Crime Inquiry 2014
Submission 032

The need for a Disability Justice Plan in Queensland

The Submission to the Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland

Legislative Affairs and Community Safety Committee

July 2014

Office of the Public Advocate
Systems Advocacy

ANTI DISCRIMINATION COMMISSION QUEENSLAND

Background

Interest of the Public Advocate (Qld)

The Public Advocate was established by the *Guardianship and Administration Act 2000* to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland. The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity (the adults) in all aspects of community life.

More specifically, the functions of the Public Advocate are:

- Promoting and protecting the rights of the adults with impaired capacity;
- Promoting the protection of the adults from neglect, exploitation or abuse;
- Encouraging the development of programs to help the adults reach their greatest practicable degree of autonomy;
- Promoting the provision of services and facilities for the adults; and
- Monitoring and reviewing the delivery of services and facilities to the adults.[1]

In 2013, there are approximately 114,000 Queensland adults with impaired decision-making capacity.[2] Of these vulnerable people, most have a mental illness (54 per cent) or intellectual disability (26 per cent).

Interest of the Queensland Anti-Discrimination Commissioner

The Anti-Discrimination Commission Queensland (the Commission) is an independent statutory body established by the *Anti-Discrimination Act 1991*.

The objectives of the Commission are to:

- Resolve complaints;
- Inform the community about its rights and responsibilities under the *Anti-Discrimination Act 1991*; and
- Promote understanding, acceptance and public discussion of human rights in Queensland.

The Commission focuses on creating a fair and inclusive Queensland where the quality of life of Queenslanders is enhanced through social cohesion and where the diverse contributions of all members of the community are valued.

Focus of this Submission

This submission intends to focus upon the rights of persons with intellectual impairment (including people with intellectual disability and cognitive impairment) and mental health impairments as they relate to the criminal justice system. We are particularly focussed upon the accommodation of people with intellectual and mental health impairments in the criminal justice system, which includes formal police, courtroom and prison settings and also relevant community-based issues and programs.

We are committed to identifying and promoting ways in which people with intellectual and mental health impairments can be accommodated within the criminal justice system.

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[1] *Guardianship and Administration Act 2000* (Qld) s 209.

[2] Office of the Public Advocate, 'The Potential Population for Systems Advocacy' (Fact Sheet, Office of the Public Advocate (Queensland), February 2013).

We place great emphasis also on the importance of justice reinvestment and preventative strategies, because as William Blackstone said 'preventative justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice.'[3]

We are also firmly committed to advocating for the development of a **disability justice plan**, which will assist in:

- implementing the necessary accommodations and improving the outcomes that the criminal justice system delivers for people with disability or impaired capacity;
- providing a fairer and more responsive justice system for victims of crime as well as defendants; and
- reducing crime in our community.

Part A: The principles underlying this submission

Rights-based framework

This submission is informed by a rights-based framework. The failure to recognise the rights of people with disability has led to wide-spread discrimination. In the context of the criminal justice system it has led to the increased victimisation of people with disability, particularly women with disability; detention and incarceration of people with disability who have not committed crimes; and the failure to provide adequate support, including specialist clinical support services to people with disability to stop their offending behaviours.

In this context of a rights-based approach addressing discrimination against people with disability is not just about providing remedies when people with disability are discriminated against in some way but taking a positive approach and making accommodations so that people with disability can participate in society on the same basis as others.

In many instances, the primary issues faced by people with disability do not stem directly from their disability, but rather from the structural obstacles that have been created and are driven by society. In particular, these obstacles may include navigating various systems and accessing necessary supports and services.

For people with intellectual and mental health impairments, there are many obstacles within the Queensland criminal justice system. As the 2009 report, *Disabled Justice*, observed:

> '... it is the Queensland justice system that disables persons with impairments that interact with it... [their experiences] not the absolute result of impairment, but... of social institutional systems that have failed to accommodate impairment as an ordinary incident of human diversity'.[4]

3 W Blackstone, *Commentaries on the Laws of England* (1753)

4 Kevin Cocks AM, *Justice for All – or – Just for Some*, Speech presented at 2014 Criminal Justice Symposium: Intellectual Disability and the Criminal Justice System. citing Phillip French, *Disabled Justice: The Barriers to justice for Persons with Disability in Queensland* (Queensland Advocacy Incorporated, May 2007) Appendix.

Similarly, Former Federal Disability Discrimination Commissioner Graeme Innes told a Federal Parliament Joint Standing Committee on migration treatment of disability that:

> '... [in many cases] it is not the disability which is the cause of the problem, but rather the way that society has constructed itself'.[5]

The Convention on the Rights of Persons with Disabilities

Representing the first time that all international human rights Covenants had been brought together under one umbrella, the *Convention on the Rights of Persons with Disabilities* (the Convention) emphasises the obligation of the state to take a positive approach to rights – to protect people, rather than just refrain from discriminating against them.[6]

The Convention acknowledges that societal constructs are the primary issues faced by people with disability, and seeks to address this by requiring that 'in order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.[7] Reasonable accommodation is defined to mean:

> 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'[8]

The Convention recognises the rights of people with disability to equal recognition before the law. In particular, the Convention provides that people with disability should be recognised by State parties as 'enjoy(ing) legal capacity on an equal basis with others in all aspects of life',[9] and that State parties should take appropriate measures to enable persons with disability to access support that they may require to exercise their legal capacity.[10]

Further, the Convention recognises the importance of access to justice, stating that people with disability should be provided with 'effective access to justice... on an equal basis with others, including through the provision of procedural and age-appropriate accommodations'.[11] These accommodations must enable people to have an effective role as a direct or an indirect participant, including as a witness, in all legal proceedings including at investigative and preliminary stages.[12] In order to ensure that access is effective, those working within the administration of justice, including police and prison staff, must have appropriate training.[13]

The Convention also requires that State parties provide people with disability from exploitation, violence and abuse; which is experienced by people with disability at an alarmingly increased rate and which currently proceeds unaddressed by existing criminal justice or anti-discrimination measures.[14] The Convention requires that State parties:

> 'take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects'.[15]

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[5] House of Representatives Committee. Joint Standing Committee on Migration 'Dismantling the deficit model', 12 November 2009.
[6] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) art 5(3) ('*Convention on the Rights of Persons with Disabilities*') preamble.
[7] *Convention on the Rights of Persons with Disabilities*, art 5(3).
[8] *Convention on the Rights of Persons with Disabilities*, arts 1 -3 .
[9] *Convention on the Rights of Persons with Disabilities*, art 12(2).
[10] *Convention on the Rights of Persons with Disabilities*, art 12(3).
[11] *Convention on the Rights of Persons with Disabilities*, art 13(1).
[12] *Convention on the Rights of Persons with Disabilities*, art 13(1).
[13] *Convention on the Rights of Persons with Disabilities*, art 13(2).
[14] Kevin Cocks AM, *Justice for All – or – Just for Some*, Speech presented at 2014 Criminal Justice Symposium: Intellectual Disability and the Criminal Justice System ,9, 11-12
[15] *Convention on the Rights of Persons with Disabilities*, art 16(1).

Further, the Convention requires that States do so by providing 'gender-and-age-sensitive assistance and support... (on) how to avoid, recognise and report instances of exploitation and abuse',[16] and by ensuring effective and independent monitoring of facilities and programs for persons with disabilities.[17] Finally, State parties are required to 'put in place effective legislation and policies... to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted'.[18]

Reviewing these and other obligations under the Convention, it is evident that Queensland (and Australia more broadly) has not met all of the requirements of the Convention. A comparison of Queensland's criminal law with the obligations of the Convention is a sobering reminder of just how far we have to go to meet our obligations and ambitions. As a state, Queensland must strive to reflect Australia's commitment to the Convention into all aspects of the criminal justice system and therefore translate human rights for people with intellectual and mental health impairments into reality.

In order to achieve this translation, we must return to the notion of reasonable accommodation and call for Queensland to improve the justice system to accommodate people with intellectual and mental health impairments. In doing so, we must remember that often it is not a person's intellectual or mental health impairment that prevents them from accessing justice, but rather the social structures that surround them. By framing any adjustments or accommodations within this context, we cease asking for the law's benevolence and instead solicit genuine justice.

