



# Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

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*Systems and Legal Advocacy for vulnerable people with Disability*

Committee Secretary  
Legal Affairs and Community Safety Committee  
Parliament House  
George Street  
Brisbane Qld 4000

Dear Committee,

QAI appreciates the opportunity to contribute to the review of the Police Powers and Responsibilities and Other Legislation Amendment Bill.

Yours sincerely,

Michelle O'Flynn, Director

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

## About QAI

Queensland Advocacy Incorporated (QAI) is a not-for-profit, member-driven advocacy NGO for people with disability. Our mission is to promote, protect and defend through advocacy, the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland.

QAI's legal services provide advice and representation in guardianship, administration, mental health, forensic and discrimination matters. The Justice Support and NDIS Appeals programs provide support to people with disability in criminal matters and to appealing NDIS participants. Individual advocacy informs our systemic work towards law and policy changes at state and federal levels, and assists us to understand challenges, needs and concerns of people who are the focus of this submission.

QAI's constitution holds that everyone is unique and valuable and diversity strengthens community. People with disability compose the majority of our board and the lived experience of people with disability guides our work.

QAI is a disability advocacy group with special interest in people with disability in the criminal justice system. .

- a. QAI has published two editions of *Disabled Justice* (2007 & 2015) about people with disability in the Queensland criminal justice system.
- b. QAI was a special interest 'friend of the court' at the 2016-2017 Queensland Coronial Inquiry into the Inquest Into The Deaths Of Anthony William Young; Shaun Basil Kumeroa; Edward Wayne Logan; Laval Donovan Zimmer; And Troy Martin Foster
- c. QAI runs the Mental Health Legal Service and has specialist experience in mental health matters.
- d. QAI runs a Justice Support Program for people with disability in the criminal justice system.
- e. QAI has 30+ years' experience working with clients with mental illness and intellectual disability in relation to their interaction with social welfare agencies, health, police and the courts.
- f. QAI has experience assisting clients in relation to restrictive practices, guardianship and administration, involuntary treatment for mental illness and the criminal justice system and its links to community services.
- g. QAI has expertise in the application of the UN Convention on the Rights of Persons with Disabilities.
- h. QAI was a key participant in the Mental Health Commissioner's 'Strategic Conversations' between QPS and mental health agencies.

- i. QAI has engaged in systemic advocacy activities in law reform and policy development, including:
  - i. Forum to launch *dis-abled Justice: Reforms to justice for persons with disability in Queensland* (28.06.15)
  - ii. Forum (with Caxton Legal Centre): *Going home safe: Use of force in policing people with mental illness* (07.05.15)
  - iii. Submission on the Police Powers and Responsibilities and Other Legislation Amendment Bill 2011
  - iv. Submission on the Penalties and Sentences and Other Legislation Amendment Bill 2012
  - v. Submission on the Review of the *Disability Services Act 2006* (2014)
  - vi. Submissions on the Review of the *Mental Health Act 2000* (2011 – 2015) leading up to enactment of the *Mental Health Act 2016* and its subsequent implementation.

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**Recommendation: Re: the proposed amendment to s 442 *Police Powers and Responsibilities Act 2000* ('PPRA')**

**It is critical that the PPRA or the regulations state that police officers must at least inform the relevant person why they wish to carry out a search, ask for the person's cooperation in conducting the search, and conduct the least invasive search that is reasonably necessary in the circumstances.**

QAI's comments relate exclusively to:

Clause 30. Amendment of s 442 - after paragraph (cb), insert '(cc) is detained under section 50<sup>1</sup> in relation to a breach of the peace and is to be transported to a place by a police officer; or'

## **Introduction**

Community safety is one of the government's priorities,<sup>2</sup> but the safety of some members of the public is more important than others'. A disproportionate number of suspects have mental illness or cognitive disabilities. Government must prioritize their safety, too, but will not if parliament passes this provision. As suspects of crime, people with mental illness or cognitive disabilities are no less entitled to fundamental protections. They, too, are 'members of the community' and when detained in relation to a breach of the peace, still innocent of any offence.

## **Police Interaction with People with Disabilities**

Police officers encounter people with mental illnesses every day, whether they are perpetrators, victims, or witnesses of crime. A survey of Sydney police officers determined that police on average spend around ten percent of their time dealing with people who appear to be mentally

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<sup>1</sup> 50 Dealing with breach of the peace (1) This section applies if a police officer reasonably suspects— (a) a breach of the peace is happening or has happened; or (b) there is an imminent likelihood of a breach of the peace; or (c) there is a threatened breach of the peace. (2) It is lawful for a police officer to take the steps the police officer considers reasonably necessary to prevent the breach of the peace happening or continuing, or the conduct that is the breach of the peace again happening, even though the conduct prevented might otherwise be lawful. Examples for subsection (2)— 1 The police officer may detain a person until the need for the detention no longer exists. 2 A person who pushes in to the front of a queue may be directed to go to the end of the queue. 3 Property that may be used in or for breaching the peace may be seized to prevent the breach.

