



# 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.

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*Systems and Legal Advocacy for vulnerable people with Disability*

Monday 19 November 2018

The Legal Affairs and Community Safety Committee

Dear Committee,

Thank you for this opportunity to comment on the **Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018**

Yours sincerely,

Michelle O'Flynn, Director

## Queensland Advocacy Incorporated

**About QAI**

Queensland Advocacy Incorporated (QAI) is a member-driven and non-profit advocacy NGO for people with disability. Our mission is to promote, protect and defend through advocacy, the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland.

Our Human Rights and Mental Health services offer legal advice and representation: the first, on guardianship and administration and the latter on mental health matters. Our Justice Support and NDIS Appeals programs provide non-legal advice and support to people with disability in the criminal justice system and to participants in NDIS Appeals. This individual advocacy informs our campaigns at state and federal levels for changes in attitudes, laws and policies, and it assists us to understand the challenges, needs and concerns of people who are the focus of this submission.

QAI's constitution holds that every person is unique and valuable, and that diversity is intrinsic to community. People with disability comprise the majority of our Board; their wisdom and lived experience of disability is our foundation and guide.

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**Introduction**

QAI supports in-community monitoring of people who may be a danger to others because of repeat sexual offences, however, the monitoring should be court ordered, and not be indefinite unless certain level of risk has first been assessed and determined. Indiscriminate monitoring 'until they die' is contrary to natural justice, contrary to the principle that any offender must be allowed the possibility of rehabilitation without undue constraint, and does not adequately safeguard the person's rights and freedoms when balanced against the rights and freedoms of others. It amounts to a form of additional punishment that is offensive to the fundamental tenets of our law, and contrary to the obligations assumed by Australia under the ICCPR.

QAI is concerned that a disproportionate number of offenders affected by this legislation will be people with disabilities, commonly having some form of intellectual impairment. We note that a common story for people with disabilities who are convicted of sexual offences is that:

- They experienced some form of abuse and neglect while growing up, often in institutions.
- Because of their disability they received little or no sex education or training in appropriate interpersonal behaviour that was suited to their needs.
- They were modelled poor behaviour and the behaviours they observed were not in 'natural' environments.

In addition, we note that the bill:

- Covers too broad a range of repeat offences and fails to distinguish between relatively minor repeat offences and serious repeat offences
- Encompasses the possibility of double punishment
- Relies on the deployment of monitoring devices that may be either inefficient or do not function
- Denies offenders the privacy required if they are ever to rehabilitate
- May encourage vigilante action

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- Potentially departs from fundamental legislative principles because it mandates administrative rather than judicial power to review indeterminate supervision, undermining the separation of powers and the necessary checks and balances critical to the effective operation of our Westminster-based political system.

We recommend that this or similar legislation takes into account the particular circumstances of offenders who have disabilities. Where responsibility for the monitoring and management of offenders who have disabilities is not aligned with a responsibility for the provision of disability support care and services, the result may be detrimental to the person's care and compromise the protection of the community.

**Sexual Offences: Overrepresentation of People with Intellectual Impairment**

People with intellectual disability are probably overrepresented for sexual offences<sup>1</sup> if we base our inferences on data from other jurisdictions, but this area is under-researched and valid generalisations are impossible when so many sorting factors distort the data. Prevalence of sex offenders with intellectual disabilities located in prison populations, for example, are not an accurate measure of the numbers of people with intellectual disabilities who have been charged with this type of offence, because the accused person who has an intellectual disability may be diverted out of the criminal justice system at many points prior to imprisonment.

Those who remain in the system and receive a custodial sentence are likely to be unrepresentative of the totality of the individuals who actually engage in problematic behaviours, or who are charged but diverted out of the criminal justice system. There is no reliable recent Queensland data.

