



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

Joint Standing Committee on the National Disability Insurance Scheme
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13 March 2017

Dear Committee

Thank you for accepting QAI's submission with extension to 13 March 2017 to the Committee's Inquiry into the provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition.

Yours sincerely,

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

Patron: His Excellency The Honorable Paul de Jersey AC

About Queensland Advocacy Incorporated

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

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program. Our expertise in providing legal and advocacy services and support for individuals within these programs has provided us with a wealth of knowledge and understanding about the challenges, issues, needs and concerns of individuals who are the focus of this inquiry.

QAI deems 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. Further, QAI believes that all communities 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.

As QAI's core objectives centre around the protection of the rights and lives of people with disability, we will limit our submission to responding to those issues which are relevant in this regard:

Terms of Reference:-

- h. the provision, and continuation of services for NDIS participants in receipt of forensic disability services;
- i. any related matter.

QAI asserts that any person who requires supports such as mentioned in Terms of Reference: Commonwealth Government funded services, including the Personal Helpers and Mentors services (PHaMs) and Partners in Recovery (PIR) programs, and current long and short term mental health state and territory government funded services must be considered as eligible for NDIS supports and services.

Key recommendations

NDIS Supports and Services & People with cognitive or psycho-social impairments in the criminal justice system

Recommendation 1: To enable fair and equitable access to the NDIS and to enable rehabilitation for an inclusive life there must be active 'behind scenes' outreach and coordination by NDIA with Police, Courts, Corrections and Forensic courts, tribunals and supports in each jurisdiction. The most critical of the NDIS Principle to Determine Responsibilities NDIS and Other Service Systems is #6 - 'The interactions of people with disability with the NDIS and other service systems should be as seamless as possible [...]'.

Recommendation 2: The NDIA must instigate the initiative with people with disabilities, their families, advocates, mental health clinicians, treating teams and Tribunals to transition support for people living under less restrictive orders..

Recommendation 3: NDIA will promote and coordinate cross-government approach to transition and post-release services in support of offenders with disabilities so that they are better equipped to reintegrate and live fulfilling lives.

Recommendation 4: NDIA ILC ('2nd Tier' or Information, Linkages & Capacity) funding for justice support mentor-style programs, where trained volunteers or paralegals support and accompany people through police interviews, assistance with court appearances and referral for legal advice.)

Recommendation 5: Police training – 'capacity building' - through ILC. This is life and death. The training provided to police in the area of disabilities in Queensland presently is inadequate.

Recommendation 6: NDIA support for Diversion from Lower Courts - The NDIA Local Area Coordinators must take the initiative. Approach the Chief Magistrate & Court Liaison Officers to explore possibilities for diversion and support.

Recommendation 7: QAI endorses the *National Statement of Principles for Forensic Mental Health 2002* proposed by the National Mental Health Working Group of the Australian Health Ministers and the Convention on the Rights of Persons with Disabilities, particularly Article 12 'Equal Recognition before the Law, and Article 13 'Access to Justice'.

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People with intellectual disability — general population¹	2%
People with intellectual disability — Qld prisons²	9.8%
People with intellectual disability — former prisoners³	30%
Women with a mental health disorder - Australia⁴	22.3%
Women with mental illness — Qld prisons (diagnosed)⁵	57.1%
Aboriginal and Torres Strait Islander women prisoners with mental health disorders	86%
Aboriginal and Torres Strait Islander male prisoners with mental health disorders	73%

¹ The figure varies from ~1.5 – 3% depending on the source. In the DSM-V intellectual disability is defined as < IQ70 and deficits in adaptive functioning. IQ relative to a population, not absolute; and <IQ70 means that the test-taker's score is more than 2 standard deviations below the median score in the test-taker's age group. Unlike many physical disabilities, there is no bright line that divides people with intellectual impairments from those who do not. The important question is not 'What is this person's disability?' but 'What is this person's support need/s?'

² Queensland Department of Corrective Services. 2002. *Intellectual Disability Survey, 2002*.

³ In NSW: S Hayes & D Mclwain. 1988. *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study*. Sydney.

⁴ 4125.0 - Gender Indicators, Australia, Jan 2013-

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features3150Jan%202013>>

⁵ Reported by the women themselves. B Hockings *et al.* 2002. *Queensland Women Prisoners Health Survey*. Department of Corrective Services.

