



The Experiences of People with Cognitive Disability in the Criminal Justice System

**Submission by
Queensland Advocacy Incorporated**

**The Royal Commission into Violence, Abuse,
Neglect and Exploitation of People with
Disability**

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About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated ('QAI') is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to advocate for the protection and advancement of the fundamental needs and rights of the most vulnerable people with disability in Queensland. QAI's board is comprised of a majority of persons with disability, whose wisdom and lived experience of disability is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in Queensland. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our three advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law, non-legal advocacy support with the Disability Royal Commission, the justice interface and the education system and social work services); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness and provides advice and legal representation before the Mental Health Review Tribunal, including for Forensic Orders and Fitness for Trial Reviews); and the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS). Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

The services most relevant to this submission are our Mental Health Advocacy Practice and Justice Support Program. The Justice Support Program provides non-legal advocacy for vulnerable people with impaired capacity who come into contact with the criminal justice system. The client is provided information regarding the system and is supported to access legal advice and representation. The program also advocates for access to appropriate and responsive supports to address underlying issues and prevent further involvement with the criminal justice system.

QAI's recommendations

QAI recommends:

1. Greater use of police prosecutorial discretion and diversion to disability support services where a person is known to have a cognitive disability, or displays clear symptoms of cognitive disability, and there is no punitive value in charging a person. Accountability measures that ensure adherence to relevant guidelines are necessary.
2. Sustainable and ongoing funding for independent disability advocates and support persons, appropriate accommodation, and health and allied health services, to ensure that appropriate early and holistic support is provided. Such services are required for individuals who are transitioning to the community from institutions, as well as for individuals eligible for release on parole or who could apply for bail.
3. Instituting 'limiting terms' for forensic orders on the proviso that appropriate therapeutic programs are available during the operation of a forensic order.
4. Reforming the test for fitness to plead so that a person's decision-making ability is emphasised, and an assessment of available support is incorporated.

5. Statutory entitlement to support services like communication assistants and court-appointed support persons throughout the criminal justice process.
6. Specifically mandating disability support services for those placed under forensic order (disability) rather than mental health services.
7. Implementing the recommendations of the 2016 Senate Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia.

Introduction

QAI welcomes the Royal Commission's focus on the experiences of people with cognitive disability in the criminal justice system. As recognised by the Royal Commission in the *Overview of responses to the Criminal Justice System Issues Paper*, people with cognitive disability are over-represented in the criminal justice system.¹ Despite increasing commitment by governments to address and uphold the rights of people with disabilities, over-representation is reportedly *increasing*.² Although this can be attributed to greater recognition and reporting of cognitive disability,³ it remains a concerning fact. An explanation for over-representation is that people with cognitive disability disproportionately experience a range of other psychological and socio-economic disadvantages that increase their likelihood of interacting with the criminal justice system.⁴ Adopting this perspective, Aboriginal and Torres Strait Islander people experience compounding disadvantageous circumstances arising from intergenerational trauma and grief, systematic discrimination and oppression, and a lack of culturally appropriate support services.⁵ These issues provide the overarching context within which QAI's submission sits.

QAI's submission is focused on two issues:

1. How people with cognitive disability become enmeshed in the criminal justice system: that is, the criminalisation of disability.
2. Concerns regarding fitness to plead laws and their potential impact of indefinite detention.

The submission will discuss the current framework, its intended and unintended consequences, and reform recommendations necessary to protect the human rights and inherent dignity of people with cognitive disability. The submission will draw on academic literature on the issues, QAI's experiences as advocates for people with disability, and the first-hand experiences of our clients. QAI endorses the Commission's

¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to the Criminal Justice System Issues paper* (Issues Paper, December 2020) 2-3. See also Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) *Griffith Law Review* 370, 374.

² Ruth McCausland and Eileen Baldry, "'I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 291.

