# Office of the Public Advocate (Qld)

## Systems Advocacy

# Submission to the Senate Community Affairs References Committee

Indefinite detention of people with cognitive and psychiatric impairment in Australia

April 2016

Queensland Government

# Introduction

## The Public Advocate (Queensland)

The Public Advocate was established by the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland.[1] The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity in all aspects of community life.

More specifically, the functions of the Public Advocate are:

- promoting and protecting the rights of the adults with impaired capacity for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.[2]

Adults with impaired decision-making capacity comprise a substantial group in Australian society. In 2016, for instance, the Office of the Public Advocate estimates the potential population of adults with impaired decision-making capacity living in Queensland to be 118,739 (1 in 40 people).[3]

Primary diagnoses that can impact upon decision-making capacity include (but are not limited to) intellectual disability, acquired brain injury arising from catastrophic accidents, mental illness, ageing conditions such as dementia, conditions associated with problematic alcohol and drug use, and co-morbid conditions.

Not all people with these conditions will have impaired decision-making capacity. Capacity for decision-making is dependent on a range of factors including situational issues and personal experience of illness or disability. Further, impaired decision-making capacity does not operate in a global way in people's lives – for instance, it does not necessarily impact all areas of a person's life and its influence may vary considerably between the subtle and substantial.

However, it is likely that many people with conditions such as these may, at some point in their lives, if not on a regular and ongoing basis, experience impaired decision-making capacity in relation to one or more matters. Many people who experience these conditions may also require support with decision-making that includes accessing and analysing information, determining and weighing up available options, and communicating choices and decisions.

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[1] *Guardianship and Administration Act 2000* (Qld) ch 9.
[2] Ibid s 209.
[3] Office of the Public Advocate (Qld), *Potential Population for Systems Advocacy* (January 2016) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/457539/fs02-potential-population-v5.00.pdf>.

# Interest of the Public Advocate (Queensland)

The issue of indefinite detention for people with impaired decision-making capacity is of considerable interest to me and to my Office. As highlighted above, many people within the target group for the *Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment* (the Inquiry) may experience impaired decision-making capacity at some point in their lives. Impaired decision-making capacity is also likely to be a major factor underpinning the experience of people with cognitive and/or psychiatric impairment who become indefinitely detained in the mental health, disability and criminal justice systems, and is therefore integral to this Inquiry.

Ensuring appropriate commitment in both word and action to the human rights of people with impaired decision-making capacity is central to our systems advocacy work, particularly given that people with impaired decision-making capacity constitute some of the most vulnerable members of the Australian community.

The indefinite detention of people with impaired decision-making capacity often represents a fundamental breach of human rights. Further, any system that lends itself to the potential for indefinite detention should be reviewed first and foremost through the lens of human rights as afforded to all human beings in all circumstances. Additionally any such system must be delivered in an equitable manner and without discrimination, give due consideration to the principles of an effective human rights framework (see page 4 of this submission), and provide for reasonable accommodation as required by key international human rights instruments.[4]

In addition to this submission, I respectfully invite the Senate Community Affairs References Committee (the Committee) to review the substantial work undertaken by my Office in recent years that has relevance to the issue of indefinite detention. I have conveyed my views and tendered submissions in response to a range of inquiries and legislative reviews that have both directly and peripherally impacted upon the systems involved in the indefinite detention of people with impaired decision-making capacity.

Of particular note are my numerous contributions to the review of the *Mental Health Act 2000* (Qld) including submissions to the Health and Ambulance Service Committee in October 2015, and to the Queensland Department of Health in August 2013, July 2014, and July 2015. My Office has also prepared a number of submissions and reports relevant to broader issues of indefinite detention for people with cognitive and/or psychiatric impairment. These include:

- *Violence, abuse and neglect against people with disability in institutional and residential settings* (submission to the Senate Standing Committee on Community Affairs – June 2015);
- *Social Services Legislation Amendment Bill 2015* (submission to the Standing Committee on Community Affairs (Legislation Committee) – May 2015);
- *Proposal for a National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework in relation to restrictive practices* (submission to the National Disability Insurance Agency (NDIA) – April 2015);
- *The need for a Disability Justice Plan in Queensland* (submission to The Legislative Affairs and Community Safety Committee Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland – July 2014);

[4] See the United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) arts 5, 14, 24, 27 <http://www.un.org/disabilities/convention/conventionfull.shtml>.

- *Responses to people with intellectual impairment who exhibit behaviours that put themselves or others at risk* (Office of the Public Advocate Annual Report 2014-2015: pp. 19-22);
- *People with intellectual disability or cognitive impairment residing long-term in health care facilities: Addressing the barriers to deinstitutionalisation* (Office of the Public Advocate Report: tabled in the Queensland Parliament in November 2013);
- *The investigation into access to justice in the criminal justice system for people with disability* (submission to the Australian Human Rights Commission – August 2013); and
- *Inquiry into the value of a Justice Reinvestment Approach to Criminal Justice in Australia* (submission to the Legal and Constitutional Affairs References Committee – March 2013).

These documents offer comment in considerably more detail than can be incorporated into this submission, and are available on the Office of the Public Advocate Queensland website (www.publicadvocate.qld.gov.au).

# Scope and structure of this submission

The scope of this Inquiry is appropriately broad given the jurisdictional variability, and the substantial and complex legislative provisions and regulations pertinent to this group. The focus of my Office's submission is, however, the systems impacting upon adults who experience impaired decision-making capacity (as a result of cognitive and/or psychiatric impairment) and who are subject to legal orders and/or practices that effectively contribute to their indefinite detention within Queensland.

The submission also refers periodically to the legislative and policy contexts of other jurisdictions for the purpose of contrasting systems and mechanisms currently operating more broadly than those in Queensland, and to highlight some of the strengths and weaknesses of systems across jurisdictions.

In summary, this submission broadly discusses:

1. infringements upon key human rights of people with impaired decision-making capacity who are subject to indefinite detention on the basis of legal or administrative orders;
2. the key legislative mechanisms effecting the indefinite detention of people with impaired decision-making capacity (including restrictive practices) in Queensland; and
3. principles, safeguards and practice strategies that should be adopted to regulate and/or minimise the occurrence of indefinite detention and restrictive practices for people with impaired decision-making capacity.

# Human rights and indefinite detention: Points of conflict

> *"Legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished. This must include the repeal of provisions authorizing institutionalization of persons with disabilities for their care and treatment without their free and informed consent, as well as provisions authorizing the preventive detention of persons with disabilities on grounds such as the likelihood of them posing a danger to themselves or others…. This should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis" (United Nations, 2009).*[5]

In addition to contravening the rule of law, the indefinite detention of people with disability is often (and arguably typically) undertaken in a manner that contravenes some fundamental human rights.[6] In doing so, it also stands in contrast to the key tenets of a robust human rights framework, as follows.[7]

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| **Universality** | The entire premise of universality is that human rights must be afforded to every person, irrespective of impairment or decision-making capacity. For instance, the right of access to justice cannot be removed simply because of a person's inability to understand the criminal charges brought against them or their limited ability to participate in the legal process. |
| **Indivisibility** | Human rights are indivisible, interdependent and interrelated, and must be upheld as a coherent whole. For example, arbitrarily taking away the right to freedom necessarily affects the right to live independently in community, and to receive supports and treatment in ways that are dignifying and free from cruel and degrading treatment. |
| **Participation** | People have a right to participate in decisions that affect the application of their human rights. Thus people with impaired decision-making capacity must be afforded opportunities to make decisions about the options available to them. If they experience decision-making limitations in this regard, they should be provided with the necessary supports to enable them to participate to the maximum degree possible. |
| **Accountability** | Governments must create mechanisms of accountability for the enforcement of rights. It is not sufficient to simply recognise rights in domestic law and policy: effective measures must be developed and implemented, and the governments that enact them held accountable against the outcomes of those measures. Systems effecting indefinite detention for people with impaired decision-making capacity should also ensure effective treatment and support, and be subject to rigorous review of process and outcomes in line with Australia's human rights obligations. |

[5] United Nations General Assembly, Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities (26 January 2009) Human Rights Council, Tenth Session, Agenda Item 2, Annual Report of the Office of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General 16.

[6] Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and Indefinite Detention of Indigenous Australians with a Cognitive Impairment* (September 2012) A Report Prepared by the Aboriginal Disability Justice Campaign for The National Justice Chief Executive Officers Working Group 28 <www.pwd.org.au/documents/pubs/adjc/NoEndinSight.pdf>.

[7] These principles are based on the National Economic & Social Rights Initiative, *Human Rights in the United States* (Fact Sheet) 2 <https://www.nesri.org/programs/what-are-the-basic-principles-of-the-human-rights-framework>.

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| **Transparency** | Transparency demands that governments be open about available information and decision-making processes related to the application of rights. People must be able to know and understand how major decisions affecting their rights are made and how public institutions, such as authorised mental health facilities, are managed and run. There is, as such, a role for independent entities to ensure the dissemination of information to those who are impacted upon by systems of indefinite detention and to investigate (and report on) the operations of relevant agencies. |
| **Equity and non-discrimination** | Human rights must be applied equitably and without discrimination. Governments must secure the equal enjoyment of human rights by everyone, which may require the redistribution of resources and prioritisation of actions that support those with greater needs. The legal rights of individuals must, therefore, be upheld consistently, irrespective of impairment. |

These principles, together with the obligations articulated in relevant human rights instruments, should comprise the foundational elements upon which the development and implementation of any formal regime for indefinite detention should be premised.

# United Nations *Convention on the Rights of Persons with Disabilities*

The international human rights instrument of primary relevance to this Inquiry is the United Nations *Convention on the Rights of Person with Disabilities* (the UNCRPD). The UNCRPD represents the convergence of all relevant principles and obligations from United Nations' international human rights Covenants into a single Convention.[8] The Convention also offers a comprehensive and proactive proclamation regarding the rights of persons with disability that protects this group rather than being limited to a requirement to refrain from discrimination.[9]

Some of the key human rights infringements that occur as a result of the indefinite detention of people with impaired decision-making capacity are outlined below.

