referral points, diversionary options and negotiating social service systems.

20. The Queensland Commissioner of Police develop practice guidelines, educational curricula and resources for police in relation to police contact and services for

persons with disability. These practice guidelines and resources ought to deal with the following matters at a minimum:

- Identification of persons with cognitive disability;
- Impact of impairment on the interview and investigation process;
- Communicating with persons with disability – including the use of alternative modes and formats for communication required by persons with disability
- Interviewing techniques for adults and children with disability;
- Working with the Police Support Service for persons with cognitive disability;
- Crimes against persons with disability;
- Flexible Service Delivery;
- Specialist referral points, diversionary options and negotiating social service systems.

21. The Queensland Department of Justice and the Attorney General and the Queensland Legal Aid Commission fund an appropriate non-government agency to establish and operate a State-wide Disability Rights Centre, which would have the following core functions:

- Continuing Legal Education for legal practitioners in disability rights issues;
- Community Legal Education for persons with disability, family members and carers, social advocacy organisations and social service providers in disability rights issues;
- Specialist advise and referral services for persons with disability, family members and carers, social advocacy organisations, service providers and legal practitioners representing persons with disability;
- Test-case litigation in relation to disability rights issues;
- Law reform and legal policy advice;
- Coordinate and resource the Police Support Service and Court Support Service for persons with disability.

22. The Queensland Department of Justice and the Attorney General or Disability Services Queensland fund the establishment and operation of a State-wide Police Support Service and Court Support Service for persons with disability who are required to participate in a police interview or attend Court, whether as victims, suspects or other witnesses. These services ought to be established under regulation and operate

according to strict guidelines to ensure the legal rights of persons with disability are protected. The *Evidence Act*, 1977 (Qld) ought to be amended to facilitate the effective operation of these services.

23. The Queensland Department of Justice and the Attorney General establish a grants program to fund projects on a recurrent and one-off basis that will build the capacity of disability rights organisations to engage with the justice sector.

24. The Department of Corrective Services develop and implement individualised community-based custodial options for offenders with disability.

25. The Australian Judicial College develop and deliver a range of educational programs for Queensland judicial officers in relation to access to justice for persons with disability. These programs ought to deal with:

- Human rights and access to justice for persons with disability;
- Flexible Service Delivery;
- Issues and options in the taking of evidence from persons with disability;
- Communicating with persons with disability, including in relation to alternative and augmentative modes of communication;
- Legal capacity;
- Diversion;
- Sentencing issues and options;
- Police Support Service and Court Support Service.

1. Introduction

1.1 Project overview

This report examines the experience of persons with disability with the Queensland criminal justice system. It considers the circumstances of persons with disability who are victims of crime, as well as those who are accused or convicted of crime. It also considers the interaction between the criminal justice and social support systems in relation to both victims and offenders with disability.

The report has a cross-disability focus. However, not every issue canvassed is relevant to persons from every impairment group, or applies in the same way to persons from different impairment groups. Nevertheless, the report attempts to identify issues and propose reforms using similar experiences and outcomes, rather than category of impairment, as the central analytical and organising principles.

The report has been written in summary form to facilitate its accessibility. For the same reason we have not attempted to provide an exhaustive list of recommendations for reform. Change in this area will take considerable time, and some aspects of the changes required present considerable challenges. We have therefore sought to focus on the greatest priorities, and on structural initiatives that will stimulate and facilitate ongoing reforms.

1.2 Methodology

The project that lies behind this report was based on ethnographic methodology so as to give primacy to the lived experience of persons with disability and their associates. In the first stage of the project, ten persons with disability with direct experience of the criminal justice system were interviewed and personal narratives of their experiences recorded. Interviewees reflected a diversity of ages, gender, geographic location, impairment type, and experience of the criminal justice and social support systems. These personal narratives have been used to identify and illustrate many of the key issues of concern in this report.

Although these personal narratives have provided a rich source of insight into the experience of these individuals with the criminal justice system, it is recognised that they represent a relatively small sample. This evidence has therefore been supplemented by interviews with representatives of legal, social advocacy, and human service organisations

who have experience working with persons with disability in contact with the criminal justice system.

Additionally, to assist in identifying issues and options for reform, three intensive workshops involving participants with a broad range of experience and roles involving work with persons with disability in contact with the criminal justice system have been conducted. The early stages of the project coincided with an international conference conducted by a number of Queensland-based non-government organisations that examined the experience of persons with intellectual and psychosocial impairment with the criminal justice system. This report also draws on a number of the presentations to this conference and associated conference discussions.

An extensive literature review, and a review of Queensland legislation and policy impacting on persons with disability involved with the criminal justice system were also conducted and inform this report.

1.3 Social relations approach

The evidence upon which this report is based has been collected and analysed using a social relations approach to disability. In brief, the social relations approach posits that disability is the result of the interaction between persons with impairments and a barrier-filled physical and social environment. It therefore carries the action implication that the physical and social environment must change so as to enable persons with impairment to participate on an equal basis with others. A social relational perspective does not deny the reality of impairment or its impact on the individual. However, it does challenge the physical and social environments to accommodate impairment as an expected dimension of human diversity.

A social relational perspective on disability is in contrast to what are sometimes referred to as the 'medical' and 'welfare' models of disability, in which disability is viewed as the product of impairment. The medical model carries the action implication of changing the person, often in isolation from the mainstream, in order that they might better cope with the physical and social environment as they presently exists. The welfare model tends to cast persons with disability as passive and dependent recipients of the sometimes begrudging benevolence of others (whether as recipients of publicly funded income support and social services, or objects of private philanthropy). Both the medical and welfare models of disability tend to deny or diminish the inherent dignity of persons with disability, and their status as human right-bearers and citizens with an entitlement to opportunities and outcomes equivalent to others.

The title of this report *Disabled Justice: The barriers to justice for persons with disability in Queensland* attempts to capture a social relational perspective on disability by positing that it is the Queensland justice system that disables those persons with impairments that

interact with it. The experiences and outcomes of these individuals are not the immutable result of impairment, but are instead the result of social institutional systems that have failed to accommodate impairment as an ordinary incident of human diversity, and which consequently, have created and imposed disabling structural barriers to equality before the law for persons with disability.

1.4 Project limitations

The research that underpins this report is qualitative. No attempt has been made to quantify the types of experience that are referred to in this report in the Queensland environment. There is a general paucity of quantitative evidence concerning the experience of persons with disability with the Queensland criminal justice system. Consequently, statistical information, where it is used, is typically used by way of analogy, and is drawn either from secondary sources, or primary sources from jurisdictions other than Queensland.

The research has emphasised the subjective experience of persons with disability. We have not attempted to undertake a forensic investigation in an effort to verify each reported experience. There will often be more than one account of any set of events, and each account will have its strengths and weaknesses. We acknowledge that there may well be other accounts of the experiences referred to in this report. However, we trust that readers will use these accounts as indicative of the structural barriers and systemic problems faced by persons with disability in the Queensland criminal justice system, rather than as individual accusations to be scrutinised.

In the course of our research we become aware of what may become important initiatives within the Queensland Government and justice system to address some of the issues of concern identified in this report. These initiatives are most welcome. However, as some of these remain at an early stage of development it has not always been possible to reflect them in this report. We trust that this report will be received as a constructive contribution in aid of these initiatives.

This project has focused upon the experience of persons with disability in their interaction within the criminal justice system. It has not looked at the experience of persons with disability in other areas of the legal system. Nevertheless, a number of the recommendations made in this report also have the potential to improve access to justice for persons with disability in the legal system generally.

1.5 Acknowledgements

QAI sincerely thanks each of those persons who have contributed their experience and expertise to this project.

In particular, QAI acknowledges with great appreciation the contribution of those persons with disability who told us their stories in Stage 1 of the project. QAI also acknowledges with great appreciation the work of Jennifer Barrkman, who undertook this first phase of research.

Phillip French of the Disability Studies and Research Institute undertook the literature and legislation and policy reviews, the overall analysis of findings, and is responsible for the production of this report. QAI also acknowledges his work great appreciation.

2. Over- representation – the evidence and issues

2.1 Introduction

In this chapter, we outline the evidence and issues associated with the significant over-representation of persons with disability as victims of crime and as suspects, defendants and offenders in the criminal justice system. While the quantitative evidence leaves little doubt that there is a crisis to be addressed, it is nevertheless quite problematic in key respects. In particular, there is a serious bias in existing research towards persons with intellectual and psychosocial impairment, to the virtual exclusion of other impairment groups. It is to be expected that different impairment groups will have different experiences of the criminal justice system. However, the qualitative evidence drawn on for this report would strongly suggest that other impairment groups are also significantly over-represented as victims of crime and, in some cases, also as suspects, defendants and offenders. The absence of formal research in relation to other impairment groups should therefore not be understood as the absence of any problems for these groups. A sound remedial strategy must therefore address the gaps in current research, as well as the priorities for action suggested by research conducted to date.

2.2 Victims of crime

There is now an extensive body of evidence that suggests that persons with disability are significantly over-represented as victims of crime. This evidence base is not without its problems, however. There is very limited Australian research in the area. Law enforcement agencies, victim and offender services collect little, if any, primary data on the incidence or characteristics of persons with disability with whom they have contact. Studies therefore tend to be based on relatively small samples.

The evidence is strongest in relation to women with intellectual and psychosocial impairment and sexual assault. Research has tended to overlook the experience of other impairment groups, arguably generating a false consciousness and complacency in relation to the prevalence and impact of crime on these groups. Research has also tended to neglect investigation of sexual offences against men and boys, and other crimes perpetrated against persons with disability. While sexual abuse of persons with disability certainly has a gender dimension, it also must be recognised that men and boys with

disability are also frequently victims of sexual assault. The qualitative evidence collected in the course of this project also strongly suggests that persons with disability are also over-represented as victims of other types of crime to a much greater extent than appears to be reported in the literature.

One of the greatest challenges for the prevention of crimes against persons with disability is the general failure of the community, and of social service and law enforcement agencies in particular, to characterise particular conduct towards persons with disability as criminal behaviour. There are several reasons for this.

In many situations, persons with disability are not accorded dignity and rights equivalent to other persons; even their fundamental 'humanness' may be challenged or denied. Members of a neighbourhood may therefore feel entirely at liberty to vilify persons with intellectual impairment, whom they have never met, in an effort to prevent them from moving into that neighbourhood. Such conduct would be unthinkable in relation to any other prospective property owner or tenant.

Particular persons or classes of persons with disability may be viewed – usually unconsciously - as more bestial or less sensate than other persons, leading to the toleration of conduct towards them that would be intolerable if directed towards others (for example, incidents of personal violence between residents in supported accommodation).

There also remains a high degree of prejudice and discrimination towards persons with disability within the community and its social institutions. This can also result the failure to characterise conduct towards persons with disability as criminal, due to an inability of observers, including those with specific professional skills, and those who occupy a position of trust or authority, to socially identify with the victim.

Many crimes against persons with disability occur in specialist service environments – for example, supported accommodation services – operated by government and non-government agencies. There is a tendency for those agencies to be viewed, and for those agencies to view themselves, as responsible for managing any issues that arise in these environments, and for those agencies and others to characterise these issues as social, rather than legal problems.

Social service personnel from the 'helping' professions also tend to be oriented towards the harmonisation of problems through casework interventions, and tend to eschew the legal analysis of social problems, and the rigidity and oppositional nature of legal interventions. This is especially the case where crimes against persons with disability are complex, multi-dimensional and may be perceived to involve competing imperatives, for example:

- Where both the offender and victim have significant cognitive impairment, the imperative of diverting the offender from the criminal justice system may compete with the imperative of recognising and prosecuting the harm perpetrated on the victim;

- While the crime may involve interpersonal violence perpetrated by one person with disability on another, the underlying cause of this violence may be the living situation, or other environmental factors over which neither the perpetrator or victim have any control (for example, forced cohabitation of persons with so-called challenging behaviours). This can lead to tension in the assignment of personal responsibility for structurally or systemically induced crime;

- Where crime occurs in a familial situation (for example, personal violence or financial exploitation) there is a tension between the recognition and prosecution of the criminal behaviour and the maintenance of the familial relationship, which may be of great importance to the victim, and also to social services, which may otherwise be required to provide support services to the person;

- In some cases, the perpetrator may have severe cognitive impairment, and consequently, may be recognised as being incapable of the assignment of criminal responsibility. Social service and law enforcement agencies may be reluctant to invoke what may therefore be viewed as a futile legal response to person's conduct;

- In other cases, there may be competing perspectives on the criminality of the behaviour due to the different value systems and knowledge base of observers. For example, the older conservative parents of a young adult male with cognitive disability may view his sexual relationship with another male as sexual assault, whereas younger libertarian support workers may view the issue in terms of his right to privacy and a same-sex relationship.

In these and other circumstances, the law is often seen as a blunt instrument incapable of dealing appropriately with the nuances of a particular situation. Legal interventions may be perceived as likely to do more harm than good, and social service personnel and others will attempt to deal with the situation without involving law enforcement agencies. For the same reasons, law enforcement agencies may be reluctant to become involved in such a situation even if approached to do so, viewing crimes against persons with disability as 'welfare' problems for social services to resolve.

2.3 Sex offences

Australian and international studies report a very high incidence of sexual offences perpetrated against persons with disability, although reported incidence varies considerably from study to study. As already noted, existing research has concentrated on women with intellectual disability, and to a lesser extent, women with psychosocial disability. The broad contours of the findings of this research may be summarised as follows:

- Between 50-99% of persons with intellectual and psychosocial impairments are subject to sexual assault at some point in their lifetimes (Carmody: 1990; Firsten:

1991; Hard: 1986; McCarthy: 1996; Muccigrosso: 1991; Mulder: 1996; Sobsey and Doe: 1991));

- Persons with disability are three times more likely than others to experience violent or severe sexual offences, usually involving penetration (Wilson and Brewer: 1992; Nosek: 1997);
- Sexual assaults against persons with disability are more likely to be of a repeated, or continuing nature, than those on other persons (Nosek: 1997);
- Allegations of sexual assault by persons with disability are less likely to be believed than those made by other persons (Connelly and Keilty: 2000; Nosek: 1997);
- Sexual assaults of persons with disability are less likely to be acted on once detected than those on other persons (Connelly and Keilty: 2000; Nosek: 1997);
- Typically, very little, if anything, is done to protect persons with disability against future sexual violence following an allegation of sexual assault, especially if the allegation is not prosecuted, or the prosecution fails (Carlson: 1997; McCarthy: 1993; Waxman: 1991; Crossmaker: 1991; Blyth: 2000; McPherson: 1991; Sobsey and Doe: 1991);
- As with other victims, women with disability are typically sexually assaulted by someone who is known to them, who is a man, in an intimate location, such as their home, the home of a friend or relative or their workplace (Sobsey and Doe: 1991; Womendez and Shneiderman: 1991);
- There is a high incidence of sexual assault of persons with disability living in residential services, including residential institutions, psychiatric services, boarding houses, nursing homes, and group-homes (Firsten: 1991; Jacobsen and Richardson: 1987; Marchetti and McCartney: 1990; Sobsey and Doe: 1991);
- There is a high incidence of sexual assault of persons with disability by other persons with disability occupying the same environment (Sobsey and Doe: 1991; Furey and Niessen: 1994; Kennedy: 1997);
- A high percentage of sexual offences against persons with disability are committed by direct service providers (residential support staff, teachers, and therapists etc) (Cole: 1986; Davidson: 1997; Firsten: 1991; Jacobsen: 1989; Jacobsen and Richardson: 1987; Marchetti and McCartney: 1990; Sobsey and Doe: 1991; Womendez and Shneiderman: 1991);
- Sex offenders are drawn to work in residential services for persons with disability because these services provide greater opportunity for assault (Blyth: 2000; Sobsey and Doe: 1991);

- Sex offenders often move from one residential facility and employer to another when suspicions arise, or conditions become less conducive to their activities, without incidents being investigated and findings made that could serve as a warning to future work placements. In some instances the sex offender moves at their own volition, while in others they are moved on by their employer (Blyth: 2000);

- Sexual offenders are attracted by vulnerability and availability, rather than by physical attributes of potential victims. As it has become more difficult for offenders to gain access to children, they have focused on vulnerable adults (Blyth: 2002; Groth: 1979).

2.4 Other offences

Persons with disability also appear to be significantly over-represented as victims of a range of other offences, although research is even less well developed for other crime. Other offences that appear to be commonly committed against persons with disability include:

- Assault (including support staff assaults; unlawful physical restraint, unlawful chemical restraint) (Community Services Commission: 1995a; 1995b)

- Personal violence/domestic violence (including spousal, familial and informal carer violence; resident to resident violence) (Cattalini: 1993; Carlson: 1997; Frohmader: 1997; Tichon: 1998);

- Stealing and financial exploitation (including misappropriation of income support payments and other benefits and concessions) (Wilson: 1990);

- Sexual servitude (including the cooption of women with cognitive impairments into prostitution);

- Deprivation of liberty (by public authorities, family members, and supported accommodation services) (Community Services Commission: 1995a; 1995b);

- Deprivation of the necessities of life (such as shelter, nutrition, hydration, and essential medical treatment by persons in a position of authority or trust); and

- Harassment, victimisation and vilification[1] (including harassment and victimisation for making a complaint; incitement of hatred towards persons with disability re-locating from institutions to the community) (Sherry 2000; Sherry 2003; Waxman: 1991; Wilson and Brewer: 1992).

1 Vilification on the ground of disability is not currently a criminal or civil offence under Queensland or Australian law. It is, however, a civil offence under Tasmanian law, and vilification of some other minority groups is a civil and criminal offence in a most Australian jurisdictions, including Queensland.

2.5 A social perspective on crime against persons with disability

2.5.1 Sexual Assault

Most studies of sexual assault of persons with disability approach the issue in terms of the inherent vulnerability of persons with disability. While it is undoubtedly the case that aspects of impairment do impact on the issue (for example, a person with physical impairment may find it more difficult or impossible to repel or escape from a perpetrator) there is a risk that such an analysis ultimately locates the problem of sexual assault in the personal characteristics of the victim. This may lead to oppressive and erroneous conclusions and responses; for example, in the past women with disability have been sterilised as a means of preventing pregnancy, or have been institutionalised in socially isolated environments that have been incorrectly perceived to offer protection from sexual predators.

A social perspective suggests that much greater emphasis must be placed on detoxifying those aspects of the social environment that render persons with disability more vulnerable to sexual assault. This includes the social institutional arrangements and power relationships that underlie sexual violence against persons with disability. In this respect it has much in common with feminist perspectives on sexual assault. A social perspective also challenges the conception of disability as the immutable consequence of impairment, revealing that what are often believed to be characteristics of impairment are in fact artefacts of social conditioning, which are susceptible change under more favourable conditions.

Chenoweth (1993) identifies a number of cultural myths that compromise normative social protections from sexual assault in the case of persons with disability. Although her analysis focuses on women, the same issues arise in relation to men and boys with disability. Elaborating Chenoweth's analysis, some of the key myths might be summarised as follows:

- Persons with disability are so unattractive that they would not be the subject of sexual desire;
- Persons with disability are so unattractive they should be grateful for any sexual contact;
- Persons with particular types of impairment (for example, persons with intellectual and psychosocial impairment) are bestial in nature and consequently a certain level bestial behaviour among them is to be expected and tolerated;
- Persons with disability are less sensate than others, and consequently do not suffer the same level of psychological and physical trauma as other victims of sexual assault;

- Persons with particular types of impairment (for example, persons with intellectual and psychosocial impairment) are promiscuous, and are likely to solicit sexual contact;

- Persons with particular types of impairment (for example, persons with intellectual and psychosocial impairment) are unstable and vindictive and are likely to unjustly accuse others of perpetrating sexual violence on them;

- Persons with particular types of impairment (for example, persons with intellectual and psychosocial impairment) have wild imaginations, fantasies, and hallucinations, and therefore can't be taken seriously.

In most cases these myths do not operate at a conscious level, and when put directly, most people would reject them. Nevertheless, they are potent at the sub-conscious level, and often influence the manner in which sexual offences against persons with disability are perceived and responded to, including by family and community members, disability service providers, sexual assault services, law enforcement agencies, and the Courts. Their pervasiveness results in a margin of tolerance, or acquiescence in, sexual violence towards persons with disability by the general community and its social institutions that intensifies victim vulnerability to sexual predation. This dimension of victim vulnerability can only be overcome through the conscious identification and deconstruction of these myths, focusing on the manner in which they influence the detection, reporting, investigation, prosecution and punishment of sexual offences against persons with disability.

Other aspects of the social environment that intensify the vulnerability of persons with disability to sexual violence include:

- Persons with disability (particularly those with intellectual impairment) may be considered asexual, eternally childlike, or eternally innocent, and may consequently be deprived of normative sex and personal relationship education by their families and by education providers. They may therefore find it difficult to identify sexually inappropriate behaviour in others, experience more intense feelings of shame, embarrassment and personal responsibility when it occurs, and may be less likely to know what to do to prevent or report it;

- Although there are exceptions, sex and personal relationship educational curricula and resources are often not adapted to meet the learning needs of persons from particular impairment groups, and may not be available in alternative formats necessary for persons from other impairment groups (for example, written resources may not be available in Braille or accessible electronic text, DVD's may not be captioned);

- There is a tendency for family members, service providers and professionals to interpret evidence (such as bodily injuries, verbal or gestural cues, and behaviour) that may be indicative of sexual assault as a characteristic of impairment or disability.

The assimilation of the indicia of sexual assault to impairment and disability results in a failure to identify, report and investigate these harms;

- Many persons with disability are socialised or compelled to tolerate a high degree of personal indignity, mishandling, and even low-grade violence and neglect as an incident of service delivery to them. This can lead to their desensitisation to, or to a sense or resignation or despondency about, sexual abuse and other violence;

- Many services such as crisis accommodation services, domestic violence support services, sexual assault services, and legal services are inaccessible or unresponsive to persons with disability, and consequently fail to provide a pathway to support and escape from sexual violence;

- Many investigations and prosecutions of sexual assault of persons with disability fail, and many social service and law enforcement officers will have had direct negative experiences of attempted investigations and prosecutions, or work in environments where others have had negative experiences. The poor expectations generated by this experience tend to create a self-fulfilling prophecy – past disappointment and frustration result in current failures to undertake appropriate investigations, or pursue prosecutions. Current failure reinforces the perception that investigation and prosecution is futile. Ultimately, this emboldens perpetrators.

2.5.2 Other offences

There are a range of other social factors that result in the increased risk of sexual assault and other offences being committed against persons with disability. These include:

- Persons with disability tend to be socialised to be passive, compliant with authority figures, and dependent upon others. These characteristics may be shaped by the experience of continual infantalising from others, physical and psychological abuse, or neglect. These characteristics are especially reinforced in residential settings, particularly in institutional environments. Persons with disability are therefore much less likely to resist or report sexual predation, assault and other crime, particularly when the offender occupies a position of authority or trust;

- Many persons with disability have a high level of physical and psychological reliance upon services such as personal care and supported accommodation services. In many cases this assistance is fragile in that it stems from budget-capped, discretionary programs, block grants to services, and is provided in the context of great, unmet demand for such assistance. This level of dependency and anxiety about the continued availability of assistance means that persons with disability and their associates will tend to tolerate abuse and exploitation rather than risk the collapse of their support system by reporting it;

- Many persons with disability live in institutional or other residential settings which are isolated from public scrutiny and which afford little or no access to police, support services, lawyers or advocates. Abuse is more likely to occur, go undetected, or not be acted upon, in isolated, closed settings;

- Persons with disability living in supported accommodation and their associates, are more likely to report crimes to disability support workers, who, if they take action, are more likely to try and solve the problem internally, rather than involve external agencies. This may be because they fear the agency's exposure to loss of reputation or to external scrutiny that may jeopardise government and other funding sources. Organisational and professional interests are often accorded precedence over the interests of the victim;

- Persons with disability, particularly those who rely on family and informal carers, or disability services, for essential support are also more susceptible to retaliation from offenders and their supporters from within these support systems should they make a complaint. Retaliation may include physical and psychological abuse and harassment and the withholding or withdrawal of services. They are therefore less likely to report abuse out of a fear that it may result in something worse;

- Persons with disability, particularly those who rely on personal care services, or who live in supported accommodation, encounter large numbers of personal care assistants and residential support staff, due to high staff turnover and high use of agency staff, among other factors. Many disability support services find it difficult to attract and retain appropriate staff, and consequently, are more likely to employ persons whose suitability may be subject to doubt. Persons with disability are therefore exposed to many hundreds of people, often in very intimate situations, many of whom are not preferred employees;

- In supported accommodation, it is often the victim who is disadvantaged when an allegation of assault or other serious crime is made and acted on by service providers and others. The person might be immediately removed from their home into marginal accommodation, such as a respite facility, and may never be able to return due to the continued presence of the alleged offender. Victims and their associates are less likely to report allegations out of fear of these potential consequences;

- Due to their relative poverty, diminished life experience, rejection and social isolation from non-disabled persons, persons with disability are particularly vunerable to predatory approaches from persons offering incentives, including apparent friendship or affection. This renders them particularly susceptible to sexual exploitation;

- Due to their relative poverty, persons with disability are compelled to live and socialise in environments that may be characterised by a high incidence of crime, the presence of persons with anti-social behaviours and high social needs, and which

lack adequate urban infrastructure (for example, lighting and policing), intensifying social problems. This leads to greater exposure to the risk of crime;

- Family members and other informal carers of persons with disability are often viewed very sympathetically by the community, social services and law enforcement agencies. Persons with disability are constructed as a personal tragedy for family members, and as a burden upon them, justifying a higher tolerance of inappropriate and unlawful behaviour. This can result in the failure of social services and law enforcement agencies to intervene in abusive and exploitative family relationships;

- Additionally, disability is often constructed as a 'private' tragedy, which may also lead social service and law enforcement agencies to take a deferential, non-interventionist approach. Abuse and neglect of persons with disability, particularly in family circumstances, is all too often viewed as a private matter in which there is little public responsibility;

- Social services and law enforcement agencies may also fail to intervene or pursue evidence of unlawful behaviour by family members and other informal carers with whom victims live because a likely outcome of such intervention will be the need to provide alternative support services to the person, which are not readily available. Disability services, in particular, often have a significant conflict of interest in this respect, which operates as disincentive to action.

2.6 Suspects, Defendants and Offenders

There is also a growing body of international and Australian research that suggests that persons with disability are significantly over-represented as suspects, defendants, and offenders in the criminal justice system. This evidence base also has its problems, however. As is the case with victims, most law enforcement and criminal justice agencies collect little primary data on the incidence or characteristics of persons with disability with whom they have contact. Even those that do don't do so consistently. Incidence studies often use different assessment methods, and consequently findings can vary considerably, and lack comparability both on a population group basis and over time.

Research has focused on persons with intellectual and psychosocial impairments and has tended to overlook the prevalence of contact of members of other impairment groups with the criminal justice system. As is the case with victims, this potentially creates a false consciousness and complacency in relation to other impairment groups. The qualitative evidence drawn on by this report would suggest that there is also significant over-representation of persons with acquired brain injury in the criminal justice system. There also appear to be very specific problems, if not also over-representation, in relation to persons who are Deaf.

In spite of the deficiencies in the evidence base, there is clearly a crisis to be addressed. As Hayes has recently commented:

> *The statistics demonstrate that there is an over-representation of people with intellectual disability in the criminal justice system – the only area of debate is the extent of over-representation. We have to accept that this is an issue where there is unlikely to be agreement, and this is not only because of the lack of well-planned and executed research. Even with the most sophisticated research, there will be differences in over representation.*[2]

Although Hayes' comment is limited to persons with intellectual impairment, the point might reasonably be generalised across a number of impairment groups.