³ *Ibid.*

⁴ Kelly Richards and Kathy Ellem, 'Young people with cognitive disabilities and overrepresentation in the criminal justice system: service provider perspectives on policing' (2019) 20(2) *Police Practice and Research* 156, 165-6; Law Council of Australia, *The Justice Project: People with Disability* (Final Report Part 1, August 2018) 22-23.

⁵ McCausland & Baldry (n 2) 292, 294; Richards & Ellem (n 4) 157; Eileen Baldry et al, "'It's just a big vicious cycle that swallows them up": Indigenous People with Mental and Cognitive Disabilities in the Criminal Justice System' (2016) 8(22) *Indigenous Law Bulletin* 10, 10-12; University of New South Wales and PwC, *People with mental health disorders and cognitive impairment in the criminal justice system: Cost-benefit analysis of early support and diversion* (Report, August 2013) 5.

commitment to taking an experiential and human rights-based approach to examining the inadequacies of the criminal justice system in supporting people with cognitive disabilities.

Criminalisation of Disability

There is no causal link between disability and the commission of crime.⁶ However, a strong causal link between disability and *incarceration* has been identified by disability advocates and researchers,⁷ where people with cognitive disability are substantially overrepresented in the criminal justice system. Concerningly, this reflects an ongoing practice of ‘managing’ people with cognitive disability through the criminal justice system.⁸ This approach is informed by various misconceptions, including ignorance of cognitive disability, the belief that criminal law is an effective tool for intervention for a person with cognitive disability, or the belief that cognitive disability should not be an ‘excuse’ for socially unacceptable behaviour.⁹ Management through the criminal justice system is also justified due to a lack of viable secure community support options,¹⁰ though this is a legitimate concern to be addressed below.

As a result of these misconceptions, people with cognitive disability can become enmeshed in the criminal justice system from their first contact, either as young people or as adults facing serious mental ill-health or a breakdown in social connections.¹¹ Unfortunately, people with cognitive disability are more likely to establish this contact due to the nature and manifestations of their disability. For example, they may have difficulties with comprehension and communication, are more likely to have their intentions misunderstood, and are more susceptible to peer influence or blame by co-offenders.¹² Structural issues like higher levels of homelessness and inadequate familial and social support also increase their visibility and vulnerability to police intervention.¹³ Once a person with cognitive disability is charged with and convicted of an offence, the destabilising nature of this process renders them susceptible to re-arrest and imprisonment. Disruption of social connections and any existing support services increasingly alienates the individual, and it becomes more probable that a period of imprisonment will be imposed for further offending.¹⁴ Prisons themselves are ill-equipped to support the complex needs of people with cognitive disability, and any treatment that had begun in this period is often not continued upon release. Either the person faces constant changes in their environment and support, or they become locked into serious institutionalisation.

Aboriginal and Torres Strait Islander people are more likely to become enmeshed in this cycle of criminalisation through earlier and more frequent contact with the criminal justice system.¹⁵ Over-representation is evident within QAI’s clientele; Aboriginal and Torres Strait Islander clients constituted

⁶ Chris Cunneen et al, *Penal Culture and Hyper-incarceration: The Revival of the Prison* (Ashgate Publishing, 2013) cited in McCausland & Baldry (n 2) 293.

⁷ McCausland & Baldry (n 2) 293.

⁸ Baldry (n 1) 371; see also McCausland & Baldry (n 2) 292.

⁹ McCausland & Baldry (n 2) 294.

¹⁰ Ibid.

¹¹ Baldry (n 1) 371; see also McCausland & Baldry (n 2) 292.

¹² McCausland & Baldry (n 2) 294.

¹³ Ibid.

¹⁴ Ibid 295; Law Council of Australia (n 4) 50-55.

¹⁵ Baldry et al (n 5) 10; Law Council of Australia (n 4) 20; UNSW & PwC (n 5) 5; Richards & Ellem (n 4) 157.