## Liberty and security of the person (article 14)

Deprivation of liberty is primarily justifiable on the basis that a person has been found guilty of a criminal offence and is consequentially subject to punishment. Justification for the deprivation of liberty of people with impaired decision-making capacity subject to treatment orders, forensic orders, or restrictive practices is, conversely, based – at least in part – on the existence of illness or disability.[10] Provisions in federal and state legislation that allow for the detention of people on the basis of disability are, therefore, in direct conflict with this article.

[8] See United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) preamble <http://www.un.org/disabilities/convention/conventionfull.shtml>.
[9] Ibid.
[10] Tina Minkowitz, *Why Mental Health Laws Contravene the CRPD – An Application of Article 14 with Implications for the Obligations of State Parties* (16 September 2011) Center for the Human Rights of Users and Survivors of Psychiatry, Social Science Research Network.

## Non-discrimination (articles 2 and 5)

The infringement of article 14 also results in breaches of articles 2 and 5 requiring States Parties to prohibit discrimination based on disability. Generally, legislative provisions that allow for the indefinite detention of people with impaired decision-making capacity may permit members of this group to be treated differently to other citizens with respect to the exercise of their legal rights. Such an approach is not disability-neutral.[11] The restriction of freedoms on the basis of impaired decision-making capacity effectively constitutes discrimination on the basis of impairment.

## Access to justice (article 13)

Equality before the law is one of the most basic tenets of justice and constitutes a fundamental human right.[12] Under article 13, States Parties are required to "ensure effective access to justice for people with disabilities on an equal basis with others"[13] and provide the necessary procedural accommodations for this access to occur.

People with impaired decision-making capacity are, at times, prevented from participating in the full legal process. They may be denied open trial and judgment by their peers, instead being assessed as unfit to plead in a closed-door environment and subjected to detention without a date of release. These processes may result in people with impaired decision-making capacity being detained for substantially longer periods than might have otherwise been ordered had the person pleaded guilty in the mainstream criminal justice system.

## Equal recognition before the law (article 12)

Article 12 requires States Parties to "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."[14] People with impaired decision-making capacity should be fully and competently assessed as to their capacity to participate in the legal process and be provided with the necessary supports to participate to their maximum ability.

Article 12 also requires that reasonable adjustments be made to maximise opportunities for people to voice their preferences. Approaches such as the use of advance health directives[15] and the application of supported decision-making processes[16] should be encouraged and adopted wherever they contribute to achieving this objective. In reality, however, people with impaired decision-making capacity may have their perspectives overridden and may not be provided with adequate decision-making support to meet their legal, treatment and/or support needs.

[11] Ibid.
[12] Graeme Innes, *Towards Justice Strategies* (February 2014) Australian Human Rights Commission <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>.
[13] United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) art 13 <http://www.un.org/disabilities/convention/conventionfull.shtml>.
[14] Ibid art 12.
[15] See, for example, *Powers of Attorney Act 1998* (Qld) ch 3 pt 3.
[16] See, for example, Margaret Wallace, *Evaluation of the Supported Decision-Making Project* (November 2012) Office of the Public Advocate (South Australia) <http://www.opa.sa.gov.au/files/batch1376447055_final_supported_decision_making_evaluation.pdf>.

## Freedom from torture or cruel, inhuman or degrading treatment or punishment (article 15)

Indefinite detention in psychiatric institutions or maximum security prisons for people with impaired decision-making capacity arguably constitutes torture or ill-treatment.[17] The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment argues that the evolving definition of torture incorporates the types of abuses that often occur in health care facilities,[18] and may include such practices as seclusion, and mechanical and physical restraint.[19] While these activities are often not intended to be painful and degrading,[20] they may be experienced as such. For instance, recent research on the imprisonment and indefinite detention of Indigenous Australians with cognitive impairment found that detention was often experienced as a form of punishment.[21]

The application of restrictive practices may similarly constitute cruel or degrading punishment for people with impaired decision-making capacity. This is particularly likely in jurisdictions where there is little or no regulation of the use of restrictive practices, insufficient professional development of frontline staff with respect to their use, or a lack of evidence-based practice (such as a positive behaviour support framework) in the way they are applied.

## Freedom from exploitation, violence and abuse (article 16)

Article 16 requires States Parties to take all appropriate measures to protect people with disability, both within and outside the home, from all forms of exploitation, violence and abuse. People with impaired decision-making capacity are already at greater risk of abuse, neglect and exploitation than are other members of society,[22] and are particularly vulnerable in institutional settings.[23] Prison environments, for instance, are often rife with violence,[24] as are mental health wards.[25] People with impaired decision-making capacity may have difficulty understanding the rules of the facility, including those that are unwritten but that govern such subtleties as personal space, eye contact, and institutional hierarchies. These challenges may increase the risk of violence for this cohort, and result in sanctions for breaches of behaviour or reduction of privileges.[26]

## Living independently and being included in the community (article 19)

Article 19 requires that States Parties take appropriate and effective measures to facilitate the full inclusion and participation of people with disability in the community. People with impaired decision-making capacity are among the most marginalised members of society, and the indefinite detention of these individuals further contributes to their exclusion. Indefinite detention also prevents members of this cohort from accessing mainstream resources and services, specialist disability providers, and the

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[17] Juan E Mendez, *United Nations Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/22/53 (1 February 2013) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf>; See also Minkowitz, above n 10.

[18] Mendez, above n 17, 4.

[19] Mendez, above n 17, 16.

[20] Mendez, above n 17, 5.

[21] Sotiri, McGee and Baldry, above n 6, 40.

[22] Kevin Cocks, *Justice for All – or – Just for Some* (2014) Criminal Justice Symposium: Intellectual Disability and the Criminal Justice System 9, 11-12.

[23] See the Office of the Public Advocate (Qld)'s Submission to the Senate Standing Committee on Community Affairs – Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings (June 2015) <http://www.justice.qld.gov.au/public-advocate/submissions>.

[24] See, for example, Kristine Levan, *Prison Violence: Causes, Consequences and Solutions* (Ashgate Publishing Company, 2012).

[25] See, for example, Jayashri Kulkarni, *Sexual Assaults in Psych Wards Show Urgent Need for Reform* (17 May 2013) The Conversation <http://theconversation.com/sexual-assaults-in-psych-wards-show-urgent-need-for-reform-14265>.

[26] Sotiri, McGee and Baldry, above n 6, 40.

natural relationships and networks necessary to enhance treatment and supports, and assist with ameliorating offending behaviours.

The UNCRPD also promotes the inclusion of people with disability in all aspects of life on the same basis as those without disability.[27] The indefinite detention of people with impaired decision-making capacity precludes their participation in ordinary life to the same standard as others. Indefinite detention may also sever people's access to the very resources needed to assist them with making the successful transition to functional community living, and limits opportunities to support the development of essential independent living skills.

### Habilitation and rehabilitation: Supporting maximum independence and participation (article 26)

Article 26 requires that States Parties take suitable measures to enable the full participation and inclusion of people with impairment in all aspects of life via the implementation of appropriate services and programmes. The purpose of this article is to facilitate independent living, not prolonged and indefinite stays in authorised institution-like facilities. The service emphasis should, therefore, be on strengthening the ability of this cohort to participate in society to the maximum possible degree, and to facilitate their earliest possible transition to community in line with article 19.

## The challenge to human rights

> *"Marlon Noble, an intellectually disabled Yamatji man from Geraldton, Western Australia, was charged in 2001 with several counts of sexual assault of two children, also with intellectual disabilities. He was nineteen. Two years later he was found 'unfit to stand' and he was jailed without charge. The charges were dropped and the two children and their mother now say nothing happened. Marlon spent a decade in prison and was conditionally released in 2012. He must now stay in line of sight of a support worker for the rest of his life, despite never being convicted of a crime. He must also apply for permission from the state to stay anywhere other than his house, or leave his home town."*[28]

Despite the practice of indefinite detention being intensely controversial,[29] there is historical precedence for sentencing citizens to indefinite sentences as a form of preventative detention,[30] the purpose being to prevent the commission of future crimes amongst those who demonstrate the traits of 'insanity', 'dangerousness' or 'undeterrable behaviour'.[31]

[27] United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) arts 17, 24, 27, 29, 30 <http://www.un.org/disabilities/convention/conventionfull.shtml>.
[28] Case study reported by Bolshy Divas, *The Uncounted* (2015) [18] <http://bolshydivas.weebly.com/the-uncounted.html>.
[29] John Petrila, 'Emerging Issues in Forensic Mental Health' (2004) 75(1) *Psychiatric Quarterly* 12.
[30] See Ben Power, '"For the Term of his Natural Life": Indefinite sentences – A Review of Current Law and a Proposal for Reform' (2007) 18 *Criminal Law Forum,* 59.
[31] See, for example, Neil Rees, 'The Fusion Proposal: A Next Step?' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart, 2010) 73, 88; Michael Louis Corrado, *Some Notes on Preventative Detention and Psychopathy* (n.d.) University of North Carolina School of Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480482>.