2.7 Incidence studies

The key prevalence data in relation to the contact of persons with intellectual and psychosocial impairment with law enforcement and criminal justice agencies may be summarised as follows:

- A NSW study of young offenders on community orders published in 2006 found that:
  - Between 11-15% had intellectual disability
  - 40% reported severe symptoms consistent with a clinical disorder (conduct disorder and substance abuse disorder were the most prevalent conditions)
  - 25% reported symptoms suggestive of a depressive or anxiety-related disorder (Kenny et al: 2006);
- A NSW study published in 2003 found that 48% of reception inmates and 38% of sentenced inmates had experienced a mental disorder (defined as a psychosis, affective disorder or anxiety disorder) in the previous twelve months. When a broader definition of 'any psychiatric disorder' was used, it was found that 74% of the New South Wales prison population had experienced an episode in the previous twelve months (Butler and Allnut: 2003);
- A Victorian study published in 2003 found that 51% of prisoners reported that they had been assessed, or had received treatment from a psychiatrist or a doctor for an emotional of mental health problem (Victorian Department of Justice: 2003);

2 Hayes, S, C (2006) *People with intellectual disabilities in the criminal justice system – when is disability a crime?* Keynote address presented at the "Lock 'Them' Up? Disability and Mental Illness Aren't Crimes Conference," Sisters Inside, Brisbane, Australia, 17-19 May 2006.

- A NSW study of young persons in custody (juvenile justice facilities) published in 2003 found that:
  - 88% reported symptoms consistent with a mild, moderate or severe psychiatric disorder
  - 30% reported symptoms consistent with Attention Deficit Hyperactivity Disorder
  - 21% reported symptoms consistent with schizophrenia
  - 10-13% were assessed as having intellectual disability (NSW Department of Juvenile Justice: 2003).
- A Queensland study published in 2002 found that:
  - Based on adaptive functioning assessment, between 4.8-14.8% of prisoners of adult correctional facilities may have intellectual disability;
  - Based on IQ testing, 9.8% of persons scored in the intellectual disability range, and 28.6% scored in the 'borderline' intellectual disability range (Queensland Department of Corrective Services: 2002);
- Another Queensland study in relation to female prisoners published in 2002 found that 57.1% of women reported having been diagnosed with a specific mental illness, the most common of which was depression. Nine percent of female prisoners had been admitted to a psychiatric hospital and 17% had been prescribed counselling or treatment (Hockings et al: 2002);
- A United Kingdom study published in 1995 reported that 9% of suspects interviewed by police had intellectual disability and a further 42% had a borderline intellectual disability (Lyall et al: 1995);
- A NSW study published in 1993 found that 23% of persons appearing before Local Courts on criminal charges had intellectual disability (NSW Law Reform Commission: 1993);
- A follow-up study focused on two rural NSW courts published in 1996 found that 51.5% of persons appearing before the Court had intellectual disability (NSW Law Reform Commission: 1996a);
- A NSW study of ex-prisoners published in 1988 found that approximately 30% had intellectual disability (Hayes and McIlwain: 1988);

These prevalence figures compare with a general population incidence of 1-3%[3] for persons with intellectual impairment and 5.6% for persons with psychosocial impairment. (Cocks: 1989; Australian Institute of Health and Welfare: 2002).

2.8 Explanations for over-representation

In its major inquiry into the issue, the NSW Law Reform Commission (1996b) outlined three primary hypotheses for the over-representation of persons with intellectual disability in the criminal justice system:

- **The susceptibility hypothesis** – which postulates that people with intellectual disability are more likely to engage in criminal behaviour because of their impairment.
- **The different treatment hypothesis** – which postulates that people with intellectual disability are not any more likely than others to commit crimes, but are more likely to be convicted by Courts owing to their vulnerability in criminal justice processes.
- **The psychological and socio-economic disadvantage hypothesis** – which postulates that persons with intellectual disability are more likely than others to be exposed to environmental factors where they can become involved in, or suspected of, committing crime.

2.8.1 The susceptibility hypothesis

The susceptibility hypothesis is ultimately based in eugenic beliefs that were most prevalent from the 1860s up to the end of the Second World War. 'Feeble-minded' persons were viewed as inherently degenerate, as having innate criminal tendencies, and as being members of a criminal underclass. The susceptibility hypothesis has declined in prominence and credibility as research has progressively revealed that social and environmental influences, rather than genetic pre-disposition, are determinative or facilitative of criminal conduct. Consequently, the different treatment and psychological and socio-economic disadvantage hypotheses have grown in prominence as explanations for the overrepresentation of persons with disability in the criminal justice system.

Nevertheless, the susceptibility hypothesis – at least a more enlightened version of it – cannot be entirely disregarded. There are, in fact, inherent characteristics that do expose persons with cognitive impairments to a greater risk of committing offences, and which interact with negative social and environmental factors to aggravate this risk. Of course, not all of these characteristics apply to each cognitive impairment group, and they may

3 This estimate does not include persons with so-called 'borderline' intellectual impairment.

also vary considerably in their impact on persons within particular cognitive impairment groups. They include:

- A greater propensity for impulsive behaviour;
- Less ability to manage extreme emotions, such as anger;
- Less ability to understand and relate to the emotions of others;
- Less inhibition;
- Greater suggestibility;
- Limited intellectual ability (ability to learn, comprehend, retain, and apply information);
- Poor problem solving skills;
- Limited volition;
- Poor memory; and
- Distorted perceptions of reality (persons experiencing acute mental illness).

2.8.2 The different treatment hypothesis

As noted, the different treatment hypothesis focuses attention on the treatment of persons with disability in the criminal justice system. The NSW Law Reform Commission (1996b) has helpfully summarised the different treatment trajectory of persons with intellectual disability in the criminal justice system. It suggests that persons with intellectual disability:

- Are more likely to be arrested, questioned and detained for minor infringements of public order law;
- Are more likely to come before the courts as a result of police policies with respect to prosecuting cases where the offender appears abnormal or possibly dangerous;
- May be persuaded to confess to a crime they have not committed;
- May not have their 'rights,' such as the right to silence, explained in a way they can understand;
- May be convicted more easily as they tend to confess rather than plea bargain;
- May be more often refused bail, perhaps because of previous breaches of bail

conditions, or lack of support and resources enabling them to obtain bail, or inadequate supervisory arrangements which do not satisfy the court's requirements;

- Are more likely to receive a custodial sentence because of the lack of alternative placements in the community;
- Tend to serve longer sentences or a greater percentage of their sentence before being released on parole; and
- May require maximum-security facilities for segregation and 'protection' needs.

The qualitative research undertaken in the early stages of this project suggests that most, if not all, of these examples of different treatment by law enforcement and criminal justice agencies are also experienced by persons from other impairment groups, especially persons with psychosocial impairments, and persons with brain injury. Unfortunately, there appears to be very limited formal research in relation to the different treatment hypothesis and other impairment groups.

One possible explanation for this different treatment is that law enforcement and criminal justice agency personnel tend to stereotype and attribute negative characteristics to persons with disability, due to entrenched negative social belief structures that are not necessarily consciously held. These beliefs, particularly with respect to persons with cognitive impairments, include:

- The susceptibility hypothesis - persons with disability are inherently prone to crime. While the susceptibility hypothesis may have been formally discredited, it lingers in social belief structures;
- Persons with disability are psychologically unstable, unpredictable, predatory and dangerous;
- Persons with disability are manipulative and exploitative in their relationships and interactions with others;
- Persons with disability are untrustworthy, deceptive, and 'cunning,' and are good at 'putting it on' when it suits them; and
- Persons with disability are bestial, sexually lascivious and predatory in nature;
- Persons with disability are a general menace to the community and need to be contained.

Surprisingly, there has been little formal research conducted into the attitudes of law enforcement and criminal justice agency personnel towards persons with disability. One exception is a study undertaken by Gething (1992) for the NSW Law Reform Commission, which concluded that such personnel 'experience more discomfort and hence display

more negative attitudes than members of the Australian population towards persons with disabilities in general.' Unfortunately, as Gething points out, the study is based on quite a limited sample of personnel, and its findings must be understood in this light. Another, Western Australian, study of the attitudes of police, judges and magistrates, prison officers, community corrections officers, lawyers and other legal service personnel by Cockram et al (1994) also contends that these personnel tend to stereotype persons with intellectual disability based on underlying prejudice. However, this study is also relatively limited.

Of course, while negative stereotyping may account in part for the different treatment of persons with disability by law enforcement and criminal justice agency personnel, it is unlikely to be the only factor at play. It is perhaps best understood as interacting with other social and environmental issues to aggravate the disadvantage experienced by persons with disability in the criminal justice system.

2.8.3 The psychological and socio-economic disadvantage hypothesis

The psychological and socio-economic disadvantage hypothesis explains the over representation of persons with disability as suspects, defendants and offenders by understanding impairment as only one of a range of factors that result in greater exposure to law enforcement and criminal justice interventions. According to this theory, impairment is not the causal or determinative factor in bringing the individual into contact with law enforcement and criminal justice agencies, although of course, it may interact with other 'primary' factors to do so.

In a study of all persons admitted to two special units for offenders with intellectual disability between 1990 and 1994 Deane and Glasser (1994) found that 'intellectual disability is itself merely a marker for an overwhelming array of psychosocial disadvantages' which included high rates of unemployment, major educational disadvantage, childhood institutionalisation, disrupted and disturbed families of origin, frequent contact with psychiatric services, alcoholism, drug addiction and poor social skills. The NSW Law Reform Commission (1996) and Simpson, Martin and Green (2001) also note that persons with intellectual disability may experience aggravated disadvantage in their interaction with law enforcement and criminal justice agencies because of other social disadvantages, such as youth, indigenous status, ethnicity, gender, sexuality, other impairments and conditions, and substance abuse. These factors are equally apposite to an explanation of the over-representation of other impairment groups in the criminal justice system.

Other psychological and social disadvantages operate and interact with impairment in some very specific ways to increase the likelihood of contact between persons with disability with law enforcement and criminal justice agencies:

- Many persons with cognitive impairment have poor organisational and problem-solving abilities and poor motivation and volition, which may result from impairment

(eg depression; intellectual impairment), treatment for impairment (eg psychotropic medications), psychological factors (for example, lack of optimism, lack of self-confidence) and environmental factors (poor education, lack of family support, lack of case-work support). They may therefore commit survival crimes that reflect an inability to manage the activities of daily life. For example, a person with cognitive impairment may find it difficult to maintain compliance with conditions necessary to receive income support (for example, an activity test), and may consequently loose access to income support. They may spend their income support payment impulsively on luxuries as soon as it becomes available, leaving nothing for daily living expenses. They may therefore need to steal food to eat, or to evade transport fares in order to get home;

- These characteristics may also lead some persons with cognitive impairment to simply avoid dealing with minor legal obligations and problems (such as the requirement to file a tax return or pay a fine). These obligations and problems may then accumulate, and escalate into major legal problems that have serious consequences;

- Many persons with intellectual impairment have had very limited educational experience, and may have been exposed to few positive role models and social expectations due to the environments in which they have grown up and now live. They may have received no, or inadequate, sex or human relationship education. They may be unable to read or comprehend basic legal information (for example, no-smoking signs). Consequently, many people with intellectual impairment have a very limited understanding of what the law requires of them. This can lead them to commit offences in circumstances where they do not realise this conduct is against the law (for example, smoking on a railway platform, urinating in public).

- For social reasons (for example, poverty, poor personal hygiene and grooming, poor dental care etc) and sometimes (though not always) also because of the characteristics of impairment, persons with disability may be much more 'visible' than other members of the community. Others are much more likely to feel discomfort and unease in their presence, and to subject them to a much higher level of surveillance, scrutiny and suspicion than they would others. Others are much more likely to anticipate that the person with disability will cause a problem, and when problems do occur, are more likely to blame the person with disability, even though they may have no actual evidence of their connection to the problem;

- Many persons with disability are homeless or live in marginal accommodation such as boarding houses, crisis, short- and medium-term accommodation services, and group homes where they may be unable, or unwilling for other reasons, to spend time during the day. Most persons with disability are also unemployed, have no access to further or higher education, and many are unable to access to developmental day programs due to their ineligibility or to unmet demand for these services. This can aggravate their visibility, and for the reasons outlined above, can lead to community

pressure for their removal or 'moving-on,' and when this fails, to their susceptibility to being charged and convicted of public space offences;

- The visibility of persons with disability may also be aggravated by minor anti-social behaviours, for example, urinating in public, and begging for money, food or cigarettes. These behaviours may derive from patterns of behaviour learned in residential institutions, from an absence of amenities (no available public toilets, and rigid re-entry times for residential services), or from a genuine need for sustenance (the person may have no access to their money, or have had this stolen from them);

- As already noted in relation to victims of crime, many persons with disability rely on social assistance for their survival. Due to current mental health, disability service, and social housing policy and practice this tends to result in them being congregated together in areas of high social need, with members of other socially disadvantaged groups. This creates conditions where conflict, predatory, abusive and exploitative behaviour can operate between socially disadvantaged groups. For example, it is relatively commonplace under such conditions for persons with intellectual impairment to be coopted into a crime syndicate (perhaps involving car break and enters, bag snatches etc) operated by a non-disabled person. It is also relatively commonplace for persons with disability (particularly persons with cognitive disability) to acquire addictions to alcohol and other drugs in these environments, perhaps because a local drug dealer has introduced them to this substance. Crime, perhaps pursued through a local organised crime network, may become the only means of supporting their addiction;

- Many persons with disability have grown up and lived as adults in closed residential environments where violent and anti-social behaviours between residents and between staff and residents were normative, or at least a common life experience. Some persons with disability will therefore express their sexuality as they have learned it – as forced acts of submission to a stronger individual by a weaker one – and may have little of no conception of loving expressions of sexual intimacy, or of the wrongness of sexual assault. Similarly, in many closed environments persons with disability will have had little experience of dignity and privacy. They are likely to be accustomed themselves, and to others, being in various states of undress and exposure, and to public masturbation and other sexual behaviour. Normative social inhibitions against such behaviour were simply not present in many institutional settings. Indeed, in some cases, institutional staff will have encouraged such behaviour, providing the person with a false consciousness of its acceptability. Theft of the property of others, often under threat, is also commonplace in closed environments where residents may have competed for food, clothing and other tangibles, such as cigarettes. Again, institutional staff may have encouraged such behaviour. These life experiences mean that formerly institutionalised persons with disability will often struggle to conform to socially normative behaviour patterns when they move to the community;

- As already noted in relation to victims of crime, many persons with disability are congregated with other unrelated persons with disability in residential and other settings. Often grouping practices result in persons with similar, rather than complimentary, needs being placed together in close proximity (for example, 5 persons with so-called challenging behaviour living in a group home). Additionally, these environments may have resident and staff densities that afford limited privacy and personal space. This can give rise to situational violence and other crime between residents and between residents and staff;

- Many persons with disability have experienced repeated rejection from other persons throughout their lives and may have few, if any, enduring personal relationships. They may therefore yearn for acceptance and belonging, and to be in relationship with others, particularly within a peer group or intimate partnership. This renders them highly susceptible to the influence of others. This can lead to their exploitation; for example, to their being coopted into a petty crime racket, or to being unknowingly set up as a 'bunny' or 'fall-guy' for the crimes of others;

- Due to their experience of rejection and ridicule by other people, many persons with disability have very low self-esteem and are very self-consciousness. This sense of shame is often exacerbated by social factors (poverty, poor personal hygiene and grooming etc), and can result in the person appearing anxious and evasive in the presence of others, particularly those who may be well-dressed and groomed etc. For example, the person may avoid eye contact, show signs of wanting to escape from the presence of others, and answer: "I don't know" to simple questions. There is a risk that law enforcement and criminal justice agencies will interpret such behaviour as suspicious and as evidence of guilt;

- Also due to their low self-image and self-consciousness, many persons with cognitive impairments in particular will deny their impairment and disability, and take active steps to mask it. They may prefer to face almost any consequence than to be stigmatised as impaired or disabled. For example, the person may adopt bravado, pretend to be able to read a document put before them, or pretend to understand something someone says to them. They may refute inquiries suggesting they are impaired or disabled, and they may refuse assistance from an advocate or lawyer also in an effort to negate any such assumption. Such behaviours can extinguish initial positive responses to the person's impairment and disability by law enforcement agencies, and can even incite more punitive responses when these agencies conclude there is no reason to tread cautiously with an individual who may be quite challenging;

- Persons with intellectual impairments, and some other impairment groups, have tended to be treated as children, or as child-like, by their families, service providers, and the community generally, irrespective of their chronological age. Childlike interests and behaviours may have been encouraged, and this may lead the person to seek contact with children and children's play things. This may create great suspicion

and alarm about the person's motives for seeking such contact, and can indeed also lead to the person committing actual offences against children that arise from age/peer disorientation;

- Due to their desire for relationship and social approval, and sometimes also because they have grown up and live in hierarchical environments dominated by authority figures with whom they have had to comply, persons with intellectual impairments tend to respond to authority figures in a manner that they anticipate will please the authority figure, and that will generate positive attention towards them from the authority figure (or at least avoid further negative attention). Consequently, persons with intellectual disability will frequently respond to law enforcement officers in a way that they think will please the officer, irrespective of the reality of the situation. They may agree to propositions put to them that are incorrect, and may even elaborate on these propositions;

- Due to their rejection by other people, consequent loneliness, and social isolation, some persons with disability will go to extreme measures to gain the attention of others, even if this attention is negative. These measures might include damage to property and violence towards others. In such circumstances, law enforcement interventions can become positively reinforcing of anti-social behaviours. The person may find the attendance of police, their going into custody, and the attention they receive from police and others during a police interviews and court proceedings exciting and motivating;

- There is crisis in unmet demand for specialist disability services and acute and community-based mental health services. Increasingly law enforcement and criminal justice agencies are being forced into a front-line role with persons who require health and social service interventions. Sometimes the only means of rendering, or stimulating, the provision of social assistance for an individual is through the initial activation of law enforcement measures. For example, community-based crisis mental health services are rarely available in practice, and it is also often very difficult to obtain admission to an acute mental health facility for a person experiencing an episode of serious mental illness. In these circumstances, it is commonplace for police to be called to apprehend and contain the person, and to deliver them to an acute mental health facility. Sometimes this also results in the activation of law enforcement measures, such as charges being laid for an offence, and the person being placed in custody, especially where a crisis admission to a mental health facility is not available;

- Many generic support services and programs for potential and actual offenders discriminate on the ground of disability. Persons with disability may therefore find it impossible to gain access to intensive counselling (for example, cognitive therapies such as anger management) and rehabilitation programs (for example, drug and alcohol services) that would assist them in addressing the underlying causes of

offending behaviour. Even if they are able to obtain access in theory, these programs are rarely adapted to meet the specific information and learning needs of persons with disability;

- Some specialist services for persons with disability also tend to use law enforcement agencies inappropriately to threaten, intimidate, and contain clients with whom they may be having difficulties. For example, residential support staff may call police to respond to a situation where a client with severe intellectual impairment is engaging in self-injurious behaviour, or damaging group home property. In these circumstances the appropriate course of action would probably be to seek the assistance of specialised behaviour intervention services. However, such assistance may not be available, or if it is, staff may simply fail to deploy or source it. They may even view calling police as 'normalising' in that it exposes the person with disability to the consequences non-disabled persons would face if they engaged in equivalent behaviour;

- Some persons with cognitive disability live in such unsupported and deprived conditions in the community that they may re-offend in order to go back into custody where they can at least be assured of regular meals, shelter, and some protection from violence and abuse;

- Over the past twenty years the disability service system has increasingly prioritised assistance to persons with severe and moderate intellectual impairment at the expense of persons with mild and so-called borderline impairment. Persons with mild and borderline impairment may now be ineligible for specialist services, or even if they are eligible, may be so low a priority that they are not likely to ever receive adequate or any assistance. The services they miss out on include casework and clinical psychology, as well as supported accommodation and developmental day programs. Eligibility for specialist services is typically based on the person's level of *impairment* (clinical characteristics), rather than their *disability* (difficulty experienced in their encounters with the social world). Most persons with intellectual impairment who come into contact with law enforcement and criminal justice agencies have mild or borderline impairments. They may experience significant *disability* in their interaction with the social world, but they will be clinically assessed as a low priority based on their mild or borderline *impairment*. They therefore have few, if any, social supports to assist them manage the necessities of daily life, and this can result in their contact with law enforcement and criminal justice agencies for the reasons outlined elsewhere in this discussion. For the same reason they will typically be assessed as ineligible for specialist disability supports when they do come into contact with law enforcement and criminal justice agencies, making diversion difficult;

- Similarly, some impairment groups, such as persons with brain injury, and to a somewhat lesser extent, persons with psychosocial impairments living in the community, simply do not have access to an evolved social service infrastructure

that is capable of providing a comprehensive range of necessary services. This is no so much a question of unmet demand for services as it is the absence of the structural elements of a necessary service system. The Australian disability support system has tended to evolve in impairment group silos. Persons with brain injury, in particular, remain largely outside this system, although the situation is changing. Services for persons with psychosocial impairments have historically been hospital-based, and although psychiatric hospitals have progressively devolved and closed, a comprehensive community-based service system has not evolved to replace them. The absence of an adequate social support system also exposes members of these impairment groups to a much greater likelihood of contact with law enforcement and criminal justice agencies, and to greater difficulties in achieving diversion from the criminal justice system once contact has been made;

- Finally, members of some cognitive impairment groups find it difficult to obtain necessary social assistance because of gaps and tensions in the horizontal and vertical interfaces between government agencies responsible for the provision of health and social services. Due to significant unmet demand for services and budget constraints, agencies tend to erect rigid boundaries around their target groups and service outputs. This can create great challenges for individuals who require services provided by more than one agency. It can lead to persistent 'cost dodging' and 'buck passing' between these agencies, each of which may assert that another is wholly responsible for providing the required supports. Problems can escalate exponentially while these arguments ensue. Agencies tend to erect target group and service type boundaries unilaterally, rather than in an integrated or seamless way in negotiation with other agencies. This creates policy and practice voids in relation to some persons and services that no agency will accept responsibility for. Impairment groups (or sub-groups) particularly affected in this way include persons with organic brain injury (acquired by substance abuse), persons with dual intellectual and psychosocial impairments, and persons with intellectual impairment at risk of committing serious offences. Often individuals within these groups are 'batted' between disability, health and criminal justice agencies, without any agency assuming primary, or even contributing responsibility for their support. Again, the absence of an adequate social support system means these individuals have a much greater likelihood of contact with law enforcement and criminal justice agencies, and greater difficulties in achieving diversion from the criminal justice system once contact has been made.

2.9 Types of offences

Although persons with disability may be accused and convicted of a wide range of offences, the overall pattern of their offending appears to have the following characteristics:

- Relatively minor, but repeated offences usually of a similar character;

- High incidence of survival crimes (stealing food, failing to pay for transport) often associated with an inability to manage the demands of daily living;
- High incidence of addiction related crime (theft of money or of property to sell to generate cash to purchase alcohol or drugs);
- Offences arising from minor anti-social behaviours exhibited in public space (drunkenness, urinating in public, smoking etc)
- Compliance related offences often associated with an inability to understand or act in accordance with legal obligations;
- Offences (including those that may involve serious personal violence, sexual assault and major property damage) committed on impulse without premeditation;
- 'Situational' offences that result from particular environmental stressors;
- Relatively low incidence of offences of mid-range seriousness, particularly where these are crimes requiring planning.

The overall pattern of offending is that of minor offences committed in circumstances where there are strong social and environmental determinants or facilitators of crime. Some of these offences are, in essence, victimless. However, it would be incorrect to suggest that this is true for all offences and all offenders with disability. Indeed, some persons with disability are involved in very serious offences that cause great harm to others, and they may also present a serious ongoing risk of harm to others.

2.10 Conclusion

In this chapter we have demonstrated the significant over representation of persons with disability as victims of crime, and as suspects, defendants and offenders in the criminal justice system. The evidence base is not without its limitations certainly, but there can be no doubt there is a very substantial problem to be addressed. Strategic action in response to this overrepresentation must, however, deal constructively with the current shortcomings in the evidence base, particularly in relation to impairment groups other than persons with intellectual and psychological impairment. Failure to do this will simply entrench the bias in research and social action that has disadvantaged other impairment groups to date in this area.

We have also overwhelmingly demonstrated that crimes against persons with disability, and the over-representation of persons with disability as suspects, defendants and offenders in the criminal justice system, has powerful structural and systemic underpinnings. Persons with disability are more exposed to crime, and to allegations that they have committed crime, because of deeply held prejudice towards impairment and

disability within our community and its social institutions. There are also very serious structural and systemic problems and failures in social service, law enforcement, and criminal justice systems that expose persons with disability to crime, and to interaction with the criminal justice system as suspects, defendants and offenders. In relation to the latter, this is not to adopt a romantic view of persons with disability as holy innocents, incapable of personal wrongdoing, or of social service, law enforcement, and criminal justice agencies as evil empires that conspire to render persons with disability culpable rather than confront their own failings. While there may be an element of justice in such a perspective, the situation is more complex and multidimensional than such an explanation would allow.

The critical point is rather that there are significant structural determinants and facilitators of crimes against persons with disability, and of interactions between persons with disability and the criminal justice system. This should generate confidence and optimism that appropriate structural interventions to address the overrepresentation of persons with disability as victims, and as suspects, defendants and offenders, can be devised and will work.

3. Prevention

3.1 Introduction

In this chapter, we outline a strategic approach to the prevention of crimes against persons with disability, and to the prevention of inappropriate contact between persons with disability and law enforcement and criminal justice agencies as suspects, defendants and offenders. Our focus is on primary prevention, but particularly in relation to offenders, we will also consider more intensive, tertiary responses to the risk of offending behaviour, including recidivism. Our discussion will highlight the critical role played by the social environment, and by the social service system in particular, in creating conditions that will resist and deter crimes against persons with disability, and contact by persons with disability with law enforcement and criminal justice agencies as suspects, defendants and offenders. For this reason, while we do explore a range of individually focused interventions, the broad thrust of the approach we recommend is structural and systemic.

This chapter should be read in close association with chapter 2, which sets out the issues to which this chapter responds.

3.2 Preventing crime against persons with disability

Preventing crimes against persons with disability requires a multi-dimensional approach that is addressed both at building the personal resilience of persons with disability to crime, and at eliminating the structural determinants or facilitators of crime in the social and service environment. Such a strategy would have four critical thematic elements:

- Assisting persons with disability to build their personal resilience to crime;
- Eliminating the structural or systemic determinants or facilitators of crime;
- Building a crime resistant social and service environment; and
- Discouraging crimes against persons with disability through effective detection, reporting, investigation, and prosecution of these crimes, and punishment of offenders.

It is important to appreciate that a one-dimensional approach to the prevention of crimes against persons with disability would almost certainly fail. The social structure of vulnerability is complex, multifactorial and resistant to simple solutions. Individually

focused initiatives, which fail to address the structural underpinnings of vulnerability, may make matters considerably worse.

3.2.1 Building personal resilience

Persons with disability may be assisted to build their personal resilience to crime through effective personal development and education programs. Key areas of focus ought to be:

- Normative sex and personal relationship education;
- Programs that develop self esteem, self-image, and self-confidence;
- Development of communication skills and the provision of assistive communication technology, including in particular, alternative and augmentative communication systems and technology for persons who have limited speech;
- Programs that develop personal advocacy and assertiveness skills;
- Effective education about human, legal and service user rights, as well as information about avenues of complaint and support when these rights are not recognised and respected;
- Effective education in protective and defensive behaviours.

