



Indefinite detention and solitary confinement – the awful reality of Queensland’s Forensic Disability Service

**Position Statement by
Queensland Advocacy for Inclusion**

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Introduction

The Forensic Disability Service (FDS) is a medium security, 10-bed facility located at Wacol in Brisbane, Queensland. The service supports up to 10 adults with an intellectual disability or cognitive impairment who are subject to an inpatient forensic order (disability) under the *Mental Health Act 2016* (Qld). A person is placed under an inpatient forensic order (disability) when they have been found to have been of unsound mind at the time of an alleged offence, or found to be unfit to stand trial, and there is an unacceptable risk to the safety of the community. QAI has represented people living in the FDS since it opened in 2011.¹

The premise of the FDS is that each person should progress in accordance with an individualised development plan that is designed with input from the person and their family, professionals, and supporters. The individualised development plan sets out the educational and training programs that will assist the person to return to living in the community.

However, the reality of the FDS is very different. Conditions observed directly by QAI staff, along with anecdotal reports from our clients, raise questions of potential torture and cruel, inhuman, and degrading treatment. Unclean physical conditions, the use of Restrictive Practices and a lack of opportunity for social and community interaction are just some of QAI's concerns. The culture of the FDS is highly institutionalised, contrary to the United Nations' guidelines on deinstitutionalisation.² Disability-specific detention is also a form of discrimination under Article 5 of the Convention on the Rights of Persons with Disabilities (CRPD).

In 2022, the United Nations Committee Against Torture raised serious concern about Australia's arbitrary and indefinite detention of people with disabilities. The Committee urged Australia to *"Stop committing persons with intellectual or psychosocial disabilities who are considered unfit to stand trial or not guilty due to "cognitive or mental health impairment" to custody and for indefinite terms or for terms longer than those imposed in criminal convictions."*³ In Queensland, people can be held indefinitely under forensic orders.

These concerns were raised following a failed visit to Australia by the United Nations Subcommittee on the Prevention of Torture. The visit was cancelled in part due a refusal to allow visits to psychiatric facilities and the FDS in Queensland.

The FDS was never intended to be a punishment. Its stated function is to minimise the risk that people under a forensic order (disability) allegedly pose and to support them with the aim of releasing and fully integrating them back into the community.

However, in its present form, the FDS is not offering a human rights compliant alternative to the mainstream criminal justice system for people with an intellectual or cognitive disability. Despite the time that has passed since it opened and the significant funding that has been invested into it, the FDS appears to be a failed model, the trial of which has been at significant human cost to the people detained within it.

¹ This is cited in the Queensland Ombudsman's report, *The Forensic Disability Service Report: An investigation into the detention of people at the Forensic Disability Service* (August 2019), page 23

² CRPD/C/5: Guidelines on deinstitutionalization, including in emergencies (2022)

³ Concluding Observations to the Review of Australia's Compliance with the Convention Against Torture November 2022 Geneva Switzerland, 32, 39 and 40.

The Queensland Ombudsman highlighted many of the human rights violations occurring at the FDS in its 2019 report⁴, yet there has been an abject failure by the Queensland Government to respond to or implement the report's recommendations.

We need to develop a new model of support for people with intellectual or cognitive disabilities under forensic orders that is consistent with the United Nations guidelines on the deinstitutionalisation of people with disability.⁵

QAI urgently calls on the Queensland Government to address the following matters:

1. Indefinite detention;
2. The use of Restrictive Practices, including seclusion;
3. Physical conditions at the FDS;
4. Communication with family and support networks outside of the FDS;
5. The lack of appropriate accommodation and support for people with disability under forensic orders; and
6. The cultural inappropriateness of the FDS.

1. Indefinite detention

People who are under a forensic order have been charged with an indictable offence, however, due to their disability this charge has never been tested in a court of law. Whether in fact the alleged offence was committed at all, by the accused person, and in the specific circumstances of the alleged offending are not proven to the standard required for a criminal conviction — beyond reasonable doubt. The person is not given a trial or an opportunity to test the evidence against them, and they have not been found guilty.

Even when the person did commit the offence, if their intellectual or cognitive impairment is significant enough, the law considers them to lack the legal capacity to be held criminally responsible for their actions.

