

Adults with cognitive disability in the Queensland criminal justice system

Discussion Paper 2: Courts

February 2025



Acknowledgement of Country

The Public Advocate and staff acknowledge Aboriginal and Torres Strait Islander peoples as Australia's first peoples and as the Traditional Owners and custodians of the land on which we live. We celebrate the diversity of Aboriginal and Torres Strait Islander cultures across Queensland and pay our respects to Elders past, present and emerging.

Acknowledgement of Lived Experience

We acknowledge the experiential expertise of adults with impaired decision-making ability, whose rights we seek in our work to promote and protect.

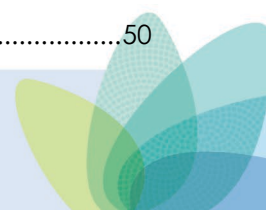
Acronyms

| | |
|--------|---|
| AHRC | Australian Human Rights Commission |
| ARJC | Adult Restorative Justice Conferencing |
| ATSILS | Aboriginal and Torres Strait Islander Legal Service |
| CDP | Illicit Drugs Court Diversion Program |
| CJG | Community Justice Group |
| DAAR | Drug and Alcohol Assessment Program |
| DFV | Domestic and Family Violence |
| FNJO | First Nations Justice Office |
| ODPP | Office of the Director of Public Prosecutions |
| OIC | Office in Command |
| OPM | Operational Procedures Manual |
| PPRA | <i>Police Powers and Responsibility Act 2023</i> |
| QAI | Queensland Advocacy for Inclusion |
| QCAT | Queensland Civil and Administrative Tribunal |
| QDAC | Queensland Drug and Alcohol Court |
| QIS | Queensland Intermediary Scheme |
| QPC | Queensland Productivity Commission |
| QPS | Queensland Police Service |
| QWIC | Queensland Wide Inter-linked Court (Database) |
| SPER | State Penalties and Enforcement Registry |



Contents

| | |
|--|----|
| Acronyms..... | 2 |
| Contents | 3 |
| Summary and critical questions | 5 |
| Introduction..... | 6 |
| The Public Advocate | 6 |
| Cognitive disability | 6 |
| The criminal justice system..... | 7 |
| Adults with cognitive disability in the Queensland criminal justice system | 7 |
| Scope of this paper | 8 |
| Courts..... | 9 |
| The journey through the Queensland court system | 9 |
| Legal Capacity | 9 |
| Legal Capacity – Summary Offences | 10 |
| Legal Capacity – Indictable Offences..... | 10 |
| Trials and sentencing..... | 10 |
| Issues and challenges | 13 |
| Bail and breach of bail conditions..... | 13 |
| Accessibility and participation | 14 |
| Dignity and respect | 16 |
| Provision of supports and reasonable adjustments | 16 |
| Identification and recognition of disability | 19 |
| Determination of legal capacity | 20 |
| Access to legal advice and representation..... | 21 |
| Sentencing and diversion | 23 |
| Overrepresentation and lack of data..... | 26 |
| Current strategies and programs..... | 27 |
| Specialist courts and programs..... | 28 |
| Advocacy and other support | 35 |
| Appendix 1: Key legislation and policies – legal representation..... | 37 |
| Lawyers | 37 |
| Queensland Handbook for Practitioners on Legal Capacity..... | 37 |
| Criminal Law Duty Lawyer Handbook..... | 40 |
| Director of Public Prosecutions..... | 42 |
| Guardians and Enduring Powers of Attorney..... | 43 |
| Appendix 2: Key legislation and policies regarding courts..... | 45 |
| Magistrates, District, and Supreme Courts..... | 45 |
| Equal Treatment Benchbook | 45 |
| Persons with disability..... | 46 |
| Aboriginal and Torres Strait Islander peoples | 47 |
| Diversionary processes | 50 |



| | |
|--|----|
| Adult Restorative Justice Conferencing..... | 50 |
| Court Link | 51 |
| Drug and Alcohol Diversion Programs..... | 52 |
| Murri Court | 53 |
| Community Justice Groups (CJGs) | 56 |
| Appendix 3: Key legislation regarding bail, evidence and sentencing..... | 59 |
| Bail | 59 |
| Expert evidence panel in relation to affirmative consent laws | 60 |
| Sentencing..... | 62 |
| Penalties and Sentences Act | 62 |
| Non-custodial sentences | 63 |
| Imprisonment..... | 66 |
| Suspended sentence..... | 66 |
| Parole..... | 67 |
| Concurrent and cumulative sentences | 68 |
| Life imprisonment | 68 |
| Exceptional circumstances parole | 69 |
| Indefinite sentence | 69 |
| Other orders..... | 70 |
| Graffiti removal order | 70 |
| Restitution and compensation | 70 |
| Non-contact order..... | 70 |
| Banning order..... | 71 |
| Licence disqualification | 71 |
| Other options..... | 71 |
| Mental Health Court (separate discussion paper) | 71 |
| Drug and Alcohol Court..... | 72 |



Summary and critical questions

The Public Advocate is undertaking a project on the interactions between adults with cognitive disability and the criminal justice system in Queensland. The aim of this project is to identify opportunities for reform to ensure that the rights of adults with cognitive disability are upheld during these interactions.

This discussion paper is the second in a series of papers that will be used to guide stakeholder consultation.

The focus of the current paper is the Queensland court system (with the exception of the Mental Health Court, which will be discussed in a separate paper). It aims to provide an overview of issues that may be experienced by adults with cognitive disability charged with a crime as they navigate the courts, including issues related to:

- the accessibility of courts and court processes;
- the provision of supports and reasonable adjustments;
- identification and recognition of disability;
- access to bail and breaches of bail conditions;
- determination of legal capacity;
- access to legal advice and representation;
- sentencing and diversionary options; and
- the lack of data available on the outcomes and experiences of adults with cognitive disability who move through the court system.

The paper also includes a summary of key policies and legislation relevant to Queensland courts and legal representation, including:

- the Queensland Handbook for Practitioners on Legal Capacity;
- the Criminal Law Duty Lawyer Handbook;
- Director of Public Prosecutions Director's Guidelines
- the Equal Treatment Benchbook;
- the *Bail Act 1980* (Qld); and
- the *Penalties and Sentences Act 1992* (Qld).

Relevant recommendations from previous reports, studies and inquiries are also discussed.

The following **key questions** are posed for further discussion:

1. How might court processes for criminal matters be made more accessible for adults with cognitive disability?
2. Should intermediaries be made available to all adults with significant cognitive disability who are charged with serious offences?
3. What other supports should be made available to adults with cognitive disability to enable them to better understand and participate in court processes?
4. Are there particular reforms that would make court processes more accessible to First Nations adults with cognitive disability?
5. What evidenced-based diversionary programs for adults with cognitive disability should be considered by Queensland?

Please note that the discussion paper on the forensic disability system will engage questions around: fitness to plead; the option for courts to find a person not guilty by reason of mental impairment; and the making of forensic orders.



Introduction

The Public Advocate

The Public Advocate is established under chapter 9 of the *Guardianship and Administration Act 2000* (Qld) to promote and protect the rights and interests of Queensland adults with impaired decision-making ability through systemic advocacy.

Section 209 of the *Guardianship and Administration Act* states that the functions of the Public Advocate are:

- a) promoting and protecting the rights of adults with impaired capacity (the adults) for a matter;
- b) promoting the protection of the adults from neglect, exploitation, or abuse;
- c) encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;
- d) promoting the provision of services and facilities for the adults;
- e) monitoring and reviewing the delivery of services and facilities to the adults.¹

Cognitive disability

The term used to describe the people who are the focus of this paper is 'adults with cognitive disability'. Cognitive disability, as the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) has noted, 'arises from the interaction between a person with cognitive impairment and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.'² People may experience cognitive impairment if they have an intellectual disability, acquired brain injury, neurological disorders (such as dementia), or if they have a mental health condition.³

People with cognitive disability may experience difficulty with communication, attention, concentration, memory, thinking, and learning.⁴ Sometimes a person with cognitive disability will have impaired decision-making ability. This may be episodic or temporary for some, requiring intensive supports at specific times, while others may require lifelong support with decision-making and communicating their choices.

Other terms used in reports, legislation, policies, research and official documents referenced in this paper include; 'people with impaired decision-making ability', 'people with impaired capacity', people with an 'impairment of the mind', 'people with cognitive impairment' or, more broadly, 'people with disability' or 'people with a mental health condition'.

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

² Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive summary: Our vision for an inclusive Australia and recommendations*, Final report, (2023), p. 316.

³ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive summary: Our vision for an inclusive Australia and recommendations*, Final report, (2023), p. 316; DV Jeste, GML Eglit, BW Palmer, JG Martinis, P Blanck and ER Saks, 'Supported decision making in serious mental illness', *Psychiatry*, vol. 81, no. 1, 2018, pp. 28-40.

⁴ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive summary: Our vision for an inclusive Australia and recommendations*, Final report, (2023), p. 316.



The criminal justice system

The criminal justice system in Australia is complex, with considerable variability evident at Commonwealth, state and territory levels when it comes to the existence of certain criminal offences and the ways that police services and courts deal with alleged breaches of them. Each jurisdiction also differs in terms of enforcement, prosecution and judgement of criminal charges. Given this variability, it is important to note that this paper explores the criminal justice system in Queensland and the issues that arise in this state.

The criminal justice system in Queensland involves a vast array of people and roles, including the police service, prosecutors, defence lawyers, support groups, the courts, the corrections system, forensic care systems and the parole system.

People with cognitive disability may interact with the criminal justice system for a number of reasons, including as witnesses, as victims of crime, or as those accused of committing a criminal offence. There have been many concerns raised in the past regarding how the criminal justice system interacts with people with disability, including recently in the work of the Disability Royal Commission.⁵

In short, people with cognitive disability are overrepresented in the criminal justice system, leading to concerns about the lack of access to justice for people with disability, and about the mainstream criminal justice system's failure to make sufficient accommodations for the needs of people with disability.⁶

These matters are highly relevant to the Public Advocate's systemic advocacy functions in relation to adults with impaired decision-making ability.

Adults with cognitive disability in the Queensland criminal justice system

This project aims to explore the various issues faced by adults with cognitive disability in Queensland when they interact with the criminal justice system and identify opportunities for reform to ensure that their rights are upheld during these interactions.

The Public Advocate will be seeking feedback from key stakeholders and asking questions focusing on issues relevant to adults with cognitive disability.

A series of discussion papers will be developed and used as the basis for consultations. The papers and consultations will explore key elements of a person's potential involvement with the criminal justice system, and will include these topics:

- policing,
- courts,
- the forensic disability system,
- detention, and
- victims of crime.

The findings from the consultations will inform the development of a reform recommendations report for consideration by the Queensland government.

⁵ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8, (2023).

⁶ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8, (2023).



Scope of this paper

This paper is the second in the series of discussion papers and follows on from a previous paper (April 2024) that explored issues relating to the engagement of adults with cognitive disability with police.

The focus of this discussion paper is mainstream Queensland courts, including the Magistrates, District and Supreme Courts, and the issues that may be experienced by adults with cognitive disability who have been charged with an offence. This paper also considers specialist courts such as the Queensland Drug and Alcohol Court, Specialist Domestic and Family Violence Courts and the Murri Court, as well as programs such as Court Link and the Queensland Intermediary Scheme.

The Mental Health Court, which decides whether a person accused of a crime was of 'unsound mind' when the alleged offence was committed or is 'unfit for trial',⁷ and matters covered under the *Mental Health Act 2016* (Qld), will be the subject of a separate discussion paper.

Issues experienced by adults with cognitive disability who are witnesses to, or victims of, crime as they engage with courts and other components of the criminal justice system will also be explored in a separate discussion paper.

The paper concludes with a series of critical questions designed to guide targeted consultations that will be undertaken with stakeholders to discuss this component of the criminal justice system.

⁷ *Mental Health Act 2016* (Qld) s 21(1).



Courts

The journey through the Queensland court system

The experiences of adults with cognitive disability interacting with courts can differ significantly depending on the offence they are accused of committing and their personal circumstances. The diagram on page 12 provides a broad overview of the steps that adults with cognitive disability may go through as they move through the Queensland court system.

This paper uses, as its starting point, an adult with cognitive disability being charged with an offence by police.

Once a charge is laid by police, there are several pathways leading to a court appearance;

- Being issued with a 'Notice to appear' or given a complaint and summons by police.
 - A notice or summons provides information about the offence (or offences) that a person has been charged with, the location of the court, and the date and time they must appear in court.
 - After being issued with a notice or summons the person can remain living in the community while they wait for their case to be heard.
- Being held in custody by the police at a watch house or remand centre.
 - If someone is held in custody, they will either remain there until their court date or be granted bail by a court.
 - If a person is granted bail they can also live in the community while they wait for their case to be heard in court, however they may be subject to certain conditions.

Most criminal matters are first heard in the Magistrates Court. The Magistrates Court typically conducts the full court process for less serious crimes (called summary offences) and the pre-trial stage of the court process for more serious crimes (called indictable offences).⁸

When a person appears in court, they may speak to a duty lawyer (a free lawyer who may be able to provide legal advice or assist on the court date) who can provide limited legal assistance for that court appearance. Alternatively, the person may choose to employ a private lawyer, receive Legal Aid assistance (if eligible), or decide to represent themselves in court.

Many cases are finalised in the Magistrates Court, however, depending on the seriousness of the offence, some cases are committed to the District or Supreme Court for sentencing or trial.⁹

Depending on their circumstances and eligibility, people may also be referred to a specialist court such as the Murri Court, Specialist Domestic and Family Violence Courts, or the Drug and Alcohol Court.

Some people may alternatively be referred to Court Link to access case management and support to address factors relating to their offending (see page 28 for further information about specialist courts and diversionary options).

Legal Capacity

In Queensland, adults are assumed to have legal capacity. Legal capacity can be understood as 'the ability of a person to make decisions for themselves and deal with their legal affairs'.¹⁰ Further information about legal capacity is provided on page 20.

⁸ Queensland Courts, *About the Magistrates Court*, (27 July 2023), <<https://www.courts.qld.gov.au/courts/magistrates-court/about-the-magistrates-court>>.

⁹ Queensland Courts, *About the Magistrates Court*, (27 July 2023), <<https://www.courts.qld.gov.au/courts/magistrates-court/about-the-magistrates-court>>.

¹⁰ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity*, p. 12.



An adult must have legal capacity to provide instructions to a lawyer and participate in mainstream court processes.

Some adults with cognitive disability may be found to be 'unfit for trial' or to have been of 'unsound mind' when the offence was allegedly committed. Appendix one includes further discussion on policies relating to, and tests of, legal capacity and the role of substitute decision-makers for those who do not have decision-making ability.

Legal Capacity – Summary Offences

If a person is charged with a summary offence, and the person's fitness for trial or soundness of mind is in issue, a Magistrate can:

- dismiss a complaint where the person is unfit for trial or appears to have been of unsound mind when the offence was allegedly committed;¹¹
- adjourn a hearing if the person is temporarily unfit for trial;¹²
- refer a person to Queensland Health or another relevant agency for appropriate treatment or care;¹³ and
- order that a person be examined by an authorised doctor (even where the complaint has been dismissed or the hearing adjourned).¹⁴

To assist the Magistrates Court in determining if a person was of unsound mind at the time of the offence or if they are unfit for trial, the Queensland Health Court Liaison Service can conduct an assessment.¹⁵ These assessments are conducted by accredited senior mental health clinicians, with the support of a consultant psychiatrist.¹⁶ The Court Liaison Service can also make referrals to other services as appropriate to assist with access to further assessment, supports and services.

Legal Capacity – Indictable Offences

If a person is charged with an indictable offence and is suspected to have a mental illness or intellectual disability, the case can be referred to the Mental Health Court.¹⁷ This court will decide whether the person was of 'unsound mind' when the alleged offence was committed and whether they are 'fit for trial'. The Mental Health Court and other matters covered under the *Mental Health Act 2016* (Qld) will be discussed further in a separate discussion paper.

Trials and sentencing

Depending on how a person pleads to the charge (guilty or not guilty) their case will proceed to either a trial or a sentencing hearing.

In some circumstances, the Queensland Police Service (QPS) prosecutor or Office of the Director of Public Prosecutions (ODPP), which typically prosecute offences in the Magistrates Court and higher courts respectively, may choose not to proceed with a prosecution (see page 42 for further information).

If a person pleads guilty or is found guilty of an offence following a trial, a sentencing hearing will be held, and they will be sentenced in accordance with the *Penalties and Sentences Act 1992* (Qld). This may include a non-custodial sentence (for example a fine, a probation order or a community service

¹¹ *Mental Health Act 2016* (Qld) s 172.

¹² *Mental Health Act 2016* (Qld) s 173.

¹³ *Mental Health Act 2016* (Qld) s 174.

¹⁴ *Mental Health Act 2016* (Qld) s 177.

¹⁵ Queensland Health, *Role of the Court Liaison Service in the Magistrates Court*, *Mental Health Act 2016*, factsheet, (1 July 2022), <https://www.health.qld.gov.au/__data/assets/pdf_file/0021/640335/FAQ_Court_Liaison_Service.pdf>.