1. Introduction

In this submission we focus on support and capacity building needs that the NDIS can meet, through individual packages or through ILC,⁶ to people with cognitive impairment and psychosocial disabilities at risk of, or in, the criminal justice system.

Apart from needs that are peculiar to Aboriginal and Torres Strait Islander people, the broad support needs of Queenslanders with cognitive or psycho-social impairments, and particularly those at risk of the criminal justice system, are not different to those of people with those impairments in other Australian jurisdictions.

The NDIA must engage with people in prisons and forensic facilities to enable smoother transition back to community per the NDIS Applied Principles – Justice which state that the NDIS ‘will fund specialised supports to assist people with disability to live independently in the community, including supports delivered in custodial settings (including remand) aimed at improving transitions from custodial settings to the community, where these supports are required due to the impact of the person’s impairment/s on their functional capacity and are additional to reasonable adjustment.

The majority of people with disabilities in or at risk of the criminal justice system, however, are not in prisons or forensic facilities. People with disability in the community may be on corrective or forensic supervision or involuntary treatment orders, or not on orders at all. Many do not identify, or even want to identify, as persons with disability.

People with disability often experience social and geographic isolation in rural and remote regions of Queensland. Unless outreach services are provided, many people are unaware of the existence of services or supports. . For many people experiencing mental health issues or with cognitive impairment who have contact with the criminal justice system, access to appropriate and understandable information is challenging. QAI is also concerned that adequate NDIS registered services may not be available for people to purchase the supports and services that they need in rural or remote areas of Queensland..

It is critical at the earliest possibility, the NDIA must engage with existing infrastructure and supports like ATSI community boards, police, courts, corrections and support services. The Queensland legal infrastructure is in flux now as the *Mental Health Act 2016* (Qld) (‘MHA’) is enacted in this state. The MHA offers new possibilities for the benefits of NDIS support, and above all, for first contact between defendants and the NDIS.

⁶ Information, Linkages and Capacity - NDIA block-funded programs

2. Who Are People with Disabilities in the Criminal Justice System?

People with intellectual and psycho-social impairments are overrepresented in the criminal justice system as victims, but particularly as suspects and offenders. The reasons for that disproportion has nothing to do with innate characteristics of people with disabilities; indeed the explanation lies in social circumstances: in the exclusion, disadvantage and discrimination experienced by people with disabilities from birth, in the collective failure of mainstream services to provide appropriate coordinated support before people come into contact with the criminal justice system and to provide it as people cycle through the system as victims of crime, suspects, defendants, offenders, prisoners, and repeat offenders..

There is insufficient Queensland research on the size and needs of this group of people, but comparisons with research in neighbouring jurisdictions confirms that the rates of overrepresentation at various stages in the criminal justice process are similar there and here, and this fact permits confident inferences about numbers and proportions where Queensland research is thin or non-existent. Almost half of Queensland prisoners, then, have disabilities, that range across the spectrum, who, while they may have many different support needs share similar experiences of adversity and disadvantage.

Prison recidivism amongst people with intellectual disability is about twice the general rate, indicating that people with intellectual disability are retained or return in the system more readily. We have no Queensland figures, but in NSW, while general recidivism stands at 38%, 68% of prisoners with intellectual disability return to jail.⁷

The recidivism rate for prisoners with intellectual impairments who have no prior convictions is more than twice that of the total inmate population rate (60%: 25%).⁸ For inmates with prior convictions, the rate for inmates with intellectual disability is 50% higher still than that of the total inmate population (72%: 49%).⁹

⁷ A Langford. 2002. *Setting the scene. Forging the links: A symposium on making the difference for offenders with a disability*. Joint initiative of NSW Department of Corrective Services & the Commonwealth Department of Family and Community Services, Sydney, February 27–28.

⁸ A Langford. 2002. *Setting the scene. Forging the links: A symposium on making the difference for offenders with a disability*. Joint initiative of NSW Department of Corrective Services & the Commonwealth Department of Family and Community Services, Sydney, February 27–28.

⁹ NSW Department of Corrective Services. 2002. *Recidivism and offences of prisoners with and without intellectual disability*. Data supplied to CDDS by the Department of Corrective Services for the period 1990–1998. Sydney.

