



18 July 2014

The Research Director

Legal Affairs and Community Safety Committee

Parliament House

George Street

Brisbane Qld 4000

Dear Sir/Madam

Queensland Advocacy Incorporated thanks the Legal Affairs and Community Safety Committee for this opportunity to contribute to the Inquiry on strategies to prevent and reduce criminal activity in Queensland. Queensland Advocacy Incorporated has based this submission on its extensive casework and other experience working with people with disability, and on our own research, observations, interactions and conversations with people with disability.

Yours sincerely,

Michelle O'Flynn, Director

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**Patron: Her Excellency, Ms Penelope Wensley, AC Governor of Queensland**

## **1. About QAI**

QAI is an independent, community-based, systems and individual legal advocacy organisation. QAI's mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

We hold ourselves to account by including people with disability as paid staff, in our membership, and in key board positions. Our board members have experience in advocacy, institutional living, community legal services, private legal practice, legal aid, accountancy and community work. QAI is a member of the National Disability Advocacy Network of Australia (DANA) and Combined Advocacy Groups Qld (CAGQ).

As well as its traditional systems advocacy QAI provides individual legal advocacy to people with a disability at risk of human rights abuses, particularly around guardianship and restrictive practice matters, and assists people required to appear before the Mental Health Review Tribunal. We also provide non-legal advocacy to people with disability at risk from the criminal justice system by working with legal and community services that help the person with a disability remain in the community.

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4. Crimes by persons with disability are linked to unemployment, poverty, limited lifeinadequate education and marginalisation from community.
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6. The most effective strategies for reducing crime by people with capacity impairments are strategies for *increasing* employment, education, participation, well-being:
  - Labour market programs that get people into paid work
  - Improved community supports and facilities that encourage people to invest in their community
  - Education, including civic education in appropriate behaviour, especially relationships education
  - Extra supports in the critical 5 weeks post-release (where the mortality and morbidity of people with intellectual disability is higher) where the mortality, morbidity and overall vulnerability of people with intellectual disability is high
    - familial/friendship/social supports that can assist

## Recommendations

- Investment in early intervention and diversion for people with capacity impairments reduces the costs to individuals to their families and communities, as well as the costs to government.
- The QPS should assess its **Disability Plan** 2011-14 for consistency with current best practice police mental health and disability service delivery.
- There is a continuing need for police training and support for police in relation to **mental health awareness and crisis de-escalation**, and for more effective communication between front-line services.
- Future training needs to focus on **differentiating** between the needs of person's mental illness and those with intellectual disability.
- **Pre-sentencing evaluations** should be available on election by criminal defendants with impaired capacity. Currently there is no determination of capacity in relation to simple offences. Whatever connection that may exist between traumatic brain injury or intellectual disability and such conduct, obtaining a history which identifies reduced capacity or injuries and their timing and severity will provide courts with another tool to assist them in designing more effective sentences.
- **Court procedures** could be adapted to the needs of persons with capacity impairments in the following ways:
  - Regular rest breaks during trials and other extended hearings
  - Priority listings
  - Excusing a person with capacity impairment from attending administrative mentions or directions hearings where he or she is represented
  - The use of clear and simple (rather than esoteric) language
  - Judges or tribunal members sitting at the bar table with the parties to reduce formality and intimidation where appropriate; and
  - Opportunities for lawyers to explain and clarify understanding during proceedings (akin to the additional time given to language-based interpreters to interpret proceedings).
- Strengthen **prison-based psychiatric services** specialising in the needs of offenders with intellectual disability.
- **Post-release - Coordinated** transitional support for people returning from prison to the community in order to reduce high recidivism, morbidity and mortality.

## 1. Crime rates are trending downwards over the long term in Queensland, and nationally

Crime is decreasing in Queensland. The Premier recently acknowledged on local ABC Radio that 'crime is down, depending on location, by 15 and 30% - for example, in Townsville break-ins are down 27% since October 2013',<sup>1</sup> and Police Commissioner Ian Stewart made a similar observation in the Queensland Police Service *Annual Report 2012-13*: '[t]he crime rate is considerably lower than it was in 2000-1: there were 12 424 total offences per 100 000 population in 2000-1, which compares to 9 561 per 100 000 population in 2012-13 (a 25% decrease)'.

