



# Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

*Systems and Legal Advocacy for vulnerable people with Disability*

'The object of sentencing is to impose a punishment which is appropriate to the particular offence committed by the particular offender'

Murray Gleeson CJ<sup>1</sup>

## About QAI

Queensland Advocacy Incorporated (QAI) is an independent community-based advocacy organisation. Since 1987 QAI has campaigned for the rights of people with disability, particularly vulnerable people with disability in Queensland, because we believe that all human beings are equally important, unique and of intrinsic value. People with disability have been marginalised in what Newell and Goggin have called a 'social apartheid'.<sup>2</sup> This devaluing and segregation is a symbol of our failure as a civil society. It continues when government continues to fund and otherwise encourage group homes and other forms of congregate care, when our statutory guardianship and administration systems practice substitute rather than supported decision-making, and when we continue to imprison people with intellectual impairment at five times the rate of the general population.

## Submission: key points

- **In-principle support for a Sentencing Advisory Council**

QAI supports the statutory reintroduction of a Sentencing Advisory Council ('Council') via the Penalties and Sentences (Queensland Sentencing Advisory Council) Amendment Bill 2016 ('the Bill'). The Council has the potential to bridge the gap between community expectations, the courts and government in determining criminal penalties, to promote consistency in sentencing, and to raise awareness and stimulate balanced public debate about the complexities of sentencing processes.

- **Community representation**

Non-legal, non-expert, non-professional Council members will give the community a stronger voice in relation to sentencing in Queensland and will likely secure greater public confidence in judicial processes.

- **Disability representative**

QAI supports the appointment of a person with disability or disability advocate to the Council for the same reason that the Bill provides for the appointment of an Aboriginal or Torres Strait Islander representative.<sup>3</sup> People with disabilities are overrepresented at every stage of the criminal justice process (see table below). Queensland

<sup>1</sup> NSW Law Reform Commission (1994: Ch 11) citing Justice M Gleeson in 'Sentencing: The Law's Communication Problem cited in "Justice when everyone's a hanging judge" *The Sydney Morning Herald* (2 December 1993) at 12.

<sup>2</sup> Gerrard Goggin and Christopher Newell. 2005. *Disability in Australia: Exposing a Social Apartheid*.

<sup>3</sup> At section 201 (2).

Corrective Services own research, for example, has determined that approximately 10 percent of prisoners have an intellectual disability.<sup>4</sup>

- **Broad representation**

The relevance of special interests to the composition of the board is complex, but QAI does not share the concern expressed by some, including the Council for Civil Liberties' Terry O'Gorman at the inception of the original Council,<sup>5</sup> that the Council's purpose would be derailed by the appointment of representatives from advocacy groups or special interests. Special interests will stimulate debate around sentencing, but the Attorney-General will need to ensure a balance of views, and particularly the views of people who are overrepresented in the criminal justice system as offenders, as well as victims.

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<sup>4</sup> Queensland Corrective Services. 2002. *Intellectual Disability Survey*.

<sup>5</sup> Marissa Calligeros. 2010. 'Victims to have a say on jail time'. *The Brisbane Times*. 8 February.

2 %	People with intellectual disability — general population <sup>6</sup>
9.8 %	Prisoners with intellectual disability — Queensland <sup>7</sup>
30 %	Former prisoners with intellectual disability <sup>8</sup>
13.6 %	People with learning disability — general population <sup>9</sup>
28.6 %	Prisoners with learning disability — Queensland <sup>10</sup>
22.3 %	Women with a mental health disorder - Australia <sup>11</sup>
57.1 %	Women with mental illness in Queensland prisons (diagnosed) <sup>12</sup>
73 %	ATSI male prisoners with mental health disorder <sup>13</sup>
86 %	ATSI female prisoners with mental health disorder <sup>14</sup>

<sup>6</sup> The figure varies from ~1.5 – 3% depending on the source. In the DSM-V intellectual disability is defined as < IQ70 and deficits in adaptive functioning. IQ relative to a population, not absolute; and <IQ70 means that the test-taker's score is more than 2 standard deviations below the median score in the test-taker's age group. Unlike many physical disabilities, there is no bright line that divides people with intellectual impairments from those who do not. The important question is not 'What is this person's disability?' but 'What is this person's support need/s?'