3. Overrepresentation of People with Intellectual and Psycho-social Impairments

'It can be theorized that many in these groups with complex needs become locked, early in their lives, into cycling around in a liminal, marginalised community/criminal justice space, a space that is neither fully in the community or fully in the prison. They do not fall through cracks; they are directed into the criminal justice conveyor belt.

This suggests it is important to recognise the different space & need for different disability and rehabilitative interventions and supports at many points along these persons' pathways.'¹⁰

Prisoners with intellectual or psycho-social impairments are among the most vulnerable and disadvantaged groups in our society, yet the justice process tend to be systemically if not deliberately careless of the criminogenic¹¹ factors that lead to their imprisonment.

Knowing 'why' people commit crimes underpins effective measures to reduce them and frames effective supports that will prevent them. People with intellectual and psychiatric impairments experience myriad disadvantages in life that can result in their engagement and or detention in watch houses, at courts, remand centres, jails, secure psychiatric and forensic facilities and receive few supports that would mitigate that disadvantage.. International and Australian research confirms that offenders with intellectual and psychiatric impairments often have common experiences of childhood neglect or abuse, often are unemployed, poor and/or from an indigenous minority, to have limitations to social and communication skills, and may experience psychiatric conditions or exhibit behaviours of concern that are related to communication methods used in situations of extreme duress and anxiety.

The circumstances in which people with disability become enmeshed in the criminal justice system are bound in a competitive society that values and rewards excellence and high achievement and often has no time or appreciation for people at the other end of the spectrum. Educational institutions are typical, rewarding those who succeed, excluding and stigmatising those who do not.¹² Special education classes part-time placements and other

¹⁰ E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*. Background Paper for the National Legal Aid Conference. Darwin, 16.

¹¹ Criminogenic means causing or likely to cause criminal behaviour.

¹² How many school mottos, for example, purport to value students for themselves, as opposed to extolling excellence, achievement, knowledge etc.?

'visiting students' and special schools send a powerful message of exclusion and play a role in setting many people with intellectual or psychiatric impairments on a descending life path. Offending must be understood in that context.

Criminogenic factors include the totality of the offender's life circumstances from birth, and particularly the person's living arrangements at the time of the offence. For example, people with intellectual impairment are at risk of offending because many lack adequate support to live in the community.¹³ The homeless [population is comprised of an over-representation of people with cognitive or intellectual impairment and mental illness and are more vulnerable than other homeless and unemployed populations; often 'invisible' to government services that rely on people to actively approach them;¹⁴ have health needs that are often greater yet inadequately met;¹⁵ and are more at risk for criminal victimisation than the general population.¹⁶

Housing, health, employment and income support are beyond the scope of this Inquiry and we do not comment on them other than to say that-

- The causes of offending behaviour lie not in the person but in life circumstances that largely lie outside the criminal justice and forensic systems. The solutions, too, lie outside those systems, in better housing, interaction with community, and better support.
- It is only by examining the whole course of a person's life that one can best understand the criminal behaviour in the immediate circumstances of a crime
- The line between offender and victim blurs when the lived experience of disability collides with a justice system geared to the prosecution of crime and dealing of punishment. Criminality and criminal behaviour are inextricably linked to the issues lack of support, education and opportunities that a person with an intellectual impairment or psycho-social disability experiences.
- Distinctions between behaviour that is criminal as opposed to behaviour that is the product compounding issues surrounding impairment will be imprecise and often counter-productive.

¹³ National Research Council. 2001. *Crime victims with developmental disabilities: report of a workshop*. Washington DC: National Academy Press.

¹⁴ M O'Connor & A Coleman. 1995. "'Particularly Vulnerable': Homeless Young People with an Intellectual Disability' *Interaction* 9(1): 8-14.

¹⁵ K Van Dooren, R Ware, K Brooker & N Lennox. 2012. *Out of sight, out of mind: People with intellectual disability in public health research*. 2012 IASSID World Congress, Halifax, Nova Scotia, 749.

¹⁶ T Nettlebeck & C Wilson. 2002. 'Personal vulnerability to victimization of people with mental retardation' *Trauma, Violence and Abuse* 3(4): 289-306.

4. Early Diversion - Police

One of the problems commonly identified by advocate, academic and practitioner observers is the failure of criminal justice jurisdictions to identify particular classes of defendants who have impairments and subsequently, where appropriate, to divert those classes of defendants from the usual criminal justice processes¹⁷ – and the earlier the better.