Indefinite sentencing has primarily been reserved for people who contravene sensitive or volatile social or political conventions.[32] Within Australia, these groups have recently included:

- asylum seekers who enter Australia illegally;[33]
- high-risk offenders who commit dangerous crimes (such as those of sexual nature);[34] and
- individuals with cognitive and/or psychiatric impairment who are charged with a criminal offence and deemed unfit to plead, require treatment for a mental health condition, and/or whose behaviours are considered harmful to self and/or others.[35]

> "…there is a need to consider the human rights implications of indefinite detention on the basis of a possible risk to others and explore alternative options to ensure those with intellectual disabilities are treated on an equal basis with others as mandated by the CRPD."[36]

As indicated previously, the indefinite detention of people with impaired decision-making capacity undoubtedly results in the infringement of several fundamental human rights. Members of this group are discriminated against by virtue of their impairment, may be prevented from exercising their full right to justice, and may be locked away for much longer periods of time than their offences warrant. Australia's legislative and administrative processes that deal with people with impaired decision-making capacity who are accused of criminal offenses and are subject to detainment are, therefore, of considerable concern from a rights-based perspective and warrant calls for urgent review.[37]

# The regime for the indefinite detention of people with impaired decision-making capacity in Queensland

In Queensland, the regime for the indefinite detention of, involuntary treatment of, and use of restrictive practices with people with impaired decision-making capacity is essentially fragmented across multiple pieces of legislation, systems and service responses.

- The *Mental Health Act 2016* (Qld) provides for the involuntary treatment of people with a mental illness or intellectual disability within authorised mental health facilities or in the community (referred to as limited community treatment).[38] The Act also provides for the making of forensic orders for people found unfit to plead or who are unsound of mind.[39]

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[32] Corrado, above n 31.
[33] Australian Government, *Immigration Detention in Australia* (20 March 2013) Parliament of Australia <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention>; Sarah Brown *What is Mandatory Detention?* (8 July 2013) The Asylum & Refugee Law Project <https://uqrefugeeresearch.wordpress.com/2013/07/08/what-is-mandatory-detention/>.
[34] Bernadette McSherry, Patrick Keyzer and Arie Freiberg, *Preventative Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposal for Policy Development* (December 2006) Report to the Criminology Council iii <http://www.criminologyresearchcouncil.gov.au/reports/200405-03.pdf>.
[35] See, for example, Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart, 2010); Bernadette McSherry, *The Involuntary Detention of People with Intellectual Disabilities* (30 October 2012) Right Now: Human Rights in Australia <http://rightnow.org.au/topics/disability/the-involuntary-detention-of-people-with-intellectual-disabilities/>.
[36] McSherry, The Involuntary Detention of People with Intellectual Disabilities, above n 35.
[37] This issue is of considerable concern for people with cognitive disability, notably so for people from Indigenous backgrounds. See, for example, Sotiri, McGee and Baldry, above n 6, 19.
[38] *Mental Health Act 2016* (Qld) ch 2 pt 4.
[39] Ibid ch 5 pt 4.

- The *Forensic Disability Act 2011* (Qld) provides for the Forensic Disability Service,[40] and for the care, support and protection of people with intellectual or cognitive disability who are forensic disability clients.[41]
- The *Disability Services Act 2006* (Qld) provides for the use of restrictive practices (such as seclusion and containment) in relation to people with disability receiving services from government funded disability service providers.[42] The Act also outlines the processes involved in approving and regulating the use of restrictive practices.[43]
- The *Guardianship and Administration Act 2000* (Qld) does not provide for the indefinite detention of people with impaired decision-making capacity per se. Health care and restrictive practice provisions of the Act do, however, enable decision-making on behalf of individuals who have impaired decision-making capacity with respect to legal, treatment and/or behaviour support matters.[44]

The following section provides a brief overview of the legislative instruments listed above to the extent that they give effect to the indefinite detention of people with impaired decision-making capacity. This section also identifies some of the strengths and weaknesses of these legislative instruments and the systems that exist to enact the provisions contained therein.

## Involuntary treatment of adults with psychiatric impairment: *Mental Health Act 2016* (Qld)

Mental health laws are generally focused on legitimising and regulating schemes for the detention and/or compulsory treatment of people who are alleged to have committed criminal offences, and who are judged unfit to plead or who are considered to be of unsound mind.[45]

Queensland recently passed the *Mental Health Act 2016* (expected to commence later in 2016), which provides a legislative framework for both the treatment and care of people with mental illness (mental health treatment provisions), as well as the detention and involuntary treatment and care of people who have been found unfit to plead or unsound of mind (due to a mental illness or intellectual disability) in relation to an alleged criminal offence (forensic provisions). This legislation also establishes safeguards to prevent abuse of its provisions.[46]

Some sections of the Act are consistent with the best-practice frameworks outlined later in this submission and are worth replicating on a broader scale. The Act, for instance, promotes a recovery orientation to treatment, service provision, and practices in responding to people with mental illness. Provisions in the Act that support a recovery-oriented and/or rights-based approach include:

- a capacity-based approach to the involuntary treatment of mental illness;[47]
- a focus on reducing and eliminating restraint and seclusion[48] (including an emphasis on supporting patient dignity and safety whilst being detained in an authorised mental health service);[49]
- the inclusion of Patient Rights Advisers to assist patients to understand their rights under the Act;[50]

[40] *Forensic Disability Act 2011* (Qld) ch 8 pt 2.
[41] Ibid s 3.
[42] *Disability Services Act 2006* (Qld) pt 6.
[43] Ibid pt 6.
[44] *Guardianship and Administration Act 2000* (Qld) ch 5, 5B.
[45] Minkowitz, above n 10.
[46] *Mental Health Act 2016* (Qld) s 3(2)(a).
[47] Ibid s 12(1)(b).
[48] Ibid s 265.
[49] Ibid s 5(a).
[50] Ibid ch 9 pt 5.

- the explicit recognition of advance health directives (as a mechanism for patients to convey their wishes for care and treatment);[51] and
- strengthening requirements for doctors to consult with family, carers and support people.[52]

The Act, however, does not go far enough in supporting a recovery orientation to mental health treatment when compared with other contemporary legislative approaches (such as the *Mental Health Act 2014* (Vic)). Of particular note, and somewhat paradoxically, a concerning inclusion is the introduction of the "less restrictive way"[53] which primarily informs the making and review of treatment authorities. While these provisions allow for appointed and trusted representatives or guardians to provide direction in relation to treatment for the person (potentially contributing to a more localised approach to decision-making), they lack adequate safeguards. Additionally, and despite being underpinned by positive intentions, the less restrictive way approach may still subject many vulnerable people to treatment for mental illness against their will and leave crucial treatment decisions to those without the requisite knowledge base, potentially increasing the risk of abuse.

Other aspects of the Act are similarly inconsistent with human rights (and other) principles outlined earlier in this submission. Provisions for non-revokable forensic orders,[54] for instance, introduce a 'punitive' approach to Queensland's mental health legislative framework that effectively contradicts the widely accepted premise of 'treatment' as a primary justification for the preventative detention of people with psychiatric impairment.[55]

The Act also fails to provide an appropriate legislative or systemic response to people with intellectual disability. The legislation does not allow for the Mental Health Court to impose a less intensive form of treatment order called a treatment support order.[56] Further, the Act is unclear as to what supports will be provided for people with intellectual disability in the Magistrates Court jurisdiction.[57]

# Forensic Disability Services: *Forensic Disability Act 2011* (Qld)

The *Forensic Disability Act 2011* (Qld) provides for the involuntary detention, and the care and support and protection, of forensic disability clients.[58] In providing a legislative regime for the detention of adults with intellectual or cognitive disability, the *Forensic Disability Act 2011* (Qld) aims to safeguard rights and freedoms while balancing those rights and freedoms with the rights and freedoms of other people; promote individual development and enhance opportunities for quality of life; and maximise opportunities for transition and reintegration into the community.[59]

At its essence, this Act provides for the indefinite detention of adults with intellectual or cognitive disability in Queensland who have allegedly committed (an) offence(s) and are considered to represent a significant risk of harm to themselves and/or the community.

[51] Ibid s 222.
[52] Ibid s 5(c).
[53] Ibid s 13.
[54] Ibid s 137.
[55] Rees, above n 31, 80.
[56] *Mental Health Act 2016* (Qld) s. 143.
[57] People with intellectual disability are simply 'referred' to the Department of Communities, Child Safety and Disability Services or the National Disability Insurance Scheme (NDIS): *Mental Health Act 2016* (Qld) s 174.
[58] *Forensic Disability Act 2011* (Qld) s 3.
[59] Ibid s 3.

The *Forensic Disability Act 2011* (Qld) and the establishment of the Forensic Disability Service were designed to provide a more appropriate model of care for people with intellectual or cognitive impairment who are found to be unsound of mind or unfit for trial by the Mental Health Court.[60] They are also intended to facilitate opportunities for the habilitation and rehabilitation of clients living there.[61]

The response, however, is not sufficient either in design or practice. The *Forensic Disability Act 2011* (Qld) provides for a ten-bed Forensic Disability Service at Wacol in Brisbane.[62] The service quickly reached full capacity post commencement, with nine of the ten clients detained at the service entering in 2011, and the tenth client entering in late 2013.

Furthermore, despite the Queensland Government's stated intention, the Forensic Disability Service has not yet delivered a 'step down' service alternative that assists people to make the transition back to community living in less restrictive environments. As of June 2015, eight of the ten clients were still waiting to commence transition planning and all ten of the initial clients detained at the service still remained there. The lack of transition raises a number of questions about the appropriateness, sufficiency and efficacy of treatments and supports provided to these individuals.

Additionally, notable concerns arise when comparing the sentencing arrangements for these clients with those of the general population. The length of time that eight of the ten clients have been detained in this facility as a result of the forensic orders made by the Mental Health Court would appear to be significantly longer than that which they might have spent in custodial imprisonment had they been found guilty of the crime/s they were alleged to have committed.[63] Some clients, for instance, were charged with minor to moderate assaults and property damage offences that may not have resulted in custodial sentences at all had these clients pleaded guilty in a standard criminal justice process.