Part B: Queensland's Criminal Justice System

Overrepresentation in the criminal justice system

Individuals with intellectual and mental health impairments, are over-represented at all stages of the criminal justice system as both victims and defendants.[19] Yet it is important to note that the majority of people with a disability (including people with cognitive and/ or mental health impairments) do not offend.[20]

Defendants

Adults with intellectual and mental health impairments are vulnerable to experiencing other risk factors that may bring them into contact with the criminal justice system as a defendant. Many experience other disadvantages that increase their likelihood of contact with the criminal justice system[21] such as difficulties with education, abuse, family violence, disrupted family backgrounds, difficulty obtaining or maintaining employment and a lack of permanent accommodation.[22]

Research in other Australian jurisdictions demonstrates the overrepresentation of people with intellectual and mental health impairments amongst criminal defendants. Research conducted in New South Wales courts revealed that 24% of people appearing before a court had an intellectual disability,

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[16] *Convention on the Rights of Persons with Disabilities*, art 16(2).
[17] *Convention on the Rights of Persons with Disabilities*, art 16(3).
[18] *Convention on the Rights of Persons with Disabilities*, art 16(5).
[19] Tony Butler and Stephen Allnutt, 'Mental Illness Among New South Wales' Prisoners' (Report, New South Wales Corrections Health Service, August 2003); Jim Simpson, 'Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System' (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013) 6 citing E Baldry, L Dowse and M Clarence *People with Intellectual and Other Cognitive Disability in the Criminal Justice System* (2012) University of New South Wales <www.adhc.nsw.gov.au/about_us/research/completed_research>; Department of Corrective Services, '*Intellectual Disability Survey 2002*' (Report, Queensland Department of Corrective Services 2002, Unpublished) 17-18..
[20] New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion* (Report 135, June 2012) xv.
[21] Jim Simpson, 'Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System' (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013) 6.
[22] Jim Simpson, 'Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System' (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013)28-35. New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion* (Report 135, June 2012) xv.

and this figure rose to 43% for Aboriginal and Torres Strait Islander accused persons.[23] In 2012, research concluded that:

> 'having a cognitive impairment predisposes persons who also experience other disadvantageous social circumstances to a greater enmeshment with the CJS [criminal justice system] early in life and persons with cognitive impairment and other disability such as mental health and AOD [alcohol and other drug] disorders (complex needs) are significantly more likely to have earlier, ongoing and more intense police, juvenile justice, court and corrections episodes and events. The cognitive and complex needs groups in the study have experienced low rates of disability support as children, young people and adults with Indigenous members of the cohort having the lowest levels of service and support. It is evident that those who are afforded [disability services] support do better, with less involvement in the CJS after they become clients compared with those with cognitive disability who do not receive [disability] services.'[24]

Research undertaken by the Queensland Department of Corrective Services in 2002 identified that almost 10% of prisoners achieved a score of under 70 in a functional IQ test, which is indicative of an intellectual disability. A further 29% of prisoners achieved a score of 70-84, which placed them in the borderline intellectual disability range.[25] The research also showed that more than one in twenty prisoners had attended a special school as a child and that almost 32% of prisoners in Queensland had a mental illness. In comparison, only a small proportion of the general Queensland population have an intellectual disability (3%) or mental illness that results in a disability (6%).

Victims

Adults with intellectual and mental health impairments also experience a greater degree of contact with the criminal justice system as victims of crime. Many of the social and economic disadvantages relevant to having contact with the system as a defendant may also contribute to the risk of being a victim of crime.

Research has demonstrated that people with intellectual and mental health impairments are more likely to become a victim of crime than people who do not have a disability. Generally, people with intellectual disability are 'twice as likely to be the victim of a crime directed against them... and one and a half times more likely to suffer property crimes than non-disabled aged-matched cohorts.'[26] Furthermore, between 50 and 99% of people with intellectual or psychosocial impairment are subject to sexual assault at some point in their lifetime.[27]

Women with disability also experience high rates of abuse. Research has demonstrated that:

> 'women with disability, particularly intellectual disability, are subjected physical violence at higher rates, more frequently, for longer, by more perpetrators and in more ways than their able-bodied peers. Moreover, women with intellectual disability are less likely to report violence, to access support, to have their cases prosecuted, or to see any prosecution be successful'.[28]

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[23] Office of the Public Advocate (Victoria), Submission No 29 to Victorian Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and* Carers, 13 September 2011, 7.

[24] Simpson, 'Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System' (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013) 6 citing E Baldry, L Dowse and M Clarence *People with Intellectual and Other Cognitive Disability in the Criminal Justice System* (2012) University of New South Wales <www.adhc.nsw.gov.au/about_us/research/completed_research>.

[25] Department of Corrective Services 2002, *Intellectual Disability Survey 2002*, Queensland Department of Corrective Services, Unpublished.

[26] Office of the Public Advocate (Victoria), Submission No 29 to Victorian Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and* Carers, 13 September 2011, 7.

[27] Phillip French, *Disabled Justice: The Barriers to justice for Persons with Disability in Queensland* (Queensland Advocacy Incorporated, May 2007), 18; Office of the Public Advocate (Victoria), Submission No 29 to Victorian Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and* Carers, 13 September 2011, 7.

[28] Kevin Cocks AM, *Justice for All – or – Just for Some*, Speech presented at 2014 Criminal Justice Symposium: Intellectual Disability and the Criminal Justice System. citing Phillip French, *Disabled Justice: The Barriers to justice for Persons with Disability in Queensland* (Queensland Advocacy Incorporated, May 2007)10.

The recently released Interim Report of the Royal Commission into Institutional Responses to Child Sexual Abuse states that the Commission has found that children with disability appear to be more vulnerable to sexual abuse in institutional settings,[29] with girls with intellectual disability significantly more likely to be victims of abuse.[30]

A Disability Justice Plan for Queensland

Despite the fact that people with intellectual and mental health impairments are over-represented as defendants and victims of crime, they often experience difficulties accessing the criminal justice system, participating in the criminal justice process and securing an appropriate outcome. The system does make provisions designed to accommodate persons with intellectual and mental health impairments, but more is required to be done.

At all stages of the Queensland criminal justice system process from prevention, through to interactions with police, the court process and imprisonment there are opportunities to make reasonable accommodations for people with disability, including a more holistic approach to addressing offending behaviours so as to further prevent crime and improve the experience of victims of crime.

The suggested enhancements outlined below are just some of the priority actions that could be taken and that could form part of a **Disability Justice Plan** in Queensland.

Crime Prevention Strategies

Priority Actions

- Case management should be available to facilitate access to appropriate multi-disciplinary interventions and supports for individuals with intellectual or cognitive impairment identified at a high risk of coming into contact with the criminal justice system.
- Evidenced-based approaches to working with people with intellectual or cognitive impairments, such as positive behaviour support, should be adopted, including in working with young people with disability who may be at risk of offending.

Early intervention

To accommodate people with intellectual and mental health impairments, Queensland must address the risks that increase the likelihood of contact with the criminal justice system. A key means of addressing these risks is by increasing the availability of supports that may prevent or reduce contact with the justice system.

Intervention at this stage is particularly beneficial because no harm is done to the community if an offence is prevented and no cost is incurred by the state in policing, processing and incarcerating an offender. It is likely that the cost of intervention programs would be less than the total cost of the criminal justice process, from apprehension to incarceration. This approach may also reduce or prevent criminal socialisation and the cycle of recidivism.

While case management is an important part of the response once a person has been charged, sentenced and/ or diverted from the criminal justice system, early case management for people identified at a high risk of coming into contact with the criminal justice system could also be advantageous and may also address repeat offending.

[29] Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (Commonwealth of Australia, 2014) 49.
[30] Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (Commonwealth of Australia, 2014) 112.

Programs or intervention strategies should be targeted at addressing the disadvantages experienced by people with intellectual and mental health impairments and increasing opportunities for meaningful participation in the community, as well as addressing 'challenging' behaviours that may heighten the risk of contact with the criminal justice system. While, in many cases, the person themselves would not consider their behaviour to be challenging in that it provides a means by which to communicate their feelings and/or achieve a desired goal, family, service providers and the community may find such behaviours to be challenging in the sense that support often needs to be provided differently and/or differing levels of accommodation need to be made to address the causal factors underpinning the behaviour. They are also deemed challenging because, if the behaviours are not addressed, they can create system risks that may negatively impact upon the individual.

Measures that will assist people with intellectual and mental health impairments to be contributing members of society, and reduce the likelihood of them coming into contact with the criminal justice system include:

- Improved access to education and training;
- supporting and increasing the resilience of families;
- increasing the number and accessibility of youth diversion programmes such as Police Citizens Youth Centres; and
- increasing, enhancing and improving the targeting of employment services.

Where people with intellectual impairments exhibit challenging behaviours that pose a risk of harm to themselves or others, more specialised supports and interventions are required. People should have access to comprehensive assessments that seek to determine the underlying causes of 'challenging' behaviours. The outcomes of such assessment processes should inform the development of personalised plans that detail the way in which supports and environments should be tailored to meet the needs of the person and minimise or eliminate the need for the person to engage in behaviours that put themselves and others at risk. Known as positive behaviour support, this evidence-based approach has proven successful in reducing behaviours of harm exhibited by some people with disability. [31]

Adults with an intellectual or cognitive impairment, who are eligible to receive disability services from the Department of Communities, Child Safety and Disability Services may receive a positive behaviour support approach if they are exhibiting challenging behaviours and / or are subject to restrictive practices.[32] However, this is a minority of adults with intellectual or cognitive disability who may be at risk of contact with the criminal justice system.