Police are not trained or expected to help a person suspected of a crime, or act as de facto social workers or psychologists. To the extent that they do act to support a suspect the support will be subordinate to their primary objective, the detection and investigation of crime. Given their strategic commitment to reducing the overrepresentation of vulnerable people,¹⁸ police must receive training in how to interact with people with disabilities across the spectrum. While this does not mean that police need to know all about different disabilities or mental illness, there is a dire need for police to understand the vast array of communication styles that people use and their need to approach and respond in respectful and clear communication of their own. However, there are many indications that the training provided to police in the area of disabilities is presently inadequate. There is great potential for this to occur within the capacity building area of ILC funded projects.

One consequence of the dearth of police training in disability issues is the inability of police to identify that potential suspects have intellectual disability or psycho-social impairments.¹⁹ There is an increasing tendency for police to be drawn inappropriately into situations where a person with disability is disoriented and in distress due to impairment.

The involvement of police in these situations presents very specific dangers, as it typically results in the deployment of ‘command and control’ tactics to subdue the person, which can lead to a serious escalation of the incident and may result in the deployment of lethal force. This can have a flow on effect, with prosecutions unsuccessful because of faulty police questioning, coerced confessions and other violations of rights, especially the right to remain silent and the right of a vulnerable suspect to have a third party present during the police interview.

Police need comprehensive policy guidance that provides them with alternative ways of interacting with people with various forms of impaired capacity, and they need to develop practices that allow them to fulfil both their duty to investigate crime and their obligations to people with disability pursuant to the *Convention on the Rights of Persons with Disabilities*. That guidance is available in the Operations Procedures Manual, but is not always reflected in front-line practice. Bridging this gap is critical.

¹⁷ For example, in many of her publications Professor Susan Hayes advocates for the identification and diversion of people with intellectual disability.

¹⁸ QPS Strategic Plan 2012-2016

¹⁹ This important issue is discussed at length later in this chapter.

The QPS *Operational Policies Manual* guides the interviewing of people with ‘special needs’: those who have ‘reduced capacity to look after or manage their own interests’, the non-exhaustive list of which includes people with mental illness, intellectual disability and people with impaired capacity.²⁰

Everyone has a right to have a lawyer or friend with them during questioning.²¹ People with intellectual disability are particularly vulnerable to verballing. People with intellectual disability may be eager to please, passive and easily confused by police questioning.

Again, this is an opportunity for NDIS ILC funding for justice support programs, where trained volunteers or paralegals are available to accompany people through police interviews, and provide incidental assistance with court appearances and referral for legal advice.

QAI’s JSP team helps people to:

- get legal advice or representation
- resolve criminal matters
- access appropriate and responsive supports e.g. counselling, personal assistance employment
- understand and comply with the Court process such as bail conditions, listing dates and the Duty Lawyer Service.

5. Early Diversion - Courts

5.1 In the Summary Jurisdiction

The *Mental Health Act 2016* (Qld) is a new legislative structure²² that allows Magistrates to refer defendants to expressly named support services, including the NDIA.²³ Until the end of February 2017, Queensland Magistrates had no special powers in relation to diversion of defendants with cognitive impairments who were charged with simple offences, even though they comprised, and still do, a substantial minority of defendants, and of criminal matters. There was a geographically limited and largely experimental bail-based diversion program operating out of the Roma St arrest courts known as Queensland Courts Referral which was effective. The inability to divert people with intellectual impairments into alternative programs

²⁰ Chapter 6.3.1 - Queensland Police Operational Procedures Manual No 44
<http://www.police.qld.gov.au/services/OperationalPolicies/opm.htm>

²¹ *Police Powers and Responsibilities Act 2000* (Qld) ss 418-419.

²² The *Mental Health Act 2016* (Qld).

²³ Referral pursuant to the *Mental Health Act 2016* (Qld) section 174, when the matter has been dismissed because, on the balance of probabilities, the person is not fit for trial.

extended the return of vulnerable people into the criminal justice and forensic systems, incarceration, debt, homelessness, housing stress and welfare dependency.