<sup>7</sup> Queensland Department of Corrective Services. 2002. *Intellectual Disability Survey, 2002*.

<sup>8</sup> S Hayes & D McIlwain. 1988. *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study*. Sydney.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* 'Learning disability' is roughly synonymous with 'mild' intellectual disability i.e. IQ in the 70-84 range.

<sup>11</sup> Australian Bureau of Statistics. 2013. *Gender Indicators, Australia*, 4125.0

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features3150Jan%202013>>

<sup>12</sup> Reported by the women themselves. B Hockings et al. 2002. *Queensland Women Prisoners Health Survey*. Department of Corrective Services.

<sup>13</sup> I Heffernan, K Anderson & K Dev. 2012. *Inside Out - The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report*. Queensland Forensic Mental Health Service

<sup>14</sup> *Ibid.*

## Introduction: An advisory mechanism to inform public debate

Sentencing is politicised: a doyen for the separation of powers and tensions between judiciary, legislature and executive; the overrepresentation of Aboriginal and Torres Strait Islander people in prisons; and community attitudes to sex crime, murder and terrorism. To those vexed social issues QAI adds the usually overlooked but no less critical problem of the overrepresentation of people with disability in prisons and throughout the criminal justice system.

Unbiased factual reporting of criminal cases is not a major goal or even in the interests of commercial news outlets, leaving a void that an organisation like a Sentencing Advisory Council can help to fill. A Sentencing Advisory Council has the potential to be a moderating influence on political and public debate around sentencing, which can be strident, irrational and oblivious to relevant facts.

The local Brisbane daily, for example, reproaches magistrates and judges for lenient sentencing, and rarely, if ever, for excessive.<sup>15</sup> The same publication led recent public criticism of the judiciary, promoting a petition and public demonstration that urged the Attorney-General to challenge the Court of Appeal's downgrading of the Baden-Clay murder conviction, prompting Justice Catherine Holmes to describe public commentary around the Baden-Clay case as 'staggeringly ill-informed'.<sup>16</sup> Appropriately briefed, the public is likely to express views about sentencing that are not dissimilar to those of judges. The widely quoted Tasmanian juror study confirms this.<sup>17</sup> The better informed the public is about judicial decisions, the more likely they are to understand and approve of them.

QAI supports a Council's role, however small, in feeding community views back to the Court of Appeal and the Attorney-General. QAI was opposed, for example, the Attorney-General's invariable practice, until recently, of engaging counsel to oppose applications for the revocation of Forensic Orders, regardless of the merits of any individual's case.

In our view the Attorney-General was trying to procure short-term community safety with little regard to the cost borne by the individuals subject to the orders, their families and loved ones. A Council would provide another mechanism by which the views of QAI and other advocacy and interest groups could be conveyed to the Attorney-General and the Courts.

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<sup>15</sup> David Murray. 2015. 'Police slam Beenleigh magistrate as too lenient on offenders' *The Courier-Mail*, 27 February; Kathleen Donaghey. 2014. 'Coward punch offender gets off with slap on the wrist — and magistrate takes swipe at 'one punch' campaigns' *The Courier-Mail* 20 March.;

Greg Stolz. 2014. 'Gold Coast bus attack: Larna Watmough, 21, gets suspended sentence for her part in bashing of elderly man'. *The Courier-Mail*, 18 September.; David Murray. 2015. 'Ice addict bashed pregnant girlfriend, walked free from court' *The Courier-Mail*. 9 September.

<sup>16</sup> AAP 'Gerard Baden-Clay sentence postponed, possibly for months, pending appeal'. *The Brisbane Times*. 8 January 2016.

<sup>17</sup> Kate Warner; Julia Davis; Maggie Walter; Rebecca Bradfield and Rachel Vermey. 2011.

'Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study' *Trends & issues in crime and criminal justice no.407*. Canberra: Australian Institute of Criminology.

