



# 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.

*Systems and Legal Advocacy for vulnerable people with Disability*

24 March 2017

Finance and Administration Committee

Queensland Parliament

Dear Committee

Thank you for accepting QAI's submission to the inquiry into State Penalties Enforcement Amendment Bill 2017

Yours sincerely,

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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

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## About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems, legal and individual advocacy organisation for people with disability. 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. QAI does this by engaging in systems advocacy work, through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives nationally and in this state. QAI also provides three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program. Our experiences in providing legal and advocacy services and support for individuals within these programs has provided us with a wealth of knowledge and understanding about the experiences, needs and concerns of individuals who are the focus of this inquiry.

## Key recommendations

**Recommendation 1:** Include an eligibility category for 'other special consideration' to ensure the Work Development Orders (WDO) scheme is accessible to as many disadvantaged people as possible.

**Recommendation 2:** Decisions to refuse or cancel a WDO on the basis of a change in the person's eligibility should be made in consultation with the sponsor and the participant.

**Recommendation 3:** Undertake further consultation with the community sector about the requirements to become a sponsor under the WDO scheme and the role of referral organizations.

**Recommendation 4:** Establish clear complaints processes and regular audits.

**Recommendation 5:** The WDO scheme should adopt a number of human rights based guiding principles.

- 5.1 A commitment purely to voluntary engagement and, where possible, to a non-judgemental and collaborative approach that focuses on compliance through engagement, mutual respect, non-monetary reward, and optimism.
- 5.2 Unpaid work should be negotiable and suited to the person's existing skills, inclinations and aspirations. Remuneration in the form of debt reduction must reflect the award for the work offered.
- 5.3 Medical treatment is subject to guidelines to ensure safety and therapeutic benefit.
- 5.4 Drug or alcohol treatment depends on willing participation. It should be neither forced nor involuntary, and conducted according to recovery principles. Programs must be secular.
- 5.5 Culturally appropriate programs should be extended to Aboriginals and Torres Strait Islanders, and to anyone who has strong cultural identity and who wants them, no matter their background or identification, including people of Cultural and Linguistically Diverse Backgrounds.
- 5.6 Fine reduction should depend on the nature of the activity. Unpaid work should attract a 'cut-out rate' that is equivalent to the going industry award for the work performed.
- 5.7 A medical or mental health treatment program, educational or life skills, financial or other counselling, and drug or alcohol and mentoring should each attract a cut-out rate that is *pro rata* equivalent of the average wage. Failure to complete should not attract any penalty, and at completion of any program participants should receive an additional reduction of their debt.
- 5.8 Decisions about eligibility, remuneration, duration and so on should be appealable.
- 5.9 If the person has a good work record under the WDO they immediately should be entitled to a reference or referee, and they should be able to refer to the experience without having to mention the circumstances in which they came by them, much as former prisoners and convicts, by law, may deny certain convictions once a rehabilitation period has expired.

## 1. Introduction

A disproportionate number of people with outstanding SPER debts have intellectual or psychiatric impairments, just as the broader criminal justice system is over-represented with victims, suspects, defendants, offenders, prisoners and repeat offenders who have intellectual impairments. People with intellectual disabilities, for example, are imprisoned at approximately *five times* the rate of the general population.<sup>1</sup> This overrepresentation is costly to people with disabilities and their families and costly to the public, which funds policing, judicial and corrective institutions.<sup>2</sup>

The circumstances in which people with disability become enmeshed in the criminal justice system are related to the devaluation of people where *impairments* become *disabilities* in a competitive society that values and rewards excellence and high achievement and often has no place for people at the other end of the spectrum. Educational institutions are typical, rewarding those who succeed, excluding and stigmatising those who do not.<sup>3</sup> Special education classes and special schools send a powerful message of exclusion and play a role in setting many people with intellectual or psychiatric impairments on a descending life path. Offending and the subsequent accrual of fine-related debt must be understood in that context.

A person may be both an offender *and* among the most vulnerable and disadvantaged groups in our society, yet the justice process tends to be systemically if not deliberately careless of

**Unemployment** for people with intellectual or psychological disabilities is high compared with other disability groups, regardless of severity, according to ABS data. Those with moderate or mild intellectual disability (20%) or psychological disability (18.9%) had higher unemployment rates than those with moderate or mild physical disability (8.8%) or the general population (5.5%). These figures reflect the unique barriers that people with intellectual or psychological disabilities face in accessing education and work.