It is therefore deeply concerning that Queensland law does not impose any limiting terms on how long a person with a disability who is alleged to have committed an offence can be subject to a forensic order.⁶

Once a person is placed on a forensic order by the Mental Health Court, Queensland's Mental Health Review Tribunal has responsibility for deciding when an individual may be released from that order, or when the conditions of the order can be changed. Consequently, people can be held *indefinitely* as an inpatient in a mental health service or the FDS. In many cases the person can be under the forensic order for much longer than the maximum penalty for the offence they allegedly committed.⁷ Even where the person is not an inpatient (that is, not detained in the FDS or a mental

⁴ Queensland Ombudsman, *The Forensic Disability Service Report: An investigation into the detention of people at the Forensic Disability Service* (August 2019)

⁵ CRPD/C/5: Guidelines on deinstitutionalization, including in emergencies (2022)

⁶ For discussion of nominal and limiting terms, and jurisdictions utilising them, see, Bernadette McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (Melbourne Social Equity Institute, 2017).

⁷ *Ibid* 20-21; McCausland & Baldry (n 2) 298.

health service), forensic orders can limit their human rights by imposing disproportionately restrictive conditions on what the person can do, where they can go and who they can see.

The use of forensic orders that are not time-limited is a serious human rights issue. Indefinite forensic orders are not consistent with Australia's international legal obligations not to use arbitrary detention or detain people on the basis of disability. There is also limited evidence of these orders contributing to the rehabilitation of people with disability, with more early intervention support needed.⁸ Indefinite detention denies people certainty about their future and keeps people involved in the forensic system beyond a point where it can be reasonably argued that continued detention and/or supervision is appropriate or beneficial.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability's Final Report recently stated that "indefinite detention is unacceptable" and explicitly recommended that "laws providing for it should be repealed."⁹

The United Nations Committee on the Rights of Persons with Disabilities has also condemned the indefinite detention of people with disability after a finding of unfitness to plead, stating that it is contrary to Article 14 of the CRPD regarding the right to liberty and security.¹⁰ These types of orders are viewed as "paternalistic declarations" preventing people with disability from enjoying and exercising their autonomy on the basis of their impairment, and the Queensland Government must take urgent action to limit how long they can be used.¹¹

2. The use of Restrictive Practices, including seclusion

The Queensland Ombudsman's 2019 report on the FDS followed an investigation which found that the FDS was significantly non-compliant with legislation designed to safeguard the care, protection, and rights of the vulnerable people it accommodated.¹²

Among the issues identified was the use of Restrictive Practices, including the use of seclusion. Restrictive Practices refers to any practice or intervention that restricts the rights or freedom of movement of a person with a disability.

The Ombudsman found that for more than five years, while the FDS was using Restrictive Practices on its residents, it did not have a behaviour control register, meaning that the use of Restrictive Practices was not recorded and was therefore in breach of the law.¹³

One person, "Adrian", was found to have been in seclusion (essentially solitary confinement) for more than six years. During this time he was only allowed to communicate with staff through a

⁸ The Senate Community Affairs References Committee (November 2016) *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, p118

⁹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability's Final Report: *Volume 8: Criminal Justice and people with disability*, Recommendation 8.12, page 22

¹⁰ Arstein-Kerslake et al (n 45) 408; Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40 *Melbourne University Law Review* 816.

¹¹ Arstein-Kerslake et al (n 45) 408; Law Council of Australia (n 4) 72; Piers Gooding and Charles O'Mahony, 'Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122, 133-4.

