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 Queensland Forensic Disability Service

Shining light on a closed system through an examination of forensic disability orders for persons with an intellectual or cognitive disability

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QAI's position statement on the Forensic Disability Service

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and legal advocacy organisation for people with disability in Queensland, Australia.

QAI's 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.

QAI does this by engaging in systems advocacy work - through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this state, and through individual advocacy.

We believe that all humans are equally important, unique and of intrinsic value and that all people should be seen and valued, first and foremost, as a whole person. We should embrace difference and diversity, rather than aspiring to an ideal of uniformity of appearance and behaviour.

Central to this, and consistent with our core values and beliefs, QAI will not perpetuate use of language that stereotypes or makes projections based on a particular feature or attribute of a person or detracts from the worth and status of a person with disability. We consider that the use of appropriate language and discourse is fundamental to protecting the rights and dignity, and elevating the status, of people with disability.

QAI considers that the Forensic Disability Service (FDS) has the potential to offer a viable habilitative alternative for persons with an intellectual or cognitive impairment with forensic issues. Appropriately implemented, the FDS could help to habilitate persons with an intellectual or cognitive impairment who have come into contact with the criminal justice system as suspects or offenders, by addressing any underlying factors that increase the likelihood of recidivism and strengthening social and community supports.

QAI holds grave concerns that, in its present form, the Forensic Disability Service is not offering a viable habilitative alternative to the mainstream criminal justice system. QAI considers that the imposition of Forensic Orders (Disability) that are not time limited has many detrimental effects and is not consistent with our international obligations, whilst offering scant habilitative benefits. The imposition of an indefinite, restrictive order denies certainty for the future, can be inconsistent with habilitation and can keep people enmeshed in the system beyond the point at which it is appropriate or beneficial.

Further, we consider that the indefinite detention of persons within the Forensic Disability Service Unit:

1. contravenes our commitments under international humanitarian law, including under the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (UN CAT)
2. contravenes the requirements of natural justice
3. is not carried out in a way that is consistent with the spirit and intent of the relevant Queensland legislation
4. violates the human rights and dignities of the persons subjected to incarceration within the FDS
5. further marginalises and disempowers an already highly vulnerable group of persons in our society.

The FDS was not intended to operate on a retributive mandate – its stated function is not to punish but rather to minimise the risk that persons placed under a Forensic Order (Disability) allegedly pose to themselves and to others, and to provide care for those held in detention, with a view to ultimately releasing them from the order and fully reintegrating them within the community. Both the non-retributive and transitional features of the FDS are important to acknowledge. Persons under a Forensic Order (Disability) have been *charged* with an indictable offence but this charge has never been tested in a court of law and therefore whether in fact the offence was committed at all, and if so by the relevant person, has not been proven to the requisite standard (which is the criminal standard of proof – 'beyond reasonable doubt'). Further, a person cannot be found criminally responsible for an offence committed while the person was of 'unsound mind'. This means that even if the person did commit the offence, they cannot be held criminally culpable for it if their intellectual or cognitive impairment impairs their capacity to the requisite extent. From this viewpoint, indefinite restrictive orders and/or incarceration of persons with an intellectual or cognitive impairment within the FDS entails multiple breaches of their human rights.

The mandate of the FDS is that each person should progress along an individualised development plan that is designed with input from the person and their family, professionals and supporters and sets out the educational and training programs that will assist them to transition back into the community. However, the reality is starkly different. In reality, Forensic Orders (Disability) operate indefinitely and significantly fetter autonomy and habilitation.

For those whose orders require detention within the FDS Unit or an Authorised Mental Health Service (AMHS), there are very limited opportunities for social and community interaction and involvement. This appears to result from a reticence to approve community involvement because of the risk assessment-based model that the FDS operates on, which places a heavy emphasis on the risk component. From this perspective, the prospect of community engagement is considered to pose unduly high levels of risk and, particularly for some residents, be excessively resource-intensive and difficult to arrange. The image of the FDS as a 'transitional' facility is challenged by the reality that, since it opened in 2011, no resident has yet been discharged. We query whether this reality is not created, at least in part, by the lack of motivation by the Department to create vacancies in the FDS Unit given that it is highly costly to run and therefore its continued operation is difficult to justify in the absence of full utilisation? The culture of the FDS Unit is highly institutionalised in an age where institutionalisation is no longer considered appropriate and social and community inclusiveness is instead the recognised goal for persons with intellectual or cognitive disability.

The FDS has not fulfilled its obligation to people with disability (whose care and lives they have been entrusted with), to their families and supporters or to society. Despite the time that has passed since its inception and the significant funding that has been invested into it, the FDS Unit is a failed prototype, the trialling of which has been at significant cost to the persons incarcerated within it

QAI believes that the FDS Unit should be redesigned to operate as a resource centre offering training to specialised support staff to enable them to work effectively within the community and detention centres. Within the community, staff should be appropriately trained and resourced to deliver habilitative and educational services to assist people with an intellectual or cognitive disability and forensic issues to live within the community with appropriate support. The FDS should also provide prison in-reach services, delivering tailored, inclusive education and training to prisoners with intellectual or cognitive impairment to facilitate their

habilitation and rehabilitation and ultimately help to facilitate their transition from detention and reduce the likelihood of recidivism.

Introduction

Persons with an intellectual or cognitive impairment and forensic issues can be placed under a Forensic Order (Disability) as an alternative to processing through the mainstream criminal justice system. As will be discussed in this paper, there are many – mostly laudable – reasons for this diversion. Yet there are also some substantive problems with this approach, both in its theory and application. Chiefly among these is the perpetual and enduring nature of Forensic Orders, with their uncapped terms potentially running indefinitely – this is a core concern with the process that has many adverse implications. As we will discuss in this paper, placing a person under a restrictive and conditional order which is not time limited is not consistent with the accepted practice in equivalent criminal justice processes. It denies certainty for the future, can be therapeutically counter-productive and can keep people enmeshed within a system beyond the point at which it is appropriate or beneficial.

The indefinite incarceration of persons with an intellectual or cognitive disability within the Forensic Disability Service (FDS) Unit is also a fundamental human rights concern. This is an issue that directly touches upon three core issues of vital importance from a human rights perspective: the inequitable and less favourable treatment of a person from a vulnerable, marginalised group; disregard for the presumption of innocence; and the deprivation of liberty for an indefinite period.

Persons with an intellectual or cognitive disability are a vulnerable group that is already significantly marginalised within our society. As a group, they face stigma and discrimination, lower rates of participation in the community and the workforce, adverse health outcomes with higher rates of chronic illness and lower life expectancy.[1]

This vulnerability is heightened at the interface of disability and the criminal justice system. The same factors that increase the vulnerability and marginalisation of this group also increase their chances of coming into contact with the criminal justice system, as victims, offenders and witnesses of crime. While there is limited and inconclusive data on the prevalence of offending by people with an intellectual or cognitive disability in Queensland, ample research from other Australian jurisdictions and overseas establishes the significant over-representation of this group within the criminal justice system.[2]

While we now know that language and discourse are fundamental to the way in which people shape and refine their views, they are never more critical than in the context of a vulnerable group such as people with disability. This is particularly so when we consider the history of disempowerment and multiple disadvantage experienced by many within this group and the adverse effects of labelling and negative stereotyping for people with disability. Therefore, as a caveat to this discussion, we note that language and discourse have a substantive impact on the lived experience of people with an intellectual or cognitive disability. The use of certain terminology, particularly terminology that labels behaviour or is based on a medicalised model, feeds into negative stereotyping and the propagation of myths about people with

[1] Including Aboriginal and Torres Strait Islander people, people with disability, people in rural and remote regions, refugees and asylum seekers (particularly those in detention), people from culturally and linguistically diverse backgrounds, LGBTI people, children and adolescents, prisoners, and people experiencing chronic disease, unemployment and homelessness: Joint NGO Submission to the 2015 Universal Periodic Review of Australia. Available from Human Rights Law Centre < http://hrlc.org.au/upr/>.

[2] Queensland Advocacy Incorporated. 2007. *Disabled Justice: The barriers to justice for persons with disability in Queensland*; Queensland Advocacy Incorporated. 2015. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland;* Department of Communities, *Forensic Disability Service: Service Model*, 2.

disability. This can clearly be seen in the context of the application of Restrictive Practices (RPs) on persons with an intellectual or cognitive disability, where people are commonly labelled as having 'challenging behaviour' and this is used to justify the imposition of RPs. The exhibition of behaviours of concern is not an attribute of the person, but is rather their attempt to communicate, in often the only way they are able to. Yet once branded as a person with challenging behaviour, this label can itself function as the basis for further negative stereotyping and labelling, rather than development of a sensitive response focussed on understanding the attempted communication.

At the interface between disability and the criminal justice system, the negative effects of anachronistic and often inaccurate language are particularly pronounced. It is inappropriate and confusing, yet common practice, to use the medical term 'treatment', when it is far more appropriate to speak of 'community access', education and training and habilitation. The use of terms such as 'natural mental infirmity' and 'unsoundness of mind' are obviously inappropriate. Further, intellectual disability is often confused with mental illness in a way that is inaccurate and misleading (for example, the conflation of intellectual disability and 'insanity').[3]

By addressing our language, we can assuage a tendency to prejudicial reactions and help to prevent the perpetuation of a cycle of disempowerment.

Background

Until 2011, the *Mental Health Act 2000* (Qld) (MHA) was the primary piece of legislation governing the forensic service system for people with an intellectual or cognitive disability in Queensland (as well as its primary target, people with a mental illness). The MHA provides for a person charged with an indictable offence to be diverted from the criminal justice system to the Mental Health Court (MHC), where the MHC has jurisdiction to make orders including diversion to non-custodial, community-based treatment and detention for involuntary treatment and/or care.[4]

In 2006, Justice Carter published a seminal report which considered the interface between intellectual or cognitive disability and the criminal justice system (the Carter Report).[5] The Carter Report focused on developing a targeted service response and improved legislative framework to respond to the needs of persons with an intellectual or cognitive disability who exhibit 'severely challenging behaviours' and may be subject to Restrictive Practices. As a sub-issue, the report considered the plight of persons with intellectual or cognitive disability who come into contact with the criminal justice system as alleged offenders. One issue of concern flagged by the Carter Report was the conflation of treatment provided to persons with mental illness and persons with an intellectual or cognitive disability. It noted the need to develop a differentiated response to persons with a sole diagnosis of intellectual or cognitive disability (that is, persons who do not have a mental illness). This delineation challenged the accepted practice of accommodating persons with an intellectual or cognitive disability who were diverted from the criminal justice system in authorised mental health services (AMHS). The Carter Report also issued an urgent call for the planned development of a range of

[3] See Queensland Advocacy Incorporated. 2015. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*, 5, 8.
[4] Department of Communities, *Forensic Disability Service: Service Model*, 4.
[5] The Hon Justice Carter QC. Challenging Behaviour and Disability: A Targeted Response. Report to Honourable Warren Pitt MP, Minister for Communities, Disability Services and Seniors, July 2006 ('Carter Report').

accommodation options which respond to the need for secure care, transitional accommodation arrangements and community living.[6]

Also in 2006, Brendan Butler QC published an important report (the Butler Report) that, among other things, noted with grave concern the lack of 'alternative legislative or service arrangements for people with intellectual disability who require secure care'.[7] Consistent with the Carter Report, the Butler Report recommended that the relevant provisions of the MHA also be reviewed, particularly insofar as they covered the treatment of persons with an intellectual or cognitive disability who exhibit severely challenging behaviour.[8]

In the following five years, these recommendations were joined by increasing calls for more appropriate and specialised services to cater for persons with an intellectual or cognitive disability who interact with the criminal justice system.

Differentiating Forensic Orders and Forensic Orders (Disability)

There is provision for the Mental Health Court to make two types of Forensic Orders: Forensic Orders (Mental Condition) (also referred to as general Forensic Orders) and Forensic Orders (Disability). The former can be made for persons with a mental health condition; the latter can only be made for persons with an intellectual or cognitive disability.

In essence, the distinction between the two orders pertains to both the treatment and/or care of the person and the type of facility they are detained in. Persons under a Forensic Order (Disability) can be subjected to involuntary *care*, but not *treatment*, whilst persons under a general Forensic Order can be subjected to both involuntary *treatment and care* for their mental illness. The treatment and care under general Forensic Orders is provided through the mental health system and monitored and reviewed by the MHRT. The care provided under a Forensic Order (Disability) is coordinated between the disability and mental health systems, depending on whether the AMHS or the FDS is accountable for management of the order.[9] Any other disability services and supports that may be available to a person are considered.[10]

Where the person has a dual diagnosis – that is, they have a co-existing mental illness and an intellectual or cognitive disability, a general Forensic Order must be made and treatment provided in an AMHS, not the FDS.[11]

The MHA defines 'care' to include the provision of rehabilitation, habilitation, support and other services.[12] 'Treatment' of a person with a mental illness is defined as anything done, or to be done, with the intention of having a therapeutic effect on the person's illness.[13]

It is outside the scope of this paper to consider the appropriateness or human rights implications of general Forensic Orders. However, without condoning the incarceration of persons with mental illness within forensic units, we emphasise that a fundamental distinction between persons with mental illness and persons with an intellectual or cognitive disability

[6] Department of Communities, *Forensic Disability Service: Service Model*, 3-4.
[7] B Butler, SC. 2006. *Promoting Balance in the Forensic Mental Health System: Final Report of the Review of the Queensland Mental Health Act 2000,* 101.
[8] Department of Communities, *Forensic Disability Service: Service Model*, 4.
[9] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014, 1.
[10] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014, 1-2.
[11] Department of Communities, *Forensic Disability Service: Service Model*, 2.
[12] MHA, Schedule.
[13] MHA, Schedule.

must be acknowledged. Persons with an intellectual or cognitive disability have a lifelong condition that cannot be 'treated'. Rather, their habilitation, rehabilitation and successful inclusion in society is dependent on a positive, supportive response that also focuses on helping others within society to understand their behaviours. Where a person has a dual diagnosis of an intellectual or cognitive disability and a mental illness, there is the potential for their need for support as a consequence of their disability to be overshadowed by a focus on clinically treating their mental illness. This makes it particularly important to distinguish between habilitation and education and Limited Community Treatment. It is important to ensure the use of appropriate language and terminology, as discussed above, to avoid medicalising non-treatable conditions such as intellectual or cognitive disability and ensure that the focus is appropriately placed on habilitating and educating people with disability and forensic issues.