From March 2017, Queensland Magistrates-

- a) will have the power to dismiss complaints (criminal charges) if satisfied on the balance of probabilities that the defendant was of 'unsound mind' or is 'unfit for trial'²⁴
- b) may refer defendants who are 'unfit for trial' to a 'appropriate agency', including the National Disability Insurance Scheme²⁵ or the Transition Agency established under the *National Disability Insurance Scheme Act 2013* (Cwlth) or the department in which the *Disability Services Act* (Qld) is administered,²⁶ and if 'a)' above applies, and the person has or may have a mental illness
- c) may make an examination order for clinical determination of need for treatment.²⁷

'Robert' - summary offences, no diversion. A man stole a chicken, took it to his local pub and asked the publican to cook it. When told to leave, the man walked to the primary school he had once attended and there ate the uncooked chicken. A teacher called the Toombul police, and they apprehended, charged and released Robert. Police later arrested him for an exposure offence at a different location. The Magistrate said he believed this was a case of 'complete lack of capacity' but the system did not allow him to recognise it as such. The Magistrate did not want to issue any kind of punitive or custodial sentence but nor did he feel in a position to simply ignore the offences. Since March 2017, Queensland's new *Mental Health Act 2016* has given Magistrates an option to refer defendants like Robert to the NDIA for 'appropriate care' (s 174 (2)).

The NDIA Local Area Coordinators must take the initiative and approach the Chief Magistrate and Court Liaison Officers to explore possibilities for diversion and support.

Again, there may be ILC opportunities for court support. Approximately one in three people appearing as defendants in Queensland's criminal courts have a degree of intellectual disability, and more could be done to adjust court processes to their needs. People with intellectual disabilities and others with diminished capacity may have considerable difficulty understanding court proceedings, yet out of longstanding habit, resignation and a fear of stigma they may not seek explanation or assistance.

²⁴ *Mental Health Act 2016* (Qld) section 172.

²⁵ Or to Queensland Health

²⁶ *Mental Health Act 2016* (Qld) section 174.

²⁷ *Mental Health Act 2016* (Qld) section 177.

People with intellectual disability may be inclined to simply agree with court directions or say they understand things even when they do not. People with intellectual disabilities may have some strong functional skills and ‘survival’ skills that mask their real difficulties. They may appear and may strongly want to participate in regular activities and transactions but may not always understand their obligations or the consequences of failing to meet courts’ expectations. They may lack confidence and communication skills and, where available, may depend on family or on other support people to assist them.

5.2 Indictable Matters

The Mental Health Court (‘MHC’) presides where a person is charged with an indictable offence and capacity is at issue, whether in relation to ‘fitness for trial’ or ‘unsoundness of mind’. The Mental Health Court²⁸ sits at the top of the ‘Forensic System’ and makes dispositions in relation to people who are unfit for trial or who are of unsound mind, or sends matters back to the regular courts where capacity is not at issue. Orders of the MHC have no limiting terms, and are usually made without a determination of guilt beyond a reasonable doubt.²⁹

Most dispositions (‘forensic orders’) send people to secure mental health facilities or place people on community supervision. A much smaller number of people are directed to the Forensic Disability Service at Wacol, near Brisbane. This is a purpose-built facility for the indefinite detention of people with cognitive impairments. There is only one such facility in the state, and inmates are sometimes held a great distance (up to ~ 2200 km) from home. No-one has yet transitioned from the Forensic Disability Service, despite its appointment as a transitional facility.

The purpose of a forensic order is treatment or training and habilitation of the person and the protection of others; the system’s ultimate goal is to reintegrate the person into the community. Properly implemented, a forensic order can have many benefits for an individual with complex needs. Those benefits must be weighed, however, against the restrictions imposed by forensic orders, restrictions that for many QAI clients have lasted for many years more than a criminal sentence in relation to a similar fact scenario.

The Forensic Disability Service (FDS)

A disability advocate has two clients who started out at The Park (Centre for Mental Health) and were later transferred to FDS when it opened. They have been in these institutions for 18 and 35 years respectively. ‘It is unlikely’ said the advocate ‘that the latter client would have been imprisoned for his actions 35 years ago, more likely community service or a fine’.

He has not gained the support he needs to live in the community, and after so many years his capacity and living skills have deteriorated.

He has become institutionalised, but had he originally appeared in a criminal court it is probable that he would not have received a custodial sentence. There is no formal process for finding housing for exiting residents at FDS.

²⁸ The Mental Health Court is a division of the Supreme Court.