12.15% of clients of all services whereas they constitute 3.3% of the total Australian population.¹⁶ This over-representation is normalised in relevant government agencies who continue to adopt an assimilationist approach in responding to Aboriginal and Torres Strait Islander people with disability.¹⁷

The following case studies canvass the criminalisation of disability.

Case Study 1

Jill¹⁸ has Prader-Willi Syndrome and has outbursts of aggression if her support workers don't help her manage her compulsions and cravings. Jill quite violently assaulted one of her support workers after they disregarded their training and disrupted Jill's normal routine.

JSP (QAI's Justice Support Program) assisted Jill by guiding her through the criminal justice process while her parents concentrated on further training for Jill's Support Worker Team. JSP provided the police extensive assessments and reports prepared by clinicians regarding Jill's disability and submitted that the police should exercise their discretion to refrain from charging her since she would never be able to defend herself in court. Despite acknowledging the inevitable outcome, the Investigating Officer pursued prosecution.

Once JSP assisted Jill in attaining Legal Aid assistance, her lawyer arranged for the Court Liaison Service to prepare a report for the Magistrate. Using the existing extensive documentation already provided to the police and a brief meeting with Jill, Court Liaison Service advised the Magistrate that Jill was not fit for trial. The Magistrate dismissed the charge at the next court date.

As indicated to the police at the outset, the outcome was inevitable and the whole exercise had no benefit to Jill, her victim or to the administration of justice. However, the financial and emotional cost to all parties and the State was extensive.

Case Study 2

Thomas¹⁹ has autism, intellectual impairment, and mental illness. He routinely took a specific path to the shopping centre, along which some children lay in wait and often taunted him to the point of bullying from within a house property. On one occasion, Thomas threatened to attack them if they continued to do so. The children's mother called the police, and he was charged with threatening violence. 17 months later, the charge was dismissed by the Mental Health Court without making a Forensic Order.

Years later, Thomas was assaulted by the children and when he went to the police to report the matter, they did not prosecute the children due to Thomas' difficulties in identifying them. This was likely a result of his previous negative experiences with police and agitation arising from the environment itself.

¹⁶ Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, 31 August 2018) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>>.

¹⁷ Baldry et al (n 5) 11; McCausland & Baldry (n 2) 294.

¹⁸ Name has been changed to ensure confidentiality of the person.

¹⁹ Name has been changed to ensure confidentiality of the person.

Soon after, on two separate occasions, Thomas spat on children at the shopping centre and was charged with common assault. He had developed a strong distrust of the police and antagonism towards children and their mothers but could not cope with or seek help for his antipathy.

The common assault charges are still being processed by the Magistrates Court and are likely to be dismissed,²⁰ 12 months after the incidents. Throughout both criminal justice processes, Thomas' overriding fear is that he will be imprisoned, despite reassurances from his lawyer and circle of support. His story demonstrates how the criminal justice process destabilises often precarious support systems, inducing fear of authority in the individual that impacts further interactions with the system, including as a victim.

Criminalisation of disability is a serious issue that the Royal Commission must address. Individualising and isolating the experience of each person with cognitive disability renders invisible the effects of negative compounding factors and the broader policy concerns that must be addressed.²¹ There is some recognition of this issue in current legislation and processes. Importantly, and as seen in the case studies, the *Mental Health Act 2016* (Qld) permits magistrates to dismiss charges for simple offences if they are reasonably satisfied the defendant is of unsound mind or unfit for trial.²² They can then refer the person to an entity that can provide appropriate support and care.²³ Magistrates may be provided a report from the Court Liaison Service regarding the defendant's antecedents, mental health and cognitive disability in making these decisions.²⁴