Personal development and education programs in these areas ought to be available for both children and adults, with appropriate age-related variation and adaptation. They must also be adapted to accommodate the specific learning needs of persons from different impairment groups, and those with differing degrees of impairment. Family members and service providers must be sensitised to the need to facilitate this type of education, and funds must be made available for the development and delivery of educational curricula and resources in these areas.

Although it is potentially the easiest and possibly also the most ideologically attractive area of focus for a primary prevention strategy, building personal resilience in the absence of other environmental measures presents very substantial risks. Many persons with disability occupy family, service, and other environments where there are enormous power disparities. No amount of personal development education can position persons with disability to overcome this power differential, and such an expectation is more likely to result in increased, rather than reduced, vulnerability. For example, personal assertiveness and rights education for persons with disability delivered in isolation from a strategy that dismantled the closed, hierarchical residential environment in which they lived may make these individuals more vulnerable to harassment, intimidation, and violence from residential staff who may view the exercise of these new skills as insubordination.

3.2.2 Eliminating the structural or systemic determinants or facilitators of crime

Key to the prevention of crime against persons with disability is the elimination of the structural or systemic determinants or facilitators of crime. In this respect the following strategies are central:

- Systematic education of social service and law enforcement personnel to raise their awareness and sensitivity about the incidence and characteristics of crimes against persons with disability, and the cultural and institutional barriers to access to justice in relation to these crimes. Among other things, this education must be specifically directed at dispelling myths, misconceptions, and prejudice that result in the failure to characterise offensive conduct towards persons with disability as crime;

- Elimination of 'closed' models of specialist service support for persons with disability, such as residential institutions or single organisations that provide all or most services for a group of persons with disability. This is because persons with disability will be less exposed to crime, or more likely to obtain support when they are, if they are in continuing contact with a number of administratively independent support services that are capable exercising a level of scrutiny over each other;

- Elimination of models of supported of accommodation that congregate unrelated persons with disability together in groups. Particularly problematic in this respect are residential institutions, boarding houses and nursing homes, but so-called group homes have the potential to be equally inductive of crime. This is especially the case where residents are grouped together on the basis of impairment, and equivalent, rather than complementary, characteristics: for example, where a group of five people with so-called challenging behaviour are required to live together, which may result in frequent interpersonal violence between them;

- Avoiding the location of supported accommodation and other services for persons with disability in marginal residential and industrial areas, areas where there is already a high concentration of crime and anti-social behaviour, or where there is already a congregation of persons with high social needs. Environments such as these increase the exposure of persons with disability to crime, and decrease the likelihood that it will be deterred or detected by supportive neighbourhood relationship networks;

- Ensuring that persons with disability and their families receive timely, sufficient and affordable social support including, as required, domestic assistance, personal care, aids, appliances and equipment, supported accommodation and home modifications, respite care etc that will avoid or minimise relationship stress;

- Elimination of aversive behaviour management practices, such as electric shock treatment, seclusion, physical restraint, and chemical restraint, to the fullest extent

possible. These practices are, or almost inevitably become, abusive. They may operate, in effect, as a license or excuse for the commission of crimes against persons with disability. They frequently disguise abuse by providing it with a professional or clinical mask, which can confuse and neutralise normative protective reactions even from the person's close associates. Where these practices continue they must be subject to the strictest independent safeguards and to regular independent monitoring and review.

3.2.3 Building a crime resistant social and service environment

In addition to eliminating the structural or systemic determinants and facilitators of crime, crime prevention in relation to persons with disability requires positive action to build a social and service environment that is crime resistant. In this respect, the following strategies are important:

- Public education programs that promote positive perceptions of persons with disability as right-bearers of equal value to other persons, which combat harmful stereotypes, prejudices, and practices, and which foster recognition and receptivity to the rights and concerns of persons with disability. This is obviously a broad goal, but nevertheless one that can be achieved if approached on a systematic, long-term basis; for example, by incorporating appropriate curricula into primary and secondary education programs, and by educating the media in contemporary rights-based understandings of disability;

- Ensuring that the curricula of applied degree and professional education programs for professions that have substantial contact or impact on persons with disability, such as policing, law, medicine, social work, education etc, include a significant disability dimension. These curriculum components must also promote positive perceptions of persons with disability as right-bearers of equal value to other persons, combat harmful stereotypes, prejudices, and practices, foster recognition and receptivity to the rights and concerns of persons with disability, as well as teach the general and specific disciplinary skills required for competent work with persons with disability;

- A human resources strategy for the disability services sector that will ensure the development of a sufficient and skilled workforce for the sector to overcome the sector's reliance on unskilled casual staff and less-preferred staff. This strategy will require the development of structural linkages with secondary and tertiary educational institutions to raise awareness of potential careers in the field, and to develop post-secondary diploma and degree programs better aligned with contemporary approaches to disability and workforce need. A fundamental aim of this strategy would be to promote work with persons with disability as an exciting and fulfilling career and life choice;

- Effective screening procedures for staff employed to work with persons with disability. The aim of these procedures must be to ensure that prospective staff who

represent an unreasonable level of risk to persons with disability are not employed. In this respect, it is notable that the Queensland Government has recently introduced a system of criminal record checks for staff employed to work with persons with disability in government funded and regulated services. This will clearly have some positive impact. However, in most cases, this system will only identify persons who have been convicted of an offence. It may also focus unnecessary attention on spent convictions for offences that may have no bearing on the suitability of an applicant for employment in the disability sector. While the screening process would generally result in permission being granted for such persons to be employed, well-suited candidates may be discouraged from applying for positions that will expose them to this level of scrutiny. In any event, it is clear that the vast majority of perpetrators of crimes against persons with disability are never charged, let alone convicted of offences, and so criminal record checking is at best a necessary, but insufficient, safeguard against the employment of staff that may represent an unreasonable risk. Other screening strategies are also necessary, including rigorous interviewing, rigorous referee checking, and structured and closely supervised probationary periods.

- Comprehensive staff supervision and support policies and procedures that ensure that direct service staff are monitored and supported in the performance of their duties with persons with disability. These policies ought to ensure regular observations of staff in the performance of their duties, including un-notified 'spot checking,' as well as continual performance development strategies;

- The development of comprehensive whistle-blower legislation and policy that will effectively protect from retaliation persons with disability, family members, staff and others who report suspected criminal offences and other abuse and neglect. While Queensland has relatively advanced whistle-blower protection, which in fact includes somewhat more expansive provisions in relation to persons with disability than it does for others, this protection is nevertheless still quite limited in key respects. This includes a very limited application to non-government organisations funded by government to provide disability services, and a relatively narrow definition of detriment, which would not appear to encompass the withdrawal of services and supports to a person with disability or family member;

- The development of clear and comprehensive codes of ethics and practice for staff in relation to at least the following matters:

  - Personal and intimate care;

  - Behaviour modification;

  - Sexuality and personal relationships;

  - Administration of medication;

- Handling money and property;
- Challenging behaviour;
- Risk assessment and management.

These codes of ethics and practice must clearly identify conduct that is not acceptable. Staff must then be comprehensively educated and monitored to ensure compliance.

- Comprehensive crime and abuse and neglect prevention training for staff working with persons with disability. This ought to include guidance on:
  - The identification of persons with disability who may be particularly exposed to offensive conduct;
  - Recognition of the various sources of risk (for example, situations of greater exposure, potential offender groups such as residential staff, medical personnel, other residents with disability, family members etc);
  - Recognition of warning signs and possible evidence of offensive conduct in relation to both victims and perpetrators;
  - Reporting obligations in respect of suspected crime or abuse;
  - Whistleblower protection provisions; and,
  - Avenues of complaint, advocacy support, referral and reporting that are external to employee's place of work.
- Providing persons with disability and their close associates with greater personal control over their support services. This ought to involve a mix of measures that includes direct allocation of funds for support services to persons with disability and their families to enable them to recruit and manage their own staff, and the ability for persons with disability and their families to select their support staff where these staff are to be employed by others. These measures have crime resistant potential because:
  - Persons with disability and families are more likely to be able to attract appropriate paid staff from within their informal networks;
  - Even where this is not possible, persons with disability and families are more likely to select staff that are compatible with their particular expectations and aspirations for such staff;
  - Persons with disability and families are more likely to be sensitive to emerging problems in their relationship with support staff than traditional hierarchically managed service models are capable of being, and consequently:

- Preventative or ameliorative action is more likely to occur in a timely manner;
- The inversion of the traditional service power structure is likely to discourage at least some unsuitable staff from applying for positions because they will be unable to control the service environment, and, conversely:
- It is more likely to attract staff committed to the empowerment and rights of persons with disability and their families.

- Designing specialist service systems so that they provide individualised family and community-based support options across the spectrum from primary prevention through to tertiary services. Service models that compel the congregation of unrelated persons with disability together ought to be phased out as quickly as possible. These measures have crime resistant potential because:
  - Individualised supports typically result in less opportunity for 'situational' crimes (such as resident on resident violence) between persons with disability;
  - Situational crimes committed against persons with disability by family members and support staff are also less likely due to reduced stress – in the case of the family member, because support is tailored to meet their needs, and in the case of the support worker, because there are fewer competing demands arising from the needs of other persons with disability in the same environment;
  - Individualised supports typically result in a higher degree of blending of informal and formal supports. Essentially, this means that the person's existing relationship networks are more likely to remain involved, and to offer normative protection of the person's interests, than is the case if the person relies entirely on a formal, external, total service system;
- Ensuring ready access to independent individual and systemic social advocacy support for persons with disability and their families. Individual advocacy is essential to the promotion and protection of the rights of specific individuals, while systemic advocacy is essential to the identification and elimination of the structural and systemic determinants and facilitators of crimes and other abuse and neglect perpetrated on persons with disability. A comprehensive system of independent advocacy for persons with disability has a crime resistant effect because it:
  - Assists in building a culture within services and the broader community that is conscious of the rights of persons with disability;
  - Assists persons with disability to be more resilient to crimes by increasing their knowledge of their human, legal and service user rights, and their confidence and ability to exercise these rights;

- Deters crimes and other abuse and neglect of persons with disability because of the greater potential of discovery and prosecution of these offences;
- Exposes 'closed' environments and service systems to greater independent scrutiny;
- Promotes structural changes to eliminate the determinants or facilitators of offensive conduct towards persons with disability, and to build a crime resistant social and service environment.

3.2.4 Discouraging crimes against persons with disability

Deterrence is also a crucial foundation for the prevention of crimes against persons with disability. Key deterrents include the effective detection, investigation, prosecution and punishment of crimes against persons with disability, which are discussed in greater detail later in this report.

However, it must be recognised that the current legal framework for the investigation and prosecution of offences is not adequately adapted for the protection of persons with disability, particularly persons with severe disability, and persons with cognitive disability. Although well-conducted investigations can overcome many of the problems that lead to the failure of prosecutions of crimes against persons with disability, there are often inherent difficulties in meeting the evidentiary standards necessary to secure convictions. Additionally, conviction of offenders may not be possible or appropriate for other reasons (for example, where the offender also has a severe cognitive disability). It also may not be a sufficient response to the person's exposure to crime (for example, the person may remain exposed to predation from others in a particular environment). Specific positive measures are therefore required to detect, investigate and deter crimes against persons with disability.

In this respect, the following additional institutional arrangements ought to be considered:

- The establishment of an independent, specialist, statutory agency responsible for the investigation of allegations of harm perpetrated on adults with disability. The agency ought to have jurisdiction to investigate all such allegations, whatever the alleged source of harm (whether from a family member, support staff, another service user etc), in whatever environment the harm is alleged to have taken place (that is, whether in a family home, specialist service, or the community). The agency ought to be invested with a range of compulsory powers, including the power to remove a person with disability from a situation of unreasonable risk. It ought to be able to make compulsory 'requests' for emergency and ongoing assistance from relevant government agencies to ensure the safety of the person (for example, the provision of supported accommodation).

The agency ought also to be able to make a finding that a particular person represents an unreasonable risk to persons with disability, without it being necessary to secure the person's conviction for a particular offence. It ought to maintain a database of such findings to be consulted as a component of a compulsory screening process for staff employed to work with persons with disability. Broadly speaking, this agency would play a similar role in relation to vulnerable adults as child protection agencies play in relation to children. It would not substitute for law enforcement agencies, but would work jointly or in close cooperation with these agencies, providing specialised expertise in the investigation process.

- The establishment of an independent, statutory, watchdog agency to oversight disability services provided by government or non-government agencies. This body ought to have at least the following functions:

  - Receiving and investigating complaints from persons with disability, family members and others about the quality of disability services funded or licensed by government;

  - Conducting reviews of persons in care (both individuals and classes of persons);

  - Undertaking broader inquiries into specific issues at its own motion;

  - Reviewing the deaths of persons with disability who die while under the 'care' of specialist services funded or licensed by government. (This function would be in addition to coronial investigation of these deaths, and be oriented to structural and systemic issues contributing to the deaths of persons with disability in care.)

  The agency ought to have power to make findings, issue recommendations, and monitor and report on action taken in relation to its recommendations. It also ought to be invested with a range of compulsory powers necessary to support its investigative functions.[1] This agency would not supplant law enforcement agencies. Instead it would have a much broader quality assurance role that would include a focus on those service system issues that operate as determinants or facilitators of crime or other abuse or neglect against persons with disability. Nor would this agency replicate the work of a vulnerable adult protection agency (although the functions of these agencies might be combined).

- The establishment of an independent, statutory, quality assurance agency for disability services. This agency would:

1 This outline of functions is based on that of the former NSW Community Services Commission, which was established 1993 under the *Community Services (Complaints, Reviews and Monitoring) Act*, 1993 (NSW).

- Set and interpret qualitative standards for disability services, tailored where appropriate to specific service types;
- Accredit disability services against these standards. Only accredited services would be entitled to receive government funding or licenses to operate disability services;
- Systemically monitor compliance with these standards on a periodic basis. The agency ought to have the power to issue compulsory compliance notices, and to withdraw accreditation for serious and persistent breaches of standards;
- Issue best practice guidelines and other educative materials to assist services to comply with the standards, and develop best practice.

New institutional arrangements of this nature would assist in overcoming the current significant structural problems in the handling of allegations of harm perpetrated against persons with disability and in the quality assurance of specialist services for persons with disability funded or licensed by the Queensland Government, which include the following:

- Apart from law enforcement agencies, which tend to lack the necessary expertise, there is no agency responsible for investigating allegations of harm perpetrated on adults with disability by family members and others in so-called informal support arrangements;
- The law as it presently exists is often too blunt, and too black and white, an instrument to penetrate to and resolve harms perpetrated on persons with disability. It is also typically unable to address the structural or systemic determinants or facilitators of harms against persons with disability. This often means that the law fails to intervene in harms against persons with disability, and even when it does, such interventions may fail, reinforcing the status quo;
- There is no genuinely independent oversight of complaint handling by government and non-government service providers for persons with disability in Queensland. The current oversight arrangement, to the extent that this exists, is vested in the government department responsible for policy setting, and the funding, licensing and quality assurance of these services. This agency – Disability Services Queensland – also has a very significant role as a direct provider of specialist services to persons with disability. These multiple functions result in critical conflicts of interest that operate as disincentives to action in particular cases (for example, congregation of five or more unrelated persons with disability together is one of the principal causes of violence and abuse of persons with disability yet it is currently a Disability Services Queensland policy (or at least widespread practice); remedy of a particular service quality issue may require expenditure that Disability Services Queensland is not willing, or in a position, to make);

- There is no genuinely independent quality assurance system for specialist disability services in Queensland. Although independently accredited auditors undertake quality assurance audits, the agency ultimately responsible for the standards against which audits are conducted, and for ensuring the implementation of audit outcomes, is Disability Services Queensland. For the reasons explained above, Disability Services Queensland's various conflicts of interest undermine the robustness with which the quality assurance system can operate in practice, whatever its theoretical potential;

- In any event, quality assurance processes are not necessarily well adapted to detailed thematic investigation of structural and systemic issues of concern within a particular service or across a service system, or to reviews of the circumstances of particular individuals or sub-populations within services;

- Coronial authorities often lack the expertise, capacity and power to investigate the underlying structural and systemic contributors to the avoidable death of persons with disability 'in care.'

The law ought also to be enhanced to provide stronger general deterrence of crimes against persons with disability. In this respect the following are priorities for law reform:

- Neither Queensland nor Australian disability discrimination law currently provides protection for persons with disability from vilification. The Queensland *Anti-Discrimination Act* ought to be amended to provide such protection. Consistent with the approach taken to vilification in other jurisdictions, 'serious' vilification ought to be made a criminal offence;

- Section 285 of the *Queensland Criminal Code* imposes a duty of persons in positions of authority to ensure the provision of necessities of life to certain vulnerable persons to whom they have direct responsibility. However, the terms of the section are almost incomprehensible. The section ought to be amended to make clear the categories of person in whom this duty is reposed, the categories of person to whom the duty is owed, and the scope of the duty. The scope of the duty should include the provision of appropriate accommodation, nutrition, water and fluids, and medical and allied healthcare necessary for survival and wellbeing;

- Section 340 'Serious Assault' of the *Queensland Criminal Code* is an aggravated offence that is applicable where an assault occurs against particular persons, or in particular circumstances, that intensify the offender's culpability. This includes in sub-section 340(h) circumstances where an assault is committed on a person who relies on a 'guide dog, wheelchair, or other remedial device.' The term 'remedial device' is defined to include a 'walking frame, calliper, walking stick and artificial limb.' The sub-section appears to rest on the assumption that assaults are more serious where the victim lacks a physical capacity to escape or defend him or herself. However, curiously, a required element of the offence is the victim's use of a remedial device or guide dog. It would not apply to a person who may have a significant physical

impairment (for example, a person with multiple sclerosis or cerebral palsy) who is able to independently mobilise), or to a person who is Blind who uses another way-finding method (for example, a cane or personal assistant). The section may not even extend to all persons with disability who utilise companion animals (this would depend on how the designation 'guide dog' is interpreted). Obviously, the sub-section also does not apply to other impairment groups, which may be equally vulnerable to assault. The narrow scope of the section appears to make little sense, particularly in light of the evidence of crimes against persons with disability outlined in chapter 2. The section therefore ought to be amended to refer to assaults on 'any person with impairment or disability.'

- The sentencing guidelines set out in section 9 of the *Penalties and Sentences Act,* 1992 (Qld) ought to be amended to incorporate as factors aggravating an offender's culpability for an offence, the following:
  - Evidence that the offence was motivated by hatred for, or prejudice against, persons with disability;
  - Any particular vulnerability of the victim as a person living with impairment and disability;
  - Any evidence that the offender abused a position of trust or authority in relation to the victim (as would be the case if, for example, the offender was responsible for the care and support of a victim living with impairment and disability).[2]

  It will be important to accompany any changes in the law in these respects with a comprehensive and continuing public education campaign that is capable of enlivening their deterrent effect.

The *Queensland Criminal Code* contains a number of offences that aim to deter crimes against persons with disability, or which have particular application to persons with disability. These include:

- Sub-section 208(1)(c) and (d) which prohibit sodomy involving persons with intellectual impairment;
- Section 216 which prohibits carnal knowledge involving persons with intellectual impairment;
- Section 285 which prohibits the withholding of the necessities of life by persons in a position of authority or trust;
- Section 320 which prohibits torture;

2 These deterrents mirror those provided in s 21A of the *Crimes (Sentencing Procedure) Act*, 1999 (NSW).

- Section 328 which prohibits negligent acts that cause harm by persons under a duty;
- Section 229 (various subsections) relating to the procurement of prostitution by persons with intellectual impairment;
- Sub-section 340(h), which is an aggravated assault charge in relation to assaults on particular impairment groups.

Qualitative research undertaken for this project would suggest that there is very limited knowledge of these provisions and their implications for harms committed against persons with disability within key audiences including persons with disability, family members, service providers, and even law enforcement agencies. Concerted efforts are therefore required to raise the level of awareness of these provisions so as to increase their deterrent effect. These efforts should be strategically directed towards target groups, such as human service workers, where there is a high incidence of harm committed against persons with disability. This might be by way of incorporating appropriate curriculum components into induction and in-service training for human service workers.

3.3 Preventing crime by persons with disability

Preventing inappropriate contact between persons with disability and law enforcement and criminal justice agencies, and preventing crime by persons with disability, also requires a multi-dimensional structural approach to these problems. Such a strategy would have four critical thematic elements:

- Eliminating offences and law enforcement and social service practices than unnecessarily ensnare persons with disability in the criminal justice system;
- Ensuring that persons with disability have access to the social supports they require to manage their daily lives and attain a reasonable quality of life;
- Eliminating the structural or systemic determinants or facilitators of crime; and
- Ensuring that persons with disability at risk of offending have equitable access to generic counselling and rehabilitation services (adapted where necessary), and to specialist disability behaviour intervention and support services.

3.3.1 Eliminating offences and practices that ensnare persons with disability in the criminal justice system;

As we have discussed in chapter 2 of this report, persons with disability are particularly susceptible to conviction on public nuisance offences (or what are often referred

to as 'public space' offences such as begging, trespass, failure to follow a police direction etc), due to the fact that they tend to be required to occupy public space to a greater extent than others, and because their impairment, disability, and associated psychological and environmental factors make them more visible, and less tolerated by others, in public space. The qualitative evidence collected in the course of this project suggests that the likelihood of persons with disability being charged with public space offences has increased significantly since the passage of the *Summary Offences Act,* 2005(Qld), which increased the range and scope of public nuisance offences. The typical consequence of a public nuisance offence is the imposition of a fine, which typically carries a default period of imprisonment. For the reasons outlined in chapter 2 of this report, many persons with cognitive disability experience significant difficulty in complying with legal obligations, such as a requirement to pay a fine. They may not be able to afford to do so, and may also find it difficult to otherwise organise themselves to do so. They are therefore much more likely to end up serving a default period of imprisonment.

Additionally, because their underlying living situation is unlikely to change, they are quite likely to be charged repeatedly with the same or a similar public nuisance offence, perhaps resulting in the accumulation of undischarged fines, and in an escalation in the sanctions imposed not only for the nuisance behaviour, but also because of the failure to deal with its legal consequences. Public nuisance offences are in essence victimless crimes and they impact in seriously disproportionate ways on persons with disability and other socially disadvantaged groups. They therefore ought to be eliminated.

Every person has a common law right to call the Police if they feel under personal threat, and disability, community based mental health and other services are not able to prevent their staff from doing so where they feel threatened by a person with disability they have a responsibility to support. Nevertheless, the qualitative information drawn on for this report suggests that in a growing number of cases staff of disability, community-based mental health and other services are seeking to involve police in incidents where a service user is exhibiting challenging behaviour (perhaps arising from an episode of acute mental illness) because:

- There is no effective emergency back-up system for front-line staff to call upon to assist them to manage critical incidents, and police are viewed, in effect, as somehow playing a supplementary role in the delivery of services;
- It is administratively more efficient and more cost effective to involve police in the management of the incident, because calling in additional and specialist staff, perhaps out of their regular work hours, would be inconvenient to them and involve an additional cost impost for the agency. Police are viewed as providing a twenty-four hour service, which is paid for by someone else. (This is, in effect, cost shifting between agencies);

- As noted in chapter 2, it is viewed as 'normalising' in that it exposes the service user to the consequences others would experience if they engaged in equivalent behaviour.

Law enforcement agencies are not intended as a substitute for comprehensive community-based disability, mental health and other services. Nor is it normalising to expose a person with disability to law enforcement agencies when they actually require intensive social assistance arising from the characteristics of their impairment and disability. Additionally, the involvement of police presents very specific dangers for persons from particular cognitive impairment groups (particularly persons with psychosocial and intellectual impairment), as it typically results in the deployment of 'command and control' tactics to subdue the person, which can lead to a serious escalation of the incident, and may result in the deployment of lethal force. This issue is explored in greater detail in chapter 4 of this report.

It is therefore critical for disability, community-based mental health, and other agencies to establish clear policy guidelines for staff for the appropriate management of critical incidents. These guidelines should make it clear that police ought not to be called to intervene in critical incidents in inappropriate circumstances. Agencies ought also to educate their staff to sensitise them to the risks for persons with disability of inappropriate involvement of police in the management of critical incidents.

3.3.2. Ensuring access to social supports

The most important foundation for the prevention of crime by persons with disability is the development of a good quality, comprehensive, individualised social support system that will ensure persons with disability have access to the services they require to manage their daily lives and attain a reasonable quality of life. Discussion of the larger dimensions of this issue is beyond the scope of this report, but we note here in summary form that this requires:

- Continuing concerted efforts by the Australian and Queensland governments to meet the crisis in unmet demand for support services for persons with disability;
- Continuing concerted efforts by the Australian and Queensland governments to establish a comprehensive community-based support system for persons with psychosocial impairments, persons with acquired brain injury and other impairment groups that lack an evolved community service infrastructure;
- Continuing fundamental reform of the disability services and mental health systems to improve and assure the quality of support services available.

It also requires continuing efforts to improve the educational experiences of young persons with disability and their flow-through into further education, other vocational

training, and employment. In particular, these efforts must be directed to:

- Early detection of impairment and disability;
- The provision of early intervention services – particularly to assist in the development of communication, impulse control, anger management, and problem solving skills;
- Positive socialisation, particularly within the age peer group - to assist in the development of self-confidence and positive self-image and to avoid bullying, harassment, ridicule etc by other students that can lead to alienation and social withdrawal;
- To improve school retention rates, and flow through to further education and employment.

As has been highlighted in chapter 2 of this report, a majority of suspects, defendants and offenders with disability have no or inadequate access to social support, and this is a key factor in bringing them into contact with law enforcement and criminal justice agencies. The key components of a social support system necessary to prevent crimes by persons with disability are:

- Ready access to casework assistance (or support coordination) to ensure referral and access to necessary services and supports, and to assist the person to plan, problem-solve and manage their affairs;
- Ready access to good quality individualised supported accommodation, or if the person is able to live in their own home, to regular drop-in support to provide assistance with domestic and daily living skills;
- Ready access to supported employment, vocational or other further education, or to individualised developmental day programs;
- Ready access to psychology, allied health, mental health, and general health services as required.

For the most part, it will not be necessary for these services to be specialised for offenders or persons at risk of offending, and the general pattern of service delivery for these target groups therefore should not be significantly different to best practice in the general disability service system. This is an important point to recognise. With appropriate supports, the vast majority of persons with disability who would otherwise be at risk of coming into contact with law enforcement and criminal justice agencies will not do so, or if they do, can be diverted from contact by unexceptional means.

However, a relatively small number of individuals who present with specific risks of serious offending behaviour may require more specialised services of the same general nature, that is:

- Intensive casework assistance (or support coordination) from persons with specific expertise and knowledge of impairment, disability and offending;

- Specialised accommodation options that provide more intensive supervision and support. This may require a certain degree of environmental positioning and adaptation, for example, locating the residence to avoid formally assessed risks of harm to particular groups (for example, children), and ensuring the perimeter of the property can be secured if necessary (and this is legally permissible). However, it does not require the development of specialist dwellings for groups of offenders (or persons at risk of offending), as is sometimes suggested. The additional supervision and support required to prevent offending are most effectively provided through specialised staffing models, environmental adaptations, and in-reach clinical services.

- Employment, education or day program support tailored to minimise the risk of offending behaviour. Again, this may require more intensive staff support and supervision for the person;

- Intensive access to clinical services, which may include counselling, rehabilitation programs, other mental health, allied health, and behaviour intervention and support services.