Statutory regulation of forensic disability 'clients'

The Queensland government ultimately responded to these calls by enacting the *Forensic Disability Act 2011* (Qld) ('FDA').[14] The FDA establishes a regime 'to provide for the involuntary detention, and the care and support and protection, of forensic disability clients'.[15] A 'forensic disability client' is defined as a person with an intellectual or cognitive disability who has been ordered by the Queensland Mental Health Court to be detained for treatment or care in the forensic disability service.[16] While the FDA specifically covers people with an intellectual or cognitive impairment charged with the commission of a criminal offence in Queensland, it is not a standalone piece of legislation. The FDA makes a number of amendments to the *Mental Health Act 2000* (Qld) (MHA), which also contains provisions relating to forensic disability. The key amendments made to the MHA include empowering the Mental Health Court to make a Forensic Order (Disability), which can authorise involuntary care for a person and, if required, order the detention of the person in the FDS or authorised mental health service (AMHS).[17] The FDS and the AMHS are the responsibility of the Health portfolio.

The *Disability Services Act 2006* (Qld) and the *Guardianship and Administration Act 2000* (Qld) are also relevant, principally in regulating the use of Restrictive Practices on persons with an intellectual or cognitive impairment on a Forensic Order (Disability). The net result is the fragmentation of the provisions regulating of the diversion of persons with intellectual or cognitive disability from the criminal justice system across four pieces of legislation. As the Public Advocate noted in its submission on the review of the MHA, this 'leaves gaps and often results in sub-optimal responses to people with intellectual disability who come into contact with the criminal justice system'.[18]

Diversion from the mainstream criminal justice system

Before discussing the FDS in detail, it is important to consider the validity of diversion from the criminal justice system for people with an intellectual or cognitive disability.

At the outset of a consideration of diversionary processes, the jurisdictional limitations on the ability to contest fitness to plead or stand trial must be noted. For simple offences, there is no scope to contest fitness. This is not directly relevant to this discussion of the FDS, as only

[14] This Act was passed by Parliament on 10 May 2011.
[15] Section 3
[16] Section 10
[17] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014, 1.
[18] Office of the Public Advocate. 2014. *Submission to the Review of the Mental Health Act 2000 (Qld).*

indictable offences can lead to detention within the FDS and fitness can be disputed for indictable offences. However, the inequity in being prosecuted and punished within the criminal justice system for an offence for which the person lacks capacity is noted.[19]

In the landmark case of *R v AAM*,[20] the court noted that a person with an intellectual disability could elect to plead guilty for a number of reasons that were separate to an admission of guilt for the alleged offence, including limitations in communication or social exchange, not understanding the charge, not understanding the consequences of pleading guilty, or a desire to deal with the charges quickly and/or to avoid the expense of defending the charge.[21] It is also recognised that persons with intellectual disabilities are often more suggestible, which can result in inappropriate omissions.[22] In this scenario – where a person is found guilty of repetitive charges and elects to plead guilty in circumstances where they would be unable or unlikely to be found criminally culpable – they may be detained in the FDS Unit as an alternative to prison. This then gives rise to the considerations discussed elsewhere in this paper, including the possibility of indefinite detention.

The establishment of diversionary programs was driven by both humanitarian and financial concerns. Arguments in support of diversion include that it is unjust to incarcerate people whose behaviour is a consequence of their mental impairment; that people with an intellectual or cognitive disability receive better care outside of prison; that vulnerable people, such as those with intellectual disability, can be exploited in prison; and that prison has very limited therapeutic and rehabilitation potential.[23] Furthermore, there can be serious adverse consequences associated with having a criminal conviction recorded.

From a broader socio-economic perspective, prisons are expensive and they reinforce a cycle that leads back to more offending – a cost-benefit analysis for government favours treatment and intervention programs over incarceration.[24]

However, without undermining the value of these considerations, for the reasons discussed in this paper, QAI considers that it is vital that these benefits are not overshadowed by the multiple adverse consequences associated with being placed under a Forensic Order (Disability). Before moving to consider these issues in detail, we will first outline some of the core features associated with the FDS and the circumstances leading to the imposition of a Forensic Order (Disability).

The imposition of Forensic Orders (Disability)

The imposition of a Forensic Order (Disability) has the necessary result that a person becomes enmeshed within the FDS. Whether the order stipulates that the person is to be incarcerated within the FDS Unit or is to remain living within the community, there are core restrictions and limitations imposed by the order. These restrictions are discretionary; the degree to which a person's autonomy is curbed will differ from case to case. However, all

[19] See Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40 for an excellent discussion of this issue in the context of the youth justice system.
[20] *R v AAM; ex parte A-G (Qld)* (Melissa's case) [2010] QCA 305, [9].
[21] Mack K and Roach S, 1995. *Pleading Guilty: Issues and Practices,* AJJA, Melbourne pp 18
[22] Milne R, Clare I & Bull R, 2002, *Interrogative Suggestibility among Witnesses with Mild Intellectual Disabilities: The Use of an Adaption of the GSS, 8* Journal of Applied Research in Intellectual Disabilities 14
[23] Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to Justice for Persons with Disability in Queensland,* 100-101.
[24] Queensland Advocacy Incorporated. *dis-Abled Justice: Reforms to Justice for Persons with Disability in Queensland,* 100-101; K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. Psychiatry, Psychology and Law. 15(2): 261, 270.

Forensic Orders (Disability), by their very nature, involve some degree of restriction on a person's liberty and autonomy and impact upon them both psychologically and practically.

Criteria for the making of a Forensic Order (Disability)

The Mental Health Court is empowered to make a Forensic Order (Disability) where it determines that a person charged with an indictable offence:

(a) was of unsound mind when the alleged offence was committed; or
(b) is unfit for trial for the alleged offence and the unfitness for trial is of a permanent nature; or
(c) is unfit for trial for the alleged offence and the unfitness for trial is not of a permanent nature.[25]

Whether the order stipulates that the person is to be detained within the FDS Unit or an AMHS or to remain within the community is at the court's discretion. In making a determination in this regard, the court is required to consider three factors: the seriousness of the offence; the treatment or care needs of the person; and the protection of the community.[26]

At present, approximately one quarter of persons under a Forensic Order (Disability) are detained within the FDS Unit or within an AMHS; the remainder reside within the community.[27] Data from the Mental Health Review Tribunal confirms that the significant majority of period reviews of Forensic Orders (Disability) result in the perpetuation of the order – in the 2013/14 reporting year, a total of 59 Forensic Orders (Disability) were confirmed while only two were revoked.[28]

Establishment of the FDS Unit

The FDA establishes and regulates the operation of the FDS Unit. The FDS Service Model operates in conjunction with the FDA, prescribing the service model for the establishment and operation of the FDS. The *Forensic Disability Regulation 2011* (Qld) commenced on 1 July 2011 and relevantly designates the location of the FDS Unit.[29]

The FDS Unit is a purpose-built, medium secure, highly structured and supervised residential treatment and rehabilitation facility in Wacol, Brisbane, with the current capacity to accommodate and provide care for up to ten individuals. As a medium secure facility, there are security features in place, including fully fenced outdoor areas, locked doors, provision for search and seizure of items from residents, the requirement that all visitors be admitted through central security and refusal of visitors where their visits 'were reported to result in a deterioration of behaviour following visit'.[30] The unit opened on 18 July 2011.[31]

The FDS Unit is operated by Regional Service Delivery Operations (RSDO) and managed by the Department of Communities, Child Safety and Disability Services (DCCSDS) using a forensic disability model of service delivery.[32]

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[25] *Mental Health Act 2000* (Qld) s 288(1).
[26] *Mental Health Act 2000* (Qld) s 288(2), (4).
[27] Mental Health Review Tribunal. *Annual Report 2013 – 2014*: In the 2013/14 reporting year, the MHRT conducted 16 first reviews of a Forensic Order (Disability) and 76 subsequent reviews of Forensic Orders (Disability).
[28] Mental Health Review Tribunal. *Annual Report 2013 – 2014*.
[29] Regulation 4.
[30] See FDA Ch 7.
[31] Department of Communities, *Forensic Disability Service: Service Model*, 2.
[32] Department of Communities, *Forensic Disability Service: Service Model*, 2.

While the drafters of the *Forensic Disability Act 2011* (Qld) (FDA) emphasised that human rights principles must underpin the establishment and operation of the FDS, the reality of the FDS Unit is very different to this vision. From the design features and protocols that the FDS Unit operates on to the treatment of its residents, there is little to distinguish the lived experience of those detained within the FDS from incarceration within a mainstream prison. Indeed, incarceration within the FDS is often more isolating and the detention significantly longer than the sentence that would have been imposed had the person been convicted and sentenced for the same offence within the mainstream criminal justice system. This grave concern is not unique to the Queensland FDS Unit but with any FDS model involving institutional detention. Indeed, this exact concern was recently highlighted in the media in Western Australia. Voicing his concerns, the Honourable Wayne Martin, the Western Australian Chief Justice, opined:[33]

> *There is an urgent need for action. There have been reviews of this topic for many years now. It's been a contentious issue, not only in WA, but in other jurisdictions. And a there are a number of problems arising from it. We've seen a couple of celebrated cases in WA where people have been detained in custody for longer periods than they would have served if they'd been convicted of the offence with which they were charged.*

In Queensland, the former Chief Practitioner Disability described the FDS Unit as unfit for human habitation, with its stark environment resembling the harshest prison-like setting. The indefinite nature of the incarceration, in contrast to a sentence imposed by a criminal court which has an end date and prospects of parole, destroys hope. In QAI's experience, a negative cycle is perpetuated, where the capacity and ability of persons detained within the FDS continually declines and they become increasingly institutionalised, which in turn can erode the possibility that the Mental Health Review Tribunal will favourably consider their prospects of community re-integration. This treatment of people, because they have an intellectual or cognitive disability that impairs their capacity in a way that may result in inappropriate conduct, challenges the egalitarian Australian ethos. It also amounts to adverse discrimination on the basis of disability and contravention of basic human rights principles. Further, and ironically, it also undermines the spirit of the rehabilitative programs offered by the FDS.

Data from the MHC shows that, on average, 28 people with an intellectual disability are referred to the MHC and approximately 11 Forensic Orders (Disability) are made each year, which includes both community-based and detention orders. Based on this data, the Department of Communities estimates that there will be three to four new referrals to the FDS Unit each year.[34] Given that the FDS is currently near capacity (nine of the 10 beds are presently occupied), and that no residents have yet been discharged from the FDS over the four years of its operation, this will necessarily result in the detention of more people with intellectual or cognitive impairment – and no co-existing mental illness – within an AMHS. As will now be discussed, there are significant problems that flow from the conflation of intellectual or cognitive disability and mental illness; these issues are aggravated by the incarceration of people under Forensic Orders (Disability) within the mental health service.

[33] http://www.abc.net.au/7.30/content/2015/s4271739.htm.
[34] Department of Communities, *Forensic Disability Service: Service Model*, 4.

Problems resulting from interface between mental health and disability

There are further significant problems created for persons on Forensic Orders (Disability) by the conflation of intellectual or cognitive disability with mental illness. An intellectual or cognitive disability is not a mental illness and to attempt to categorise or treat it as such creates significant structural problems in this area and can result in serious adverse outcomes for people with an intellectual or cognitive disability.

This conflation results, in part, from the lack of appropriate services for people on Forensic Orders (Disability), who consequently get bundled together with persons on general Forensic Orders. Where the FDS Unit is at capacity, or where the MHC decides it in its discretion that it is appropriate, people can be lawfully detained under a Forensic Order (Disability) in an Authorised Mental Health Service (AMHS). This obviously has the effect of further conflating the issue of people with intellectual impairment being inappropriately subsumed into mental health. That, this practice continues notwithstanding the strong recommendations against this by Justice Carter nearly a decade ago (discussed above) is highly concerning.

Complexities also arise because some persons have dual diagnoses of an intellectual or cognitive disability and a mental illness. This can create complexities both in the diagnosis, care and, where appropriate, treatment of the person.[35] As one stakeholder submitting on the current review of the MHA noted:

> *Where responsibility for management of a forensic order (disability) for a person is not aligned with responsibility for the provision of disability support care and services [it] can be detrimental to the person's care and compromise the protection of the community.*

It is well recognised that persons with an intellectual disability do not receive appropriate services from mental health.[36] The development of capacity in persons with an intellectual disability is built upon an understanding of intellectual disability, which is quite distinct from a mental health condition. Historically, there have been significant problems associated with housing people with intellectual impairment with people with mental illness. Such forced co-habitation has resulted in the perpetration of significant abuses against people with disability in institutions such as Wolston Park and Baillie Henderson Hospital, including through the administration on medicalised 'treatment' as a means of behavioural control, rather than the provision of appropriate supports for habilitation.