This is an example of 'therapeutic jurisprudence', where the criminal justice system is utilised to play an active role in rehabilitation of offenders rather than simply as an adversarial tool.²⁵ Other examples include diversionary programs designed to mitigate punitive aspects of the criminal justice system. While these are useful tools to continue, they are usually designed for intervention *after* the court process has begun.²⁶ The experience of our JSP is that there are points for intervention prior to this stage, when the police are first informed of an issue and are making the decision to prosecute.²⁷ In deciding whether to prosecute, police are required to consider whether there is sufficient evidence and whether prosecution is in the public interest.²⁸ The second step includes considering the seriousness of the offence, the alleged offender's background and culpability, and the availability of effective alternatives to prosecution.²⁹ It is at this stage that police officers should exercise their prosecution discretion where a person is known to suffer from a cognitive disability or displays clear symptoms of a cognitive disability.³⁰ In many cases, the person may be unfit to stand trial and the charge would be dismissed should it reach the Mental Health Court or Magistrates Court in the first place. Therefore, this is an ideal point to consider diversion to disability support services as an alternative to

²⁰ *Mental Health Act 2016* (Qld) s 172.

²¹ Baldry (n 1) 379.

²² *Mental Health Act 2016* (Qld) ss 22, 172.

²³ *Ibid* s 174.

²⁴ Queensland Health, *Court Liaison Service* (Chief Psychiatrist Policy, 15 April 2020) 5
<https://www.health.qld.gov.au/__data/assets/pdf_file/0030/638454/cpp_court_liaison_service.pdf>.

²⁵ McCausland & Baldry (n 2) 295.

²⁶ Baldry (n 1) 384.

²⁷ Mental Health Commission of NSW, *Towards a just system: mental illness and cognitive impairment in the criminal justice system* (Report, July 2017) 16-17

<https://nswmentalhealthcommission.com.au/sites/default/files/documents/justice_paper_final_web.pdf>.

²⁸ Office of the Director of Public Prosecutions (Qld), *Director's Guidelines* (at 30 June 2019) guideline 4, 2.

²⁹ *Ibid* 3-4.

³⁰ Law Council of Australia (n 4) 41.

prosecution. It would save significant costs associated with the administration of justice and assist in addressing the root cause of the person's offending behaviour, that is, inadequate therapeutic support.³¹ The case studies demonstrate a failure on the part of the police to adequately utilise this prosecution discretion. The corollary of this is an inappropriate use of force and verbal abuse that escalates the situation, as well as fosters fear and hostility toward authority and the justice system generally.³²

As foreshadowed above, another key issue that contributes to the criminalisation of disability is the lack, or perceived lack, of critical support services in the community. Magistrates who suspect a person may have a cognitive disability have been found to give prison sentences so that the person receives the diagnosis and support unavailable to them in the community.³³ However, prisons are not therapeutic places where people with cognitive disability should or can be 'managed'; holistic community-based support is necessary to ensure there are genuine alternatives to criminalisation.³⁴ Critical support services required to deliver access to justice are:³⁵

- Independent disability advocates or support persons, who support people with cognitive disability through the criminal justice system, such as QAI's JSP. The New South Wales government's recent injection of \$28 million in funding for the Justice Advocacy Service (JAS) demonstrates the level of commitment and resourcing required to ensure essential support for people with cognitive impairment navigating the criminal justice system, and must be replicated in other states and territories.
- Appropriate housing and non-custodial accommodation for people found unfit to stand trial and forensic patients. Accessible bail and parole hostels with requisite resources to support people with cognitive disability is necessary to ensure people do not instead spend lengthy periods in prison on remand or waiting for parole accommodation.
- Health and allied health services that operate as early intervention strategies for people with cognitive disability.³⁶

Critical support services with the requisite training, knowledge and experience that can support people with cognitive disability, are essential. Police are not social workers; however equipping them with information regarding these services will allow them to effectively divert people with cognitive disability to receive the required support. Such services must also be gender and culturally sensitive,³⁷ centring self-determination and acknowledging the specific disadvantage of women and Aboriginal and Torres Strait Islander people.³⁸

There are therefore two broad areas for improvement in relation to the criminalisation of disability. First, police guidelines must allow for sufficient early diversion from the criminal justice system. Police training must ensure that prosecutorial discretion is not only available, but actively and appropriately utilised.³⁹ This would ensure non-prosecution where the person has a cognitive disability and there is no punitive value in charging them. Consideration of processes whereby police identify that a person may have a cognitive disability and

³¹ Mental Health Commission of NSW (n 27) 19; UNSW & PwC (n 5) 12; Baldry (n 1) 383.

