



# 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*

## The Justice Project

28 September 2017

Law Council of Australia

**Ph:** (07) 3844 4200 or 1300 130 582 **Fax:** (07) 3844 4220 **Email:** [qai@qai.org.au](mailto:qai@qai.org.au) **Website:** [www.qai.org.au](http://www.qai.org.au)

2nd Floor, South Central, 43 Peel Street, STH BRISBANE QLD 4101

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

## Executive summary

QAI congratulates the Law Council of Australia for developing a very comprehensive and thorough Consultation Paper focusing on people with disability.

QAI endorses the paper in its entirety. The following summary highlights issues discussed in the paper which we consider particularly critical to address:

- Australian laws, policies and practices should embrace a supported decision-making approach.
- The starting point must be the presumption of capacity, with capacity recognised as an absolute, inviolable right.
- People with disability are highly vulnerable, with many experiencing multiple disadvantage
- People with disability face systemic and structural barriers to accessing justice and the justice system does not adequately accommodate the varying needs and capabilities of people with disability.
- Commonwealth and state governments should increase funding for specialist community legal centres and Legal Aid lawyers with expertise in disability, in order to enable people with disability to have affordable access to legal representation, irrespective of the complexity of their matter.
- Formal non-legal advocacy is complementary to legal advocacy to build capacity and to negotiate improved outcomes for vulnerable people with disability, particularly when legal negotiations are not desirable or appropriate. Funding for non-legal disability advocacy must be increased and made available in more locations.
- People with disability can face unnecessary, protracted and even indefinite imprisonment as a consequence of the inadequate laws governing unfitness to stand trial, a lack of suitable alternative accommodation, limited community support services, perceived or actual difficulty in understanding bail or parole conditions and lack of availability of diversionary programs.
- Detention of people with disability can exacerbate social exclusion, mental health conditions and general ill-health. It can also erode their legal capacity.
- An inability to access justice can compound disadvantage and social isolation for people with disability, increase vulnerability to additional legal problems and increase the risk of problem escalation.
- People with disability need appropriate, accessible, targeted, timely and joined-up services, to meet their complex, interconnected legal and non-legal needs; and adequate therapeutic and rehabilitative programs to help people to maintain and develop their capacity and to successfully reintegrate into the community following a period of incarceration.

We also make some suggestions for additional matters for consideration, including:

- The use of Restrictive Practices on children in psychiatric facilities and educational institutions, as an urgent priority.
- Development of a disability responsive National Preventative Mechanism that is well-resourced, proactive and appropriately staffed (including with people with disability and their advocates) to implement the Optional Protocol to the Convention Against Torture in Australia.
- Ensuring that the staffing of relevant bodies within the criminal justice system equips them to properly understand and respond to the needs of people with disability, by employing people with disability and experienced disability advocates.
- Implementing the Convention on the Rights of Persons with Disabilities (CRPD) fully into Australian law and making consequential amendments to existing legislation, including guardianship legislation, to ensure it is consistent, including by implementing a supported decision-making approach.
- Introducing Human Rights acts in all remaining states and territories and at a federal level.
- Amending the National Human Rights Action Plan and National Disability Strategy to mandate an intergovernmental process to implement State and Territory parliamentary scrutiny, strengthening the links between Commonwealth human rights commitments and State and Territory action.
- Establishing a cluster of 'problem solving' courts like the Special Circumstances Court trialled in Queensland.
- Introducing Indigenous Sentencing Lists in every jurisdiction.

## About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service, the Justice Support Program and the NDIS Appeals Support Program. Our expertise in providing legal and advocacy services and support for individuals within these programs, particularly through our Human Rights Legal Service and our systemic advocacy around issues of guardianship and administration, has provided us with a wealth of knowledge and understanding about relevant issues in this area.

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

## What do we know generally about this group?

QAI supports the approach taken by the Law Council of Australia (Law Council) to adopt an encompassing definition of disability, drawing on the social model of disability as articulated in the Convention on the Rights of Persons with Disabilities (CPRD) and recognising the often fluctuating nature of disability.

QAI supports the findings of the Law Council that:

- the proportion of the population living with disability or a mental health condition is significant;
- people with disability can be highly vulnerable to legal problems;
- people with disability often face multiple barriers to equal access to justice; and
- disability can increase vulnerability to multiple forms of disadvantage, including homelessness or inadequate housing, low levels of education, unemployment, crime and socio-economic disadvantage.

These findings are well supported by evidence.

QAI also supports the findings of the Law Council that people with disability have legal capacity unless found otherwise and that if a person does not have legal capacity they may have a reduced personal capacity to access, understand and act on legal advice.

QAI has published, with Allens Linklaters, the *Queensland Handbook for Practitioners on Legal Capacity*.<sup>1</sup> This handbook emphasises that:

1. capacity is time-specific;
2. capacity is domain-specific;
3. capacity is decision-specific; and
4. capacity can be increased with appropriate support.

With respect to this fourth limb, we are pleased to see the Law Council referencing the findings by the Committee on the Rights of Persons with Disabilities (the Committee) on the need to shift the focus from substituted decision-making to supported decision-making, and noting that this paradigm shift is supported by the human rights-based model of disability. We also support the explicit call to acknowledge the Committee's view of legal capacity as an absolute, inviolable right that must be upheld on an equal basis for people with disability.

We emphasise that careful attention must be given to increasing understanding of, and facilitating, the provision of support that is appropriate in the circumstances and responds to the unique needs of each person with disability, to build and maintain their legal capacity.

QAI submits that guardianship, administration and mental health legislation must do more to recognise a person's right to exercise their capacity. Courts and administrative tribunals must proceed on the presumption that, with support, all persons are capable of determining their own best interests.