This decline in rates of offending appears to be a long term trend, and unprecedented in our history. The homicide rate, which has remained remarkably consistent since record keeping began, has dropped considerably.

Offences against the person have decreased by 19% in the decade from 2002<sup>2</sup> and homicide by 40% over the same period.<sup>3</sup> Sexual offences, property, breaking and entering, arson, unlawful use of a motor vehicle and fraud offences have all decreased in varying degrees; fraud offences decreased by nearly 60% over the period.<sup>4</sup>

### Interstate Comparison

Long term national trends are consistent with this pattern. The number of homicides<sup>5</sup> has decreased from 354 victims in 1996 to 274 in 2011. Adjusted per capita the homicide rate has decreased by 37% since the early 1990s.<sup>6</sup> Crime rates are trending down in many other categories nationally too.<sup>7</sup>

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<sup>1</sup> 15 July 2014 <http://blogs.abc.net.au/queensland/2014/07/police-commissioner-says-crime-rates-are-down.html>

<sup>2</sup> From approximately 740 offences per 100 000 in 2002 to 600 offences per 100 000 in 2012 – source Queensland Police Service Annual Crime Trends  
<http://www.police.qld.gov.au/Resources/Internet/services/reportsPublications/statisticalReview/1112/documents/AnnualCrimeTrend.pdf>

<sup>3</sup> From 1.7 per 100 000 to 1.0 per 100 000 in 2012- source: Queensland Police Service Annual Crime Trends.

<sup>4</sup> From approximately 770 offences per 100 000 population to 330 offences per 100 000 population.

<sup>5</sup> Includes manslaughter.

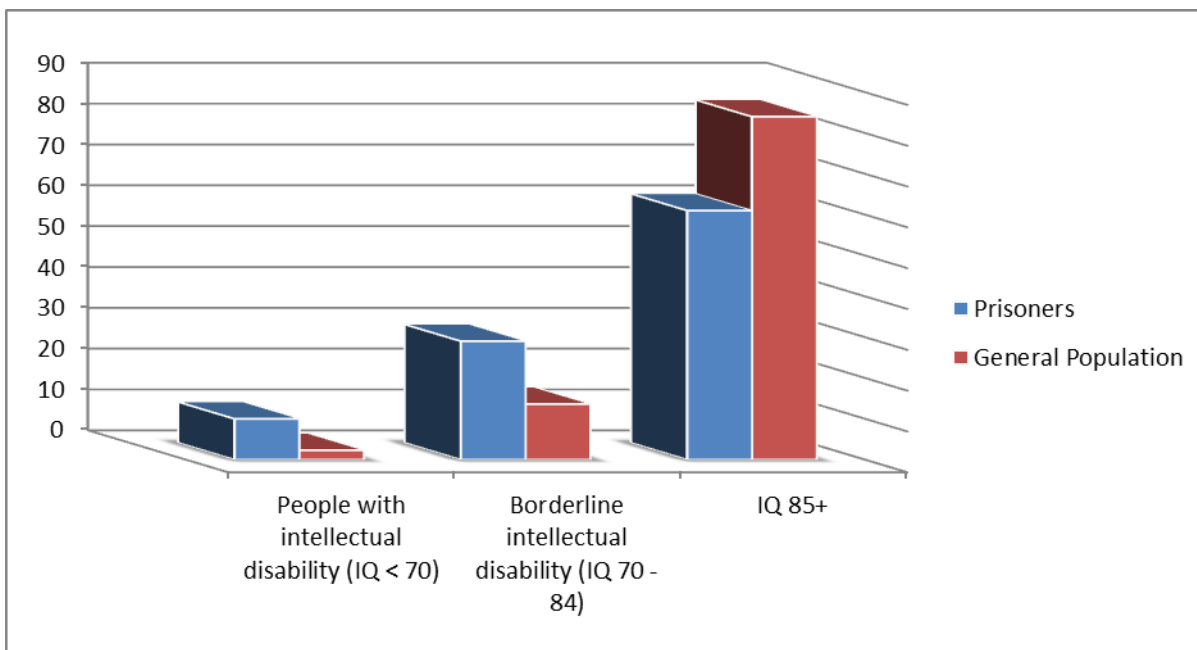
<sup>6</sup> Australian Institute of Criminology - Crime Facts 2012  
[http://www.aic.gov.au/media\\_library/publications/facts/2012/facts12.pdf](http://www.aic.gov.au/media_library/publications/facts/2012/facts12.pdf)

<sup>7</sup> Fraud, for example, has decreased from 500 to 374 offences reported per 100000 population over the period from 1996 – 2011.