**Source:** Australian Bureau of Statistics. *Australian Social Trends*. 4102.0; March Quarter 2012.

<sup>1</sup> Queensland Corrective Services conducted a general survey of Queensland prisoners in 2002 and determined that 10% of the prison population at that time had IQs indicative of intellectual disability (below IQ 70) and that a further 29 per cent of prisoners were in the borderline range (IQ 70-79) Queensland Corrective Services. 2002. *Intellectual Disability Survey 2002*. The significance of the over-representation illustrated by these figures is highlighted when we understand that people with intellectual disability make up only 2% of the general population.

<sup>2</sup> See C Mason. 2007. *Pathways for People with a Disability in the Criminal Justice System: Using a benefit cost analysis to reframe the approach to policies and programs*, for comparative costings of early human services intervention vs criminal justice intervention for people with intellectual disabilities in Queensland, particularly at 33: 'when taken over the whole life of the individual who requires an ongoing response, without human service interventions, responses will likely shift to criminal justice responses which are most costly in client, social and resource allocation terms'.

<sup>3</sup> How many school mottos, for example, purport to value students for themselves, as opposed to extolling excellence, achievement, knowledge etc.?

the criminogenic<sup>4</sup> factors that lead to the imprisonment of people with intellectual impairments at more than five times the rate of the general population.<sup>5</sup>

Criminogenic factors that lead to offending include the totality of the person's life circumstances from birth, and particularly the person's living arrangements and other personal circumstances at the time of the offence. For example, people with intellectual impairment are at risk of offending because many lack adequate support to live in the community.<sup>6</sup>

Homeless people with impairments are more vulnerable than other homeless and unemployed populations; often 'invisible' to government services that rely on people to actively approach them;<sup>7</sup> have health needs that are often greater yet inadequately met;<sup>8</sup> and are more at risk for criminal victimisation than the general population.<sup>9</sup>

International<sup>10</sup> and Australian research<sup>11</sup> confirms that offenders with intellectual and psychiatric impairments have a history of childhood neglect or abuse, experienced significant poverty and may come from an indigenous minority, often have limited social and communication skills, may experience behavioural and/or psychiatric conditions and are often unemployed.

Unemployment and underemployment, particularly the long-term or lifelong unemployment endured by many people with disabilities drastically impacts on their solvency and on the likelihood that they will commit misdemeanours of necessity, as it does on their ability to pay outstanding SPER amounts. The accrual of fines and infringements becomes part of a cycle where people incur penalties at times of crisis or as a result of chronic disadvantage. As people cannot pay, they are driven further into debt and greater involvement with the criminal justice system through the sanctions and enforcement costs that follow.

Many people with intellectual disability and other intellectual impairments offend because they do not have the life experience or support they need to know that a particular act is a crime or infringement, or because they commit crimes or infringements linked to their life circumstances such as poverty, homelessness and use of public space.

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<sup>4</sup> Criminogenic means causing or likely to cause criminal behaviour.

<sup>5</sup> People with intellectual disability make up approximately 2% of the population.

<sup>6</sup> National Research Council. 2001. *Crime victims with developmental disabilities: report of a workshop*. Washington DC: National Academy Press.

<sup>7</sup> M O'Connor & A Coleman. 1995. "'Particularly Vulnerable': Homeless Young People with an Intellectual Disability' *Interaction* 9(1): 8-14.

<sup>8</sup> K Van Dooren, R Ware, K Brooker & N Lennox. 2012. *Out of sight, out of mind: People with intellectual disability in public health research*. 2012 IASSID World Congress, Halifax, Nova Scotia, 749.

<sup>9</sup> T Nettlebeck & C Wilson. 2002. 'Personal vulnerability to victimization of people with mental retardation' *Trauma, Violence and Abuse* 3(4): 289-306.

<sup>10</sup> William Glaser & Kristen Deane. 1999. 'Normalization in an Abnormal World: A Study of Prisoners with an Intellectual Disability' *International Journal of Offender Therapy and Comparative Criminology*. 43(3): 338.

<sup>11</sup> See, for example, S Hayes. 2005. *Prison Services and offenders with intellectual disability – the current state of knowledge and future directions*. 4th International Conference on the Care and Treatment of Offenders with a Learning Disability, 2005 April 6-8, University of Central Lancashire, Preston, UK.

Many disadvantaged people accrue significant unpaid fines for public space, public order and public transport offences. Indigenous people, people who are homeless or poor, or have intellectual impairment or a mental illness are more likely than other members of the population to occupy public space. They are more visible to police, more vulnerable to surveillance, and thus more likely to be charged with public nuisance type offences.<sup>12</sup>

Yet the courts do not formally identify that a person has an intellectual impairment or other form of disability. The Duty Lawyer might appreciate that a person has an intellectual disability, or they may not. In any case, duty lawyers are constrained by operational limits. The magistrate will try to do his or her own assessment of a person's capacity but, as one Magistrate observed to us, they generally do so with no special training or expertise. It is an *ad hoc*, non-clinical assessment based on a single conversation at each appearance in court.

