

26 September 2011

Legal Affairs, Police, Corrective Services and Emergency Services Committee.

Parliament House

George St

Brisbane 4000

Dear Committee,

Re: Police Powers and Responsibilities and Other Legislation Amendment Bill 2011.

Please accept Queensland Advocacy Incorporated's submission on the proposed changes to the Police Powers and Responsibilities and Other Legislation Amendment Bill 2011. We would particularly like to thank you for agreeing to an extension of time for this submission.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'K Wade'.

Ken Wade, Director

Nick Collyer, Systems Advocate

Introduction

Queensland Advocacy Incorporated's submission focuses solely on the sections of the Bill that propose to widen powers with respect to **pat-down searches**.

Summary

- People with disabilities are overrepresented in the criminal justice system.
- Widening police powers around public order behaviour disproportionately affects people with intellectual and cognitive disabilities.
- Pat-down searches for people with intellectual and cognitive disabilities are another form of intrusion.
- Pat-down searches are likely to escalate rather than defuse conflict situations.
- Section 52A will increase police interaction with, and result in additional charges for people with disabilities, and increase State costs in relation to the prosecution of offences.
- Prevention and diversion are fairer and less costly than arrest, conviction and detention, but prevention and diversion are less likely when police are awarded powers that tend to trigger and escalate conflict.

Eliminating offences and practices that ensnare persons with disability in the criminal justice system

There is overwhelming evidence that police powers around public nuisance and order offenses must be curtailed if we are to attempt to redress the overrepresentation of people with disabilities in the criminal justice system. That people with disabilities - especially those with cognitive and intellectual disabilities - are overrepresented is clear and unequivocal. The boxed area below provides a selection of recent research on overrepresentation. 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.¹

Persons with disability are particularly susceptible to conviction on public nuisance offences (or what are often referred to as 'public space' offences such as begging, trespass, failure to follow a police direction and so on) due to the fact that they tend to be required to occupy public space to a greater extent than others, and because their impairment, disability, and associated psychological and environmental factors make them more visible, and less tolerated by others, in public space.

In Queensland the likelihood of persons with disability being charged with public space offences has increased significantly since the passage of the *Summary Offences Act* 2005, which increased the

¹ 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'.

range and scope of public nuisance offences. The typical consequence of a public nuisance offence is the imposition of a fine, which typically carries a default period of imprisonment.

Persons with cognitive disability often experience significant difficulty in complying with legal obligations, such as a requirement to pay a fine. They may not be able to afford to do so, and may also find it difficult to otherwise organise themselves to do so. They are therefore much more likely to end up serving a default period of imprisonment. Additionally, because their underlying living situation is unlikely to change, they are quite likely to be charged repeatedly with the same or a similar public nuisance offence, perhaps resulting in the accumulation of undischarged fines, and in an escalation in the sanctions imposed not only for the nuisance behaviour, but also because of the failure to deal with its legal consequences. Public nuisance offences are in essence victimless crimes and they impact in seriously disproportionate ways on persons with disability and other socially disadvantaged groups.

Police Dealing with Suspects

Police contact with persons with disability as suspects of crime is also often very problematic for reasons that include the following:

- > For environmental reasons, persons with disability tend to occupy public space to a much greater degree than others, are often more visible, and are subject to a higher level of surveillance and suspicion than others. Members of the public are more likely to experience discomfort in their presence and to seek police assistance in moving them on. Persons with disability are therefore particularly susceptible to being charged by Police with public nuisance offences;
- > Public space policing, in particular, is typically characterised by a high degree of verbal direction to take certain actions (such as to move-on). Due to their impairment and to psychological and environmental factors persons with disability may find it difficult to comprehend these directions, to remember them, and to act in accordance with them (for example, the public space may be in proximity to a necessary support service). This can lead to an escalation in law enforcement interventions, based on the inappropriate belief the person is wilfully disobeying a police instruction;
- > Police may (usually unconsciously) view persons with disability (particularly those with cognitive impairments) as inherently prone to crime, and may consequently focus inappropriate attention on them when a crime is committed to the exclusion of other potential explanations and suspects. This belief is typically exacerbated and reinforced by the frequent churning of particular persons with disability through the law enforcement and criminal and youth justice systems, which occurs for the psychological and environment reasons outlined in this report, rather than because of any inherent propensity for crime. It also becomes a self-fulfilling prophecy;
- > Police may inadvertently or intentionally proceed to interview a suspect with disability without having effectively advised the suspect of his or her rights to silence and legal representation, or the fact that anything the suspect says may be taken down and used in evidence against them. Although police may formally issue this advice, it may not be done in a manner in which it can be effectively understood and acted upon by the suspect;

> Police interviews are discursive verbal processes. Many persons with cognitive disability have limited receptive and expressive language. They also tend to have poor concentration skills, poor memory, are easily confused and become stressed and tired in relatively short periods of time. They therefore may have great difficulty understanding and following what is being put to them in the police interview, and in explaining their version of events in response. This may appear to police as evasive and suspicious, and as indicative of guilt;

Police detection and investigation of crimes against persons with disability is currently inhibited by a range of factors, including the following (*Disabled Justice*, 2007: 64):