**2. People with capacity impairments are overrepresented at every stage of the criminal justice system (e.g. jailed @ 4 times the rate of the general population; people with intellectual disability + borderline<sup>8</sup> = approx. 30% of jail population)**

People with disabilities, primarily people with capacity impairments linked to intellectual and cognitive disabilities, acquired brain injury, Foetal Alcohol Spectrum Disorder, some forms of mental illness and other capacity-affecting conditions are overrepresented at every stage in the criminal justice system - as suspects, defendants, offenders, prisoners and as repeat offenders. And that overrepresentation is costly- human rights, natural justice and systemic equity aside. It's costly to people with disabilities and their families, and costly to the public that funds policing, judicial and corrective institutions.<sup>9</sup>

**Prisoners-** Queensland Corrective Services conducted a general survey of Queensland prisoners in 2002 and determined that 10% of the prison population at that time had IQ's indicative of intellectual disability (below IQ 70) and that a further 29 per cent of prisoners were in the borderline range (IQ 70-79).<sup>10</sup>



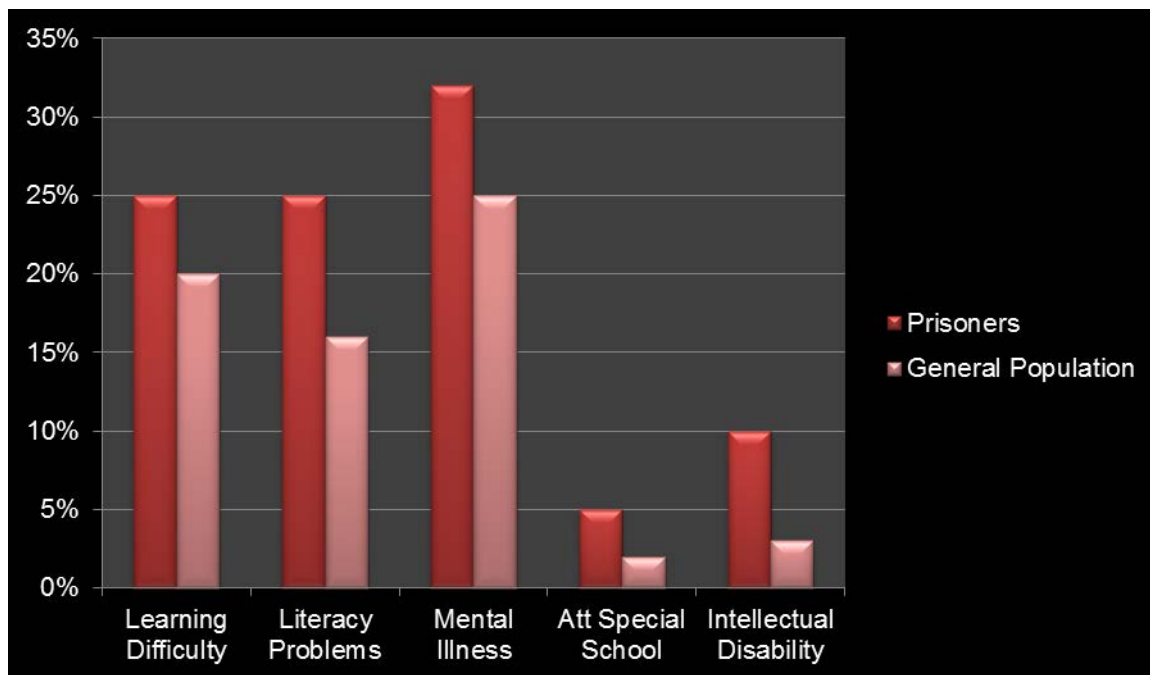
**Fig 1: Intellectual disability in Queensland Prisoners v General Population- Survey by Corrective Services Queensland 2002**