Yet despite this body of knowledge, the AMHS can be and is responsible for people with intellectual disability on a Forensic Order (Disability).[37] Persons with intellectual disability can be detained within an AMHS, which are established to support people with mental illness, not intellectual disability. These concerns have been noted by stakeholders in the ongoing

[35] See example of epilepsy, discussed by Lyons J in *Re DKB* [2012] QMHC 6: 'Epilepsy is a mental disease and if DKB had been given a defence based on his epilepsy then he would have been placed on the normal forensic order… and the authorised psychiatrist could prescribe medication for his epilepsy. It would seem to me that if he is placed under a Mental Health Court – Disability forensic order then he is only detained for care… The authorised psychiatrist cannot therefore prescribe treatment for DKB's epilepsy, depression or other mental illness but it would seem that the Adult Guardian could provide consent to this health care for at least his epilepsy. This would seem to be an anomaly.

[36] Simon Wardale. *People with intellectual impairment and forensics.* Paper given at *dis-Abled Justice: Reforms to justice for persons with disability in Queensland* forum. Brisbane, 28 May 2015.

[37] As at Dec 2013, there were no persons on a FO (Disability) detained in an AMHS but an AMHS was responsible for the management of FO (Disability) for 21 persons, all of whom had approval to reside full-time in the community.

review of the MHA.[38] The complex procedural requirements that apply to proposed transfers between an AMHS and the FDS are also problematic. One proposal is that an MOU developed across these services that sets out collaborative working arrangements for persons with an intellectual or cognitive disability under a Forensic Order (Disability) would be advantageous,[39] and this seems a reasonable suggestion, although it fails to address the underlying problem.

Case Study 1: Forensic Order (Disability) – community category – no funding for support from Disability Services

Ash was placed under a Forensic Order (Disability) and permitted to live in the community. As a part of Ash's order there were strict conditions relating to where Ash could live and with whom Ash could have contact.

At the time of making the order it was recommended by the Mental Health Court that Ash engage in counselling and obtain support to address forensic issues. However, whilst under the order Ash's primary support was sourced from the local Mental Health Service.

Ash and the treating team tried to source support from Disability Services but Ash was deemed not eligible for Disability Services. The local Mental Health Service had limited resources to be able to assist people with an intellectual disability or cognitive impairment but nonetheless was still responsible for Ash's order.

After some time Ash's treating team felt that they had addressed the original concerns of the Mental Health Court to the best of their ability and decided to recommend that the Forensic Order (Disability) be revoked. Both Ash and the treating team felt that the order was having an overall negative impact upon Ash's life and daily activities as Ash was forced to attend appointments with the local Mental Health Service.

Despite these continuous recommendations and legal assistance Ash's matter is still ongoing.

It has been noted that the conflation of intellectual disability and mental health may be further complicated with the transition to the NDIS from July 2016, as the Queensland Government will cease to provide specialist disability services to people with disability who become funded under the NDIS.[40] Under the NDIS, people with disability will receive funding for their disability-related support needs. People with mental illness will also be eligible for funded supports and/or services that are not provided under the existing state funded health systems. However, this is likely to be assessed according to their primary disability support needs and therefore it is vital that careful planning ensues. Pursuant to the current NDIS agenda, which is still being refined as trials progress in preparation for the progressive roll-out of the NDIS from July 2016, persons in forensic detention will not be eligible for NDIS funded support. We consider that this is inappropriate and that all people should be funded by the NDIS according to their support needs without distinction.

[38] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014
[39] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014.
[40] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014.

The path to the FDS – criteria for forensic detention

The individuals who may be detained under this regime are generally subject to a forensic order made by the MHC.

Residents of the FDS Unit are persons:

1. with an intellectual or cognitive impairment
2. no co-occurring serious mental illness
3. who are alleged to have engaged in offending behaviour
4. who have been found to not have capacity to plead – that is, they are of 'unsound mind' or unfit for trial
5. for whom a secure setting is judged, at the time the order is made, to be the most appropriate option
6. whose detention is therefore ordered pursuant to a Forensic Order (Disability).[41]

The genesis of a Forensic Order (Disability) is the basic principle of law that a person who was of 'unsound mind' at the time of allegedly committing an offence or who is presently unfit to face trial cannot be held criminally responsible for their actions.[42] A related principle of natural justice is that a person who cannot understand court processes cannot be fairly tried and convicted of an offence. Against the background of these fundamental principles, other stated factors including the need to manage risk of harm to others and community safety, the desire to minimise recidivism and the goals of treatment, habilitation and rehabilitation are also relevant.

The criteria for detention in the FDS Unit will now be considered in further detail.

1. An intellectual or cognitive impairment:

An intellectual disability is defined as:

> *A disability characterised by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behaviour, which covers a range of everyday social and practical skills. This disability originates before the age of 18.*[43]

A cognitive disability is defined as:

> *A disability that is attributable to cognitive impairment that results in a substantial reduction of the person's capacity for communication, social interaction, learning, mobility or self-care or management, and the person needing support. The impairment may result from an acquired brain injury, the disability must be permanent or likely to be permanent.*[44]

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[41] Department of Communities, *Forensic Disability Service: Service Model*, 2; *Mental Health Act 2000* (Qld) *Resource Guide*. 2014. 'Chapter 7 – Forensic Order and Disability Forensic Order', 7-3.

[42] This refers to 1. a disease of the mind, a legal rather than medical term meaning a mental state not encountered in normal persons (Gaudron J in *R v Falconer* (1990) 171 CLR 30) or 2. where the person has a natural mental infirmity, meaning mental retardation to such a degree that it affects at least one of the three capacities (*R v Rolph* [1962] Qd R 262). For common law principles in relation to an insanity defence, see the rules in *M'Naughten* (1843) 8 ER 718 and *R v Porter* (1933) 55 CLR 182. While there are differences in terminology, the *M'Naughten* rules are essentially the same as the defence of insanity under s 27 of the *Criminal Code 1899* (Qld) except that the latter includes the control test; cf *The Queen v Falconer* (1990) 171 CLR 30 per Mason CJ, Brennan and McHugh JJ at 46. In relation to fitness to plead, see *R v Presser* [1958] VR 45.

[43] The definition is based on the definition from the American Association on Intellectual and Developmental Disability and on advice from the Centre of Excellence for Behaviour Support (Professor Karen Nankervis) and the clinical team (including Dr Jonathan Mason): Department of Communities, *Forensic Disability Service: Service Model*, 8.

[44] The definition has been advised by Professor Karen Nankervis, and is taken from the *Disability Services Act 2006:* Department of Communities, *Forensic Disability Service: Service Model*, 8.

For offences within Queensland that are subject to commonwealth law, the terms 'intellectual disability' and 'developmentally disabled' are not defined in the *Crimes Act 1914* (Cth), which can result in confusion and inconsistent applications of these provisions.[45]

2. No co-occurring serious mental illness

Persons with a dual diagnosis of an intellectual or cognitive disability and a mental illness do not come within the scope of Forensic Orders (Disability). Rather, these persons are covered by general Forensic Orders.

3. Offending behaviour

To be placed under a Forensic Order, a person much have been charged with an indictable offence[46] – that is, they must have been alleged to have committed a crime or a misdemeanour in contravention of the criminal laws of Queensland.[47] Indictable offences are those for which an offender cannot, unless otherwise expressly provided, be prosecuted or convicted except upon indictment (that is, they cannot be summarily convicted of the offence in a Magistrates Court).[48]

Research has generated a list of characteristics common to offenders with an intellectual or cognitive disability, many of which are the result of the interaction between the person's disability and their history of psychosocial and socioeconomic disadvantage – offenders are predominantly young (early twenties); male; with a mild to moderate intellectual disability; a history of exhibiting behaviour of concern; reduced social skills; familial, social and financial difficulties; difficulties with 'self-control'; naivety or gullibility; reduced understanding of social norms; immature or disinhibited sexual behaviour; inability to manage finances; poor self-esteem and the inability to appropriately express emotions, whether they be affect, anger or frustration.[49]

The types of offending behaviour that typically result in the imposition of a Forensic Order (Disability) and incarceration in the FDS are directly linked to these characteristics and may include one or more of the following:

- physical aggression
- verbal aggression
- inappropriate sexual behaviour
- multiple incidents of offending behaviour.[50]

As will be discussed in detail below, while it is a precondition to the making of a Forensic Order (Disability) that the person has been *charged* with a serious offence, there is no requirement of a finding of criminal culpability.

The normal rules of evidence do not apply to the Mental Health Court.[51] Where the MHC makes a finding that the person lacks capacity, it must only be satisfied on the balance of

[45] O'Carroll B, 2013, *Intellectual disabilities and the determination of fitness to plead in the magistrates' courts,* 37 Criminal Law Journal 51
[46] Section 288 *Mental Health Act 2000* (Qld).
[47] Note that offences against Commonwealth laws are specifically excluded: *Mental Health Act 2000* (Qld) s 235.
[48] *Criminal Code 1889* (Qld) s 3.
[49] Department of Communities, *Forensic Disability Service: Service Model*, 2-3. Intellectual Disability Rights Service 2008; Nankervis 2010; Milne 2003.
[50] O'Brien, et al. 2010. Department of Communities, *Forensic Disability Service: Service Model*, 3. Data from the MHC shows that the most common offence types resulting in a forensic order are violence against humans (41%), sex offences (28%) and arson (13%): Department of Communities, *Forensic Disability Service: Service Model*, 4.

probabilities[52] that the person committed the alleged offence – this is a far less stringent test than the usual criminal test of 'beyond reasonable doubt.[53] While we are anecdotally aware that some investigations are carried out in an endeavour to satisfy the Director – Forensic Disability that the accused person did commit the alleged crime, any investigations are not subject to the normal rigorous criminal justice standards and safeguards established by the rules of evidence.

This is a significant concern from a natural justice and human rights perspective, particularly when we consider that, by its very definition, an indictable offence requires the order for the *trial* of the person.[54] This issue will be discussed in depth later in the paper.

4. Lack of capacity to plead

The requirement that the person lack capacity to plead means that the MHC must decide that the person:

- was of 'unsound mind' when the alleged offence was committed
- is unfit for trial for the alleged offence and the unfitness for trial is of a permanent nature
- is unfit for trial for the alleged offence and the unfitness for trial is not of a permanent nature.[55]

In Queensland, the default presumption is that the accused person is fit to plead and to stand trial.[56] This presumption will not be challenged unless there is evidence brought before the court that suggests that this is not the case.[57] Where a question as to fitness is raised, it may theoretically be dealt with by either a superior criminal court (the District or Supreme Court) or by the MHC.[58] The former avenue involves determination by a jury and is no longer common practice – the usual custom is now to refer cases where there is a question of fitness to the MHC for determination.

Magistrates are not empowered to determine issues of fitness. There is no statutory provision that permits a magistrate to summarily dismiss a matter where it is alleged (or evident) that an accused lacks fitness.[59] This is an issue of substantial concern, as it can result in persons with intellectual disabilities who lack fitness to plead to enter a guilty plea to

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[51] Unless it decides it is in the interests of justice that it be bound for the hearing or a part of the hearing – section 404 *Mental Health Act 2000* (Qld).
[52] Section 405 (2) *Mental Health Act 2000* (Qld).
[53] Section 268 *Mental Health Act 2000* (Qld).
[54] See *Criminal Code 1889* (Qld) s 1.
[55] Section 288 *Mental Health Act 2000* (Qld).
[56] *Eastman v The Queen* (2000) 203 CLR 1 at [86]; *Crimes Act 1900* (ACT), s 312(1); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 7(1); *Criminal Code Act 1983* (NT), sch 1, s 43K; *Criminal Law Consolidation Act 1935* (SA), s 2691; *Criminal Justice (Mental Impairment) Act 1999* (Tas), s 9(1); *Criminal Law (Mentally Impair Accused) Act 1996* (WA), s 10(1). There is a presumption of sanity in some jurisdictions. See, for example, *Criminal Code 1899* (Qld), s 26; *Criminal Code 1913* (WA), s 26; *Criminal Code 1924* (Tas), Sch 1, s 15; *Criminal Code 1983* (NT), Sch 1, s 43D
[57] *Eastman v The Queen* (2000) 203 CLR 1 at [86]; *Crimes Act 1900* (ACT), s 312(1); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 7(1); *Criminal Code Act 1983* (NT), sch 1, s 43K; *Criminal Law Consolidation Act 1935* (SA), s 2691; *Criminal Justice (Mental Impairment) Act 1999* (Tas), s 9(1); *Criminal Law (Mentally Impair Accused) Act 1996* (WA), s 10(1). There is a presumption of sanity in some jurisdictions. See, for example, *Criminal Code 1899* (Qld), s 26; *Criminal Code 1913* (WA), s 26; *Criminal Code 1924* (Tas), Sch 1, s 15; *Criminal Code 1983* (NT), Sch 1, s 43D
[58] Fitness to plead and stand trial is dealt with in both the *Criminal Code 1899* (Qld) and the *Mental Health Act 2000* (Qld). A different test is applicable in each jurisdiction.
[59] Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40, 42.

a summary offence with which they are charged.[60] In this situation, as discussed above, diversion is not available. Alternatively, it can result in a matter being referred to a higher court so that capacity can be determined, which results in the loss of procedural advantages and is also only generally available for indictable (and not simple) offences.

A further relevant factor to consider is that persons with intellectual or cognitive impairment often lack support, both in terms of having the necessary support and assistance to increase their capacity to understand the situation they are in, and in having the financial means to obtain adequate legal advice and assistance. In the absence of appropriate legal advice and representation, the services of a duty lawyer are available, yet the time and resources needed to consider issues associated with disability and fitness are generally beyond those of busy duty lawyers with heavy caseloads.

5. Detention in a secure setting

As noted above, detention in the FDS Unit is considered an alternative to a prison sentence, ironically it offers many of the same features as a mainstream prison. In essence, the overarching purpose of a forensic order is two-pronged and encompasses both an individual and communal focus: the treatment or habilitation of the person and the protection of the community.

Incarceration of persons within the FDS Unit is justified on the basis that the person requires conditions of medium security because of the risk their behaviour poses to their own safety or to the safety of others, or because of the intensity of the intervention they are deemed to require.[61] This requirement of medium security has been translated into the establishment of a facility that resembles a prison in its starkness of design and furnishing, securely bolted-down furniture and requirement that all entrants to the facility be admitted via the guarded reception. This is a significantly departure from the vision of the FDS Unit as closely replicating life within the community.