QAI supports implementation of the National Decision Making Principles and accompanying recommendations of the Australian Law Reform Commission in *Equality, Capacity and Disability in Commonwealth Laws*. Consistent with this, reform of commonwealth, state and territory laws and legal frameworks concerning decision-making by persons who may require support in making decisions should be guided by the National Decision-Making Principles and Guidelines. A way to build capacity for decision making for people without informal supporters (and to avoid unnecessary guardianship applications) is the establishment of a well-funded and local network of citizen advocacy supports which is built on the formally coordinated and trained pool of volunteer citizen advocates who form long-standing relationships with vulnerable people who often have no-one else in their lives.

With respect to the discussion about definitional issues around mental health/mental illness/psycho-social disability, we note two issues of significance that should be addressed:

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<sup>1</sup> This resource is freely available, including through our website ([www.qai.org.au](http://www.qai.org.au)) and through the Queensland Law Society website ([www.qls.com.au](http://www.qls.com.au)).

1. *Psycho-social disability and the NDIS*: the initial exclusion of mental illness ('psycho-social disability') from the original design of the National Disability Insurance Scheme (NDIS), and later (hasty) inclusion of psycho-social disability has resulted in an attempt to fit psycho-social disability into a framework that was not designed with it in mind. This has meant that many of the features and criteria of the NDIS do not sufficiently cater to the needs of people with mental illness, despite purporting to;
2. *Conflation of intellectual/cognitive disability and mental illness*: the conflation of mental illness with intellectual and cognitive disabilities afflicts many areas, and results in, for example, people with an intellectual/cognitive impairment with forensic issues *and no co-existing mental illness* being accommodated in Authorised Mental Health Services for 'treatment' (despite not having a treatable condition).

### What are the key legal needs of people with disability?

QAI supports the findings of the Law Council that:

- people with disability are likely to have high levels of legal need;
- people with disability are vulnerable to a broad range of legal problems, including consumer, crime, housing, government, discrimination, personal injury, family, and care and protection;
- people with disability have high levels of interaction with the criminal justice system – as victims, witnesses, defendants and offenders; and
- there is a strong correlation between disability and vulnerability to legal problems, with vulnerability heightening in correlation with the severity of the disability.

First hand accounts of the experience of prison can give a unique perspective into the vulnerabilities that can contribute to offending behaviour, and to the experience of incarceration. Piper Kerman, in her account *Orange is the New Black – My Time in a Women's Prison*, provides the following insights:

*Prison is quite literally a ghetto in the most classic sense of the world, a place where the US government now puts not only the dangerous but also the inconvenient – people who are mentally ill, people who are addicts, people who are poor and uneducated and unskilled. Meanwhile the ghetto on the outside world is a prison as well, and a much more difficult one to escape from than this correctional compound. In fact there is basically a revolving door between our urban and rural ghettos and the formal ghetto of our prison system.*

...

*I saw on the callout that I was scheduled to spend my afternoon in a mandatory prerelease class on housing and my blood pressure started to rise. All federal prisoners are required to go through a series of prerelease classes before they reenter society. This made perfect sense. Many of the women in Danbury had been cloistered away in prison for years and despite the harshness of being institutionalized, it was also infantilizing. The idea that they were going to hit the ground running and be able to cope with the day-to-day requirements of life 'on the outs' was ridiculous.*

...

*Housing, employment, health, family – these are the factors that determine whether a person returning home from prison will succeed or fail as a law-abiding citizen. The*

*guy who was leading this session from CMS – he was a nice enough guy. And he talked about what he knew – which was insulation and aluminium siding and the best kind of roof to put on your house.... [another inmate asked] “Mr Green, that’s cool and all, but I need to find an apartment to rent Can you talk about that?”*

...

*I was only one of the more than 700,000 people who return home from American prisons and jails every year but I was hyperconscious of my opportunities ‘on the outs’ in stark contrast to most of those other men and women, I had a safe and stable place to live, a network of family and friends with many resources to help me come home and a precious job with health insurance. I thought often of the plans other women from Danbury had been making: homeless shelters, family court, uncertain prospects for work. I had watched hundreds of women leave prison with optimism and a resolve to change their lives going forward, and I knew that most of them would have to find a way to make those changes with very little help.*

...

*Lack of empathy lies at the heart of every crime – certainly my own – yet empathy is the key to brining a former prisoner back into the fold of society. What happens in our prisons is completely within the community’s control. The public expects sentences to be punitive but also rehabilitative; however, what we expect and what we get from prisons are very different things. The lesson that our prison system teaches its residents is how to survive as a prisoner, not as a citizen – not a very constructive body of knowledge for us or the communities to which we return.*

...

*Most of the women I know from prison have lived lives that were missing opportunities many of us take for granted... we have built revolving doors between our poorest communities and correctional facilities and created perverse financial incentives to keep those prisons full, while the public institutions that actually prevent crime and strengthen communities – schools, hospitals, libraries, museums, community centres – go without.*

While this is but one perspective, Kerman’s insights into linked ghettos and the value of skilled and relevant education to equip former inmates to re-enter society are significant.

We also support the Law Council’s recognition that many of the international human rights standards set out in UN treaties and conventions, including the CRPD, have not been fully incorporated into domestic law, such that people with disability who experience human rights violations can lack a legal remedy and remain highly vulnerable in the legal system.

#### **How do people with disability respond to their legal problems?**

QAI agrees with the Law Council that many people with disability do not recognise their legal problem(s) as being of a legal nature and thus refrain from taking action to resolve their legal problem on this basis. However, we also note (as is implicit in other findings of the Law Council’s paper) that there are many other reasons why people with disability may be more reticent, or less able, than people without disability to seek a resolution for their legal problems, including:

- difficulties with communication;
- lack of appropriate information and support, including – importantly – from skilled, independent advocates;

- experiencing a history of treatment that normalises the present legal problem (ie a history of institutionalisation and abuse can result in a person not recognising abuse for what it is);
- fears of interaction with the justice system, often based on past experiences;
- having their initial complaints not progressed, or disregarded (people with disability can often face significant barriers to being recognised as a credible witness).