¹⁶ Queensland Health, *Court Liaison Service*, *Mental Health Act 2016* Chief Psychiatrist Policy, (17 December 2021), <https://www.health.qld.gov.au/__data/assets/pdf_file/0030/638454/cpp_court_liaison_service.pdf>.

¹⁷ Queensland Courts, *About the Mental Health Court*, (21 August 2024), <<https://www.courts.qld.gov.au/courts/mental-health-court/about-the-mental-health-court>>.



order), or a custodial sentence (imprisonment). The Magistrate or judge may also make additional orders such as banning orders, driver licence disqualification, non-contact orders, and restitution or compensation orders.¹⁸

A sentence may be given for the purpose of punishment, rehabilitation, deterrence, denunciation, community protection, or a combination of these purposes.¹⁹ A person's 'intellectual capacity' is one of a number of factors and principles considered by a judge or Magistrate when sentencing an adult.²⁰

Further information about sentencing is provided on page 62.

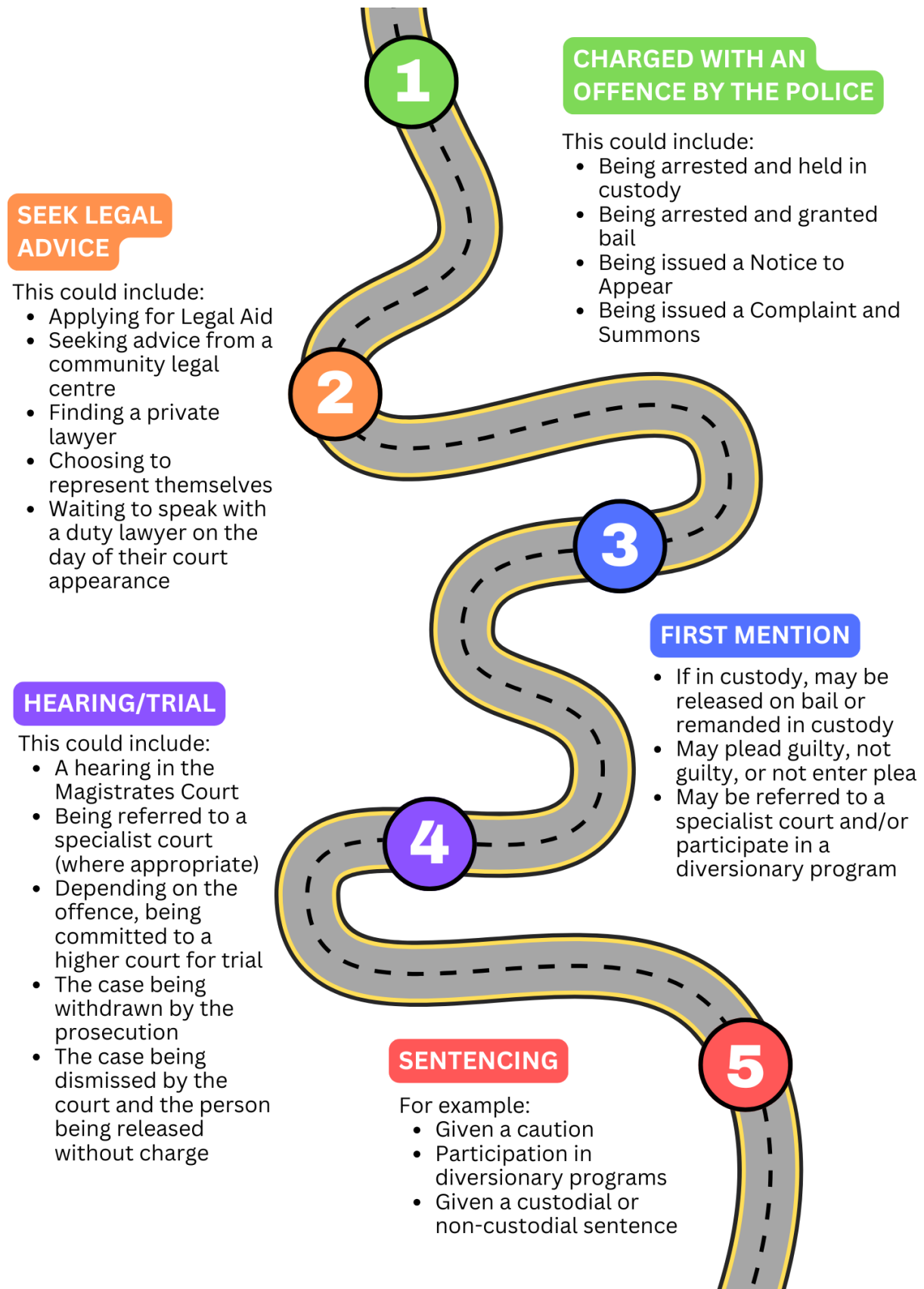
¹⁸ Queensland Sentencing Advisory Council, *Queensland Sentencing Guide*, 2023, <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/572161/QLD-Sentencing-Guide.pdf>.

¹⁹ *Penalties and Sentencing Act 1992* (Qld) s 9.

²⁰ *Penalties and Sentencing Act 1992* (Qld) s 9.



Summary of a person's potential journey through the criminal justice system: Courts



Note: This diagram aims to provide a broad overview of a possible journey for the purpose of discussion, individual cases may potentially be more complex and vary in terms of process and outcomes.

Issues and challenges

In Queensland, under the *Human Rights Act 2019* (Qld), 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination'.²¹ The Act also includes a number of 'Rights in criminal proceedings'²² and rights in relation to a 'Fair hearing'.²³

'Equal recognition before the law'²⁴ and 'Access to justice'²⁵ are also amongst the rights outlined in the United Nations *Convention on the Rights of Persons with Disabilities*, to which Australia is a signatory.

However, despite these commitments and protections, there are a range of issues and challenges that adults with cognitive disability may experience that can affect their participation in court processes and their equal access to justice.

Bail and breach of bail conditions

After being charged with an offence, a person may be granted bail by the police or courts.²⁶ (See page 59 for further information about bail and the *Bail Act 1980*.)

However, there are concerns that adults with cognitive disability may be disadvantaged when it comes to bail applications. For example, adults with cognitive disability can experience difficulty obtaining timely, appropriate supports and accommodation.²⁷ They may therefore be at risk of remaining in custody for extended periods of time, which can negatively affect their access to services and supports. For some people, it can also result in the loss of their housing arrangements.²⁸ This may also result in inconsistencies with the *Human Rights Act*, in relation, for instance, to a person's right to access health services without discrimination.

There are also concerns that some adults with cognitive disability may breach bail due to difficulties with understanding or complying with the bail conditions.²⁹

The *Criminal Procedures Review — Magistrates Courts* report notes that failure to appear under the *Bail Act 1980* is the most common summary offence heard in the Magistrates Court.³⁰

A breach of conditions of bail or failure to appear in court can result in a non-custodial penalty, such as a fine, however it can also result in custodial penalties of up to two years imprisonment.³¹

The Australian Human Rights Commission's (AHRC's) report titled *Equal Before the Law* identified a range of issues that people with disability may experience while they engage with the criminal justice system. The report made a number of recommendations relating to bail, including:

²¹ *Human Rights Act 2019* (Qld) s 15(3).

²² *Human Rights Act 2019* (Qld) s 32.

²³ *Human Rights Act 2019* (Qld) s 31.

²⁴ United Nations, *Convention on the rights of persons with disabilities*, GA Res 61/106, 76th plen mtg, UN Doc A/RES/61/106 (adopted on 13 December 2006), article 12.

²⁵ United Nations, *Convention on the rights of persons with disabilities*, GA Res 61/106, 76th plen mtg, UN Doc A/RES/61/106 (adopted on 13 December 2006), article 13.

²⁶ *Bail Act 1980* (Qld) s 7, 8.

²⁷ Queensland Advocacy Incorporated (QAI), *dis-abled Justice: Reforms to justice for persons with disability in Queensland*, QAI, 2015, p. 92.

²⁸ Centre for Innovative Justice (RMIT University) and Jesuit Social Services, *Recognition respect and support: Enabling justice for people with an acquired brain injury*, <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>.

²⁹ Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014, p. 20.

³⁰ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 56.

³¹ Queensland Sentencing Advisory Council, *Sentencing spotlight on breach of bail offences*, 2017, <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0007/543598/qsac-spotlight-series-breach-of-bail.pdf>.



'ACTION 4.1.3 Align terms and conditions of bail, bonds and restraining orders to a person's abilities and capacity to comply.

...

ACTION 4.1.4 Communicate bail decisions in a format and mode appropriate to the person with disability.

...