<sup>8</sup> According to the NSW Law Reform Commission, borderline is defined as “individuals who do not meet formal diagnosis of ID, but who have cognitive and adaptive deficits compared with the general population.” Those with borderline ID often fall within the cracks of the system as they may not be identified as having an intellectual disability and thus will not be able to access protections and legal safeguards. However, they may still require such support. NSWLRC found that 8.8% of the sample that came before the courts were identified as having borderline intellectual disability with an IQ between 70 and 79. New South Wales Law Reform Commission Report 135 *People with cognitive and mental health impairments in the criminal justice system* Diversion June 2012. [www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc)

<sup>9</sup> See *Preparing Pathways to Justice* (2010) for comparative costings of early human services intervention vs criminal justice intervention for people with intellectual disabilities in Queensland, particularly p 33, ‘when taken over the whole life of the individual who requires an ongoing response, without human service interventions, responses will likely shift to criminal justice responses which are most costly in client, social and resource allocation terms’.

<sup>10</sup> Queensland Corrective Services, 2002. *Intellectual Disability Survey*.

There is no other published data from the Corrective Services Queensland concerning the number of prisoners with intellectual disability, but the 2002 survey findings are consistent with NSW data. In 1988 Australian researchers Hayes and Craddock ventured a calculated estimate that people with intellectual disability make up at least 12 to 13% of the NSW prison population, yet comprise at most only 2% to 3% of the general population.<sup>11</sup> According to Hayes the proportion of NSW prisoners with intellectual disability rose by nearly 8% to 19-20% in the decade to 2000.<sup>12</sup>



**Fig 2:** Comparison of Queensland prisoners with the general population- Source: Corrective Services Queensland 2002

The Queensland Forensic Mental Health Service’s 2013 study looked at a sample of Aboriginal and Torres Strait Islander<sup>13</sup> prisoners: a staggering 72.8% of Aboriginal and Torres Strait Islander men and 86.1 % of Aboriginal and Torres Strait Islander women had at least one mental health episode in the preceding twelve months, against a 20% rate in the general community. The proportion in the remand sample was even higher - 84.4% compared with 70.4% overall.

**As Defendants-** Three decades of research by Australian authorities Susan Hayes and Eileen Baldry has repeatedly confirmed that people with intellectual disability and people who are borderline are grossly overrepresented as defendants too, comprising about 30% of all defendants in local courts.

Hayes carried out more research at local NSW courts in 1992 and 1995. Assessing defendants in four regional and two city magistrates’ courts she concluded that 23.6% of persons had an IQ of less than 70, placing them at the least in the mild intellectual disability category.<sup>14</sup>

<sup>11</sup> Susan Hayes and G Craddock, 1992. *Simply Criminal.2<sup>nd</sup>* Edition. p 30.

<sup>12</sup> Susan Hayes. *Hayes Ability Screening Index (HASI) Manual.* (2000, Behavioural Sciences in Medicine, University of Sydney, Sydney.

<sup>13</sup> Aboriginal and Torres Strait Islander

<sup>14</sup> Susan Hayes. 1996. *People with an Intellectual Disability and the Criminal, Two Rural Courts.* NSW Law Reform Commission Report 5. Sydney.

Follow-up research in four magistrate's courts conducted by Vanny, Greenberg and Hayes in 2009 determined that 10% of participants achieved a standard IQ score below 70 and a further 20% were in the borderline (70-79) range.<sup>15</sup> Of those 46% were mentally ill, compared to 36% of those without intellectual disabilities. In another study the same year almost one third of the sample of defendants before NSW magistrates' courts had a mental health problem.<sup>16</sup> Three years later Baldry *et al* established that approximately 24% of people appearing before a NSW court had an intellectual disability, and 43% of Aboriginal and Torres Strait Islander People defendants.<sup>17</sup> There is no comparable Queensland research, but given that we know that the proportions of prisoners with intellectual disability are similar state by state it is not unreasonable to infer that the proportions of defendants with intellectual disability and other capacity related impairments is similar for Queensland defendants.