This analysis is supported by the data displayed in Table 1, which contrasts the approximate length of time spent in detention by the ten clients of the Forensic Disability Service with the probable length of sentence they might have received had their offences been progressed via the standard criminal justice system.[64]

[60] Ibid s 4.
[61] Ibid s 7(b).
[62] McSherry, The Involuntary Detention of People with Intellectual Disabilities, above n 35.
[63] This observation has been made more generally by McSherry, The Involuntary Detention of People with Intellectual Disabilities, above n 35.
[64] The analysis was based on the overall types of offences and available information about the clients' criminal histories.

**Table 1:** **Comparative analysis between time spent in the Forensic Disability Service and likely sentence in the criminal justice system.**

| Client | Offending and history | Time at Forensic Disability Service | Likely sentence in the criminal justice system |
|---|---|---|---|
| 1 | Offences: Two charges of assault occasioning bodily harm (AOBH) on two separate occasions; other minor assault and damage charges.<br>History: Minor nuisance and assault charges. | Approx. 5 years | If the offending was serious enough to warrant imprisonment (not all AOBH offences attract imprisonment – the person can be subject to fines[65] and community-based orders[66]), the potential range for sentencing is likely between 3 months[67] to 2 ½ years' imprisonment.[68] |
| 2 | Offences: Two charges of wilful damage on two separate occasions.<br>History: History of summary offences. | Approx. 4.5 years | The highest sentence of imprisonment for wilful damage is probably no more than 6 months.[69] However, it is far more likely that wilful damage offences will attract lesser sentences (such as community-based orders) even when there are a large number of such charges.[70] |
| 3 | Offences: Unlawful use of motor vehicle with circumstance of aggravation; minor assault and other charges; post-order offences including various assault, AOBH and damage charges. | Approx. 4.5 years | The likely sentence for this client is difficult to determine: it is unclear as to how the forensic order was structured and whether separate orders were handed down when the post-order offences occurred. Regarding the initial charges (the subject of the forensic order), the client could have received a sentence of up to 2 years imprisonment (higher end)[71] for the motor vehicle offence, although the offence probably would have attracted a lesser penalty (such as a community-based order).[72] |
| 4 | Offences: Arson, attempted arson, various enter dwelling/premises charges, damage and stealing offences.<br>History: Various property damage offences. | Approx. 4.5 years | The likely sentence for this series of offences would probably be around 4 years' imprisonment (higher end).[73] A sentence of between 2 to 3 years imprisonment would also be within range.[74] |

Notes:
1. The terms of imprisonment that are presented as the 'likely sentence in the criminal justice system' are indicative of the head sentence. The sentencing convention in Queensland is that, on a plea of guilty, an offender serves one-third of the time in actual custody or, after a trial with a guilty finding, an offender serves half of the time in custody. A person may otherwise be released on parole or suspended sentence (except where there is a declaration of a serious violent offence or the person commits an offence while subject to a court order).
2. Community-based orders are either community service orders or probation.

[65] *R v Heenan* [2002] QCA 292.
[66] *R v Ryan* [2000] QCA 401.
[67] *R v Coutts* [2008] QCA 380.
[68] *R v George* [2006] QCA 1.
[69] *R v Betts* [2003] QCA 159; *Faint v Claude* [1995] QCA 369.
[70] See, for example, *R v Arana* [2000] QCA 184 where the defendant was charged with 48x charges of wilful damage.
[71] *R v Williams* [1994] QCA 088.
[72] See, for example, *R v Mathers* [2008] QCA 69; *R v Foreman* [2000] QCA 071; *R v Briskey* [2002] QCA 180; *R v Davies* [2002] QCA 029.
[73] *R v Smith* [2001] QCA 476.
[74] See, for example, *R v Braithwaite* [2004] QCA 082, *R v Edwards* [1991] CCA 121; *R v Payne* [2002] QCA 075.

| Client | Offending and history | Time at Forensic Disability Service | Likely sentence in the criminal justice system |
|---|---|---|---|
| 5 | Offences: Serious assault, bail offences.<br>History: Summary offences, assault. | Approx. 4.5 years | Depending on the seriousness of the offending, a single serious assault charge is likely to attract a sentence of around 12 months' imprisonment.[75] However, even relatively serious examples of these offences attract only 6 months imprisonment[76] or less. |
| 6 | Offences: Two burglary and assault charges, as well as stealing. | Approx. 4.5 years | Although offences involving both burglary and assault have a range of potential penalties, a likely sentence for these offences would be approx. 12 months[77] (depending on circumstances) or 2 years imprisonment (higher end).[78] |
| 7 | Offences: Rape, sexual assault, assault. | Approx. 4.5 years | Rape can carry a range of sentences depending upon the seriousness of offending. The range for a single charge can vary between 2 ½ years[79] to 15 years imprisonment.[80] |
| 8 | Offences: Four charges of indecent treatment of child, two charges of rape.<br>History: Long history of property offences. | Approx. 4.5 years | Offending of this kind would likely carry a penalty of around 8 years' imprisonment (higher end).[81] |
| 9 | Offences: Indecent dealing with a child, post-order offences including further sexual assaults and various summary offences. | Approx. 4.5 years | The likely sentence for this client is difficult to determine as it is unclear as to how the forensic order was structured and whether separate orders were handed down when the post-order offences occurred. The initial charge that is the subject of the forensic order would, however, generally attract a sentence of 3 years imprisonment (higher end).[82] Lesser sentences, including community-based orders, can also be imposed depending on the circumstances.[83] |
| 10 | Offences: Two charges of indecent treatment of a child, deprivation of liberty, various assault charges.<br>History: Various assault and property offences. | Approx. 2.5 years | The likely sentence for these offences would be akin to that detailed for client 9. |

Notes:
1. The terms of imprisonment that are presented as the 'likely sentence in the criminal justice system' are indicative of the head sentence. The sentencing convention in Queensland is that, on a plea of guilty, an offender serves one-third of the time in actual custody or, after a trial with a guilty finding, an offender serves half of the time in custody. A person is then generally released on parole or suspended sentence (except where there is a declaration of a serious violent offence or the person commits an offence while subject to a court order).
2. Community-based orders are either community service orders or probation.

[75] *R v Conway* [2005] QCA 194.
[76] *R v Barry* [2007] QCA 48.
[77] *R v Sailor* [2003] QCA 227.
[78] *R v Mortimer* [2005] QCA 361; *R v Hood* [2005] QCA 159.
[79] *R v Iqbal* [2008] QCA 356.
[80] *R v Daphney* [1999] QCA 069.
[81] *R v Gregory* [2011] QCA 86.
[82] *R v RAK* [2012] QCA 26; *R v SAQ* [2002] QCA 221.
[83] *R v SBQ* [2010] QCA 89; *R v SAT* [2006] QCA 70.

# Restrictive practices and the response to challenging behaviour: *Disability Services Act 2006* (Qld)

People with intellectual disability or cognitive impairment who are supported by Queensland Government-provided or -funded disability services, and who demonstrate behaviours of concern that may cause harm to self or others, may be subject to the application of restrictive practices. These practices include: containment; seclusion; physical, chemical and/or mechanical restraint; and/or restricting access to objects.[84]

The *Disability Services Act 2006* (Qld) outlines the circumstances under which a government funded disability service provider can be authorised to use restrictive practices for people with intellectual or cognitive disability whose behaviour causes harm to themselves and/or others.[85] The Act establishes the principles for use by government funded disability service providers delivering services to this cohort,[86] and regulates the use of restrictive practices in a way that:[87]

- has regard to the human rights of those adults;
- safeguards them and others from harm;
- maximises the opportunity for positive outcomes and aims to reduce or eliminate the need for use of the restrictive practices; and
- ensures transparency and accountability in the use of the restrictive practices.

The Act provides for considerable regulation of practices that were previously used unlawfully, and often in abusive and covert ways.[88] Some of the provisions that have reduced these risks include the requirements for:

- assessment of individuals prior to the application of restrictive practices (including multidisciplinary assessment in some cases);[89]
- a positive behaviour support approach to supporting individuals who evidence behaviours of concern, including the implementation of positive behaviour support plans;[90]
- stringent approval processes;[91]
- diligent record-keeping by service providers;[92]
- specified review periods;[93] and
- specific requirements for the use of restrictive practices for adults subject to forensic orders or involuntary treatment orders.[94]

[84] Queensland Civil and Administrative Tribunal, *Restrictive Practice Types* (27 March 2012) <http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/guardian-for-restrictive-practices/restrictive-practice-types>.
[85] *Disability Services Act 2006* (Qld) s 139(a).
[86] Ibid s 139.
[87] Ibid s 139(b).
[88] W J Carter, *Challenging Behaviour and Disability: A Targeted Response* (2006) Report to the Queensland Government 23, 148.
[89] *Disability Services Act 2006* (Qld) s 148(1).
[90] Ibid s 150.
[91] Ibid ss 152(1)(d)(i), 153-154, 178-179, 195.
[92] Ibid s 194.
[93] Ibid s 150(3).
[94] Ibid ss 176-177.

Overall, the objective of the Queensland restrictive practices regime is the reduction and eventual elimination of restrictive practices from the person's support, and improvements in quality of life for the person. The experience of restrictive practices for many individuals is not, however, one of improved quality of life. For example, a support worker described the conditions under which a client subject to 'restrictive practices' was living when she first met him in a residential disability service in Queensland:

> *"She said that she was greeted by a support worker who unlocked and unbolted the front door. We were immediately inside a small room. This appeared to be for staff. This was double locked by another half door with Perspex leading to a small kitchenette. This was again separated by a wall which was half Perspex with another big locked door in the middle; beyond which was a small, bare, what appeared to be lounge area which had a chair bolted to the ground, a sleeping area, and unmade single bed with a couple of wall shelves above it, small drawers and a toilet. There were no doors to any of these areas. P was stood in the middle of this area. The worker proceeded to join the other worker at a small dining table, where they had obviously been sat watching P through this observation room. One of the staff unlocked the door to where P was standing, to let us in…they then locked it immediately behind us. There was handwriting all over those grey concrete walls …'Help me, I want to die, I hate you.'".*[95]

In other Australian states and territories, restrictive practices are imposed in an unregulated manner, without the 'safeguards' delivered through regulatory frameworks like the system operating in Queensland. This situation has come to the attention of the United Nations Committee on the Rights of Persons with Disabilities, which has expressed concern about the unregulated use of restrictive practices in Australia.[96]

Even in states that regulate the use of restrictive practices, the regimes are limited to state-funded or -operated disability services. This means that even in the four jurisdictions that have enacted restrictive practices legislation (Victoria, Queensland, Tasmania and the Northern Territory), restrictive interventions used in privately funded services or in hospitals, aged care and other health facilities remain unregulated.[97]

# Decision-making for health care and restrictive practices matter: *Guardianship and Administration Act 2000* (Qld)

In Queensland, guardianship legislation comprises the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*. Together, these Acts provide a regime for decision-making for adults with impaired decision-making capacity.