ACTION 4.1.5 Provide support to remind a person of bail conditions and support compliance.'³²

Accessibility and participation

Court procedures and the language used during a court appearance can be confusing, stressful, intimidating, and difficult to understand, particularly for adults with cognitive disability.³³ This can affect a person's ability to effectively participate in the process, which is relevant to upholding their human rights.

As described in the *Criminal Procedures Review* report:

Being able to broadly understand and be involved throughout criminal proceedings is known as 'effective participation'. It is directly linked to the right to a fair trial recognised at common law and in sections 31 and 32 of the Human Rights Act 2019.³⁴

There are a number of issues that may affect an adult's ability to take part in, and meet the requirements associated with, court processes.

Complex court processes

The forms and processes that must be followed during court proceedings can be complex, which may result in adults with cognitive disability having trouble understanding or complying with requirements.³⁵

The Queensland Courts website, which provides information about court processes and procedures, may also be challenging for an adult with cognitive disability to navigate and understand. The Supreme Court's Annual report 2021-2022 notes that the website is 'unwieldy and impenetrable' and 'not easily navigated, updated or maintained'.³⁶

The Public Advocate has been advised that work is currently underway to enhance the Queensland Courts website, which may improve its accessibility.

Some people with cognitive disability may also have limited access to computers, mobile devices, and the internet, further exacerbating challenges they have in obtaining timely access to appropriate information.

As noted above, adults with cognitive disability can experience challenges in understanding and complying with bail conditions, including the requirement to attend court on a particular date.

An SMS reminder service has been introduced for adults appearing in the Magistrates Court in Queensland, which includes a reminder five days before and the day before the person's court appearance,³⁷ which may assist in addressing this challenge.

Once at court, general administrative processes can also be confusing and stressful for adults with cognitive disability, as explained in Queensland Advocacy for Inclusion's (QAI's) report *Disabled Justice* (2007):

³² Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014, p. 33.

³³ Centre for Innovative Justice (RMIT University) and Jesuit Social Services, *Recognition respect and support: Enabling justice for people with an acquired brain injury*, <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>.

³⁴ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 54.

³⁵ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007.

³⁶ Supreme Court of Queensland, *Annual report 2021-22*, p. 9.

³⁷ Queensland Courts, *SMS reminder service*, (18 June 2020), <<https://www.courts.qld.gov.au/services/sms>>.



From a participant perspective, Court processes may make little sense, and cause great frustration and anxiety. For example, a person with cognitive disability may be called to attend Court at 10:00am along with 30 other matters in that list. They may not comprehend why they must wait (sometimes several hours) for their matter to be called. They may become confused, frustrated or [lose] concentration and leave the Court. The experience of sitting for several hours in a crowded waiting room may also be very anxiety provoking for a person with psychosocial disability.³⁸

The formality of court proceedings, the language used, and the frequent use of verbal cues and instructions can also create barriers to understanding and participation for adults with cognitive disability.³⁹

A 2023 report that explored the lived experience of people with disability and the Queensland criminal justice system recommended the development of 'specialist accessibility provisions for people with cognitive disability who are required to attend court'.⁴⁰ This could include court familiarisation processes, and accessible information about the courts and court processes,⁴¹ such as information in Easy English.

Building accessibility

When people arrive at court, there may be issues associated with the accessibility of the venue.

QAI's *Disabled Justice* report, published in 2007, noted issues with the accessibility of physical infrastructure, particularly for people who use mobility aids, and the need for more cues to support wayfinding within the courts.⁴²

In 2014, the AHRC's *Equal Before the Law* report also highlighted opportunities to create environments that better support the needs of people with cognitive disability, noting the need for 'quiet rooms for people with disabilities to wait, meet or for break times in court'.⁴³

It is not clear that these issues have been progressed by Queensland Courts since the publication of these reports.

The Public Advocate has been advised that work is currently being undertaken by the Department of Justice (previously known as the Department of Justice and Attorney-General) to develop an accessibility strategy for the courts to improve accessibility for users with diverse needs, including people with cognitive disability.

Giving evidence

Adults with cognitive disability may also experience challenges when giving evidence in court, including understanding the questions that they are asked. For example, they may experience difficulty with the leading or closed questions often used during cross-examination and may be more likely to acquiesce if they do not understand the questions asked.⁴⁴

Through the Queensland Intermediary Scheme (QIS), 'vulnerable witnesses' may receive assistance from an impartial intermediary who can help to facilitate communication with the court. However,

³⁸ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007, p. 95.

³⁹ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007; Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014.

⁴⁰ K Ellem, L Dowse, S Rowe, L Holland, J Cullin, M Parker, and C Henderson, *Final report: Insights from people with lived experience of disability and the justice system*, report to the Department of Justice and Attorney General, Queensland, 2023, p. 15.

⁴¹ K Ellem, L Dowse, S Rowe, L Holland, J Cullin, M Parker, and C Henderson, *Final report: Insights from people with lived experience of disability and the justice system*, report to the Department of Justice and Attorney General, Queensland, 2023, p. 15.

⁴² Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007.

⁴³ Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014, p. 35.

⁴⁴ Queensland Advocacy Incorporated (QAI), *dis-abled Justice: Reforms to justice for persons with disability in Queensland*, QAI, 2015, p. 81.



defendants are not currently eligible for the program (see page 33 for further information about the QIS).

Issues related to giving evidence in court will be explored further in the paper focused on witnesses and victims of crime.

In September 2024, new laws came into effect in the *Criminal Code* where the concept of 'affirmative consent' was introduced for the purposes of sexual offending.⁴⁵ This changed the existing consent and mistake of fact framework to require 'free and voluntary agreement' and specified the criteria and circumstances for when consent can be said to have been given.⁴⁶

In relation to these new laws, an exception was created for a person with a 'cognitive impairment' or a 'mental health impairment', where such a person is not required to take a positive step to ascertain whether the complainant consented.⁴⁷ In cases where this issue is to be raised, a person from an 'expert evidence panel' (which has begun as a pilot program in February 2025) can be engaged to provide evidence about the effect of a person's 'impairment' on their ability to ascertain whether the complainant consented.⁴⁸ (See page 60 for further information regarding the expert evidence panel).

Dignity and respect

People with disability, including cognitive disability, have also reported being subject to disrespectful treatment that negatively affects their experiences across the criminal justice system, including participation in court processes.⁴⁹

Disrespectful treatment can have a range of harmful consequences for people with disability. The report on the Enabling Justice project, which explored the experiences of people with acquired brain injury during their interactions with the criminal justice system in Victoria, explains this further:

A disrespectful environment can have cascading negative impacts for people with an ABI. The absence of respect makes effective communication difficult, increasing the chances that a person's disability will not be recognised. If a person's disability is unrecognised, the necessary supports for them to participate in the criminal justice process may not be made available. Finally, being unable to participate effectively in the criminal justice process can have grave consequences for a person with an ABI, including a wrongful conviction or the imposition of a sentence that is inappropriate or excessive.⁵⁰

Respectful treatment during court proceedings may not only shape a person's current engagement with the criminal justice system, but may also help to reduce future engagement:

If authorities treat the person with dignity and respect, their experience of the CJS [criminal justice system] is likely to be less traumatic, and the person is likely to be more compliant with the law.⁵¹

Provision of supports and reasonable adjustments

Given the challenges described above, the provision of appropriate, timely supports and adjustments is critical to enabling adults with cognitive disability to understand and participate in these processes on an equal basis with others.

⁴⁵ *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld).

⁴⁶ Explanatory Note, *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) 4.

⁴⁷ *Criminal Code Act 1899* (Qld) s 348A(4).

⁴⁸ *Evidence Act 1977* (Qld) s 103ZZE.

⁴⁹ K Ellem, L Dowse, S Rowe, L Holland, J Cullin, M Parker, and C Henderson, *Final report: Insights from people with lived experience of disability and the justice system*, report to the Department of Justice and Attorney General, Queensland, 2023; Centre for Innovative Justice (RMIT University) and Jesuit Social Services, *Recognition respect and support: Enabling justice for people with an acquired brain injury*, <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>.

⁵⁰ Centre for Innovative Justice (RMIT University) and Jesuit Social Services, *Recognition respect and support: Enabling justice for people with an acquired brain injury*, <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>, pp. 55-56.

⁵¹ K Ellem, L Dowse, S Rowe, L Holland, J Cullin, M Parker, and C Henderson, *Final report: Insights from people with lived experience of disability and the justice system*, report to the Department of Justice and Attorney General, Queensland, 2023, p. 77.



As was noted in the *Equal Before the Law* report:

For people with disabilities who have complex or multiple support needs there is an ever-present risk that in the absence of support they will give inconsistent evidence or plead guilty to get the process over.⁵²

Access to appropriate supports may also assist adults to be considered 'fit for trial' and participate in the mainstream court processes, rather than being referred to the Mental Health Court.