## **The need for a better informed understanding of people with intellectual impairment, sentencing and imprisonment**

A Council has the potential to provide the public with a more nuanced understanding of judicial processes. It can help dispel a popular one-size-fits-all notion of sentencing, and alert the public to the Courts need to weigh relevant circumstances.

The disparities in offenders' circumstances make a mockery of the adage 'If you do the crime, you must do the time'. In particular, the Courts have acknowledged the justice of mitigation when sentencing offenders with mental illness.<sup>18</sup> The imprisonment of offenders with mental illness or intellectual impairment does not necessarily achieve goals of detention such as punishment, denouncement, deterrence, and rehabilitation. An offender's impaired mental functioning, whether temporary, or permanent, may reduce

"While Queensland crime rates have trended downwards over the last decade, vulnerable people remain over-represented as victims, offenders, and repeat offenders."<sup>19</sup>

an offender's moral culpability and the need for denunciation. It may affect the court's decision about the conditions under which a sentence should be served.

Depending on the nature and severity of an offender's impairment, and its effect on the offender's mental capacity at the time of the offending, at the date of sentencing, or both, intellectual impairment may moderate or eliminate general deterrence as a relevant sentencing consideration. The nature and extent of the condition may also mean that a given sentence will weigh more heavily on the offender, and where there is a serious risk that imprisonment that may have an adverse effect on the offender's mental health it will tend to mitigate punishment.

The High Court considered the relevance of intellectual disability in sentencing in *R v Muldrock*.<sup>20</sup> As a child Muldrock was subjected to homosexual sexual abuse; as an adult he showed a sexual interest in male children, and was convicted and sentenced in relation to sexual intercourse with a minor. The High Court acknowledged that neither punishment, in the sense of retribution, nor denunciation required significant emphasis in light of the appellant's limited moral culpability for his offence, and that there was no requirement for general deterrence.

### **A better appreciation of behaviour and context**

The essence of discrimination is the treatment of equals unequally, or the treatment of people with significant differences in the same way as everybody else. Disabilities, especially intellectual disabilities, are significant differences.

For people with intellectual disability offending often stems from a general lack of understanding of social norms and acceptable sexual behaviour and may be attributable to

<sup>18</sup> See, for example, Verdin's principles in *R v Verdins*, *R v Buckley*, *R v Vo* [2007] VSCA 102.

<sup>19</sup> Queensland Police Service. *Queensland Police Service Strategic Plan 2012-2016*.

<sup>20</sup> [2011] HCA 39.

segregated and restricted social lives,<sup>21</sup> to not knowing what behaviours are acceptable, and reflecting the restricted life or special circumstances of the person with the disability, denied relationship and sex education, or avenues to pursue sexual interests in a safe and appropriate way. This fact was acknowledged by Mr Muldrock's sentencing judge when he imposed a condition that the defendant must reside at a residential treatment facility with a program designed to assist people with intellectual impairments to moderate sexually inappropriate behaviour.<sup>22</sup> Protective factors preventing sex offending include early recognition and intervention, stable home life and no experience of being the victim of sexual violence.

Once in jail, 'peer abuse' by one inmate against another is a risk that may be overlooked by prison authorities. Susan Hayes has observed that in any programme for sex offenders with learning disability, a major aim must be to protect participants from other participants.<sup>23</sup>

Some prisoners may identify the vulnerability of other prisoners with intellectual impairments offering them support, protection and assistance.<sup>24</sup> Prisoner peer support is common, particularly amongst Aboriginal and Islander prisoners; and is generally a positive part of the prison experience rarely discussed in the research literature, but prisoners may also offer physical and psychological abuse to prisoners with intellectual impairments who may be perceived to be easy targets, including bullying, humiliation, harassment and intimidation. This victimisation may lead to or exacerbate mental illness and contribute to social withdrawal, anti-social behaviour and feelings of alienation.<sup>25</sup>