The *Powers of Attorney Act 1998* (Qld) allows people to make decisions and/or arrangements for decision-making that can be implemented in the future. These arrangements are primarily made through an advance health directive or an enduring power of attorney, and enable people to have a voice in their future health care should they later develop a condition that prevents them from consenting to treatment.[98]

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[95] Annette Osborne, *Human Rights v Restrictive Practices* (31 August 2013) Presentation at QAI Forum.
[96] United Nations Committee on the Rights of Persons With Disabilities, *Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session* CRPD/C/AUS/CO/1 (2-13 September 2013) 5.
[97] Kim Chandler, Lindy Willmott and Ben White, 'Rethinking Restrictive Practices: A Comparative Analysis' (2014) 2 *QUT Law Review* 91.
[98] See, for example, the discussion in Penelope Weller, 'Lost in Translation: Human Rights and Mental Health Law' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart, 2010) 51, 63.

Where an adult has impaired capacity for a matter and has not made arrangements under the *Powers of Attorney Act 1998* (Qld), the *Guardianship and Administration Act 2000* (Qld) provides a system by which people can, either formally or informally, act as a decision-maker for that adult.

The purpose of the *Guardianship and Administration Act 2000* (Qld) is to strike an appropriate balance between the rights of an adult to the greatest possible degree of autonomy in decision-making and to adequate and appropriate support for decision-making.[99] This Act seeks to achieve this purpose by (amongst other things) presuming that adults have capacity for a matter, providing principles that must be observed by those performing a function or exercising a power under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld), and encouraging an adult's support network to be involved in decision-making for the adult.[100] Principle 7 is of particular relevance as it preserves the right of people to be involved in decisions affecting their life to the greatest extent possible,[101] specifies that 'any necessary support' must be provided to enable a person to be involved in their own decision-making,[102] and gives expression to the person's views and wishes.[103]

Despite the inclusion of these principles and the broadly protective nature of the *Guardianship and Administration Act 2000* (Qld), decisions made under this Act may give effect to the indefinite detention of people subject to treatment or forensic orders. Detailed provisions allow for authorised entities (such as the courts[104] and the Queensland Civil and Administrative Tribunal[105]), formal guardians and administrators,[106] and/or informal decision-makers[107] to make decisions for an adult, including those relating to involuntary healthcare treatment (in this instance, treatment for mental illness as provided for in the *Mental Health Act 2016* (Qld))[108] or the application of restrictive practices (as provided for in the *Disability Services 2006 Act* (Qld)).[109]

Arguably, the guardianship system was designed to preserve and promote the right of adults with impaired decision-making capacity to make their own decisions,[110] not to impose treatment that is potentially highly restrictive of people's liberties. There are, therefore, potential tensions between the intent of the *Guardianship and Administration Act 2000* (Qld) and provisions of the *Mental Health Act 2016* (Qld), which may allow for the indefinite detention of people with impaired decision-making capacity. Queensland mental health and disability legislative instruments may, as a result, contradict decision-making rights and have the potential to remove liberties from people who may be objecting to mental health treatment, or who require treatment, supports, practices or detention to protect themselves and/or the community.

# Avoiding complacency: The argument for ongoing review and reform

As a result of the siloed nature and insufficient resourcing between and across legislation and systems, responses to people under treatment and forensic provisions (as well as restrictive practices) are often sporadic and inconsistent. While the introduction of the *Mental Health Act 2016* (Qld), for example,

[99] *Guardianship and Administration Act 2000* (Qld) s 6.
[100] Ibid s 7.
[101] Ibid sch 1 pt 1 principle 7(1); *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 principle 7(1).
[102] Ibid sch 1 pt 1 principle 7(3)(a); *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 principle 7(3)(a).
[103] Ibid (Qld) sch 1 pt 1, principle 7(3)(b); *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 principle 7(3)(b).
[104] Ibid s 9(2)(b)(vii).
[105] Ibid s 9(2)(b)(vi).
[106] Ibid s 9(2)(b)(iv)-(v).
[107] Ibid s 9(2)(a).
[108] Ibid ch 5.
[109] Ibid ch 5B.
[110] Rees, above n 31, 84.

includes provisions that may generate improvements with respect to practices associated with the indefinite detention of people with impaired decision-making capacity, it fails to incorporate sufficient mechanisms to support the operationalisation of the underpinning approach to mental health service delivery (the recovery model), or provide adequate and well-designed approaches for responding to people with intellectual disability.

Further, people with intellectual disability who have 'no mental illness requiring involuntary treatment' still reside in mental health facilities on an indefinite basis. Some of these people are subject to forensic orders, and some are not. In Queensland, some people with intellectual disability are subject to approval for containment and seclusion by the Queensland Civil and Administrative Tribunal and are subsequently held in detention-like conditions in the 'community' or at a precinct in Wacol that was previously the site of a large institution. Some of these individuals are also subject to forensic orders, and are receiving limited community treatment whilst still subject to containment. While some individuals under forensic orders are housed in the Forensic Disability Service (also located at Wacol), the vast majority are not.

Additionally, the provision for a single Forensic Disability Service under the *Forensic Disability Act 2011* (Qld) is vastly insufficient in terms of scope and nature of service provision to adults with cognitive impairment who may require support as a result of having come into contact with the criminal justice system, as are transition outcomes for existing clients of the service.

While the intended outcome for Queensland's restrictive practices regime is the reduction and eventual elimination of restrictive practices from the person's support, and improvements in quality of life for the person, the reality for many is one of ongoing restriction, containment and seclusion. And although Queensland offers a relatively highly regulated environment with regard to the application of restrictive practices in disability services, other states and territories (and also systems) offer considerable variability in their approaches, leaving Australia best characterised as a 'hotchpotch' of restrictive practices regulation.[111]

Queensland clearly lacks an integrated and comprehensive approach to working with people who have complex mental health, disability and/or behavioural needs. This situation lends itself to ongoing discrimination of people with impaired decision-making capacity and breaches of numerous human rights. Concerted effort must be made to reform the existing system using approaches that are more closely aligned with Australia's stated position on, and commitment to, human rights.

It is recognised, however, that Queensland's and Australia's institutions, systems, policies, legislation, practices and infrastructure are not sufficiently well developed to support a strongly rights-based response to the issues raised by people with impaired decision-making capacity whose paths collide with the criminal justice system. One of the key priorities emerging from this Inquiry should, therefore, be to remedy the human rights infringements via the strategic evolution of existing responses within Australia's mental health, disability, guardianship and criminal justice systems.

To assist with this process, the principles and associated safeguards and practices outlined in the following section are offered to inform the development of an integrated and rights-based regime for responding to the treatment and support needs of people with impaired decision-making capacity as they interface with the criminal justice system.

[111] Kim Chandler, Lindy Willmott and Ben White, 'Rethinking Restrictive Practices: A Comparative Analysis' (2014) 2 *QUT Law Review* 120.

# Key principles, safeguards and practice approaches

## Principles

> "The decision to detain an individual has the effect of depriving that individual of his or her liberty, and should be subjected to rigorous scrutiny according to rule of law principles, such as access to justice, the right to a fair trial, the prohibition of torture and inhuman and degrading treatment and the right to liberty and security."[112]

Any system that potentially effects the indefinite detention of people with impaired decision-making capacity must be underpinned by sound guiding principles. At minimum, the following principles should be used to operationalise, and evaluate the worth and effectiveness of, systems of treatment and support for the target group.

1. **Legislation should have a strong ethical foundation that includes both rights-based and evidence-based approaches to treatment and support for people with impaired decision-making capacity:** A strong ethical framework promotes integrity, clarifies objectives, and provides guidance for those interpreting the law and exercising legislative powers. Consistent with contemporary understandings about appropriate treatment and care of people with impaired decision-making capacity, this framework should be both rights-based and promote evidence-based approaches to treatment and support.
2. **Responses should reduce stigma and discrimination against people with impaired decision-making capacity:** One of the key objectives of any piece of legislation relevant to the needs of people with impaired decision-making capacity should be to reduce stigma, dispel stereotypes, and reduce discrimination against people with impaired decision-making capacity.
3. **Policy and legislation should balance respect for autonomy and self-determination of people with impaired decision-making capacity with the need to protect the person and community from harm:** While policy and legislative responses must balance a number of competing priorities and risks, respect for autonomy requires that people with impaired decision-making capacity be supported using a least restrictive approach that promotes maximum possible participation in the legal process and decisions about treatment and support.
4. **Emphasis must be placed on diversion not detention:** Every effort should be made to divert people with impaired decision-making capacity at the earliest possible signs of risk such that they are provided with high quality support and treatment options that enable appropriate participation and ongoing accommodation in the community while mitigating emerging risk.
5. **Approaches that result in indefinite detention for people with impaired decision-making capacity should only be employed as a time-limited and transitional last resort option:** In recognition that the indefinite detention of people with impaired decision-making capacity results in a breach of fundamental human rights, mechanisms that give effect to indefinite detention should be engaged as an intervention of last resort only. In instances where indefinite detention is effected, it must be employed as a transitional strategy and be subject to strict time-limitations.