It is important to emphasise that the FDS Unit was established to operate as a *transitional* facility, whereby persons with intellectual or cognitive disability and forensic needs could be provided with care in preparation for reintegration within the community. It was intended to operate as part of a continuum, and a rehabilitative part at that, not as a stagnant end-point which erodes the prospects of ultimate successful community reintegration.

If a person is found permanently unfit the forensic order may remain in place indefinitely, or for a period much longer than the relevant term of a sentence had the person been found guilty of the alleged offence.

Where the demand for places for persons on Forensic Orders (Disability) exceeds the capacity of the FDS Unit, persons may be placed in an AMHS. As discussed below, this conflation of disability and mental health is problematic for many reasons. Additionally, where the requirements for discharge from the FDS are satisfied, the person may be transferred to an AMHS on discharge rather than relocated within the community.[62]

QAI has grave concerns about the detention of persons with an intellectual or cognitive impairment in these circumstances. There is a significant body of international humanitarian

[60] Toombs D, 2012. *Disability and the Queensland Criminal Justice System,* Thomson Reuters, p xii
[61] Chan, Jeffrey, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.
[62] See FDA s 33, which permits a transfer from the FDS to the AMHS where it is deemed to be in the 'best interests' of the person; and s 142, which provides that where the 'benefits' from incarceration in the FDS are deemed unlikely to continue, the person may be transferred to an AMHS.

law which places this practice in breach of basic human rights. In particular, we note the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[63] the *Universal Declaration of Human Rights*,[64] and the *Convention on the Rights of Persons with Disabilities.*[65]

6. Making of a Forensic Order (Disability)

Where the above five criteria are satisfied, a Forensic Order (Disability) will be made by the MHC.

Aside from under a Forensic Order (Disability), a person may also be admitted to the FDS Unit pursuant to an agreement to transfer them made between the Director – Forensic Disability and the Director – Mental Health, a transfer order made by the Mental Health Review Tribunal (MHRT), or following review of a Forensic Order by the MHRT.[66]

The vision in establishing the FDS

The Queensland FDS model is based upon pre-existing FDS models in other jurisdictions and was informed by research and by consultation with stakeholders including policy makers, disability practitioners and service providers.[67] It is also informed by offender treatment programs that have been utilised in other jurisdictions, including the Risk-Need-Responsivity model for offender assessment and rehabilitation[68] and the Good Lives model.[69]

The stated vision that led to the establishment of the FDS is laudable. Touted as a favourable alternative for persons with an intellectual or cognitive impairment to processing through the mainstream criminal justice system or detention in a mental health facility, the FDS was purportedly designed to 'provide a safe and developmental service that provides for the specific needs of adults with an intellectual or cognitive disability',[70] including supporting and protecting individual's rights, promoting their development, improving their quality of life and creating opportunities for reintegration into the community (including developing social roles and maximising participation in the community).[71] The FDS Service Model outline states:[72]

> *A number of policies, procedures and practice tools have been developed to safeguard people residing in the FDS from abuse and institutionalisation and ensure they are receiving care and support in the least restrictive way.*

[63] Australian signed the UNCAT on 10 December 1985 and ratified it on 8 August 1989. Australia is yet to sign or ratify the Optional Protocol to the UNCAT.
[64] The UDHR (1948), along with International Covenant on Civil and Political Rights (1966), its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (1966), forms the International Bill of Human Rights.
[65] Australia signed the CRPD on 30 March 2007 and ratified it on 17 July 2008.
[66] Chan, Jeffrey, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.
[67] Department of Communities, *Forensic Disability Service: Service Model*, 2.
[68] Andrews, DA & Bonta, J 1994, *The psychology of criminal conduct*, Cincinatti OH: Anderson.
[69] Ward, T Brown, M 2004, '*The good lives model and conceptual issues in offender rehabilitation*', *Psychology, Crime & Law*, 10(3), 243-257.
[70] Department of Communities, *Forensic Disability Service: Service Model*, 2.
[71] *Forensic Disability Act 2011* (Qld), Section 3; Department of Communities, *Forensic Disability Service: Service Model*, 7.
[72] Department of Communities, *Forensic Disability Service: Service Model*, 18.

The FDS Service Model explicitly incorporates key principles of the *Convention on the Rights of Persons with Disabilities* (CRPD) as integral to its core aim of 'safeguarding human rights', stating:[73]

> *The FDS ensures all policies and practices adhere to the principles and obligations of the convention. Of particular importance are the obligations that protect people from violence and abuse, respect their privacy and respect their right to education, health, rehabilitation, and an adequate standard of living.*

Further aims of the FDS, as prescribed in the FDS Service Model, include making a 'positive difference' to the lives of people with an intellectual or cognitive disability who are subject to a Forensic Order (Disability). Service objectives detail providing 24/7 care and support in a 'safe environment'; assessment and intervention based on best practice principles; multidisciplinary care, support, treatment and rehabilitation that maximises strengths, improves functioning, supports people to overcome the impact of past traumas, provides positive behaviour supports and reduces the risk of re-engaging in offending behaviour; enabling people to participate actively in everyday activities and improve self-care, vocational, social and other skills so they are able to take up valued roles in their community; maximising opportunities to exercise choice; cultural respect; community connections; and individualised support.[74] Overriding these objectives is the principle of achieving positive outcomes through a variety of approaches.[75]

There are a number of legislative and policy safeguards that purport to protect the human rights and freedoms of persons detained within the FDS Unit. The stated guiding principles for the FDS are as follows:

- safeguarding human rights
- a person centred approach
- evidence-based programs and support to develop life skills
- evidence-based programs to address offending behaviours
- building and maintaining family, natural and community support networks
- a well-planned and positive approach to risk
- multidisciplinary team model and collaboration across agencies
- high quality services, continuous improvement and continuous learning.

However, these admirable principles do not effectively translate into practice. In the experience of one of the residents QAI has been assisting, the antithesis of these guiding principles has been the reality. Since admission to the FDS Unit, the person-centred approach has not been followed and the resident has been expected to perform tasks or meet certain standards of behaviour, even though it was apparent to FDS staff that this was not possible. As a result, the care provided to this person was considered punitive by the resident and family members.

It is important to recognise that a further, and significant, reason underpinning the establishment of the FDS was community safety and protection, which is the justification for involuntarily detaining people in a medium secure facility. In the example of the FDS resident discussed above, the approach undertaken in regards to risk was not positive and in fact any risk took priority over the other relevant principles. As this paper will show, there has been a significant tension in balancing the aims of habilitation, support and community integration on

[73] Department of Communities, *Forensic Disability Service: Service Model*, 22.
[74] Department of Communities, *Forensic Disability Service: Service Model*, 6.
[75] Department of Communities, *Forensic Disability Service: Service Model*, 7.

the one hand with the focus on detention as a means of protecting the community from risk on the other.

This tension is theoretically managed by the utilisation of the FDS Unit as a temporary safe zone for offenders to be habilitated and cared for, with regular opportunities for limited community involvement increasing to full community integration. By this vision, transition planning commences 'the moment a person moves into the service' and is prioritised as a 'key component' of each person's individual development plan. The stated focus is on recognising the point at which the goals required to support transition have been achieved (suggesting that the length of time spent incarcerated in the FDS Unit is minimised to the greatest extent possible). In this utopian vision, the person, their family and important others are actively included in transition planning, the person is supported to develop skills that will assist them to reintegrate into the community and there is a gradual ramping up of time spent in the community.[76]

In practice, however, the vision is badly distorted - the tension between protection of the individual and protection of the community has been far too heavily resolved on the community protection side of the equation, to the extreme detriment of persons incarcerated within the FDS Unit. This is particularly concerning when we acknowledge that the necessity to protect the community is based on allegations of criminal misconduct only, which are never tested or substantiated and that there is also no proof that the increasing restrictions on persons subject to forensic orders over the past few years has increased community safety.[77]

Therapeutic rehabilitation

The FDA provides statutory recognition of the desirability of and need for individualised, therapeutic rehabilitation for persons within the FDS. The FDA dedicates a chapter to the support and development of FDS 'clients',[78] to be achieved by individualised development plans and what is termed Limited Community Treatment or LCT, with a further chapter devoted to the role of allied persons in assisting in this endeavour.[79] Preparation of the development plans is compulsory and they form a pivotal part of the therapeutic vision of the FDA.[80]

In reality, however, there are very limited therapeutic opportunities provided for persons detained in the FDS Unit. One research study documented a high prevalence of substance abuse within a forensic disability unit and noted that this is a systemic issue that could be therapeutically addressed.[81] This recommendation has broader implications for other forensic disability services, and for the development of other types of therapeutic opportunities.

Devapriam and Regi note that, with deinstitutionalisation, the combined effect of behaviours previously hidden or 'tolerated' within institutions becoming more visible in the community, the increased societal aversion to any degree of risk and the lack of services and staff with specialised intellectual disability (as distinct from mental health) skills can 'sometimes result in

[76] Department of Communities, *Forensic Disability Service: Service Model*, 15-16.
[77] Queensland Advocacy Incorporated. 2015. *Dis-Abled Justice: Reforms to justice for persons with disability in Queensland*.
[78] FDA, Ch 2.
[79] FDA, ch 3.
[80] *Mental Health Act 2000* (Qld) *Resource Guide*. 2014. 'Chapter 7 – Forensic Order and Disability Forensic Order', 7-7.
[81] Plant, Aimie, Emily McDermott, Verity Chester, Alexander Regi. 'Substance misuse among offenders in a forensic intellectual disability service'. *Journal of Learning Disabilities ad Offending Behaviour* (2011) 2(3): 127-135.

an inappropriate "forensicisation" of challenging behaviour'.[82] They argue that increased community services can help to modify some of the causative factors and reduce the number of persons ending up as in-patients in forensic services, as well as facilitating the care pathways of those discharged from secure in-patient facilities to less restrictive or community settings and improving their long-term treatment outcomes.[83]

As noted above, QAI considers that a core part of the lack of success in this regard is attributable to the inappropriate, medicalised discourse applied to this area, which precludes the likelihood of an appropriate habilitative response.

Another relevant factor that impacts on the likelihood of successful habilitation is the frame of mind of the person. Being detained in a medium secure facility against their will can be therapeutically counterproductive and can impede a person's progress. The prospect of indefinite detention is another relevant factor that can work against rehabilitation.[84]

The relationship between the person and their support worker is also very important. Clarkson and associates note:[85]

> *Within the field of challenging behaviour, a number of studies have also found that staff psychological characteristics can influence how staff respond to people who have an intellectual disability. For example, poor job satisfaction, including perceived stress and lack of support has been associated with reduced positive interactions between service users and direct support staff, and lower levels of staff assistance.*

Limited Community Treatment

A core part of the vision in establishing the FDS is the therapeutic provision of limited community treatment (LCT) for forensic disability 'clients', designed to foster their development and rehabilitation.[86] The FDA stipulates that a person on a Forensic Order (Disability) may be granted LCT, which enables the person to go into the community for a period of time (which can range from a brief period during the day to a number of days or longer).[87] The FDS (or relevant AMHS) remains responsible for the person while they are temporarily in the community.[88] As noted above, it is difficult for LCT to deliver appropriate outcomes when its very name remains couched in the inappropriate, medicalised terminology of treatment.

LCT is considered advantageous for the following reasons: it supports people to learn skills in the actual environment where they will use those skills, which is how people with intellectual disability typically learn best; it facilitates access to community and health services on a timely and equitable basis; it enables supportive relationships and community connections to be maintained during the period of incarceration; and it fosters the person's development of their

[82] Devapriam, John & Alexander Regi. 'Tiered model of learning disability forensic service provision'. *Journal of Learning Disabilities and Offending Behaviour* (2012) 3(4): 175-185.
[83] Devapriam, John & Alexander Regi. 'Tiered model of learning disability forensic service provision'. *Journal of Learning Disabilities and Offending Behaviour* (2012) 3(4): 175-185.
[84] Queensland Advocacy Incorporated. 2015. *Dis-Abled Justice: Reforms to justice for persons with disability in Queensland*, 132.
[85] Clarkson, Rachael, Glynis Murphy, Jon Coldwell & David Dawson. 'What characteristics do service users with intellectual disability value in direct support staff within residential forensic services?' *Journal of Intellectual & Developmental Disability* (20009) 34(3): 283-289.
[86] Chan, Jeffrey, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.
[87] Chan, Jeffrey, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.
[88] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014, 1.

potential and their physical, mental, social and vocational ability and therefore enhances their quality of life.[89]

It is important to note that formal access to LCT is the *only* means by which an FDS client is able to access community treatment and rehabilitation.[90] The entitlement to LCT is therefore critical from a therapeutic perspective. However, while the right to LCT is based on the principle that persons on Forensic Orders (Disability) have the same human rights as other people, this principle rarely translates into practice as again the calculus of LCT falls on risk in a highly risk-adverse culture – the statutory policy governing the provision of LCT states that the rights of FDS 'clients' to LCT must be balanced with the management of community safety.[91] Accordingly, power to order, approve or revoke LCT is vested in the MHC or MHRT, which also has discretion to set the conditions attached to the LCT.[92]

When reviewing an order for LCT as part of a Forensic Order (Disability) review, the MHRT has power to order, amend or revoke monitoring conditions in relation to the LCT. The MHA provides that the MHRT must have regard to the following criteria in making its order:[93]

- the patient's mental state
- the patient's intellectual disability
- each offence leading to the patient becoming subject to the forensic order
- the patient's social circumstances
- the patient's treatment plan
- the patient's behaviour in response to that plan, including behaviour that places the patient's health or safety or the safety of others at risk
- any report by the Director (Forensic Disability) on a review about the patient, where the patient has been detained for more than five years.