Offenders may use those with intellectual impairments to violate institutional rules or carry out illegal activities such as drug dealing. It is difficult to determine the extent of victimisation of prisoners with capacity impairments as official prison records are not likely to cover all incidents and victims may be reluctant to report abuse for fear of retribution from other prisoners or placement in protective custody. People with capacity impairments may not have the verbal or written skills to complain, may not have the endurance to persist with a complaint when faced with questioning and the possibility of exposure or may not be aware that their experiences form the basis of a complaint in the first place.<sup>26</sup>

The *Framework Report*<sup>27</sup> examined the needs of offenders with intellectual disability in NSW prisons, and described threatened and actual physical and sexual violence as one of the main

<sup>21</sup> S Hayes. 2004. 'The relationship between childhood abuse and subsequent sex offending'. 12th World Congress of the International Association for the Scientific Study of Intellectual Disability. Montpellier.

<sup>22</sup> Muldrock v The Queen. [2011] HCA 39. <<http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca39-2011-10-05.pdf>>

<sup>23</sup> Peer abuse, either sexual or physical or both, of one person with an intellectual disability by another, is a widespread problem, which many service agencies have failed to address; repeated offences are frequent and lack of appropriate intervention is the norm. Susan Hayes. 2004. 'Identifying intellectual disability in offender populations – and what then?' (Workshop presented at a seminar organised by the Prison Research Project) (2004) <http://www.qcjc.com.au/research/download/3/research/intellectual-disability-1/identifying-intellectual-disability-in-offender-populations.pdf>

<sup>24</sup> PE Mullen. 2001. *A review of the relationships between mental disorders and offending behaviours and on the management of mentally abnormal offenders in the health and criminal justice services*. Criminology Research Council. <<http://www.aic.gov.au/crc/reports/mullen.html>>; G Denkowski & K Denkowski. 1985. 'The Mentally Retarded Offender in the State Prison System: Identification, Prevalence, Adjustment, and Rehabilitation'. *Criminal Justice and Behavior*. 12(1): 55-70.

<sup>25</sup> QAI. 2015. *dis-abled Justice II*.

<sup>26</sup> S Hayes & G Craddock. 1992. *Simply Criminal*. 2nd ed. Sydney: Federation Press.

<sup>27</sup> J Simpson, M Martin & J Green. 2001, *The framework report: appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending*. NSW Council for Intellectual Disability, Sydney.

issues of concern to prisoners with intellectual disabilities. An earlier survey of NSW prisoners aged 18–25 identified a high incidence of sexual (and other) forms of abuse, especially amongst male respondents in NSW prisons.<sup>28</sup>

Imprisonment is likely to erode the living skills of people with disabilities, thereby increasing the challenges they will face on release. People with intellectual disability are more than twice as likely to return to jail compared to other ex-prisoners. The likelihood of reoffending is determined more by a person's socio-economic circumstances after release than by the length of their term in prison.<sup>29</sup>

We believe that people with an intellectual disability are especially vulnerable when detained in custody, and that detention in custody imposes a greater hardship on such people than is usual. For many people with an intellectual disability, routine and patterns of life are essential to their wellbeing; they require familiarity and continuity. In addition, they often have little concept of the calculation of time or of the full extent of the criminal process. ... It is clear from our experience that the effect of custody threatens to diminish the living skills of an intellectually disabled person, and that the impact of custody will also be more severe than for an ordinary person.<sup>30</sup>

The high rate of return to prison for people with intellectual disability demonstrates the failure of imprisonment as a mechanism for individual or social change. When discharged from prisons, the negative effects of imprisonment combined with a lack of adequate monitoring and support often exacerbates re-offending.

Upon release, offenders with intellectual disability re-entering the community face a number of impediments to community placement that may result in re-institutionalisation.<sup>31</sup> The critical time is at about five weeks out. One source has described prison release as comparable to the soldier returning from battle.<sup>32</sup> Reintegration is more challenging for ex-prisoners with intellectual disability. Barriers include poverty, inferior levels of education, unemployment, homelessness and personal risks including drug or alcohol dependency, lack of social support or loss of family ties.<sup>33</sup> The risk of recidivism increases when services are not available. Commonwealth and state government services are difficult to access, in part because they are poorly coordinated at the policy level.<sup>34</sup>

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<sup>28</sup> D Heilpern. 1998, *Fear or favour: sexual assault of young prisoners*, Southern Cross University Press, Lismore.