### What are the barriers constraining people with disability from accessing justice?

QAI supports the findings of the Law Council that people with disability face systemic and structural barriers to accessing justice and that, as a whole, the justice system does not adequately accommodate the varying needs and capabilities of people with disability.

We agree that these barriers include:

- physical inaccessibility;
- lack of support (including support to communicate, allowing appropriate time to process and respond to information), adjustments and aids;
- lack of legal information and advice in accessible formats; and
- negative attitudes of people with disability which can be held by those working in the justice system.

Further, we agree that specific barriers for people with intellectual or cognitive disability to accessing justice include negative assumptions and stereotypes about the reliability of their evidence and their ability to participate in police interviews and court proceedings.

QAI agrees that the lack of people with disability within the legal and judicial profession contributes to a lack of understanding of disability experiences and we propose that increasing the proportion of people with disability employed within the legal and justice systems would be a step towards dismantling this barrier.

We agree that many community legal centres (CLCs) are not sufficiently disability-aware but emphasise that this is not due to the fault of individual CLCs, but rather points to the larger issue facing all CLCs of inadequate funding and resourcing to develop appropriate resources and engage and train sufficient staff. While QAI is a specialist legal centre funded to advocate for the most vulnerable people with disability and mental illness in Queensland, funding constraints mean that we often lack capacity to meet the demand for our services. Further to this, it is not appropriate for QAI to deliver all legal services to people with disability who need legal representation. People with disability should have choices about who represents their legal need and no one organisation can hold expert knowledge about all legal issues confronting vulnerable people with disabilities.

We propose that Commonwealth and state governments should increase funding for specialist community legal centres and Legal Aid lawyers with expertise in disability, in order to enable people with disability to have affordable access to legal representation, irrespective of the complexity of their matter. Adequate funding should also be provided to enable people with disability, their families and carers to have access to specialist advocacy services so that they can more easily negotiate justice systems, services and community where discrimination and unfair treatment occurs.

We note that additional barriers of significance include:

- Negative attitudes held by people outside the justice system, which can adversely impact on people with disability;
- Discriminatory treatment of people with disability from birth, particularly in the educational system, which can significantly limit their life options and can ultimately result in financially-linked issues including inadequate healthcare, lack of appropriate housing or employment opportunities, homelessness;
- Differential treatment and disempowerment, including by people and organisations in protective roles (such as service providers). This can normalise inappropriate treatment of people with disability and can subject people with disability to violence, abuse and neglect, including domestic violence;
- Lack of appropriate support, including freely available, independent, appropriate and quality advocacy.

### What are the legal capabilities of individual people with disabilities?

QAI supports the findings of the Law Council that:

- People with disability are a diverse group with varying levels of legal knowledge and personal capabilities to resolve legal problems;
- An individual's legal capacity is affected by a wide range of personal characteristics or competencies, including legal knowledge, skills, psychological readiness, socio-economic status, employment status and educational attainment, as well as systemic and structural barriers.

We note that an adult's capacity to make decisions can vary depending on the type and complexity of the decision and the availability of support. As discussed above, the Capacity Handbook emphasises that:

1. capacity is time-specific;
2. capacity is domain-specific;
3. capacity is decision-specific; and
4. capacity can be increased with appropriate support.

Again, we emphasise the importance of this fourth limb – appropriate support, chosen by the person, is critical to capacity. Access to appropriate support, particularly advocacy support available from a robust, independent advocacy sector, is a vital access to justice issue that is being challenged in the present climate, where diminishing funding is reducing the already limited independent advocacy services available.

We agree that a distinction should appropriately be made between legal capability and legal capacity. Education is vital to the development of legal capability, yet many people with disability are significantly disempowered by the failure of the educational system to offer a properly inclusive education. As the Law Council notes, an important factor is also the lack of legal information in accessible formats. QAI emphasises that in considering the accessibility needs of people with disability, it is important to consider not only the accessibility needs of people with physical disabilities (such as vision impairments) but also intellectual disabilities. We take the view that all important information, including legal information, should be developed in easy English resources and, where necessary, appropriate support to explain information (for people with no literacy).

To this end, QAI has recently published a Handbook: *About the police, the court and lawyers: What to do and what not to do*. This resource was developed by our Justice Support Program and is intended to inform and guide a person with intellectual disability **and** his/her support network through the criminal justice process in Queensland, from the point of first contact with police to the first day at court. It provides basic information in an accessible form (cartoon illustrations are used to tell the story, accompanied by simple text). In developing this resource, it is our hope that it will be read to every person with intellectual impairment in Queensland – not because we anticipate that they will all need to know it, but just in case they and their support network do.

We submit that other, complementary resources should be developed.

### **Are there critical gaps in services which are necessary to deliver access to justice to people with disabilities?**

QAI supports the findings of the Law Council that gaps in services necessary to deliver access to justice to people with disability include:

- lack of free legal assistance for those facing proceedings in guardianship, administration and mental health jurisdictions;
- lack of court support services; and
- unavailability of appropriate accommodation for people found unfit to stand trial due to mental impairment.

QAI stresses the importance of a holistic approach to addressing the needs of people with disability.

QAI's Justice Support Program is an individual non-legal advocacy service designed to respond to the needs of people with disability and mental illness who have come into contact with the criminal justice system. The Program marshals legal and community services to support people, help them to remain in the community and prevent any further entrenchment into the criminal justice system. More specifically, assistance includes helping people to obtain legal advice or representation, trying to resolve issues they are facing; advocating with service systems to acquire appropriate and responsive supports (including housing, personal assistance and counselling) and helping people to comply with court orders by attending appropriate appointments, etc. This Program has been highly successful - in the past seven years, only four clients of the Program have reoffended.