¹² Queensland Ombudsman, *The Forensic Disability Service Report: An investigation into the detention of people at the Forensic Disability Service* (August 2019)

¹³ *Ibid*, p63

narrow horizontal slot through which meals were passed and was permitted seclusion breaks for one minute or less.¹⁴ It was also reported that the police had been called on multiple occasions and that they frequently used police dogs to control his behaviour. The investigation found that police had entered into the adult's records that, "he hates dogs, and it works every time,"¹⁵ and that he was left crying in the foetal position after one such event.¹⁶

The Ombudsman described the circumstances of Adrian's case as "severe and concerning" and observed that they:

were widely known to the Director and the Department. The Director's 5-year review suggests that the impact of this seclusion on Adrian has been significantly detrimental to his health and wellbeing ... [and] concluded that the approach to secluding Adrian has been contrary to law, unreasonable, oppressive, and improperly discriminatory.¹⁷

The Ombudsman recommended the Director review the clinical management of Adrian with a view to "reducing the use of seclusion and improving his quality of life."¹⁸

However, there has been no material change in Adrian's day-to-day management since the Ombudsman's report and he remains essentially in permanent seclusion.

The Annual Reports of the Director of Forensic Disability released since the Ombudsman's 2019 report also seek to justify and minimise Adrian's ongoing, full-time seclusion. In the 2019-2020 Annual Report, instead of acknowledging his ongoing seclusion, the seclusion was simply described as a "consistent feature" of his management regime due to his "high risk".¹⁹ The report also seemed to suggest that "the FDS fulfilled legislative requirements ... for instances of the use of seclusion". However, the Ombudsman found that certain provisions of the *Forensic Disability Act 2011* (Qld) had been consistently breached in the FDS's treatment of Adrian, and none of those provisions are mentioned in the annual report.²⁰

The use of long-term seclusion and its compatibility with the *Human Rights Act 2019* (Qld) was considered in the case of *Owen-D'Arcy*²¹, which found that a decision to isolate a prisoner for a further six months (taking the prisoner's total time in isolation to seven years) had not considered the prisoner's right to humane treatment when deprived of liberty and was unlawful. The Supreme Court also found that the burden to justify the reasonableness of a limitation on a detained person's right to humane treatment was "a heavy one".²²

QAI is of the view that the long-term seclusion of Adrian by the FDS breaches his human rights and is unlawful.

Adrian's long-term seclusion breaches the United Nations Nelson Mandela Rules (which set minimum standards for the treatment of prisoners). These rules define solitary confinement as "the confinement of prisoners for 22 hours or more a day without meaningful human contact" and state it must only be used in exceptional circumstances as a last resort, for as short a time as possible.

¹⁴ Ibid, p80

¹⁵ Ibid, p101

¹⁶ Ibid, p81

¹⁷ Ibid. p viii and p 92

¹⁸ Ibid, pxvii, Recommendation 9

¹⁹ Ibid, p 23.

²⁰ Ibid, commentary on pp 78-91, opinion and recommendation 9 at p 92

²¹ *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273

²² Ibid, at para 250

They also prohibit the use of solitary confinement for prisoners with “mental or physical disabilities” if their conditions would be exacerbated by such measures.²³

Adrian's long-term seclusion also breaches the Convention Against Torture. In their Concluding Observations in 2022, the Committee Against Torture mandated that Australia stop using solitary confinement over 15 days or in any instance where a person's disability is exacerbated by solitary confinement. Adrian has clearly been detained in solitary confinement for more than 15 days and his confinement has undoubtedly contributed to and exacerbated his disability.²⁴

There is nothing that can justify *absolutely no progress* having been made to improve Adrian's living conditions and reduce his now 10-year regime of permanent seclusion or solitary confinement. The grave impact of prolonged seclusion and the subsequent deterioration of Adrian's health and well-being was emphasised by the Ombudsman in its 2019 report. Adrian's psychologist suggested his behaviours reflected a sense of hopelessness and institutionalisation and that this regime would likely contribute to further deterioration in his emotional and psychological health.²⁵

This ongoing disregard of the law and of the human rights of a vulnerable person in State-run detention undermines the authority of the Queensland Ombudsman and the rule of law in Queensland. It also suggests that public servants can disregard significant opinions and recommendations made by the Ombudsman and other regulatory and monitoring bodies and breach the law without consequence. This threatens public confidence in the government and the institutions responsible for integrity and accountability in public administration and must be urgently addressed.

3. Physical conditions at the FDS

QAI holds serious concerns about safety and hygiene conditions for FDS residents. During visits to the FDS, QAI staff have observed some residents' living areas to be unclean and untidy and there does not appear to be a regular cleaning regime operating at the FDS.