### **3. Despite reduction in crime there is no reduction in the overrepresentation of people with disabilities**

'While Queensland crime rates have trended downwards over the last decade, vulnerable people remain over-represented as victims, offenders, and repeat offenders'.<sup>18</sup> This is one of the QPS's 'Challenges and Tasks' enumerated on page 4 of its 2012-13 recent annual report. While not all people with intellectual disability and other impairments are vulnerable it is significant that the report makes the link between the general reduction in crime and the continued overrepresentation of people with disabilities. It begs the question 'if we can reduce crime, why can't we reduce the criminal justice involvement and incarceration of people who without support are clearly disadvantaged in life's lottery?'

#### **Case Study: (Dealing with summary offences, no system to divert offenders).**

An man with an intellectual disability stole a chicken from a local butcher shop and took it to his local pub. He asked the publican to cook the chicken for him, but the publican responded by kicking him out. He took the chicken to the local school grounds - the school he had attended as a child - and ate the uncooked chicken there. The police were called and the man was apprehended. Later he was picked up by the police at Wynnum and charged with wilful exposure. In the magistrate's assessment this defendant lacked the capacity to understand that what he had done was wrong, but the law does not provide for the determination of capacity in relation to minor offences.<sup>19</sup>

Ideally this man's incapacity should have been picked up early and diversionary options explored. The QPS Vulnerable Persons Policy refers only once to vulnerable persons as offenders, offering police little guidance on how

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<sup>15</sup> K A Vanny, M H Levy, D M Greenberg, S C Hayes. 2008. 'Mental illness and intellectual disability in Magistrates Courts in New South Wales, Australia'. *Journal of Intellectual Disability Research*. 53(3):289-97.

<sup>16</sup> Hayes, S. (2009) The evidence from Magistrates Courts - the prevalence of accused persons with intellectual and cognitive disabilities. NSW Justice Health Court Liaison Service Professional Days, Burwood.

<sup>17</sup>

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](http://www.adhc.nsw.gov.au/about_us/research/completed_research)>

<sup>18</sup> Queensland Police Service. *2012-13 Annual Report*. P 4.

<sup>19</sup> This case study was provided to us by a Brisbane magistrate.



to proceed when they pick up a suspect with a capacity impairment. The QPS Disability Service Plan provides strategies to support people with disabilities and their carers, but in practice there are no allowances or provisions or supports available for the majority of people with intellectual impairments going through the system.

#### **4. Crimes by persons with disability are linked to unemployment, poverty, limited life experiences and marginalisation from community**

Knowing why people with capacity impairments are more likely to be suspects, defendants and prisoners is an essential first step to the development of strategies to reduce their involvement in the criminal justice system, and to reducing crime itself. Explanations for the preponderance of people with capacity impairments include the differential treatment hypothesis and the psychological and socio-economic disadvantage hypothesis.

**Differential treatment-** Support workers, police, prosecutors, defence counsel, court and corrective services staff consciously and unconsciously discriminate to the disadvantage of people with intellectual disability and other impairments. Thomas suggests, for example, that for people with disability living in supported accommodation the decision by staff to report an incident may depend on who is the (alleged) offender, and who is the (alleged) victim.<sup>20</sup> When attending an alleged incident police may use their discretion when deciding whether to charge an offender based on their own assessment as to whether a matter is serious enough to prosecute and the likelihood of gaining a conviction based on the competence of victim and witnesses.

These sorts of explanations for overrepresentation are consistent with what is known as the differential treatment hypothesis - that people with intellectual disability and other capacity impairments are more likely to be apprehended, more likely to be charged and more likely to be convicted because their living circumstances make them more likely to attract police attention,<sup>21</sup> perhaps in relation to minor infringements of public order law,<sup>22</sup> they are more likely to confess or to acquiesce to police accusations, more likely to come before the courts as a result of police policies with respect to prosecuting cases where the offender appears abnormal or possibly dangerous, less likely to have their rights, such as the right to silence, explained in a way they can understand.<sup>23</sup>

Compounding those tendencies is the possibility, advanced by Wolf Wolfensburger and other proponents of Social Role Valorization,<sup>24</sup> that people with intellectual disability or other capacity impairments may be more likely to be

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<sup>20</sup> Professor Stuart Thomas, University of Wollongong. 2013. 'At What Point, and on What Basis, does behaviour by people with intellectual disability become criminal?' Paper presented at Disability at the Margins: Vulnerability, Empowerment and the Criminal Law. November 2013.