QAI recommends further programs of this nature, which take a holistic approach to addressing the many and varied problems that people with disability and mental illness can face.

We also agree that CLCs can face difficulties targeting clients most in need. This can be for a variety of reasons, including funding and resourcing limitations which significantly restricts the capacity of CLCs to engage in advertising and in educational and awareness raising work. It can also be because the nature of some clients' disability means that they have difficulty accessing appropriate information.

QAI has found that engaging with relevant tribunals and building relationships with stakeholders – including mental health services, statutory bodies, health professionals, support services, other advocacy organisations, Legal Aid Queensland – has been an important way to help to ensure vulnerable clients are referred to us.

We agree that appropriate and skilled legal representation is critical in helping vulnerable people, including people with disability, access justice. We agree that limited availability of affordable legal services combined with personal barriers (such as poor communication skills or a perceived lack of merit) make it difficult for many people with disability to find legal representation and results in self-representation. In our opinion this is highly unsatisfactory and a significant barrier to justice. We recommend a reconsideration of the criteria determining a person's eligibility to government supported representation according to their vulnerability and their prospect of being subject to custodial orders. We consider it appropriate for the government to increase the provision of government-funded representation for persons with intellectual impairments who face the prospect of custodial orders or use of Restrictive Practices. Legal representation should be offered for any imposed order (including the appointment of the Public Trustee) but orders such as Restrictive Practices and Forensic Orders should activate automatic referrals for representation.

QAI also supports the findings of the Law Council with respect to the difficulties faced by victims with disability, for reasons that can include lack of appropriate support, issues with credibility, feelings of shame and embarrassment, fear of retribution, lack of awareness of legal rights and a history of abuse and rights violations that normalises inappropriate and unlawful treatment.

#### **Are there laws, policies and practices which exacerbate access to justice barriers for people with disabilities?**

The Law Council has noted that implementation of the National Disability Insurance Scheme (NDIS) has increased demand for legal assistance services but there has been a failure to account for this additional legal need and allocate funding accordingly. We note that while the government has allocated CAPS funding for NDIS Appeals, funding has not been allocated for non-legal, non-NDIS advocacy or any advocacy to assist people to apply to the NDIS.

The Law Council also recognises that recent changes to social security policies, including the shift from the Disability Support Pension (DSP) to Newstart, and Centrelink's new online compliance intervention system for raising and recovering debts has created additional legal need for people with disability and added complexity for those needing to navigate the social security system. QAI supports this finding. We have made separate submissions on both of these issues, and our recommendations have included the following points that are of present relevance:

#### **Shift from the Disability Support Pension to Newstart:**

QAI has made separate submissions to inquiries (including the welfare reform inquiry and the inquiry into the establishment of the NDIS Special Savings Fund Account, expressing our concern about that the proposal to demarcate between people with temporary and permanent disability and to allocate payments for people with disability who have current or future capacity to work through the tiered working age payment to better reflect different work capacities, reserving Disability Support Pension only for people with a permanent impairment and no capacity to work. There are two primary reasons for our concern.

- A binary, absolute classification into temporary or permanent disablement fails to appreciate the complexities and fluctuations associated with many types of disability. QAI considers that a black-and-white classification system such as this will potentially limit the

labour market potential of, or create undue pressure on, many people with disability.

- People with disability have complex needs that generally require additional (and often significantly higher) finances to manage, as compared with people who would otherwise be categorised within the same group but who do not have the disability. Transferring some people with disability to the tiered working age payment system fails to acknowledge the additional financial costs associated with having a disability and places people with disability at heightened risk of financial hardship. In the context of including people with disability in a standardized system, QAI is concerned that the additional payments will not be sufficient to ensure adequate financial protection for all people with disability, particularly for those people who require substantial modifications to their home or vehicle or specific aids as a consequence of their disability, which can incur significant additional expense above any available subsidies. Our concern in respect of this issue was heightened by the Reference Group's allusion to the National Disability Insurance Scheme as providing income supports, supplements and other supports, as the NDIS is not available to all people with disability and is not designed as an income safety net for people with disability but rather as a means of facilitating disability support services. Further to this, if people with disability have had legal issues or had engagement with the criminal justice system, the extreme hardships in finding employment are exacerbated by this added tension and burden of poverty creating a cycling from which people can rarely emerge.

QAI has also expressed concerns about the Federal Government's proposed budgetary savings measure of recouping \$62.1 million over five years by reviewing 30,000 Disability Support Pension recipients each year for three years by assessing their capacity to work. QAI supports genuine measures to increase the labour market participation of persons with disability and is distressed by the very low rates of employment of people with disability. The Convention on the Rights of Persons with Disabilities and the International Bill of Rights protects the right of all persons, including persons with disabilities, to work in a role freely chosen by the person, in fair working conditions, with appropriate remuneration. We consider that being a worker has significant benefits, including:

- People with disability have complex needs that generally require additional (often significantly higher) finances to manage, as compared to people without disability. The income generated by working can assist with meeting financial need.
- Being a worker has significant, multi-dimensional benefits for the emotional health of people and protects against other vulnerabilities, such as homelessness, and is a buffer against becoming involved in the criminal justice system.

We remain concerned that many safeguards are needed to ensure that this proposal does not further disadvantage people with disability in receipt of the DSP who already experience poverty and associated disadvantage, including:

- addressing the many barriers and obstacles that preclude people with disability from

actively participating in the labour market (which encompasses addressing the significant impediments people with disability encounter in the educational system and the onerous assessment and appraisal requirements applied to people with disability (and not applied to people without disability) at points of transition from school to the workforce).