One resident's room was noted to have a bad odour, flies, stains, and a lack of furniture, a soiled mattress and no bed linen. A pillow in the room was observed to be completely black on one side (possibly with mould) and food wrappers were on the floors of the bedroom and bathroom. Old food spillages could be observed in the outdoor courtyard area and a resident had reportedly raised concerns about rodents in the outdoor areas.

It is unacceptable that people with disability who are in the custody of the State are living in sub-standard conditions that are likely to pose health risks. This treatment amounts to institutional neglect and is a breach of the human rights and dignity of residents of the FDS.

4. Communication with family and support networks outside of the FDS

There is no standard approach to giving FDS residents access to phones and other communication devices to maintain relationships with family and friends outside of the FDS.

²³ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 44

²⁴ Concluding Observations to the Review of Australia's Compliance with the Convention Against Torture November 2022 Geneva Switzerland, 31(g) on page 10

²⁵ Ibid, p82

As a result, FDS residents can experience significant difficulties communicating with family and their support networks. This can lead to social isolation and negatively impacts important relationships which are critical to a resident's ongoing psychological health and wellbeing and their eventual reintegration back into the community. Restricting access to the basic means necessary to maintain family and other relationships is a breach of human rights and directly undermines the purpose of the FDS.

5. The lack of appropriate accommodation and support for people with disability under forensic orders

The lack of appropriate secure accommodation and support services for people with disability under forensic orders in Queensland impacts the way the FDS operates and the opportunities available for residents to transition to community living.

With a capacity for only 10 people, the FDS is the sole specialist accommodation service for people with disability under forensic orders in Queensland. The criteria for admission to the FDS is very restrictive. Secure mental health units are the only other accommodation option available for people with disability under forensic orders who are required by their orders to be placed in secure accommodation. Yet mental health units do not provide an appropriate accommodation alternative for people with intellectual or cognitive disability.

Mental health services provide involuntary treatment to people on the premise that once their illness is treated and the person has recovered, they will no longer be a risk to the community. However, a person does not 'recover' from an intellectual or cognitive impairment. In QAI's experience, staff at these services do not typically have specialist disability training or knowledge. Trying to 'treat' people with disability in this context is inappropriate and a clear breach of human rights, including the right to support services under Article 26 of the CRPD.

People with disability who do not have a diagnosed mental health condition, or whose mental health conditions are stable, are therefore being warehoused in institutions where they are unable to access appropriate disability supports or programs.

FDS residents considered to be 'disruptive' are also sometimes transferred to mental health units as a form of 'circuit-breaker' to manage escalating behaviours or provide respite for staff. Residents are sent to receive a mental health assessment, yet this practice has occurred even when a person has recently been assessed by a visiting psychiatrist and found to be clinically stable. Transfers can occur without warning and are typically distressing for the individual.

Further, some FDS residents have impairments that affect their ability to adjust to changes in their physical environment or routine. A history of trauma can mean a person is more easily triggered and can overreact to a situation leading to incidents of physical aggression. Inappropriate environments can therefore lead to incidents which contribute to a person's detention and involvement with the forensic system being extended.

Funding must be provided to construct appropriately robust accommodation outside of the institutionalised setting of the FDS for high-risk people with disability in the forensic disability system, including long-term residents of the FDS, that allows them to live close to their families and access supports in the community without institutionalisation.

6. The cultural inappropriateness of the FDS

Institutional contexts such as the FDS are particularly inappropriate for First Nations people. They do not provide healing, care or supports and instead remove people from culture and community. The United Nations Committee Against Torture expressed serious concern about practices in forensic disability settings that disproportionately affect Aboriginal and Torres Strait Islander people with disability and people with intellectual or psychosocial disability.²⁶ QAI has seen First Nations people on forensic orders transferred to mental health units far away from family and country, impacting their cultural rights and community connections. QAI considers that First Nations people should be allowed to live as close as practicable to their family and country, as is required for people in the mainstream criminal justice system.²⁷

Given that 30% of people detained on a forensic order (mental health or disability) identify as First Nations,²⁸ the harms of disproportionate institutionalisation must be explicitly considered with the aim of eliminating institutions in favour of culturally appropriate supports.

