

Office of the Public Advocate (Queensland) Systems Advocacy

Submission to the Legal and Constitutional Affairs References Committee

For the Inquiry into the Value of a Justice
Reinvestment Approach to Criminal
Justice in Australia

March 2013

Interest of the Public Advocate for Queensland

The Public Advocate was established by the *Guardianship and Administration Act 2000* to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland. The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity (the adults) in all aspects of community life.

More specifically, the functions of the Public Advocate are:

- Promoting and protecting the rights of the adults with impaired capacity;
- Promoting the protection of the adults from neglect, exploitation or abuse;
- Encouraging the development of programs to help the adults reach their greatest practicable degree of autonomy;
- Promoting the provision of services and facilities for the adults; and
- Monitoring and reviewing the delivery of services and facilities to the adults.¹

In 2013, there are approximately 114,000 Queensland adults with impaired decision-making capacity.² Of these vulnerable people, most have a mental illness (54%) or an intellectual disability (26%).

Research suggests that individuals with a mental illness and/or intellectual disability are over-represented at all stages in the criminal justice system.³ More specifically, research undertaken by the Queensland Department of Corrective Services in 2002 identified that almost 10% of prisoners achieved a score of under 70 in a functional IQ test, which is indicative of an intellectual disability. A further 29% of prisoners achieved a score of 70-84, which placed them in the borderline intellectual disability range.⁴ The research also showed that more than one in twenty prisoners had attended a special school as a child and that almost 32% of prisoners in Queensland had a mental illness. In comparison, only a small proportion of the general Queensland population have an intellectual disability (3%) or mental illness that results in a disability (6%).

Position of the Public Advocate (Queensland)

Addressing risks through justice reinvestment

I commend the Legal and Constitutional Affairs References Committee for its examination of the value of an Australian justice reinvestment strategy. Prison and the criminal justice system represent an expensive response to criminal activity that, for people with a disability or impaired decision-making capacity and/or people from Indigenous or culturally diverse backgrounds, is often a consequence of the disadvantage and exclusion they have experienced throughout their lives. Justice reinvestment provides an opportunity to improve life outcomes, minimise re-offending and recidivism, and prevent further disadvantage and exclusion.

Justice reinvestment is a broad term that can have different strategic applications. I view justice reinvestment as a localised criminal justice policy under which a portion of the public funds spent on imprisonment are diverted to local communities where there is a high concentration of offenders and/or evidence of risk factors that contribute to contact with the criminal justice system. Funds are diverted to community programs, supports, services and activities that are aimed at addressing the underlying causes of crime.

The concept of justice reinvestment aligns with the national social inclusion agenda. The Australian Social Inclusion Board acknowledges the destructive effect of social inequality and exclusion on the Australian community.⁵ Through its early intervention approach, justice reinvestment provides the opportunity to make fundamental changes within communities and provide a pathway out of disadvantage for many vulnerable people.

Justice reinvestment can be premised on a number of assumptions that have been evidenced in various national and international jurisdictions:

- The majority of offenders, prisoners and re-offenders usually live in a small number of easily-identified neighbourhoods.
- Services that reduce the risk of crime can be delivered in a community environment.

¹ Section 209, *Guardianship and Administration Act 2000 (Qld)*.

² Office of the Public Advocate 2013, *The potential population for systems advocacy*, Office of the Public Advocate, Brisbane.

³ Butler T. and Allnutt S. 2003, *Mental Illness Among New South Wales' Prisoners*, New South Wales Corrections Health Service, Sydney.

⁴ Department of Corrective Services 2002, *Intellectual Disability Survey 2002*, Queensland Department of Corrective Services, Unpublished.

⁵ Australian Social Inclusion Board 2012, *Social Inclusion in Australia: How Australia is Faring*, 2nd Edition, Australian Social Inclusion Board, Canberra.

- Services that reduce the risk of crime are far more cost-effective than passage through the criminal justice system.

These evidence-based premises suggest that a portion of the funding that is currently used to apprehend, process and incarcerate offenders could be diverted to targeted community services that provide alternate opportunities and supports for those who might otherwise engage in criminal behaviour or find themselves vulnerable to exploitation by those seeking assistance in criminal activities.