Appropriate management of the offending behaviour of some individuals may require the imposition of restrictions on their freedom of movement, either in the context of a developmental program that will ultimately lead to the offending behaviour being extinguished, or less often still, on an ongoing basis. This presents very significant legal and ethical problems where the person is not subject to an order of a Court or Tribunal that authorises the restriction.

It is often suggested that Guardianship Tribunals are the appropriate bodies to deliberate upon, and authorise, proposed restrictions on liberty for offenders or potential offenders with disability. However, there are two very significant problems associated with this approach:

- Modern guardianship legislation, very properly, is primarily concerned with the protection of the rights of the individual with disability. It is not concerned with the protection of the rights of the community at large. In most cases the restriction to be imposed is for the protection of the community, rather than to protect the rights of the person with disability. Using guardianship law in this way potentially corrupts the rights-based framework of modern guardianship. Of course, it might be argued that avoiding the commission of offences is also in the person with disability's best interest, as otherwise they may be charged with an offence, and potentially incarcerated. This argument may be more persuasive in circumstances where the restriction is imposed in the context of a developmental program that will ultimately eliminate the offending behaviour and the need for the restriction. However, it is less

persuasive when the restriction is ongoing and its function is essentially penal or preventative detention.

- As most offenders are persons with mild or borderline cognitive impairment, many are unlikely to be assessed as having a sufficient level of decision-making disability to fall within the guardianship jurisdiction.

Related to this issue is the legal capacity of the disability service system to provide support services in a manner that restricts the liberty of persons with disability, even if there is an order of a Court or Tribunal that authorises this restriction. It is sometimes suggested that the rights-based framework of the *Disability Services Act,* 2006 (Qld) would not permit this. In part, this view turns on a misunderstanding of the rights-based approach that underpins the Act. The Act requires, among other things, services for persons with disability to be provided in the least restrictive manner possible. The least restriction possible will not always equate with no restriction on liberty. Where there is a lawful justification for the restriction – such as an order of a Court or Tribunal – there is no conflict between the rights-based approach of the Act and the restriction. However, where there is no such order authorising the restriction, it is unlikely that terms of the *Disability Services Act,* 2006 (Qld) itself could justify the restriction.

Consequently, there remain significant legal and ethical issues to resolve concerning the development and implementation of accommodation options for a small number of persons with disability who are at risk of serious offending. Further exploration of these issues is beyond the scope of this report. It is therefore recommended that the issues be referred to the Queensland Law Reform Commission for further investigation.

Typically, the most critical problem faced by offenders, or persons at risk of offending, is their ineligibility or low priority for social assistance programs, such as those outlined above. To address this problem, eligibility criteria for these programs ought to be based on assessed level of *disability* (difficulty encountered in interaction with the social world), rather than a clinical measure of *impairment*. Persons with disability who are offenders, or who are at risk of offending, clearly have major social interaction problems, and ought to readily qualify for assistance due to their level of disability, which may bear little relationship to their clinically assessed level of impairment. Policy guidelines governing the allocation of social assistance ought to make this clear by identifying these groups as priorities for such assistance.

A second critical problem faced by offenders, or persons at risk of offending, (where they are assessed as eligible for social assistance) is the timeliness with which such assistance is provided. The types of assistance required usually stem from budget capped, discretionary programs that are subject to intense unmet demand. Offending behaviour, or the risk of it, can escalate significantly, and perhaps irrecoverably, before any or adequate social assistance is provided. In most cases, there is little doubt that social assistance will ultimately have to be provided, even where there are no additional

resources to support such provision. Often this occurs because the situation escalates to a point where there is an executive direction from a Minister or Departmental head to provide necessary assistance. By the time the matter reaches this stage, often intensive tertiary interventions are required, which have significant public cost. A more timely response may have involved significantly less public cost, and would of course, have been in the best interests of the person.

To overcome this problem, social service agencies require access to an emergency response fund from which they would be able to obtain funds to support the immediate deployment of necessary social assistance. Once established, this fund ought to be deficit financed by Treasury on a quarterly basis: that is, expenditure against the fund would be uncapped and replenished on an ongoing basis. Once appropriate support services are established they would transfer to relevant programs, with ongoing costs built into annual budget appropriations for these programs. This will no doubt be a challenging proposition for central agencies, which may fear uncontrolled expenditure. However, the critical point to recognise in this respect is that in these situations there will inevitably be a significant public cost – if not in the eventual deployment of social assistance, then on expenditure in the criminal justice system. A timely response is more likely to reduce public costs, quite apart from its benefit to the person.

A third critical problem most commonly encountered in efforts to secure appropriate social assistance for offenders, or persons at risk of offending, is the acceptance of primary and contributing responsibility by relevant agencies. As we noted in chapter 2, typically members of this group will require assistance from more than one agency. They may also potentially qualify for support from more than one agency leading to attempts to cost shift between these agencies, or even more commonly, they will fall between agency target groups and service types. These problems can only be effectively overcome though mandatory high-level interagency co-operation, co-ordinated by a central agency, such as the Department of the Premier and Cabinet. The mandate of this coordination mechanism would be to ensure that high-level decision-makers from each relevant agency are involved in planning and implementing supports required by this target group. It would assign lead agency responsibility, as well as designate responsibilities for the provision of supplementary services. Although this coordination mechanism would not normally be involved in decision-making around specific individuals, it would nevertheless be the forum in which specific unresolved cases would be referred for final decision.

3.3.3 Eliminating the structural or systemic determinants or facilitators of crime;

Also fundamental to the prevention of crime by persons with disability is the elimination of structural or systemic determinants or facilitators of crime. This includes, for reasons already discussed in relation to victims of crime and in chapter 2:

- The elimination of 'closed' and segregated service models that expose persons with disability to negative role models and social expectations and to anti-social and criminal behaviours which they learn and repeat in their own interactions with others;
- The elimination of models of supported accommodation that congregate unrelated persons with disability together in groups, and which result in the commission of 'situational' offences;
- Avoiding the location of supported accommodation and other services for persons with disability in marginal residential and industrial areas, areas where there is already a high concentration of crime and anti-social behaviour, or where there is already a congregation of persons with high social needs;
- Ensuring that persons with disability and their families receive timely, individualised and affordable social support that will avoid or minimise relationship stress that can lead to interpersonal violence.

3.3.4 Access to specialist clinical services

The prevention of crime by persons with disability also requires the ready availability of a range of specialist clinical services for offenders and persons at risk of offending. The specialist interventions required include:

- Offence specific cognitive behaviour therapy and counselling, to assist in the elimination of maladaptive obsessive behaviours and ideations etc;
- Offence related cognitive behaviour therapy and counselling, to assist in the elimination of secondary reinforcers of specific offending behaviour, for example, limited ability to control anger, poor impulse control, poor problem solving skills, limited ability to understand the feelings of others;
- Drug and alcohol rehabilitation to overcome substance abuse;
- Risk assessment and risk management of potential offending behaviour, in particular, for service planning and design purposes;
- Other psychiatric services;
- Other behaviour intervention and support services.

Access to these specialist services is currently inhibited by a number of structural problems that must be systemically addressed. These include (elaborating on the analysis of Simpson, Martin and Green: 2001):

- 'Generic' cognitive behaviour therapy and counselling services are rarely available to persons with cognitive impairments. For example, eligibility criteria may specifically exclude persons with intellectual impairments and persons with brain injury. Although cognitive therapies may be less effective with persons with moderate to severe intellectual impairment or brain injury, this is not necessarily the case with persons with mild and borderline impairment. Their exclusion is typically based on unjustifiable direct or indirect discrimination on the ground of disability. This includes a fundamental refusal to adapt existing programs to meet the needs of persons with cognitive impairments. Pressure must be brought to bear on relevant agencies to ensure the development and accessibility of programs suitable for persons with cognitive impairments;

- Drug and alcohol services also frequently refused to persons with cognitive disability in circumstances that amount either to direct or indirect discrimination;

- There are very few psychiatrists competent in the treatment of persons with intellectual impairment and brain injury who also have mental health conditions. Consequently, it is very difficult to obtain specialist psychiatric advice on a range of critical treatment issues, including in relation to the efficacy and review of medications, the design of cognitive and other behaviour intervention programs, and the assessment of risk of offending behaviour. Concerted effort is required from the Australian and Queensland governments to sponsor the development of expertise in this area – perhaps by means of funding an academic chair;[3]

- While the existing disability support system includes specialist behaviour intervention and support services that are at least potentially available to persons with disability in contact with law enforcement and criminal justice agencies, staff of these services tend to be skilled and experienced working with persons with moderate to severe cognitive impairment who live in stable residential environments. In general, they are far less skilled and experienced working with persons with mild or borderline intellectual impairment or persons from other impairment groups, such as persons with acquired brain injury, who often also lead unstable lifestyles;

- There is no specialisation, focal point or coordination mechanism for professionals working with offenders with disability.

The absence of a specialisation, focal point or coordination mechanism for professionals working with offenders with disability inhibits the development of specific disciplinary knowledge and expertise, and results in the dissipation of individual expertise to more general functions within the disability support system. This ought to be addressed by establishing a functional unit within Disability Services Queensland which has specific responsibility for work with offenders, and persons at risk of offending. This unit would have a central policy,

3 Such an initiative has been taken under the New South Wales Government's ten-year plan for disability services, *Stronger Together*, launched in 2006.

program development and coordination function, as well as a decentralised service delivery function. The central function would include the following responsibilities:

- Strategic policy and program development in relation to persons with disability and criminal justice issues;
- High-level interagency coordination – including joint service planning, relationship management and problem solving;
- Coordination and development of professional staff involved in direct service delivery roles with offenders, and those at risk of offending.

The service delivery function would comprise of a multi-disciplinary team of professionals (psychologists, psychiatrists, caseworkers, and educators) expert in working with offenders with disability, and those at risk of offending. The team would:

- Provide specialist casework support for individual offenders and persons at risk of offending;
- Develop, monitor and evaluate individual intervention plans for offenders and persons at risk of offending;
- Provide consultancy advice and back up to the person's informal supports (for example, family) and to accommodation service and day program providers etc. This would include a 24 hour, seven day a week, on-call capacity; and,
- Coordinate responses between relevant agencies to ensure seamless service delivery.

3.4 Conclusion

In this chapter, we have outlined a strategic approach for the prevention of crimes against persons with disability, and to prevent inappropriate contact between persons with disability and law enforcement and criminal justice agencies as suspects, defendants and offenders. Our discussion has highlighted the critical role played by the social and service environment in creating the conditions under which persons with disability become susceptible to crime, whether as victims, or as suspects, defendants and offenders. We have demonstrated that crime prevention requires a structural, multi-dimensional and multi-agency approach that is principally directed to the elimination of the environmental determinants or facilitators of crime. It calls for the development of a multi-agency strategic policy and program framework to drive the necessary reforms and ensure the delivery of necessary services. While some of the issues are complex, and some of the challenges are considerable, the essential point to recognise is that there is a vast array of strategic and practical measures that will reduce crimes against persons with disability, and inappropriate contact between persons with disability and law enforcement and criminal justice agencies. There is no excuse for inertia.

4. Policing

4.1 Introduction

In this chapter we consider the impact of policing practices on persons with disability as victims of crime and as persons suspected of crime. Police obviously have a critical role to play in the detection of crime and in its investigation. The results of police detection and investigation provide the foundations upon which successful prosecutions can be launched and convictions secured. It is therefore essential that police have the capacity and expertise necessary to detect and investigate crimes against persons with disability. As we have demonstrated in chapters 2 and 3, police attitudes and practices – both in the past and in the present – have tended to result in crimes against persons with disability going undetected or inadequately investigated, significantly contributing to the failure to prosecute, or failed prosecution of these crimes. Such failures ultimately undermine the deterrent effect of criminal law in relation to crimes against persons with disability. As we have already noted, this emboldens those who perpetrate crimes against persons with disability.

We have also seen that policing practices can inappropriately ensnare persons with disability in the criminal justice system as suspects, defendants and ultimately as convicted offenders. In chapter 2 we outlined a number of psychological and environmental factors that tend to result in a high level of inappropriate contact between persons with disability and police, and in the inappropriate activation of law enforcement interventions. This included the current pressure on Queensland police to increasingly respond to critical incidents involving persons with disability in distress or disorientation, in lieu of effective responses by social service agencies. We also outlined a number of psychological and environmental factors that tend to expose persons with disability to inappropriate suspicion of criminal conduct, and which make it much more difficult for them to assert and demonstrate their innocence.

It is essential that Queensland police develop strategic policy and operational practice that will overcome these problems.

4.2 Police practice and victims of crime

As we have begun to discuss in chapter 2, police detection and investigation of crimes against persons with disability is currently inhibited by a range of factors, including the following:

- Lack of police sensitivity and knowledge in relation to the specific types of crime to which persons with disability may be subject,
- Inaccurate, stereotyped and discriminatory beliefs and attitudes held by police about persons with disability, that may result in the failure to characterise conduct towards them as criminal, or in the assignment of a low priority to the investigation of these crimes;
- A tendency not to believe persons with disability, and to prefer the accounts of others in relation to a set of events;
- A tendency to feel personal discomfort in the presence of a person with disability, particularly where the person has significant impairment or disability, leading to a failure to identify and a desire (which is often unconscious) to disengage from them;
- Poor reporting practices in relation to crimes against persons with disability, including by disability and social service agencies, which often means that investigations are not timely, and that primary evidence has been lost or compromised by the time an investigation commences;
- A tendency to view crimes against persons with disability as social problems which social service agencies have a responsibility to resolve;
- A tendency to idealise social service agencies involved in the provision of services and supports to persons with disability, and a consequent reluctance to investigate allegations that involve misconduct by these agencies and their employees;
- A tendency to idealise the family of persons with disability and a consequent reluctance to investigate allegations that involve misconduct by family members. This also results from a tendency to view disability as a private tragedy in which there is little public responsibility;
- An absence of alternatives to the abusive environment (whether a disability service or family situation), which appears to make intervention futile, or at least operates as a disincentive to timely action;
- A tendency to view the investigation of crimes against persons with disability as too hard, too complicated, and too time-consuming to warrant the investment of police resources, particularly in light of the perceived poor prospects of success;
- A culture of failure in relation to the investigation and prosecution of crimes against persons with disability, which creates a negative self-fulfilling prophecy.

4.3 Police practice and suspects of crime

As we have also begun to discuss in chapter 2, police contact with persons with disability as suspects of crime is also often very problematic for reasons that include the following:

- For environmental reasons, persons with disability tend to occupy public space to a much greater degree than others, are often more visible, and are subject to a higher level of surveillance and suspicion than others. Members of the public are more likely to experience discomfort in their presence and to seek police assistance in moving them on. Persons with disability are therefore particularly susceptible to being charged by Police with public nuisance offences;

- Public space policing, in particular, is typically characterised by a high degree of verbal direction to take certain actions (such as to move-on). Due to their impairment and to psychological and environmental factors persons with disability may find it difficult to comprehend these directions, to remember them, and to act in accordance with them (for example, the public space may be in proximity to a necessary support service). This can lead to an escalation in law enforcement interventions, based on the inappropriate belief the person is wilfully disobeying a police instruction;

- Police may (usually unconsciously) view persons with disability (particularly those with cognitive impairments) as inherently prone to crime, and may consequently focus inappropriate attention on them when a crime is committed to the exclusion of other potential explanations and suspects. This belief is typically exacerbated and reinforced by the frequent churning of particular persons with disability through the law enforcement and criminal and youth justice systems, which occurs for the psychological and environment reasons outlined in this report, rather than because of any inherent propensity for crime. It also becomes a self-fulfilling prophecy;

- Police may inadvertently or intentionally proceed to interview a suspect with disability without having effectively advised the suspect of his or her rights to silence and legal representation, or the fact that anything the suspect says may be taken down and used in evidence against them. Although police may formally issue this advice, it may not be done in a manner in which it can be effectively understood and acted upon by the suspect;

- Police interviews are discursive verbal processes. Many persons with cognitive disability have limited receptive and expressive language. They also tend to have poor concentration skills, poor memory, are easily confused and become stressed and tired in relatively short periods of time. They therefore may have great difficulty understanding and following what is being put to them in the police interview, and in explaining their version of events in response. This may appear to police as evasive and suspicious, and as indicative of guilt;

- Persons with cognitive disability will typically deny or attempt to mask their impairment and disability. They may claim to comprehend matters put to them by police when they do not;

- Persons with disability typically have a very poor self-image and poor self-esteem. They may feel awkward and embarrassed in the company of others, particularly where others are well dressed and groomed, and articulate. In a police interview situation, this can result in disproportionate stress for the person, and in attempts to avoid or disengage from contact. This behaviour may be interpreted by police as indicative of guilt;

- Persons with intellectual impairment, in particular, are often highly suggestible and compliant with authority figures. They tend to say what they believe the authority figure wants to hear. They are therefore likely to agree to propositions put to them by police, confess to crimes, and may even elaborate on a fact scenario because they believe this will please police. There may be no underlying reality to such accounts;

- Charging persons with disability with an offence often provides convenient 'closure' for law enforcement and policing problems. It may avoid more complicated and time-consuming solutions, such as identifying and apprehending the ringleader in a local crime racket into which a person with disability has been coopted.

4.4 Other issues

The foregoing discussion has tended to concentrate on persons with cognitive disability in their interaction with police as victims and suspects. However, we must not overlook the fact that other persons with disability may also experience significant difficulties in their interaction with police. Some of these problems include:

- Not all police stations are physically accessible to persons who use a mobility device or aid (for example, there may be stairs into the building, fixed furniture, lack of accessible toilet facilities etc);

- Reception counter heights may be too high for a person who uses a mobility device;

- Reception and interview rooms may lack hearing augmentation required by persons with hearing impairment. Reception may be sealed behind perspex, exacerbating hearing difficulties;

- There may be no way finding aids (for example, tactile indicators, Braille signage, or audible que) within or near police facilities to assist a person who is Blind find the entrance, reception counter, avoid obstacles, or navigate in a life between floors of a building;

- There may be limited or no signage, or poor quality signage (eg in terms of its complexity, the size of print, or the degree of colour contrast in the lettering), which may seriously inhibit way finding for people with vision impairment, and persons with intellectual impairment. Signage may be at a height where it cannot be observed by a person seated in a mobility device;
- Police may not be willing, or know how, to arrange an Auslan interpreter to communicate with a person who is Deaf;
- There may be no visual alarm to warn a person who is Deaf of an emergency requiring evacuation of the building;
- Police information may not be available in alternative formats such as Braille, large print, or Easy-English;
- Interview rooms will typically have observation windows that are likely to increase anxiety of some persons with psychosocial disability.
- Police may lack sensitivity to other issues associated with positive customer service to persons with disability. For example, they may use outmoded language and concepts to describe persons with disability, they may arrange meetings early in the day or in the evening or at short notice not appreciating the inconvenience this may cause someone who relies on inflexible support services, or they may unnecessarily talk loudly, or in a childish way, or talk to a third party instead the person with disability. This inadvertent and thoughtless conduct may cause embarrassment and offence to persons with disability.

4.5 Structural issues and priorities for reform

In light of these problems, there are a number of major structural reforms required to improve the experience and outcomes of policing for persons with disability both as victims and suspects of crime, and indeed as members of the public in contact with police for whatever reason. These include:

- The introduction of Flexible Service Delivery as the basic strategic approach to customer service to persons with disability. Flexible Service Delivery involves the adaptation of mainstream service delivery to ensure that the needs of persons with disability will be met, as far as possible, without the need for specialist services. Its' focus is on sensitising front-line staff to the needs of persons with disability, and on the eradication of negative attitudes and stereotypes. It orients staff to the need for accessible and inclusive customer service, and provides them with the knowledge and practical skills required for this to occur (for example, how to book an interpreter, the specifications for production of information in large print etc);

- A capital work plan that will ensure that all police premises are fully accessible to persons with disability within five years. This plan ought to deal with access issues for persons from all impairment groups, including those who use mobility devices; those with other physical impairments (for example, those with limited strength and dexterity); those who require hearing augmentation; and those who require way finding assistance (persons who blind and those with cognitive disability);

- Comprehensive basic education in disability issues for all police, both as part of their initial induction and ongoing professional development. This education should deal with the following issues at a minimum:

  - Challenging the myths and stereotypes that are commonly attached to persons with disability;

  - Flexible service delivery as the basic strategic approach to customer service for persons with disability;

  - Communication modes and methods used by persons with disability, including the use of interpreters, assistive communication devices, and other alternative and augmentative communication systems;

  - The incidence of crime against persons with disability, and the types of crime commonly experienced by persons with disability;

  - Identification of persons with cognitive impairments, and understanding of the characteristics and impact of cognitive impairment;

  - Working with support persons for victims and suspects with disability (see following);

  - Policing practices that can inappropriately ensure persons with disability in law enforcement measures, and precautions that will avoid this;

  - Knowledge of disability support and mental health services, and best practice approaches to diversion at the policing stage.

- Additionally, police should receive appropriate specialised education in:

  - Best practice investigative techniques and strategies for crimes involving persons with disability;

  - Best practice interviewing techniques and strategies for persons with disability – whether as victims, suspects, or other witnesses;

  - Conducting joint investigations, and joint investigative techniques, where appropriate, with adult protective services (assuming the establishment of such an agency).

It is also essential for police to develop and implement a basic screening process for suspects that will assist front-line staff to identify persons who may have a cognitive disability and which will therefore trigger a precautionary approach to interviews and investigations.

As we have noted in chapters 2 and 3, currently police collect few if any statistics in relation to incidence or characteristics of those persons with disability with whom they come into contact whether as victims, suspects or other witnesses. It is virtually impossible to undertake effective strategic and operational policy and program development and to monitor and evaluate such initiates in the absence of such an evidence base. It is therefore essential that police collect basic information that will show:

- Incidence of contact persons with disability;
- Nature of the contact (victim, suspect, other witness);
- Impairment type.
- Other characteristics including gender, age, racial, religious, and ethic background.

One of the greatest barriers to the development of a capacity for best practice policing in relation to persons with disability is the lack of a functional unit within police dedicated to this task. The lack of functional specialisation inhibits the development of specific disciplinary knowledge and expertise, and results in the dissipation of the expertise that individual officers may have across broader policing functions. We recommend the establishment of such a specialist function within police in relation to disability and policing issues, which ought to have a central policy, program development and coordination role, as well as a decentralised service delivery role in relation to victims, suspects and other witnesses with disability:

The central function would include the following responsibilities:

- Strategic policy and program development in relation to persons with disability and policing issues;
- High-level interagency coordination – including joint service planning, relationship management and problem solving (with the prosecution service, disability and mental health service systems, sexual assault services, corrective and youth justice services etc)
- Coordination and development of specialist police working with victims, suspects and other witnesses with disability;
- Development of best practice guidelines for police in relation to disability and policing issues;

- Provide education and resources for the community in relation to policing and disability issues.

The service delivery function would comprise police specialists who are expert in working with victims, suspects and other witnesses with disability. These specialists would:

- Provide consultancy support to front-line police in relation to disability and policing issues. This would include providing specialist referral information; mentoring in interview techniques; advice about working with support persons; assistance in the development of investigation plans; liaison with prosecutors; and, assistance in the management of critical incidents involving persons with disability (see following);

- In complex or particularly challenging cases, or in situations of limited policing capacity, undertake investigations, or components of them (for example, key interviews of victims, suspects and other witnesses) directly

One of the most celebrated innovations impacting on policing with respect to suspects with intellectual impairment has been the Police Support Program operated by the NSW Intellectual Disability Rights Service and funded by the NSW Government through the Department of Ageing, Disability and Home Care. This program builds upon the earlier Victorian initiative known as the Independent Third Persons Program (Deane: 1992; 1994), and its immediate predecessor is a pilot program that began in the Illawarra region of NSW in the early 1990s (NSW Law Reform Commission: 1996). The Police Support Program recruits, trains, deploys and advises volunteer support persons, who attend police interviews with suspects with intellectual impairment. Volunteers are on-call 24 hours a day, 7 days a week.

The role of the support person is to (Simpson, Martin and Green: 2001):

- Provide emotional support to the suspect during the interview process;

- Assist the suspect to understand their right to silence, the consequences of giving up that right, and the right to legal advice;

- Assist the suspect to understand the importance of legal advice and if possible assist the suspect to obtain such advice;

- Assist the suspect to work with his or her solicitor, if he or she has one;

- Advise police or the suspect's solicitor if they think the suspect does not understand the right to silence or the right to legal advice;

- Advise the police or the suspect's solicitor if the suspect appears not to understand something, or if information provided the suspect appears to be misinterpreted;

- Advise the police or the suspect's solicitor if the suspect needs a break from the interview;

- Assist the suspect to understand each stage of the charge process, bail and any bail conditions.

Support persons must maintain, and be seen to maintain, their independence from the police. The role and responsibilities of the support person must not, in any way, be understood as reducing the onus on police to ensure the fairness of the investigation process. Support persons must not:

- Ask the suspect questions about the alleged offence before, during or after the interview process;
- Allow the suspect to talk to them about the alleged offence before, during or after the interview process;
- Put questions relating to the alleged offence on behalf of the police.
- Encourage the suspect to answer police questions regarding the alleged offence.

The number of suspects assisted by the NSW Police Support Program since its establishment remains relatively small, but a recent independent evaluation suggests that it is having a positive impact (West Wood Spice: 2006).

It is important to appreciate that uninformed and unskilled support persons can undermine rather than secure the legal rights of persons with disability in police interviews in a number of ways, such as by encouraging the suspect to talk to the police, assisting the police to put questions to the suspect, and by leading the suspect to explain their account of events. Some of these problems became evident in the Victorian scheme in its early stages (Deane: 1992; 1994). It is therefore essential that such a scheme operate under strict guidelines, with competently trained and monitored volunteers. To assist in this respect Simpson, Martin and Green (2001) propose that the role of the support person be formally prescribed by regulation.

The NSW Police Support Program is at this stage limited to suspects with intellectual impairment. This restriction on eligibility for the program is problematic given that the issues to which it responds are similar for a number of other impairment groups, in particular persons with brain injury and psychosocial impairments. Support persons may also play a positive role in assisting victims and witnesses through police interviews by providing emotional and communication support, and maintaining consciousness of the specific needs of the person.

We recommend that a similar program to the NSW Police Support Program be established under regulation in Queensland. However, it should operate on a cross-disability basis and be available to suspects, victims and other witnesses.

Other aspects of the law ought also be amended to facilitate the functioning of a Police Support Program of this nature. The *Evidence Act,* 1977 (Qld) ought to be amended to make

support persons competent by not compellable witnesses in respect of the content or conduct of the interview. This would allow the support person to play a broader supportive role with a suspect outside the police interview. The Act should also be amended to give a right to the use of a support person for all witnesses, including defendants, with disability (Simpson, Martin and Green: 2001).

4.6 Policing and critical incidents

We have also noted in chapters 2 and 3 of this report the increasing tendency for police to be drawn inappropriately into situations where a person with disability is disoriented and in distress due to impairment (for example, during an acute psychotic episode, or in the case of persons with intellectual impairment or brain injury, an episode of challenging behaviour).

The involvement of police in these situations presents very specific dangers, as it typically results in the deployment of 'command and control' tactics to subdue the person, which can lead to a serious escalation of the incident, and may result in the deployment of lethal force. In Australia, there has been a long series of incidents in which persons with psychosocial disability have been fatally shot by police intervening in situations where the person is presenting in a disorientated state, which typically involve actual or perceived threats of self-harm or harm to others. A study of all police fatal shootings in Australia for the period 1990 to 1997 found that more than a third of victims were subject to a recognised psychosocial disability at the time of the incident (Dalton: 1998). During the period 2000 to 2004 there were five fatal police shootings in Victoria, each of which involved a victim who had a psychosocial disability at the time of the incident (Springvale Monash Legal Service Incorporated: 2005). It has been estimated that at least three persons with psychosocial disability were fatally shot by police in Queensland between 2002 and 2005 (Office of the Public Advocate: 2005).