For example, the Disability Justice Support Program was a six-month program which involved four trained non-legal support persons providing assistance to people with cognitive disability to exercise their legal capacity.⁵³ The program was operated by three community legal centres located in Victoria, the Northern Territory and New South Wales. People who were interviewed as part of the program evaluation, including support persons, lawyers and two clients who participated in the program, reported that it improved participation and outcomes for people accused of an offence. (Issues related to fitness for trial and legal capacity are explored further below.)

The Justice Advocacy Service, operated by the Intellectual Disability Rights Service (IDRS), can also assist people with cognitive disability by arranging a support person to be present during their interactions with the criminal justice system, including in court.⁵⁴ This service is available in locations across New South Wales, and can also support people who are victims of, or witnesses to, crime.

The *Equal Treatment Benchbook*, published by the Supreme Court of Queensland, aims to provide judges and lawyers with information that may be of assistance in the conduct of cases.⁵⁵ The benchbook includes information about disability, appropriate terminology to use when referring to disability in court, and elements that judges may need to consider during a trial involving a person with disability, including people who are accused of an offence, victims, and witnesses of crime.

Further information about the *Equal Treatment Benchbook* is provided on page 45.

However, people with cognitive disability often do not, or cannot, access required supports or adjustments to assist them in navigating their way through the court system.

Previous reports have noted that this may be due to a range of factors including:

- disability and the need for supports or adjustments not being identified;⁵⁶
- people with cognitive disability not being aware that they are able to access supports or adjustments, or having difficulty requesting supports or adjustments;⁵⁷
- limited availability of support workers, or support workers and interpreters not being booked;⁵⁸
- communication devices can be disallowed in court;⁵⁹
- high workloads and time pressure limiting the opportunity for lawyers to use flexible or individualised approaches;⁶⁰ and,
- challenges associated with balancing the need for timeliness and cost-effectiveness with fairness and effective participation.⁶¹

Several reports have also made recommendations relating to the support provided to adults with cognitive disability during courts processes.

⁵² Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014, p. 26.

⁵³ P Gooding, B McSherry, and A Arnstein-Kerslake, 'Supported decision-making in criminal justice proceedings: A sociolegal empirical study', *Journal of Disability Policy Studies*, 2023, vol 34(1), pp. 28-38.

⁵⁴ IDRS, Justice Advocacy Service, (2024), <<https://idrs.org.au/jas/>>.

⁵⁵ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016.

⁵⁶ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8, (2023); Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014.

⁵⁷ Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014.

⁵⁸ Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014, p. 24.

⁵⁹ Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies*, 2014, p. 24.

⁶⁰ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8, (2023), p. 173.

⁶¹ Law Council of Australia, *The Justice Project, Final report- part 2: Courts and tribunals*, 2018, p. 9.



For example, the Disability Royal Commission recommended that:

The Commonwealth, state and territory criminal justice systems should provide information about seeking or making adjustments and supports and services for people with disability, and the circumstances in which they may be required. This information should be made available to judicial officers, legal practitioners and court staff, including through practice notes or bench books.⁶²

Both the Australian Government and the Queensland Government accepted this recommendation of the Disability Royal Commission in principle.⁶³

In response to this recommendation, as noted above, the Queensland Department of Justice is developing an accessibility strategy, which will include strategies to improve the accessibility of the courts for people with disability.

In considering how information and supports could be made more accessible to court users, the *Criminal Procedures Review* report notes that Queensland Courts could adopt a similar approach to the New South Wales Courts, which have a 'more streamlined' website.⁶⁴ The website also provides information for people seeking reasonable adjustments and has a single point of contact for court users to request reasonable adjustments.

The report also noted that 'the format of all court information (whether orders, procedures, general contact advice or forms) needs review as a priority.'⁶⁵

The *Criminal Procedures Review* report recommended that new legislation be introduced in Queensland for criminal procedures in the Magistrates Court and that:

The object of the Act is to set out a contemporary and effective criminal procedure framework for the Magistrates Courts that:

- a) simplifies court procedures and encourages better understanding for all court users;
- b) enables matters to be dealt with in a way that is accessible, fair, just, consistent and timely...⁶⁶

The report also noted that:

We heard any new legislation should change the criminal procedure rules to require the court to inform itself if any adjustments are needed to be able to participate effectively in the proceedings. It should further include the right for defendants to have reasonable procedural adjustments based on individual needs. These could include making required appropriate adjustments in the interests of justice, such as:

- a support person to provide emotional support to the defendant
- listing the case at a preferred time
- informal seating arrangements
- removing formal attire such as uniforms, and robes
- permitting additional breaks or questions limited by time
- reducing the number of personal court appearances required
- accessing and using video-link or other technology
- closing the court
- using communication devices
- using simple language and terms
- allowing extra time for the defendant to understand and respond.⁶⁷

The report on the Enabling Justice project in Victoria (noted above) recommended improved information sharing to enable agencies, with the consent of the person, to share information about

⁶² Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8, (2023), p. 153.

⁶³ Australian Government, *Australian Government Response to the Disability Royal Commission*, 2024; Queensland Government, *Queensland Government response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 2024.

⁶⁴ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 432.

⁶⁵ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 8.

⁶⁶ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume two: Appendix C — Drafting Instructions, 2023, p.1.

⁶⁷ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, pp. 66-67.



their needs, diagnoses and the professionals who support them, where this information is used to benefit the person with disability.⁶⁸

Previous reports have also made recommendations related to supporting a person's legal capacity, which are explored in more detail below.

Identification and recognition of disability

Identification of cognitive disability is critical to ensuring that an adult can access appropriate supports, adjustments and diversionary options within the court system.

However, there is no standardised screening or assessment process used to identify adults who may have cognitive disability as they come into contact with the courts.

Adults with cognitive disability may also be reluctant to identify themselves as having a disability or may have difficulty communicating their support needs.

Additionally, as the court registries use a system that focuses on a legal case rather than a person-based approach, the system will not automatically flag or indicate adults who have been previously identified as having a disability or the supports they required during previous engagements with courts or the criminal justice system.

Registry staff can however act on specific requests for supports when identified.

As a result, lawyers often play an important role in identifying an adult's cognitive disability and proposing diversionary or sentencing options.

However, identification of cognitive disability can be challenging due to a lack of knowledge and experience in working with people with disability.⁶⁹ The limited timeframes in which lawyers, including duty lawyers, must often work can also create a barrier to identification of cognitive disability.⁷⁰

QAI's *Disabled Justice* (2007) report also noted that some lawyers may choose not to explore a client's cognitive disability where this is suspected, believing that they do not have the time or resources to do so, or that the person would be better off pleading guilty and 'getting on with their lives'.⁷¹

Regardless of the reasons that an adult's cognitive disability can go unrecognised, there can be serious consequences for that person, including an unjust conviction.⁷² It can also result in a lost opportunity to identify an adult's need for referrals and support, and reoffending may occur, potentially resulting in more serious consequences than flow from the initial offence.

The Queensland Productivity Commission's (QPC's) *Inquiry into Imprisonment and Recidivism* final report also discussed the role of pre-sentence screening and assessment, particularly for adults with a mental illness or intellectual disability, in ensuring that any sentences imposed by the courts were 'efficient and effective'.⁷³ However, the report also notes that a requirement for pre-sentence screening could lead to delays in proceedings.

⁶⁸ Centre for Innovative Justice (RMIT University) and Jesuit Social Services, *Recognition respect and support: Enabling justice for people with an acquired brain injury*, <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>, pp. 69-70.

⁶⁹ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007; Centre for Innovative Justice (RMIT University) and Jesuit Social Services, *Recognition respect and support: Enabling justice for people with an acquired brain injury*, <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>.

⁷⁰ Centre for Innovative Justice (RMIT University) and Jesuit Social Services, *Recognition respect and support: Enabling justice for people with an acquired brain injury*, <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>.

⁷¹ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007, p. 91.

⁷² Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007.

⁷³ Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, Final Report, 2019, p. 297.



Previous reports have also highlighted the need for improved screening and assessment of cognitive disability,⁷⁴ and noted the need for, or recommended, additional and/or ongoing training for lawyers, court staff and Magistrates to support the identification of, and responses to, a person's disability support needs.⁷⁵

Use of culturally appropriate screening tools, including for Aboriginal and Torres Strait Islander peoples, is also critical. The Guddi Way screen is an example of one such tool that is being used in the Murri Court in Brisbane and Richlands to assist Magistrates in understanding how people can be better supported through the Murri Court process.⁷⁶

Determination of legal capacity

As previously noted, in Queensland, all adults are presumed to have 'legal capacity' unless proven otherwise. Legal capacity can be broadly understood as 'the ability of a person to make decisions for themselves and deal with their legal affairs'.⁷⁷

A person's legal capacity is relevant to whether they are able to instruct a lawyer, and to the determination of their 'fitness for trial' and (as discussed in the overview on page 9) can also affect the legal outcome of a case.