Further, the Honourable W J Carter QC emphasised that positive behaviour support must start at infancy and is particularly important for young people, who have not yet reached the age of 18 years, as early intervention could prevent the adoption of challenging behaviours later in life.[33]

The provision of additional support may also assist in reducing the risk of people becoming victims of crime. A recent study has highlighted that many current approaches are reactive, with a general focus on responding to instances of abuse or neglect. There is a lesser focus on promoting personal safety strategies and proactive approaches to enable people with intellectual disability and/or impaired decision-making capacity to protect themselves from abuse, neglect and violence, including in their home. At a broader level, preventative health, community health and community service messages are often not tailored to or inclusive of the needs of people with intellectual and mental health impairments.[34]

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[31] Edward G Carr et al, 'Positive Behaviour Support: Evolution of an Applied Science' (2002) 4(1) *Journal of Positive Behaviour Support Interventions* 4, 4-5.
[32] *Disability Services Act 2006*, part 10A
[33] W J Carter QC, *Challenging Behaviour and Disability: A Targeted Response* (July 2006),85.
[34] Sally Robinson, 'Safe at Home? Factors Influencing the Safety Strategies Used by People with Intellectual Disability' (2013) *Scandinavian Journal of Disability Research* 1.

Strategies or programs to educate people about safety and ensure that service providers allow people to implement safety measures would not only increase the feeling of security for persons with disability and/or impaired decision-making capacity, but would also increase their actual security and potentially decrease levels of victimisation.

Interactions with Police

Priority Actions

- Further training and guidance in procedural manuals to address:
  - Identification of people with disability
  - Responding to suspected abuse, neglect and exploitation of people with disability that may constitute a criminal offence
  - Provision of support and advocacy for people with disability when they are subject to questioning and arrest
  - Appropriate questioning and interviewing techniques of people with disability.
- Disability Liaison Officers to drive systemic change and improvements, undertake training and liaise with relevant community and government services.
- Provision of trained independent support workers or advocates to attend at interviews and questioning of people with cognitive and intellectual impairments.
- Further options for pre-court diversion be explored including the expansion of existing police responses to people with mental health issues to include people with intellectual or cognitive impairments.

When a person is a victim, defendant or witness in a criminal matter, their initial interactions regarding that matter are generally with a police officer. This initial interaction can set the scene for the overall interaction with the criminal justice system. It is important that police are appropriately trained to identify and accommodate persons with intellectual and mental health impairments[35] and that people with intellectual and mental health impairments are provided with adequate legal and emotional support, to facilitate equal access to justice.

There are numerous ways in which this can be, and in some instances is being, achieved.

Current Police Policies and Guidelines

The Queensland Police Service (QPS) has developed a number of important initiatives including:

- *The Vulnerable Persons Policy:* The QPS has developed the 'Vulnerable Persons Policy applying to people who may be vulnerable within the criminal justice system including those with mental illness, intellectual disability and impaired capacity, noting the importance of an appropriate response that may include information and support, as well as emphasising the importance of procedural fairness. [36]
- *The Operations Procedure* Manual (OPM): This also makes some provision for persons with intellectual and mental health impairments. A person with a mental illness, intellectual disability or impaired capacity (amongst other conditions) is considered to be a person 'with a special need' and as such the OPM indicates that a range of actions may need to be taken to accommodate them such as arranging an interpreter, obtaining the assistance of an independent person and phrasing questions in an appropriate manner.[37]

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[35] *Convention on the Rights of Persons with Disabilities* art 13(2).
[36] Queensland Police Service, *Vulnerable Persons* Policy (30 July 2013) Queensland Police Service – Our Policies <http://www.police.qld.gov.au/Resources/Internet/rti/policies/documents/QPSVulnerablePersonsPolicy.pdf>.
[37] Queensland Police Service, *Operational Procedures Manual* (18 January 2013) Queensland Police Service Operational Procedures Manual (Public Copy) <http://archive.sclqld.org.au/qps-manuals/opm/current-issue/>6.3.3.

Police Training in Identifying and Engaging with Persons with Intellectual and mental health impairments

While there are some good initiatives, if police are not adequately trained to recognise, understand and interact with people with intellectual and mental health impairments, whether they are a victim, defendant or witness, this may have negative consequences for individuals and for the justice system.

Training and further guidance in procedural manuals in the following areas is of importance for police officers:[38]

- how to identify people with intellectual and mental health impairments, including indicators of these conditions. Many officers are unaware of potential indicators of intellectual and mental health impairments,[39] training and guidance may be of particular assistance in situations where intellectual and mental health impairments is not immediately apparent.[40]
- implementation and use of a simple screening test to determine whether a person may have an intellectual disability. For example, the Hayes Ability Screening Index (HASI) would take police only five minutes to administer and could point to the need for further assessment or advice.
- how best to engage with people who have a intellectual and mental health impairments. This could include hands-on training with a particular focus on communication or interviewing techniques.[41] If training is not provided, miscommunications or misunderstandings may occur. For example, a limited understanding of intellectual disability may mean that police officers incorrectly interpret certain behaviours as a sign of guilt,[42] or a person with intellectual disability may be considered an unreliable or untrustworthy witness and their evidence not regarded as credible.

Further options should be explored for police training, policies, and guidelines that are inclusive of appropriate and supportive responses for people with intellectual and mental health impairments. The absence of such supports may have serious consequences. For example, if a complaint is not taken or properly pursued then a person may be denied access to necessary supports or compensation, and data regarding crimes against persons with intellectual and mental health impairments will be impacted.[43] Further, a limited ability to indentify or understand intellectual and mental health impairments may mean that where a person is charged with an offence, police do not enable that person to access the assistance necessary for them to engage with the system, or that their behaviour is incorrectly interpreted as a sign of guilt.

Police could also be provided with access to a support service, such as a disability liaison officer, to assist in identifying and appropriately responding to the needs of people with intellectual and mental

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[38] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) 102.

[39] Lyn Douglas and Monica Cuskelly, 'A Focus Group Study of Police Officers' Recognition of Individuals with Intellectual Disability' (2012) 19(1) *Psychiatry, Psychology and Law* 35.

[40] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) 115, citing New South Wales Police Force, Code of practice for CRIME (custody, rights, investigation, management and evidence) (2011) NSW Police Force, 144-145.

[41] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) 125-126; Douglas and Cuskelly, A Focus Group Study of Police Officers' Recognition of Individuals with Intellectual Disability' (2012) 19(1) *Psychiatry, Psychology and Law* 35; BL Spivak and SDM Thomas, 'Police Contact with people with an Intellectual Disability: The Independent Third Person Perspective' (2013) 57(7) *Journal of Intellectual Disability Research* 635, 635.

[42] Office of the Public Advocate (Victoria), Submission No 29 to Victorian Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and* Carers, 13 September 2011, 25; Victorian law Reform Committee, , *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) 103-104; Lorana Bartels, *Police Interviews with Vulnerable Adult Suspects*, Australian Institute of Criminology Report No 21 (2011) 2.

[43] Office of the Public Advocate (Victoria), Submission No 29 to Victorian Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and* Carers, 13 September 2011, 26; Victorian law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) 104; Bartels, *Police Interviews with Vulnerable Adult Suspects*, Australian Institute of Criminology Report No 21 (2011) 2.

health impairments.

Questioning People with Intellectual Disability or Impaired Decision-Making Capacity

In Queensland when a person with disability or impaired capacity (amongst other conditions) is suspected of committing an offence, police must comply with certain policy, procedural and legislative requirements for questioning those persons.[44]

These requirements provide some important procedural safeguards. Notably, the *Police Powers and Responsibilities Act 2000* provides that an officer must not start to question a person with impaired capacity until they have, if practicable, allowed the person to speak to a support person privately and the support person is present whilst questioning takes place.[45]

The QPS OPM also provides that when a person with a 'special need' is to be interviewed, an independent person should be present to assist that person in overcoming the condition or circumstance that is creating the special need. This may include safeguarding the rights of a person who cannot effectively look after or manage their own interests. An independent person includes a support person,[46] but can be anyone nominated by the person with special need. Each station is required to maintain a list of people who are competent and willing to act as an independent person, including relevant service providers, agencies and support groups.[47]

These requirements are valuable, but they will provide limited protection if police officers are unable to identify that a person has an intellectual or mental health impairment. The relevant legislation and policies do not define the term 'impaired capacity' or provides guidance as to indicators or identifiers of impaired capacity (though it is acknowledged that these may be drawn from other sources, such as the vulnerable person's policy).[48] Additionally, these procedures only apply to indictable offences, which suggest that persons are not offered the same protections when they are suspected of having committed a summary offence.[49] This may be because fewer interviews occur in relation to summary offences, but it is nonetheless problematic because the potential for an unfair interview exists.

These requirements will also provide limited protection if a support person is not trained or skilled in dealing with the criminal justice system. An unskilled support person may unintentionally undermine a person's legal rights, for example by encouraging a person to talk to the police or to give their account of events.[50] The option to be supported by a skilled volunteer could mitigate against such issues and potentially result in a more favourable outcome for the person in question. This approach is taken in Victoria and NSW, where persons with intellectual disability are also offered the opportunity of being supported by a trained volunteer.[51]

The provision of trained support workers is a reasonable accommodation that all State parties must make to enable equality and access to justice for people with intellectual and mental health impairments.

Complaints by Third Parties and abuse, neglect and exploitation

Many people with intellectual impairments in particular may experience difficulty with communication. If those people were the victim of an offence, it is likely that they would be unable to make a complaint to the police. For example, the victim may lack the ability to communicate or be unable to adequately explain what occurred.