<sup>2</sup> Queensland, *Parliamentary Debates*, 12 June 2018, 1415 (MT Ryan, Minister for Police and Minister for Corrective Services).

ill.<sup>3</sup> People with cognitive or psycho-social disabilities are subject to excessive incarceration, prison overcrowding, strip-searching, solitary confinement [and] lack of alternatives to custodial sentences.

People with cognitive or psycho-social impairments disproportionately are represented in the criminal justice system as victims and witnesses of crime, and as suspects, defendants and offenders. More than the general population, they are likely to encounter police, and the statutory enhancement of police powers disproportionately affects them. Police focus on minor 'street' or public nuisance offences such as begging, trespass and failure to follow a police direction. Many offenders have mental illness, cognitive impairment, homelessness, unemployment and poverty in common. People with mental illness or cognitive impairment are more likely to live in private rentals and group homes, in boarding houses and hostels or on the street and to be caught up in petty criminality associated with poverty and drug addiction.

Police take an oath to keep the peace and the street is the focus of police activity. This focus places people with intellectual impairments who are more likely to live in public spaces at a disadvantage, and they are:<sup>4</sup>

- more likely to be arrested, detained and questioned for minor public order infringements
- disproportionately affected by police powers around public order behaviour
- more easily persuaded to confess, and
- more likely to misunderstand their rights, such as the right to silence.<sup>5</sup>

People with intellectual impairments tend to be clustered at the lower end of the socio-economic scale, are more likely to live in private rentals and group homes, in boarding houses and hostels or on the street and to be caught up in petty criminality associated with poverty and drug addiction. They are particularly susceptible to prosecution for public nuisance offences such as begging, trespass and failure to follow a police direction.

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

- In Queensland, the likelihood that police would charge persons with intellectual impairments with public space offences increased with the passage of the *Summary Offences Act 2005* (Qld), which also increased the range and scope of public nuisance offences. The typical consequence of a public nuisance offence is the imposition of a fine that may carry a default period of imprisonment.

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<sup>3</sup> Godfredson JW, Ogloff JP, Thomas SDM & Luebbers S. 2010. 'Police discretion and encounters with people experiencing mental illness'. *Criminal Justice and Behaviour* 37(12): 1392. Three-quarters of police participants reported that they had dealt with people in this category in the past month.

<sup>4</sup> See, for example, NSW Law Reform Commission. 1996. *Report 80: People with an Intellectual Disability and the Criminal Justice System*.

<sup>5</sup> A police officer must caution a suspect that they have a right to silence before questioning: *PPRA* s 431; *PPRR* Sch 9, 26(1). If the police officer suspects the relevant person does not understand the caution, the officer may ask the person to explain the meaning of the caution in their own words: *PPRR* Sch 9, 26(2).

- Persons with intellectual impairments are subject to a higher level of police surveillance and suspicion than others are. Members of the public are more likely to experience discomfort in the presence of people who they perceive as different or dangerous and they may seek police assistance in moving them on. Persons with disability are therefore particularly susceptible to being charged with public nuisance offences, whether or not there has been wrongdoing.
- Public space policing typically involves verbal directions to take certain action, such as to move on, or submit to a search. Persons with disability may find it difficult to comprehend directions, remember them or act in accordance with them, leading to an escalation in law enforcement interventions based on the mistaken belief that the person is wilfully disobeying a police instruction. For some people with cognitive impairment or mental illness, talking loudly or calling out is a communication tool and not necessarily intended to offend or annoy anyone. 'Resisting arrest' can simply be being loud or yelling out - something that a person with cognitive impairment or mental illness may do when apprehended by more than one officer.

## Police procedures

Many people with an intellectual disability experience serious breaches of their rights in this initial stage of contact with the criminal justice system. The problems associated with police interrogation of suspects who have an intellectual disability are considerable<sup>6</sup> and the courts have acknowledged this problem.<sup>7</sup>

Less widely acknowledged are the problems that occur before police conduct their interrogation. The Bill's Explanatory Notes' passively phrased "[b]reaches of the peace have the potential to

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<sup>6</sup> The problems referred to are numerous and people with an intellectual disability may be disadvantaged by several factors:

- they may be more prone to suggestibility, and thus leading questions by interviewing officers may be a distinct problem;
- many may be eager to please a person perceived to be an authority figure thus giving the answers he or she believes are the desired ones rather than the correct ones;
- people with an intellectual disability may be more likely to respond to questions in a manner they believe is expected of them;
- many may be prone to 'cued' or 'initiative behaviour';
- there may be poor understanding of questions asked, and the implications of the answers given;
- many people with intellectual disabilities try to hide their disability and may, for example, answer a question to which they do not know the answer, so as not to appear 'dumb or stupid'.

<sup>7</sup> *Tipler v The Queen* [2009] QDC 240.

result in a heated confrontation”<sup>8</sup> hides the uncomfortable truth that police often cause or escalate the heated confrontation, and for many reasons.

Police training focuses on closing down interaction as quickly as possible. Police focus is therefore on terminating the interaction by rendering the suspect harmless: often by using overwhelming force, rather than the more difficult but less violent option of de-escalation.