Subsequent investigations by Coronial and other authorities have been critical of the failure of police to identify the person as subject to a psychosocial disability, police lack of understanding of psychosocial disability, and the lack of specialist training provided to police in the management of critical incidents involving persons with psychosocial disability. The counterproductive 'command and control' intervention tactics typically employed by police, and the lack of interagency co-operation between mental health services and police, have also been heavily criticised. Although the available research is focused on persons with psychosocial disability, the same general issues pertain to police involvement in incidents involving persons with intellectual impairment and those with brain injury.

The resolution of this problem requires a concerted interagency approach between law enforcement, disability and mental health services based on the following principles:

- In general, police should not be relied upon by social service agencies to fulfil service and support functions that arise because of a person's impairment or disability. Social services must develop the infrastructure and expertise necessary to manage these situations directly. This necessitates access to specialist expertise in mental health and behaviour intervention and support that is available for deployment on a 24 hour 7 day a week basis. This capacity must be built into multi-disciplinary community-based support teams for persons with psychosocial disability and those for other persons with disability;

- It is inevitable that police will sometimes become involved in the management of critical incidents involving persons with disability (for example, they may be called to attend by a neighbour or member of the public, rather than a support staff member), and indeed, there will be occasions where such involvement may be warranted (due to particular risk of harm to others or to property). Where police do become involved:

  - They ought to investigate the possibility that the person may be subject to a disability as an essential part of their initial assessment of the incident. They ought to do this in consultation with local mental health and disability casework services utilising a 24 hour 7 day per week designated contact point (this might the be a regular on-call arrangement already in use by mental health and disability support agencies);

  - It is essential that police plan their response to the incident in conjunction and close cooperation with expert mental health and behaviour intervention and support services, to ensure appropriately tailored and coordinated initiatives that have the maximum potential for the de-escalation of the incident without harm being caused to any person;

  - In particular, 'command and control' tactics should be specifically avoided, as should policing practices typically associated with command and control. This includes the use of loud hailers, sirens, flood lights etc that only serve to heighten the person's distress and disorientation;

  - Law enforcement measures (for example, arrest and charge) should not be instigated during or following an incident where the situation can be de-escalated and the person returned or diverted to appropriate mental health, disability service or other social supports.

- Local police commands and local community-based mental health and disability services should establish and maintain interagency linkages that will provide the foundation for coordinated emergency responses, as well as the ongoing sharing of expertise, and education and training, on issues relevant to the management of critical incidents involving persons with disability in the community.

- All police should receive specific training in the management of critical incidents involving persons with disability, directed to:
  - Sensitising them to the characteristics and impact of impairment and disability, particularly as this is experienced during periods of acute distress and disorientation;
  - Knowledge of local community-based mental health and disability support systems, including key contact points for use in an emergency;
  - Coordinating emergency responses to critical incidents involving persons with disability with mental health and disability services;
  - Developing expertise in non-threatening intervention tactics and in the avoidance of command and control tactics and associated policing practices;
  - Diversion of the person from police contact to appropriate social support services wherever possible.

4.7 Conclusion

In this chapter, we have examined the impact of policing practices on persons with disability as victims of crime and as persons suspected of crime. We have observed that police investigation is the foundation upon which the successful prosecution of crimes against persons with disability is built. Unfortunately, due to negative police attitudes and practices, and a lack of specialised expertise, many crimes against persons with disability are not investigated at all. Even where they are, the quality of investigations is frequently poor, creating a self-fulfilling prophecy that such investigations are futile because prosecutions always fail anyway. We then considered how policing practices inadvertently and inappropriately ensnare persons with disability in the criminal justice system as suspects, defendants and ultimately as convicted offenders. We also examined the critical risks for persons with disability that arise from the involvement of police in the management of critical incidents that arise as a result of a characteristic of impairment and disability. Clearly there are very serious problems to be addressed.

In response to these issues, we have recommended a number of structural reforms to policing in Queensland to better equip police to provide a high quality service in relation to persons with disability. Key among these reforms is better data collection and a general and specialised education strategy for police that would sensitise them to the issues, and equip them with the applied knowledge and skills necessary to work effectively with persons with disability. We have also recommended that Queensland police adopt Flexible Service Delivery as it basic strategic approach to meeting the customer service needs of members of the public who may have impairment and disability. As a corollary of this initiative, we have also recommended the development of a major capital works program

to ensure all police premises are fully accessible to persons with disability within five years. Equally importantly, we have recommended the establishment of a specialist functional unit within Queensland police to drive and deliver best practice approaches to policing and disability issues. Finally, we have proposed the establishment of a cross-disability Police Support Program to provide practical assistance and safeguards for persons with disability in their interactions with police during police interviews and investigations.

5. Legal services and the Courts

5.1 Introduction

In this chapter we explore the way in which legal services contribute to the disadvantage and discrimination experienced by persons with disability both as victims of crime and as suspects and defendants. Perhaps more than any other factor, access to justice for persons with disability in the criminal justice system is dependent upon the quality of the legal information, advice and representation they receive. It is therefore quite alarming to note that access to legal services, and the quality of legal services, were identified by many stakeholders as two of the most significant barriers to justice for persons with disability in Queensland. We will therefore consider the issues associated with this in some depth.

We also examine the role of the courts, including judicial officers, in securing access to justice for persons with disability as victims, defendants and convicted offenders. Court processes can also be instrumental in the facilitation or denial of justice to persons with disability. Judicial officers, in particular, have a critical role to play in ensuing the accessibility and fairness of the legal process. To achieve this they require a good understanding of human rights and access to justice issues for persons with disability, as well as ready access to specialist advice about adjustments and technical supports required to achieve fairness in the courtroom.

Beyond this, the overarching legal framework applied by the Courts has to be capable of producing fair and enlightened outcomes for persons with disability. Criminal and sentencing law must allow the courts to deal in a socially responsible way with defendants who lack capacity for the assignment of criminal responsibility, or who it is preferable, in the interests of justice, to divert to appropriate support options within the social service system. To facilitate this, the courts require greater power to supervise and direct social services to ensure the provision of necessary supports.

5.2 Legal services – generally

Persons with disability experience a range of problems in obtaining access to legal services, and with the quality of legal services generally. In summary, these problems include:

- The lack of affordability of commercial legal services;

- Lack of eligibility for publicly funded legal assistance in particular critical situations (such as pleas of not guilty and bail applications in the Magistrates Court);
- Negative attitudes and values of some legal service providers in relation to persons with disability, which affects their analysis of, and response to, the legal problems of persons with disability;
- Direct and indirect discrimination on the ground of disability by legal service providers, including publicly funded legal services (premises may be inaccessible, assistance may be refused on the basis of impairment ("we don't/can't take instructions" from a person with intellectual or psychosocial impairment), adjustments may not be made to accommodate a person's impairment and disability-related needs;
- Lack of expertise and experience in substantive disability law and legal issues among legal service providers.
- Lack of expertise and experience working with persons with disability among legal service providers, including in relation to the following issues:
  - Identification of persons with cognitive disability;
  - Obtaining instructions from persons with cognitive disability;
  - Dealing with circumstances where it is not possible to obtain instructions from a person with disability;
  - Communicating with persons with disability – including the use of alternative modes and formats for communication required by persons with disability;
  - Interviewing persons with disability;
  - 'Fitness to plead,' and related issues;
  - Modification of court procedures and practices to accommodate the needs of persons with disability, including the use of alternative technology;
  - Working with support persons for persons with disability; and
  - Specialist referral points, diversionary options and negotiating social service systems.
- An unwillingness of general legal services to invest the time and resources necessary to deal with the legal problems of persons with disability;
- The lack of specialist legal services for persons with disability;

5.3 Legal Aid

Most persons with disability who come into contact with the criminal justice system in Queensland, whether as victims[1] or defendants, are financially disadvantaged. They rely on income support, or minimum wages, and are not able to afford commercial legal services. They therefore principally rely upon Legal Aid, community legal centres (both general and specialist), and pro-bono legal services for assistance.

Legal Aid Queensland is the principal legal service provider for financially and socially disadvantaged Queenslanders. It is also the State's largest criminal law practice, providing legal information, advice and representation in relation to criminal law matters. It is therefore the principal legal service provider to Queenslanders with disability involved in the criminal justice system, and it is appropriate to explore its role in some detail.

Legal Aid Queensland provides legal services directly, and also funds community legal centres and the private profession to provide legal services to its target group.

5.3.1 Legal Information

Legal Aid Queensland's legal information services are provided free to all Queenslanders (that is, they are not subject to a means or merit test). The principal delivery platform is the Client Information Call Centre, which can be contacted from anywhere in Queensland for the cost of a local call. The Client Information Call Centre also has a telephone typewriter service available, but it does not operate on a free-call basis. If a person is deaf or hearing impaired, normally, after the first contact, arrangements are made at an informal level between the legal aid advisor and the deaf or hearing-impaired client, for the advisor to call the client so as to minimise the client's costs.[2] However, this practice is not supported by formal customer service policy, nor is there any public customer service information that advertises this arrangement.

The Call Centre would also be unsuitable, or less preferred, by persons with a range of other impairments that make communication over the telephone difficult or impossible (for example, persons with severe physical impairment, aphasia, or intellectual impairment). As an alternative, in some cases Legal Aid Queensland is able to offer face-to-face interviews with a Client Information Officer over the counter. According to Legal Aid Queensland's Strategic Policy Coordinator, personal interviews would normally be arranged where the client was unable to communicate effectively over the telephone.[3] Again, these practices do not appear to be supported by formal customer service policy, nor is there any public customer service information that advertises these arrangements.

1 For example, in pursuit of a claim for criminal compensation.
2 Telephone interview with Ms Tracey De Simone, Strategic Policy Coordinator, Legal Aid Queensland, 25 August, 2006.
3 Ibid.

There are, however, significant constraints on Legal Aid Queensland's capacity to offer face-to-face interviews. Generally, this alternative can only be offered where the client lives in reasonable proximity to one of Legal Aid Queensland's fourteen offices. It is therefore generally not available to persons who live in rural and remote Queensland.[4] Additionally, not all of Legal Aid Queensland's premises are fully accessible to persons who use mobility devices, or who require hearing augmentation. There also appears to be very limited use of way-finding aids or ques for persons who are blind or have vision impairment. Legal Aid Queensland does not appear to have any standards in relation to the physical accessibility of its offices.

Legal Aid Queensland also operates an extensive legal information database, which is available to the public on-line through Legal Aid Queensland's website. This database contains substantial holdings of materials relevant to persons with disability and the law. Obviously, a website and database of this nature cannot be expected to reach all members of Legal Aid Queensland's potential user groups. However, for cost and psychosocial reasons, members of some impairment groups utilise on-line information to a much higher degree than the general population. This includes persons who are blind, persons with severe physical disability, persons with psychosocial disability, and some persons with neurological conditions, such as Autism Spectrum Disorder. While the website and database would be accessible to most of these groups, they do not appear to be capable of being navigated by screen-reading software and are therefore inaccessible to people who are blind. This is probably a violation of the Queensland *Anti-Discrimination Act* 1991, and the Commonwealth *Disability Discrimination Act*, 1992.[5]

In addition to its on-line database, Legal Aid Queensland produces a range of information products that describe aspects of its service delivery, or which provide basic information about a range of legal issues. These information products are available on-line, and in most cases, also in hard copy. While some of these information products appear to have been written to a plain-English standard,[6] many are not.[7] None appear to have been written to an easy-English standard, suitable for persons with cognitive disability and low literacy. Additionally, the on-line versions of these information products do not appear capable of being read by screen-reading software utilised by persons who are blind. Nor do they appear to be available in hardcopy in Large Print or in Braille for persons who are sight impaired or blind. It is also notable that although Legal Aid Queensland has produced a range of legal information for other specific population groups (young people, Aboriginal and Torres Strait Islanders and women), no specific information has been produced for persons with disability.

4 Legal Aid Queensland has offices in Brisbane, Bundaberg, Caboolture, Cairns, Inala, Ipswich, Mackay, Maroochydore, Mount Isa, Rockhampton, Southport, Toowoomba, Townsville and Woodridge.
5 cf *Maguire v Sydney Organising Committee for the Olympic Games* [2001] EOC 93-123
6 For example, the Youth Legal Aid Fact Sheet Series.
7 For example, the Criminal Injuries Compensation Fact Sheet.

Legal information is also available from Community Legal Centres. There are currently thirty-six Community Legal Centres across Queensland, thirty of which are funded by either the Commonwealth or Queensland governments, or both.[8] Within the limitations of this project it has not been possible to examine in any depth the accessibility of legal information available from these Centres. Some preliminary observations may be made however. There appears to be wide variation in the level of physical accessibility of community legal centres. While some centres appear to be fully accessible to persons who use mobility devices or require hearing augmentation, others do not. Few if any of the Centres appear to utilise way-finding aids or ques to assist persons who are sight impaired or blind navigate to the Centre, or within the Centre. Few Centres appear to have a telephone typewriter service available for people who are deaf or hearing impaired. There does not appear to be any standard of accessibility required for these centres as a condition of government funding.

Many Community Legal Centres operate websites, which provide on-line legal information. Many also produce a range of legal information products,[9] which are usually available on-line and may be downloaded from the Centre's website. A number of the websites of Community Legal Centres reviewed for this project do not appear to be accessible, or at least fully accessible, to screen-reading software utilised by persons who are blind or vision impaired. Additionally, the on-line information products also appear inaccessible or not fully accessible to screen-reading software. These publications were also generally unavailable in alternative hard-copy formats, such as Large Print, Braille, and easy-English. Some Community Legal Centres have produced legal information specifically for persons with disability, or in relation to persons with disability. This includes Caxton Legal Centre, the Welfare Rights Centre, and the Disability Discrimination Legal Advocacy Service. However, not all of this information is available in alternative accessible formats.

5.3.2 Legal Advice

Legal Aid Queensland's legal advice service provides a "one-off" interview with a Legal Aid lawyer in relation to a particular legal problem. Legal advice is not subject to a means or merit test. The aim of the service is to provide the client with an understanding of their legal problem and knowledge about the steps to take next. However, in some circumstances, the lawyer may be able to provide minor assistance such as a letter or phone call on the client's behalf. Generally, interviews are limited to twenty minutes duration. This time restriction presents very serious access to justice barriers for many persons with disability who have communication and other impairments that require accommodation. This is especially the case where the person is from a non-English speaking or Aboriginal and

8 A complete list of these centres, with associated contact information, can be found on Legal Aid Queensland's website: www.legalaid.qld.gov.au - select "Links" on horizontal navigation bar, then select "Community Legal Centres" in directory at the left of the page.

9 A list of Community Legal Centre websites and legal information products, and links to these, is available on Legal Aid Queensland's website at www.legalaid.qld.gov.au - home page – go to directory on left side of page.

Torres Strait Islander background, where cultural and linguistic factors may compound communication barriers. According to Legal Aid Queensland,[10] the time limit on advice interviews is varied in practice where a client has particular needs arising from disability or their cultural and linguistic background. However, this practice does not appear to be supported by formal customer service policy, nor is there any public customer service information that advertises this arrangement.

Legal Aid Queensland's legal advice service is available:

- by personal interview at all Legal Aid Queensland Offices;
- by telephone for some locations and in some special circumstances;
- at prisons either by personal interview or by videoconference; and,
- at some community sites either by personal interview or by videoconference.

Interviews for Legal Advice are arranged through the Client Information Call Centre. As is the case with access to legal information, persons with disability who do not live in proximity to a Legal Aid Office, and who are unable to use the telephone, may experience difficulty in obtaining access to legal advice. However, according to its Strategic Policy Coordinator, Legal Aid Queensland would attempt to resolve these situations on a case-by-case basis.[11] This practice does not appear to be supported by any written customer service policy or customer service information, however.

Legal Aid Queensland advises[12] that if a client requires an Auslan or DeafBlind interpreter in order to receive legal information or advice, the agency will arrange and meet the costs of this. This requires sufficient notice of these requirements so that Legal Aid Queensland can put appropriate arrangements in place. However, again, this practice does not appear to be supported by any written customer service policy or customer service information that would serve to advertise this to the relevant constituencies.

5.3.3 Legal Representation

Legal Aid Queensland provides or funds legal representation for clients in both 'prescribed' and 'non-prescribed' criminal matters. However, except in the case of the Duty Solicitor Scheme, such assistance is subject to a 'means' test, and, in the case of non-prescribed matters, it is also subject to a 'merits' test. Prescribed crime matters are serious criminal matters that carry a sentence in excess of 14 years or more. Non-prescribed crime matters are less serious criminal offences.

10 Telephone interview with Tracey De Simone, Strategic Policy Coordinator, Legal Aid Queensland, 25 August 2006.
11 Telephone interview with Tracey De Simone, Strategic Policy Coordinator, Legal Aid Queensland, 25 August 2006
12 Telephone interview with Tracey De Simone, Strategic Policy Coordinator, Legal Aid Queensland, 25 August 2006

The means test consists of an income and assets review. For people whose income and assets are within the means test limits, legal representation is free. However, some clients may be required to make a contribution to the costs of conducting their matter. Persons with disability who are on income support satisfy the means test for legal aid. The merits test is, in fact, constituted by three tests:

- the "reasonable prospects of success" test;
- the "prudent self-funding litigant" test; and
- the "appropriateness of spending limited public legal aid funds" test.

To satisfy the *reasonable prospects of success* test, it must appear 'on the information, evidence and material provided to Legal Aid Queensland that the proposed actions, applications, defences or responses for which legal assistance is sought have reasonable prospects of success.' To satisfy the reasonable prospects of success test, the case must be 'more likely to succeed than not.' The *prudent self-funding litigant* test involves an assessment of whether a responsible self-funding litigant would risk his or her funds in the proposed legal action. The test aims to put assisted litigants into an equal but not better position than private litigants without 'deep pockets' who risk their funds. The *appropriateness of spending limited public legal aid funds test* involves consideration of whether the costs of providing legal assistance are warranted by the likely benefit to the applicant, or in some circumstances, the community. In most cases, a grant of aid for a person with disability charged with a criminal offence will turn on the "reasonable prospects of success" test.

5.3.4 Application for legal aid

In order to obtain a grant of legal aid the applicant must complete and submit an *Application for Legal Aid.* This application form solicits the information that is required to assess both the applicant's 'means,' and the 'merit' of their legal claim. The form of this application has been agreed by all Australian Governments under the Commonwealth, State and Territory Legal Aid Agreement – it is not peculiar to Queensland. While some attempt appears to have been made to reduce the form to plain-English, it nevertheless remains quite complex. Apart from an on-line lodgement pro-forma to which the public does not have access, the form is only available electronically in a pdf format and in hardcopy. It is not available in Braille, large print, accessible electronic text, nor is it available in easy-English.

In some cases a solicitor acting for, or otherwise assisting the applicant, will complete this application. In such a situation, the form is likely to be accurately completed, and the information required to assess the merit of the applicant's claim will be presented in its best light. However, in many cases, an applicant with disability has no-one available to assist them, and therefore has no option but to complete this form personally.

Informants reported numerous instances in their experience where an applicant with disability simply could not complete the form. Where the person did attempt to complete the form, it was reported that they often failed to do so properly, did not properly comprehend the information they were required to supply, or were unable to present the information in a way that was persuasive of the merit of their claim for legal aid. Question 49 of the application form, which reads, "[b]riefly explain your legal problem," was noted as particularly problematic in these respects. It was suggested that persons with cognitive disability, who will usually also have low literacy, simply do not comprehend what this question entails, and are unable to present information in response that is persuasive of the merit of their application. The typical result is that the application for legal aid is declined and the person with disability is left with no option but self-representation. One commentator has noted the irony of this situation:

> This process ... means that people with disability who apply in person for legal aid are systemically [and] routinely disadvantaged because they have no-one to advocate for them on the merit of their case before they can receive assistance. Where that person's disability goes directly to [the] ability to self-represent, how can anyone make a decision [to provide legal aid or not] by relying on [the person's written] communication?[13]

A recent study of women's access to legal aid in Queensland made similar observations (Hunter, R; De Simone, T; and Whitaker, L: 2006):

> One grants officer said women with disability would have trouble applying without assistance, particularly women with intellectual disabilities, and service providers also noted that in a process that relies upon women seeking help and articulating their case, it is difficult for a woman with an intellectual disability to articulate what happened and therefore she may struggle to tell her story in a way that demonstrates merit.

The study continues:

> Three of the women interviewed disclosed conditions that impacted on their ability to apply for aid in this respect. One woman who suffered (*sic*) from Attention Deficit Disorder described the need for time to help her organise what she wanted to say and express it in an organised way *so I sound as though I am credible.* Two women with mental health conditions acknowledged that their mental health had impaired their ability to make a legal aid application, even with assistance.

The study recommends a number of measures to improve the application process, with an emphasis on personal assistance. It recommends, in particular, that Legal Aid Queensland 'should take active responsibility for organising and maintaining a network of assistance for legal aid applicants.' It notes that possible sources of assistance could

13 Stannard, J, "A Study without Legal Aid" Queensland Advocacy Incorporated, unpublished, undated.

include disability advocacy groups. The report also recommends that the application form be reviewed and revised and make it simpler and to specify more clearly the kinds of information required to be provided.

5.3.5 Legal representation – Duty Lawyer services

In the area of legal representation, Legal Aid Queensland coordinates free duty lawyer services (that is, this service is not subject to a means test) in approximately 100 Magistrate's and Children's Courts throughout Queensland.[14] Lawyers are drawn from Legal Aid Queensland's Legal Practice and private lawyers. The Duty Lawyer Service aims to ensure that people appearing in court after being charged with a criminal offence have access to independent advice and representation.

If the person pleads guilty, the duty lawyer will take their instructions and make submissions to the court on their behalf. However, if the person decides to defend the matter, the duty lawyer cannot conduct their defence. If the person seeks legal aid, they have to make an application for a grant.

A number of informants noted that the immediate availability of a lawyer to enter a plea of guilty, but not defend a charge, creates an incentive to plead guilty. There is significant potential for this incentive to operate improperly, especially where the defendant is a person with cognitive disability. It was suggested that a person with cognitive disability is more likely to do what is necessary to obtain assistance, even if the appropriate course would be to enter a defence. The formality of the Court process, personal stress associated with the Court appearance, a potentially limited understanding of the charge, a lack of knowledge of legal rights, and a lack of capacity to act upon these rights, were all viewed as factors that would contribute to this outcome. It was also suggested that this policy might inadvertently suggest to a person with disability that it would be 'wrong' for them to contest the charge, and that they might plead guilty believing it would 'please' the relevant authority figures.

In most Courts, the Duty Lawyer Service operates under significant pressure. Lawyers conducting the service must see, advise, and represent many clients in the course of the Court session. In most cases, they will have had no contact with a defendant before, and only have very limited time to gain an understanding of the legal issues and provide advice. For this reason, the Duty Lawyer's focus tends to be on the legal issues, and in the present, rather than on the personal characteristics of their client, or their past or future. Within the limited time available, and with this focus, duty lawyers often fail to identify a person with cognitive disability, or simply do not have time to investigate the matter, even where this may be suspected.

14 Duty lawyers do not represent people charged with drink driving or simple traffic offences, unless the person is at risk of imprisonment.

Additionally, even where the lawyer may firmly suspect their client has cognitive impairment, they may tend to take the view that the matter is best resolved though a plea of guilty, rather than by entering a defence, or canvassing issues relating to the defendant's capacity to plead before the Court. The lawyer's focus is on the immediate resolution of the problem, as it presents on that day, by the most direct and resource un-intensive means available. This strategy is oblivious to the cumulative impact of these 'quick-fix' solutions, which can be very negative in the case of a repeat offender. One commentator narrates a typical scenario as follows:

> He'll ...wait for the duty lawyer to call his name.
>
> The duty lawyer has seen around fifteen clients already, its 9:45am, the Magistrate want to get the matters on at 10:00am and there is another twelve clients to see.
>
> If the client isn't looking at a term of imprisonment, the duty lawyer knows that despite this bloke being a little hard to read, that he is not going to get Legal Aid for him. Time is also ticking away.
>
> Here is the likely panacea.
>
> And the panacea for the client is to plead guilty, when by virtue of his disability he may not only have a defence of unsound mind, but also is a fellow who may not be fit to plead to this charge.
>
> And it doesn't end there.
>
> On that occasion he will possibly be punished by way of a fine. However, two weeks later he might again be in court on a similar charge. He might get a substantially bigger fine. Six months later, he does it again, on this occasion a probation order. The client's flat out being compliant with himself, let alone with probation, so inevitably he'll breach it and be back before the Magistrate.
>
> He's now in an untenable position.
>
> We're before a Magistrate who's justifiably vexed.
>
> "I've given him fines and they haven't worked."
>
> "I've given him a probation order and that hasn't worked."
>
> "An intensive correctional order wouldn't work"
>
> Where to from here? Imprisonment.
>
> And that's the stark reality.[15]

15 Toombs, D, *Why Criminal Lawyers Assist in the Imprisonment of the Disabled* Paper presented at "Lock 'Them' Up: Disability and Mental Illness Aren't Crimes Conference, Brisbane, Australia, 17-19 May 2006.

Advising or supporting a client to plead guilty in circumstances where they may have a viable defence available, or may be unfit to plead, is deeply problematic from a human rights and access to justice perspective. It may amount to 'unsatisfactory professional conduct' or 'professional misconduct' on the part of the lawyer.[16] However, the situation is not necessarily clear-cut. In the *Meissner v R,* the High Court held that lawyers are not ethically prohibited from representing a client in circumstances where the client proposes to plead guilty:

> A person charged with an offence is at liberty to plead guilty or not guilty to the charge whether or not that person is in truth guilty or not guilty ... A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even it the person entering it is not in truth guilty of the offence.[17]

The High Court requires that in such a case the person must be 'apparently of sound mind,' and perhaps this provides some degree of protection against an inappropriate plea of guilty being entered by a persons with cognitive disability, and such a plea being accepted by the court. However, unless the person's legal representative identifies their cognitive impairment, and alerts the Court to this, this test will be satisfied by default. It might also be observed that the High Court appears to be contemplating a situation where the client is the 'moving party' with the plea of guilty, and maintains this course despite their lawyer's advice. This situation is qualitatively different from that which generated most concern among stakeholders in this project, where it is the lawyer who is, in effect, the moving party, positively advising the plea of guilty.

5.3.6 Legal representation – funding priorities

Legal aid is made available on the basis of funding provided under a Commonwealth and State Legal Aid Agreement. Under this agreement, both the Queensland and Commonwealth Governments set priorities for the delivery of legal aid in Queensland in relation to their respective financial contributions. These priorities are sometimes referred to as the 'type-of-case guidelines."

In the area of State criminal law, Legal Aid Queensland grants legal assistance in the following order of priority:[18]

16 *Legal Profession Act*, 2004 (Qld) s 244 and s 245; It would appear to be conduct that 'falls short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner.

17 (1995) 184 CLR 132 at 141 per Brennan, Toohey and McHugh JJ.

18 Legal Aid Queensland, *Policy Manual*, 30 June 2003 at 3.

Prescribed criminal proceedings

- District and Supreme Court criminal proceedings
- Indictable offences in the Children's Court at every stage of the proceedings
- Appeals to the Court of Appeal or the High Court with respect to criminal charges
- References to the Mental Health Tribunal in respect of prescribed criminal proceedings
- Committal proceedings in the Magistrates Court in respect of charges for which the maximum penalty exceeds 14 years
- Breaches of probation, community service and suspended sentences in District and Supreme Courts
- Bail

Committal Proceedings – Generally

Committal proceedings in the Brisbane and Ipswich Magistrates Court during the Committals Pilot Project.