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[44] *Police Powers and Responsibilities Act* 2000 (Qld) s 422; OPM.
[45] *Police Powers and Responsibilities Act* 2000 (Qld) s 422.
[46] As defined in schedule 6 of the *Police Powers and Responsibilities Act 2000*.
[47] Queensland Police Service, *Operational Procedures Manual* (18 January 2013) Queensland Police Service Operational Procedures Manual (Public Copy) <http://archive.sclqld.org.au/qps-manuals/opm/current-issue/> 6.3.4.
[48] *Police Powers and Responsibilities Act* 2000 (Qld) s 422; Bartels, *Police Interviews with Vulnerable Adult Suspects*, Australian Institute of Criminology Report No 21 (2011), 2.
[49] *Police Powers and Responsibilities Act* 2000 (Qld) s 414.
[50] Phillip French, *Disabled Justice: The Barriers to justice for Persons with Disability in Queensland* (Queensland Advocacy Incorporated, May 2007)70.
[51] Victorian law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) , 138-139; French, , 'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland' (Report, Disability Studies and Research Institute, May 2007) 69.

In some instances, that offence may be witnessed by another person. Where this occurs, the witness' testimony must be able to operate as a complaint of criminal conduct against the victim. Further, it must be ensured that this complaint is then properly investigated and, if warranted, the alleged offender is prosecuted.

We have recently been informed of an incident in Queensland whereby a member of the public witnessed a physical assault committed against a person with disability. The member of the public took down specific details to assist in the identification of the perpetrator and, with these details on hand, approached police to make a complaint regarding the assault. However, she was unable to successfully file the complaint and was told by police that the victim was required to make the complaint. It should never be the case that a victim with disability or impaired decision-making capacity is required to personally make a complaint before an alleged offence against a person is investigated.

It should be noted that the QPS OPM states 'members receiving a complaint or report of a suspected offence where a person with impaired capacity is a victim are to ensure that such offence is investigated and where appropriate, prosecution action taken against the offender'.[52] Compliance with this requirement is essential not only by police but also by all persons making decisions regarding the prosecution or progress of a matter involving persons with disability and/or impaired decision-making capacity.

At the heart of this matter is often a lack of awareness about the vulnerability of people with disability to abuse, neglect and exploitation and the difficulties people with disability may have in making a complaint. Numerous studies have consistently shown that people with intellectual disability experience abuse and neglect at high rates and that there is often both poor recognition of abuse and neglect as well as little access to justice as victims.[53]

Alternatives for Police, including diversion

Pre-court diversion can be an appropriate response in some situations to people with intellectual or cognitive impairment. For example it can help ensure that people with disability are engaged with appropriate support services at an early stage to help prevent re-offending.[54]

In Queensland, where a person with an intellectual or mental health impairment has committed or is at risk of committing an offence, there are options available to police to prevent or decrease that risk or to avoid that person being charged with an offence. We support the availability and implementation of options such as these in order to accommodate people with intellectual and mental health impairments in the criminal justice system. Some of these alternatives include:

- *SupportLink:* This is a voluntary e-referral program that operates statewide and links to over 200 registered local, state and national support service agencies. Using the SupportLink e-referral program, police are able to refer people to services for a wide range of issues, including 'domestic violence, drug and alcohol abuse, crime prevention, elder abuse and neglect, victim support and counselling, road and other trauma support as well as suicide prevention and support following suicide'.[55] It is not necessary for a person to have committed an offence in order for a referral to be made.
- *Mental Health Intervention Project*: This is a divisionary programme that aims to prevent and safely resolve mental health crisis situations through enhanced co-operation, collaboration and understanding between the Queensland Police Service, Queensland Health and the Queensland

[52] Queensland Police Service, *Operational Procedures Manual* (18 January 2013) Queensland Police Service Operational Procedures Manual (Public Copy) <http://archive.sclqld.org.au/qps-manuals/opm/current-issue/> 6.3.12.
[53] Sally Robinson,*'Safe at home? Factors influencing the safety strategies used by people with intellectual disability'*, Scandinavian Journal of Disability Research (2013) DOI:10.1080/15017419.2013.781958, 2.
[54] K Bradley, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (UK Department of Health, 2009) 34.
[55] Queensland Police Service, *QPS Makes 50,000th SupportLink Referral* (24 January 2013) Queensland Police Service News <http://mypolice.qld.gov.au/blog/2013/01/24/qps-makes-50000th-supportlink-referral/>.

Ambulance Service.[56] Officers are trained to identify, provide support and intervene in situations that may otherwise result in mental health incidents.[57] The project focuses coordinating an inter-agency response to assist the person at the point of the initial crisis and to provide increased access to a range of relevant services.[58]

Initiatives such as *SupportLink* and the *Mental Health Intervention Project* could be further expanded to specifically include responses to people with intellectual impairments who are in crisis and who come into contact with the criminal justice system, as well as those who are already in contact with the criminal justice system. However, it requires appropriate service responses to be made available. In many cases, although police would like to provide a response such as this to people with intellectual disability, the services and supports are not readily accessible or available. For example, it is not appropriate to take a person with intellectual disability to a hospital or a mental health service, unless they are evidencing symptoms that would make it appropriate to do so.

In some situations, where the appropriate criteria are met, it may be possible for a police officer to caution a person with an intellectual and mental health impairment, instead of charging them with a criminal offence. A caution is generally 'given in exceptional circumstances where it is in the public interest' and for the purpose of 'deter(ring) minor criminal behaviour... and prevent(ing) the disproportionate use of prosecution resources for minor matters.'[59] Police may use the option to caution in relation to an adult who is 'intellectually disabled or infirm to the extent that there is no real risk of repetition of the offence.'[60]

However, this strategy must be accompanied by appropriate access to support and legal advice, particularly for people with impaired decision-making capacity, given the person must admit that the offence has occurred and consent to receiving a caution. Whenever possible, police should also refer a person who has been cautioned to SupportLink or other services for appropriate assistance.[61]

The Court Process

Priority Actions

- A statewide court liaison and referral service for people with intellectual impairments should be established to assist with identification, assessment, referral and case management.
- A systematic approach to identifying people with intellectual impairments in the criminal justice system inclusive of training and education of legal professionals.
- Greater guidance and training to all legal professionals on utilising current mechanisms (eg special witness provisions and flexibility in giving evidence available under the *Evidence Act 1977*) to better accommodate people with intellectual and mental health impairments in the criminal justice system.
- A system of accessing support people for people with intellectual and mental health impairments who need to engage in the court process, including interpreters and people to assist with communication if needed.

[56] Queensland Police Service, *Mental Health Intervention Project* (18 November 2011) Queensland Police Mental Health Intervention Project <http://www.police.qld.gov.au/programs/cscp/mentalHealth/>.
[57] Queensland Police Service, *Operational Procedures Manual* (18 January 2013) Queensland Police Service Operational Procedures Manual (Public Copy) <http://archive.sclqld.org.au/qps-manuals/opm/current-issue/>, 6.6.20.
[58] Queensland Police Service, *Mental Health Intervention Project* (18 November 2011) Queensland Police Mental Health Intervention Project <http://www.police.qld.gov.au/programs/cscp/mentalHealth/>.
[59] Queensland Police Service, *Operational Procedures Manual* (18 January 2013) Queensland Police Service Operational Procedures Manual (Public Copy) <http://archive.sclqld.org.au/qps-manuals/opm/current-issue/>, 6.5.1.
[60] Queensland Police Service, *Operational Procedures Manual* (18 January 2013) Queensland Police Service Operational Procedures Manual (Public Copy) <http://archive.sclqld.org.au/qps-manuals/opm/current-issue/>, 6.5.1.
[61] Queensland Police Service, *Operational Procedures Manual* (18 January 2013) Queensland Police Service Operational Procedures Manual (Public Copy) <http://archive.sclqld.org.au/qps-manuals/opm/current-issue/>, 6.5.1.

Court Diversions

For many people with intellectual and mental health impairments, in order to best accommodate the person within the criminal justice system there must be the ability to divert the person away from traditional responses and toward alternative and therapeutic approaches aimed at addressing the underlying causes that led to the offending behaviour. We are particularly interested in this strategy because the over-representation of people with intellectual disability or mental illness in the criminal justice system suggests that traditional responses may not be as effective with this offender group.

Specialist mental health courts and diversion programs have proven to be effective alternatives to traditional criminal justice processes.[62] In order to accommodate persons with intellectual and mental health impairments in the criminal justice system, these options must be utilised and expanded.

The Mental Health Court

The Queensland Mental Health Court is a specialist court that diverts people who have committed an indictable offence away from the criminal justice system if it is determined that the person was of unsound mind at the time of the offence or is unfit for trial.

The *Mental Health Act 2000* is currently being reviewed by the Queensland government. The Office of the Public Advocate has provided a submission to stage 1 of this review, and a submission to stage 2 is forthcoming. Reform of the Mental Health Court and the *Mental Health Act 2000*, particularly as they relate to people with intellectual and mental health impairments, is considered in detail in those submissions.

The Magistrates Court

At present, the Queensland Magistrates Court does not offer a diversionary option equivalent to the Mental Health Court for people who have committed a summary offence and were of unsound mind or are unfit for trial.