[112] Jackie Charles, *Mash Up – Indefinite Detention and the Rule of Law in Australia* (8 October 2014) Rule of Law Institute of Australia <http://www.ruleoflaw.org.au/indefinite-detention-australia>.

6. **The criminal justice system response to people with impaired decision-making capacity should be based on treatment and support, not punishment:** Legislation should reject approaches that are inconsistent with the principles underpinning Australia's system of criminal justice. Detention for people who are found unsound of mind or unfit for trial must be based on the need for appropriate treatment and/or care, not on a system of indefinite detainment premised on punishment without trial.
7. **Individualised approaches to enacting rights cannot be viewed as a substitute for robust systemic safeguards:** While strategies to engage patients and their families (such as consultation, advocacy and patient involvement) are an important inclusion in legislation and essential in frontline practice, they must not be viewed as a substitute for a robust safety net of systemic safeguards.
8. **Legislation should be workable and practicable for practitioners employed in the relevant systems:** All relevant legislation must enable the provision of effective care and treatment for people with impaired decision-making capacity, without the unnecessary bureaucracy that interferes with people receiving timely and responsive treatment and care.
9. **An empirical approach to the monitoring, review and evaluation of legislative schemes as they apply to vulnerable people with impaired decision-making capacity is crucial:** There must be explicit emphasis on the need for ongoing data collection and transparent reporting that promotes, measures and assesses the efficacy of treatment and supports.

# Establishing safeguards

> *"Mark, a 40 year old man with Prader Willi Syndrome, was tied to the bed to prevent him from removing his CPAP mask at night. The reason Mark was tied to the bed is that elbow splints, the less restrictive alternative, were 'not affordable' and not available off the shelf. He was routinely put to bed at 6pm because of the conflicting needs of the other residents in the group home where he lived and consequently was bored during the night. The family objected, to no avail, and it took a great deal of time and energy to finally have his restraints removed."*[113]

Any regime that results in the indefinite detention of people with impaired decision-making capacity requires the development, implementation and regular review of adequate safeguards that support the above-mentioned principles and ensure that the rights and wellbeing of individuals are adequately promoted and protected. The following section outlines some key safeguards in relation to legislative provisions, minimum standards of practice, and independent scrutiny, monitoring and support.

## Legislative provisions

### Legislative provisions for treatment *not punishment*

A forensic order should not be viewed in the same way as a custodial sentence under criminal law. A forensic order should be for managing and treating mental illness, or the care, support and protection of people with disability whose behaviour puts themselves or others at risk. Legislative provisions for detaining people with impaired decision-making capacity should, therefore, be premised on the need for treatment and care *not punishment*, and instead be used to effect recovery and/or ensure appropriate behaviour support for a person who has been found to not be criminally responsible for their actions.

[113] Case study reported in Bolshy Divas, above n 28, [37].

### Diversion from the criminal justice system

To ensure that detention remains the last-resort approach to managing the offending behaviours of people with impaired decision-making capacity, individuals who commit a simple offence or an indictable offence that can be dealt with summarily should be diverted away from the criminal justice system and into systems offering specialist treatment and supports wherever appropriate and feasible.

### Stringent and time-limited application of treatment authorities

Safeguards should exist for people with impaired decision-making capacity who are subject to a treatment authority. Authorisation of treatment must, for instance, be undertaken by qualified professionals according to strict criteria, thus reducing the risk of abuse of patients' rights. Similarly, where advance health directives or other advance care statements are not established, or are inconsistent with clinically appropriate practice, treatment for individuals with mental illness should be authorised only by those with legislated authority to do so. Further, once a treatment authority is made, strict time limits must apply to the authorisation.

### Reduction and elimination of restraint, containment and seclusion

A key objective of mental health and disability/forensic disability legislation should be to reduce and eliminate the use of restraint and seclusion on people with impaired decision-making capacity to the maximum possible degree. This objective is congruent with the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment's call for an absolute ban on the use of seclusion and restraint in mental health facilities,[114] the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector*,[115] and the *Australian Government's National Safety Priorities in Mental Health: A National Plan for Reducing Harm*.[116]

### Compulsory planning and review processes

The instigation of appropriate planning and review processes is an essential safeguard for people who are detained in authorised facilities for the purpose of treatment and/or behaviour support. Formal plans hold facilities to account by requiring staff to work according to specific objectives and standards, establishing outcomes against which agency practice can be measured, and documenting progress against these benchmarks. Provisions for treatment plans based on a recovery framework, positive behaviour support plans, and/or transition plans should, therefore, be incorporated into relevant legislation.

## Minimum standards of practice

Under existing provisions, people with impaired decision-making capacity may be detained indefinitely if the treatment and/or supports provided do not generate substantial improvements in mental wellbeing or sufficiently ameliorate the risk of reoffending. There are, however, no existing standards against which to evaluate the success of these treatment and supports, nor is there an independent process that evaluates the quality of treatment and/or supports and determines whether they are appropriate

[114] Mendez, above n 17, 15.
[115] Department of Social Services, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector* (7 November 2014) Australian Government <https://www.dss.gov.au/sites/default/files/documents/04_2014/national_fraemwork_restricitive_practices_0.pdf>.
[116] Department of Health, *National Safety Priorities in Mental Health: A National Plan for Reducing Harm* (19 August 2014) Australian Government 17 <http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-n-safety>.

and adequate to the task of restoring a person's health and/or stabilising a person's supports, and facilitating the transition to community living.

There is a need to ensure that the treatment and/or support regimes for people are effective: that is, that they result in improvements in people's health and wellbeing, and eventually result in successful transition to community living. Should treatment and/or supports not result in improvements after a designated period, a robust independent review of existing arrangements should be initiated. This review should be conducted by an independent entity with the power to make recommendations for, and enforce, improved treatment and supports.

## Independent oversight, monitoring and support

### Establishment of a statutory body

While a number of Australian jurisdictions have established statutory positions or funded agencies that provide varying levels of oversight of disability systems,[117] there are no systems or agencies responsible for ensuring that adults subject to mental health, forensic disability, restrictive practices, guardianship and other potentially restrictive legislative provisions avoid becoming caught in a self-perpetuating spiral of treatment and support that fails to facilitate their reintegration into community.

There is, as such, a need for substantial oversight for people with impaired decision-making capacity at risk of indefinite detention. An independent statutory body should be established to provide a necessary layer of external and independent scrutiny with respect to this group. In recognition of the multiple systems involved in the issue of indefinite detention, the positions would require authority to operate across the mental health, disability, corrective services, guardianship and other related systems. The functions and powers of the position might include:

- advocating for, and contributing to, the development of a comprehensive legislative framework, as well as guidelines and standards with respect to the appropriate treatment and support of people with impaired decision-making capacity who are subject to treatment orders, forensic orders, and restrictive practices;
- reviewing all legal orders that effectively result in the indefinite detention of people with impaired decision-making capacity within mental health units, disability services, corrective services, or other long-term institutional facilities;
- monitoring the effectiveness of treatment plans, support plans, and transition plans that includes ensuring that comprehensive reviews of treatment, supports and transition outcomes are undertaken;
- operating a complaints system that allows for the reporting of breaches of standards within authorised services, and undertaking investigations with respect to alleged breaches of standards;
- conducting research (e.g. the effectiveness of guidelines on reducing the length of time spent in detention, and effective strategies for transitioning people from detention to community-based supports);
- publishing information and evidence-based educational materials to inform systems improvement;

[117] See, for example, Department of Health and Human Services, *Senior Practitioner,* Tasmanian Government <http://www.dhhs.tas.gov.au/disability/senior_practitioner>; Department of Human Services, *Office of Professional Practice* (17 February 2016) Victoria State Government <http://www.dhs.vic.gov.au/about-the-department/our-organisation/organisational-structure/our-groups/office-of-professional-practice>.

- delivering training and education to service providers and health facilities treating and/or supporting individuals under treatment orders, forensic orders, and restrictive practices legislation (such as mental health facilities, disability services, corrective services, and aged care facilities) – such training should ensure that all information with respect to people's rights in detention is sufficiently accessible to individuals with impaired decision-making capacity;
- reporting findings to parliament; and
- publishing annual reports on its activities.

I acknowledge the potential tensions that may result from a single agency working across the multiple institutions/disciplines of health, law, disability and guardianship. There is, however, substantial need for stronger systems interface in responding to people with impaired decision-making capacity who may experience indefinite detention. It is foreseeable that a statutory body working across this space may facilitate awareness of the need for increased dialogue between systems.

## Inspectorates

External scrutiny is often considered a necessary strategy for the prevention of abuse and neglect that has the potential to occur within the context of institutionalised living.[118] An external visitor scheme (such as the Queensland Community Visitor Program) may act as a key outreach mechanism for people residing in authorised mental health facilities, forensic disability services, and community-based supported accommodation services. External visitors may also serve as an important vehicle for identifying and addressing issues for those adults with impaired decision-making capacity who find it extremely difficult to understand their rights, express concerns, and navigate complaints systems.[119]

## Independent advocacy

Ensuring that people under treatment orders and/or in receipt of restrictive practices (and who reside in authorised facilities or community-based disability services) have appropriate access to independent advocacy constitutes a critical safeguard. The *Mental Health Act 2016* (Qld), for instance, introduces the concept of independent Patient Rights Advisers to ensure that patients in authorised mental health facilities are advised of their rights under the Act.[120] Such an approach potentially strengthens both the human rights of patients[121] and the recovery orientation of mental health services.[122]

The UNCRPD holds States Parties responsible for providing supports to people with disability across a number of facets of life in order to uphold their human rights to the highest possible degree. Any regime that effects the indefinite detention of adults with impaired decision-making capacity must, therefore, be accompanied by a well-resourced system of both specific and generic safeguards to facilitate the protection of these rights.