²⁹ Except in some matters where the defendant can elect to do so.

When considering the term or extension of forensic orders, the Mental Health Court and the Mental Health Review Tribunal ('MHRT') weigh a number of factors more heavily than the criminal courts and parole boards, including the person's mental health, their response to treatment, the risk of harm to self and others and their likely social circumstances including the availability of accommodation or support. The MHRT is reluctant to release a person who has limited living skills, housing or support.

An imposed Forensic Order is not meant to be punitive, but without adequate, tailored and targeted supports for habilitation and rehabilitation, it becomes retribution. While it is not intended that a detainee atones for their crime, without an opportunity to be rehabilitated, detainees are punished for extended if not indefinite periods and a person's eventual release is unknown. Its calculus, instead, focusses on risk: For a person to move from detention to community treatment and, finally, to release from an order, the Tribunal must be satisfied that the person is no longer a risk to the community. The person must also demonstrate that they have sufficient supports for them to live in the community without need for further surveillance. It is QAI's observation that the Tribunal tends to be conservative in its assessment of risk and will renew orders by default. Meanwhile, every day in an institution further erodes that person's ability to live independently. Some people become so institutionalised that their prospects for reintegration fade all together.

Although the disposition of punishment is not one of the courts' purposes, people subject to forensic orders invariably view and experience the orders as such. They resent the system for it and the result is therapeutically counterproductive: An order can impede a person's recovery, and the prospect of interminable and onerous restrictions deters some from entering the forensic system in the first place, reducing the chance that they will get necessary treatment.

While community protection is necessary, there is no proof that the increasing restrictions on people subject to forensic orders over the last few years³⁰ is either improving the treatment of underlying mental illness or increasing community safety. A certain result is the extra expense of prolonged treatment, detention and surveillance.

Current forensic provisions reinforce damaging stereotypes, such as the not uncommon belief that

Inappropriate Detention

A forensic client was originally assessed as having an intellectual disability. He qualified for a support package and community release. Recently he was reassessed as having an IQ just above the cut-off and was therefore no longer eligible. Disability Services withdrew the support funding that enabled him to live in the community. His 'risk' (based on past offending behaviour) therefore required that he be confined in a forensic unit. With an individual funding package he may have the opportunity to live in the community again.

³⁰ Electronic monitoring is one such restriction.

offenders with mental illness or intellectual disability are violent, unpredictable and need control.³¹ People receiving treatment for a mental illness are no more violent or dangerous than the general population.³² Ironically, they and people with intellectual disability are more likely to be victims of violence, or to self-harm.³³

The forensic system, although nominally less punitive, creates a new set of barriers that slow or indefinitely defer a person's transition to community. Whether detained in a secure mental health facility or in the Forensic Disability Service, one of the primary reasons for prolonged detention is the lack of accommodation or supports needed for transition into community. The kinds of supports needed are not available through mainstream services, but do fall squarely into the reasonable and necessary supports the NDIS can provide.

6. Post-sentencing – Prison and other Corrective Services

6.1 People with intellectual impairments

People who have intellectual impairments are in prison because they committed crimes *and* because they continue to experience particular life circumstances — homelessness, unemployment, reliance on Commonwealth income support, and addiction to drugs, alcohol and/or gambling.³⁴

If people with intellectual impairments are sufficiently supported, imprisonment will be avoided. Given a suitable range of options, the courts would divert them from prisons, which are expensive to run and

Situational Offending – Permanent Branding

X has intellectual disability. He and a young girl were invited to a secluded place by an older boy, who directed him to expose himself and the girl to touch the younger boy's penis. The girl's parents complained to police. This was the boy's first and only offence. The risk to the community from this young man with an intellectual disability is low, but he is now a registered sex offender and detained in an institution.

X needs training in appropriate sexual behaviour. This is true for many offenders with intellectual disabilities, who often come from either over-protective or dysfunctional backgrounds and who may have learned inappropriate behaviour from parents and peers, or simply an uneducated inappropriate curiosity. Detention in an institutional setting will cost more and often rehabilitation is not provided. In the community setting people such as X can build capacity, and by building capacity will get to a point where they are no risk to the community and no longer need high level support.

³¹ 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>> .

³² Heather Stuart. 2003. 'Violence and mental illness: an overview' World Psychiatry. 2(2): 121–124.