<sup>21</sup> J Zimmerman, W D Rich, I Keilitz and P K Broder "Some observations on the link between learning disabilities and juvenile delinquency" (1981) 9 Journal of Criminal Justice 1, 10.

<sup>22</sup> New South Wales Anti-Discrimination Board.1981. *Discrimination and Intellectual Handicap*, 320.

<sup>23</sup> J Cockram, R Jackson and R Underwood "People with an intellectual disability and the criminal justice system: The family perspective", paper presented at Partnerships for the Future, 6th Joint National Conference of the National Council of Intellectual Disability and the Australian Society for the Study of Intellectual Disability (26-30 October 1994, Perth) ("Cockram, Jackson and Underwood (1994a)") at 8.

<sup>24</sup> J Cockram, R Jackson and R Underwood "Attitudes towards people with an intellectual disability: Is there justice?", paper presented at the First International Congress on Mental Retardation: The Mentally Retarded in the 2000's Society (Rome, March 1994) ("Cockram, Underwood and Jackson (1994b)") at 4. See also J Bright "Intellectual disability and the criminal

negatively stereotyped by police, prosecutors, defence lawyers and the courts. They may be thought of and subtly treated as deviants, social outcasts, or as needy dependents who are less capable of making their own decisions, needing management and support, all of which may be internalized by people with capacity impairments themselves, serving to diminish people's self-confidence and self-reliance,<sup>25</sup> and contributing to low expectations all round.

The same people may be more often refused bail due to previous breaches of bail conditions or a lack of support and resources enabling them to obtain it, and they may be less likely to be able to afford quality representation so more likely to be convicted, more likely to receive a custodial sentence because of a lack of alternative placements in the community, more likely to serve in maximum security for segregation and 'protection',<sup>26</sup> more likely to serve a longer sentences before release on parole (in Queensland parole applications must be hand written) and less likely to qualify for parole because of a want of appropriate support and accommodation.

**Socio-economic disadvantage and susceptibility-** People with impaired capacity may experience disadvantages in childhood and youth that increase the likelihood that they will have contact with the criminal justice system: family conflict, poor education and lack of accommodation and employment.<sup>27</sup> Most people with capacity-related disabilities rarely break the law or come to the attention of police, yet a significant proportion cycle through the criminal justice system, moving from juvenile detention through to adult experiences of watch-houses, courts, remand centres, jails, forensic orders and other detention or community-based orders, their disabilities attracting cumulative consequences at every stage. People with intellectual disabilities and other capacity impairments may have considerable difficulty in understanding court proceedings, but out of longstanding habit, resignation and a fear of stigma they may not seek explanation or assistance.

People with intellectual disability may be inclined to simply agree with court directions or say they understand things even when they do not despite strong functional and 'survival' skills that mask their real difficulties. They may appear and may strongly want to participate in regular activities and transactions but may not always understand their obligations or the consequences of failing to meet courts' expectations.

They may lack confidence and communication skills and where available may depend on family or on other support people to assist them. People with intellectual disabilities may not appreciate the importance of personally attending court at a designated time. They may, on the other hand, find court distressing and avoid it. Procedural breaches by a person with an intellectual disability should be met with inquiry into the circumstances behind that breach rather than the immediate application of sanctions. Lack of understanding, however, is not a reason to exclude people from those processes, but a reason to tailor court and ancillary procedures to people with such disabilities and to provide appropriate support so that all people can exercise their legal capacity on an equal basis.

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justice system: New developments" (1989) 63 Law Institute Journal 933.

<sup>25</sup> W Wolfensberger. 1992. *A Brief Introduction to Social Role Valorisation as a High Order Concept for Structuring Human Services*. (Training Institute for Human Service Planning, Leadership and Change Agency, Syracuse University, Syracuse NY).