The MHRT thus has a broad discretion with respect to LCT, the exercise of which dictates the lived experience of persons under Forensic Orders (Disability).

The reality of the operation of the FDS

As noted above, the vision in establishing the FDS has commendable components. Properly implemented, a forensic order could offer benefits for individuals within the target group. However, the reality of the lived experience of those under Forensic Orders (Disability) has been a significant departure from this vision. For reasons which will now be discussed, Forensic Orders (Disability) have in many instances been significantly more onerous than an equivalent criminal sentence and have had grave adverse consequences for the persons subject to them.

Case study 2 – Susan's story – indefinite detention within the FDS

Susan is 52 years old and has an intellectual disability**.** She has been institutionalised for over 30 years. She was transferred to the FDS when it opened in 2011 following a determination that she would benefit from the adapted treatment and rehabilitation options

[89] Chan, Jeffrey, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.
[90] Chan, Jeffrey, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011
[91] *Mental Health Act 2000* (Qld) s 275; Chan, Jeffrey, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.
[92] Chan, Jeffrey, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.
[93] *Mental Health Act 2000* (Qld), s 203(6A).

offered by the FDS and that this program of care would provide her with the most realistic opportunity for community reintegration.

The FDS operates on the guiding principle that "life at the FDS is as close as possible to ordinary life in the community." However, people like Susan are incarcerated in a secure, low-stimulus environment, subject to strict visitation regulations and lack choice with respect to their treatment program.

Susan has reported her unhappiness with her living arrangements on many occasions and this frustration and anger has at times been expressed in the form of behaviours of concern. Her triggers for aggression result mainly from the ward environment; she has also stated she does not like being at the unit as she experiences harassment and has her personal space and possessions invaded.

Susan is approaching her 36th year of detention. It remains to be seen whether she can achieve at least one of her dreams in her lifetime: to live in her own home in the community.

Violations of human rights law

The indefinite nature of Forensic Orders (Disability) enlivens a number of human rights concerns – as will be discussed below, relevant human rights in this regard include respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; and full and effective participation and inclusion in society. Our concern with the imposition of Forensic Orders (Disability) that are not time limited is for people with an intellectual or cognitive disability who remain within the community and those who are incarcerated within the FDS Unit. Australia's obligations under international humanitarian law provide a strong platform from which to assert that placing indefinite restrictions on people with an intellectual or cognitive disability and failing to provide them with appropriate habilitative support that will ensure the orders are revoked in a timely way is contrary to our accepted human rights obligations.

As noted above, protection for human rights is provided by a number of international conventions, including the *International Bill of Rights* (comprised of the *Universal Declaration of Human Rights*; the *International Covenant on Civil and Political Rights* and its two Optional Protocols; and the *International Covenant on Economic, Social and Cultural Rights*); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and the *Convention on the Rights of Persons with Disabilities*. In this paper, we focus on the CRPD as this represents the most specific and recent consensus by the international community with respect to the human rights principles applicable to people with disability.

The general principles prescribed by the *Convention on the Rights of Persons with Disabilities*[94] include respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; and full and effective participation and inclusion in society.[95] Being subjected to a Forensic Order (Disability) is not consistent with these general principles.

[94] Australia ratified the *Convention on the Rights of Persons with Disabilities* on 17 July 2008: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en.
[95] Article 3 of the *Convention on the Rights of Persons with Disabilities.*

Article 12 of the CRPD requires that persons with disabilities are given equal recognition before the law. Safeguards that are prescribed to support the exercise of legal capacity and to prevent abuse include ensuring that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The potentially indefinite duration of Forensic Orders (Disability) contravenes Article 12.

Article 13 of the CRPD seeks to facilitate equal access to justice for persons with disabilities. That a person with an intellectual or cognitive disability can be charged with an indictable offence yet not provided with the opportunity to answer this charge arguably does not amount to any access to justice and certainly falls short of equality of access. The failure to provide persons charged with an indictable offence with the opportunity to defend themselves against the charge also contravenes the right to equal integrity of person protected by Article 17 of the CRPD.

Further, the detention of individuals with intellectual disabilities purely on the basis that they may pose a risk to others raises substantial human rights concerns.[96] Article 14 of the CRPD requires States Parties to ensure that persons with disabilities:

> *..are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability alone shall in no case justify a deprivation of liberty.*

Article 14 further provides that where persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to be treated in compliance with the objectives and principles of the CRPD, including by provision of reasonable accommodation. Article 19 of the CRPD, which covers the right to community living, is also relevant here, as by this provision persons with disability are to be accorded the equal right to live, participate and be included in the community, with choices equal to others regarding their place of residence and living arrangements.

The gravity of the concern with respect to incarceration is heightened when we consider that detention in the FDS Unit is not time-limited – there is a real possibility of indefinite detention, a fear that is substantiated by the fact that, to date, no one has yet been discharged from the FDS Unit. Laws, policy and practices that involuntarily detain people with intellectual or cognitive disability limit their rights to liberty and security and equal recognition before the law. The involuntary detention of persons with an intellectual or cognitive disability on the basis of a risk of harm to others is discriminatory because those without mental or intellectual disabilities are not, as a general rule, indefinitely detained on this basis in the absence of a criminal conviction.

Article 15 of the CRPD provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, with Article 16 prohibiting exploitation, violence and abuse against persons with disability. These Articles align with the United Nations' *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which prohibits such conduct against persons with disability.

Article 26 affirms the right to comprehensive habilitation and rehabilitation services, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental,

[96] B McSherry. 2012. *The Involuntary Detention of People with Intellectual Disabilities*. Right Now: Human Rights in Australia.

social and vocational ability, and full inclusion and participation in all aspects of life. This is consistent with the underlying rationale of the imposition of Forensic Orders (Disability). However, this rationale does not translate into the reality of the lived experiences of persons under these orders, whether residing within the community or within the FDS Unit.

Other provisions of the CRPD which are directly relevant include Article 22, which affirms respect for privacy (which is infringed by the monitoring protocols in place at the FDS, pursuant to which residents are monitored through viewing windows except when within their bedroom or bathroom); Article 25, which establishes the right to health and the non-discriminatory provision of services; and Article 28, which requires that persons with disability are provided with access to an adequate standard of living and social protection.

The implementation of the CRPD is monitored by the United Nations Committee on the Rights of Persons with Disabilities. In response to a Tunisian report, the Committee recommended that Tunisia 'repeal legislative provisions which allow for the deprivation of liberty on the basis of disability, including a psychosocial or intellectual disability'.[97] Responding to a similar scenario in Spain, the Committee stated that Spain must:

> *… repeal provisions that authorize involuntary internment linked to an apparent or diagnosed disability; and adopt measures to ensure that health-care services, including all mental-health-care services, are based on the informed consent of the person concerned.*[98]

Addressing the root cause of the denial of many of these rights guaranteed under the CRPD to persons under Forensic Orders (Disability) is complex, and touches on issues including the availability of funding and resources. It cannot be denied that funding is a critical issue, both in terms of helping to safeguard against the possibility of the making of the initial Forensic Order (Disability), and in terms of enabling persons to attend programs and ultimately fulfil the necessary requirements to be discharged from their Order (this can leave people in limbo, remaining on orders as they are unable to fulfil the stated requirements of the order). This is a particularly important issue in rural and regional areas, where availability of therapeutic services can be an issue.

However, the issue of funding and resourcing is complex in this area, as the establishment and operation of the FDS Unit was and is resource-intensive – this creates an obvious expectation that it will be fully utilised, in terms of maintaining maximum occupancy. This goal is obviously at odds with the stated legislative aim of habilitating 'clients' of the FDS Unit and prioritising their transition back into the community and may act as a disincentive for the Director – Forensic Disability to seek to move people out of the Unit. Another relevant factor is that the heavy emphasis on minimising risk to the community means that resource-intensive safeguards are put in place to monitor and escort FDS 'clients' during periods of LCT, etc. For example, if a person is deemed to be 'oppositional defiant', it may be determined that they require as many as four FDS support staff to escort them to any activities, including routine medical appointments, to ensure community safety. The labelling of a person in this way is attributable to a fracture in the relationship between that person, their support staff and FDS personnel rather than an explicit risk to the public. However, the resulting imposition of conditions both erodes the beneficial effects of any period of absence from the FDS Unit (it is difficult to perceive that you are exercising choice, liberty and

[97] B McSherry. 2012. *The Involuntary Detention of People with Intellectual Disabilities.* http://rightnow.org.au/topics/disability/the-involuntary-detention-of-people-with-intellectual-disabilities/.
[98] B McSherry. 2012. *The Involuntary Detention of People with Intellectual Disabilities.* http://rightnow.org.au/topics/disability/the-involuntary-detention-of-people-with-intellectual-disabilities/.

autonomy when you are buffered by FDS personnel to this extent) and increases the cost, thus minimising the occurrence.

However, until we can address the inconsistency between core features of the FDS system and baseline human rights, progress in this area will be difficult to achieve.

Indefinite detention

As noted above, a grave problem that presently casts a significant shadow over the FDS is the real possibility for a person to be subjected to indefinite detention within the FDS Unit. The incarceration of persons with an intellectual or cognitive disability within the FDS Unit potentially involves multiple human rights breaches. Notwithstanding that the prescribed periodic reviews of Forensic Orders (Disability) are theoretically designed to protect against this possibility, the reality that no one has yet been released from the FDS Unit is unsurprising when we consider the following key elements that underpin its operation. Above, we have noted the human rights implications of indefinite detention, insofar as it is inconsistent with Australia's obligations under the *Convention on the Rights of Persons with Disability*. Here, we will discuss factors pertaining to indefinite detention in further detail.

As noted above, the FDS does not operate on a retributive mandate – incarceration in the FDS Unit purports to rehabilitate persons with an intellectual or cognitive disability charged with the commission of a serious offence and to safeguard the community from these persons for the duration of their rehabilitation.

However, there are no mechanisms in place to effectively guarantee the release of a person from the FDS within a designated timeframe, instead there is a systemic cycle of restrictions and human rights abuses. The MHRT is required to review Forensic Orders (Disability) within six months of the order being made and thereafter at intervals of not more than six months.[99] However, the reviews are open-ended, the MHRT can choose whether to comply with recommendations of a clinical team, including the FDS, to revoke a Forensic Order (Disability) and there are a number of variables – availability of treatment, calculus of risk – that are both idiosyncratic and subjective. The assessment of risk posed by a person with an intellectual or cognitive disability, and the notion of indefinite detention based on risk, is highly problematic having regard to the nature of intellectual and cognitive disabilities, which are not 'curable' or 'treatable'. The concept of incarceration based on risk can be contrasted with normative sentences imposed by mainstream criminal justice courts, which have a designated end point and set criteria by which this end point may be moved forward.

For a person to be released from detention into community treatment and, finally, to have the Forensic Order lifted, they must satisfy the MHRT that they are no longer a risk to the community and demonstrate sufficient supports for them to live in the community without the need for further surveillance. The MHRT has traditionally taken a conservative approach to its assessment of risk and will renew orders by default. This is particularly problematic when we consider the interdependence of the two limbs – the more time that passes without satisfying the risk test, the more difficult it becomes to demonstrate the ability to successfully re-integrate into the community – increasing institutionalisation further erodes a person's ability to live independently.[100] Furthermore, for some of the people within the FDS Unit their life history has been one of institutionalisation. This raises the concern that prolonged incarceration within the FDS Unit exacerbates the ingrained dependency and alien lifestyle a

[99] *Mental Health Act 2000* (Qld) *Resource Guide*. 2014. 'Chapter 7 – Forensic Order and Disability Forensic Order', 7-15.
[100] Queensland Advocacy Incorporated. 2015. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland.*

person experiences when removed from the community for such long periods. The most appropriate scenario would be for people to not enter the FDS Unit, but rather be placed immediately, or at the earliest possible opportunity, under the terms and conditions of a community forensic order that includes the required educational and rehabilitation programs to be completed. Disability Services and Queensland Health must fund such programs and the supports required by the person to ensure that they can meaningfully participate and engage in such programs.

Finally, the use of risk as a primary means of determining the perpetuation of Forensic Orders (Disability) for people who have not been tried or convicted of an offence embeds the incorrect and damaging stereotype that persons with intellectual disability are violent and in need of control.[101] The sad irony of this stereotype is that people with intellectual disability are more likely to be victims of violence, or to self-harm, than perpetrators of a criminal offence.[102]

There is a strong rehabilitative focus underpinning the FDA, with the FDS to offer 'a multidisciplinary model of care and support for clients that is designed to promote their continual development, independence and quality of life' and to focus on promoting habilitation and rehabilitation.[103] However, it is QAI's understanding that this is not the lived experience of those incarcerated within the FDS Unit – rather, the FDS Unit operates as a type of holding facility. As QAI notes in *dis-Abled Justice*:[104]

> *Even if the 'existence of a disability alone' does not, in Queensland, justify detention, but 'dangerousness' does, detention without treatment or habilitation is still punishment - and Forensic Orders were not meant to be punitive.*

The potential for indefinite detention is particularly concerning from a human rights perspective when we consider that no 'clients' of the FDS have been convicted of the offence with which they were originally charged. By its very definition, a finding of unfitness nullifies the possibility of criminal culpability. It is therefore quite extraordinary that persons who have been charged with an offence and yet have never had the opportunity to contest the allegations against them, and which may have been found by an arbiter of fact to not meet the requisite standard of proof had the matter proceeded to a trial within the criminal justice system, are deprived of their freedom and liberty.

The rationale of protecting the community in the calculus of risk that results in incarceration within the FDS Unit is not advanced by detaining innocent people. Indeed, this is not even consistent with the aims of the FDA, which emphasises ensuring that a person's liberty and rights can be adversely affected only if it is the *least restrictive way,* the *minimum necessary in the circumstances,* to protect the health and safety of that person and others.[105] This theoretical statement of rights is consistent with the human rights articulated in the CRPD; unfortunately, these principles are not appropriately translated into practice.