Currently there are no procedures for the Magistrates Court to determine fitness for trial or unsoundness of mind. While the common law would apply and the Magistrates Court could hear evidence and determine if the defendant is fit to plead or to stand trial in relation to charges for simple offences, there are no statutory provisions setting out the procedure in the Magistrates Court to follow.

Further, even if the Magistrates Court found that the person was of unsound mind and acquitted the defendant, there are no statutory provisions that enable the Magistrates Court to order treatment or care or other interventions for the defendant to prevent further offending.

There is also no power for the Magistrates Court to refer the question of the defendant's mental condition to the Mental Health Court, either for simple offences or indictable offences dealt with summarily.

These issues were highlighted by the Court of Appeal in the case of **R v AAM; ex parte A-G (Qld) [2010] QCA 305.**

In this case the appellant had been convicted of many simple offences, fifteen of which were the subject of the hearing. Subsequent to her conviction, the Mental Health Court had found that the appellant was permanently unfit for trial by reason of her intellectual disability. The Court of Appeal found that the appellant was also unfit to plead to all of the offences subject to the appeal that she had pleaded guilty to in the Magistrates Court. The Court of Appeal set aside the convictions on the basis that it would be a miscarriage of justice to allow these findings of guilt to stand.

[62] Australian Institute of Criminology, *Court-Based Mental Health Diversion Programmes*, Australian Institute of Criminology Tip Sheet No 20 (2011) 1-2.

The Court of Appeal noted at [9]:

> 'It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The Magistrates Court has attempted to meet this problem through its Special Circumstances Court Diversion Program which apparently presently operates only in the Brisbane area. This program assists categories of vulnerable people including those with impaired decision-making capacity because of mental illness, intellectual disability, cognitive impairment, or brain and neurological disorders. This commendable initiative, which allows for suitable compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases, may well be effective in assisting these vulnerable people. But it does not and cannot provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system.'[63]

The review of the *Mental Health Act 2000* (Qld) is currently underway and as part of that review a number of legislative changes have been proposed which would affect the Magistrates Court jurisdiction. These include:

- Where issues of unsoundness or unfitness are raised due to the reasonable belief that a person has a mental illness, Magistrates will have the power to make a non-revokable involuntary treatment order for a maximum period of:
    - six months for a summary offence; and
    - one year for an indictable offence.
- Where a Magistrate is satisfied that a person is likely to be, or appears, unfit for trial or of unsound mind due to an intellectual disability, the magistrate:
    - must discharge the person unconditionally; and
    - may refer the person to the Department of Communities, Child Safety and Disability Services (DCCSDS), to consider whether appropriate care can be provided to the person.

These proposed legislative changes will be considered as part of the review the *Mental Health Act 2000*, and both the Public Advocate and the Anti-Discrimination Commission Queensland will make submissions to that review.

Yet, what is not considered as part of that review are the systems changes and supporting services that would be needed to support these legislative changes. Consistent findings of reviews and inquiries in other jurisdictions have found that without effective mechanisms to identify offenders with disability as well as case management to support diversion and available services to divert people to, legislative provisions will be of limited effectiveness in preventing re-offending. Without such services, the legislative changes proposed in the review of the *Mental Health Act 2000* could continue to see people 'falling between the cracks' with serious impacts both for their own rehabilitation and community safety.

While there are currently mental health court liaison staff, no such service exists for offenders with intellectual and cognitive impairments that would assist in identification, assessment, referral and case management.

[63] ***R v AAM; ex parte A-G* (Qld) [2010] QCA 305 [9].**

We would recommend that the proposed reforms to the *Mental Health Act 2000* be accompanied by a statewide court liaison service for people with intellectual and cognitive impairment, or alternatively expand the current mental health court liaison service to also encompass people with intellectual and cognitive impairments.

Giving Evidence

The court process is very formal and can be a very intimidating environment for many people. People with disability may face additional barriers including misconceptions about the credibility of their evidence and a lack of support to provide evidence.

Yet many of these barriers to people with disability participating in the process could be removed if proper accommodations are made particularly in relation to modifying the way evidence is provided and the provision of support. While there are some existing mechanisms to provide for flexibility in giving evidence these are reliant on a number of factors including the identification of people with disability to begin with, an understanding of the mechanisms available and how and when they should be used.

The Evidence Act 1977

In Queensland, the giving of evidence by witnesses is governed by the *Evidence Act 1977*. That Act provides that every person is presumed to be competent to give evidence and competent to give evidence on oath,[64] but if a doubt is raised then the court will make a determination about a person's competency. A person will be deemed competent to give evidence if they are 'able to give an intelligible account of events which he or she has observed or experienced.'[65] A person will be competent to give evidence on oath if they understand that 'the giving of evidence is a serious matter and in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.'[66] If a person is competent to give evidence, but not to give evidence on oath, then the court must explain to the person the duty of telling the truth.[67]

Therefore, it does not automatically follow that if a person has impaired capacity, intellectual disability or mental illness they will be incapable of giving evidence; nor would they necessarily be considered incompetent to give evidence under the *Evidence Act 1977*. However, they may have difficulties in demonstrating their competency due to the inherent nature of the legal process. For example, persons with disability may be intimidated or confused by cross-examination, may perceive the defence lawyer as an authority figure and give answers they think will please that person, may become confused by court processes, may not understand the language or terminology used in court and may become tired and confused without frequent breaks.[68] These issues may be used or exacerbated by defence lawyers to discredit the person as a competent and credible witness.[69]

The *Evidence Act 1977* provides special procedures that may be used when taking evidence from a person with intellectual and mental health impairments, which may assist to overcome any issues raised about that person's competency or credibility.[70]

Evidence-in-Chief

When a person has an 'impairment of the mind',[71] which arguably includes many people with intellectual and mental health impairments, a police officer taking their evidence at first contact may

[64] *Evidence Act 1977* (Qld) s 9.
[65] *Evidence Act 1977* (Qld) s 9A(2).
[66] *Evidence Act 1977* (Qld) s 9B(2).
[67] *Evidence Act 1977* (Qld) s 9B(3).
[68] Equal Treatment Benchbook, p 151-152.
[69] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) , 271-272.
[70] *Evidence Act 1977* (Qld) s 93A.
[71] *Evidence Act* 1977 (Qld) sch 1; '*person with an impairment of the mind* means a person with a disability that—
(a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
(b) results in—
(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and
(ii) the person needing support.

interview the person and record their evidence on video, as opposed to taking a written statement.[72] This may assist in overcoming any difficulties that a person with impairment has in making a written statement, illustrate more clearly the person's understanding and non-verbal responses and, particularly if the person has difficulty with later recall, allows their evidence to be preserved.[73]

The recording of their evidence may later be admitted and used in trial as the person's evidence-in-chief. However, it is still a requirement that the person be called as a witness at trial and be subject to cross-examination.[74]

If a recording is not made, the ability to declare a person is a special witness (discussed immediately below) may also apply to the giving of evidence-in-chief.

Cross-Examination and Re-Examination

A person with an intellectual or mental health impairment could be declared by the court to be a special witness,[75] and some of the following special provisions may apply for that person's evidence:

- that the defendant or another party be excluded from the room or obscured from the view of the witness provided that there is some provision, by electronic device or otherwise, for the defendant to see and hear the witness whilst they are giving evidence;
- that, during the witness' evidence, everyone except those specified by the court be excluded from the courtroom;
- that the witness give evidence in a separate room and with others excluded;
- that the witness have a person with them to provide emotional support;
- that the witness' evidence be video-taped and that the recording be viewed at trial instead of the witness testifying directly (and at any subsequent re-trial, hearing or related matter);
- anything else the court considers appropriate such as:
    - rest breaks;
    - directions that questions are kept simple;
    - limitation as to the length of time for questioning; and
    - limitation as to the number of questions that can be asked about a particular issue.[76]

It should be noted that, although the term used is 'special witness', a defendant in a criminal proceeding can also be classed as a special witness and given special provisions if required.[77]

Improper Questions

Legal representatives are not permitted to ask improper questions. A question is improper if it uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive. In deciding if a question is improper, one of the matters that the court will consider is any mental, intellectual or physical impairment the witness has or appears to have or any other relevant matters, such as level of understanding.[78] This provision also protects people with intellectual and mental health impairments who are required to give evidence in court.

The combined effect of the above provisions is that in many instances a person with an intellectual or mental health impairment will not need to enter a courtroom or attend a trial. While the person will

[72] *Evidence Act 1977* (Qld); Equal Treatment Benchbook, p 153-154.
[73] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) , 273-274.
[74] *Evidence Act 1977* (Qld) s 93A.
[75] *Evidence Act 1977* (Qld) s 21A. *Special witness* includes a person who, in the court's opinion would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court. A *relevant matter* includes a person's level of understanding.
[76] *Evidence Act 1977* (Qld) s 21A.
[77] *Evidence Act 1977* (Qld) s 21A(1B).
[78] *Evidence Act 1977* (Qld) s 21; Equal Treatment Benchbook, p 154.

still be subject to cross-examination, they can nonetheless be well accommodated as witnesses. The person can be supported throughout and the legal process can be adapted to better accommodate needs specific to their intellectual or mental health impairment. With proper implementation, these provisions should have the result that witnesses experience lower levels of stress or confusion, their evidence can be preserved at an early opportunity, and they can have the opportunity to demonstrate their competence and credibility in a more suitable environment than the traditional courtroom.