Summary Criminal Prosecutions

Pleas of Guilty in the Magistrates Court

In the area of Commonwealth criminal law, Legal Aid Queensland grants legal assistance to the following priority areas[19]:

Criminal Law

Representation on charges arising under any Commonwealth statute including charges arising under the Corporations Law and State/Territory Legislation applying that Act:

(i) where the charges are to be dealt with summarily, there is a reasonable prospect of acquittal and where there is a real prospect that the accused, if convicted:

- would be imprisoned; or
- would lose the capacity to continue in his or her usual occupation, or

19 These priorities are rated as 'equally important,' however, the decision-maker is required to also have regard to the urgency of a matter: Legal Aid Queensland, *Policy Manual*, 10 June 2003 at 6

(ii) where the charges are to be dealt with on indictment.

Pleas of guilty in limited circumstances

Where such charges are brought together with charges under State/Territory law, Commonwealth funds may be used to fund a grant of legal assistance on a pro rata basis.

Pursuant to these priorities, Legal Aid Queensland has determined guidelines to indicate the circumstances in which legal aid may be provided. In the area of criminal law, these guidelines are as follows:[20]

1. Magistrates Court Trial

Aid may be granted where:

- The applicant has reasonable prospects for success; and
- Conviction would be likely to result in imprisonment; or
- Conviction would be likely to have a detrimental effect on the defendant's livelihood or employment (actual or prospective), or
- The defendant suffers from a disability or disadvantage which prevents self-representation or
- The defendant is a child.

2. Magistrates Court Pleas of Guilty

Pleas of guilty will be entered by a Duty Lawyer unless:

- The defendant is likely to be sentenced to imprisonment; or
- Complexity or other issues suggest that the matter cannot be dealt with by a Duty Lawyer, or
- The defendant has limited ability to give instructions because of a disability or disadvantage, such as a language difficulty.

3. Committals

3.1 Aid may be granted in for committal proceedings related to the Committals Project in Brisbane Magistrates Court No 1 and Ipswich Magistrates Court.

20 see generally, Legal Aid Queensland, *Policy Manual*, 30 June 2003.

3.2 Aid may be granted in other committal proceedings where it is likely that:

(i) the defendant will be discharged; or

(ii) the charge which the defendant faces will be dealt with summarily; or

(iii) the committal will identify and early plea, or

(iv) the committal will significantly reduce the length of a subsequent trial or

(v) the defendant has a disability or disadvantage which would prevent self-representation.

4. Superior Courts

Aid may be granted for a plea or trial where the hearing of charges could not be heard in the Magistrate's Court for compelling reasons.

5. Appeals

Aid may be granted for an appeal against conviction and/or sentence where a solicitor or advocate certifies that there is a strong likelihood that the conviction will be quashed or the sentence materially reduced.

In addition, legal assistance may be granted to respond to a Crown appeal, without regard to the merit test.

6. Bail

Aid may be granted for bail applications where:

(i) there is a strong likelihood of bail being granted; and

(ii) bail is opposed by the prosecution.

Aid may also be granted where an applicant seeks to respond to an application for revocation of bail.

7. Other Criminal Proceedings

Aid may be granted for other court proceedings.

8. Dietrich Applications

Assistance will not normally be provides for the purpose of an accused person conducting an application before a court seeking, pursuant to the decision of the High Court in Dietrich's case, an adjournment or stay of the case until legal representation is available.

9. Commonwealth Criminal Law – Expensive Cases Fund

...

10. Proceeds of Crime

...

11. National Security Matters[21]

...

These 'type-of-case' guidelines clearly prioritise grants of aid to the most serious offences. These are generally matters dealt with by superior courts. As noted in a previous study (Dewar, J; Giddings, J; Parker, S; Cooper, D and Michael, C: 1998):

> In general, funding constraints and increased numbers of criminal prosecutions have resulted in [Legal Aid Queensland] focussing more heavily on more serious criminal cases in the superior courts. This appears to have resulted in a corresponding shift away from the provision of legal representation in the lower courts.[22]

The vast majority of criminal matters are dealt with in Queensland's Magistrate Courts. This includes more serious matters that first appear in the Magistrate Court and then are committed for trial in the District Court or Supreme Courts. For reasons described elsewhere in this report, most defendants with disability are likely to be charged with lower level prescribed offences, and non-prescribed offences that will be dealt with in Magistrates Courts. The prioritisation of funds for serious offences dealt with by superior courts therefore has a significant impact on access to justice for persons with disability.

Nevertheless, the type-of-case guidelines do permit the granting of aid for matters dealt with by Magistrates Courts in specific circumstances. It is particularly notable that they permit the granting of aid for trials, pleas of guilty, and committal hearings where the defendant has a disability that prevents self-representation. However, there did not appear to be either awareness or confidence in these provisions amongst the informants to this report, all of whom said it was almost impossible to obtain legal aid in relation to summary matters even where the person has disability. It is possible that this discrepancy arises because the person's disability is not identified at the time of the application for aid, and is therefore not before the decision-maker when the grant determination is made. It is also possible that there is disconnection between the published policy and actual practice. This is an issue that warrants further investigation.

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21 Guidelines 9-11 are not discussed here due to their very unlikely relevance to persons with disability before the Courts.

22 Dewar, J; Giddings, J; Parker, S; Cooper, D and Michael, C, *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland,* Faculty of Law, Griffith University, 1998 at 58.

In relation to the possible disconnection between published policy and actual practice, it is salutary to recognise that Legal Aid Queensland has a finite budget, and grants of aid have to be made within the funds available on a month-to-month basis. There is significant continuing demand for grants of aid. In order to maintain grant approvals within budget, it would appear that the merit test is applied differentially depending upon the funds available. This often results in an apparent discrepancy between the published 'merit' and 'type-of-case' guidelines and the practical realities of obtaining a grant of aid. It has been noted in a prior study that summary criminal trials are an example where the guidelines indicate that assistance should be available in certain circumstances, but where aid is never granted in practice. (Dewar, J; Giddings, J; Parker, S; Cooper, D and Michael, C : 1998).

5.3.7 Bail applications

While disability is recognised as an exceptional factor that may warrant a grant of aid in relation to summary trials, pleas of guilty, and committal hearings, it is not an explicit factor structuring the discretion to grant aid in bail applications. For reasons discussed elsewhere in this report, many persons with disability face considerable challenges in satisfying the Court that they are entitled to the grant of Bail. This is especially problematic given the vulnerability of persons with disability in custody. It is therefore an area of high risk that appears to warrant the provision of expert legal assistance to the person, not only for the presentation of their case before the court, but also to advise and negotiate the kind of support arrangements for the defendant that would assist the Court to exercise its discretion in favour of Bail.

5.3.8 Pleas of not guilty

Legal Aid is not generally available for a plea of not guilty in the Magistrates Court, nor do the guidelines appear to contemplate a situation where a person's 'fitness' to be tried might need to be argued in a Magistrate's Court. It is ironic that more intensive, and potentially more expert, assistance is available at this stage of proceedings only to those defendants who propose to enter a plea of guilty, rather than to those who propose to enter a plea of not guilty or to raise issues concerning their fitness to be tried. Arguably, this latter group have at least as great a need for intensive expert assistance as those who propose to plead guilty, and potentially an equivalent or greater moral claim to such assistance.

5.4 Identification of persons with disability

A number of informants of this study highlighted the failure to identify that a defendant has a cognitive impairment as one of the most significant access to justice issues for this population group. As noted above, it was suggested that most lawyers are not skilled at identifying persons with impairment, where that impairment is not physically

obvious. Many persons with cognitive disability will not have external characteristics that signal their impairment. In the absence of formal evidence of impairment, such as a psychometric assessment, this will need to be discerned from other characteristics, such as the level of the person's expressive and receptive communication, and the level of their comprehension, recall, and concentration. While these traits may be obvious in some defendants, in others it will be far less clear. The person may not self-identify with the impairment, and may even reject such a suggestion, if it is put to them.

While legal practitioners cannot reasonably be expected to exercise the clinical insight and expertise of a psychologist, there are nevertheless common sense strategies that are likely to elicit basic evidence of impairment and disability in most cases. Apart from direct observation of communication, comprehension, recall, and concentration ability, other potential indicators may include type of income support the person receives, the type of accommodation they live in, and their contact with specialist disability or mental health services. Often family members, and social support services involved with the person can provide important information. Inquiries of the person, and their support network, in relation to these issues may provide sufficient prima facie evidence of disability to warrant further investigation by an appropriate specialist.

However, as has already been noted, it appears that even where the legal practitioner may suspect that a defendant has impairment that may have significant implications for their defence, this suspicion is often left unexplored. It was suggested by a number of informants of this project that this may be because the practitioner takes the view he or she does not have the time and resources to pursue the matter, or because the practitioner takes a 'here-and-now' view, believing the person is better off to 'cop-it-sweet' by entering a plea of guilty and 'getting on with their lives.' Whatever the reason, the practitioner's failure to frankly identify the defendant's impairment and to raise any implications of this with the prosecution and the court presents very serious risks for the defendant. It may result in an unjust conviction, and in the case of repeat offenders, it may contribute to the failure to get to the underlying cause of the problem.

5.5 Structural issues and priorities for reform – legal services

It is thus apparent from the foregoing discussion that there are a number of major structural problems affecting the provision of good quality legal assistance to persons with disability in contact with the criminal justice system.

The 'base' of the legal service delivery system for economically disadvantaged persons in Queensland – Legal Aid and Community Legal Services – is inaccessible, or not sufficiently accessible to persons with disability. This ought to be addressed by the introduction of Flexible Service Delivery to underpin customer service delivery by these agencies. As we have noted in chapter 4 of this report, Flexible Service Delivery involves the adaptation of mainstream service delivery to ensure that the needs of persons with

disability will be met, as far as possible, without the need for specialist services. Its' focus is on sensitising front-line staff to the needs of persons with disability, and on the eradication of negative attitudes and stereotypes. It orients staff to the need for accessible and inclusive customer service, and provides them with the knowledge and practical skills required for this to occur.

Legal Aid Queensland should undertake an access audit of all its facilities and services, and those of community legal services it funds, and develop a capital work plan that will ensure that all facilities and services are fully accessible to persons with disability within five years. This plan ought to deal with access issues for persons from all impairment groups.

Legal Aid Queensland currently has very limited accessible and adapted customer service information that would assist persons with disability and their associates to obtain legal services. Additionally, very little, if any, customer service information is available about how to obtain impairment and disability related assistance and adjustments in order to obtain equitable access to these services. Legal Aid Queensland ought to undertake a comprehensive review of the adequacy of its customer service information with a view to addressing these problems. Customer service information ought to be made available in a range of alternative formats, and there ought to be clear and comprehensive information available about how to request impairment or disability related adjustments and assistance if required. This customer service information ought to be distributed to relevant constituencies through disability advocacy organisations and service providers etc.

Legal aid is currently not available – either as a matter of policy or practice - to assist persons with disability resist at critical thresholds to entry to the criminal justice system – pleas of not guilty (including the ability to raise the issue of fitness to be tried) and bail applications in the Magistrates Court. Legal Aid Queensland therefore should immediately review its duty solicitor guidelines, and its grants policy and practice to ensure that persons with disability have access to legal assistance at these thresholds.

The failure to identify persons with cognitive disability upon *contact* with the criminal justice system is one of the most critical contributors to the ultimate over-representation of persons with disability in criminal justice facilities. If impairment and disability is identified at an early stage, legal interventions can result in the effective diversion of the person from the criminal justice system. It is therefore essential that legal aid lawyers, particularly duty solicitors, are equipped with the tools, and develop the skills, to screen those persons with whom they have contact in relation to possible impairment and disability. Legal Aid Queensland must therefore immediately institute a screening tool that will facilitate the identification of persons with cognitive disability by its legal service staff.

Most legal practitioners lack the positive attitudes and values, and the experience and expertise necessary to provide effective legal services to persons with disability. To resolve this situation, the Legal Aid Commission, the Director of Public Prosecutions,

the Queensland Law Society and the Queensland Bar Association ought to develop practice guidelines and resources to support the provision of legal services to persons with disability. These practice guidelines and resources ought to deal with the following matters at a minimum:

- Human rights and access to justice for persons with disability;
- Flexible service delivery;
- Identification of persons with cognitive disability;
- Obtaining instructions from persons with cognitive disability;
- Dealing with circumstances where it is not possible to obtain instructions from a person with intellectual disability;
- Fitness to plead;
- Interviewing persons with disability;
- Modification of court procedures and practices to accommodate the needs of persons with disability, including the use of alternative technology;
- Working with support persons for persons with cognitive disability;
- Specialist referral points, diversionary options and negotiating social service systems.

These agencies should also collaborate to ensure legal practitioners have access on a regular basis to continuing legal education in these and other relevant areas.

There is currently a lack of specialist disciplinary expertise in disability law and policy in Queensland. As a consequence, there is insufficient sustained focus on the identification and redress of human rights violations and barriers to justice for persons with disability. This ought to be addressed by the establishment of a specialist Disability Rights Centre. At the broadest level the Centre would have the role of a catalyst within the Queensland legal environment stimulating sustained action across time to address structural and systemic problems affecting persons with disability. Specifically, the Centre would have the following core functions:

- Continuing Legal Education for legal practitioners in disability rights issues;
- Community Legal Education for persons with disability, family members and carers, social advocacy organisations and social service providers in disability rights issues;
- Specialist advise and referral services for persons with disability family members

and carers, social advocacy organisations, service providers and legal practitioners representing persons with disability;

- Test-case litigation in relation to disability rights issues; and
- Law reform and legal policy advice.

The Queensland Department of Justice and the Attorney General or Queensland Legal Aid should fund such a centre as a priority. To further this capacity building objective, the Queensland Department of Justice and the Attorney General should also establish a grants program to fund projects on a recurrent and one-off basis that will enable disability rights organisations to engage with justice issues and the justice sector.

5.6 Court processes

Court processes are ultimately a combination of:

- The physical infrastructure in which the legal process takes place;
- The administrative processes that precede, attend on, and follow the hearing and adjudication of a matter;
- The rules of evidence; and
- Other legal rules and conventions that operate within the environment – sometimes these are explicit, and sometimes they are not; and,
- The conduct and attitudes of courtroom players.

Many aspects of the courtroom process can be inaccessible or otherwise problematic for persons with disability, perhaps compounding the pre-existing disadvantage with which they come to court, further diminishing their prospects for access to justice. Key problems include:

- Inaccessible physical infrastructure – Court buildings may be inaccessible for persons who use mobility devices; there may be no hearing augmentation for persons with hearing impairments; there may be no Braille signage or other ques to assist way-finding by a person who is blind;
- Information about Court processes, and initiating forms, etc may not be available in accessible alternative formats, such as large print, Easy English, Braille, or accessible electronic text. Persons with disability may therefore find it difficult to obtain information about, or comprehend or comply with, required administrative processes;

- Court officers may be unwilling or unable to provide disability related adjustments or assistance; for example, to arrange an Australian Sign Language or DeafBlind Interpreter. If such assistance is available, it may not be clear how such assistance can be requested from the Court;

- Court officers manage the Court flow by issuing rapid verbal ques to what may be a crowded waiting room (for example, calling a matter in the list). It may be impossible for a person with hearing impairment or cognitive disability to hear or comprehend these instructions;

- From a participant perspective, Court processes may make little sense, and cause great frustration and anxiety. For example, a person with cognitive disability may be called to attend Court at 10:00am along with 30 other matters in that list. They may not comprehend why they must wait (sometimes several hours) for their matter to be called. They may become confused, frustrated or loose concentration and leave the Court. The experience of sitting for several hours in a crowded waiting room may also be very anxiety provoking for a person with psychosocial disability;

- The process of cross-examination is intended to test the reliability and strength of a witness' account of events. This is achieved by various advocacy tactics, including especially, by leading questions, which aim to undermine the witness' account of events by revealing untruths, ambiguities, gaps, and inconsistencies etc. For reasons we have discussed earlier in this report persons with intellectual impairment may be easily confused during cross-examination, and are particularly susceptible to leading questions. The credibility of their evidence is therefore often readily undermined;

- Court time is usually under great pressure, and consequently there is typically an associated pressure to move through a case expeditiously. This may present great difficulties for a Deaf or DeafBlind person who uses an interpreter, if the interpreter is not able to take regular breaks, or for a person who with intellectual disability who requires regular breaks in order to maintain concentration;

- Due to poor self-esteem and self-image persons with disability are often easily intimidated by the courtroom and by courtroom players, making it more difficult for them to assert and explain their account of a set of events. Often there will be very significant differentials in their level of dress and grooming, and level of literacy and articulation, to that of other courtroom players that will intensify feelings of self-consciousness and worthlessness;

- Some judicial offices may hold negative attitudes towards persons with disability, and be poorly informed about contemporary approaches to disability and human rights, and disability and access to justice issues.

5.7 Structural issues and priorities for reform – court processes

Again, a structural approach is required to the resolution of these problems. In this respect, the Queensland justice system has already taken some important and far-reaching initiatives. In 2005, the Queensland Supreme Court published the *Equal Treatment Benchbook,* which is an excellent resource for judicial officers providing practical guidance in relation to many of the issues outlined above. Additionally, the Queensland *Evidence Act*, 1977, in section 21, provides scope for the Court to regulate cross-examination of witness with disability to reduce the likelihood that they will be confused or inadvertently led to contradict their evidence. Section 9C of the *Evidence Act*, 1977 also allows the Court to hear expert evidence about a witness' ability to give evidence. This may provide the opportunity for an expert witness to dispel any myths and misapprehensions about the evidence of a person with disability. A number of Queensland Courts also now have capacity to take evidence via a closed circuit television, which can greatly assist in reducing the anxiety of a witness with disability who may be seated in a quiet room, perhaps with a support person, and not be distracted and intimidated by the larger courtroom scene. Continuing efforts are required to draw these, and other, positive initiatives to the attention of the judiciary and the legal profession to ensure they are fully utilised.

We also recommend the following structural responses to the difficulties encountered by persons with disability in court processes:

- The Queensland Department of Justice and the Attorney General ought to adopt Flexible Service Delivery as a core strategic policy framework for identifying and responding to the needs of persons with disability in contact with all its front-line services, including all courts;

- The Queensland Department of Justice and the Attorney General should undertake an access audit of all its court facilities and services and develop a capital work plan that will ensure that all facilities and services are fully accessible to persons with disability within five years. This plan ought to deal with access issues for persons from all impairment groups;

- The Queensland Department of Justice and the Attorney General should undertake a comprehensive review of the adequacy of its customer service information for persons with disability. Customer service information ought to be made available in a range of alternative formats, and there ought to be clear and comprehensive information available about how to request impairment or disability related adjustments and assistance if required. This customer service information ought to be distributed to relevant constituencies through disability advocacy organisations and service providers etc.

- Introduction of a Court Support Service that will provide skilled volunteers to support persons with disability through the court process. The role of these volunteers ought

to be defined as follows (Simpson, Martin and Green: 2001):

- To inform the court if the witness does not understand a question;
- To inform the court if the witness needs assistance because she or he has become tired, confused or needs a break from proceedings;
- To inform the court of any other difficulty the witness is experiencing in understanding the proceedings.

The support person would not make physical contact with the witness without leave of the court. As we have noted in our earlier discussion of the Police Support Service, to facilitate the functioning of the Court Support Service the *Evidence Act,* 1977 (Qld) ought to be amended to give a right to the use of support persons for all witnesses (including defendants) with disability.

- The Australian Judicial College should develop and deliver a range of educational programs for Queensland judicial officers in relation to access to justice for persons with disability. These programs ought to deal with:
  - Human rights and access to justice for persons with disability;
  - Flexible Service Delivery;
  - Issues and options in the taking of evidence from persons with disability;
  - Communicating with persons with disability, including in relation to alternative and augmentative modes of communication;
  - Legal capacity;
  - Diversion;
  - Sentencing issues and options;
  - Police Support Service and Court Support Service (if established)

5.8 The Queensland legal framework

In the course of this project it has become apparent that there are serious shortcomings in the Queensland legal policy framework as it applies to persons with cognitive disability. These problems include:

- Outmoded and incorrect legislative concepts of cognitive impairment and disability, and confusions between types of impairment;

- An apparent inability of Magistrates Courts to consider the issue of fitness to be tried;
- A requirement that a defendant enter a plea of guilty as a condition precedent to diversion to the Mental Health Court;
- Very limited diversionary and sentencing options permitting other diversion of defendants and convicted persons from the criminal justice system under appropriate court conditions;
- Very limited custodial options;
- Lack of designated agencies responsible for the provision of social support, and an inability of the Court to order the provision of social assistance;
- Lack of an individual planning framework for diversion of defendants and convicted persons to social supports, which can operate under the supervision of the Court.

We note that a multi-disciplinary, multi-agency problem-solving approach to offending by persons with disability is rapidly gaining support both within Australia and internationally. Under this model the Court essentially assists in solving the underlying problems that lead to or sustain the offending behaviour - stimulating, coordinating, and monitoring social services to provide the supports necessary for diversion, and tailoring legal outcomes to support diversion. The Queensland Mental Health Court is one example of this. A problem solving court for persons with cognitive disability also operates on a pilot basis in Victoria.

5.9 Structural issues and priorities for reform – legal framework

We believe the time has come for Queensland to significantly modernise its approach to dealing with persons with cognitive disability in contact with the criminal justice system. These reforms ought to include:

- A clear policy and procedural framework for the determination of legal responsibility (capacity) based on the *International Classification of Functioning, Disability and Health;*
- A framework for the diversion of persons with cognitive impairment accused of both prescribed and non-prescribed offences from the criminal justice system to the social service system in appropriate cases. Activation of this framework ought not require a plea or finding of guilty. This will also require the development of flexible sentencing options and community based custodial options;
- Designation of social service agencies responsible for the provision (or arrangement) of social support to accused persons, and Court powers to order these designated agencies to provide support services;

- A framework for the development, implementation and monitoring of 'justice plans' to coordinate justice and social service agency responses in relation to an accused person. This framework ought to provide for the approval and monitoring of justice plans by the Court. The Court ought to have the power to accept, reject, and require the amendment of any such plan.

5.10 Conclusion

In this chapter, we have examined the role that legal services and court processes play in securing or denying persons with disability access to justice. We have observed that there are currently very serious problems to be resolved in access to legal assistance for persons with disability. Current access is constrained by discriminatory attitudinal and physical barriers, and some eligibility and targeting measures that produce perverse outcomes for persons with disability, intensifying their exposure to the criminal justice system. Concerted efforts are required to improve access to legal assistance for persons with disability in Queensland, and to provide for the development of specialist infrastructure and disciplinary knowledge in disability and the law. In the area of court processes, we have noted some excellent initiatives that have genuine prospects to improve the courtroom experiences of persons with disability. However, there remains further work that can and ought to be done to overcome the barriers to justice in this area. In particular, we have recommended the institution of Flexible Service Delivery as the basic approach to customer service within the Court system. We have also recommended the introduction of a Court Support Service for persons with disability.

We have also briefly reviewed the major structural problems in the Queensland legal framework that constrain the implementation of a problem-solving juridical approach to offending by persons with disability. This is a significant barrier to achieving fair and enlightened outcomes for persons with disability in contact with the criminal justice system. As we noted at the outset, criminal and sentencing law must allow the Courts to deal in a socially responsible way with defendants who lack capacity for the assignment of criminal responsibility, or who it is preferable, in the interests of justice, to divert to appropriate support options within the social service system. To facilitate this, the courts require greater power to supervise and direct social services to ensure the provision of necessary supports.

6. Corrective and Young Offender Services

6.1 Introduction

In this chapter, we examine the issues and concerns relating to the treatment of persons with disability by corrective and young offender services. This discussion encompasses correctional facilities and conditional release services. The basic thrust of this report has been that persons with disability ought to be diverted from the criminal and youth justice systems wherever possible. However, it must be recognised that even if optimal prevention and diversion programs are in place, corrective and young offender services will continue to deal with some persons with disability for whom criminal and youth justice interventions are appropriate, or at least inevitable.

In any event, as we have compellingly demonstrated in our earlier discussion, effective prevention and diversion programs for persons with disability either do not yet exist in the Queensland environment, or where they do exist, are in a very rudimentary state. We must therefore face the reality that the criminal and youth justice systems will continue to deal with a disproportionate number of offenders with disability for some time to come. A great deal is required to better equip these services to deliver competent interventions to persons with disability that will improve, rather than diminish, their prospects for rehabilitation and positive reintegration into the community upon release.

6.2 The purpose of corrective interventions

The objects and purposes of the *Corrective Services Act*, 2006 (Qld) provide a useful starting point for a discussion of the role of corrections in relation to offenders with disability. Section 3 of the Act defines one of the fundamental functions of corrective services as 'crime prevention through humane containment, supervision and rehabilitation of offenders.' The section also refers to the obligation of corrections to respect the dignity and recognise the basic human rights of offenders. It requires the recognition of any special needs of offenders that may arise from a disability. These basic principles are also generally reflected in the *Charter of Juvenile Justice Principles*, set out in Schedule 1 of the *Juvenile Justice Act, 1992* (Qld).

The essential point is that notwithstanding the fact that a person with disability may stand accused or convicted of a serious offence, he or she retains basic human rights that

must be respected. It is also essential to recognise that, punishment aside, corrective interventions are intended to lead to the rehabilitation of offenders and their positive reintegration into the community.

6.3 The realities of correctional interventions for persons with disability

Of course, it is widely recognised that the realities of correctional facilities and corrective interventions are often very different from their stated purpose and objectives. This is true for all prisoners. However, for the reasons we have explored in chapter 1 of this report, persons with disability may experience much more intense negative outcomes from incarceration than other persons. Some of the problems include:

- Persons with disability are particularly vulnerable to physical violence and abuse from other offenders, including sexual assault;
- Persons with disability are much more likely than other prisoners to be the subject of emotional and psychological abuse in a correctional setting (for example, teasing, ridicule, bullying, humiliation, harassment, intimidation etc) which may lead to the development or exacerbation of psychosocial impairment, alienation, social withdrawal and anti-social behaviour;
- Corrections-based counselling and rehabilitation programs are inadequate and are often poorly adapted or inaccessible to persons with disability;
- Corrections-based basic education (such as literacy and numeracy education etc) is inadequate, often not adapted to the specific learning needs of persons with particular impairment types, nor may it be available in accessible formats that may be required by persons with specific impairment types;
- Corrections-based employment and vocational education programs are inadequate and are also often inaccessible or poorly adapted to the needs of persons with disability;
- Persons with disability are much more likely to be influenced in an ongoing way by the negative role models, and role expectations, evident in the correctional environment, leading to the intensification of offending and anti-social behaviour. It may also lead to the development of relationships between offenders with disability and other offenders that will also continue a cycle of criminal and anti-social behaviour post release;
- Persons with disability are more likely to be subject to intensified stigma as a result of incarceration. They are far less able to protect their privacy, and a history of imprisonment will interact very negatively with existing stereotypes and prejudice towards persons with disability within the community;

- Persons with disability have little, if any, access to alternative and augmentative communication systems in correctional facilities. A person who is Deaf, for example, will typically have no access to an interpreter, and consequently, is likely to experience extreme social isolation and alienation;
- Correctional health services are inadequate and may have very limited knowledge of the specific health needs of persons with disability;
- Correctional mental health services, in particular, are totally inadequate and may have very limited expertise in the treatment of persons who may have multiple impairments, for example, intellectual as well as psychosocial impairment;
- Correctional facilities may not be physically accessible to persons with mobility and other functional restrictions.