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[101] See, for example, the Melbourne Herald Sun's article and associated comments 'Sex fiends from a secret facility in Melbourne suburb Fairfield released to strike again'. 28 October 2013. <http://www.heraldsun.com.au/news/law-order/sex-fiends-from-a-secret-facility-in-melbourne-suburb-of-fairfield-released-to-strike-again/story-fni0fee2-1226747880040>.

[102] http://www.sane.org/information/factsheets-podcasts/204-facts-and-figures; http://www.sane.org/information/factsheets-podcasts/209-violence-and-mental-illness.

[103] FDA s 7.

[104] Queensland Advocacy Incorporated. 2015. *Dis-Abled Justice: Reforms to justice for persons with disability in Queensland*, 147.

[105] FDA, s 8.

Furthermore, as noted above, there is a significant lack of impetus to help people to exit the FDS Unit at the earliest possible opportunity. There is no support currently provided by either the state or federal government that assists persons to transition out of the FDS Unit. Even in circumstances where the person is deemed ready to transition from the FDS Unit, there are significant resourcing problems that preclude this transition. To be considered for release from the FDS, a person must be able to demonstrate the availability of appropriate accommodation. This requirement is not accompanied by a commitment from the Department of Housing or Disability Services Queensland to secure such housing or to provide funded supports aimed at avoiding recidivism. This requirement to demonstrate the availability of appropriate housing is therefore a significant hurdle for many people, particularly when we consider the disproportionately slim family and friendship support network available to many people with an intellectual or cognitive impairment. Support networks can also break down over time and thus the likelihood of maintaining a strong support network is decreased in proportion with time spent incarcerated within the FDS Unit.

The five yearly review period of the 'benefit of the care and support provided to the client' by the FDS[106] is becoming the normative minimum duration of a stay in the FDS Unit. This is a significant period of institutionalisation that, as discussed, has the effect of eroding independent living skills and supports – and there appears to be a lack of impetus to assist people to transition from the FDS unit earlier.[107]

The Federal Government has recently proposed amending the *Social Security Act* to, among other things, cease payment of the Disability Support Pension (DSP) to persons incarcerated or confined in a psychiatric institution under state or territory law due to serious criminal charges because they were considered unfit to stand trial or were not convicted due to mental impairment.[108] If passed, this amendment will have a significant adverse impact on persons under Forensic Orders (Disability) incarcerated in psychiatric institutions (notwithstanding that they do not suffer from a mental health condition). People with an intellectual or cognitive disability can be subject to mental impairment legislation and, since 2013, have been formally identified in Social Security Regulations pertaining to people with psychiatric disabilities under the same regime. QAI considers that the cessation of the DSP is a punitive measure that is inappropriate in light of the lack of trial or conviction of FDS 'clients'. It also has grave consequences for an already marginalised and vulnerable group that disproportionately experiences poverty and social exclusion, adversely impacting their ability to ultimately reintegrate into the community following their detention by leaving them without any funding to obtain or maintain appropriate housing, therapeutic and disability support options. DSP funds are utilised in conjunction with therapeutic and educational programs aimed at supporting the learning, development and rehabilitation of persons with an intellectual or cognitive disability. Therefore, cutting off the DSP effectively stymies rehabilitation.

Lack of access to advocacy at hearings

A primary human rights concern with respect to Forensic Orders (Disability) is that the persons under the orders are often unrepresented at the reviews of the orders by the Mental Health Review Tribunal. While the FDA does make provision for an 'allied person' to 'assist the client to represent the client's views, wishes and interests relating to his or her

[106] Section 141 of the FDA.
[107] In the four years that have elapsed since the FDS Unit opened on 18 July 2011, no one has yet been discharged.
[108] Mid-Year Economic and Fiscal Outlook 2014-15 DECEMBER 2014 Statement by The Honourable J. B. Hockey MP Treasurer of the Commonwealth of Australia and Senator the Honourable Mathias Cormann Minister for Finance of the Commonwealth of Australia For the information of honourable members, p 193.

assessment, detention, care and support and protection',[109] in reality the role of the allied person is often ineffective in the face of the powerfully resourced department. Further, there is no assumption that the allied person has legal training or adequate understanding of the processes pertaining to the making of Forensic Orders (Disability) and their reviews.

The predominant lack of legal representation is directly counter to the recommendations of the CRPD, which places a strong emphasis on the importance of representation and advocacy for persons with disability. Article 12 of the CRPD prescribes the requirement that persons with disability be provided with the support they may require to exercise their legal capacity, while Article 13 requires that they be accorded effective and equal access to justice. The right to legal representation is critical, and therefore it is of utmost concern that it is not translated from the CRPD into domestic law, policy or practice.

While the right to legal representation is important for all persons, and particularly important for all members of vulnerable and disempowered groups, it is perhaps never more critical than in the context of the making and review of Forensic Orders (Disability). The unique features of these orders, including their displacement of the normative presumption of innocence with what effectively amounts to an assumption of guilt and the very real prospect of indefinite detention, designates forensic disability as an area that should attract skilled legal representation as a matter of right.

As Perlin notes, the 'presence of counsel is the lynchpin to authentic change in this area of the law'.[110] Without free, regularised and organised legal representation for both individual and systems advocacy work, Perlin considers the legislative and judicial creation of rights to be illusory – 'paper victories' only.[111] Perlin explains:[112]

> *The CRPD's focus on the right to counsel is critical. One of the most critical issues in seeking to bring life to international human rights law in a mental disability law context is the right to adequate and dedicated counsel.*

In the context of reviews of Forensic Orders (Disability), legal representation and effective advocacy is critical to support persons under these orders to have a voice in a process in which they are otherwise completely disempowered. The Tribunal reviews of Forensic Orders (Disability) are intended to function as a 'critical safeguard' in the involuntary care processes,[113] yet in the absence of adequate representation, are reduced to purely bureaucratic processes that fail to heed the needs of the persons they are designed to support and care for.

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[109] FDA s 25 & 26; Jeffrey Chan, Director of Forensic Disability Statutory Policy: *Limited Community Treatment and other leave*, May 2011.

[110] Perlin, Michael, 'Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the UN Convention on the Rights of Persons with Disabilities' (2012) 44 GEO. WASH. INT'L L. REV. 1, 34.

[111] Perlin, Michael, *The Significance of the Convention on the Rights of Persons with Disabilities – And Why It Demands the Creation of an Asian/Pacific Disability Rights Tribunal*, available from: <http://ssrn.com/abstract=2512846>, 11.

[112] Perlin, Michael, *The Significance of the Convention on the Rights of Persons with Disabilities – And Why It Demands the Creation of an Asian/Pacific Disability Rights Tribunal*, available from: <http://ssrn.com/abstract=2512846>, 9.

[113] *Mental Health Act 2000* (Qld) *Resource Guide*. 2014. 'Chapter 7 – Forensic Order and Disability Forensic Order', 7-18.

Ill-treatment and adverse experiences of people with disability in forensic detention units

Further human rights concerns associated with the FDS flow from the lived experiences of persons incarcerated within the FDS.

The environment of the FDS is highly institutionalised. The description provided by QAI in *dis-Abled Justice: Reforms to justice for persons with disability in Queensland* summarises this experience:

> *The physically sterile and stimulus-free environment of the Wacol unit erodes whatever living skills detainees may have once had. They are subject to wrap-around control: everything is done for detainees; words and actions monitored, recorded and judged. The stigma is self-perpetuating…*

It is well documented that the conditions of institutional settings[114] can give rise to incidents of violence, abuse and neglect of people with disability within them. The 'closed' nature of institutional settings makes it difficult to detect, investigate and prosecute acts of violence,[115] and the lack of reporting of violence and 'cover ups' by staff and management of institutions is a significant factor that hinders the adequate investigation and prosecution of offences of this nature.[116]

In 2013, the United Nations, building upon its history of concern about the forms of violence against people with disability in Australia, issued an urgent call for investigations into violence against women and girls with disability in institutional environments.[117] While these recommendations remained largely unaddressed for a significant period, a Senate inquiry into violence, abuse and neglect of people with disability in institutional and residential settings has recently been instigated.[118]

The experiences of institutionalisation and despair also means that the occurrence of self-harm is frequent in institutional settings. There has been consideration within the research literature of the possibility of adapting a harm minimisation model for residential services such as the forensic learning disability service in England. This would involve accepting the occurrence of self-harm and giving people information and assistance with a view to

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[114] *'Institutional and residential settings'* include: residential institutions; boarding houses; group homes; respite care services; day centres; recreation programs; mental health facilities; hostels; supported accommodation; prisons; schools; out of home care; special schools, boarding schools, school buses; hospitals; juvenile justice facilities; disability services; aged care facilities. See Joint NGO Submission to the 2015 Universal Periodic Review of Australia. Available from Human Rights Law Centre < http://hrlc.org.au/upr/>.

[115] Phillip French, Julie Dardel and Sonya Price-Kelly, People with Disability Australia, *Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment* (2009).

[116] See for example *Director of Public Prosecutions v Vinod Johnny Kumar* [20 November 2013] VCC. See also Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings* (2014).

[117] See, eg, Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, UN Doc. CRPD/C/AUS/CO/1. (4 October 2013); Committee on the Elimination of Discrimination against Women, *Concluding Observations: Australia*, UN Doc. CEDAW/C/AUS/CO/7. (30 July 2010); Committee Against Torture, *Concluding Observations: Australia*, UN Doc. CAT/C/SR.1284. (November 2014); Human Rights Committee, International Covenant on Civil and Political Rights, *List of issues prior to the submission of the sixth periodic report of Australia*, UN Doc. CCPR/C/AUS/Q/6. (9 November 2012); Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc. CRC/C/AUS/CO/4. (19 June 2012).

[118] See<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect>. QAI has made a detailed submission to this inquiry. The Australian Parliament has initiated an inquiry in the Senate, but an independent judicial inquiry is still required: Joint NGO Submission to the 2015 Universal Periodic Review of Australia. Available from Human Rights Law Centre < http://hrlc.org.au/upr/>.

promoting their safety when engaging in acts of self-harm,[119] along with formal and informal therapy aimed at harm minimisation.[120] The necessity for this approach is a sad indictment of the ineffective nature of such services as therapeutic facilities.

Initiatives of note in other jurisdictions

Forensic detention

A significant difference between Queensland and Victoria is that, in Victoria, the offence with which the person is charged that results in forensic detention must be proven. This requirement addresses a significant human rights concern with the Queensland regime, whereby a person can be detained in the FDS as a result of being charged with an indictable offence that has never been tested in a court of law due to the person's deemed lack of capacity. In Victoria, the presumption of innocence before the law is preserved as, notwithstanding a lack of capacity to be found criminally responsible, the person must still be found to have engaged in the conduct giving rise to the offence to the requisite criminal standard. The human rights concerns associated with incarcerating a person with an intellectual or cognitive disability who lacks legal capacity remain.

In the Commonwealth, NSW, ACT, and South Australian jurisdictions a 'limiting term' caps the period that a person can remain under a forensic order or equivalent, although a person can be released from detention earlier on a revocable (if breached) 'parole'. This is distinct from the situation in Queensland. In Victoria, like Queensland, forensic detention is based upon risk. Under the *Sentencing Act 1991* (Vic), a judge can place an offender with an intellectual disability under a Residential Treatment Order (RTO) if they have been found guilty of a serious offence.[121] Offenders placed under an RTO are sent to a residential treatment facility or residential institution for up to five years in order to receive specified treatment.[122] The judge can only make the order if there are suitable places; if not, they are to be sentenced to prison. A person cannot be released from detention unless the court is satisfied on the evidence that the safety of the patient or members of the public would not be seriously endangered, but after the expiry of a nominal term the person must be transferred to a non-custodial order unless risk justifies continued detention. Involuntary detention of persons with a disability who lack capacity in New South Wales similarly operates on the basis of assessment of risk.[123]

In South Australia, the *Guardianship and Administration Act 1993* (SA) grants the South Australian Civil and Administrative Tribunal special powers to detain an offender in a place they deem suitable, although there are no specialised facilities for secure care for persons with an intellectual or cognitive disability[124] – this group is dealt with by Mental Health services, which is concerning given the different needs of these groups. This Act also allows

[119] Fish, Rebecca; Woodward, Sarah; Duperouzel, Helen. ''Change can only be a good thing:' staff views on the introduction of a harm minimisation policy in a Forensic Learning Disability service.' British Journal of Learning Disabilities, 2012 Mar; 40 (1): 37-45

[120] Fish, Rebecca; Woodward, Sarah; Duperouzel, Helen. ''Change can only be a good thing:' staff views on the introduction of a harm minimisation policy in a Forensic Learning Disability service.' British Journal of Learning Disabilities, 2012 Mar; 40 (1): 37-45, 44.

[121] *Sentencing Act 1991*(Vic) s 82AA (Austl.).

[122] *Disability Act 2006* (Vic) s. 180 (Austl.).

[123] *Mental Health (Forensic Provisions) Act* 1990 (NSW) s. 39 (Austl.).

[124] Department for Families and Communities, 2011, Forensic Disability: The Tip of Another Iceberg. *Government of South Australia*

reasonably necessary force to be used on such persons in care to ensure proper medical treatment and well-being.[125]

Queensland does compare favourably to the Northern Territory in its treatment of persons with intellectual or cognitive impairment charged with an indictable offence. In the Northern Territory, offenders found unfit to plead are placed under a Custodial Supervision Order. Rather than being accommodated in a forensic detention facility, they are placed in prison under maximum security and can be indefinitely detained under this order.