Determining legal capacity can be complex. The *Queensland Handbook for Practitioners on Legal Capacity* provides a framework for lawyers to use to assess whether a client is able to provide legal instructions (see page 37 for further information relating to the *Queensland Handbook for Practitioners on Legal Capacity*).

The *Criminal Law Duty Lawyer Handbook* also provides information about how a duty lawyer can determine whether they should take instructions from a client, including the Presser test.⁷⁸ It outlines considerations in situations where there is a question about the client's capacity, and whether the lawyer should consider a referral to the Mental Health Court (see page 40 for further information about the *Criminal Law Duty Lawyer Handbook*).⁷⁹

There are also other guidelines that assist in determining the capacity of another person, such as the Queensland Capacity Assessment Guidelines 2000.⁸⁰ However, these guidelines are designed to understand capacity, capacity assessments and the legal tests for capacity regarding Queensland's guardianship legislation and are not specific to the determination of legal capacity for the purposes of other legal processes.

In Queensland, the common law Presser test, established in *R v Presser* [1958] VR 45, is used to determine whether a person is fit for trial. The criteria include:

1. Ability to understand the charge — this involves a basic understanding of the essential facts of the charge and the elements of the offence.
2. Ability to plead to the charge and to exercise the right of challenge — the client must understand that a plea of guilty is an acceptance that the essential facts and elements of the offence are established.
3. An understanding of the nature of the proceedings, namely, that it is an inquiry as to whether he/she committed the offence charged — the client must understand that he/she is involved in a formal process inquiring into his/ her responsibility for the matter alleged and be aware of the potential consequences of that process.

⁷⁴ Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, Final Report, 2019.

⁷⁵ Queensland Advocacy Incorporated (QAI), *dis-abled Justice: Reforms to justice for persons with disability in Queensland*, QAI, 2015; Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8, (2023); Centre for Innovative Justice (RMIT University) and Jesuit Social Services, *Recognition respect and support: Enabling justice for people with an acquired brain injury*, <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>; M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023.

⁷⁶ Synapse, *Guddi Way Screen*, (2024), <<https://synapse.org.au/creating-real-change/our-research-work/research-projects/guddi-way/>>.

⁷⁷ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity*, p. 12.

⁷⁸ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014.

⁷⁹ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014.

⁸⁰ Queensland Government, *Queensland Capacity Assessment Guidelines 2020*, 7 April 2021.



4. Ability to follow the course of proceedings so as to understand what is happening in court in a general sense, though not necessarily understand the purpose of all the various court formalities — this involves following the proceedings and understanding the roles of the various participants.
5. Ability to understand the substantial effect of the evidence that may be given — the client must have an awareness of the implications of the prosecution evidence.
6. Ability to make a defence or answer to the charge — the client must be able to give the court a basic version of the facts as he/she claims them to be, if necessary through his/her lawyer, by entering the witnesses box and responding to questions in evidence-in-chief and cross-examination.⁸¹

This test is intended as a protective measure to prevent people from being tried for a crime if they are not able to defend themselves.⁸²

However, concerns have been raised that these criteria focus on intellectual ability, and do not adequately consider decision-making ability or whether a person may be able to stand trial if appropriate supports and adjustments are provided.⁸³

This can result in a person being found unfit for trial, and potentially subject to indefinite detention, or detained for periods longer than what they may have experienced if sentenced through mainstream court processes (the forensic disability system and the issue of indefinite detention will be explored in more detail in a separate discussion paper).⁸⁴

To address these issues, QAI's *dis-Abled Justice* report (2015) recommends that:

Any test for fitness to plead or to stand trial should be based on a person's decision-making ability in the context of the particular criminal proceedings which he or she faces. Any test should take into account the supports mandated by Article 12 of the *Convention on the Rights of Persons with Disabilities*.⁸⁵

In its final report, the Disability Royal Commission also noted the need for:

the tests for fitness to stand trial be amended, insofar as necessary, so a court must consider whether the accused person could participate in a trial if they were provided with adequate support or assistance and modifications to court processes. These should include cultural supports, particularly for First Nations people, necessary to support their disability needs.⁸⁶

Access to legal advice and representation

Access to legal advice and representation is critical for all people who engage with the criminal justice system and is particularly important for adults with cognitive disability who may require additional advice and assistance to navigate the court and legal representation system.

There are a number of issues and challenges that adults with cognitive disability may experience when trying to access legal advice and services. For example, some services or practitioners can potentially display negative attitudes towards people with disability or may have a lack of knowledge or experience in working with people with disability.⁸⁷ This can include issues relating to identifying disability, communication, working with people who support an adult with disability, and use of reasonable adjustments.

⁸¹ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 210.

⁸² Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, discussion paper, 2014.

⁸³ Queensland Advocacy Incorporated (QAI), *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*, QAI, 2015; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, discussion paper, 2014.

⁸⁴ Queensland Advocacy Incorporated (QAI), *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*, QAI, 2015.

⁸⁵ Queensland Advocacy Incorporated (QAI), *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*, QAI, 2015, p. 74.

⁸⁶ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023), p. 150.

⁸⁷ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007, p. 76; K Ellem, L Dowse, S Rowe, L Holland, J Cullin, M Parker, and C Henderson, *Final report: Insights from people with lived experience of disability and the justice system*, report to the Department of Justice and Attorney General, Queensland, 2023.



There are several ways in which people with cognitive disability may seek to access legal advice and representation. The potential challenges associated with each is detailed below.

Private legal services

People may choose to hire a private lawyer however this can be costly,⁸⁸ and may not be an affordable option for some people with cognitive disability.

Legal Aid, the Aboriginal and Torres Strait Islander Legal Service, and Community Legal Centres

Some people may be eligible for Legal Aid. Legal Aid Queensland is funded by the Queensland Government to undertake state law matters, including criminal matters, for people experiencing financial disadvantage.⁸⁹

Due to the high demand for Legal Aid services, strict criteria are used to prioritise more serious offences, which means that people seeking to defend less serious charges may not be able to access this service.⁹⁰

The Aboriginal and Torres Strait Islander Legal Service (ATSILS) provides a range of legal services, including criminal law services, to eligible Aboriginal and Torres Strait Islander people in Queensland.⁹¹

In Queensland, there are also 34 community legal centres, which provide 'free information, legal assistance and referral, representation and casework, community education and advocacy for vulnerable clients and communities facing legal problems.'⁹² Some community legal centres may be able to assist eligible people with particular criminal matters.

However, the 2022-23 sector survey found that, due to inadequate funding and staffing, community legal centres across Australia are struggling to meet the growing demand for services. It is estimated that 350,000 people who were seeking assistance with legal problems were turned away during that period.⁹³

A recent review of the National Legal Assistance Partnership, which includes funding for Legal Aid Commissions, community legal centres, and Aboriginal and Torres Strait Islander Legal Services, found that current levels of funding are insufficient to meet legal assistance needs.⁹⁴ This review made 39 recommendations to address the challenges identified for the legal assistance sector and to improve access to these services for those who need assistance.

Duty Lawyers

Duty lawyers can provide free legal advice or assistance to people who have been charged with a criminal offence and who are attending the Magistrates Court.⁹⁵ A duty lawyer can only assist a person on the day that their case is listed in court.

Duty lawyers, according to Legal Aid Queensland, can typically provide advice or represent a person in court where they need assistance with:

- pleading guilty for less complex matters

⁸⁸ K Ellem, L Dowse, S Rowe, L Holland, J Cullin, M Parker, and C Henderson, *Final report: Insights from people with lived experience of disability and the justice system*, report to the Department of Justice and Attorney General, Queensland, 2023.

⁸⁹ Legal Aid Queensland, *Legal Aid Queensland, How we are funded*, (11 May 2023), <<https://www.legalaid.qld.gov.au/About-us/Our-organisation/Legal-Aid-Queensland>>.

⁹⁰ Queensland Advocacy Incorporated (QAI), *dis-Abled Justice: Reforms to justice for persons with disability in Queensland*, QAI, 2015.

⁹¹ Aboriginal and Torres Strait Islander Legal Service, *Criminal law*, <<https://atsils.org.au/indigenous-legal-assistance/#tab-id-2>>.

⁹² Community Legal Centres Queensland, *About us*, (2025), <<https://www.communitylegalqld.org.au/about-us/>>.