³² Law Council of Australia (n 4) 40-42.

³³ McCausland & Baldry (n 2) 295.

³⁴ Ibid 295.

³⁵ Law Council of Australia (n 4) 50-55.

³⁶ See also UNSW & PWC (n 5) 12.

³⁷ Mental Health Commission of NSW (n 27) 15-16.

³⁸ Baldry et al (n 5) 13-14. See also McCausland & Baldry (n 2) 296.

³⁹ .

refers them to disability support services to obtain the requisite reports for police consideration, could be explored. This would require in-depth training into the recognition of cognitive disability and impaired capacity, as well as of the referral system itself. Accountability measures, such as appeal rights regarding the decision, would also be necessary. Second, the existing gaps in critical support services must be filled. Sustainable and ongoing funding is necessary for independent disability advocates and support persons, appropriate housing and accommodation, and health and allied health services, to ensure that appropriate early and holistic support is provided.⁴⁰

Fitness to Plead Laws

The process for determining fitness and the consequences of such a finding are governed by the *Mental Health Act 2016* (Qld). The legislation involves balancing two considerations:⁴¹ ensuring that a person cannot be tried for a crime unless they are capable of defending themselves,⁴² and that person's perceived risk to the community.⁴³ There is no definition for 'fitness for trial', so the common law interpretation of the term is applied. Six minimum standards were outlined in *R v Presser*, overall assessing whether the accused has sufficient capacity to decide their defence and make their defence and version of the facts known to the court and their counsel.⁴⁴ The test is hence a functional assessment of decision-making skills,⁴⁵ further to the requirement that the accused has an impairment.⁴⁶ Our discussion is limited to the Queensland framework, though some recommendations may be extrapolated to other jurisdictions.

If an accused person is found unfit to plead in Queensland, the Mental Health Court may make a Forensic Order (Disability) ('FOD') if it is considered necessary for the protection of community safety, including from the risk of serious harm to other persons or property.⁴⁷ The Court can decide between inpatient and community categories, the latter being traditionally less restrictive and available only if there is not an unacceptable risk to the safety of the community.⁴⁸ Common conditions attached to community FOD are supervision, non-contact provisions, taking certain medication and attending intervention programs.⁴⁹ The Mental Health Review Tribunal is tasked with determining when an individual may be released from a FOD, or when the category or conditions of the order can be changed, however there are no nominal or limiting terms on how long a person may be subject to an FOD.⁵⁰ Consequently, individuals may be held *indefinitely* under an FOD as an inpatient for a period longer than the maximum penalty for the offence allegedly committed.⁵¹ Even where the individual is not an inpatient, FODs may unduly infringe on their human rights by imposing disproportionately limiting conditions.

⁴⁰ Mental Health Commission of NSW (n 27) 15-16.

⁴¹ Law Council of Australia (n 4) 67.

⁴² See also McCausland & Baldry (n 2) 297.

⁴³ Ibid 299.

⁴⁴ *R v Presser* [1958] VR 45, approved in *Kesavarajah v The Queen* (1994) 181 CLR 230, 245.

⁴⁵ Anna Arstein-Kerslake et al, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (2017) 17(3) *Human Rights Law Review* 399, 403.

⁴⁶ Ibid 403.

⁴⁷ *Mental Health Act 2016* (Qld) ss 130(1)(a); 134(1).

⁴⁸ Ibid ss 138. See also ss 139-140.

⁴⁹ Ibid ss 135-6.

