



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 Individual Advocacy for vulnerable People with Disability

20 December 2019

Dear Committee,

Thank you for this opportunity to comment on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019.

Yours sincerely,

Michelle O'Flynn, Director

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About QAI

Queensland Advocacy Incorporated (QAI) is a member-driven, non-profit advocacy organization 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 legal services offer advice and representation on guardianship, administration and mental health matters. Our Justice Support and NDIS advocacy programs provide non-legal advice and support to people with disability in the criminal justice system and the NDIS. This individual advocacy informs our campaigns at state and federal levels for changes in attitudes, laws and policies and assists us to understand the challenges, needs and concerns of people with disability.

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 and their lived experience of disability is our foundation and guide.

Recommendations

- QAI supports the measures in the Bill.
- QAI recommends extension of the intermediary pilot to include all witnesses with cognitive impairment.
- QAI recommends the 'narrowing' of the CCQ definition of 'impairment of the mind'.
- The State Government must:
 - Do more to ensure that people with intellectual disability who have committed minor sexual offences get better support in the community rather than detention.
 - Take steps to improve the supports, particularly behaviour supports, available to people with intellectual disability who have been convicted of child sexual offences.
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QAI comments on the bill

QAI supports these amendments, but our primary concern is the people with disabilities affected by them, whether as complainants, suspects or offenders. In our view there is more that this bill could do to protect children with disabilities who are victims of sexual abuse, and more that could be done by government to reduce sexual abuse by and of people with disability.

Mandatory reporting and witness intermediaries

QAI welcome's mandatory reporting, but we note that reporting is only the first step in a process that may or may not lead to the cessation of abuse, if it is so; the reduction of risk to other possible victims through the identification, prosecution, and punishment/rehabilitation of a sexual offender; and a deterring signals to other potential offenders. It is not enough to have mandatory reporting if reports are not properly investigated because children with disabilities, particularly those with cognitive disabilities, are not taken seriously as complainants and allowed to be witnesses because they are not credible.

Where incidents are reported, too frequently people with disability are not supported by police to seek further investigation or conviction in relation to reports of violence, abuse or neglect. In many cases, witnesses with disability and the evidence they provide are not perceived as 'credible'.

The Senate Standing Committee on Community Affairs looked into abuse of people with disability in 2015, and the Disability Alliance provided the committee with evidence from over 70 victims of abuse, violence or neglect, many of who attempted to report to the police. In most cases, these investigations did not proceed due to a perceived lack of evidence or credibility of witnesses with disability. Ms Kobie Hicks, who has an intellectual disability, told the committee of her experience reporting incidents of sexual abuse to police:

I reported a sexual abuse that happened to me when I was a child. It was happening, from what I can remember, from grade four right up until I was 19. The police were saying there was no evidence, but I can give a description of the house, what I was wearing. I found that the police did not help me very much. They did not want to listen to me...They wrote everything in the report, but they asked the person who did it to me and that is when they turned and said that there was no evidence...They said, 'The case is closed. There is no evidence. Don't bother.' That is how I was spoken to by a police officer. They were not going to go any further, so 'drop it'. There is no point.¹

QAI has advocated in the past for a Queensland Disability Justice Plan that includes provisions that will improve the investigation of complaints of abuse, violence and neglect against people with

¹ Senate Community Affairs Committee. 2015. Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability. P 156.

cognitive impairments. We are pleased then that the new bill includes provisions to support a pilot program for intermediaries who will provide communication support to vulnerable witnesses.

The victim liaison officers and training for police in working with vulnerable witnesses are also provisions of the bill that QAI strongly supports. We urge the government to consider expanding the program for witness intermediaries so that every witness who has cognitive impairment regardless of the matter likewise supported.

Redefining 'impairment of the mind'

The only other provision about which we would like to comment is 'Clause 25' that provides for mandatory reporting when an adult becomes aware of information that causes the adult on reasonable grounds, or ought reasonably to have caused them to believe, that a child sexual offence is being or has been committed against a child under 16, or < 18 who has impairment of the mind.

The definition of 'impairment of the mind' in the Criminal Code needs revision. It casts too a wide net in the current circumstance, as it does in relation to section 216. It includes any person who has intellectual, cognitive, psychiatric or neurological disability or combination thereof, resulting in a substantial reduction in capacity for learning, social interaction or communication and that person needing support. So, it could be unlawful, for example, for someone to have sexual relations with a person under 18 who has cerebral palsy, MS or another neurological condition with no 'cognitive deficit' and who is as capable as any other person between the ages of 16 and 18 years of giving or refusing consent. A very intelligent young woman, of 'genius IQ' who has MS or cerebral palsy, may choose to have intimate relations - but this clause places her partner in jeopardy should she choose such a course.

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Excerpts from QAI's previous submission to this inquiry

International and Australian research, including the Royal Commission's² own contracted research, suggests that women and girls with disabilities, particularly with cognitive disabilities, are subjected to sexual abuse at higher rates than women and girls generally. The same likely is true for male victims,³ but there is not a lot of research to confirm it.