Conclusion

The FDS has not fulfilled its intended purpose. It has failed to ensure the successful transition of all its residents back into the community. During the last 12 years, the FDS has been the site of ongoing breaches of the law and of the human rights of the people detained there. Despite a 2019 Ombudsman's report finding poor accountability processes and unlawful treatment of its residents, not enough has changed and the Ombudsman's recommendations are yet to be fully implemented.

There is now broad recognition that institutionalised environments are harmful to the rights and lives of people with disability. QAI fully supports the United Nations guidelines on deinstitutionalisation which state that people with disability have a right to live independently and be included in the community.²⁹ Receiving appropriate care and supports is vital to supporting people with disability to live independently in the community.

The Senate Committee found in its inquiry into indefinite detention in 2016, "*there are few issues of greater injustice, than the continued detention of people because of a lack of appropriate spending on disability accommodation.*"³⁰

QAI calls on the Queensland Government to act immediately to address these wrongs. The Queensland Government must develop a comprehensive strategy and action plan for the deinstitutionalisation of people with disability under forensic orders and provide a greater range of specialised disability services and accommodation other than the FDS. This is vital if the Queensland Government is committed to respecting the rule of law and upholding the human rights of vulnerable people in State care.

²⁶ Concluding Observations to the Review of Australia's Compliance with the Convention Against Torture November 2022 Geneva Switzerland, 39(a) on page 12

²⁷ *Corrective Services Regulation 2017* (Qld), section 3

²⁸ Ogloff, J. R. P., Ruffles, J., & Sullivan, D. (2018). *Addressing Needs and Strengthening Services: Review of the Queensland Forensic Disability Service System*. Centre for Forensic Behavioural Science, Swinburne University of Technology. p14

²⁹ CRPD/C/5: Guidelines on deinstitutionalization, including in emergencies (2022)

³⁰ The Senate Community Affairs References Committee (November 2016) *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, p120

QAI's recommendations

The Queensland Government design a new model of support for people with intellectual or cognitive disabilities under forensic orders that is consistent with the United Nations guidelines on the deinstitutionalisation of people with disability.

While a new model of support is being designed, QAI calls on the Queensland Government to:

1. Fully implement the recommendations of the Committee Against Torture's Concluding Observations in 2022, including:

- a. Cease the indefinite detention of people with disability who are under forensic orders and introduce 'limiting terms.' Ensure people do not serve longer in detention or under an order than a person would serve as their sentence if found guilty of the offence following a regular criminal prosecution process;
- b. Repeal any law or policy and cease any practice that enables the deprivation of liberty on the basis of disability;
- c. Establish an effective, independent, confidential and accessible oversight body to monitor the FDS; and
- d. Ensure people with disability cannot be held in solitary confinement within the FDS.

2. Immediately implement substantive changes to "Adrian's" day-to-day management that will end his permanent seclusion, improve his quality of life, including by allowing him regular time outside of his living quarters within the grounds of the FDS, and support him to transition to a less restrictive living arrangement in the community.

3. Commission an independent specialist to prepare a report about the impact of "Adrian's" ongoing seclusion on his mental health and recommend actions to prevent him from suffering further harm. Direct the government department responsible for the FDS to implement those actions.

4. Review the cleaning and maintenance program for the FDS and ensure that all areas of the FDS, particularly residents' living spaces, are regularly cleaned and maintained to an acceptable standard.

5. Review and update FDS policies relating to resident communications with family and community networks to ensure they have ready access to the means to communicate with family and supporters.

6. Fund and construct appropriately robust accommodation outside of the institutionalised setting of the FDS for high-risk people with disability in the forensic disability system, including long-term residents of the FDS, that allows them to live close to their families and access supports in the community without institutionalisation.

7. Cease the detention of people with disability who do not have a diagnosed mental illness in mental health services and ensure they are provided with appropriate accommodation and care consistent with their needs and their human rights.

8. Investigate the practice of transferring FDS residents to mental health units who pose management challenges or other 'risks', as perceived by the FDS management.

9. Ensure that First Nations people are supported to live in culturally appropriate, deinstitutionalised environments closest to their family and country.