Consequently, the incarceration of persons with disability in correctional facilities is much more likely to lead to a denial of their human dignity and fundamental human rights. It is also much more likely to intensify the psychological and environmental factors that expose persons with disability to offending behaviour, typically diminishing their prospects of rehabilitation and positive reintegration into the community upon release.

6.4 Recidivism

This reality is startlingly reflected in the rates of recidivism recorded for offenders with disability. A study of recidivism conducted by the NSW Department of Corrective Services for the period 1990 to 1998 found that prisoners with intellectual impairment have a 78% higher rate of re-imprisonment than that of the total population of offenders. Worse still, it found that the rate of recidivism for first offenders with intellectual impairment with no prior conviction was 139% higher than that of the total population of offenders with no prior conviction. During the period studied, 68.3% of prisoners with intellectual impairment were reimprisoned within two years of their release, compared with the rate of 38.3% for the total prison population. In the case of offenders with intellectual impairment with no prior conviction, 59.9% were reimprisoned within two years, compared with the rate of 25% for the total population of offenders with no prior conviction. (NSW Department of Corrective Services: 2000). Other impairment groups, particularly persons with psychosocial impairments, also have very high rates of recidivism. These alarming rates of recidivism compare very unfavourably with the reported rates of recidivism for participants of some specialist programs for offenders with disability in the United States, which are as low as 5% (Simpson, Martin and Green: 2001).

Of course, it would be unreasonable to suggest that the rate of recidivism is wholly attributable to the correctional experience. It is, in fact, due to a constellation of factors,

including the failure of community support systems post release. However, the role of the corrections experience, particularly in the intensification of psychological and environmental disadvantage and antisocial behaviour, cannot be overestimated.

6.5 Structural issues and priorities for reform

There are a number of major structural reforms required to improve the experience and outcomes for persons with disability of corrective and youth justice services. Two of the reforms required have already been discussed earlier in this report in relation to other areas, and therefore will be noted here in summary form only:

- Implementation of an overarching policy of flexible service delivery to ensure that mainstream service delivery is readily adapted to the needs of persons with disability, and that any specialised requirements are flagged for attention;
- Ensuring that persons with disability have access while in custody and on conditional release to appropriate clinical services which are adapted or specific to their needs, including:
  - Offence specific cognitive behaviour therapy and counselling;
  - Offence related cognitive behaviour therapy and counselling;
  - Drug and alcohol rehabilitation services;
  - Risk assessment and risk management of potential offending behaviour;
  - Other psychiatric services;
  - Other behaviour intervention and support services; and
  - General and specialist health services.

Additionally, it is essential to ensure that persons with disability have access to appropriately adapted developmental programs, including education and training, while in custody and on conditional release that will develop their potential and assist in their positive re-integration into the community. This should include:

- Education in daily living skills (cooking, washing, basic health care etc);
- Education in literacy and numeracy – particularly in applied areas, such as budgeting;
- General social skills;

- Sex and personal relationship education;
- Developing self-esteem and a positive self-image;
- Developing assertiveness and personal advocacy skills;
- Applied vocational education and training for the acquisition of skills necessary for employment.

The planning and delivery of services for offenders with disability within corrective and youth justice services is currently seriously inhibited by very poor data collection.[1] In chapter 1 of this report we noted that most criminal justice agencies, including corrective and youth justice services, fail to collect and maintain statistics on the incidence and characteristics of those persons with disability with whom they have contact. It is virtually impossible to undertake effective strategic policy and program development, and to evaluate the impact of corrective and broader social interventions in the absence of such an evidence base. It is therefore of crucial importance that corrective and youth justice services institute a routine screening process that is capable of identifying persons with disability on their entry to the criminal and youth justice systems. This screening process ought to be implemented both in relation to detainees on remand, as well as those entering custody following conviction. This screening process ought to collect data that can be disaggregated to provide at least the following information:

- Type and degree of impairment;
- Gender;
- Age;
- Racial, religious, ethnic and linguistic background.

A second equally important reason for implementing such a screening process is to ensure the identification of persons with disability for the purpose providing them with appropriate protection, services and supports within the custodial environment. In an optimally evolved correctional system this initial screening process would play a principal role in the streaming of detainees and convicted offenders into appropriate custodial options, and in the individualised planning, adaptation and deployment of rehabilitation, health, basic education, vocational education and other social assistance. In the absence of an evolved system of this nature, screening plays a crucial triage role, hopefully ensuing that at least those persons with disability with the greatest needs are identified so that protection and necessary services and supports may be provided to them.

1 We note that the Department of Corrective Services is currently participating in a project led by the Legal Aid Commission Queensland to design a screening tool and package for use in the criminal justice system to identify persons with cognitive impairment. At the time writing the outcomes of this project are still to be determined.

The rehabilitation and positive re-integration into the community of offenders with disability is also seriously inhibited by very poor interagency coordination, and a lack of functional specialisation and expertise within corrective and youth justice services in relation to impairment, disability and offending. This inhibits the development of specific disciplinary knowledge and expertise, and results in the dissipation of individual expertise to more general functions. These problems are even more pronounced within corrective and youth justice services than they are in relation to disability and community services (where we made similar observations).

Poor interagency coordination is also characterised by the frequent failure of social services and other agencies to participate in appropriate post release planning and service provision. Frequently corrective and youth justice services will be involved in protracted disputes with social service agencies in an effort to plan and secure post-release services for offenders with disability. In part, this stems from a lack of knowledge of specialist disability programs and supports, and interagency integration of corrective and youth justice services with social service systems, and a resulting inability of corrective and youth justice officers to 'work these systems.' As a consequence of this, persons with disability will often be assessed as unsuitable for conditional release, and will serve custodial sentences far in excess of those served by others for similar offences. This is manifestly unjust and discriminatory.

Clearly, the resolution of this problem requires action from a number of agencies. However, part of the solution must lie with corrective and youth justice services. To address these problems we recommend the establishment of specific functional units within the Departments of Corrective Services, and Communities, which will have specific responsibility for work with offenders with disability. Like their recommended counterpart in Disability Services Queensland, these units would have a central policy, program development and coordination function, as well as a decentralised service delivery function, in relation to offenders with disability.

The central function would include the following responsibilities:

- Strategic policy and program development in relation to persons with disability and criminal and youth justice issues;
- High-level interagency coordination – including joint service planning, relationship management and problem solving; and
- Coordination and development of professional staff involved in direct service delivery roles with offenders.

The service delivery function would comprise a multi-disciplinary team of professionals (psychologists, psychiatrists, caseworkers and educators) expert in working with offenders with disability. This team would:

- Provide specialist casework services for offenders to ensure access to and adaptation of necessary services and supports, and effective post-release planning;
- Design and monitor individual clinical intervention plans for offenders;
- Provide specialist clinical services not otherwise available to offenders with disability, including offence specific and offence related cognitive behaviour therapy and specialist mental health services;
- Provide consultancy back-up support to build the capacity or supplement other services for offenders (such as education and rehabilitation services, probation and parole, and youth conferencing etc);
- Coordinate interagency individual planning, service provision and transition arrangements.

Perhaps the greatest barrier to the successful rehabilitation and re-integration of offenders with disability into the community is the lack of appropriate custodial options for this group. As far as possible, offenders with disability, those on remand, and those found unfit to be tried, should be subject to community-based detention in custodial accommodation options integrated into local communities. These custodial options should be individualised, and as far as possible, not accommodate members of the target group together or with other offenders. The custodial elements of these services would principally comprise of intensive supervision provided by specialist staff, and restrictions on movement achieved by the imposition of environmental and staff controls. Individualised community-based detention has a number of critical advantages over incarceration in large-scale correctional facilities for this population group. These include:

- Far less likelihood that the person will be subject to physical or emotional violence and abuse;
- Far less likelihood that the person will be exposed to negative role models, negative role expectations, and stigma, and a greater likelihood of exposure to positive role models and role expectations;
- Far less likelihood of social isolation, for example, if the person communicates using a specific communication method, it will be considerably easier to recruit or train staff with the necessary communication skills in a community-based custodial option;
- Much greater potential to individualise and adapt developmental programs according to need;
- Much greater potential for the in-reach of, or out-reach to, social and educational services necessary for rehabilitation;
- Much greater potential to access generic and specialist health care services, including

mental health services, in the community, both on an in-reach and outreach basis;

- Much greater potential for effective post-release planning and seamless transition between corrective and youth justice services and social services that will support the person post release;
- Much greater potential to commence social re-integration, for example, enrolment in vocational education or employment, prior to final release;
- Much greater capacity for the structured tapering of custodial conditions, and the monitoring of the offender's conduct during the period of conditional release;
- Much greater potential for the in-reach of social advocacy support, and for contact with informal support networks, such as family, that will assist in sustaining the offender's rehabilitation and access to necessary services upon release.

For the reasons outlined above, community-based custodial options are significantly preferable to specialist units for offenders with disability located within large-scale correctional facilities. While these special units will, in some cases, be preferable to the maintenance of persons with disability within the general population of offenders, even under optimum circumstances they cannot overcome most of the problems outlined above.

We must also face the reality that these special units rarely live up to their expectations, often becoming a dumping ground for offenders who present critical challenges in the general population of offenders. Experience also suggests that these units rapidly become stigmatised workplaces and find it difficult to attract appropriate staff. They may become over-crowded, resource starved, and administratively unsupported within the larger structure of the correctional setting. They may therefore intensify rather than overcome the problems experienced by offenders with disability in corrective and young offender facilities.

6.7. Other issues

Public protective services, such as the Public Guardian, have a history of resisting appointment and failing to act for offenders while they remain in custody. Such resistance is incomprehensible given the critical role protective services have to play in stimulating and coordinating action to protect and secure the human rights of persons with disability, including their access to necessary health and social services. While many offenders with disability will not fall within the guardianship jurisdiction, some certainly do. They often lack strong informal support networks, such as family members, and access to external casework support from social service agencies, that are willing and capable of working the system on their behalf. Similarly, although there are outstanding exceptions, very few social advocacy services for persons with disability are available either on an in-reach

or out-reach basis for offenders with disability. They too ought to have a critical role to play in stimulating and coordinating action to protect and secure the human rights of offenders. Much greater efforts are required by corrective and youth justice services on the one hand, and protective and social advocacy services on the other, to ensure that offenders with disability have access to effective champions of their interests as they confront the enormous structural barriers to their rehabilitation and reintegration into the community.

6.8 Conclusion

In this chapter, we have examined the major issues and concerns relating to the treatment of persons with disability by corrective and young offender services, and some associated matters. We have argued that even if prevention and diversion strategies were to function at an optimum level, there would still be offenders with disability for whom custody is an appropriate or inevitable outcome. Currently, corrective and young offender services produce very poor outcomes for persons with disability with whom they have contact, often intensifying the psychological and environmental factors that lead to their offending. It is therefore critical that they take concerted action to develop the capacity and expertise necessary to support the rehabilitation and positive reintegration of persons with disability into the community.

In this respect, apart from basic issues of unmet need for health, education and clinical services within correctional facilities, there are several critical structural problems to be overcome. These include the current failure to collect primary data on offender characteristics to inform strategic and operational policy development and planning, the lack of functional specialisation and expertise in disability and offender programs, poor interagency coordination, and a lack of appropriate custodial options. Action to address these structural problems would significantly improve outcomes for offenders with disability, and also, importantly, for the community generally, which would be far less exposed to recidivist behaviour, and to the public costs associated with the current over-representation of persons with disability in the corrective and youth justice systems.

Appendix

Voices of the Voiceless

In the following pages we present narratives developed from intensive interviews with eight of those persons with disability with direct experience of the criminal justice system, and their key associates, who participated in the first stage of this project. These narratives provide penetrating and sometimes painful personal insights into the issues under discussion in this report. They have provided the lens and perspective through which many of these issues have been explored.

QAI is deeply indebted to the individuals who have been prepared to share their experiences with us, who for privacy reasons we are not able to acknowledge directly. QAI is also greatly indebted to Jennifer Barrkman who undertook this first stage of work. These contributions are acknowledged with great appreciation.

Of course, names and some facts in these narratives have been changed to preserve the anonymity of contributors.

BRIAN'S STORY

Brian is a middle aged man with an obvious intellectual disability. He loves his dog, country music and milkshakes. Brian proudly speaks of how he has recently worked very casually packing shelves at a local service station in return for food and drink. He is often described as having 'complex and high needs"

Brian has problems making good decisions for himself, his problem solving skills are limited and he becomes frustrated when he doesn't understand things. Yet he is fiercely independent, often wanting to live alone. During the 1990's Brian lived in a group home that was block funded by Disability Services Queensland (DSQ). Later he was moved into public housing and community funded supports were offered by DSQ. Unfortunately these supports were never provided because Brian said he didn't want them. His family were not consulted about this. Brian's problems accepting support services arise largely from his experience of support which has not been positive, with his individual needs not catered for. As Brian said about one support worker

> *"He did what he wanted – he went to shops he wanted to visit not what I wanted to do."*

Brian's involvement with the criminal justice system started in the last few years and with good support much of what has happened need never have occurred. This story is based on a meeting with Brian and meetings with his advocate.

Whilst living alone, without support, Brian was charged with a sexual offence. Without negating the seriousness of the charge the incident in question allegedly occurred when children visited Brian's residence without invitation or supervision. As a result of the alleged incident the neighbours drove him out of his house and Brian went to live with brother.

Brian was originally questioned by the police with his brother present. He had little understanding of what was happening. Brian was assumed to be competent to instruct a solicitor and attend court. Brian had no support throughout this process except whatever his brother could manage.

Luckily his brother found him a solicitor, funded by Legal Aid. After a number of postponements by the prosecution the case never proceeded.

DSQ again became aware of Brian as a result of this case. Whilst not prepared to provide any funding to support Brian they did subsequently provide a case manager whose role was to assist Brian find free services eg apply for housing, write funding applications, help him to access HACC funding. Someone in DSQ also contacted an advocacy organisation seeking an advocate for Brian. Despite all this activity no ongoing regular support or assistance was in place to assist Brian in his day to day activities.

The DSQ case manager's assistance in reapplying for public housing saw Brian move into public housing in the Logan area, still without funding or supervision. Brian was soon charged with another sexual offence in very similar circumstances.

This time DSQ offered emergency support of 10 hours a week for a twelve week period. This support involved different people with no relationship to Brian and without the possibility of developing one. A series of difficult living experiences occurred. Brian's life became increasingly chaotic. He lived in a group home briefly with three other people with high needs

> *"One woman there she yelled a lot and threw knives - she was crazy'(Brian)*

He lived with his brother again, then in an aged care facility. Finally the DSQ case manager, who had developed the sort of relationship with Brian so lacking in prior service responses, found him a place on the Gold Coast where his dog could also be with him. He shared the house with another man with a disability. Unfortunately Brian's twelve weeks of support finished around this time.

> *He was getting into heaps of trouble he couldn't shop, he would ring me up saying I've got no food.– There was no-one to take him to court – no-one to read his mail nothing - it was an absolute disaster. He ended up with some real medical problems – he had a catheter inserted at the local hospital there – no one knows why exactly and no-one was there to help him. His urinary functions are now so damaged specialists at the Mater hospital cannot remove the catheter and he regularly gets infections requiring hospitalisations. (His advocate)*

Brian was forced to move in with his brother again angry and unhappy.

The proceedings for the second criminal matter rolled on meanwhile. In the absence of any other support Brian's advocate took him to mentions and committal hearings. Brian's solicitor advised him to plead guilty. With no prior criminal record he felt Brian probably wouldn't get jail time although he said he "Wouldn't bet my house on it'. The outcome would largely depend on the judge and jury's attitude and his advocate felt Brian's presentation and speech which are not good might be held against him. Brian's advocate was generally unhappy with the whole court process.

> *I felt Brian was unfit for trial – I didn't think he could participate or understand exactly what was going on in court. At a hearing a police woman gave evidence against Brian. Brian later told me he thought she was being very helpful. Another time Brian came up to his barrister before court and said'Hi' and the barrister wouldn't look at him or talk to him – and he was going to represent him in court!*
>
> *They didn't seem to care what happened to him – (Brian's advocate)*

Brian's advocate applied to the guardianship tribunal to have the Adult Guardian appointed for decisions about legal matters. He felt that there was no one in the scenario who could actually make the necessary decisions in relation to Brian's representation. He hoped The Office of Adult Guardian office could take a role in watching and instructing the solicitor on Brian's behalf. He was dismayed to find that the Adult Guardian didn't want to be involved.

> *"'If we had the money we would appeal" [the appointment] the Adult Guardian told me. That's how interested they were in doing this for Brian. But they have been required to take on the role and miraculously the solicitor has been instructed to refer the case to Mental Health Court to decide whether he is fit for trial (his advocate)*

Brian has since been assessed by a psychiatrist who thinks he is unfit to stand trial. The Mental Health Court hearing to determine Brian's competence or otherwise to stand trial is yet to happen. Assuming he is not competent to stand trial, the final outcome will largely depend on the supports available for Brian. The Court's options include making an order allowing Brian to live in the community under certain conditions such as regular meetings with a psychiatrist. Alternatively in the absence such supports he may be ordered to live in a locked ward or psychiatric hospital even though he does not have a mental illness. If the tribunal is satisfied enough supports are arranged to ensure Brian and the community are safe it is possible that no order may be made at all. To date DSQ has not committed to any ongoing funding to enable such supports to be put in place.

Without his advocate's intervention, Brian would have stood trial by now, assumed competent.

> *The solicitor is a bit peeved that it has gone to Mental Health Court as it would have all been over by now. When you have a person like Brian the solicitor is going to do what they think is best for him – but that's by their standards of what should happen to a person with an intellectual disability.*
>
> *I have to go through all this rigmarole to get what is a very obvious case of not being fit for trial - how many people end up going to trial who just aren't competent?*

Brian remains living with his brother, seeing a counsellor once a month (covered by Medicare because the counsellor is a doctor!) while Blue Nurses assist him with his medical issues, but there is still no funding available for ongoing support for him to live independently.

> *It is so much better for Brian to live with his brother but he has two kids and a business to run. Without some additional support it may bust up as it put too much pressure on the family.*

Brian needs ongoing, well managed, flexible support to ensure both his and the community's safety. His advocate has continually approached DSQ asking for funding to

support Brian and is still hopeful this will eventually occur.

> *I feel very sad - people who are meant to be protected, vulnerable people like Brian, are not. DSQ says Brian is difficult to support – he is universally disliked because of the nature of the offences he is alleged to have committed .... He doesn't fit services and therefore [they feel] he shouldn't be funded. Without support the chances of him being locked up increase - Perhaps DSQ would prefer him to be in jail - its not their problem then.*

FROM HELL & BACK - CAMERON'S STORY

Trusting his "friends" has led Cameron to hell and back. This is his story about his experience of the criminal justice system.

> *I met these people who I regret meeting now 'cause I thought they were friends of mine but then they started taking over my life. My life was just hell and stuff. (Cameron)*

Cameron met a man who he thought could be his friend. Over time this man started going into Cameron's flat taking stuff, using drugs. He also threatened to hurt Cameron's Mum and his community support worker, Trish if he told them what was happening.

> *People would turn up at one or two o' clock in the morning. I said no but I got scared. I didn't feel safe so I started talking to my Mum and Trish.*

Cameron moved and things seemed to be going OK and then....

> *I met this girl, Amy, at Sandgate and I let her move into my place. She said her Dad was chasing her with a knife so I let her move in. She met a boy and they both moved in and stuff ... Other people starting hanging around there ... they had mates. They kicked me out of my room and wouldn't let me sit on my lounge – I had to sit on the floor – I gave her money - She said she was my carer – she said she was looking after me but she wasn't really looking after me she was looking after herself.*

Amy encouraged Cameron to obtain a $500 advance from Centrelink and then took it for herself. She also tricked Cameron's mother and step-father into thinking she was looking out for Cameron. Amy and her boyfriend stole mowers, whipper-snippers and bike parts, some of which were stored in the ceiling of Cameron's place.

> *They asked me if I wanted to help them steal some garden gnomes around the flats. I got sucked into it thinking Ok, that they were friends and I wouldn't get caught.*

> *Somebody saw me do it and they just took off and left me and let me take the blame for it.*

The police interviewed Cameron without a support person. Scared from his earlier incident he didn't tell the police about the role Amy and her boyfriend played.

> *The police started questioning me. I wanted to tell the police it was them as well but I knew I'd probably get bashed... or he would say a different story and get someone to back it up. I ended up in the watch house as well for 4 or 5 hours. Like I've been through hell and back*

Cameron was charged with the theft. He didn't tell his family or support worker. Amy, who was still living with him 'helped' him by taking him to his court appearances. He had no other support or representation.

She was just making sure I wasn't going to say anything about her or the boyfriend.

The judge fined Cameron $2000 plus the cost of replacing the gnomes. When Cameron received a letter about the fine, and had no capacity to pay, he finally involved Trish, his community support worker.

From that point Trish supported Cameron by going to Legal Aid and seeking assistance in appealing the fine. The lawyer listened to Cameron's story, took time to check he understood what was happening and allowed Trish to be present. Cameron went back to court, this time with a supportive lawyer and Trish. He was able to explain more about what had happened including his fear that the others might hurt him if he had given the police their names. The lack of support and Cameron's intellectual disability were also raised. No conviction was recorded and Cameron did community service at the local showground.

I get sucked into this sort of stuff. I've learnt my lesson since then not to trust anyone.

I now go to schools to talk about my experiences of being bullied and how we can be helped and how it can be stopped - how it's important to tell our stories.

IN FOR LIFE? - DAVID'S STORY

David is twenty four and has an acquired brain injury from a hit and run accident when he was fourteen. This story is told by his advocate, Lucy.

David comes from a very disadvantaged family background. His mother is a habitual drug user who has had a series of abusive partners in her life, some of whom physically abused David. Even before the accident David had behavioural problems that saw him expelled from school and have contact with Mental Health Services. As a result of the accident David received a compensation payout which is managed by the Public Trust.

At eighteen years of age he was jailed for sexually assaulting two young boys. Whilst little information is available from this time, it appears unlikely any provision or support was provided for David to go through the court and legal processes, but David may be in prison indefinitely, incarcerated under the new serial sexual offenders legislation. The Attorney General's office will not confirm or deny his current prison status.

> *They're probably happy to leave him there until he dies – and they can - once it's been established it's a pattern of behaviour they don't have to let them out. (Lucy)*

David was referred to an independent disability advocacy organisation by the Forensic Mental Health Team who regularly visits the prison. David's parole had been refused because he had not participated in the necessary treatment programs and had no appropriate place to go once released.

> *The Department of Corrections refused David's entry into the sex offenders and anger management program because his intellectual capacity does not allow him to meet the criteria. His mother's place was the only suggested [accommodation] option and this was not appropriate.*

Lucy began visiting David on a regular weekly basis. She found David was very reliant on the prison guards to help him and, fortunately over time, some guards had become supportive, prompting him to attend to his bathing and personal care which he would otherwise neglect. However he has no ability to cope with other prisoners on the block and he claims to have been sexually assaulted in prison

> *He is always in the Detention Unit or CSU – Crisis Support Unit – suicide watch for self harming behaviour. Sometimes he'll drink 30-40 cups of coffee a day to the point he has heart palpitations so he can go to medical unit to have respite from the block.*

> *He was often being stood over by the other inmates. David would spend all his money on tobacco and food on the weekly buy up on Wednesday. He is not capable of going on the inmate roster to make breakfast and lunch so the others would say "You can't have your lunch until you give us your tobacco." By Thursday or Friday he'd have no*

tobacco – which is a big deal –David would beg the officers and me for tobacco

We managed to get Public Trust to reduce the weekly amount they gave him. We also met with one of the guards who was prepared to hold on to David's tobacco giving it to him bit by bit. I had to convince David to trust this guard. It may seem like a small thing but it took some months to manage this.

Lucy began investigating alternative living options to assist David's parole applications. Such options were required due to his inability to look after himself in the community, particularly after six years of institutionalisation. She discovered an agency in Brisbane that specialises in supporting people with brain injury or mental illness who have difficult behaviours. The agency leases a block of units for clients and one unit has a support worker available 24 hours a day. Residents can access alcohol and drug counselling, sex offender's counselling and be taught independent living skills. After two years the aim is to be transitioned to the community. David could afford the cost because of his compensation payout.

It was this or prison and I managed to obtain the vacancy for David but the parole board denied the parole and the vacancy has since been lost. They were concerned it wasn't a secure facility.

In the meantime David has been shifted under the new sex offenders legislation which is retrospective. Now his parole applications go through to the State Parole Board which reports to Linda Lavarch, the Attorney General. She makes the final decision.

We have been lobbying her office for the last four months to get feedback from her about what we were trying to achieve for David. We have written letters and made countless phone calls. They will not talk to us at all – We have had no feedback on what they are planning for David – We have lost that vacancy and we are waiting for another...

A few months ago David was also transferred to another prison to give the guards respite. David was constantly harassing the "fish bowl", the office where the officer's sit behind glass in the middle of the block. He would bang repeatedly on the glass and eventually they had enough. His new prison is six hundred kilometres away from his advocate, the only independent person who has been actively concerned for his welfare.

He phoned me this morning crying because another inmate had bashed him over the head with an ashtray.

He is absolutely alone. No-one visits him at all now. His Mum has moved to the area and asked for money for moving costs from the Public Trust but she hasn't gone to see him. They (the guards) don't understand him – before the guards knew I was his advocate and I went to visit him every week.

I have tried to build up a relationship with the prison psychologist so he can keep an eye on David. We have also encouraged David to phone the agency in Brisbane – they have been willing to support him on the phone.

According to David he has been in Detention Unit 11 times since he was transferred although Lucy suspects it is probably more likely to be around four times. She is concerned his behaviour is getting worse.

He just won't get out at all if he doesn't behave himself - behaviour in prison is one criteria for release

He is completely frustrated. He is not coping and he is getting worse. He doesn't even know he may be under the new legislation.

Since we cannot get a definite confirmation or denial as to whether he is classified under this legislation we're not going to tell him as he is likely to react badly.

Lucy has now managed to obtain an agreement from the support agency in Brisbane that should a vacancy arise they will provide David with his own support worker twenty four hours a day for the first three months after his release. He would then share the support worker with other residents. Yet without any indication from the Attorney General, who ultimately decides David's fate no-one knows when, or if, this will happen.

Update

The support agency in Brisbane has since had a vacancy in an innovative housing project. However David's parole application was again denied as the proposed house was too close to a school. The parole board has again raised the issue of a "secure facility" in relation to parole for David.

"A TRAIN WRECK WAITING TO HAPPEN" - GRAY'S STORY

It's ugly and it's unpleasant and nobody wants to take responsibility and no-one wants to put the resources into assisting him.

We get the feeling if you are not a nice person with a disability, not someone who looks good – the ones you can put on calendars – the minute it gets complicated or difficult no-one wants to get involved. Yet on the other hand DSQ said "Gray is not disabled enough for DSQ to be involved". That was their exact words. (Fiona - Gray's advocate)

Gray is a 19 year old indigenous man with a diagnosed intellectual disability. This story is told by his advocate, Fiona. Since an early age Gray's parents gave him marijuana as a way of controlling his behaviour. Expelled from school in Year 8 Gray and his family were largely isolated from any assistance. Four years ago Gray was apparently found riding his bike down street with bag of cannabis in his mouth. He reportedly told police he was getting it for his parents. Child Safety became involved in the family at this point because of his cannabis use and DSQ provided the family with two hours respite per week in acknowledgement of his disability.