The safeguards discussed in this section are not intended to be comprehensive. More in-depth discussions on this topic may be sourced from the Office's other submissions, as referenced earlier.

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[118] See, for example, Carolyn Frohmader (cited in Xavier Smerdon, 'Independent Inquiry Call Over Yooralla Abuse' (Pro Bono Australia News, 25 November 2014) [24] <http://www.probonoaustralia.com.au/news/2014/11/independent-inquiry-call-over-yooralla-abuse#>.
[119] Office of the Anti-Discrimination Commissioner Tasmania, Submission of the Anti-Discrimination Commissioner, Tasmania, to the Australian Law Reform Commission, *Inquiry into Equality, Capacity and Disability in Commonwealth Laws* (2014) 6 <http://www.antidiscrimination.tas.gov.au/__data/assets/pdf_file/0006/277449/14.01.30-ADC_Submission_to_ALRC_re_capacity.pdf>.
[120] *Mental Health Act 2016* (Qld) ch 9 pt 5.
[121] The UNCRPD requires States Parties to provide accessible information to people with disability to support their exercise of their rights: United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) arts 4, 9, 16 <http://www.un.org/disabilities/convention/conventionfull.shtml>.
[122] Queensland Mental Health Commission, *Mental Health Bill Improves Rights, Promises Reform* (July 2015) Queensland Government <https://www.qmhc.qld.gov.au/mental-health-bill-improves-rights-promises-reform/>.

# Applying principles to practice

Systems responses have little value unless they are operationalised via evidence-based strategies and mechanisms that generate desirable outcomes at the individual level. While not intended to be comprehensive, the following section discusses practice methodologies that support rights-based and evidence-based approaches to the treatment and care of people with impaired decision-making capacity in authorised mental health facilities and disability services.

## The application of evidence-based treatment and models of support

### Recovery-oriented model of treatment (mental health services)

> "From the perspective of the individual with mental illness, **recovery** means gaining and retaining hope, understanding one's abilities and disabilities, engaging in an active life, and having personal autonomy, social identity, meaning and purpose in life, and a positive sense of self."[123]

The recovery model is an evidence-based approach to treating and working with people with mental illness, and forms the basis for *Australia's National Framework for Recovery-Oriented Mental Health Services*.[124] Adults with a psychiatric impairment who are subject to treatment or forensic orders and housed in authorised mental health wards and facilities should be supported by a recovery-oriented approach to mental health treatment. This approach aligns with best-practice standards in contemporary mental health care and must be integral to any system that provides for the indefinite detention of this cohort.

A recovery-oriented approach should be complemented by individualised treatment plans that incorporate the patient's wishes to the highest degree possible. Mental health treatment plans that are based on a strong recovery approach would, for instance, allow for the making of advance statements, such as advance health directives, that clearly articulate the person's treatment preferences in the event he/she becomes unwell and requires mental health treatment. Where an advance statement exists, the treating psychiatrist should be obligated to make a treatment decision in accordance with the advance statement unless he or she is satisfied that the treatment specified is not clinically appropriate. Various elements of this approach have been incorporated into the *Mental Health Act 2016* (Qld) and the *Mental Health Act 2014* (Vic), and are accompanied by supporting strategies (underpinned by principles of supported decision-making) to encourage the participation of patients in treatment decisions in partnership with their treating teams.

[123] See Department of Health, *National Standards for Mental Health Services 2010: Principles of Recovery Oriented Mental Health Practice* Australian Government <http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-n-servst10>.
[124] See Department of Health, *A National Framework for Recovery-Oriented Mental Health Services: Policy and Theory* (19 August 2014) Australian Government <http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-n-recovpol>.

## Positive behaviour support (forensic and community-based disability services)

> **"Positive behaviour support** is both a philosophy of practice and a term that encompasses individual and multi-systemic interventions intended to change behaviour and improve quality of life… Positive behaviour support recognises that all human behaviour serves a purpose, and that in order to bring about adaptive change, the purpose of behaviours, the contexts and environments in which they are used, and the person's aspirations, knowledge and skills must be properly understood."[125]

Positive behaviour support is an evidence-based and widely accepted approach to managing behaviours that may cause harm to the person, others and/or property. Individuals who demonstrate behaviours of concern, and who are receiving support from disability and/or forensic disability services, should be supported using positive behaviour support approaches that acknowledge the purposeful nature of behaviour; minimise and, where possible, eliminate the identified behaviours of concern; and contribute to ongoing improvements in quality of life for the person.[126]

Further, and as per the *Disability Services Act 2006* (Qld), a positive behaviour support plan should be developed whenever restrictive practices are used with adults with intellectual and/or cognitive impairment whose behaviours cause harm to themselves and/or others.[127] The positive behaviour support plan must be informed by the principles of positive behaviour support and evidence-based practice;[128] be developed in accordance with professional input[129] and approved by the delegated authority;[130] and must incorporate information about the nature of the behaviour, the positive strategies that will be used to respond to the behaviour, and the context and way in which the restrictive practice will be used (if required).[131] The plan must also be used in ways that meet the adult's needs,[132] support his/her skill development,[133] maximise opportunities to improve quality of life,[134] reduce the intensity, frequency and duration of behaviour,[135] and ultimately result in the reduction and elimination of restrictive practices.[136]

## Person-centred responses (all services and authorised facilities)

> **Person-centredness** refers to the development, providing and organising of services that are based in knowing and listening to people, and supporting them to live in communities as they choose. The person is not simply assigned to an existing service (or system) and expected to adjust to that service – rather the service strives to adjust to the person.[137]

Many of the widespread social reforms currently underway in Australia require services to be delivered within the framework of person-centred care and support. The person-centred approach is congruent with the UNCRPD in that it facilitates the delivery of reasonable accommodation to people with

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[125] Department of Human Services, Positive Practice Framework: A Guide for Behaviour Support Services Practitioners (2011) State of Victoria 7.
[126] See Department of Communities, Child Safety and Disability Services, *Five Steps to Meet the Requirements* (July 2014) Queensland Government, Positive behaviour Support <https://www.communities.qld.gov.au/disability/key-projects/positive-behaviour-support>.
[127] See *Disability Services Act 2006* (Qld) s 143.
[128] Ibid s 142(d)(i).
[129] Positive behaviour support plans that include certain restrictive practices require a doctor's input: *Disability Services Act 2006* (Qld) s 158(5).
[130] Ibid s 151(1)(c)(i), 153(1)(d), 154(1)(d).
[131] Ibid s 150.
[132] Ibid s 150(1)(a).
[133] Ibid s 150(1)(b).
[134] Ibid s 150(1)(c).
[135] Ibid s 150(1)(d).
[136] This is one aim of the positive behaviour support approach: see W J Carter, *Challenging Behaviour and Disability: A Targeted Response* (2006) Report to the Queensland Government 105.
[137] Valuing People (2009) quoted in Jane Sherwin, 'Social Role Valorisation Theory as a Resource to 'Person Centred Planning'' (2009) 4(2) *The SRV Journal* 6–9.

disability.[138] Service and practice responses to people with impaired decision-making capacity who are on treatment orders or forensic orders and who are being detained in authorised facilities should similarly be tailored to people's needs and situations in accordance with this approach.

### Transition planning and review processes (all services and authorised facilities)

Transition planning provides an evidence-based approach to facilitating improved rates of re-integration of offenders to life post-detainment.[139] An appropriate transition plan for an individual under a treatment or forensic order would be based on an outcome-oriented process that promotes the transition of the person from an authorised facility (such as a mental health ward or forensic disability service) to ordinary living in community. The plan would ideally include and/or require:

- clear timeframes for the transition to occur;
- anticipated milestones indicating progress towards transition;
- assessment of eligibility for supports under the National Disability Insurance Scheme (NDIS);
- assessment of the person's capabilities, resources and preferences, along with ongoing treatment and support needs, in relation to community living;
- strategies for integration into community that include linkages to relevant disability and mainstream services and resources;
- information and education for the person and his/her family members and networks to support increased functionality in community;
- evaluations of the appropriateness and sufficiency of treatment and lifestyle supports (including decision-making supports); and
- consistent data gathering about progress against transition plan milestones.

## Engaging diversionary approaches

In order to ensure a 'last resort' approach to indefinite detention, every effort should be made to source and generate alternative pathways to essential treatment and supports. A diversionary approach to people with impaired decision-making capacity allows for these individuals to be discharged into a safe environment or, if an order for treatment is made, to be discharged with access to services that may assist in reducing the risk of further offending.

### The Magistrates Court

There are a number of strategies that could facilitate diversion from the criminal justice system. The Magistrates Court (or other 'courts of first instance' for criminal matters depending on jurisdiction) could, for instance, offer a diversionary option equivalent to the Mental Health Court for people who have committed a summary offence and are deemed to be of unsound mind or unfit for trial. Such a program may assist vulnerable people, including those with impaired decision-making capacity because of cognitive and/or psychiatric impairment, by allowing for compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases.

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[138] See United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) art 2 <http://www.un.org/disabilities/convention/conventionfull.shtml>.

[139] See, for example, Eric C. Trupin, Aaron P. Turner, David Stewart and Peter Wood, 'Transition Planning and Recidivism Among Mentally Ill Juvenile Offenders' (2004) 22(4) *Behavioral Sciences & The Law* 599-610; Henry J. Steadman, Fred C. Osher, Pamela Clark Robbins, Brian Case and Steven Samuels, 'Prevalence of Serious Mental Illness Among Jail Inmates' (2009) 60(6) *Psychiatric Services* 765 <http://ps.psychiatryonline.org/doi/abs/10.1176/ps.2009.60.6.761>.