⁹³ Community Legal Centres Australia, *State of the sector 2022-23 survey report: A sector in crisis, 2024*, <https://clcs.org.au/wp-content/uploads/2024/03/SotS22-23SurveyReport_ASectorInCrisis.pdf>.

⁹⁴ W Mundy, *Independent Review of the National Legal Assistance Partnership*, Final Report, 2024, <<https://www.ag.gov.au/sites/default/files/2024-06/NLAP-review-report.PDF>>.

⁹⁵ Legal Aid Queensland, *Criminal law duty lawyer*, (16 May 2024), <<https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Criminal-court-process/Criminal-law-duty-lawyer>>.



- criminal cases in the Magistrates Court (adjourn)
- bail
- changing your bail conditions
- bail breaches
- probation breaches
- extradition proceedings.⁹⁶

Duty lawyers can also assist in obtaining a police summary of the charge (QP9) and may be able to hold a case conference with the prosecutor.⁹⁷

Duty lawyers cannot provide ongoing assistance to an adult who has decided to defend a charge. In these circumstances, an adult needs to put in an application for Legal Aid, seek assistance from a community legal centre, or retain the services of a private lawyer.

QAI's *Disabled Justice* (2007) report noted concerns that the immediate availability of the duty lawyer to assist a person to plead guilty, but not defend the matter, may create an incentive to plead guilty, particularly where an adult has a cognitive disability.⁹⁸

The report also noted concerns that, given the time constraints faced by duty lawyers, identification of disability can be challenging.⁹⁹ Even where potential cognitive disability is suspected, some lawyers may take the view that the matter is best resolved through a guilty plea, which may provide immediate resolution to the matter at hand, but create further difficulties in the longer term for the adult with cognitive disability.¹⁰⁰

Self-representation

Adults may also appear in court without legal representation. This is more common in the Magistrates Court than in higher courts.¹⁰¹

There are a range of reasons why people may not have legal representation, including that it may be their preference to represent themselves in court. However, the *Criminal Procedures Review* report noted that stakeholders had reported an increasing trend in unrepresented defendants and noted that this was often related to the limited availability of legal aid funding for matters heard in the Magistrates Court.¹⁰² The legal system can be difficult to understand and navigate, and the report notes that unrepresented defendants may be disadvantaged without the knowledge and skills of a lawyer. This may also contribute to court delays, as Magistrates are required to explain procedures and rights to ensure that those who choose to self-represent receive a fair trial.¹⁰³

Given the lack of data available relating to adults with disability and their interactions with the criminal justice system, the type of legal services accessed by people with cognitive disability, and how well they meet their needs, is unclear.

Sentencing and diversion

As previously noted, where a person pleads guilty or is found guilty of an offence, they can be sentenced to a custodial or non-custodial sentence in accordance with the *Penalties and Sentences Act 1992* (for more information on this Act, see page 62).

⁹⁶ Legal Aid Queensland, *Criminal law duty lawyer*, (16 May 2024), <<https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Criminal-court-process/Criminal-law-duty-lawyer>>.

⁹⁷ Legal Aid Queensland, *Criminal law duty lawyer*, (16 May 2024), <<https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Criminal-court-process/Criminal-law-duty-lawyer>>.

⁹⁸ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007, p. 83.

⁹⁹ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007, p. 83.

¹⁰⁰ Queensland Advocacy Incorporated (QAI), *Disabled Justice: The barriers to justice for persons with disability in Queensland*, report prepared by P French, QAI, 2007, p. 84.

¹⁰¹ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 51.

¹⁰² M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 51.

¹⁰³ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 52.



The QPC's report on its *Inquiry into imprisonment and recidivism* noted that rates of imprisonment are increasing, which is associated with a range of challenges:

... the costs of imprisonment are likely to outweigh the benefits, with increasing imprisonment working to reduce community safety over time:

- It costs around \$111,000 per year to accommodate a prisoner, with indirect costs in the order of \$48,000 per person, per year.
- Prisons are not effective at rehabilitation and can increase the likelihood of reoffending.
- Without action to reduce growth, the government will need to build up to 4,200 additional cells by 2025. This will require investments of around \$3.6 billion.¹⁰⁴

While there is limited information available, existing data suggests that adults with cognitive disability are overrepresented within prisons.¹⁰⁵ These environments also create a range of challenges for adults with cognitive disability, with reports indicating that people in this cohort are at risk of violence and abuse, and face barriers to accessing appropriate disability-related supports.¹⁰⁶ These experiences can negatively impact an adult's transition back to the community, instead contributing to their 'enmeshment' in the criminal justice system.¹⁰⁷

The topic of the imprisonment of adults with cognitive disability, and their transition back to the community, will be explored further in a future discussion paper.

In a bid to address the overrepresentation of adults with cognitive disability entering detention, a number of reports have made recommendations to increase the sentencing and diversionary options available to courts in Queensland.

For example, the Disability Royal Commission recommended that:

The Australian Capital Territory, Northern Territory, Queensland and Tasmanian governments should develop and fund court-based diversion programs for people with disability charged with summary offences in local or magistrates' courts which:

- are accessible and culturally appropriate, particularly in regional and remote areas
- provide support for defendants to access the NDIS
- satisfy service needs, including connecting defendants to appropriate education, housing, employment and other services.

All states and territories should commission independent evaluations of their diversion programs. Any evaluation should assess and, where feasible, quantify economic and social benefits for both individual defendants and the community as a whole.¹⁰⁸

In its response to the Disability Royal Commission, the Queensland Government accepted this recommendation in principle and noted that:

The Queensland Government acknowledges there are limited diversionary options for adults and children charged with summary offences who do not meet the threshold for dismissal of charges under the *Mental Health Act 2016* (Qld), and that effective, court-based diversion programs have the potential to reduce the number of people with disability entering the justice system.

The Queensland Government will pilot a disability stream as part of the Court Link program in the Brisbane Magistrates Court. This pilot will aim to support identified adult defendants who present with formally diagnosed or suspected cognitive disability to access support as well as referrals to service providers and

¹⁰⁴ Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, final report, 2019, p x.

¹⁰⁵ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023).

¹⁰⁶ Human Rights Watch, 'I needed help, instead I was punished': Abuse and neglect of prisoners with disabilities in Australia, 2018; Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023).

¹⁰⁷ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023).

¹⁰⁸ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023), p. 27.



programs (including the NDIS). The enhanced model will be evaluated prior to any potential expansion across other Court Link sites.¹⁰⁹

Further information about Court Link and the pilot disability stream is provided on page 28.

Several previous reports have also recommended the consideration of or introduction of diversionary options that, while not specifically focused on adults with disability, may also be of benefit to them.

These recommendations include:

- the exploration of, or establishment of, deferred prosecution arrangements;¹¹⁰
- the expansion of adult restorative justice conferencing;¹¹¹
- the exploration of conditional cautioning for low-level offenders;¹¹² and
- the introduction of a Summary Offences Diversion Program potentially modelled on Victoria's Criminal Justice Diversion Program.¹¹³

In Victoria, the Criminal Justice Diversion Program operates out of the Magistrates Court.¹¹⁴ Under this program, court proceedings may be adjourned for up to 12 months to enable the defendant to complete a diversion plan. Diversion plans can include conditions such as apologising to, or providing compensation to the victim, donating to a charitable organisation, undertaking counselling or treatment, or completing an education course.¹¹⁵ The program is targeted at first-time offenders or people charged with minor offences, to enable them to avoid obtaining a criminal record.

To increase the sentencing options available to courts, the QPC's report recommended the introduction of a new community corrections order to increase the range of alternatives to prison sentences available to the courts. It recommended that this include a residential supervision order to provide 'better rehabilitation options for offenders with cognitive impairment, mental illness, drug problems or other relevant circumstances'.¹¹⁶

The introduction of a community correction order was also recommended by the Queensland Sentencing Advisory Council in its report on *Community-based sentencing orders, imprisonment and parole options*.¹¹⁷

In response to a recommendation from the Women's Safety and Justice Taskforce's *Hear Her Voice* report (report two, volume one),¹¹⁸ amendments were made to section 9(2) of the *Penalties and Sentences Act 1992* to require the court to consider, amongst other factors, the following when sentencing an offender:

the hardship that any sentence imposed would have on the offender, having regard to the offender's characteristics, including age, disability, gender identity, parental status, race, religion, sex, sex characteristics and sexuality ...¹¹⁹

¹⁰⁹ Queensland Government, *Queensland Government response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 2024, p. 103.

¹¹⁰ Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, Final Report, 2019, p. lvi; Women's Safety and Justice Taskforce, *Hear her voice, Report two, Volume one, Women and girls' experiences across the criminal justice system*, 2022, p. 26.