Adults with impaired decision-making capacity are a particularly vulnerable group of individuals for whom targeted justice reinvestment strategies could help address social exclusion and disadvantage while enhancing opportunities to participate socially and economically.

Any form of justice reinvestment should be approached with a human rights focus that reflects and upholds Australia's responsibilities as articulated in the relevant Conventions to which Australia is party. These include the United Nations Convention of the Rights of Persons with Disability and the Principles for the Protection of Persons with Mental Illness, as well as relevant national standards for education and disability services.

The disadvantage and social exclusion faced by adults with impaired decision-making capacity often lead to a range of risks that could be addressed through a justice reinvestment framework.

When considering justice reinvestment strategies for adults with impaired decision-making, I encourage the committee to explore the numerous individual considerations and systems issues that impact on the likelihood of adults with impaired decision-making capacity coming into contact with the criminal justice system. These include, but are not limited to:

- Social isolation and limited access to community services;
- Compromised judgement that may increase the risk of coercion into criminal activity;
- Low socioeconomic status and limited opportunity;
- A lack of meaningful day activities that provide opportunities for the development of skills and enhance social and economic participation; and
- The fragmented nature of human services systems.

Evidence suggests that the fragmented and complex human services system often results in high levels of frustration, anxiety and burn-out for adults with impaired decision-making capacity and their families as they attempt to identify, secure and manage supports.⁶ Systems change that focuses on integrated and collaborative approaches to service delivery is urgently required so that the adequacy of such services, both individually and collectively, to generate improved outcomes for adults with impaired decision-making capacity and their families is enhanced.

The extreme social isolation experienced by many adults with impaired decision-making capacity may compound the risk of contact with the criminal justice system.⁷ This is a commonly reported risk factor.

Justice reinvestment strategies that promote access to social resources could strengthen and develop social networks, social connectedness, and social participation for adults with impaired decision-making capacity. Without appropriate policy and service responses, people with impaired decision-making capacity and their families face poor quality of life and diminished life opportunities, which often lead to frustration, poverty and crime.

People at risk of extreme social isolation need to be identified early as the social care interventions, particularly within a justice reinvestment framework, will be less costly, easier to design and deliver, and more likely to succeed.

Justice reinvestment is one avenue through which all levels of government may address the unacceptably high level of educational disadvantage experienced by people with impaired decision-making capacity. For young people in particular, access to education promotes independence, reduces boredom and frustration, maximises individual potential and is a fundamental human right that must be upheld and safeguarded. Through participation in education, young people with impaired decision-making capacity experience not only an important element of social inclusion, but also the opportunity to be supported through important life transitions such as progression to post-school employment, or education, or other meaningful day activities.⁸

⁶ The Parliament of the Commonwealth of Australia 2009, *Who Cares...? Report on the Inquiry into Better Support for Carers*, House of Representatives Standing Committee on Family Community Housing and Youth, April 2009, Commonwealth of Australia, Canberra.

⁷ Office of the Public Advocate 2013, *Social participation of people with impaired decision-making capacity*, Office of the Public Advocate, Brisbane.

⁸ Office of the Public Advocate 2013, *Educational attainment of people with impaired decision-making capacity*, Office of the Public Advocate, Brisbane.

Employment opportunity is another pathway to addressing social and economic disadvantage. Employment, both of people with impaired decision-making capacity and their families, may reduce financial stress and increase resilience. Yet many people with impaired decision-making capacity (65%) do not have the opportunity to participate in employment.⁹

There have been a number of employment policies aimed at increasing workforce participation for people with a disability.¹⁰ Most initiatives tend to focus on increasing incentives for employers seeking to engage people with a disability. These policies will be only partly successful until adequate supports are in place to overcome the barriers to workforce participation faced by people with impaired decision-making capacity. Justice reinvestment offers a chance to address barriers such as:

- Low levels of general educational attainment;
- Lack of access to vocational and continuing training;
- Lack of effective general technical and vocational guidance programmes and placement services ;
- Lack of access to meaningful work experience;
- Discriminatory attitudes towards people with impaired decision-making capacity participating in the workplace;
- Lack of reasonable accommodation of impairment and disability related needs in the workplace.