<sup>26</sup> S C Hayes and G Craddock *Simply Criminal* (2nd ed, Federation Press, Sydney, 1992) at 34, referring to S C Hayes and D McIlwain *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (Sydney, November 1988), 144.

<sup>27</sup> 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.

## **5. Detention is not a deterrent; jail is often a place of belonging and security, but with a potential for more abuse and exploitation**

It is often said that jail is like a vacation. It is not, but the fact that some prisoners feel more secure and at home in jail indicates how desperate their living conditions are on the outside. Objectively, prisoners get 3 meals a day, some exercise and restricted if not nil access to drugs and alcohol. Many prisoners, especially those with impairments, have been in and out of institutions since childhood, and they lack the adaptive skills to function independently. There is no doubt that whatever prison does, it does not prepare prisoners for thriving self-sufficiency on release. The majority of deaths in recently released prisoners are due to preventable causes such as drug overdose, injury and suicide.<sup>28</sup> We need is coordinated transitional care for people returning from prison to the community.<sup>29</sup>

## **6. The most effective strategies for reducing crime by people with capacity impairments are strategies for *increasing* employment, supports, participation, well-being:**

Baldry and Dowse's recent NSW study establishes that the majority of persons with disability in fact receive little disability support as children, young people and adults, with Indigenous members of the study having the lowest levels of service and support. People with capacity impairments who are afforded disability support and housing support do better, with less involvement in the criminal justice system than those who do not.<sup>30</sup>

- Labour market programs that get people into paid work
- Improved community supports and facilities that encourage people to invest in their community
- Education, including civic education in relationships and social behaviour.
- Extra supports in the critical 5 weeks post-release (where the mortality and morbidity of people with intellectual disability is higher) where the mortality, morbidity and overall vulnerability of people with intellectual disability is high
  - familial/friendship/social supports that can assist

## **In conclusion**

Having a cognitive impairment predisposes persons who also experience other disadvantageous social circumstances to a greater enmeshment with the criminal justice system early in life. Persons with cognitive impairment and other

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<sup>28</sup> S Kinner, ML Williams. 2006. Post-release experience of prisoners in Queensland: implications for community and policy. Centre for Social Change Research, School of Humanities and Human Services, QUT

<sup>29</sup> Stuart Kinner. 2013. Quoted on 'The World Today' interview transcript @ <http://www.abc.net.au/worldtoday/content/2013/s3809843.htm>

<sup>30</sup> Professor Eileen Baldry, Dr Leanne Dowse and Ms Melissa Clarence People with intellectual and other cognitive disability in the criminal justice system Report for NSW Family and Community Services Ageing, Disability and Home Care December 2012

disabilities are significantly more likely to have earlier, ongoing and more intense police, juvenile justice, court and corrections episodes and events. Support and housing and other measures that integrate people with their communities are the most effective way of breaking the criminal justice cycle.

Early holistic support is crucial for the development and well-being of children and young people with mental health disorders and cognitive impairment, particularly Aboriginal children and young people and those from disadvantaged backgrounds.

Without such early intervention and diversion, the costs to individuals with mental health disorders and cognitive impairment, to their families and communities, as well as the costs to government can be extremely high. Such costs increase over time, as people with mental health disorders and cognitive impairment become entrenched in the criminal justice system and are further disadvantaged. Case studies presented in Baldry's cost/benefit analysis of different life paths of NSW residents with capacity impairments illustrate that the lifetime of prison and crisis supports can be as high as \$1 million per annum per person.

A number of small but successful initiatives appear to improve well-being and other outcomes for people with mental health disorders and cognitive impairment and result in diversion from the criminal justice system. Estimated benefit cost ratios in the above case studies range from 1.4 to 2.4. That is, for every dollar spent on the early investment, between \$1.40 and \$2.40 in government cost is saved in the longer term.<sup>31</sup>

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<sup>31</sup> Ruth McCausland Sarah Johnson Eileen Baldry Anna Cohen . 2013. People with mental health disorders and cognitive impairment in the criminal justice system Cost-benefit analysis of early support and diversion. University of New South Wales