Magistrates may ask questions about the person's living arrangements, financial support and how he or she manages his or her life. The magistrate may recognise intellectual disability or other impairment based on a person's responses and demeanour, but no determined screening exists. Magistrates have the option to adjourn a matter for reassessment in two or three weeks' time if the duty lawyer (who can also only make a lay assessment) has identified signs of intellectual disability or other impairment. Some magistrates, however, will proceed even when the duty lawyer declines to take instructions because the person is not able to meet the requisite capacity standard.<sup>13</sup>

The most common response to public nuisance-type offences, such as drunkenness, begging, offensive language and offensive behaviour, is a fine.<sup>14</sup> 80 per cent of all finalisations in which a person was found guilty in the Magistrates' Court in Queensland resulted in a monetary order.<sup>15</sup>

The factors that lead to homelessness and increased vulnerability are the same factors that impact a person's capacity to pay a fine and impedes their ability to deal with SPER and navigate the enforcement process, and while the fine enforcement systems in place throughout Australia may appear to treat people equally, these systems already have a disproportionate impact on people with disabilities, particularly people with intellectual impairments who are more likely to have low incomes or be unemployed, have poor literacy and numeracy skills and higher levels of mobility. Cognitive impairment leads to difficulties engaging with fine-collection authorities and a greater likelihood of loss of licence and imprisonment resulting from non-payment of the fine and levy reducing money available to pay for other needs.

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<sup>12</sup> Tamara Walsh, 2006. 'Won't Pay or Can't Pay? Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland', *Current Issues in Criminal Justice* 17, p 220.

<sup>13</sup> The requisite standard is that set out by the court in *R v Presser* [1958] VR 45.

<sup>14</sup> Walsh *ibid.* p 221.

<sup>15</sup> Australian Bureau of Statistics, 2012:table 3.11)

There is a 'chicken-and-egg' aspect to SPER enforcement: people offend and accrue SPER debt because they're skint from paying SPER debt. SPER debt puts added pressure on budgets and engenders expense-avoidance offending. When faced with a choice between making a contributory payment to a SPER debt and paying for incidental necessities that many of us take for granted, some will choose the incidental necessity.

Many people who accrue SPER debts are on low incomes and can scarcely afford expenses beyond basic necessities, which are in turn a motivating factor in minor or regulatory offences like shop stealing or fare evasion. Fare evasion, for example, is a risk that some are willing to take because the alternative is not to travel at all. Brisbane City Council is one of the few in Australia that does not offer discounted fares to people on Newstart Allowance.

The current fines enforcement and collection system in Queensland leads the world in its consolidation and case management of debts but it does not yet appropriately recognise or respond to vulnerability and marginalisation. As it stands, the system generates, reinforces and exacerbates disadvantage by failing to provide accessible and non-financial options to address unpaid fines, and significant resources are spent by government to enforce fines that may not be recovered in a reasonable time.

We therefore welcome many of the changes proposed. Money spent on programs aimed at reducing homelessness and poverty and on providing support to people with disabilities is much more likely to reduce infringements, minor and public space offences and crime (and the accrual of SPER debts) and make communities safer than money spent on police, courts, prisons and mechanisms for pursuing fine payment.



## 2. Specific Commentary

Work Development Orders provisioned by this amending act cover a range of activities, therapeutic relationships and approaches.<sup>16</sup> They are available to people in an assortment of 'minority' categories<sup>17</sup> that in our view should not be exhaustive. The amending act should include an eligibility category for 'other special consideration' to ensure the WDO scheme is accessible to as many disadvantaged people as possible.

In our view, WDO schemes can benefit people with disabilities who engage with them. No one in this debate, however, and particularly members of the Committee, should lose sight of the fact that WDOs primarily are mechanisms to expunge bad debts. The chief side-benefit for debtors is that these amendments provide them with alternatives to crippling cash payments, mounting liabilities or jail.

At best, WDO programs can offer useful experiences, life skills, treatment or rehabilitation. At worst they can be punitive, humiliating and demeaning. A badly run program can undermine participants' self-confidence, reinforce their sense of subordination, vulnerability and dependence and encourage engagement only in bad faith.

In formulating a WDO program, it is tempting for the state and administering organisations to take the view that WDOs are a *de facto* form of punishment. Debtors will be alert to and will sniff out such hypocrisy and they will treat WDOs as something to be endured, evaded or in other ways circumvented, with negligible or even detrimental therapeutic or rehabilitative consequences.