In the United Kingdom, it has been recognised that services for persons with intellectual disability and forensic needs are underdeveloped.[126] A 2012 Mencap report describes the significant risks people with a disability face under institutional care.[127] It was published in response to six people with learning disability dying whilst in National Health Service (NHS) care in 2007 and exposed the unequal healthcare and institutional discrimination that people with a learning disability often experience within the NHS. The report documents the deaths of 74 people with learning disabilities dying prematurely inside hospitals or trusts and states:[128]

> *The very thought of this figure continuing to rise is damaging enough beyond any words that can be expressed here, but also damaging to the entire fabric of a society that purports to care with compassion.*

Other measures for persons with intellectual or cognitive disability

Summary offences

Queensland is not alone in denying magistrates jurisdiction to determine whether a defendant has fitness to plead to a relevant charge – magistrates courts in the Northern Territory and Victoria also lack jurisdiction to determine an accused's fitness to plead or stand trial for a summary offence,[129] although in Victoria, the Victorian Law Reform Commission has recently recommended extending the power to determine fitness to plead to magistrates, including magistrates in the Children's Court.[130] The denial of jurisdiction to magistrates with respect to capacity determinations can result in indictable offences that may otherwise have been dealt with summarily proceeding to a superior court in the event that concerns regarding fitness to plead are raised.[131]

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[125] *Guardianship and Administration Act 1993* (SA) s.32 (Austl.).

[126] Devapriam, John & Alexander Regi. 'Tiered model of learning disability forensic service provision'. *Journal of Learning Disabilities and Offending Behaviour* (2012) 3(4): 175-185. In Leicester, Leicestershire and Rutland, a tiered model of learning disabilities forensic service provision facilitated and driven by a core team of professionals with skills and expertise in the area was established, to play an advisory role (mentor and train and support) for community and in-patient teams via virtual software.

[127] Mencap. 2012. *Death by Indifference: 74 Deaths and Counting: A Progress Report 5 Years On.* Mencap, London.

[128] Jackson, William. 'Developing a values evidence-based clinical supervision model within a forensic intellectual disability service'. *Journal of Intellectual Disabilities and Offending Behaviour* 5.1 (2014): 14-23, 22.

[129] Australian Human Rights Commission. *Equal Before the Law: Towards Disability Justice Strategies* (2014), 27.

[130] Victorian Law Reform Commission. *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997.* June 2014, 182.

[131] *Criminal Code Act 1983* (NT), Pt IIA, Div 3 covers unfitness to stand trial; s 43A defines a 'court' to mean the Supreme Court. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) contains provisions governing fitness to stand trial; s 4(1) stipulates that the Act (including the fitness to plead provisions) only applies in relation to trials of indictable offences in the Supreme Court or the County Court. See also the discussion of this point in Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40, 46.

In South Australia,[132] Tasmania,[133] Western Australia[134] and the ACT,[135] magistrates have power to address issues concerning fitness to plead directly. This can result in a person with a mental illness or intellectual disability being diverted from the criminal justice system, thus avoiding a potentially stressful formal inquiry into fitness.[136]

While considerations pertaining to diversion from the mainstream criminal justice system for persons with an intellectual or cognitive disability and forensic issues are discussed above, we will now briefly outline some of the different approaches taken to this issue in other jurisdictions.

Approaches to diversion

In Tasmania, the Diversion List is an initiative within the Tasmanian Magistrates Courts aimed at defendants of summary offences who have a mental illness and/or impaired intellectual functioning. With the assistance of health professionals, defence lawyers and prosecutors, there is an opportunity for eligible individuals to address their mental health and/or cognitive disability needs associated with their offending behaviour in the Magistrates Court.[137] The Diversion List strives to provide a therapeutic response to the offending behaviour of defendants with mental health or cognitive disability issues. It is reported that participants of the List who adhered to their conditions of bail such as attending rehabilitation programs and counselling sessions benefited greatly from this initiative. In the first 12 months of operation, the majority of participants left the program without a conviction. Furthermore, participants of the program reported a reduction in reoffending rates in the first six months after completion, as well as a positive outlook to treatment and engagement in services.[138]

In New South Wales, there is broad scope for persons with intellectual disability charged with a summary offence to be diverted from the criminal justice system into community treatment programs or another order the court considers appropriate.[139] For summary offences under the *Crimes Act 1900* (ACT), if the court considers it appropriate, having regard to the nature of the charge or the nature of the defendant's mental impairment, and it's determined that it would be inappropriate to prosecute the defendant in relation to the offence, the court can decide not to carry out or continue the investigation and may dismiss the charge and order that the person be released.[140]

Western Australia's Intellectual Disability Diversion Program (IDDP) was established in 2003 in an attempt to reduce imprisonment and recidivism rates of offenders with intellectual disabilities by diverting participants away from prison.[141] An IDDP coordinator works with each participant to create an individualised program plan. Between the IDDP's commencement in 2003 and 2007, a total of 112 offenders have participated in the program. Participants often receive a reduced sentence for having completed the program, and in particular cases a Conditional Release Order or Community Based Order is made under the

[132] See *Criminal Law Consolidation Act 1935* (SA), Pt 8A, Div 3.
[133] See *Criminal Justice (Mental Impairment) Act 1999*, Pt 2.
[134] See *Criminal Law (Mentally Impaired Accused) Act 1999*, Pt 3, Div 2.
[135] See *Crimes Act 1900* (ACT), Part 13, Div 13.2
[136] *Mental Health (Forensic Provisions) Act 1990* (NSW), s 32; *Crimes Act 1914* (Cth), Div 8.
[137] Magistrates Court of Tasmania. 2007. *Magistrates Court Mental Health Diversion Program*. <http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/mental_health_diversion>. Mental illness is defined by the Act.
[138] H Graham. 2007. *A foot in the (revolving) door? A preliminary evaluation of Tasmania's mental health diversion list*. Hobart: University of Tasmania. <http://eprints.utas.edu.au/7186/1/MHCT_Thesis_MC_Report_Version.pdf>.
[139] *Mental Health (Forensic Provisions) Act 1990* (NSW), s 32 & 33.
[140] *Crimes Act 1900* (ACT) s. 315 (Austl.).
[141] Zapelli R & Mellor A, Evaluation of the IDDP Project (2004) 14.

condition that the offender continues working with the service providers they have been introduced to through the program.[142]

South Australia has a magistrate diversion program that lasts for six months. The program is aimed at adults who have impaired intellectual functioning as the result of (but not limited to) intellectual disability or acquired brain injury who commit summary and certain minor indictable offences.[143] If a person is deemed suitable for the program, the court case is adjourned and an intervention plan is created to suit the needs of the individual. Upon completion of the program, charges may be reduced or withdrawn in recognition of the offender's participation. There have been mixed results regarding the efficacy of this program. The majority of participants still leave with a criminal record and a traditional sentence.[144] However, there are positive outcomes from this program. There was a significant decrease in the number of offences committed by participants in the 12 months after their participation in the program compared to 12 months prior. Within the sample group used in a 2004 study, the number of total charges decreased from 348 to 116.[145] Another positive feature of the program is the reported resulting increase in understanding of the needs of people with different types of intellectual and cognitive impairment in the criminal justice system. This includes the difficulties some people may have in understanding the criminal justice process. The program appears to have increased awareness within the criminal justice system of the significance of a systemic, individualised response to these cases.[146]

Relevant prison initiatives

In recognition that prisoners with an intellectual disability have complex needs, the Port Phillip Prison offers the Joint Treatment Program (JTP) for eligible offenders with an intellectual disability. The JTP is a 35-bed facility at Port Phillip Prison with adapted treatment groups targeting relapse prevention and development of independent living skills. It is directed at addressing offending behaviour in prisoners with a cognitive impairment. Participation is voluntary – persons identified within the prison as being suitable for the program can agree to take part.[147] Loddon Prison also has similar program for violent offenders with an intellectual disability with two specialist clinical staff providing support to eligible prisoners.

A formal mentoring program has also been developed at both the Port Phillip Prison and Loddon Prison. Commencing in 2010, this initiative recruits, trains, supports, supervises and mentors suitable prisoners with a cognitive impairment. This is achieved by the mentor reinforcing appropriate behaviour and building the skills of those they are mentoring. This also facilitates positive relationships and connections for the person with a cognitive

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[142] Perlinski A & Holder F, 2007. *Small but Beautiful – the Intellectual Disability Diversion Program*, presentation to the Disability and Justice Conference, Perth

[143] Courts Administration Authority of South Australia, 2012, *Magistrates Court Diversion Program,* available at <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Magistrates-Court-Diversion-Program.aspx>

[144] RD Schneider. 2010. 'Mental Health Courts and Diversion Programs: A Global Survey'. *International Journal of Law and Psychiatry. 33:* 201.

[145] Skrzypiec G., Wundersitz J., & McRostie H, 2004. *Magistrates Court Diversion Program: An Analysis of Post-Program Offending,* Office of Crime Statistics and Research

[146] See K Vanny, M Levy & S Hayes. 2008. 'People with an Intellectual Disability in the Australian Criminal Justice System'. *Psychiatry, Psychology and Law.* 15(2): 261, for a further discussion of these issues.

[147] Department of Human Services – Statewide Forensic Service and Department of Justice – Corrections Victoria, 2007, *The Joint Treatment Program*, Department of Justice – Corrections Victoria available at <http://assets.justice.vic.gov.au/corrections/resources/604f6fb1-d71a-4bcc-b4a1-06e0325ae036/joint_treatment_program.pdf>

impairment.[148] QAI considers that this is a commendable initiative that could be replicated in Queensland, not only for prisoners but for any offenders with an intellectual or cognitive impairment following their court appearance.

Another innovation within Victoria is the Acquired Brain Injury (ABI) Correctional Service Program. This was piloted in 2010 and the success of this trial led to Corrections Victoria creating an ongoing ABI clinician position. Over an 18-month period, this clinician conducted 751 offender screenings and identified 123 offenders with an ABI, with a view to adapting treatment programs for this group.

While Tasmania has developed an innovative Integrated Offender Management framework within the Tasmania Prison Service, which focuses on reducing recidivism through case management and reintegration into the community, these community correction services are not tailored for persons with intellectual disability and acquired brain injury and there does not appear to be any existing support, programs or compulsory treatment at present for this vulnerable group.[149]

Courts in England and Wales provide the services of registered intermediaries (RIs) for witnesses and victims who have difficulty communicating in any stage of the criminal justice system.[150] RIs are impartial professionals who assist individuals to understand a question being asked of them and communicate to the questioner the response of the witness. From 2004 until March 2012, over 5300 requests were made for an RI by persons involved in the criminal justice system within these jurisdictions.[151] In response to this initiative, a Registered Intermediary program was also trialled in Northern Ireland from 2013 – 2014 with the inclusion of suspects and offenders as well as victims and witnesses.[152] Police officers responded positively to the RIs during investigations when questioning both victims and offenders. Positive outcomes reported by police included that implementation of RIs were effective at identifying an intellectual disability during early stages of an investigation, that RIs facilitated vulnerable persons to give best possible evidence/details and that police who worked with RIs also reported that they had improved their own communication skills through observation.[153]

Proposed reforms in this area

Addressing language and discourse

The language and terminology used in this area, like many issues pertaining to people with disability, is also deeply problematic. To label a person as an 'offender' when the allegations made against them have not been proven to the requisite standard is inappropriate and harmful. The discourse within forensic services is also problematic – the normative

[148] Corrections Victoria, 2011. *Disability Report Card 2011,* Department of Justice.
[149] Tasmania Department of Justice, 2009. *Breaking the Cycle: Tasmania Corrections Plan 2010-2020.* <http://www.justice.tas.gov.au/correctiveservices/breaking_the_cycle/documents/Breaking_the_Cycle_Discussion_Paper.pdf>
[150] Hepner I., Woodward M.N., Stewart J., 2014, Giving the Vulnerable a Voice in the Criminal Justice System: The Use of Intermediaries With Individuals With Intellectual Disability, *Psychiatry, Psychology and Law,* doi: 10.1080/13218719.2014.960032
[151] Cooper, P., 2012, Ten years of Registered Intermediaries in England and Wales. *City University London*. available from https://www.city.ac.uk/__data/assets/pdf_file/0010/150688
[152] Department of Justice, 2015, *Northern Ireland Registered Intermediaries Schemes Pilot Project*, available from http://www.dojni.gov.uk/index/...categories/.../ri-post-project-reviewfeb15.pdf
[153] The report highlights one case where parents and carers told police it was pointless talking to a victim of alleged sexual assaults because he had limited communication due to an acquired brain injury. However, an RI was able to facilitate communication with the victim and police.

terminology is highly medicalised and is inconsistent with the remedial and rehabilitative objectives of the legislation. The MHC has been described as operating 'on a medical model addressing issues of mental illness and intellectual disability, to the exclusion of other factors that could give rise to unfitness'.[154] This is a matter of concern.

As a broader issue, QAI notes that the forensic disability service regime should be an empowering one, which focuses on building a person's capacity and developing their abilities. Unfortunately, this is not presently the case.

Preventative measures

As with many matters pertaining to persons with an intellectual or cognitive disability, prevention is far more appropriate and effective than punishment. It is now well documented that the roots of criminal behaviour amongst this group are embedded in their early treatment and life experiences.

Many people with intellectual or cognitive disability who engage in offending behaviour do so because they lack the appropriate life experience or support to know and understand what behaviour is appropriate in a particular circumstance and indeed that a particular act that they engage in is a crime. Many people within this group commit crimes of desperation, crimes to survive – there is a strong link between crime and life circumstances such as poverty, homelessness and childhood institutionalisation and abuse within this group.

Money spent on programs aimed at reducing homelessness and poverty and on providing support to persons with an intellectual or cognitive disability is much more effective as a means of reducing crime and improving community safety than money spent on police, courts and forensic detention facilities.

[154] Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40, 41.