In general, offences committed by people with intellectual impairments tend to be low level and less serious, and in many instances more likely to be considered sexual harassment if perpetrated by a person without a disability. People with disabilities who engage in what are known as 'Problematic Sexual Behaviours' tend to engage in nuisance behaviours including public masturbation, exhibitionism, voyeurism and sexual threats whilst penetration of the victim

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<sup>1</sup> W Glaser. 1997. 'Assessing the Dangerousness and Treatability of Sex Offenders in the Community' Australian Institute of Criminology Conference. Sydney; April 1997; G Simon. 1987. 'A manual of practice' cited in M Little. 'Sport and recreation: Help for intellectually disabled offenders' in Challenger (ed.) 1987. *Intellectually Disabled Offenders*. Australian Institute of Criminology. Seminar Proceedings 19. Canberra.

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and physical violence is less likely to occur when a person with an intellectual disability is the perpetrator.<sup>2</sup>

## Recidivism

People with intellectual disability who have been convicted of sexual offences are more likely to have been victims of sexual and physical abuse, especially during childhood and in institutions,<sup>3</sup> - a history of having been the victim of sexual abuse occurred in 44 percent of sexual recidivists with intellectual disability, compared with 17 percent of non-recidivists.<sup>4</sup> Another study revealed that more than a third of offenders with intellectual disability had previously been victims of sexual assault.<sup>5</sup>

About half of a sample of respondents with foetal alcohol syndrome had repeated problems with inappropriate sexual behaviour or had been sentenced to a sexual offender programme.<sup>6</sup> Contributing factors are complex and difficult to disentangle, but offending correlates with unstable family background, environmental trauma, cognitive impairments learning difficulties, impulsivity, and social problems.<sup>7</sup>

People with intellectual disabilities who exhibit Problematic Sexual Behaviours are likely to have been physically or sexually abused in institutional or group home settings, by family members or acquaintances, or by strangers.<sup>8</sup> The leading Australian case in relation to the court's determination of a non-parole period in the sentencing of a person with intellectual disability convicted of a sexual offence, for example, concerns a man who himself had been sexually abused at precisely the same age that he abused his victim.<sup>9</sup>

It is important to note that the infantilisation of people with intellectual disability has contributed, and still does, to the view that people with intellectual disability do not need sex education,

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<sup>2</sup> Gilby *et al* 1989. Mentally retarded adolescent sex offenders: A survey and pilot study. *Canadian Journal of Psychiatry*, 34(6), 542-548.

<sup>3</sup> W Glaser. 1987. Assessing the Dangerousness and Treatability of Sex Offenders in the Community in Australian Institute of Criminology Conference. Sydney; S Hayes. 2001. The relationship between childhood abuse and subsequent sex offending. In: 12th World Congress of the International Association for the Scientific Study of Intellectual Disability. Montpellier; 2004; L Lindsay, J Law, K Quinn, N Smart & A Smith. 'A comparison of physical and sexual abuse: sexual and non-sexual offenders with intellectual disability'. *Child Abuse and Neglect*; 25: 989-995.

<sup>4</sup> C Morrison. 2002. 'Characteristics of recidivist and non-recidivist sex offenders with an intellectual disability'. International Association for the Scientific Study of Intellectual Disability European Congress, Dublin.

<sup>5</sup> Balogh *et al* 2001. Sexual abuse in children and adolescents with intellectual disability. *Journal of Intellectual Disability Research*, 45(Pt 3), 194-201.

<sup>6</sup> J Baumbach. 2000. Sexual offending behaviour in persons with fetal alcohol syndrome. Paper presented at the International Association for the Scientific Study of Intellectual Disability Congress, Seattle.

<sup>7</sup> *Ibid.*

<sup>8</sup> Balogh *et al* 2001. 'Sexual abuse in children and adolescents with intellectual disability'. *Journal of Intellectual Disability Research*, 45(Pt 3), 194-201.

<sup>9</sup> *Muldrock v The Queen*. [2011] HCA 39.