³³ <http://www.sane.org/information/factsheets-podcasts/204-facts-and-figures>; <http://www.sane.org/information/factsheets-podcasts/209-violence-and-mental-illness>.

³⁴ T Walsh. 2007. *No Vagrancy: An examination of the impact of the criminal justice system on people living in poverty in Queensland*, 7.

promote recidivism. Effective prevention and diversion programs for persons with disability either do not yet exist or are rudimentary and lack appropriate levels of funding. In this chapter we canvas some of the strategies employed in other Australian jurisdictions.

Rehabilitation is a primary sentencing goal.³⁵ A fundamental function of corrective services is 'crime prevention through humane containment, supervision and rehabilitation of offenders'. Rehabilitation is nevertheless subordinate to punishment and community safety. Prisons do not prioritise psychological support, therapy, the development of prisoner social skills and prisoner employability on release.³⁶

6.2 People with Psycho-social Impairments

A prisoner, whether remanded, sentenced or in police custody, should have timely referral and access to specialist mental health services when appropriate. Persons attending court who appear to be mentally ill, or about whom there is concern that mental health issues exist, should have access to assessment by an appropriately trained mental health clinician.

All persons entering a custodial environment should be assessed with regard to their mental health needs and referral arranged accordingly. Prisoners should be made aware of the availability of specialist mental health services. All custodial facilities should have capacity to assess and treat mental illness within the primary care setting, and to refer to specialist mental health services, both outpatient within the custodial setting and inpatient in a secure mental health hospital, as clinically indicated.

The range of treatments and interventions available and the qualifications and experience of mental health staff, should be at least congruent with that available in the general community. There should be access to acute interventions and to psychosocial rehabilitation and pre-release planning, in order to minimise the acute effects of illness and longer-term disability. It is recognised that persons within the criminal justice system and juvenile justice system have a higher prevalence of mental illness and mental disorder than the general population. Strategies aimed at early intervention and prevention through education, development of social skills and improved coping mechanisms should be available to those within the justice system.

This range of services should be available to all those in custody including minority groups such as women and juveniles. Prisoners from Aboriginal and Torres Strait Islander backgrounds, or other culturally and linguistically diverse backgrounds, should have access to appropriate cultural support, including access to accredited interpreters and the translation of written documents.

³⁵ *Penalties and Sentences Act 1992* (Qld), s 9(1)(b).

³⁶ Office of the Public Advocate. 2005. *Issues for People with a Cognitive Disability in the Corrections System*. <http://www.justice.qld.gov.au/files/Guardianship/ip_0505.pdf>, 12. See also *Corrective Services Act 2006* (Qld), ss 20(1), 33(2), 36(1), 39(1), 48(1), 52(4), 53(1), 60(2), 62(2), 111(4), 135(1), 136(5), 138(1), 154(2), 156, 163(1), 265(4), 268(1), 280(1), 306(2), 336(3), 341(4).

7. Transition and Post-release Supports

7.1 Prison Transition

The work of the Prisoners' Legal Service, the Catholic Prison Ministry³⁷ and the Queensland Centre for Intellectual and Developmental Disability demonstrates that ex-prisoners are most likely to reoffend in the first difficult weeks out of jail. Ex-prisoners often have nowhere to live, little money, few friends or supporters and meagre employment prospects. For some, a return to prison is an alternative to poverty, loneliness and homelessness.

Piecemeal changes are not enough: The NDIA's first step is to promote a coordinated cross-government approach to post-release services for ex-offenders with disabilities so that they are better equipped to reintegrate and live fulfilling lives. This will require planned access and eligibility processes to begin well before release from detention.

7.2 Forensic Transition

As a person transitions to community, their support needs will fluctuate. People need assistance with planning, finding accommodation, and employment. Treating teams and Tribunals alike have a tendency to think of support needs in terms of the status quo, and not in terms of people's long term prospects. For many people with intellectual or cognitive impairment, especially those whose support experiences have been inappropriate or scant will need pre-planning conversations to ensure that they can develop plans with aspirations and complement rehabilitation progress.

In custody or in transition to community, plan reviews need to be regular and plans must be reflexive. People's needs fluctuate and it has been reported that the number of requests for plan reviews in the launch site is more than expected or even reported to the advocacy agency responsible for undertaking requests for NDIS Appeals support.