Legal representation as of right

Case Study 3: Forensic Order (Disability) – community category – revoked

Sam was placed under a Forensic Order (Disability) and was permitted to live in the community. As a part of Sam's order there were strict conditions relating to where Sam could live.

Whilst under the order Sam's supports were sourced from the local Mental Health Service and a Disability Service Provider. As a result of the order Sam was forced to attend multiple appointments with the local Mental Health Service who had limited resources to assist people with an intellectual disability or cognitive impairment.

After receiving support and treatment for 3 years under the order, Sam's treating team at the local Mental Health Service recommended that Sam's Forensic Order (Disability) be revoked. Sam and the treating team sought to have the Mental Health Review Tribunal (**MHRT**) revoke the order, however they were unsuccessful.

Sam's treating team referred Sam to QAI and QAI agreed to represent Sam. At Sam's first review with legal representation Sam's Forensic Order (Disability) was revoked.

This case illustrates the importance of legal representation in Forensic Order (Disability) reviews.

As discussed above, there is a strong argument that persons with an intellectual or cognitive disability and forensic issues are a highly vulnerable and disempowered group that collectively warrant comprehensive legal representation as a matter of right.

That persons under Forensic Orders (Disability) are often unrepresented at the reviews of the orders by the Mental Health Review Tribunal raises fundamental human rights concerns that are not adequately addressed by the statutorily defined role of an 'allied person'. The lack of universal legal representation as a guaranteed right for this group is contrary to the spirit of the CRPD which emphasises the right to counsel and to support and advocacy for persons with disability; and it also contravenes specific provisions including Articles 12 and 13, discussed above.

As noted above, the lack of skilled, free legal representation is particularly poignant in the context of a discriminatory starting position, where the presumption of innocence is disregarded and the possibility of indefinite detention very real. Without appropriate legal representation, people under Forensic Orders (Disability) are effectively without a voice in legal proceedings which serve to completely disempower them.

Translating the non-retributive intent of the FDS from theory to practice

QAI considers that the FDS could operate in a much more humane and effective way, both in terms of the service and the FDS Unit.

QAI believes that the FDS should operate as a resource centre offering training to specialised support staff to enable them to work effectively within the community and detention centres. This could be achieved in collaboration with the Department of Communities, Child Safety and Disability Services' Centre of Excellence for Behaviour Support. Within the community,

staff should be appropriately trained and resourced to deliver habilitative and educational services to assist people with an intellectual or cognitive disability and forensic issues to live within the community with appropriate support. Skilled workers could support, train and habilitate people with an intellectual or cognitive impairment within the community as part of their diversion from the mainstream criminal justice system under a time-limited Forensic Order (Disability).

The FDS should also provide prison in-reach services, delivering tailored, inclusive education and training to prisoners with intellectual or cognitive impairment to facilitate their habilitation and rehabilitation and ultimately help to facilitate their transition from detention and reduce the likelihood of recidivism.

The FDS theoretically operates on a non-retributive mandate – the rationale for the detention of forensic disability 'clients' is not to punish them but rather to minimise risk to the community whilst providing intensive care for them. Yet the prison-like environment of the FDS and the involuntary and indefinite nature of the detention casts grave doubt on the value of the FDS as a non-punitive alternative to a normative criminal justice sentence.

There are particular concerns for juveniles who are considered to lack fitness to plead to a charge or to stand trial. Recent Queensland qualitative research interviewing lawyers, youth justice workers and mental health professionals has shown that some legal practitioners make a calculated decision to not formally raise their client's unfitness to avoid a referral from a mainstream criminal court to the MHC, in part because of pragmatic concerns about indefinite detention within the FDS.[155] The researchers found that a 'significant disincentive for raising unfitness' in the case of juvenile offenders with an intellectual disability is the possibility that the person could be detained in a psychiatric facility. The authors assert:[156]

> *This reason for declining to raise fitness might well loom large in the minds of Queensland lawyers, as there are no purpose-designed facilities in Queensland for juveniles who are found unfit for trial."*

This has resulted in many juveniles being held in solitary confinement for their safety and protection in adult prisons. Noting that the laws relating to fitness to plead were intended to operate as a protective measure to ensure that people who lack trial fitness do not end up convicted and punished, yet that this has not been the case, the authors conclude:[157]

> *The low take up of fitness to plead as a protective measure by juveniles in Queensland compared to adults indicates that reform is required to address barriers and disincentives in raising unfitness. In addition to reforms aimed at ensuring timely disposition of all matters for juveniles who are unfit, the gap in the legislative framework at the magistrates' court level, where most offences committed by juveniles are disposed of, requires specific reform.*

The answer to the difficulties that arise in the area of juvenile justice and capacity will not be resolved by the establishment of a specialised juvenile forensic disability service. Rather, an appropriate response for juveniles, and for adults, with impaired and forensic issues, is the provision of supports enabling them to undertake programs designed to assist with their disability support needs and address the social issues that may result in offending behaviour.

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[155] Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40, 40.
[156] Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40, 42.
[157] Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40, 48.

The proposal currently before the Senate to cease payment of the Disability Support Pension to people in psychiatric confinement, discussed above, exemplifies the implied punitive approach to people deemed to lack capacity who have forensic issues.[158]

Appropriate therapeutic intervention

At present, the FDS is not operating as a therapeutic service. Rather, a number of factors, including the highly institutionalised and sterile, prison-like environment of the FDS Unit, the lack of a coordinated and consistent approach to the delivery of therapeutic or habilitative programs and services, the isolation from community, family and friendship networks and the indefinite nature of the detention which can erode hope of ultimate community reintegration collectively result in the FDS Unit being therapeutically counter-productive for those detained within it. In the ongoing review into the MHA, submissions have noted that an important issue to address in this regard is the need for greater accountability and consistency as regards the management of individuals on Forensic Orders (Disability).[159]

In the context of therapeutic intervention, it must again be emphasised that, in contrast to mental illness, people with cognitive or intellectual impairments do not have illnesses that respond to medical treatment. The conflation of intellectual and cognitive disability with mental illness, as discussed above, can result in difficulties authorising and providing appropriate treatment and care for these groups.[160] As identified in submissions to the MHA review, where the person has a dual diagnosis of mental illness and intellectual disability, there is still a need for greater clarify regarding their treatment and care.[161]

Appropriate community treatment is recognised as being of real habilitative value. Research by the Centre of Excellence for Behaviour Support indicates that a significant majority of persons in the target group for receiving forensic disability services have the potential to be supported within the community.[162] There is an urgent need for Queensland to explore alternative support mechanisms for persons with intellectual or cognitive disability who are vulnerable to coming into contact with the criminal justice system.

As QAI asserts in *dis-Abled Justice: Reforms to justice for persons with disability in Queensland:*[163]

> *If the success of the Forensic Disability Service is measured by its ability to habilitate or rehabilitate and then integrate people back into the community, then there is more to do. No inmate has yet left the Wacol facility; it has become, in essence, a warehouse.*

Persons under Forensic Orders (Disability) need habilitation and rehabilitation to help them to reintegrate as independently as possible into the community. The therapeutic support and interventions provided should be given in a community context, as this is where the person will ultimately need to exercise these skills and persons with intellectual or cognitive disability can have difficulty transferring skills learned in one environment to another setting. Research

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[158] Social Services Legislation Amendment Bill 2015 (Cth).
[159] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014.
[160] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014; and see Lyons J in *Re DKB* [2012] QMHC 6.
[161] Queensland Health, *Review of the Mental Health Act 2000: Background Paper: Forensic Disability*, May 2014.
[162] Nankervis, K. 2010, *A secure forensic disability service model and system of supports for people with intellectual disability who engage in seriously challenging behaviour and/or offending behaviour*, Centre of Excellence for Behaviour Support, Australia.
[163] Queensland Advocacy Incorporated. 2015. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland.*

shows that learning opportunities for persons with intellectual disability are most effective when they are real, continued and sustained and are targeted to the learning style of the person. Practice in particular behaviours in the community, with assistance by support staff, is recognised as an effective means of providing therapeutic rehabilitation.[164]

Forensic disability support should be centrally focussed on supporting and building capacity. Support is critical in this regard and, consistent with a rights-based approach, persons with an intellectual or cognitive disability and forensic issues have a right to support to exercise their capacity on an equal basis with others.

Redesigning Forensic Orders (Disability)

Forensic Orders (Disability) have the potential to facilitate the diversion of people from mainstream criminal justice proceedings into an appropriate rehabilitative regime that provides them with education and habilitation designed to aid their successful participation in the community and reduce the risks of recidivism. The order must be time limited, rather than indefinite, with the assistance and support provided throughout the duration of the order focussed on working towards a successful conclusion to the order within a specified timeframe.

In circumstances where it is deemed that the risks of allowing the person to remain in the community are too great, the focus must remain strongly on education and habilitation. Further, the order must again be time-limited and have a certain end date – this is in stark contrast to the current process of reviewing orders, yet allowing them to perpetuate. Having a time-limited duration for Forensic Orders (Disability) would provide the person subject to the order with appropriate certainty and enable them to hope and plan for their future. It would require the Director – Forensic Disability to ensure that the FDS Unit is operating as a transitional unit, as is the legislative intent. It would also ensure that the focus of the educational and habilitative services provided would be properly directed towards ensuring the person is equipped with the necessary skills and understanding to enable them to successfully transition from the FDS Unit into the community.

Cessation of indefinite detention

This paper has engaged in an in-depth exploration of the problems associated with indefinite detention, from the perspectives of international humanitarian rights and obligations, basic human rights norms and in terms of the lived experience of persons with disability subjected to the prospect of indefinite detention and their family and friendship networks.

Along with being objectionable on multiple levels, indefinite detention is also ineffective and socio-economically counter-productive. It absorbs a significant amount of government funding with no related public benefit outcomes. While it is justified on the basis of risk, there are many more practically and cost-effective routes towards enhanced community safety, particularly when we engage in a cost-benefit comparison.[165]

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[164] Simon Wardale. *People with intellectual impairment and forensics.* Paper given at *dis-Abled Justice: Reforms to justice for persons with disability in Queensland* forum. Brisbane, 28 May 2015.

[165] In this regard, note, for example research by McCausland, Johnson, Baldry and Cohen into the cost-benefit of early support and diversion, which suggests that every dollar spent in prevention saves approximately $1.70 later on: Eileen Baldry, Ruth McCausland, Anna Cohen & Sarah Johnson. 2013. *People with mental health disorders and cognitive impairment in the criminal justice system - cost-benefit analysis of early support and diversion.* UNSW and Price Waterhouse Coopers.

As QAI notes in *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*:[166]

> *Neither the public nor people with these impairments themselves derive clear benefits from incarceration in a forensic facility. Behaviour that is a natural reaction to confinement and control may be misconstrued as 'acting out', 'difficult', 'challenging', 'aggressive' or 'angry'… Locking people away only feeds the public misperception that all people with intellectual disability are fundamentally not like the rest of us.*

Equality of treatment

An analysis of the lived experience of persons under a Forensic Order (Disability) detained within the FDS reveals a complete picture of disempowerment and inequality of treatment.

The exclusion from participation in ordinary community living, the deprivation of liberty and autonomy and the denial of hope for this group is significantly detached from the lived experiences of those without an intellectual or cognitive disability.

In distinctly less favourable, and therefore discriminatory, treatment on the basis of their disability, persons under Forensic Orders (Disability) detained within the FDS are not given the opportunity to defend the allegations made against them. There is no independent testing of the facts that give rise to the allegations of criminal conduct to the requisite criminal standard of 'beyond reasonable doubt'.

Instead, they are indefinitely detained in prison-like conditions, despite that the law specifically disallows persons who lack capacity to be found criminally responsible for their conduct.

Conclusion

A key barrier to improvement in the area of forensic disability is the lack of transparency endemic to forensic disability services. Since its inception, the FDS has functioned as a closed system. Sadly, it is trite to note that the marginalisation and disempowerment of vulnerable groups such as those with intellectual or cognitive impairment and forensic needs is heightened by isolating them from the community. The decline in functional familial and social support networks and consequent lack of access to a supporter with the knowledge and ability to effectively advocate for their rights is a predictable result. This is also a group that is seldom accorded sufficient attention in the popular press and therefore the plight of this group continues largely unnoticed.

The upcoming review of the FDA, likely to occur within the next 12 months, is an important opportunity for the state government to introduce much-needed change in this area and to address the human rights of persons with intellectual or cognitive disability and forensic needs. There are some developments in the area of forensic disability in other jurisdictions, both within Queensland and overseas, that offers a core evidence and practice base from which Queensland can learn.[167] By its establishment of the MHC, Queensland is sometimes seen as leading the way in the provision of forensic services, yet this is not predominantly the

[166] Queensland Advocacy Incorporated. 2015. *dis-Abled Justice: Reforms to justice for persons with disability in Queensland.*

[167] Simon Wardale. *People with intellectual impairment and forensics.* Paper given at *dis-Abled Justice: Reforms to justice for persons with disability in Queensland* forum. Brisbane, 28 May 2015.

lived experiences of those with an intellectual or cognitive disability within the Queensland system.[168]

The introduction of the NDIS in Queensland also presents a significant opportunity to amend and redesign the forensic disability system and this opportunity should be embraced by supporters and advocates of people with an intellectual or cognitive disability.

There is much work to be done to bring the FDS up to meet the requirements stipulated by international humanitarian law and indeed, even those prescribed by Queensland legislation. In the intervening period, the human rights and dignities of the persons indefinitely subjected to forensic orders and/or incarcerated within the FDS Unit for a crime which, even if they did commit it, was so inextricably linked to their intellectual disability that the law cannot find them criminally responsible for their conduct, remain crushed.

[168] Suzie O'Toole, Jodie O'Leary and Bruce D Watt. 'Fitness to plead in Queensland's youth justice system: The need for pragmatic reform'. (2015) 39 *Criminal Law Journal* 40, 52.