The Queensland Coroner’s investigation into five shooting deaths by Queensland police concluded when the Coroner made a number of recommendations in relation to the killings. Each of the deceased was mentally ill at the time police shot and killed them. The Coroner recommended that people with a lived experience of mental illness should assist to train police recruits.

### **Police Power to Search in Relation to Suspected Breaches of the Peace**

Granting police the power to search, and search again, members of the public when taking them into custody to prevent a breach of the peace is no less likely to *cause* a breach of the peace than it is to prevent one. The Bill’s Explanatory Notes<sup>9</sup> acknowledge that, “[b]reaches of the peace have the potential to result in a heated confrontation which may or may not lead to the commission of a violent offence”. When a police officer searches a detained person they may “calm the situation”, but pragmatically, they may inflame it, particularly when they carry out repeated searches.

To search a person without their consent is to violate their bodily integrity. A person’s clothes and the possessions carried in or on their person are an extension of their identity.

The @metoo movement has heightened public awareness of the significance of power dynamics in interpersonal relations. @Meetoo has highlighted the need to respect other people’s personal space; the importance of gaining consent, preferably express consent, before touching; and the sense of wrong and of violation that people experience when they have not given their consent to bodily intrusion, when their apparent consent is negated by the power imbalance.

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<sup>8</sup> <Queensland <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T781.pdf> > page 3.

<sup>9</sup> The bill’s explanatory notes state that: “Breaches of the peace have the potential to result in a heated confrontation which may or may not lead to the commission of a violent offence. Section 50 of the PPRa allows police to take reasonable steps to prevent a breach of the peace, including taking a person into custody for a reasonable amount of time. This intervention often calms a situation and is an alternative to arrest in many instances. However, police have no capacity to search a person who has been taken into custody to prevent a breach of the peace when they are required to be transported by police. This creates a potential risk if, while being transported from the scene of a breach of the peace, the person intends to self-harm or injure police with objects that were concealed on the person.”

The @metoo movement is relevant because all interpersonal interactions that involve touch also involve power, yet interaction between the police officer and the citizen/suspect is one of the few where one party can lawfully touch another without their consent. These dynamics apply not only to intimate relations. Often, they are sex or intimacy-related, but even when they are about intimacy, unsought touch is less about sex than it is about power.

When an armed, uniformed police officer demands of a suspect that they turn out their pockets, or remove their jacket, trousers, dress or shoes and submit to the officer's probing hands and fingers on their body, the officer's demand is backed by overwhelming legal, moral and physical authority. The law and the implied or sometimes express threat of assault, restraint or detention allows the police officer to breach social norms around mutual respect for personal boundaries.

Legal and physical authority stands behind the officer's breach of those norms, but conflict can heighten everyone's sensitivities. The detained person has little choice but to submit. They may not see a search as a reasonable precaution. The police officer has just detained them against their will.

They may take it personally. They may feel the breach as contempt for personal boundaries and personal disrespect. When a police officer places their hands in between a suspect's thighs or against her chest, they move beyond social expectations about personal space and transgress more potent gender boundaries.

Many people with disability have personal experiences in institutions of such violations, from inappropriate touching to rape, and may be hypersensitive to similar transgressions by authority figures.

## **A Human Right to Privacy**

Queensland does not yet have a charter of human rights and responsibilities. The Victorian Charter<sup>10</sup> establishes a right to privacy<sup>11</sup> that in the view of that state's police commissioner,<sup>12</sup> was *prima facie* incompatible with the provisions of the Victorian *Summary Offences and Control of Weapons Acts Amendment Bill*.

That bill provided powers for police to randomly search persons (including children) and vehicles in public places within designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon.

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<sup>10</sup> Charter of Human Rights and Responsibilities Act 2006

<sup>11</sup> Section 13.

<sup>12</sup> Hansard, 12 November 2009. Assembly Statement of Compatibility Control of Weapons and Firearms Acts (Search Powers) Bill p4024



There is nothing in this proposed amendment, in the current *Police Powers and Responsibilities Act 2000* (Qld) or in the relevant regulation,<sup>13</sup> that qualifies the search provision. Prior to conducting a more intrusive search in designated areas, Victorian police must form the view a person may be concealing a weapon. When conducting a pat-down or strip search in any circumstances, police are also required to:

- Preserve the person's dignity during a more intrusive search
- Inform the person if he or she is required to remove clothing during the search and, if so, why this is necessary,
- Ask the person to cooperate
- Conduct the search as quickly as possible and in a way that provides a reasonable privacy to the person
- Undertake the least invasive kind of search necessary in the circumstances
- As far as practicable be of the same sex as the person being searched.

## Conclusion

It is critical that section 442 or the regulations state that police officers must at least inform the person why they wish to carry out a search, ask for the person's cooperation in conducting the search, and conduct the least invasive search that is reasonably necessary in the circumstances. Allowing police to exercise their own judgement will sometimes get good results, but there will always be police who abuse a poorly qualified power of personal trespass.

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<sup>13</sup> Police Powers and Responsibilities Regulation 2012.