The key decision-maker, apart from the person and the Mental Health Review Tribunal, is a person's treating team. If the treating team is not aware of supports that are available, or may be possible, a conservative estimate of supports will be included in the plans.

Example: A man in a rehabilitation unit had to make his own application to the NDIA. He had no support, and consequently, his plan lacked elements that he would otherwise have had.

³⁷ M Alexander & D Martin. 2013. *Queensland Prison Report 2013*. Prisoners' Legal Service & Catholic Prison Ministry.

8. Conclusion

People with intellectual impairments do not fall through the social security net and only then turn to crime. People with intellectual disability enter the criminal justice system at a comparative disadvantage opportunities to leave it are severely diminished.

Condoning punishment, for some, is an end in itself, regardless of the life-sapping consequences of long-term and revolving door incarceration. However, it is possible to reliably predict that a disproportionate number of people who share particular traits will follow similar paths into and through the criminal justice system. People with disabilities and or mental illness will experience all the emotional and financial costs and negative consequences that accrue to them, their families, victims and the community, while we the community have a collective responsibility to divert those people from those paths.

Key areas for further research:

- Which program and service features work best for prisoners with intellectual impairments?
- What are the patterns and causes of recidivism? Is recidivism linked to impairment, given that ex-prisoners with intellectual disability have almost twice the risk of re-offending?
- What is the relationship between environmental circumstances and re-offending, especially post-release housing, employment and income support?
- What are the specific needs of Aboriginal and Islander prisoners with intellectual impairments and the issues in developing and delivering programs and services to them?
- What are the experiences of offenders serving community correctional orders and what are their supervision and support needs in non-custodial settings?

Appendix A





Queensland's Forensic Disability Service & Secure Mental Health Facilities

The FDS³⁸ Unit is a prison-like facility at Wacol (pictured) in the middle of a cluster of other medium security places of detention³⁹ on Brisbane's western outskirts.

Opened as a transitional facility in 2011, the FDS Unit holds up to fifteen people. Like prisons, this forensic facility is a typical 'mainstream service' (secure facility for people with disability) per the 'Principles'⁴⁰ and the NDIS is not responsible for supports while people are detained there.

Nowhere is the failure of the FDS as a transitional arrangement more evident than in the fact that since 2011 no one has yet left it. The literal sticking point is the lack of alternative programs or places,, and the lack of support to make alternatives viable. Powerless, without choices and among strangers, they are denied opportunities for mundane and everyday

³⁸ Forensic Disability Service

³⁹ The Brisbane, Wolston and Youth prisons.

⁴⁰ Principles To Determine The Responsibilities Of The NDIS And Other Service Systems

<<https://www.coag.gov.au/sites/default/files/communique/NDIS-Principles-to-Determine-Responsibilities-NDIS-and-Other-Service.pdf>>

activities like shopping, paying bills, working, volunteering, or travelling about on foot, by car or public transport. The longer a person is compelled to remain in such a sterile and artificial facility, the longer they will *need* to stay there, by default. The FDS is a self-fulfilling prophecy in that like many institutions, where investment has been made there is a commitment to its continued use regardless of whether it is effective or efficient.

It is well documented that when people are institutionalised there is a great loss of skills and independence and the more that people are removed from typical community life, the less success at reintegration and more reliance on support at least until the person is able to re-learn or learn such skills.

It is not an environment conducive to rehabilitation or ordinary living experiences. 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.

Anecdotally, we are aware of many cases of those with disability indefinitely detained in the FDS Unit, an Authorised Mental Health Service or in prison. Invariably, these are tragic stories of wasted lives.

They all share a number of similarities:

- The presence of a disability or mental illness that significantly impacts on the person's ability to understand the consequences of their behaviour and a world that does little to understand their perspective;
- A lifetime of disempowerment and disadvantage and lack of support to overcome their life history;
- Vulnerability and lack of appropriate support throughout the continuum of contact with the criminal justice system;
- The alleged offences that led to the indefinite detention are not generally the 'horrific' offences that would be expected to result in indefinite imprisonment, but rather public order offences or offences of a minor or summary nature. (See text boxes above for examples)
- The law breaking of people with intellectual impairments is inextricably linked to circumstances surrounding their disability and is determined by social and familial circumstances that shaped them - and, more urgently, by the person's present circumstances and behaviours that attract police attention.

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