- Addressing inequities in the welfare laws that penalise people with disability for working, particularly where their employment may fluctuate (which can be consequential of their disability or an episodic mental illness).

QAI is concerned that any savings made at the interface between Disability Support Pension and employment do not further disempower or disadvantage people with disability.

### **Recommendations regarding Centrelink's online compliance intervention:**

With respect to the automated debt collection process, QAI submitted that the Government should:

1. prohibit this process, effective immediately, and suspend any current actions against individuals affected by the scheme and retrospectively address detriment resulting from this initiative (including repaying funds recouped in error within 7 days, with appropriate interest, rather than in instalments);
2. in light of the vast numbers of mistakes, where a customer is being labelled as having a debt (or having committed welfare fraud) due to a Centrelink error, there is an urgent need to redress the language used. Mistakes in the form of overpayments or errors by Centrelink should be named as such, and Centrelink must absorb the costs of their errors;
3. ensure any individuals affected by the scheme are provided with an appropriate remedy and with access to any information, support and assistance they require;
4. prohibit any program that can have the effect of incorrectly notifying Australians in receipt of welfare benefits that they owe the Federal Government money;
5. prohibit any computer-generated notifications that allege the existence of a debt before the conclusion of the relevant process (including review processes);
6. ensure all communication by Centrelink is provided in a fully accessible format and in Easy English, and that there are staff available to people without literacy skills to explain all information and communications;
7. increase the levels of staff of Centrelink and the Department of Human Services, and impose a quota for the employment of people with disability within this increase to the size of the Centrelink workforce;
8. amend Centrelink complaint and review processes, which are inadequate, particularly for

people with disability or another vulnerability and particularly given that they unjustly reverse the presumption of innocence and instead presume the existence of debt and welfare fraud on the basis of incomplete, unaccountable and protected data;

9. discontinue the process of data-matching between Centrelink and the Australian Taxation Office – the data relied upon in support of this process (ie Pay As You Go income tax data) is incomplete and inappropriate for use in this way. It disadvantages people in casual employment (in which people with disabilities are disproportionately over-represented, as compared with their representation in permanent employment) and provides an inaccurate assessment of their entitlement to claim welfare benefits;
10. ensure Government funding is invested in supportive, rather than punitive, measures;
11. mandate that the Government not base its projected budgetary savings on anticipated recuperation of welfare payments;
12. ensure that the statute of limitations on commencing investigations is not be violated;
13. require the Federal Government to initiate an investigation into any losses experienced by unfair and incorrect recovery of 'debt', for example, where people have lost housing, or endured repossession of goods that are under loan repayments, etc, and to take appropriate remedial action.

The Law Council also notes that the test for unfitness to stand trial can result in the indefinite detention of people with severe intellectual disability or cognitive impairment, which disproportionately impacts on Aboriginal and Torres Strait Islander peoples with disability.

QAI's work has provided us with firsthand insight into the accuracy of the Law Council's finding that people with disability can face unnecessary, protracted and even indefinite imprisonment as a consequence of the inadequate laws governing unfitness to stand trial, a lack of suitable alternative accommodation, limited community support services, perceived or actual difficulty in understanding bail or parole conditions and lack of availability of diversionary programs. For some people with disability, this has meant detention for longer, sometimes years longer, than the likely period of detention, had they been convicted and sentenced in relation to the alleged offence(s). QAI maintains that it is not appropriate for most people with disability to be incarcerated in the general prison system, as it is often the social deprivations that are the root cause of the catalysts for offending behaviour. Therefore the education and habilitation supports that should be provided to ensure people gain the knowledge and skill set to prevent recidivism should be provided in the community.

One option QAI suggests is to reform the test for fitness for trial. The current test (the *Presser* test) is discriminatory, as it excludes accused persons with intellectual impairment from the criminal process. This is not consistent with the requirements of the CRPD, which provides that people with disability should be supported to exercise their legal capacity on an equal basis with others. We suggest replacing the current test with one, based on the UK model, which assesses whether the defendant 'has decision-making capacity for trial' and takes into account 'all the requirements for meaningful participation in the criminal

proceedings'.<sup>2</sup>

We agree with the Law Council that detention of people with disability can exacerbate social exclusion, mental health conditions and general ill-health. It can also erode their legal capacity. We agree that prisons are often ill-equipped to provide appropriate care and support for people with disability who have complex and multiple needs – indeed, in our opinion prison is never an appropriate place for a person with disability.

QAI submits that it is not only that indefinite detention of people with disability *may* violate Australia's international human rights obligations – in our submission it certainly does do this.

QAI made a submission to the Senate inquiry into indefinite detention and are quoted by the Committee in its report. Key points which we made in our submission included:

- Persons with an intellectual, cognitive and/or psychiatric impairment are imprisoned and indefinitely detained in forensic disability service units and authorised mental health service units.
- This is highly concerning and is an important human rights issue.
- Vulnerability, disempowerment and marginalisation are strongly linked to imprisonment and indefinite detention for people with an intellectual, cognitive or psychiatric impairment.
- We must increase understanding of the nature and effects of disability within the criminal justice system, to enable a more appropriate response to these vulnerable people.
- There are a number of features that people imprisoned or indefinitely detained have in common, including:
  - They have a disability or mental illness that significantly impacts on their ability to understand the consequences of their behaviour;
  - They have experienced a lifetime of disempowerment and disadvantage and lack of support to overcome their life history;
  - They have heightened vulnerability and have lacked appropriate support throughout the continuum of contact with the criminal justice system;
  - They have usually been charged with a series of minor offences, rather than a very violent or serious offence;
  - The law breaking of people with intellectual impairments is inextricably linked to their disability and is determined by the social, historical and familial circumstances that shaped them - and, more urgently, by the person's present circumstances and behaviours that attract police attention.
- The Forensic Disability Service (FDS) Unit at Wacol in Brisbane, Queensland, where people with disabilities and forensic issues can be detained, has been described as unfit for human habitation, resembling the harshest of prison-like settings. It is not an environment conducive to rehabilitation or ordinary living experiences. A negative cycle is perpetuated, where the capacity and ability of persons detained within the FDS continually declines and they become increasingly institutionalised, which in turn can erode the possibility that the Mental Health Review Tribunal will favourably consider their prospects of community re-integration

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<sup>2</sup> Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010).