Research and related literature suggests that for people with impaired decision-making capacity, low levels of meaningful participation exacerbate the risks of social exclusion. This may lead to increased risks of poor mental and physical health, boredom and anti-social behaviour (including involvement in often petty criminal activity), family and carer stress, family crisis and family breakdown.

For younger people (15-34 years) with complex needs, access to meaningful day activity, including life skills development, may represent a sustainable, mainstream approach to addressing the risk factors that increase the likelihood of coming into contact with the criminal justice system. More generally, it may promote broader participation opportunities and inclusion, and provide opportunities to develop appropriate social behaviours, greater self esteem and independence.

An effective justice reinvestment framework must address risks such as social exclusion, educational and economic disadvantage and the existing shortfalls in services systems if it is to reduce the level of contact that adults with impaired decision-making capacity have with the criminal justice system.

The value of justice reinvestment for adults with impaired decision-making capacity

As evidenced in the previous section, adults with impaired decision-making capacity are particularly vulnerable to risks that may see them come into contact with the criminal justice system. The lack of a cohesive and integrated approach to the provision of human services also increases the risk and vulnerability for this cohort. In considering the value of justice reinvestment for adults with impaired decision-making capacity, there are three points in the criminal justice process at which funding could be reinvested.

Pre-offence

A justice reinvestment framework in Australia would be most effective, in terms of maximum reinvestment and social returns, if it focused on addressing the risks faced by adults with impaired decision-making capacity prior to any contact with the criminal justice system. This form of reinvestment is most effective for two reasons.

First, it represents the greatest opportunity for reinvestment. No harm is done to the community if an offence is prevented and no cost is incurred by the state in policing, processing and incarcerating an offender. The total cost of the criminal justice process, from apprehension to incarceration, can therefore be reinvested in the community. This approach also prevents criminal socialisation and the cycle of re-offence and recidivism.

Second, the types of services that could be targeted through pre-offence reinvestment strategies are the most generic and therefore require fewer resources and are most easily implemented. These strategies included improved access to education and training, supporting and increasing the resilience of families, increasing the number and accessibility of youth diversion programmes such as Police Citizens Youth Centres, and increasing, enhancing and improved targeting of employment services.

⁹ Office of the Public Advocate 2013, *Employment opportunity for people with impaired decision-making capacity*, Office of the Public Advocate, Brisbane.

¹⁰ For example, the Employment Assistance Fund, the Supported Wage System and the Disability Support Pension Employment Incentive Pilot.

Pre-offence interventions have been effectively employed since the 1960s and fit well within the context of other early intervention strategies, however the notion of funding them through justice reinvestment is relatively new. An example of an effective pre-offence intervention is the Canadian Controlling Disruptive Boys programme, which focused on improving social and academic competence. The program achieved a 13-20% reduction in participation in petty crime amongst the participants.¹¹ Other research cites programmes that provide education, vocational training and job placement for disadvantaged youth, which have been shown to significantly improve employment performance and reduced involvement in criminal activity for programme participants.¹²

Programmes of this nature could be used to address the disadvantage experienced by adults with impaired decision-making capacity and reduce the risk of contact with the criminal justice system. By examining the risk factors that may lead adults with impaired decision-making capacity to come into contact with the criminal justice system and considering the causal factors underpinning these risks, strategies and programmes could be devised that address these issues and increase opportunities for meaningful participation in community.

Post-offence

Post-offence reinvestment strategies would intervene after an adult with impaired decision-making capacity had committed an offence and would provide value by diverting the adult away from traditional criminal justice responses toward alternative processes aimed at addressing the behaviours that led to the adult offending and strengthening their social and economic participation. I am particularly interested in this strategy as the over-representation of people with intellectual disability and/or mental illness in the criminal justice system suggests that traditional criminal justice responses are not as effective with this offender group.