<sup>29</sup> Allan, A and D Dawson. 2004. *Trends and Issues in Crime and Criminal Justice*. Canberra: Australian Institute of Criminology.

<sup>30</sup> Kingsford Legal Centre *Submission* (29 October 1992) at 5. See also The Law Society of New South Wales *Submission* (24 August 1992) at 4 in Law Reform Commission of New South Wales. 1994. *Discussion Paper 35 - People with an Intellectual Disability and the Criminal Justice System: Court and Sentencing Issues*. Sydney: Law Reform Commission.

<sup>31</sup> J Cleur & D Coyne. 1994. Behaviour, crime and life: Issues for people with an intellectual disability in contact with the criminal justice system in NSW. Paper presented to the Third Inter jurisdictional Conference on Guardianship and Administration. Western Australia.

<sup>32</sup> E Ogilvie. 2001. Post-release: the current predicament and the potential strategies. Canberra: Criminology Research Council. <http://www.aic.gov.au/crc/reports/ogilvie-html.html>.

<sup>33</sup> E Baldry & M Borzycki. 2003. Promoting integration: the provision of prisoner post-release services. *Trends And Issues In Crime And Criminal Justice*. Canberra: Australian Institute of Criminology.

<sup>34</sup> V Catherine Riches, T Parmenter, M Wiese & R Stancliffe. 2006. 'Intellectual disability and mental illness in the NSW criminal justice system'. *International Journal of Law and Psychiatry* 29: 386–396.

## Media misperceptions of disability

A Sentencing Advisory Council can act as both a relatively impartial and a more nuanced voice in sentencing debates. This is a pressing need given the public ignorance about people with disability in the criminal justice system. A substantial proportion of victims, suspects, offenders and prisoners are people with intellectual impairment,<sup>37</sup> or mental illness, yet is not uncommon for professional journalists to either ignore or underplay disability when it may be relevant to an alleged offender's conduct. Even when a person's disability is known it may be misconstrued as an innate and causal factor in crime,<sup>38</sup> as it was early last century when the biological determinism of the eugenics movement imputed latent criminality to people with intellectual impairments, and reinforced public misconceptions that mental impairment produces vice and crime.<sup>39</sup>

When people with intellectual disability and other capacity impairments do offend it is often because they have been denied the life experience or support they need to know that a particular act is wrong, or because it is linked to their life circumstances such as poverty, homelessness and childhood institutionalisation.

Many people with cognitive impairments have had poor school education (or none at all) and low disability service recognition and support. They are more likely to experience homelessness. Indigenous girls and women with complex needs are more likely than any other group to experience these problems. Evidence shows that those provided with disability and housing support in managed supported accommodation will fare better than

The proportion of prisoners with disabilities may be close to 30 percent,<sup>35</sup> costing the public \$1 billion *annually* to keep them in jail. The placement of people with intellectual disability alone in prisons costs Australian taxpayers approximately \$300 million annually. That is the figure for accommodation and support only, but when lost productivity, the incalculable loss to children deprived of a parent and the ongoing costs of the cycle of post-prison rehabilitation and recidivism are factored in, the real costs are far greater. Preventing people from entering prison and preventing recidivism by people with intellectual and cognitive disabilities could significantly reduce those proportions. A 10 percent decrease in the number of prisoners, for example, would result in savings of approximately \$300 million per annum.<sup>36</sup>

<sup>35</sup> Australian Institute of Health and Welfare. 2011. *The Health of Australia's Prisoners 2010*. Australian Institute of Health and Welfare.

<sup>36</sup> Price Waterhouse Coopers calculations, based on: Australian Bureau of Statistics. 2010. *Prisoners in Australia, Cat. no. 4517.0*.

<sup>37</sup> E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*. Background Paper for the National Legal Aid Conference, Darwin.