To enable these existing provisions to be effective, there should also be a system of accessing support people for people with disability who need to engage in the court process, including interpreters and people to assist with communication if needed.

Weight of Evidence

The foregoing has demonstrated that, given appropriate support, many persons with intellectual and mental health impairments are able to give evidence in criminal proceedings, both as witnesses and as defendants, and that there are means by which the justice system can and does accommodate them to do so. The question then becomes one of the weight to be ascribed to the person's evidence. This is a question that must be considered in relation to the evidence of every person who gives evidence in a criminal proceeding, whether or not they have an intellectual or mental health impairment.

The criminal justice system must always ensure that provisions are made for people with intellectual and mental health impairments to give evidence in court proceedings. The system must also ensure that people with intellectual and mental health impairments are identified, and that these provisions are utilised for their benefit and in the way that will best accommodate them within the criminal justice system. If a person is properly accommodated within the justice system and is able to give their evidence to the best of their ability, then their evidence can and should be considered in the same way as the evidence of all other witnesses.

Further Accommodations within the Court Process

While these existing provisions, if applied appropriately, will assist to accommodate people with intellectual and mental health impairments in the criminal justice system, there is still more that can be achieved. Some areas in which further accommodations should be made are discussed below.

Identification of People with Intellectual impairment in the Lower Courts

At present in Queensland, there is no systematic approach to identifying people with intellectual impairments who appear in the Magistrates Court; although mental health liaison officers do assist to identify people who may be subject to an order under the *Mental Health Act 2000*. It would be preferable for identification of intellectual impairments to occur at the time of initial police contact, but in absence of this, the system should strive for identification at the time of first appearance.

It is not necessary that people undergo comprehensive assessments, which can be expensive and time consuming, but rather that relatively simple screening processes are utilised to identify people who may have intellectual disability and/or impaired decision-making capacity.

Once people are identified, there should be appropriate coordination of referrals to appropriate support services and a mechanism to bring this to the attention of the appropriate personnel, including their lawyers. Early identification can assist with appropriate responses, including referral to appropriate supports and diversions, and may assist in having a matter efficiently processed through the criminal justice system.

Legal Personnel

It is also important that lawyers be appropriately trained to identify and properly accommodate persons with disability and/or impaired decision-making capacity.[79] For example Legal Aid Queensland, which assists many persons with intellectual disability who are charged with an offence, makes effort to identify those people who have a disability. The 'Application for Legal Aid' form asks

[79] *Convention on the Rights of Persons with Disabilities* art 13(2).

whether a person has a disability, and the Duty Lawyer Handbook provides guidelines to assist in identifying persons who may have mental illness, intellectual disability or cognitive impairment.

We recommend that the types of strategies employed by Legal Aid Queensland to identify intellectual impairments be required to be used by all Queensland lawyers. These requirements should be augmented by training, to ensure that all lawyers are able to identify indicia of disability or impaired capacity and respond appropriately to those indicia.

The Supreme Court of Queensland's Equal Treatment Benchbook refers to recommendations that, when taking evidence from a person with intellectual impairments, the following matters should be considered:

- speak slowly, using simple words and regular pauses;
- avoid yes/no questions or questions that suggest the answer;
- do not repeat questions as this may encourage the person to change their answer (but the same question may be asked again later to check consistency);
- clearly delineate topics and avoid abstract questions;
- do not make assumptions about timing or lifestyles;
- allow the witness to tell his or her own story;
- formulate questions in a way the witness can understand (this may necessitate developing an understanding of particular disabilities or impairments; and
- always treat witnesses with respect.[80]

We recommend that the Equal Treatment Benchbook, and particularly the recommendations regarding the taking of evidence, be more broadly circulated to practitioners. Further, legal personnel should be required to undertake training on the implementation of such recommendations in practice.

Communication and Interpreters

Many people with intellectual impairments communicate through means other than speech; such as by writing, typing, using symbols or pointing to words on a communication board. Further, there may be situations where a person with intellectual impairment can speak but is only properly understood by those with whom he or she is in close contact, or can only understand things said by others if they are carefully explained by a person with whom they can communicate effectively.

In the United Kingdom, where such situations arise, a 'witness intermediary' may be used.[81] In that instance:

> 'the function of an intermediary is to assist intellectually disabled and other 'vulnerable' witnesses to communicate by explaining the questions being asked of them and in turn explaining to the court the answers given by the witness. An intermediary effectively acts as a 'go-between' to facilitate communication between the witness and the court.'[82]

A witness intermediary can also be used before trial to improve the person's understanding of court processes and consequently enhance their ability to be involved in court proceedings and to appear as a witness.[83] Witness intermediaries must be trained, accredited, assessed and registered, and often come from professional backgrounds.[84]

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[80] Equal Treatment Benchbook, p 154.
[81] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) , 283.
[82] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) , 283.
[83] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) , 283.
[84] Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) , 283.

We believe that there is benefit to further investigation of such an approach in Queensland. Just as the criminal justice system makes accommodations to enable communication with people who speak a language other than English, people with intellectual impairments should be similarly accommodated.

Some provision has been made for an interpreter or witness intermediary in some Australian states. In criminal proceedings in New South Wales, a witness who has difficulty communicating is entitled to use a person or a communication aid to assist the witness with giving evidence, if the witness ordinarily receives that assistance or uses that aid on a daily basis.[85]

In New South Wales, a vulnerable person,[86] which could include a person with an intellectual or mental health impairment, who is giving evidence in court may be permitted to have a support person (for example, a friend, relative or another chosen person) present if it would enable the facts of the case to be better ascertained.[87] The support person

> 'may be with the vulnerable person as an interpreter, for the purpose of assisting the vulnerable person with any difficulty in giving evidence associated with an impairment or a disability, or for the purpose of providing the vulnerable person with other support.'[88]

In Western Australia a person who is a special witness,[89] which could include a person with intellectual or mental health impairment, may have a communicator appointed.[90] The communicator will, if requested by the Judge, communicate and explain to the person questions that were put to the person, and explain to the court the evidence that was given by the person.[91] Concerns have been raised that New South Wales and Western Australia do not utilise these provisions fully.[92]

In Queensland, legislation does not make specific reference to alternate communication methods but does not restrict the means by which a person could give evidence. This suggests that a person could (and should be permitted to) give evidence using an alternative means of communication. Further, it is arguable that if the person was declared a special witness, then the court could make an order that the person give their evidence in the preferred style of communication.[93]

In a criminal proceeding in Queensland, 'a court may order the State to provide an interpreter for a complainant, defendant or witness, if the court is satisfied that the interests of justice so require.'[94] An argument could reasonably be made that the legislation regarding the provision of an interpreter and the making of suitable arrangements for special witnesses are broad enough to permit an interpreter to be used for a person with an intellectual impairment.[95] To our knowledge, the provisions have not been used to this effect.

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[85] *Criminal Procedure Act 1986* (NSW) s 275B.

[86] *Criminal Procedure Act 1986* (NSW) s 306M. A **'vulnerable person'** means a child or a cognitively impaired person. A **'cognitive impairment'** includes any of the following:

(a) an intellectual disability,
(b) a developmental disorder (including an autistic spectrum disorder),
(c) a neurological disorder,
(d) dementia,
(e) a severe mental illness,
(f) a brain injury.

[87] *Criminal Procedure Act 1986* (NSW) s 306P(2).

[88] *Criminal Procedure Act 1986* (NSW) s 306ZK(3).

[89] *Evidence Act 1906* (WA) s 106R(3). A person is declared a special witness if, in the courts opinion, if the person was not treated as a special witness he or she would:

(a) by reason of physical disability or mental impairment, be unlikely to be able to give evidence, or to give evidence satisfactorily; or
(b) be likely —
(i) to suffer severe emotional trauma; or
(ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily,

by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.

[90] *Evidence Act 1906* (WA) s 106R(4)(b).

[91] *Evidence Act 1906* (WA) s 106F.

[92] Terese Henning, 'Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments – 'Plus Ca Change' or Prospects News?' (2013) 37 Criminal law Journal 155, 165.

[93] *Evidence Act 1977* (Qld) s 21A(f).

[94] *Evidence Act 1977* (Qld) s 131A.

[95] Henning, 'Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments – 'Plus Ca Change' or Prospects News?' (2013) 37 Criminal law Journal 155, 166-167.

Approaches utilised in the United Kingdom and those Australian jurisdictions that are indicative of good practice should be further investigated to inform a similar approach in Queensland. Although there is an argument that an alternative means of communication or an interpreter may be used by a person with an intellectual impairment in Queensland, this is not clearly stated in legislation, meaning that reform is necessary

However, in order to reduce the potential risks of an interpreter drawing any inferences during translation or attempting to exert any influence over the witness and to enable greater validation of interpretations, we would recommend that only independent third parties fulfil this role. The use of independent persons would allow for people with intellectual impairments to be accommodated whilst giving their evidence, but still allow the justice system to operate and to be seen to operate on an unbiased and independent basis.