- It is inappropriate to indefinitely imprison **any** person, but particularly any person with an intellectual, cognitive or psychiatric impairment. To do so breaches their human rights and dignities, erodes their capacity and skills, enhances their vulnerabilities and makes them the target of violence, exploitation and abuse.
- Imprisonment or detention should be considered an option of last resort for all people, but particularly for vulnerable people with an intellectual, cognitive or psychiatric impairment.
- Programs for rehabilitation should be tailored to be inclusive of persons with disabilities.
- The Forensic Mental Health Service (FMHS) should be funded to provide additional psychological services, including therapeutic services to people with intellectual disability and other capacity impairments with mental illness in prison.
- The FDS should be funded and have staff with appropriate expertise to provide habilitation, rehabilitation, education and training programs to prisoners with intellectual and or cognitive impairments. It is not appropriate for FDS staff to deliver programs for which they are not qualified.
- The FMHS or another service should be funded to provide addiction treatment services in prisons and to others subject to correctional orders.
- Corrective Services and the National Disability Insurance Agency (NDIA) should establish prison-based support and conduct a pilot project to compare prison-based support against prison without support.
- Disability Services Queensland (and later the NDIA) should provide funding support to people subject to custodial orders.
- the indefinite detention of persons within the Forensic Disability Service Unit:
  1. contravenes our commitments under international humanitarian law, including under the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (UN CAT)
  2. contravenes the requirements of natural justice
  3. is not carried out in a way that is consistent with the spirit and intent of the relevant Queensland legislation
  4. violates the human rights and dignities of the persons subjected to incarceration within the FDS
  5. further marginalises and disempowers already highly vulnerable persons in our society.
  6. Ignores the second theme of the National Disability Strategy (the Australian implementation of the CRPD) for Rights protection, justice and legislation

Additionally, in our submission to the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, we noted the following examples of blatant violations of the rights prescribed by the CRPD:

- the use of Restrictive Practices on people with disability;

- the indefinite detention of people with disability who have not been convicted of an offence within the Forensic Disability Service;
- the failure to take proactive steps to ensure the provision of appropriate accommodation for people with disability within the community; and
- the failure to ensure appropriate employment opportunities for people with disability.

As the terms of the CRPD are not directly enforceable by state or federal courts, these flagrant breaches of the human rights of people with disability are difficult to prosecute. The Australian government has shown scant regard for the impact of such abuses on its human rights record and international disapproval of Australian human rights breaches have not resulted in the imposition of trade sanctions or other more concrete means of censure.

It is no small wonder then, as our treatment of vulnerable people with disability is tantamount to torture, that QAI holds grave concerns for the future of our children. The use of seclusion and restraint on children, both in mental health facilities and in educational institutions gives pause to consider what the potential future might hold for young children being subjected to horrific treatment. We are very concerned that the legislation governing the use of Restrictive Practices does not extend to protect these highly vulnerable children. There have recently been horrific instances of the application of unspecified, unsanctioned and illegal use of Restrictive Practices to students within the educational setting. For example, recent allegations of physical and emotional abuse and deprivation of liberty of a child with disability include the caging of a 10 year old boy with autism in a Canberra classroom,<sup>3</sup> locking a child with autism in a dark cupboard at a Newcastle school,<sup>4</sup> tying a child with special needs to a chair with a seat belt,<sup>5</sup> and constraining an autistic boy in a cell-like room.<sup>6</sup> QAI calls for the introduction of stringent protections in this area as an urgent priority.

#### **What are the costs and consequences if people with disabilities cannot access justice?**

QAI supports the findings of the Law Council that:

- Unmet legal need has significant flow-on effects for the individual and the broader community.
- An inability to access justice can compound disadvantage and social isolation for people with disability, increase vulnerability to additional legal problems and increase the risk of problem escalation.
- In the criminal justice system, people with disability can face unnecessary, protracted and indefinite detention as a consequence of inadequate laws governing unfitness to stand trial, a lack of suitable alternative accommodation, limited community support services, perceived or actual difficulty in understanding bail or parole conditions, and lack of availability of diversionary programs.

With respect to the issue of parole, QAI made the following recommendations in our submission on the Corrective Services (Parole Board) and Other Legislation Amendment Bill 2017:

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<sup>3</sup> Rachel Browne, 'Children with autism caged and abused at school', *The Sydney Morning Herald* (online), 2 April 2015 <<http://www.smh.com.au/nsw/children-with-autism-caged-and-abused-at-school-20150331-1mbt48.html>.

<sup>4</sup> <http://mobile.abc.net.au/news/2015-12-16/police-investigate-schools-treatment-of-autistic-child/7032038?section=nsw>.

<sup>5</sup> <http://www.scribd.com/doc/287809156/Parents-Claim-Special-Needs-Student-Tied-to-Chair-With-Seat-Bel>.

<sup>6</sup> <http://www.scribd.com/doc/287338662/School-Puts-Autistic-Boy-in-Cell-Like-Room-QLD>.