To counteract these tendencies the legislation should adopt a number of guiding principles, foremost of which ought to be a commitment purely to voluntary engagement and, where

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<sup>16</sup>

- unpaid work
- medical or mental health treatment
- educational, vocational or life skills course
- financial or other counselling
- drug or alcohol treatment
- mentoring program (if <25 yrs)
- culturally appropriate program (if ATSI + remote).

<sup>17</sup>

- financial hardship
- mental illness
- cognitive or intellectual disability
- homelessness
- substance use disorder
- domestic and family violence.

possible, to a non-judgemental and collaborative approach that focuses on compliance through engagement, mutual respect, non-monetary reward, and optimism .

## **2.1 Unpaid work**

The nature of the work should be negotiable, and suited to the person's existing skills, inclinations and future aspirations. Remuneration in the form of debt reduction must reflect the relevant award rate for the kind of work offered.

## **2.2 Medical treatment.**

This must be subject to strict guidelines to ensure participants' safety and therapeutic benefit.

## **2.3 Drug or alcohol treatment.**

The long-term success of drug or alcohol treatment critically depends on willing participation. It should never be forced or involuntary. It should be conducted according to recovery principles. Programs must be secular and non-theist, and therefore no religious institution should be involved as a provider.

## **2.4 Aboriginal and Torres Strait Islanders**

Culturally appropriate programs should be extended to include all ATSI Queenslanders, and all people who want them, no matter their background or identification.

## **2.5 Debt Reduction**

Reduction of fines should depend on the nature of the activity. Unpaid work should attract a 'cut-out rate' that is equivalent to the going industry award for the work performed.

A medical or mental health treatment program, educational or life skills, financial or other counselling, and drug or alcohol and mentoring should each attract a cut-out rate that is a *pro rata* equivalent of the average wage. Failure to complete a program should not attract any penalty, and at completion of any program participants should receive an additional reduction of their debt.

## **2.6 Appeals**

Decisions about eligibility, remuneration, duration and so on should be appealable.

## 2.7 Rehabilitative Benefit

WDO experiences may be in some cases the only workplace experience that some of the participants have ever had. Just as many people with disability successfully use evidence of volunteer work experience to support future job applications, so too should WDO experiences be available to be used on their CV.

It is vital, then, that no notification should be included as to the WDO that would identify the person or cause discrimination in their pursuit of employment. If the person has a good work record under the WDO they should be entitled to a reference or referee, and they should be able to refer to the experience without having to mention the circumstances in which they came by them, much as former prisoners and convicts, by law,<sup>18</sup> may deny certain convictions once a rehabilitation period has expired.

## 3. Miscellaneous

In addition to supporting the intent of Clause 28 that allows the sending of enforcement orders by electronic communication, we suggest that - if not already so - SPER uses text messages, with the offender's consent, to inform them of imminent further action, or, within reasonable limits, remind them of their obligations, and that these messages should be addressed personally. We refer you to the Victorian Sentencing Advisory Council Report that refers to two trials of text messaging. They demonstrate that personalised messages were instrumental to increasing payment rates, and that people were more likely not only to make a payment on their overdue fine if they received a text message containing their name, but that the average value of fine repayments went up by over 30%.<sup>19</sup>

## 4. Conclusion

Statistics from New South Wales' State Debt Recovery Office have indicated that 82.5% of WDO clients have not received another fine or penalty since having WDO approved.<sup>20</sup> The NSW scheme has provided clients with an incentive to work and build employment opportunities. A similar scheme here in Queensland can be an important trigger for change in people's lives, and can reduce bad debts in the fine enforcement system.

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<sup>18</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)* section 8.

<sup>19</sup> Sentencing Advisory Council Victoria. 2014. *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report*. Melbourne.

<sup>20</sup> *A fairer fine system for disadvantaged people: An evaluation of the time to pay, cautions, internal review and the work and development order scheme*. May 2011. Available online at [http://www.lpcld.lawlink.nsw.gov.au/agdbasev7wr/lpcld/documents/pdf/a\\_fairer\\_fine\\_system.pdf](http://www.lpcld.lawlink.nsw.gov.au/agdbasev7wr/lpcld/documents/pdf/a_fairer_fine_system.pdf). Quotation taken from Appendix B, page iii.

The WDO scheme has the potential to engage clients in appropriate treatment or activities that they may not otherwise have engaged in, including in particular mental health, drug and alcohol treatment, but the program should be conducted according to established human rights principles.

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