Imprisonment and Post Release

Priority Actions

- Undertake a review of the trial of the Intellectual and Cognitive Impairment Screen (ICIS) tool undertaken in correctional centres in Queensland in order to inform the implementation of an appropriate screening test to be implemented in all correctional centres.
- Offenders with intellectual impairment should have equal access to appropriate programs for rehabilitation and specialist clinical services.
- Specialist disability support services should be available to offenders with intellectual impairments in correctional facilities.
- Transition from prison services for people with intellectual and mental health impairments must be strengthened.
- Appropriate support post-release must be provided to continue to link people with intellectual and mental health impairments to appropriate supports and to continue to build their capacity for living in the community including all aspects of daily living skills.

Imprisonment

Entry into Prison

When a person with disability (particularly intellectual disability) or impairment is imprisoned, it is very important that the intellectual impairment is identified and made known to staff at the correctional centre. If additional measures enabling police and lawyers to identify intellectual impairments are put into place, it is to be hoped that any identification would have occurred prior to the person's entry into prison. However, whether or not additional measures for police and lawyers are implemented, it must be ensured that corrective services staff are also adequately trained in recognising and communicating with people with intellectual impairments.[96] This will further ensure that the intellectual impairment does not go unrecognised and that people are treated appropriately.

The routine application of screening tests may be appropriate. For example, Queensland Corrective Services trialled the Intellectual and Cognitive Impairment Screen (ICIS) tool in two correctional centres. It is proposed that this screening tool would be administered to all prisoners at the time of

[96] *Convention on the Rights of Persons with Disabilities*, art 13(2).

admission to a correctional centre, with Queensland-wide implementation anticipated in 2013-14.[97] We recommend that this trial is reviewed and that an appropriate screening test be implemented in all correctional centres.

It is likely that people with intellectual impairments will require additional supports when they initially enter prison. For example, they may have difficulty grasping the procedures or the rules that are to be observed within the prison, and if they cannot understand the rules and procedures then they cannot reasonably follow them. If a person skilled in communicating with people with intellectual disability were available to explain the rules initially and to reinforce explanations later as required, this would arguably improve a person's understanding of the rules and avoid or reduce any unintentional breaches.

Programs in Prison

In the same way as any prisoner without an intellectual impairment, prisoners with intellectual impairments must be provided with adequate access to programs whilst in custody. Without equal access to appropriate programs, people with impairments may be unfairly impacted upon in relation to rehabilitation and access to parole.

Several instances have been reported where people with intellectual impairments have been unable to access programs. For example, a male with an IQ of 70 who had been convicted of a sex offence and imprisoned was ineligible to participate in a sexual offender treatment program, because corrective services only allowed those with an IQ above 85 to complete the course. However, a sex offender who has not completed such a program may be viewed less favourably by the parole board and therefore not placed onto parole. As a result, a discrimination case was made and a program suitable for a person with intellectual disability and tailored to this man's circumstances was created. Whilst positive, the creation of this individualised treatment program did not take into account the many other persons with intellectual disability who would also benefit from access to this and other programs.[98]

A study conducted by the Queensland Department of Corrective Services in 2002 stated:

> 'The government has an expectation of the Department that offenders with disabilities will gain equitable access to programs and services. It is highlighted that two thirds of persons who had an IQ of greater than or equal to 70 indicated that they gained nothing from attendance at core programs. Fourteen percent of prisoners scoring between 71-100, who had attended programs, also indicated that they felt that they gained nothing from such attendance. Anecdotal information from prisoners indicated that current level of programs may be too difficult for some persons to understand, particularly in relation to the understanding of the meaning of words, literacy levels required and higher level concepts.'[99]

To provide equitable access to justice for persons with intellectual impairments in the criminal justice system, it is necessary to provide programs that are appropriate and accessible to this cohort.

There appear to have been advances in the programs offered to persons with intellectual disability. Literacy, education and vocational programs suitable for persons with disability are now provided in Queensland correctional centres[100] and steps have been taken by other jurisdictions to provide persons with disability with access to programs, most notably sexual offender treatment programs. In Victoria, NSW and Western Australia, correctional centres offer sexual offender treatment programs

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[97] Simpson, 'Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System' (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013) 50; Queensland Corrections, *Assessing for Cognitive Impairment in Queensland Corrective Services* (31 May 2013) <https://qldcorrections.wordpress.com/tag/cognitive-impairment/>.

[98] Phillip French, 'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland' (Queensland Advocacy Incorporated, May 2007) 132-133.

[99] Department of Corrective Services' *Intellectual Disability Survey 2002*' (Report, Queensland Department of Corrective Services 2002), 18.

[100] Department of Community Safety, 'Department of Community Safety Annual Report 2011-12) (Annual Report 2011-2012, Department of Community Safety, 10 September 2012) 38.

that have been written specifically for persons with intellectual disability.[101] Similarly, in South Australia the Sexual Behaviours Clinic-Me pilot program has been developed. This program recognises that persons with intellectual disability have difficulty with concepts and learning methods used in standard sexual offender treatment programs and has adapted the standard program accordingly. The success of this program is currently under review.[102] We recommend that the Queensland government review these initiatives and consider the introduction of additional programs targeted toward people with intellectual impairments.

It may be that more targeted and suitable programs could be offered to people with intellectual impairments if they were grouped together in certain units or correctional centres. This approach may enable targeted programs to be offered to more prisoners, encourage a focus on the needs of persons with intellectual impairments and facilitate further improvement or expansion of those programs. It would also have the benefit of avoiding or minimising any negative influence on persons with intellectual impairments by other offenders or by the correctional system as a whole.[103] For example, a dedicated accommodation unit has been established at Woodford Correctional Centre, which focuses on the management and 'throughcare' planning for offenders impacted by impaired cognitive function .[104] Of course, any grouping together of persons must be done in a way that complies with the Convention and does not negatively impact upon the rights of those persons.

Release from Prison

When a person is to be released from prison, support should be provided to facilitate their release and re-entry to society. This is a form of support that should be offered to all people, but may be particularly useful for people with intellectual and mental health impairments. Preferably, support should begin when a person enters prison, continue throughout their time in prison and assist with their transition from prison. To be most successful, this should involve an integrated and coordinated response from government, non-government and community.[105]

Research has indicated that prisoners with intellectual disability experience particular difficulties in participating in programs for rehabilitation, applying for and being granted parole, organising suitable accommodation prior to their release, developing daily living and social skills, developing employment skills and securing ongoing employment. It is often the case that people are denied funding from Disability Services once they enter a correctional centre, and they may have difficulty in re-applying for or obtaining funding after their release.[106]

Considering these difficulties, two things are apparent. First, prisoners with intellectual and mental health impairments being released from a correctional centre require support, and this support must be in the form of a coordinated response that takes into account people's needs across all areas of life.

Queensland Corrective Services offered a program entitled 'Bridging the Gap: Throughcare Support for Prisoners with Impaired Cognitive Functioning', which supported a number of prisoners with intellectual disabilities for six months prior to release and nine months following release.[107] The program provided case management support while people transitioned back into community. The support offered included improvement of basic living skills and the use of non-government organisations to assist with access to housing and employment opportunities. The aim of the program

[101] Jim Simpson, 'Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System' (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013) 47; Jackie Tang, 'Offenders with Special Needs (Intellectual Impairment)' Paper presented at the Pacific Regional Heads of Prisons Meeting, 2005) 3.
[102] Jim Simpson, 'Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System' (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013) 55.
[103] Phillip French, 'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland' (Queensland d Advocacy Incorporated, May 2007) 101.
[104] Department of Community Safety, 'Disability Service Plan 2010 – 2011' (Service Plan, Department of Community Safety, 2010) 12.
[105] Kathy Ellem, 'Experiences of Leaving Prison for People with Intellectual Disability' (2012) 3(3) *Journal of Learning Disabilities and Offending Behaviour* 127, 127.
[106] Kathy Ellem, Experiences of Leaving Prison for People with Intellectual Disability' (2012) 3(3) *Journal of Learning Disabilities and Offending Behaviour* 127, 132.
[107] Kathy Ellem, Experiences of Leaving Prison for People with Intellectual Disability' (2012) 3(3) *Journal of Learning Disabilities and Offending Behaviour* 127, 128.

was to successfully reintegrate persons into the community and therefore reduce the risk of reoffending.[108] The Bridging the Gap program concluded in June 2012, but Queensland Corrective Services continued to contract with a specialist disability non-government organisation to deliver post-release support to prisoners with impaired cognitive functioning using alternative project funding.[109]

Presently, people with intellectual impairments can access support to plan for their release through the programs and services offered under the Reintegration Support Model, delivered by the Transitional Support Service. Further, where prisoners with intellectual impairments present with complex reintegration needs (which is arguably often the case) they may qualify for access to the Transitions Program, which provides a more intensive service. They may also be considered for referral to the Offender Reintegration Support Service for up to six months post-release support.

We are of the opinion that programs targeted at persons with disability and/or impaired decision-making capacity and transition programs such as Bridging the Gap are a reasonable accommodation that can be made by the Queensland government to assist in reducing the rate of re-offending and in successfully reintegrating people with intellectual impairments back into the community. To maximise the chances of long-term success, these programs should provide a coordinated response and ensure that adults are linked to ongoing support and assistance before their participation is ended.