Precise figures are difficult to determine, because child sexual abuse already is underreported for a variety of reasons including offenders' threats of violence or other forms of retaliation, shame and children's fears of damaging valued relationships. Rates of investigation, prosecution and conviction too are lower compared to other kinds of crime, but for child victims with disabilities the rates of reporting through to conviction are even lower because for children with disabilities, the already formidable barriers faced by victims are even more complex, and the bars set by our rules of evidence and legal procedures are even more difficult for children with disability to surmount.

There is not a lot of relevant Australian research, but work elsewhere suggests that 10-15% of sex offenders are intellectually impaired;⁴ the percentage of intellectually disabled offenders dealt with for sexual offences may be up to six times higher than the percentage for all offenders;⁵ 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;⁶ more than a third of offenders with intellectual disability had previously been victims of sexual assault offenders with learning disabilities start offending at an early age, had a history of multiple offences, and that sexual and arson offences were over-represented;⁷ a higher proportion of sex offenders report having been sexually abused in childhood (38% versus 12.7%)⁸ and sex offenders with an intellectual disability are more likely to have experienced significant levels of abuse, particularly while in institutional or group home settings, by family members or acquaintances, or by strangers⁹

Although it would be simplistic to suggest that a childhood history of abuse is the primary variable in the 'cycle of abuse', QAI's work representing people with disabilities on forensic and treatment orders gives us repeated anecdotal evidence that abusers with cognitive impairments often have been abused. We cannot disclose client details of our own clients, but the High Court judgement in *Muldrock*¹⁰ is on public record and illustrates the point.

² Royal Commission into Institutional Responses to Child Sexual Abuse.

³ For example, Llewellyn G, Wayland S and Hindmarsh G Disability and child sexual abuse in institutional contexts Sydney, N.S.W. : Royal Commission into Institutional Responses to Child Sexual Abuse, 2016.

⁴ W Murphy, E Coleman and M Haynes "Treatment and evaluation issues with the mentally retarded sex offender" (1983) cited in W Glaser "A comparison of intellectually disabled and non-intellectually disabled sex offenders" in Freckelton., Greig and McMahon (eds) (1991) 243 at 243.

⁵ G Simon "A manual of practice" (1980) cited in M Little "Sport and recreation: Help for intellectually disabled offenders" in Challenger (ed) (1987) 113 at 117.

⁶ 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.

⁷ Barron, P., Hassiotis, A. & Banes, J. (2004). Offenders with learning disability: a prospective comparative study. *Journal of Learning Disability Research*, 48, 69-76.

⁹ Glaser, W.F. 1997. Assessing the Dangerousness And Treatability of Sex Offenders in The Community. Paper at Australian Institute of Criminology Conference. Sydney, April.

¹⁰ *R v Muldrock* [2011] HCA 39.

Mr Muldrock, who has intellectual disability, was subjected to homosexual sexual abuse at the age of ten. As an adult he showed a sexual interest in male children, and he was convicted and sentenced in relation to sexual intercourse with a minor who was ten years old too at the time of the offence. The High Court in *R v Muldrock*¹¹ considered the relevance of intellectual disability in sentencing and acknowledged that a child sex offender with intellectual disability neither punishment in the sense of retribution, nor denunciation requires significant emphasis, and general deterrence none at all in light of Mr Muldrock's limited moral culpability. There was no requirement, said the Court, for general deterrence.

The importance of sex education and habilitation

Without in any way discounting the often permanent hurt and damage to victims, some sex offenders with intellectual disability have behaved inappropriately because they did not know what behaviours are acceptable, often lacking knowledge about sexuality, and reflecting the restricted life of the person with the disability who may have been denied sex education in the past or denied legitimate avenues to pursue sexual interests in a safe and appropriate way.¹²

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.¹³ This was a fact acknowledged by Mr Muldrock's sentencing judge when he imposed 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.¹⁴ The factors that prevent sex offending include early recognition and intervention, stable home life and an absence of sexual violence.

The segregation of people with impairment contributes to a lack of experience in and ignorance of social expectations with regard to some types of social and sexual relationships and interactions. That ignorance of social norms is at the root of some unlawful behaviour.

Too often, people with intellectual disability throughout their lives are treated by parents, supporters, clinicians, teachers and peers as sexless and therefore not in need of sex education, but people with intellectual disability, like anyone else, are curious about sexual expression and want to love and be loved, like and be liked, touch and be touched. People with intellectual disability have a right to education about and support for establishing friendships and relationships, including sexual relationships, yet Queensland is the only Australian jurisdiction in which it is unlawful for any person to have intimate relations with a person who has intellectual disability,¹⁵ or to expose a person with intellectual disability to 'indecent material'. The generality of the provision makes intimate

¹¹ [2011] HCA 39.