The Magistrates Court could:

- provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges;[140]
- be assigned discretionary power when a person with cognitive disability (who is charged with a summary offence) appears before the court;[141]
- offer dedicated intellectual disability-focused Court Liaison Services to properly assess people who may have impaired decision-making capacity (with respect to their impairment, unsoundness of mind, and fitness to plead), and be afforded the right of appearance in criminal proceedings to make submissions to the court;
- provide Court Liaison Services that have strong links to the NDIA so that potentially eligible participants are provided with access to services that may support successful transitions to community living; and
- refer a person to a 'relevant agency' for appropriate care (for instance, the health department, or to another entity the court considers appropriate for treatment and care).[142]

### Linkages to the NDIS

Diversionary strategies and transition processes for individuals with impaired decision-making capacity should automatically trigger engagement with the NDIS so that the person's eligibility for ongoing supports within the disability system can be assessed, and linkages between the criminal justice and other more appropriate support systems can be established. The aim of this process would be to facilitate the earliest possible transition from a mental health facility or forensic environment to supported community living arrangements.

Additionally, the Information, Linkages and Capacity Building (ILC) arm of the NDIS[143] offers a potentially valuable resource for strengthening the transition of people from detention to community living. For example, services funded under Stream 1 of the ILC framework (Information, Linkages and Referrals) may enable people within this cohort to engage with the difficult-to-locate mainstream services and resources that are available. Similarly, services under Stream 4 (Individual Capacity Building) may assist with strengthening the person's ability to interact successfully with the broader community.

## Seamless systems interface

> *"The NDIS and the mental health system will work closely together at the local level to plan and coordinate streamlined care for individuals requiring both mental health and disability services recognising that both inputs may be required at the same time or that there is a need to ensure a smooth transition from one to the other."*[144]

[140] See *R v AAM; Ex parte A-G* (Qld) [2010] QCA 305 (5 November 2010) [9] (McMurdo P).
[141] Betheli O'Carroll, 'Intellectual Disabilities and the Determination of Fitness to Plead in the Magistrates' Courts' (2013) 37 *Criminal Law Journal* 51, 61.
[142] *Mental Health Act 2016* (Qld) s 174(2).
[143] National Disability Insurance Scheme, *Information, Linkages and Capacity Building* <http://www.ndis.gov.au/community/ilc-home>.
[144] Council of Australian Governments, *NDIS – Principles to Determine the Responsibilities of the NDIS and Other Service Systems* (27 November 2015) 6 <http://www.coag.gov.au/node/497>.

A strong systems interface will be crucial to ensuring that adults with impaired decision-making capacity do not remain in detention for any longer than is absolutely necessary, and that the treatment and support they receive whilst in detention is appropriate to their needs, and results in desirable outcomes for both the individual and the community. A seamless interface will require key agencies within each system, and across federal and state funding divides, to work together to maximise the interface between treatment and supports.

Consideration must be given to how best to integrate the key features of these systems, such as the person-centred and supports-oriented approach of the disability system, the treatment and recovery orientations of mental health, decision-making supports available through the guardianship regime, and the risk management and community protection components of the justice system, while still ensuring individualised responses that appropriately attend to unique and individual circumstances, and complexity of need where required.

## Appropriate service responses and systems

The needs and experiences of people with various forms of cognitive impairment are often significantly different to those of people living with mental illness or psychiatric impairment. For example, the appropriate response for mental illness (which may be fluctuating or episodic) is treatment, whereas intellectual impairment is a permanent condition that may require ongoing supports to facilitate functional daily living. Further, people who have a dual diagnosis of both intellectual impairment and mental illness may have even more complex needs, and may require a combination of treatment for mental illness and ongoing lifestyle supports. Where the availability of service types is limited, authorised mental health services (and, where appropriate, forensic disability services) should be required to make policies and practice guidelines regarding the treatment, care and support of people with cognitive disability or dual diagnosis.

Training and education of clinicians and support staff will also be crucial if authorised facilities are to respond in accordance with best practice and from a rights-based perspective regarding the issues and differing needs presented by people with impaired decision-making capacity who are detained in authorised facilities.[145] Education will also be essential for attorneys, guardians and nominated support people to increase their understanding of the mental health and/or disability systems, guardianship and decision-making. Education about these matters would also be valuable for the person's informal network (such as family, carers and other support people). Individuals under treatment and forensic orders should also have straightforward access to advice and relevant information about, for instance, their legal and human rights, treatment plans, and how to make complaints and provide feedback.[146]

[145] The UNCRPD requires States Parties to raise awareness about, and foster respect towards, the rights, capabilities and vulnerabilities of people with disability. See United Nations, Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) art 8 <http://www.un.org/disabilities/convention/conventionfull.shtml>.
[146] The UNCRPD recognises the importance of accessible information for people with disability: Ibid preamble.

## Culturally sensitive responses

> ***"Aboriginal woman's jailing highlights plight of intellectually impaired Aboriginal offenders (ABC Lateline, 13 March 2014)***
>
> *An investigation has revealed dozens of intellectually disabled Aboriginal people are being kept in prison indefinitely because of a lack of proper healthcare facilities.*
>
> *The ABC's Lateline program exposed the case of 23-year-old Rosie Anne Fulton, who has spent the past 18 months in a Kalgoorlie jail without a trial or conviction after she was charged with driving offences.*
>
> *The magistrate in her case declared her unfit to plead because she is intellectually impaired - a victim of foetal alcohol syndrome - and has the mental capacity of a young child.*
>
> *Her legal guardian, former police officer Ian McKinlay, says Ms Fulton ended up on a prison-based supervision order because there were no alternatives in the area at the time.*
>
> *"At the moment this outcome is almost entirely reserved for Aboriginal, Indigenous Australians," he said.*
>
> *The Aboriginal Disability Justice Campaign says there are at least 30 Indigenous people in a similar situation around the country."*[147]

The case of Rosie Anne Fulton, along with that of Marlon Noble, highlight the importance of developing a system of treatment and supports that addresses the intersection of impairment and impaired decision-making capacity with other facets of disadvantage, more specifically those individuals from Indigenous backgrounds.

In Western Australia and the Northern Territory, Aboriginal and Torres Strait Islander people with cognitive or intellectual disability are detained indefinitely, not in psychiatric facilities, but in maximum security prisons.[148] Many of these individuals are not identified as having a disability[149] and may, therefore, not be given access to the additional supports provided to people with impaired decision-making capacity charged with an offence. This situation within Australia has resulted in numerous infringements of key international human rights instruments, including the United Nations International Convention on the Elimination of all Forms of Racial Discrimination.[150] Ensuring appropriate regard for culture, and the implementation of culturally sensitive responses within relevant systems, are areas of support that still require significant development.

[147] ABC News, *Aboriginal Women's Jailing Highlights Plight of Intellectually Impaired Aboriginal Offenders* (13 March 2014) <http://www.abc.net.au/news/2014-03-12/intellectually-disabled%C2%A0aboriginal-people-stuck-in-legal-limbo/5316892>.
[148] Sotiri, McGee and Baldry, above n 6.
[149] Ibid 7.
[150] Ibid.

# Concluding comments

> *"…the continuing struggle regarding the proper balance to draw between individual choice and the use of coercive strategies is a struggle that has gone on for decades. However, with the emergence of the consumer/survivor movement, the development of notions of procedural justice and perceived coercion, and the sweep toward more punitive social policies, the debate today may be more urgent and important than it has ever been."*[151]

I am committed to ensuring that Australia, as a State Party to the UNCRPD, upholds its overarching obligation to protect people with disability from discrimination, ensures all people are provided with equal benefit and protection of the law, and promotes the application of human rights across all areas of society.

The UNCRPD expressly states that people with disability are not to be deprived of their liberty unlawfully or arbitrarily;[152] are afforded full access to justice[153] and are recognised as equal before the law;[154] are free from torture or cruel, inhuman or degrading treatment or punishment;[155] are protected from exploitation, violence and abuse;[156] have their equal right to live in the community recognised, with choices equal to others;[157] and have the right to habilitation and rehabilitation, with services and programs offered at the earliest possible stage to support their participation and inclusion within society.[158]

The existing system of indefinite detention for people with impaired decision-making capacity in Australia clearly infringes upon fundamental human rights, and given that the system deprives people with impairment of their freedom because of their impairment, it is also fundamentally discriminatory.

The existing fragmentation across the policy, legislative, service and practice landscape has also resulted in gaps in responses and safeguards, and generates less-than-optimal outcomes for people with impaired decision-making capacity who come into contact with the criminal justice system and subsequently the mental health and disability service systems.

Systems involved in the treatment and support of people with impaired decision-making capacity clearly require considerable revision if these individuals' human rights are to be upheld and indefinite detention is to be eliminated. Any system that facilitates indefinite detention should be founded on a coherent legislative framework, along with sound principles that prioritise human rights and position detention in *any form* as the option of last resort. Such a system should also offer best-practice, least-restrictive theoretical and practice positions for treatment and supports; promote cohesion and interconnection between systems, services and practice; and provide multi-featured safeguards that offer robust protections for people's rights.

Ultimately, any restrictions on the liberty of people with impaired decision-making capacity must be premised upon equality in the application of law, and demonstrate efficacy in respect of improving people's functional skills and overall quality of life within community.

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[151] Petrila, above n 29, 15.
[152] United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) art 14 <http://www.un.org/disabilities/convention/conventionfull.shtml>.
[153] Ibid art 13.
[154] Ibid art 12.
[155] Ibid art 15.
[156] Ibid art 16.
[157] Ibid art 19.
[158] Ibid art 26.

As Public Advocate, I appreciate the opportunity to provide comment on the indefinite detention of people with impaired decision-making in Australia. I commend the Australian Government for initiating this Inquiry, which represents an important opportunity to develop appropriate responses and achieve national consistency on this issue.

Should additional information or comment be required, I would be pleased to discuss this submission further.

Yours sincerely,

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