- Lack of police sensitivity and knowledge in relation to the specific types of crime to which persons with disability may be subject,
- Inaccurate, stereotyped and discriminatory beliefs and attitudes held by police about persons with disability, that may result in the failure to characterise conduct towards them as criminal, or in the assignment of a low priority to the investigation of these crimes;
- A tendency not to believe persons with disability, and to prefer the accounts of others in relation to a set of events;
- A tendency to feel personal discomfort in the presence of a person with disability, particularly where the person has significant impairment or disability, leading to a failure to identify and a desire (which is often unconscious) to disengage from them;
- Poor reporting practices in relation to crimes against persons with disability, including by disability and social service agencies, which often means that investigations are not timely, and that primary evidence has been lost or compromised by the time an investigation commences;
- A tendency to view crimes against persons with disability as social problems which social service agencies have a responsibility to resolve;
- A tendency to idealise social service agencies involved in the provision of services and supports to persons with disability, and a consequent reluctance to investigate allegations that involve misconduct by these agencies and their employees;
- A tendency to idealise the family of persons with disability and a consequent reluctance to investigate allegations that involve misconduct by family members. This also results from a tendency to view disability as a private tragedy in which there is little public responsibility;

There is an increasing tendency for police to be drawn inappropriately into situations where a person with disability is disoriented and in distress due to impairment (for example, during an acute psychotic episode, or in the case of persons with intellectual impairment or brain injury, an episode of challenging behaviour). The involvement of police in these situations presents very specific dangers, as it typically results in the deployment of 'command and control' tactics to subdue the person, which can lead to a serious escalation of the incident, and may result in the deployment of lethal force.

In Australia, there has been a long series of incidents in which persons with psychosocial disability have been fatally shot by police intervening in situations where the person is presenting in a disorientated state, which typically involve actual or perceived threats of self-harm or harm to others. A study of all police fatal shootings in Australia for the period 1990 to 1997 found that more than a third of victims were subject to a recognised psychosocial disability at the time of the incident (Dalton: 1998). During the period 2000 to 2004 there were five fatal police shootings in Victoria, each of which involved a victim who had a psychosocial disability at the time of the incident (Springvale Monash Legal Service Incorporated: 2005).

It has been estimated that at least three persons with psychosocial disability were fatally shot by police in Queensland between 2002 and 2005 (Office of the Public Advocate: 2005). Subsequent investigations by Coronial and other authorities have been critical of the failure of police to identify the person as subject to a psychosocial disability, police lack of understanding of psychosocial disability, and the lack of specialist training provided to police in the management of critical incidents involving persons with psychosocial disability. The counterproductive 'command and control' intervention tactics typically employed by police, and the lack of interagency co-operation between mental health services and police, have also been heavily criticised. Although the available research is focused on persons with psychosocial disability, the same general issues pertain to police involvement in incidents involving persons with intellectual impairment and those with brain injury. (2007: 71).

In particular, 'command and control' tactics should be specifically avoided, as should policing practices typically associated with command and control. This includes the use of loud hailer, sirens, flood lights, dogs, and physical intrusions including pat-down searches etc that only serve to heighten the person's distress and disorientation;

> Law enforcement measures (for example, arrest and charge) should not be instigated during or following an incident where the situation can be deescalated and the person returned or diverted to appropriate mental health, disability service or other social supports (*Disabled Justice*, 2007: 72).

People with Intellectual and Cognitive Disabilities and the Justice System: Facts and Figures

People with intellectual and cognitive disabilities are more likely than the general population to be victims of crime (Disabled Justice, 2007: 19-20) and as offenders are overrepresented at every stage of the criminal justice process. The key prevalence data in relation to the contact of persons with intellectual and psychosocial impairment with law enforcement and criminal justice agencies may be summarised as follows:

A Queensland study published in 2002 found that:

- > Based on adaptive functioning assessment, between 4.8-14.8% of prisoners of adult correctional facilities may have intellectual disability;
- > Based on IQ testing, 9.8% of persons scored in the intellectual disability range, and 28.6% scored in the 'borderline' intellectual disability range (Queensland Department of Corrective Services: 2002);

Another Queensland study in relation to female prisoners published in 2002 found that 57.1% of women reported having been diagnosed with a specific mental illness, the most common of which was depression. Nine per cent of female prisoners had been admitted to a psychiatric hospital and 17% had been prescribed counselling or treatment (Hockings et al: 2002);

A NSW study of young offenders on community orders published in 2006 found that:

- ☐ Between 11-15% had intellectual disability
- ☐ 40% reported severe symptoms consistent with a clinical disorder (conduct disorder and substance abuse disorder were the most prevalent conditions)
- ☐ 25% reported symptoms suggestive of a depressive or anxiety-related disorder (Kenny et al: 2006);

A NSW study published in 2003 found that 48% of reception inmates and 38% of sentenced inmates had experienced a mental disorder (defined as a psychosis, affective disorder or anxiety disorder) in the previous twelve months. When a broader definition of 'any psychiatric disorder' was used, it was found that 74% of the New South Wales prison population had experienced an episode in the previous twelve months (Butler and Allnut: 2003);

A Victorian study published in 2003 found that 51% of prisoners reported that they had been assessed, or had received treatment from a psychiatrist or a doctor for an emotional or mental health problem (Victorian Department of Justice: 2003);

These prevalence figures compare with a general population incidence of 1-3% for persons with intellectual impairment and 5.6% for persons with psychosocial impairment. (Cocks, 1989; Australian Institute of Health and Welfare, 2002) (from *Disabled Justice: The barriers to justice for persons with disability in Queensland*. (Queensland Advocacy Incorporated, 2007: 26-7)

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