¹² Lindsay, W (2002) 'Research and Literature on Sex Offenders with Intellectual and Developmental Disabilities', *Journal of Intellectual Disability Research*, 46(1), 74-85. Lindsay L, Law J, Quinn K, Smart N and Smith A. 2001. 'A comparison of physical and sexual abuse: sexual and non-sexual offenders with intellectual disability'. *Child Abuse and Neglect*. 25: 989-995; Lindsay, W & Smith, A (1998) 'Responses to Treatment for Sex Offenders with Intellectual Disability: A Comparison of Men with 1- and 2-year Probation Sentences', *Journal of Intellectual Disability Research*, 142(5), 346-353; Lindsay, W.R., Taylor, J.L. & Sturmey, P. (Eds.). 2004. *Offenders with developmental disabilities*. Chichester: Wiley; Lindsay, W.R. & Taylor, J.L. 2005. A selective review of research on offenders with developmental disabilities: Assessment and treatment. *Clinical Psychology & Psychotherapy*; M Ierace. 1989. *Intellectual Disability: A Manual for Criminal Lawyers*. Sydney: Redfern Legal Centre Publishing.

¹³ 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.

¹⁴ *Muldrock v The Queen*. [2011] HCA 39. <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca39-2011-10-05.pdf>

¹⁵ 'Person with impairment of the mind' is the expression used in the Queensland Criminal Code. The definition is broad and captures "a person with a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these and results in a substantial reduction of the person's capacity for communication, social interaction or learning and the person needing support".

relationships with Queenslanders who have an intellectual disability unlawful, and exposes the partners of people with intellectual disability (often other people with intellectual disability) to prosecution.

Discriminatory provisions such as this are symptomatic of wider prejudices about disabilities, and these prejudices prevent girls and boys with disabilities from learning appropriate sexual behaviour, expose them to social and sexual miss-expression, and make them more vulnerable to predatory behaviour.

Jayden¹⁶ has an intellectual disability. At a church outing, he and a young girl were invited to a secluded place by an older boy (without intellectual disability). The older boy directed Jayden to expose himself, and the girl to touch Jayden's penis. The girl told her parents, and they complained to police. This was the Jayden's first and only offence. The risk to the community from this young man with an intellectual disability is low, but he is now a registered sex offender and detained in an institution. He needs training in appropriate sexual behaviour.

Jayden's experience is indicative: his problem was lack of education and awareness, but other young people with intellectual disability may come from dysfunctional backgrounds and have learned inappropriate behaviour from parents and peers.

Detention in an institutional setting is costly. Apart from the mitigation of risk to the community for the duration of a prisoner's detention, the benefits to the offender, victim and community are at best questionable, and to the offender, at worst, clearly damaging.

Just over 30% of prisoners at any time are on remand.¹⁷ Queensland Corrective Services ('QCS') provides no rehabilitation programs to remandees. While QCS has a range of evidence based sexual offending programs, including one that is specifically directed to people with cognitive disabilities,¹⁸ there is a range of impediments to prisoners completing them. Of the less than 60% of prisoners who *could* complete a program, many do not get the opportunity to do so because programs are only available to people with longer sentences, and only in some prisons. A program completed in the middle of a sentence is of limited value to a prisoner on release, sometimes years later, and prison programs are of limited value when completed at a time when the prisoners' exposure to sexual 'triggers' is small to non-existent because there are few potential victims and prisoners have no access to internet or mobile phones. What offenders with disabilities need is assistance to understand and implement strategies to avoid sexual offending while in the community where sexual offending is possible, but with the right support, unlikely.

Prisoners who have intellectual disabilities are at greater risk of emotional, physical and sexual victimisation.¹⁹ In the community, people such as Jayden can build capacity, and by building capacity will get to a point where they are less of a risk and need less support.

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¹⁶ Not actual name.

¹⁷ Queensland Corrective Services. *Annual Report 2018-2019*. Page 8.

¹⁸ Inclusion Sexual Offending Program – designed for offenders with an identified cognitive deficit who require assistance to understand and implement strategies to avoid sexual offending.

¹⁹ S Hayes. 1991. 'Sex offenders'. *Australia and New Zealand Journal of Developmental Disabilities*. 17:221–227.

Remedies

The Attorney-General said in relation to mistake of fact rape reform that “when you're looking at reforms to significant legislation like the Criminal Code, you need to do it carefully”.²⁰ This bill places before parliament a slew of recommendations on the classification of child exploitation material²¹ and recommendations on reporting through to sentencing and appeals by the Criminal Justice Report, but it deals with only a part of the problem.

The focus of the Bill is to increase the rate of conviction of child sex offenders, but QAI would like to see the State Government strengthen remedial and rehabilitative measures for people with disability who have sexually offended and who are in community corrections and prisons at the other end of the criminal justice system. We note that where the state has been responsible for institutions in which abuse is known to have occurred there appears to be a moral obligation on society to provide rehabilitative and treatment-oriented dispositions for offenders rather than punishment.

For people in a custodial setting (including remand), NDIS-funded supports are limited to aids and equipment; allied health and other therapy (behaviour support); capacity and skills building supports for living in the community after release; transition supports, and training for staff.

Like other potential NDIS participants, the challenge for those who live in prisons and secure facilities is to establish their eligibility and design a support plan, but with the enormous additional challenge to implement it while living in detention with all its restrictions and in an environment unaccustomed to allowing external access.

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²⁰ <https://www.abc.net.au/news/2019-07-09/mistake-of-fact-defence-review-queensland/11291856>

²¹ Recommended by the Queensland Sentencing Advisory Council