⁵⁰ For discussion of nominal and limiting terms, and jurisdictions utilising them, see, Bernadette McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (Melbourne Social Equity Institute, 2017).

⁵¹ Ibid 20-21; McCausland & Baldry (n 2) 298.

Addressing indefinite detention

The UN Committee on the Rights of Persons with Disabilities ('UNCRPD') has explicitly condemned indefinite detention of people with disability after a finding of unfitness to plead, stating that it is contrary to Article 14 of the *Convention on the Rights of People with Disabilities ('CRPD')* regarding the right to liberty and security.⁵² Broadly, custodial and supervision orders are viewed as 'paternalistic declarations' preventing an individual from enjoying their autonomy due to their impairment, even if there are other factors used to justify such deprivation of liberty.⁵³ Although the number of individuals who are subject to indefinite FODs as inpatients is relatively low, QAI considers this to be a serious issue that must be appropriately dealt with.

The 2016 Senate Inquiry on this issue recommended the institution of 'limiting terms' where the Court sets a term on forensic orders beyond which they cannot be extended, on the proviso that appropriate therapeutic programs were available during the operation of the forensic order.⁵⁴ Aside from the fundamental benefit of avoiding indefinite detention, the introduction of limiting terms would force governments to accept greater responsibility for forensic patients,⁵⁵ who in turn receive greater certainty about the operation of forensic orders. A potential concern is that the risk to the community posed by the person's behaviour continues to exist beyond the limiting term even if the person has access to appropriate supports. QAI acknowledges the difficulty in balancing community safety with the individual's rights, and that in certain circumstances the individual's human rights may need to be limited in favour of community safety. However, given the gravity of continuing FODs, it is important to ensure there are sufficient safeguards within the process to protect the rights of people with disability. Therefore, greater supported decision-making during the application stage and the provision of appropriate and adequately funded therapeutic disability services remain necessary for a holistic approach to supporting people with cognitive disability and addressing community safety concerns. Such reform maps onto other problems identified with the consequences of a finding of unfitness.

Supported decision-making

Numerous problems have been identified with this test for fitness outlined above, namely that it is simultaneously under- and over-inclusive as certain people who cannot understand and participate fail to meet the threshold whereas those that could be assisted to understand with appropriate support are found unfit to plead.⁵⁶ Academics also have serious reservations about the compliance of the test with Article 12 of the CRPD regarding equal recognition before the law, arguing that mental capacity assessments are being utilised to deny individuals their ability to exercise their legal capacity, contrary to the Article.⁵⁷ Reflecting these concerns, according to the UNCRPD, the measure of a person's legal capacity should be 'the range and

⁵² Arstein-Kerslake et al (n 45) 408; Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40 *Melbourne University Law Review* 816.

⁵³ Arstein-Kerslake et al (n 45) 408; Law Council of Australia (n 4) 72; Piers Gooding and Charles O'Mahony, 'Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122, 133-4.

⁵⁴ Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, (Report, 29 November 2016) 70. See also Australian Law Reform Commission ('ALRC'), *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, August 2014) 210; Mental Health Commission of NSW (n 27) 22; Gooding & O'Mahony (n 53) 128-9.

⁵⁵ Piers Gooding et al (n 52) 856.

⁵⁶ McCausland & Baldry (n 2) 298; Gooding & O'Mahony (n 53) 126-9.

⁵⁷ McCausland & Baldry (n 2) 299; McSherry et al (n 50) 23-24; Gooding & O'Mahony (n 53) 134-40; Arstein-Kerslake et al (n 45) 405-6, 409-18. See also ALRC (n 54) 196.

quality of supports and accommodations around them’ as opposed to their inherent decision-making.⁵⁸ This reinforces the requirement for access to justice under Article 13 of the CRPD.⁵⁹ QAI supports this interpretation and reiterates our previous recommendations for reforming the test for fitness so that a person’s decision-making ability and an assessment of support is emphasised.⁶⁰