<sup>38</sup> These views persist in public debate about sex offenders with intellectual impairments now. 'They should be institutionalised until the day arrives that it can be guaranteed they are 100 per cent safe to be released back into the community. If that day never arrives, it's bad luck for them.' This was the view of a Victorian police officer reported in Melbourne's *The Herald Sun*. Ellen Whinnet. 2013. 'Sex fiends from a secret facility in Melbourne suburb of Fairfield released to strike again' *The Herald Sun*. 28 October. < <http://www.heraldsun.com.au/news/law-order/sex-fiends-from-a-secret-facility-in-melbourne-suburb-of-fairfield-released-to-strike-again/story-fn0fee2-1226747880040> >

<sup>39</sup> According to Terman, such people were 'a menace [...] to the social, economic and moral welfare of the state'. L Terman. 1917. 'Feeble minded children in the schools' in F Nelles. *Report of 1915 legislature committee on mental deficiency and the proposed institution for the care of feeble-minded and epileptic persons*. Whittier, CA: Whittier State School, Department of Printing Instruction.



those who are not. Money spent on programs aimed at reducing homelessness and poverty and on providing support to people with disability is more likely to reduce crime and make communities safer than tougher sentences and the associated dollars spent on prisons and other corrective and post-corrective services.

The University of NSW carried out comprehensive long-term research on the criminal justice system and people with cognitive impairment, establishing that people with complex cognitive disabilities are more likely to have earlier contact with police, or to have been clients of juvenile justice, and experience multiple police episodes throughout their life and increased prison episodes.<sup>40</sup> It is not uncommon for people to go right through the system - police, courts, corrections - without any recognition of their impairment. Where intellectual impairment is acknowledged, support provided tends to be crisis driven. Other research by Baldry *et al* has established that every dollar spent on early support saves government between \$1.40 and \$2.40 in longer term costs of courts and corrections.<sup>41</sup>

### About language

- Section 201 (3) (d) includes unnecessary qualifiers and contestable value judgements that in our view do not belong in legislation. ‘Persons *suffering* mental illness’ would be better framed as ‘persons with mental illness’ or ‘persons who have mental illness’ or ‘persons who have lived experience of mental illness’. Suffering warrants pity – and being pitiable is not a sound foundation on which to build equitable relationships with other Council members.
- The Council’s members who have ‘experience relevant to the functions of the council’<sup>42</sup> ought not be only professionals, academics, practitioners and the like, but should include people with lived experience of, for example, mental illness, homelessness, disability. Just as the Bill provides for membership including an Aboriginal and Torres Strait Islander person, rather than someone who is an ‘expert’ in Aboriginal and Torres Strait Islander persons, the Bill should provide for membership that includes people with personal experience of the circumstances that are so strongly associated with overrepresentation in the criminal justice system.
- For similar reasons, QAI does not support conviction, including summary conviction, for an indictable offence as grounds for the Attorney-General to terminate a member’s appointment to the Council. Exclusion of such persons is not consistent with particular functions of the Council set out in section 199, namely, ‘to obtain the community’s views on sentencing and matters about sentencing’. People convicted of indictable offences are still ‘members of the community’, and ones who have experience that is particularly relevant to the Council’s proceedings.

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<sup>40</sup> Professor Eileen Baldry, Dr Leanne Dowse and Ms Melissa Clarence. 2012. *People with intellectual and other cognitive disability in the criminal justice system. Report for NSW Family and Community Services Ageing, Disability and Home Care*

<sup>41</sup> Ruth McCausland, Sarah Johnson, Eileen Baldry and 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.

<sup>42</sup> Section 201 (3)

**Conclusion**

A Sentencing Advisory Council is one step removed from political processes. A Council has the potential to act as a rational contributor to public debate on law and order, and as a corrective to public and media pressure on the judiciary - in particular, pressure on the judiciary to impose longer, harsher terms of imprisonment. It can provide more objective information to legislators and courts, permitting greater community input into the sentencing debate. The overrepresentation of people with disability in our prisons and in the whole of the criminal justice system is one of those objective facts that is often overlooked.

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