In considering opportunities for reinvesting in post-offence strategies and programmes, it may be worth examining specialist mental health courts and diversion programmes, many of which have proven to be effective alternatives to traditional criminal justice processes.¹³ The Queensland Mental Health Intervention Project is a divisionary programme that aims to prevent and safely resolve mental health crisis situations through enhanced co-operation, collaboration and understanding between the Queensland Police Service, Queensland Health and the Queensland Ambulance Service. It focuses on recognising and de-escalating crisis situations in which mental illness is a factor, and coordinating inter-agency activities both at the point of the initial crisis response and also in subsequent follow up supports such as case management, communication, collaborative service and community development, training and evaluation, assessment and support and crisis intervention.

The Queensland Mental Health Court is a specialist court focused on diversion on legal grounds. It determines issues of fitness to plead or stand trial, and whether an alleged offender was of unsound mind at the time of an offence. The Mental Health Court also has jurisdiction to hear appeals from the Mental Health Review Tribunal relating to involuntary detention and treatment.

The Court uses inquisitorial powers to explore the relationship between the defendant's mental illness and the alleged offences to determine criminal culpability and their present fitness to stand trial. Following a determination of unsound mind or unfitness to stand trial, the Court can make a forensic order detaining a person in an authorised mental health service or an order for limited community treatment so that the person may access or reside in the community under the supervision of an authorised mental health service.

While the Mental Health Court does act to divert adult offenders with impaired decision-making capacity away from imprisonment, it is limited in that it only considers the effect of the person's impairment in relation to, or at the time of, the crime. In contrast, 'therapeutic jurisprudence' is a concept that emphasises the law's 'healing potential to increase wellbeing' and can be applied through court-based mental health diversion programmes.¹⁴ I encourage the committee to investigate programmes and strategies that embody this concept when considering justice reinvestment and how it may be applied to addressing the needs of adults with impaired decision-making capacity.

Programmes based on therapeutic jurisprudence seek to address the underlying causes of criminal behaviour exhibited by offenders with a mental illness and/or intellectual disability by referring them to disability or mental health services. They also function to link clients to mental health services, reduce reoffending rates and reduce public expenditure.¹⁵

¹¹ Tremblay, R, Vitaro, F, Bertrand, L, LeBlanc, M, Beauchesne, H, Boisileau, H & David, L 1992, *Parent and child training to prevent early onset of delinquency: The Montréal longitudinal-experimental study*, Preventing Antisocial Behavior, eds J McCord & R Tremblay, Guilford Press, New York, pp. 17-138.

¹² United States House of Representatives, Committee on Government Operations 1985, *Job Corps Program: Its Benefits Outweigh the Costs*, US Government Printing Office, Washington

¹³ Australian Institute of Criminology 2011, *Court-based Mental Health Diversion Programmes*, Australian Government, Canberra

¹⁴ Graham H 2007, *A foot in the (revolving) door? A preliminary evaluation of Tasmania's mental health diversion list*, University of Tasmania, Hobart

¹⁵ Sarteschi C, Vaughn M & Kim K 2011, *Assessing the effectiveness of mental health courts: A quantitative review*, Journal of Criminal Justice 39(1): 12–20

Post-release

Post-release strategies represent the least effective approach to justice reinvestment for adults with impaired decision-making capacity. While these strategies are focused on discouraging recidivism, reducing community corrections costs and the rehabilitation of offenders, such strategies also have the least funding available for reinvestment because significant amounts of funding have already been expended through apprehension, processing and incarceration of the offenders. In the United States, these strategies represent the bulk of justice reinvestment and are justified on the basis that they delay the construction of additional prison facilities.

The challenge for Australia is to identify the scope for post-release reinvestment for adults with impaired decision-making capacity who are already in contact with the criminal justice system. There exists significant opportunity to provide supports aimed at linking these adults with community services that address the risks that originally led to their contact with the criminal justice system. These include access to stable accommodation, vocational training and employment services.