The first contact the advocacy organization where Fiona works had with Gray was a phone call from the Magistrates courts requesting their presence at a hearing. Gray had sexually assaulted a young female family member who was staying at his family's place and had been taken to the watch house over the weekend. This hearing, at the resourceful Magistrate's insistence, developed into more of a stakeholders meeting with a number of agencies asked to assist in determining what to do. Due to Gary's age (just under 18) and the nature of the offence, he went under a temporary child safety order but no one at the stakeholders meeting had a solution regarding where he was to live once he was released from the watch house. Fiona felt all agencies denied responsibility.

Child Safety said he wasn't their responsibility as he was nearly eighteen although they had been involved in the family previously.

Disability Services Queensland said he wasn't their responsibility as he was an unfunded client who didn't have a severe enough disability - the marihuana use was the problem. The two hours allocated to family had run out two weeks before the offence so they were saying no further money was available.

Mental Health said he has no mental diagnosis

I said if you do not intervene he could offend again. I was very clear about it. You cannot wipe your hands of this – you are negligent in as much as you have the capacity to stop him from sexually assaulting another child.

In the end Gray's mother said she would take him home and remove her two youngest daughters from the house until something more permanent could be found. Nobody

questioned her offer because it seemed culturally appropriate and no other options were provided. No offers of support were given by the agencies.

Gray was given bail with the conditions that he reside with his mother and have no contact with minors. Fiona twice went to see him in his home and both times Fiona suspected he may be under the influence of marijuana

> *Two times I went there and kids were there. His Mum had no intention of sending the daughters away – she just said that to get Gray home. She did not believe the offence was serious and still does not. The way they approach his offending behavior is they can't understand why it is such a big deal.*
>
> *Warning bells were sounding and I made numerous phone calls. Basically everyone we spoke to said it was not our responsibility. We wrote letters to both the Minister for Child Safety and the Minister for Communities outlining the issues – family needed an immediate intervention with funding. All we received were cursory letters back.*

Not long after Fiona received a phone call from the social worker at the secure mental health unit. Gray had been taken in on urgent forensic order. He had sexually assaulted his young sister.

> *I was that upset I wanted to phone some of the people who had been at the earlier meeting and ask them how they sleep at night.*

The assault was discovered by a Child Safety Officer who was monitoring the house as a safeguard for the other children. Apparently Gray's mother disclosed the abuse accidentally. Gray has been locked in a Secure Mental Health Unit since this time.

> *The first time when I saw him at the court house he was handcuffed sitting in the glass box where he was taken from the watch house. He was sitting in the box, crying. He had absolutely no idea of why he was there. I asked him "How are you, mate?" He said "I'm hungry." I asked "Haven't they fed you?" He replied "I only eat what Mum cooks".*
>
> *Now whenever I see him at the Secure Unit he still asks "Why am I here?" He just doesn't understand. I try to explain what he did was wrong and he says, "But I went to court." He thinks going to court is the penalty - its heart wrenching.*

The advocacy organisation pressured the Child Safety Department to remain involved in Gray's case even though he had since turned eighteen. They reminded Child Safety of little used legislation that allows them to maintain involvement until a child is 21 if the child is not capable of being exited safely. Child Safety called a stakeholders meeting, the first of three, in an attempt to find a solution.

> *DSQ came to the first meeting. They said Gray did not have an intellectual disability. He was not severe enough and his lack of capacity was a result of his marijuana use.*

They would not be involved until an assessment was carried out when he had been in the secure unit without marihuana use for a period of time. This was despite the fact that DSQ had previously provided respite to the family.

After nearly two months tests were conducted and the report made available to the second stakeholders meeting indicated Gray did have a severe intellectual disability in relation to communication and comprehension and a moderate intellectual disability in relation to language and other areas. Only then did DSQ acknowledge that he did have an intellectual disability

Two more months passed with Gray still living in the secure Mental health Facility. At the final stakeholders meeting DSQ said they would *consider* admitting Gray into an "Innovative Housing" program which is staffed 24 hours and the doors are locked. There were four spots and eight candidates, one of whom was Gray. Assuming this happened the plan was to exit him from innovative housing into the community after intensive support in 3-6 months.

We have heard its worse than the secure mental health facility but it's the only available option for Gray. The best outcome would be if after he is exited from the Innovative Housing, he has his own place away from children. He needs 24/7 support with counselling and rehabilitation and the adult guardian involved as his decision maker.

I don't believe he will ever be independent in the community without support but because of his age it's absurd to think he will live his whole life locked up. Yet I doubt if DSQ will fund him 24/7 – he is more likely to get insufficient support hours a week, and I reckon he would pose, and be at, serious risk.

But for now Gray remains still in the Secure Mental Health unit despite not receiving any treatment. He has not been provided any or sexual offenders counselling either.

We have sourced a counsellor who does sex counselling with people with an intellectual disability. She could have some good outcomes with Gray. We presented this proposal to the stakeholder meeting - at the moment he doesn't receive treatment from a psychiatrist – but it wasn't seen as an option. The consultant psychologist believed it was not appropriate while he is incarcerated – that he needs to be settled in the community before this happens. Yet when Mental Health do a sex offenders risk assessment to determine how and whether to release him into the community he comes up as too high a risk without doing the counselling.

Hence it appears DSQ will now consider supporting him in the community but neither they, nor any other stakeholder, will fund the counselling required for him to leave the Secure Mental Health unit!

The advocacy organisations have given up on DSQ and are now focusing on Child Safety as a possible source of funding for the counselling.

Neither department [DSQ or Child Safety] wants to pay for counselling whilst he is in the Secure Unit because they believe it is Queensland Health's responsibility to provide this. Q Health is saying, and rightly so, he doesn't have mental health disability.

Mental Health have already picked up the tab for last 6 months. They took him in an emergency with 2 hours notice. They have been good advocates for Gray.

DSQ have only become more involved because of Q Health pressuring them to take up their responsibility.

The advocacy organisation has since supported he appointment of the Adult Guardian to oversee Gray's accommodation and support matters and the Public Trustee to manage his financial affairs.

When asked what interventions would be needed to change Gray's story, Fiona says more needed to happen for the whole family before Gray left school.

People like Gray and his family just kept slipping through the cracks with band aid approaches. These agencies were involved in Gray's family and they failed spectacularly. Its damage control instead of prevention

My fear is if the innovative housing doesn't happen Gray will end up in prison under the new sex offenders legislation ... he will be incarcerated as a serial sex offender and he will not be released ever.

UPDATE

DSQ has since denied Gray access to the "innovative housing project" on the grounds that his behaviours cannot be directly linked to his disability. When questioned on this they had no subjective way of determining or ruling out a causal link. A further ground was that Gray's primary need is supervision not support. DSQ went on say Gray's level of intellectual disability was not severe enough to warrant 24/7 support! So Gray remains in the secure mental Health Unit with no options on the table as DSQ completely withdraws from his life.

ONE OF THE POLITEST CRIMINALS I'VE MET – JOHN'S STORY

John is serving a two year suspended sentence for attempted armed robbery. This story was written from an interview with John, Rachel his friend and worker, and Chris his advocate from a disability advocacy organisation.

John's involvement with the criminal justice system begins five years ago after he, aged 20, was badly injured in a traffic accident and acquired a permanent brain injury. This condition affects John's ability to problem-solve, make decisions and remember things. Immediately after the accident he was taken away from his home, a small regional town in North Queensland, to Brisbane where he spent ten months alone in the PA hospital. His elderly parents could only visit him once.

> *It was like being stuck in a prison down there (John)*

John's parents were phoned by the hospital the day before John was to be put on a plane back to the closest regional city, 100 kilometres from his home town. No discussions were held with his family, no plan for how he would live or be supported. Rachel, a community worker who was known to John's sister, was asked to help. She made some calls, flew to Brisbane and managed to postpone John's return. She has since remained in John's life developing a friendship with him and acting at times in an informal advocacy role.

Rachel began making applications for funding to DSQ at this time although she now considers herself naïve to assume that even someone with John's complex needs would instantly receive instant funding. From the PA in Brisbane John was later transferred to the regional city's ABI Unit where he lived for another two years. He was eventually discharged, again without any adequate planning or support or even any information-sharing with the people who would be trying to assist him.

> *They wouldn't give me or his parents discharge papers, nothing to say what had happened in the prior six months. As far as they were concerned we had no right to know – they were hiding behind the Privacy Act. (Rachel)*

As his elderly parents are unable to care for him on a regular basis, John was discharged to a boarding house in Townsville, one with a reputation of being something of a 'hellhole' which is actually now closed. John experienced a form of freedom after months of being told what to do in a hospital regime.

> *They went and packed all my stuff and the next day I was in the Avenue – no-one would tell me what to do – I could do whatever I want! (John)*

No one helped John to deal with living in the community again - how to shop or use money. Fortnightly visits from a Community Mental Health worker were ironically the only support he received given that John does not have a mental illness. Rachel and his parents lived over an hour away. Laree, his advocate visited twice a week

He hadn't bathed or been fed – the boarding house only provide one meal a day. Later he was evicted by the boarding house which was a good thing as he became homeless and DSQ registered him as homeless. (Chris)

Prior to leaving the boarding house, John met a couple of men who offered John a trip to Cairns. All he needed to do was steal a car.

When first asked what he did John said –

"Its all just a blank at the moment – I don't remember"

Later he said -

I grabbed her and threw her out of the car and hot wired it– that's what I was told and hot wired the car while she was on the ground. I left her for dead and took off. Don't know if I got far.

In reality John asked a woman for her car keys to take her car. When she said no he asked again for her money. She said no and he ran away. The victim of the crime, an off-duty policewoman, called the police. John was arrested along with one of the other men and questioned without any support or assistance. He had scissors in his pocket and hence was charged with attempted armed robbery. Clearly he has a disability.

You sit down and they ask you all these questions like 20 questions – you're just sitting there. It was like you couldn't get away from them. (John)

John remembers being asked if he wanted a lawyer although he is not sure what was his response. He thinks he said '*Yes and no, in between?*

John maintains he asked the police about ringing his family –

'I asked them and they said no. I said okay that's fine, I don't care. I had a go to try and get out.' (of the watch house.)

Section 253 of the *Police Powers And Responsibilities Act 2000* states that if a police officer reasonably suspects a person has impaired capacity they must allow them to speak to a support person allow that support person to be present before any interview takes place.

The police will tell you to your face situations like this never happen. Yet time again we hear stories like John's where they were never given the opportunity. (Chris)

John spent the weekend in the watch house. Luckily on the Sunday afternoon another policeman came on duty who sat down with John and had a chat with him. He could see his obvious disability which everyone else had chosen to ignore. He asked John if he had

any friends or family and that's when John gave him numbers for Rachel and his parents. To this point no one had asked about John's friends or family.

> *I thank God for that policeman. John had already confessed and been picked out of a line up. If I hadn't been contacted he would have been put up for mention in court on Monday and a date set for sentencing. He would have been remanded in the watch house or sent straight to Stuart prison. The other guy who was involved was sentenced there and then. (Rachel)*

Rachel was able to organise a solicitor and be with John in the court hearing the next day. Later John pleaded guilty. Whilst the confession could have been challenged, the eye witness evidence clearly proved he had committed a crime. John had little understanding of what was going on in court, the etiquette or rules.

> *I was standing there with my hands in pocket and the Judge said I had to take my hands out – he thought I had a gun! (John)*

Eventually the judge described John one of the politest criminals he had ever met. The evidence showed John said "Please" and "Thank you" when attempting to steal the car! He was given a two year suspended sentence. The relative severity was due to the need for parity of sentences with the other man who was arrested with John and who had a prior criminal history. If John commits any other crime during a two year period he will be jailed.

> *I go straight to the cell. It's like I'm on my last warning. There is no way I am going there. (John)*

As a result of this charge and John's homelessness DSQ at last provided some short term emergency funding to support him. Six months later, thanks to Rachel's committed advocacy, forceful personality and sound knowledge of the funding system, John received recurrent funding from DSQ.

> *I followed the due process which is what people are supposed to do and I did that for 4 ½ years. I made it perfectly clear if funding wasn't forthcoming to get this guy's life in order and he went to jail then people had better run for cover. They knew I was fair dinkum. This is the time I am going to stand up and be counted – I was prepared to risk everything (Rachel)*

The criminal justice system has since let John down again. Four days after coming back to his home town he was very badly assaulted, with symbols even being carved into his head. He was in hospital for five days. Both John's parents and Rachel spent a lot of time convincing John to give a statement to the police. He knew who had assaulted him and was able to provide a statement to the police but nothing has happened since. The police have said John is not a credible witness.

He sees he's been punished for breaking the law and had to pay the price and these people have broken the law and get away with it. (Rachel)

John is now living independently in his own flat with support. He is becoming very involved in art. *"I drew that"* laughs John pointing at a drawing entitled 'Bad Boy'. He doesn't seem to be very bad!!

STANDING UP FOR MYSELF - MANDY'S STORY

Mandy is a young woman who experienced the criminal justice system firsthand after she was the victim of sexual exploitation. Mandy's story begins when she phoned her community support worker, Tanya, letting her know she had a modelling contract. Tanya was sceptical and, after talking more to Mandy discovered she was being exploited by two men who were taking sexually explicit photographs of her.

> *To me it sounded like it was wrong so I talked to her about what was happening and some options and one of them was going to the police. (Tanya)*

> *They tried to pay me money and buy me KFC for taking photos of me undressed – it was all about getting me to do modelling. (Mandy)*

Tanya rang the police on Mandy's behalf and was transferred to the sexual assault service. Mandy then went, with Tanya, to give a statement to the police. Both police were respectful and considerate of her needs. They interviewed her in the room often used with young people and videoed her.

> *I was a bit upset through some of it. (Mandy)*

Later, when the police had questions of Mandy, they would ring Tanya who would communicate information to her as often the information was too complicated.

> Section 216 of the *Queensland Criminal Code* deals with Abuse of Intellectually Impaired Persons including the taking of indecent photographs. 'Intellectually impaired person' is defined quite broadly in some regards – it refers to a disability attributable to intellectual, psychiatric, cognitive or neurological impairment that results in a substantial reduction in the person's capacity for communication, social interaction or learning and in the person needing support. However this section has been criticised on the basis that a person with, for instance poor communication and high support needs resulting from cerebral palsy would arguably be covered, while someone like Mandy who presents somewhat better despite actually having an intellectual impairment in the true sense struggles to receive the same protections.

Through information provided by Mandy the police raided the place where the photos were taken and found the physical evidence to support Mandy's claims. Two men were arrested and charged.

> *He was an old boyfriend I used to go out with at a social group and he had a few problems and he was mixing with the wrong people. He said "I thought you loved me", but I didn't want to be hurt or used and I knew I was and I decided to go the law cause that was wrong. (Mandy)*

Her faith and sense of judgement and trust was shattered, particularly as she knew one of the men and he has learning difficulties. (Tanya)

Having taken her story to the police Mandy now had to be involved in the court processes. The defence argued Mandy was a consenting adult who did not have a disability given she lived on her own. Consequently Mandy was required to undergo a psychological assessment to determine she had a disability. The defence did not want Mandy's taped evidence to be admitted in court on the basis of her 'special witness' status and fought for Mandy to give evidence directly.

Under section 21A of the *Evidence Act 1977* the court may declare a person a 'special witness' if, among other things, they would in the court's opinion 'as a result of a mental or physical impairment or a relevant matter , be likely to be disadvantaged as a witness'. Various orders can then be made in relation to special witnesses aimed at making their giving of evidence as stress-free as possible.

I know they have improved the way people can give video evidence but it is still difficult – the DPP were trying for her to give evidence in the other room so she wouldn't have to be in court – the defence were trying to get her to testify in court. (Tanya)

Until the morning of the committal it seemed as if Mandy would need to give evidence in court. Mandy was very distressed at the prospect of giving evidence in court. She was supported by a worker from WWILD, a service for women with an intellectual disability, who also have a victim court support service. Tanya was a witness and could not also undertake this role. Fortunately on the morning of the hearing the DPP liaison person rang to say Mandy didn't need to appear in court. The magistrate watched Mandy's video evidence and Mandy's doctor who made the psychological assessment, the police and Tanya all gave evidence. On the basis of the evidence it was decided the case would go to trial.

The defence made applications to have their own psychologist assess Mandy. The DPP refused, not wanting her to go through this process again with another psychologist. The request was made four times, and was still refused but the DPP decided to instead ask her to participate in more specific testing with the psychologist she had previously seen.

The DPP and Defence were arguing over this issue. I supported Mandy to understand what was happening and she consented to participate in further testing. In the end the thing that turned it (against the defendants) was the suggestibility test that indicated Mandy is very vulnerable to suggestion. (Tanya)

The need for a trial was eventually avoided as both men decided to plead guilty. There was a delay in one of the men's sentencing due to his hospitalisation after a suicide attempt.

They both received suspended sentences - the other guy should have gone to jail- he was the ringleader. (Tanya)

Whilst there were many supports available for Mandy in this process it was still a very difficult time for her.

> *The system doesn't make it easy for vulnerable people to speak up for themselves – the court process can be very uncertain which creates stress – interviews with the doctor, the prospect of going to court was all very hard. Thank God she didn't have to appear in court in the end. That was totally due to the prosecution lawyers who did a good job.*
>
> *She wouldn't have gone through this process if she didn't have someone to help her through it. She wouldn't have even reported it to the police, not realising that she had been exploited. (Tanya)*

For Mandy she has put this experience behind her but is proud of what she did.

> *I stood up for myself and did something about it. It was wrong what they did.*

PAUL'S STORY

Paul has served five years of an eight year sentence for a serious sexual offence. He remains in prison and his story is told by Wayne, a worker from the Deaf Society, who has supported Paul since his imprisonment.

Paul became profoundly deaf at the age of six. His father left and later Paul experienced nine years of physical abuse from his step-father largely due to his inability to communicate. Paul went to school in Rockhampton where he learnt to communicate in signed English, then later to Dutton Park Deaf School in Brisbane where he learnt Auslan. Nobody else in his family learnt Auslan although Paul is unable to speak English and his English literacy is minimal. After school he lived in Bowen with his mother. He worked picking tomatoes and as a mechanic's assistant. At twenty one he moved to Brisbane and experienced difficulty finding permanent work. He worked briefly as a gardener at a Deaf Society sheltered workshop. Most of his time was spent drinking and smoking pot due to boredom! Paul was never taught right from wrong during his early life and he began getting into trouble with the law for minor offences.

When Paul was first charged with the sexual offence he contacted the Deaf Society. They referred him to Legal Aid and assisted him to book interpreters when needed. As a result of Paul's early life, lack of education and lack of access to English language Paul has difficulty understanding complex concepts. Even with an Auslan interpreter he was unable to understand his solicitor. A support worker from the Deaf Society attended meetings with Paul and his solicitor to assist him to understand what was happening. During the court process an Auslan interpreter interpreted for Paul. On sentencing the judge indicated the need for the Deaf Society to continue supporting Paul whilst he was in jail although no funding was allocated. The Deaf Society have continued to support Paul without funding or additional resources to do so.

Upon conviction the Deaf Society played a role in Paul's transition from community to prison, educating the prison about Paul's needs and what it means to as be Deaf. They also identified areas requiring change to allow Paul receive equal treatment in prison.

> *Paul needed to have captioning on his TV. He also had problems making phone calls. Prisoners only get ten minutes to make phone call – we organised for Paul to have a TTY but it takes Paul much longer than ten minutes to make a call as he can't write well. Then we wanted him to have an interpreter so he could attend courses but they couldn't provide one. "It would be of no benefit to him" they said. (Wayne)*

Paul experiences a number of difficulties in prison due to his deafness. He doesn't understand written information well. The prison does not provide interpreters for most of his meetings with prison staff and professional visitors eg the doctor. There is no-one for Paul to talk with. When he was first in prison there was another prisoner with a hearing impairment who could use Auslan. This prisoner has since been moved to a minimum

security prison. Paul is totally isolated and becoming increasingly depressed. He has had friends visit only to be told visits had been cancelled.

> *Every time I visit Paul he tells me he is being teased and bullied because of his disability – I have told him he needs to be more specific in order to make a complaint but Paul has difficulty doing this. He can't indicate clearly when and where something happened. I am trying to encourage him to make a simple note but it's hard for him. (Wayne)*

Paul is unable to participate in any courses, including sex offender's courses or group therapy. This means he is still considered a high risk prisoner; he cannot be moved to minimum security prison and is not eligible for early parole. The prison says it can't afford the interpreter but has also stated that providing an interpreter would be a waste of time because they believe his IQ level is low.

> *I've met him a number of times and I don't think his IQ is low – he has low concept levels and needs someone to assist his understanding in some things. Sometimes he needs to be given a concrete example or prompting.*

> *This is more to do with his education and upbringing than him having a low IQ. People don't understand what it's like being totally deaf. Paul's parents could both hear and his family experienced lot of abuse and dysfunction. I don't think he had a great education. Paul wouldn't have known what was happening much of the time - relying solely on visual cues. He had few role models to guide him and explain what was right and wrong. (Wayne)*

Legal Aid are now assisting Paul with an application to The Anti Discrimination Commission regarding discriminatory treatment in jail.

Wayne tries to visit Paul as much as possible to assist him to deal with issues and problems. However it is often up to Paul's partner, who is also Deaf, to bring letters or raise concerns to the Deaf Society via their weekly walk-in service. He then relays back to Paul the meaning of a letter although by the time this occurs it is often too late. Wayne is concerned about what will happen when Paul is eventually released from prison.

> *His partner and the Deaf Society will support him as much as possible but we can't provide case management – helping him with Centrelink, bank accounts and all the things he needs to do on a day to day basis.*

> *He can't get support from other agencies such as Lifeline because they don't provide interpreters. Nor is it likely he will be able to receive ongoing counselling or other support after his release. It just makes things very difficult. (Wayne)*

SAM'S STORY - CATCH 22

> *"You do not have a serious criminal history You do have an intellectual disability yourself. The report of the psychologist shows you have had an unhappy childhood, you yourself being a person who was abused, and not had the opportunities to develop and improve your circumstances. You need assistance and support*
>
> *It would not be appropriate to make declaration that you are a serious violent offender. I recommend you be eligible for early release after four years." (Judge during sentencing)*

Now well over four years later, Sam is still in prison. Not because he has committed any further offences but because he has a disability. He has no family or friends in his life, nobody who visits him in prison except for paid staff. His story has been developed by talking to agencies that have been advocating for him.

Sam became a Ward of the State as a child as a result of being abused by his parents. Due to his intellectual disability he was provided with a support package from DSQ to assist him to live. Sam wasn't necessarily an easy young man to support as he was wary of services. Many services ended up pulling out of arrangements for assisting him.

In the early 2000's at the age of 20, Sam was charged and later convicted for a sex offence against another man. Prior to this time he had never committed a similar violent crime although he had been charged with some property related offences. It is unlikely he had the capacity to instruct his solicitor and stand trial.

> *Sam is a very sociable and friendly – a big guy. It's not immediately obvious he has a disability. I don't think his case went to the mental health tribunal to determine if he was fit for trial. It's often easier and quicker for lawyers not to do this. (His advocate)*

At the time he was charged and went to court A, a small community organisation, came in contact with Sam. They continued to provide some support for him in prison and referred him to a disability advocacy organisation. During the trial Sam's barrister resigned for some reason. Sam's advocate has been unable to find out what happened.

Once in prison Sam's individualised DSQ funding package was withdrawn. He received a letter from the Minister which said:

> *'Given you are now under the care of the Correctional Centre, the Centre has assumed responsibility for your care and support. When you leave ... you can apply for support through the Adult Lifestyle Support Program. Your application will be considered when funding becomes available.'*

How and who would make this application was not suggested! Fortunately he had an advocate who began preparing for the time when he would be eligible for parole. Obviously

Sam needs considerable support to live in the community. This requires financial assistance.

> *Because of Sam's intellectual disability lots of things need to be put in place. He needs his DSQ funding package*

DSQ's initial responses were not encouraging. The other barrier likely to affect Sam's parole was his ineligibility to do the sexual offence treatment program. Corrective Services allows only those with an IQ greater than 85 to do the course. Sam's IQ is 70 which makes him, and many others ineligible. Sex offenders who have not done the sexual offenders treatment program may be viewed less favourably by the parole board and not be paroled. Catch 22.

An anti discrimination action regarding Sam's exclusion from the sex offenders course was mounted. After much pressure and considerable advocacy Corrections have agreed to implement an individual program for Sam to address his offending behaviour suitable for a person with an intellectual disability. This individual response ignores the fact that many people with an intellectual disability reside in jail without modified courses to address their offending behaviour. Catch 22.

As Sam's parole hearing came closer his advocate increased his efforts to obtain a guarantee from DSQ that he would have funding upon release. The parole board indicated they would not consider parole unless Sam was properly supported in the community – ie that funding was guaranteed.

After a letter to the Minister, and subsequent meetings with senior DSQ staff, DSQ agreed to assess Sam to determine what kinds of support he would need to move back into the community. Two interviews were held with Sam, DSQ staff and psychologist and Sam's advocate. DSQ's report arrived the day of the first parole hearing confirming Sam's level of need and outlining the kinds of supports and training necessary. It concludes by stating:

> *'Should Mr B be positively considered for parole, DSQ will give further consideration to a support arrangement.... No guarantee of funding can be given at this stage.'*

Clearly this would not be enough for the parole board which declined to give parole at that time but adjourned proceedings to enable any possibility of support to be explored. Sam's advocate was asked by the parole board to write up a plan for how Sam's support would work – what agencies could (if funding became available) provide support such as budgeting, shopping, employment and assistance just to diarise his probation meetings.

> *If he doesn't go to those (probation meetings) he ends up back in jail. (His advocate)*

Several community agencies agreed to be involved but none wanted to take a lead role. DSQ was not willing to take a lead role. Sam's plan was developed but still there was no funding. His advocate asked for an undertaking from DSQ to provide for emergency funding should Sam be released. Again this was not forthcoming from DSQ.

A second parole hearing was set and informally Community Corrections told Sam's advocate.

> *"We'd release this guy if he had support. We don't think he should be in jail"*

Again letters and representations were made to the Minister DSQ and the Director General by Sam's advocate. Community Corrections even wrote indicating their preparedness to release Sam provided funding and support were forthcoming, but DSQ still would not guarantee adequate funding and this support could not be arranged.

The latest letter from the DG to Sam's advocate restates DSQ's unsympathetic stance:

> *Mr B may apply for consideration for funding once his release date is known. Access to funding will be in accordance with established procedures and availability of funding.*

Catch 22. Sam remains in jail.

> *Prisons are a service provider now. I reckon the cost of keeping Sam in prison is about the same as a DSQ package. (His advocate)*

Most of Sam's time has been spent in the secure section of prison. Whilst in the less secure residential unit, Sam says he was raped. He wasn't encouraged to make a formal allegation with the solution being to ensure Sam's safety by placing him in the much stricter secure section. Here Sam spends a lot of time alone, isolated, becoming increasingly stressed. Until recently Sam wasn't able to work. He has however improved his reading and writing skills by attending a literacy course and has participated in a certificate in cleaning.

Postscript

Sam has recently been granted release on parole after finally being granted an Emergency and Crisis Response package and/or lifestyle support package from DSQ. This occurred as his advocate was contemplating a Judicial Review application in relation to the decision not to fund him. DSQ indicated he was eligible for emergency funding to meet his immediate disability needs while his longer term needs are identified and stable living arrangements negotiated.

The issue now is how well he will be supported over the long term so he can safely become part of the community.

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