To ensure the criminal justice system is compliant with the CRPD as interpreted by the UNCRPD, greater formal support options for accused persons with cognitive disability and flexibility of court procedures to ensure accessibility are necessary.⁶¹ QAI recommends statutory entitlement to support services like communication assistants who facilitate the provision of evidence at court, and support persons who provide emotional support and information about the legal process.⁶²

Therapeutic disability services

In QAI’s experience, a significant issue is the legislation itself. Intellectual impairment is grouped with mental health issues under the *Mental Health Act 2016* (Qld) and while there are separate forensic orders, much of the decision-making regarding support is made by a treating team including a psychiatrist and mental health professionals. Their wealth of knowledge, whilst considerable, does not necessarily extend to supporting a person with cognitive disability. It is astonishing that despite the delineation of forensic orders, once instituted there is such conflation of mental health and cognitive disability, especially given that treatment and/or support is so distinct.⁶³ This is exacerbated where a person with a cognitive disability, often due to their disability, suffers from mental health issues, since they are then placed solely under a Forensic Order (Mental Health).⁶⁴ Cognitive disabilities are permanent and cannot be ‘treated’ in the manner that mental health illnesses may be with pharmaceutical and clinical treatment.⁶⁵ Instead, specific processes and diversionary pathways are necessary for people with cognitive disability.⁶⁶ The following case study demonstrates this issue.

⁵⁸ Gooding & O’Mahony (n 53) 136. See also Queensland Law Society, *Queensland Handbook for Practitioners on Legal Capacity* (Handbook, 1 July 2014) <https://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity>; Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (Guidelines, 29 September 2020) <<https://www.publications.qld.gov.au/dataset/capacity-assessment-guidelines/resource/23e5bde1-40d7-4115-a15d-c15165422020>>.

⁵⁹ Arstein-Kerslake et al (n 45) 406.

⁶⁰ Queensland Advocacy Incorporated, *dis-Abled Justice: Reforms to justice for persons with disability in Queensland* (Queensland Advocacy Incorporated, 2015) 86; Law Council of Australia (n 4) 75.

⁶¹ As discussed in Piers Gooding, Anna Arstein-Kerslake and Bernadette McSherry, ‘Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings in Australia: Avoiding the Pitfalls of Unfitness to Stand Trial Laws’ (2017) 35(2) *Law in Context* 64, 71-2. See also Office of the Public Advocate, *Decision Time: Activating the rights of adults with cognitive disability* (Report, February 2021).

⁶² McSherry et al (n 50) 26-28.

⁶³ Baldry (n 1) 381.

⁶⁴ *Mental Health Act 2016* (Qld) s 134(3)(a)(ii).

⁶⁵ McCausland & Baldry (n 2) 294; Mental Health Commission of NSW (n 27) 6; Senate Community Affairs Reference Committee (n 54) 120; Baldry (n 1) 381.

⁶⁶ McCausland & Baldry (n 2) 294.

Case Study 3⁶⁷

Clients with cognitive disability have complex needs to be addressed by the FOD. This is usually done by including a condition requiring engagement with disability support services. However, the treating team remains responsible for the client. Three key issues are consequently often highlighted in our cases.

First, many clients reported communication issues between themselves, their treating team and disability support services, affecting the quality of treatment and care they receive and impacting their ability to comply with the FOD. For example, clients with intellectual impairments were directly contacted by support services instead of their preferred contacts who would be able to facilitate meaningful engagement with the client. This issue appears more prevalent in rural areas where fewer resources exist and services are stretched, meaning that communication breakdowns and associated problems are more frequent. Although these problems may be addressed later, decision-makers are unable to hold relevant parties accountable for failure to appropriately engage with clients and support their compliance with the FOD.

Second, despite the prominence of the treating team, disability support services provide most of the support. This includes supervision when in the community and working with the client to devise mitigatory techniques. For example, clients facing sexual offences worked closely with support workers to manage inappropriate sexual behaviour by limiting access to pornography, children and phone usage. Often decision-makers acknowledge that disability support achieves more than that which can be achieved under a FOD, thereby bringing into question why the treating team is necessary in the first place.