The use of diversionary systems and the provision of support when exiting prison are particular aspects of the criminal justice system that must be linked to the National Disability Insurance Scheme (NDIS). In order to ensure that people with intellectual and mental health impairments receive adequate services and are properly supported upon their release from prison, there must be provision made for NDIS supports to be put into place before or simultaneously with a person's release. These supports must be individualised and take into account any post-prison needs, such as ongoing rehabilitation courses or risk-factors that need to be addressed. If a person is released without proper support, there is a greatly increased chance of re-offending. Similarly, where a person is placed into a diversionary program, there must be provision for the NDIS to take into account the person's present and future needs, in light of the diversionary program, and tailor the support provided to that person as necessary.

Post-Release

Post-release strategies may be the least effective approach to reducing offences committed by persons with intellectual and mental health impairments. While these strategies are focused on discouraging recidivism, reducing community corrections costs and rehabilitating offenders, such strategies have minimal funding available and the target group have also had significant exposure to the criminal justice system. However, there does exist significant opportunity to provide supports aimed at linking these people with community services to address the risks that originally led to their contact with the criminal justice system. These include access to stable accommodation, vocational training and employment services.

Although these services may be the least effective, they should not be ignored. In particular, programs within correctional centres that aim to link adults with support services should be continued following an adult's release and should not end until ongoing supportive links have been established. Further, these services should focus not only on rehabilitation, but also on daily life skills that are necessary for a person to live within the community. This will enable a person's accommodation within the wider community.

[108] Department of Community Safety, 'Corrections NEWS: October 2009 (Newsletter, Queensland Corrective Services, October 2009) 7; Department of Communities, 'Annual Progress report 2010' (Annual Report 2010, Department of Communities, 2011) 9.
[109] Jim Simpson, Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System' (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013) 50.

Part C: Responding to these issues

Justice Reinvestment

Both the Office of the Public Advocate and the Anti-Discrimination Commission Queensland consider justice reinvestment to be an important strategy to prevent and reduce criminal activity in Queensland. This issue has been discussed extensively by the recent Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the value of a justice reinvestment approach to criminal justice in Australia.

Applying a justice reinvestment methodology, many opportunities will be found to shift expenditure away from the resource intensive and expensive involvement of courts and correctional facilities in responding to people with intellectual and mental health impairments, if there are appropriate legislative, policy and program responses in place to address the social and economic disadvantages faced by people with intellectual and mental health impairments; address challenging or problematic behaviours when they first arise; and provide diversion from the criminal justice system when it is appropriate.

To be effective in reducing the level of contact that people with disability or impairment have with the criminal justice system, a justice reinvestment strategy must also address issues such as social exclusion, educational and economic disadvantage and the existing shortfalls in services system, particularly the lack of a cohesive and integrated approach to the provision of human services.

The Anti-Discrimination Commission Queensland will lodge a separate submission to the committee discussing the issue of justice reinvestment .

Initiatives in other jurisdictions

Other states and territories have similarly noted the prevalence of people with disability in the criminal justice system and the barriers and disadvantages they face when they seek to access justice (either as offenders or victims) compared with people without disability. This has prompted some recent inquiries and moves for legislative, policy and programmatic reform.

The **New South Wales Law Reform Commission** (NSW LRC) was tasked with undertaking a general review of criminal law and procedure applying to people with cognitive and mental health impairments. The NSW LRC released a number of consultation papers as well as two final reports: *People with cognitive and mental health impairments in the criminal justice system: Diversion (tabled in May 2012)* and *Criminal Responsibility and Consequences* (tabled in June 2013). [110]

The **Victorian Law Reform (Parliamentary) Committee** have also conducted an inquiry into the issue culminating in the Report*: Inquiry into Access to and Interaction With the Justice System by People with an Intellectual Disability, their Families and Carers.*[111]

The South Australian Government undertook extensive consultation to develop a **Disability Justice Plan** that aims to make the criminal justice system more accessible and responsive to the needs of people with disability.[112] With a raft of strategies aimed at both victims of crime and people who are accused or convicted of a crime, the Disability Justice Plan also includes proposed legislative changes such as changes to the *Evidence Act 1929* (SA) to accommodate people with disability giving evidence in court as well as strategies to overcome barriers to jury duty for people with disability.

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[110] New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion* (Report 135, June 2012); New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal Responsibility and Consequences*(Report 138, June 2013).

[111] Victorian law Reform Committee, *Inquiry into Access to and Interaction With the Justice System by People with an Intellectual Disability, their Families and Carers*, (Parliamentary Paper no216, Session 2010-13 , March 2013).

[112] Government of South Australia, *Disability Justice Plan 2014-17* (Attorney-General's Department).

The Queensland Government's Disability Plan 2014-19

The vision of the Queensland government, as expressed in the Queensland Government's disability plan 2014-19 'Enabling choices and opportunities', is for people with disability to be able to have choices and share the opportunities that are available to all Queenslanders.[113]

Priority six of the disability plan aims to 'enhance mainstream services and facilities to enable genuine choice and participation in all areas, including education, employment, health, justice services and housing'.[114] In order to achieve this, the Queensland government will 'strengthen safeguards and enable equal and effective access to the justice system as victims or offenders'.[115]

Disability Justice Plan for Queensland

While there are some good initiatives in place, more can be done to better accommodate people with intellectual and mental health impairments in the criminal justice system to both enhance the response to victims of crime and so that offenders can receive effective responses that will reduce the risk of re-offending and help to prevent crime.

To give effect to these noble ambitions, Queensland must develop a Disability Justice Plan. A number of priority strategies have been articulated throughout this submission for persons with intellectual or cognitive impairments. Further consultation and research is needed to identify the range of strategies that may be effective in better accommodating people with physical, mental health, sensory and other disabilities in the criminal justice system. As well as considering victims and offenders, a Disability Justice Plan should include means of including all persons with disability as participants in the justice system , be they witnesses, jurors, court administrators and court staff, prosecutors or advocates or magistrates and judges, as well as victims and offenders.

1. Crime Prevention

- Case management should be available to facilitate access to appropriate multi-disciplinary interventions and supports for individuals with intellectual or cognitive impairment identified at a high risk of coming into contact with the criminal justice system.
- Evidenced-based approaches to working with people with intellectual or cognitive impairments, such as positive behaviour support, should be adopted, including in working with young people with disability who may be at risk of offending.

2. Interactions with Police

- Further training and guidance in procedural manuals to address:
  - Identification of people with disability
  - Responding to suspected abuse, neglect and exploitation of people with disability that may constitute a criminal offence
  - Provision of support and advocacy for people with disability when they are subject to questioning and arrest
  - Appropriate questioning and interviewing techniques of people with disability.
- Disability Liaison Officers to drive systemic change and improvements, undertake training and liaise with relevant community and government services.
- Provision of trained independent support workers or advocates to attend at interviews and

[113] See http://www.communities.qld.gov.au/resources/reform-renewal/qld-disability-plan.pdf last viewed on 11 June 2014 at 6.
[114] See http://www.communities.qld.gov.au/resources/reform-renewal/qld-disability-plan.pdf last viewed on 11 June 2014 at 11.
[115] See http://www.communities.qld.gov.au/resources/reform-renewal/qld-disability-plan.pdf last viewed on 11 June 2014 at 11.

questioning of people with cognitive and intellectual impairments.

- Further options for pre-court diversion explored including the expansion of existing police responses to people with mental health issues to include people with intellectual or cognitive impairments.

3. Court process

- A statewide court liaison and referral service for people with intellectual impairments should be established to assist with identification, assessment, referral and case management.
- A systematic approach to identifying people with intellectual impairments in the criminal justice system inclusive of training and education of legal professionals.
- Greater guidance and training to all legal professionals on utilising current mechanisms (eg special witness provisions and flexibility in giving evidence available under the *Evidence Act 1977*) to better accommodate people with intellectual and mental health impairments in the criminal justice system.
- A system of accessing support people for people with intellectual and mental health impairments who need to engage in the court process, including interpreters and people to assist with communication if needed.

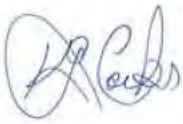
4. Imprisonment and post release

- Undertake a review of the trial of the Intellectual and Cognitive Impairment Screen (ICIS) tool undertaken in correctional centres in Queensland in order to inform the implementation of an appropriate screening test to be implemented in all correctional centres.
- Offenders with intellectual impairment should have equal access to appropriate programs for rehabilitation and specialist clinical services.
- Specialist disability support services should be available to offenders with intellectual impairments in correctional facilities.
- Transition from prison services for people with intellectual and mental health impairments must be strengthened.
- Appropriate support post-release must be provided to continue to link people with intellectual and mental health impairments to appropriate supports and to continue to build their capacity for living in the community including all aspects of daily living skills.

Conclusion

We are pleased to lend our support to the Committee as it progresses this important inquiry, in the interests of ensuring that the criminal justice system makes appropriate accommodations for persons with intellectual and mental health impairments. We would also be pleased to make ourselves available to the Committee should there be an opportunity to further discuss the points made in this submission and/or explore opportunities for collaboration.

Yours sincerely



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