- Membership of the Parole Board should include a person with either lived experience of disability or disability-specific expertise and experience.
- 'Relevant information' provided to the Parole Board to assist in its decision-making should include all information necessary to understand and address the needs, especially support needs, of persons with disability.
- Programs for rehabilitation and parole should be delivered in a variety of teaching methods and supports to ensure accessibility for all people including those with disability.
- Persons with disability and mental illness should be provided with transitional support prior to release and additional supports upon release from prison.
- There should be specific contact between the Parole Board and the National Disability Insurance Agency, in circumstances where a person is eligible for NDIS funding, to facilitate this.
- Queensland Corrective Services and Department of Housing and Public Works cooperate to:
  - pilot a comprehensive program of housing and support for exiting prisoners with disabilities (the Intellectual Disability Rights Service may provide a useful example); and
  - give prisoners the option to maintain public or community housing for a reasonable time while they serve in prison.
- Prisoners who apply for public or community housing must be eligible for priority housing on release from prison.
- In the weighing of personal autonomy (successful reintegration of a person into the community) and potential risk to community safety, it is imperative to cease the inaccurate and damaging stereotypes that misconstrue mental illness and/or disability with a propensity to violence.

### What measures are effective – what works and why?

QAI supports the findings of the Law Council that people with disability need:

- Appropriate, accessible and targeted services;
- Joined-up services, to meet their complex, interconnected legal and non-legal needs; and
- Timely services.
- Adequate therapeutic and rehabilitative programs to help people to maintain and develop their capacity and to successfully reintegrate into the community following a period of incarceration.

While there are some notable examples of initiatives that achieve this (such as QAI's Human Rights Legal Service, Justice Support Program and Mental Health Legal Service, and LawRight's Mental Health Law Practice), there is a pressing need for significantly greater

variety and coverage of the available programs, with the investment of appropriate funding to achieve this.

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

QAI agrees that training in understanding disability is fundamental to ensuring access to justice. We consider that it is appropriate to improve protocols for recognising intellectual disabilities and reduced capacity in the criminal justice system, in order to determine eligibility for decision-making and other kinds of support. However, we caution that sometimes identification results in labelling people, which is problematic in light of the negative stereotypes and assumptions about disability and particularly mental illness. It is more effective and beneficial to consider a person's history and their experiences, the issues that confronts them and their support needs rather than relying on classification and depersonalising stigmata. QAI submits that all persons with any indications of vulnerability (whether or not the presence of a disability is definitively established), should have the optional presence of a third person during their police interview. QAI recommends that the *Evidence Act 1977* (Qld) and the *Criminal Code 1889* (Qld) should be amended to increase the protection available to vulnerable persons, including persons with an intellectual, cognitive or psychiatric disability, including by increasing their entitlement to support at all stages of the criminal justice process and expanding the scope of recognised ways of responding to police questioning and giving evidence.

Regular training and adequate resourcing, developed and provided in consultation with people with cognitive disabilities and their advocates, should be provided to the police, the judiciary, court staff, duty lawyers, prosecutors and private solicitors involved in the criminal justice and civil law systems in order to improve their understanding of the needs and communication techniques of clients with intellectual impairment, and to enable those clients to be assisted to engage effectively with all aspects of the legal system. Training and associated resourcing should include information about different forms of cognitive disabilities and provision for the decision-making support.

People with disability and mental illness have been significantly adversely affected by damaging stereotypes about the nature of particular types of disability and mental illness. Historically, there have been negative connotations associated with mental illness that have created a stigma about mental illness, and also generated the correlation between mental illness and a predisposition to violence.<sup>7</sup> While this stigma has been substantially overcome in recent decades, scholars such as Salzman attribute the historical perspective on psychosocial disability as explaining in part the differential treatment of people with a mental illness within the legal system, which can result in an unjustified assumption of general incapacity based on stereotypes of behaviour.<sup>8</sup> As Caivano notes:<sup>9</sup>

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<sup>7</sup> Leslie Salzman, 'Guardianship for Persons with Mental Illness – A Legal and Appropriate Alternative?' (2010-2011) 4 *St Louis University Journal of Health Law & Policy* 279, 286.

<sup>8</sup> Leslie Salzman, 'Guardianship for Persons with Mental Illness – A Legal and Appropriate Alternative?' (2010-2011) 4 *St Louis University Journal of Health Law & Policy* 279, 288-9.

<sup>9</sup> Nicholas Caivano, 'Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention' (2014) 4(1) *Western Journal of Legal Studies* 1, 2-3.

*People with disabilities, particularly those with intellectual and psychosocial disabilities, have long been subject to limitations on their right to legal capacity. They have endured arbitrary detention and have been deprived of access to basic health interventions. They have faced cruel, inhumane, and degrading treatment, including physical abuse, confinement in squalid institutions, and subjection to restraint and seclusion. Due to stigma and discrimination, people with disabilities in many parts of the world continue to be deprived of legal capacity despite being able to make and communicate decisions, either by themselves or with support.*

As discussed above, many people with disability who are diverted from the criminal justice system to an Authorised Mental Health Service or the Forensic Disability Service Unit are indefinitely detained, in a setting indistinguishable from a prison, for significantly longer than they would have been had their disability not been a determining factor in their treatment through the criminal justice system. In our publication *dis-Abled Justice: Reforms to Justice for Persons with Disability in Queensland*, we noted:<sup>10</sup>

*One of the problems commonly identified by advocate, academic and practitioner observers is the failure of criminal justice jurisdictions to identify particular classes of defendants with impaired capacity and subsequently divert those classes of defendants from the usual criminal justice processes... For the majority of defendants with intellectual impairment, support to exercise legal capacity is more consistent with human rights principles than (needlessly) discriminatory identification and diversion, no matter how well-intentioned.*

There is a need for significant reform in this area.