Third, decision-makers often uphold FODs on grounds of 'significant risk' posed to others despite expert reports stating that existing restrictions could be easily streamlined into voluntary support services that the client would readily engage with. Thus, there is a lack of active facilitation of transition out of the forensic system.

Better distinction between the two forensic orders is therefore necessary, and this can be achieved through specifically mandating disability support services for those placed under FOD rather than mental health services who likely cannot assist them. In conjunction with limiting terms, this would assist individuals to access the appropriate personnel who have the expertise to support them accordingly. Two further advantages arise from streamlined and sufficiently funded disability services through the forensic order framework: the underlying disability associated with the identified 'forensic risk' of individuals is recognised and rehabilitated, and such invaluable support could allow the individual where possible to move off the FOD.⁶⁸ Adequate therapeutic support services should also be available in the community to ensure this is possible.⁶⁹

The 2016 Senate Inquiry on the issue of Indefinite Detention detailed some of the recommendations highlighted in this submission, and many more. The Australian Government has not responded to this report.⁷⁰

⁶⁷ This case study is drawn from the experiences of various QAI clients to avoid identification of any specific individual.

⁶⁸ Mental Health Commission of NSW (n 27) 22; ALRC (n 54) 210.

⁶⁹ Mental Health Commission of NSW (n 27) 22; ALRC (n 54) 210; Senate Community Affairs Committee (n 54) 70.

⁷⁰ CRPD Working Group, *Disability Rights Now 2019: Australian Civil Society Shadow Report to the United Nations Committee on the Rights of Persons with Disabilities: UN CRPD Review 2019* (Report, July 2019) 26 <<https://dpoa.org.au/wp-content/uploads/2019/08/CRPD-Shadow-Report-2019-English-PDF.pdf>>.

QAI recommends the implementation of the recommendations from the 2016 Senate Inquiry as an urgent priority.

QAI also notes the importance of appropriate therapeutic habilitation and rehabilitation for people with disability within the mainstream criminal justice system and expresses concern about the sufficient deficits that presently exist in this regard. A paradigm shift from punitive to restorative justice is particularly critical for people with disability, to ensure that their capacity is supported during any period of incarceration and to increase the prospects that they will successfully reintegrate into society following discharge.

It is also noted that all people exiting the criminal justice system are vulnerable, and this is particularly so for people with disability. It has been documented that a person's socio-economic circumstances after release are more indicative of reoffending than the prison term itself.⁷¹ Additionally, the particular vulnerability in the first, critical six weeks from release has been noted, with an ex-prisoner's success in securing accommodation and supportive social relationships in the first six weeks after release substantively determinative of whether they reoffend.⁷² QAI notes the need for significant progress in this space, and further notes the potential created by the NDIS to provide targeted in reach to prisoners approaching discharge, to ensure that appropriate supports and services are in place at the appropriate time.

Conclusion

Legislative reform and robust police guidelines necessary to ensure access to justice and equal recognition before the law of people with cognitive disability. Further, greater support services and entitlements must be available throughout the criminal justice process to give effect to such provisions. We attach two further relevant reports by QAI to this submission;

- [Dis-Abled Justice: Reforms to Justice for Persons with Disability](#)
- [Dis-Abled Justice: Barriers to Justice for Persons with Disability](#)

QAI is grateful for the opportunity to contribute to this inquiry and is happy to provide further information or clarification upon request.

⁷¹ Allan, A & Dawson, D. *Trends and Issues in Crime and Criminal Justice*. (Australian Institute of Criminology, 2004).

⁷² Queensland Advocacy Incorporated, *dis-Abled Justice: Reforms to justice for persons with disability in Queensland* (Queensland Advocacy Incorporated, 2015).

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