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coaching, training or instruction in appropriate sexual behaviour. People with intellectual disability historically have been treated as asexual 'children' who are incapable of intimate relations. In Queensland, we still have a provision in our criminal code which makes it unlawful for any person to have a sexual relationship with someone who has 'Impairment of the mind'. 'Impairment of the mind' includes anyone who has an intellectual, psychiatric, cognitive or neurological impairment resulting in a substantial reduction of the person's capacity for communication, social interaction or learning, and the person needing support.<sup>10</sup>

The provision is arguably discriminatory, in effect, if not in law, but the key problem is that it removes any prosecutorial onus to show lack of consent. In other words, the assumption underlying the provision, like that for statutory rape in relation to minors, is that people with intellectual impairment are not capable of consenting to intimate relations. Any kind of sexual activity with them is an offence, and by implication, any intimate relationship between a person with intellectual disability and any other person is criminalized.

A person who is considered legally to not be capable of consenting is considered to be a person who does not need to have appropriate sexual behaviour explained to them, and many people with intellectual disability grow up without any sex education at all. It is not uncommon for parents and institutions that operate *in loco parentis* to treat people with intellectual disability as perpetual children, denying them sex education and actively discouraging them from pursuing safe and appropriate sexual experiences.

Apart from this prejudice about a person's ability to understand one of the most basic forms of human communication, people with intellectual disability commonly have been raised in segregated environments: sent to special schools, and to special education units, and then proceeding straight to sheltered workshops when they reach adulthood. They have few opportunities to mix with other young people without disability and of their own age, where much of the learning about relationships and sexual behaviour occurs. Instead, thrown together, people with disability will often learn other inappropriate behavior from each other.

For people with intellectual disability this kind of offending often stems from a general lack of understanding of social norms and acceptable sexual behaviour and may be attributable to segregated and restricted social lives.<sup>11</sup> This was acknowledged by Mr Muldrock's sentencing

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<sup>10</sup> Section 216 Criminal Code Queensland. Impairment of the mind is defined broadly to include not only people who have intellectual disability and who need support, but also many people who have some form of communication impairment but no impairment of cognitive function.

<sup>11</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.

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judge when imposing the 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>12</sup> The protective factors preventing sex offending include early recognition and intervention, stable home life and no experience of being the victim of sexual violence.

Unlawful sexual behaviour by people with intellectual disability is responsive to, and effectively corrected by programs for habilitation and rehabilitation.<sup>13</sup> If in jail, people with intellectual disability and other cognitive impairments need tailored prison education/rehabilitation even if the benefits are mitigated by the negative effects of incarceration itself.

There is clearly little understanding or differentiation made regarding pedophilia and a person with intellectual impairment who has interest and curiosity about children because of a lack of adult social relationships. QAI acknowledges the risk that can be posed by these situations, however, it is inappropriate and unjustly harsh to label a person with disability in these circumstances as a predator. It is evident that the person requires counselling and relationship education and this must be provided if we are to redress the cycle of victims' offending against others.

Quoting Police Minister Ryan "We're lowering the threshold for what constitutes 'concerning conduct' and expanding the types of conditions a court can impose, including enforcing GPS tracking, making counselling sessions compulsory, and directing them where to live." If the Minister is committed to providing such counselling then appropriate funding must be set aside to ensure that young people with disability (particularly those who have themselves experienced abuse and sexual violence) are afforded those counselling supports.

## Conclusion

QAI supports the intent of the bill to provide protection to the community and peace of mind to victims. These goals, however, must be balanced with fundamental rights that we all share in a democratic society: to privacy, to freedom from unreasonable government interference, to due process.

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<sup>12</sup> *Muldock v The Queen*. [2011] HCA 39. <<http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca39-2011-10-05.pdf>>

<sup>13</sup> Simon Wardale, Director Forensic Disability, Queensland.

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People with disability who have been convicted of sexual offences often have terrible childhood histories of abuse and neglect in segregated environments, and have been denied even the possibility of normal intimate relations by a society that sees them as non-persons, not worthy of education or a normal life in the community. To impose permanent monitoring conditions is to deny them the most basic civil rights, to again treat them as non-persons, and provides no guarantee of reduced recidivism. Instead of focusing on models that are primarily restrictive and punitive, we recommend that Queensland considers the need for:

- Better-informed risk assessment, and
- more support and treatment programs for high-risk offenders.

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