#### **Possible priorities for discussion**

The Law Council has proposed 13 possible priorities for discussion, as follows:

1. State and Territory governments to consider establishing specialised problem-solving courts or court lists for people with mental, cognitive and/or intellectual disability in all jurisdictions, such as the Assessment and Referral Court List in Victoria.
2. Drawing on the Court Integrated Services Program and the Mental Health Court Liaison Service in the Victorian Magistrates' Court as a model, other jurisdictions could consider establishing court-based integrated service providers that can provide individualised support plans for people with disability.
3. State and Territory governments should consider implementing a more flexible approach to adducing evidence from witnesses with disability, looking to recent amendments in South Australia as a guide.
4. Increase disability and communication training for the legal profession, judiciary, court staff, police officers and community workers, including promoting the implementation of a Disability Action Plan.

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<sup>10</sup> Queensland Advocacy Inc. (2015). *dis-Abled Justice: Reforms to Justice for Persons with Disability in Queensland*, 10.

5. The Council of Chief Justices of Australia could consider establishing a judicial leadership body, such as a Judicial Council on Disability, modelled on the Judicial Council on Cultural Diversity, to champion cultural change across the legal profession in regards to disability. It may be beneficial for such a body to work closely with disability advocacy groups in order to effect systemic legislative, social and cultural change.
6. Greater funding and resources for the continued development of alternative accommodation options that offer appropriate and joined-up services for people with disability who have been found unfit to stand trial. Accommodation should be 'sustainable, stable, accessible (meets the person's support and environmental needs) secure, individualised (non-congregate) [and] culturally responsive'.
7. Establish procedures for regular and independent review of the reasonableness and necessity of ongoing detention and ensure all decisions relating to the detention of people with cognitive impairment, without charge or conviction, are subject to judicial review across all Australian jurisdictions.
8. Establish monitoring and qualitative assessments of the efficacy of programs and plans assigned to people with disability in any detention – schools, hospitals, forensic detention, mental health facilities, nursing and aged care settings where restrictions and involuntary practices are imposed.
9. The test for unfitness to stand trial should continue to be reviewed by State, Territory and Commonwealth governments. A human rights-focused approach to law reform is encouraged. At a minimum, in circumstances where there is a determination that a person is unfit to stand trial, state and territory laws should provide for: (a) limits on the period of detention that can be imposed; and (b) regular periodic review of detention orders.
10. Invest in methods to ensure early detection, treatment and support of FASD and other disabilities which can potentially lead to adverse outcomes in the criminal justice system, particularly for Aboriginal and Torres Strait Islander peoples.
11. Noting that many people with disability require intensive, face-to-face and ongoing assistance, substantial additional funding should be injected into the legal assistance sector to ensure legal and non-legal advocacy assistance services are resourced to assist those with disability, particularly, cognitive, intellectual and psychiatric impairment.
12. Continued development of health-justice partnerships and co-location of medical and legal services, including ongoing research and evaluation of existing partnerships.
13. Invest in community legal education and public awareness raising with regards to disability and dealing with people with disability.
14. All persons subject to applications under Guardianship and Administration and Mental Health legislation receive free legal assistance and representation at the first instance hearing or be provided with appropriate supports to represent themselves and that there

be funding for disbursements for obtaining medical reports whenever there is an issue about the existence of mental health condition.

QAI supports all of the possible priorities for discussion. We consider the injection of adequate funding into the legal assistance sector particularly critical. To this list we also add:

- Address the use of Restrictive Practices on children in psychiatric facilities and educational institutions, as an urgent priority.
- Develop a disability responsive National Preventative Mechanism that is well-resourced, proactive and appropriately staffed (including with people with disability and their advocates) to implement the Optional Protocol to the Convention Against Torture in Australia.
- Ensure that the staffing of relevant bodies within the criminal justice system equips them to properly understand and respond to the needs of people with disability, by employing people with disability and experienced advocates and carers.
- Implement the CRPD and the NDS fully into Australian law and make consequential amendments to existing legislation, including guardianship legislation, to ensure it is consistent, including by implementing a supported decision-making approach.
- Introduce Human Rights acts in all remaining states and territories and at a federal level.
- Amend the National Human Rights Action Plan and National Disability Strategy to mandate an intergovernmental process to implement State and Territory parliamentary scrutiny, strengthening the links between Commonwealth human rights commitments and State and Territory action.
- There are insufficient specialist support programs that assist vulnerable persons with an intellectual, cognitive or psychiatric disability. QAI recommends the development, strengthening and expansion of further programs, such as the Independent Third Person program, QAI's Justice Support Program, the Court Integrated Services Program and the Enforcement Review Program. These initiatives need to be rolled out on a national basis and available to all that need them.
- Establish a cluster of 'problem solving' courts like the Special Circumstances Court trialled in Queensland.
- Introduce Indigenous Sentencing Lists in every jurisdiction. Persons with intellectual, cognitive or psychiatric impairment from Aboriginal and Torres Strait Islander and CALD backgrounds are particularly vulnerable and disadvantaged, both in Australia generally and in prisons and detention centres, where they are significantly over-represented. QAI recommends the development of culturally appropriate measures designed to specifically assist people from these indigenous and/or culturally or linguistically diverse backgrounds.
- Develop more magistrate diversion programs which:

- are available to all and do not set out to identify defendants with mental health and intellectual and cognitive disabilities
- divert from Criminal Justice System
- expedite early intervention by establishing:
- day programs to support court orders
- community-based programs emphasising prevention and rehabilitation.

### **Conclusion**

QAI thanks the Law Council for its excellent and comprehensive Consultation Paper. The paper canvasses many significant issues facing people with disability in Australia and recognises the significance of the problems facing them and the extent of their disempowerment in the justice system.

We look forward to seeing the outcomes of the project and would welcome the opportunity to be involved as the project is further developed.