Economic outcomes

In Queensland, it costs more than \$116,000 per year to house a single prisoner and over \$5,000 per year to provide community corrective services.¹⁶

By comparison, the average annual cost for a person with impaired decision-making capacity or a profound or severe disability (e.g. as a result of an intellectual disability or mental illness) to access a specialist disability service ranges from as little as \$7,800 to \$80,500 for full time supported accommodation. Similarly, federal employment services for people with a disability carry an average annual cost of \$5,600 per client.

While these areas of support represent only a few of the many potential avenues for reinvestment, they serve as an example of the fiscal advantages that may be realised through targeted justice reinvestment strategies. Many other opportunities for leveraging reinvestment through mainstream human services such as education and housing programmes are also likely to exist.

Social outcomes

Australia has a clear obligation to ensure and promote the full realisation of all rights and freedoms for adults with impaired decision-making capacity. Among these rights are the rights to be included in the community, education and the full development of their potential, work and seek employment and participate in cultural life, recreation and sport.¹⁷

Research undertaken by my Office has highlighted that in the areas of education, employment and social inclusion, adults with impaired decision-making capacity experience alarming degrees of disadvantage and exclusion.¹⁸ The lack of access to supports across these domains forms the basis of most measures of socioeconomic disadvantage, which is itself one of the principal predictors for entry into the criminal justice system. This highlights the need for policies that address the socioeconomic disadvantage of people with impaired decision-making capacity as a natural response to the over-representation of this cohort in the criminal justice system.

I am particularly concerned about the unacceptable lack of meaningful day activity for adults with impaired decision-making capacity. Meaningful day activity is a holistic concept that describes an individual's overall access to education, employment and social inclusion opportunities.

Research undertaken by my Office demonstrates that more than 40% of working age adults with impaired decision-making capacity have no meaningful day activity.¹⁹ These people do not work, attend education or vocational training nor do they have access to even the most basic of community access services. The lack of meaningful day activity may exacerbate social exclusion and lead to increased risk of antisocial behaviour, which often precipitates contact with the criminal justice system. Addressing the lack of meaningful day activity for adults with impaired decision-making capacity should form a significant part of any justice reinvestment strategy.

¹⁶ Productivity Commission 2013, *2013 Report on Government Services*, Chapter 8, Appendix A, Table 8A.7, Productivity Commission, Canberra.

¹⁷ United Nations General Assembly 2007, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106*, Article 24, 26, 27, UNGA, New York.

¹⁸ Office of the Public Advocate 2012, *2010-11 Annual Report*, Office of the Public Advocate, Brisbane.

¹⁹ Office of the Public Advocate 2013, *Meaningful day activity for people with impaired decision-making capacity*, Office of the Public Advocate, Brisbane.

Concluding Comments

It is the submission of the Public Advocate of Queensland that justice reinvestment is an important step toward reducing the over-representation of adults with impaired decision-making capacity in the criminal justice system. These vulnerable people face unacceptable levels of social exclusion and disadvantage that the fragmented nature of Australian service systems as they currently exist is unable to address. This disadvantage increases the likelihood of contact with the criminal justice system, which in turn exacerbates the exclusion and disadvantage experienced by adults with impaired decision-making capacity.

All people with a disability or impaired decision-making capacity have the right to access the social and economic resources required to realise their full potential. In accordance with this, I support the development and implementation of an effective justice reinvestment framework that addresses disadvantage and exclusion and reduces interaction with the criminal justice system.

There are choices to be made about where to put effort and emphasis to address disadvantage and exclusion, given competing priorities and scarce resources. Investment in a pre-offence justice reinvestment model should be a high priority and advanced accordingly given that early system responses are more effective and enduring than crisis intervention. They can achieve improved life outcomes and reduce the risk of entry or re-entry into expensive and resource intensive systems.

More broadly, there is an immediate need for all levels of government, across all sectors, to invest in an integrated and sustainable social system that ensures access to social, economic, civic and specialist resources for people with impaired decision-making capacity, their families and the networks of support that surround them. This is a primary way to promote inclusion, protect rights and interests, and reduce risks of disadvantage, abuse, neglect and exploitation.

I look forward to the opportunity to provide comment on further detail regarding how a justice reinvestment framework might address the over-representation of people with impaired decision-making capacity in all stages of the criminal justice system.

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