¹¹¹ Women's Safety and Justice Taskforce, *Hear her voice, Report two, Volume one, Women and girls' experiences across the criminal justice system*, 2022, p. 25; M Shanahan, *Criminal Procedure Review — Magistrates Courts, Volume one: Summary report*, 2023, p. 279.

¹¹² Women's Safety and Justice Taskforce, *Hear her voice, Report two, Volume one, Women and girls' experiences across the criminal justice system*, 2022, p. 26.

¹¹³ M Shanahan, *Criminal Procedure Review — Magistrates Courts, Volume one: Summary report*, 2023, p. 279.

¹¹⁴ Sentencing Advisory Council (Victoria), *The Criminal Justice Diversion Program in Victoria, Second statistical profile*, 2024.

¹¹⁵ Sentencing Advisory Council (Victoria), *The Criminal Justice Diversion Program in Victoria, Second statistical profile*, 2024.

¹¹⁶ Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, Final Report, 2019, p. l.

¹¹⁷ Queensland Sentencing Advisory Council, *Community-based sentencing orders, imprisonment and parole options: Final report*, 2019, p. xxvii.

¹¹⁸ Women's Safety and Justice Taskforce, *Hear her voice, Report two, Volume one, Women and girls' experiences across the criminal justice system*, 2022, recommendation 126, p 30.

¹¹⁹ *Penalties and Sentences Act 1992* (Qld) s 9(2)(fa).



Overrepresentation and lack of data

It is widely understood that adults with cognitive disability are overrepresented at each stage of the criminal justice system, including in the courts.¹²⁰

As was noted by the Disability Royal Commission in its final report:

It is clear from the evidence that the disproportionate rate of imprisonment of people with disability is not the result of any inherent causal relationship between disability and crime. Rather it reflects the disadvantages experienced by many people with disability, such as poverty, disrupted family backgrounds, family violence and other forms of abuse, misuse of drugs and alcohol, unstable housing and homelessness.¹²¹

Aboriginal and Torres Strait Islander peoples with cognitive disability are also overrepresented and can face multiple types of discrimination and disadvantage in their interactions with this system.

Poor experiences of the criminal justice system, including in courts, and a lack of support, can serve to exacerbate this disadvantage, which can lead to people with cognitive disability becoming 'caught up in a cycle of reoffending and incarceration'.¹²²

Similar to other components of the criminal justice system, there is limited data available on the number of defendants with disability who appear in Queensland courts, the programs and supports that they engage with throughout the process, and the outcomes that they experience. Additional data on the interactions of people with cognitive disability with the courts would assist with the identification of opportunities for future improvements, and the development and evaluation of diversionary and support programs.

The *Criminal Procedures Review* report noted that the lack of statistics about the work of the Magistrates Court is largely due to limitations with the system used to record court outcomes, the Queensland Wide Inter-linked Court (QWIC) database.

... it is impossible to further analyse the results of summary hearings to discover whether it was a finding of guilt or the entry of a plea of guilty. It is impossible to further particularise the types of cost orders made. The system also does not permit the recording of information about a particular defendant such as language or disability which impact on their interactions with the court system. It also does not allow the notation of the appointment of the Public Guardian for a legal matter in relation to a person with impaired decision-making capacity. A result is that there is no notification to the Public Guardian when that person is before the courts.¹²³

The *Hear Her Voice* report (report two, volume one) by the Women's Safety and Justice Taskforce recommended the replacement of the QWIC database (recommendation 177).¹²⁴ The Queensland Government supported this recommendation and has agreed to replace QWIC.¹²⁵

The *Criminal Procedures Review* report noted that the consistency and accuracy of data entry is also likely affected by a lack of data rules to guide data entry, and the use of a paper-based system in courts, which means that data must be manually entered into the system.¹²⁶

¹²⁰ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023); M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023.

¹²¹ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023), p. 33.

¹²² Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023), p. 4.

¹²³ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 9.

¹²⁴ Women's Safety and Justice Taskforce, *Hear her voice, Report two, Volume one, Women and girls' experiences across the criminal justice system*, 2022.

¹²⁵ Queensland Government, *Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, Hear her Voice, Report two, Women and girls' experiences across the criminal justice system*, 2022, p. 53.

¹²⁶ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, pp. 26-27.



In 2022, the Department of Justice (previously the Department of Justice and Attorney General) established the Courts and Tribunal Digitisation Project, which will seek to 'provide new digital solutions for use across court services, to enhance service delivery enabling a digitised court and tribunal system'.¹²⁷

Current strategies and programs

A key strategy for the then Queensland Department of Justice and Attorney-General, which includes the courts, during the 2021-2022 financial year included:

enhancing service delivery enhancements and access to justice services for vulnerable and disadvantaged Queenslanders such as victims of crime, adults with impaired capacity, children in need of protection, people with disability, and people overrepresented in the justice system.¹²⁸

In June 2022, the Attorney-General announced that \$246.8 million had been allocated to the modernisation of the courts over the next five years.¹²⁹ This includes funding for upgrades to court houses and technological improvements that will enable court users to 'interact virtually with the courts where appropriate'.¹³⁰

The Queensland Government has committed to pilot a disability stream as part of the Court Link program in the Brisbane Magistrates Court, consistent with the Queensland Government response to the Disability Royal Commission final report.¹³¹ The Queensland Government response also notes that:

This pilot will aim to support identified adult defendants who present with formally diagnosed or suspected cognitive disability to access support as well as referrals to service providers and programs (including the NDIS). The enhanced model will be evaluated prior to any potential expansion across other Court Link sites.¹³²

Further information about Court Link is provided below.

The Public Advocate has also been advised that work is underway within the Department of Justice to understand, and improve, the accessibility of the courts, to culminate in the development and implementation of a Courts Accessibility Strategy (noted previously in this report).

The First Nations Justice Office (FNJO), which is part of the Department of Justice, was established by the Queensland Government in 2023 in response to the Women's Safety and Justice Taskforce report *Hear Her Voice— Report One —Addressing coercive control and domestic and family violence in Queensland*.¹³³

The FNJO developed, and will lead the oversight and implementation of, the *Better Justice Together: Queensland's Aboriginal and Torres Strait Islander Justice Strategy 2024-2031*, which aims to address the overrepresentation of Aboriginal and Torres Strait Islander peoples in the Queensland criminal justice system.¹³⁴ The strategy was co-designed with Aboriginal and Torres Strait Islander community

¹²⁷ Queensland Government, *Welcome to the Courts and Tribunals Digitisation Program*, <<https://talk.justice.qld.gov.au/hub-page/courts-and-tribunals-digitisation-program>>.

¹²⁸ The State of Queensland, *Department of Justice and Attorney-General annual report 2021–22*, p. 6.

¹²⁹ S Fentiman (Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence) *Budget delivers access to justice for Queenslanders*, media release, The State of Queensland, 21 June 2022.

¹³⁰ S Fentiman (Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence) *Budget delivers access to justice for Queenslanders*, media release, The State of Queensland, 21 June 2022.

¹³¹ Queensland Government, *Queensland Government response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 2024.

¹³² Queensland Government, *Queensland Government response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 2024, p. 103.

¹³³ The State of Queensland (Department of Justice), *First Nations Justice Office*, (26 July 2024), <<https://www.justice.qld.gov.au/about-us/services/first-nations-justice-office>>.

¹³⁴ The State of Queensland (Department of Justice), *First Nations Justice Office*, (26 July 2024), <<https://www.justice.qld.gov.au/about-us/services/first-nations-justice-office>>.



members, community-controlled organisations, government agencies, and non-government organisations.¹³⁵

The FNJO will also be responsible for conducting a review of the strategies of criminal justice agencies and identifying recommendations to achieve a system that strongly supports cultural safety. This action is in response to the Disability Royal Commission's recommendation that:

By the end of 2024, state and territory governments should review the effectiveness of their strategies, if any, directed to providing and ensuring the cultural safety of First Nations people with disability in criminal justice settings and in doing so take into consideration what the Royal Commission has heard about that issue.

The review findings and recommendations should be made public.¹³⁶

As Aboriginal and Torres Strait Islander peoples with disability are significantly overrepresented in the criminal justice system,¹³⁷ this strategy, and the work of the FNJO, is also highly relevant to this office's work on adults with cognitive disability in the criminal justice system.

There are also a number of specialist courts and programs that have been designed to support diversion away from the criminal justice system or facilitate better outcomes and experiences for those appearing before the courts. While they have not been designed specifically for adults with cognitive disability, eligible people with cognitive disability may benefit from engagement with these courts and programs.

Specialist courts and programs

Court Link

Court Link is a voluntary 'integrated court assessment, referral and support program'¹³⁸ designed to support adults to address issues related to the frequency or severity of their offending. This may include issues such as:

- drug and alcohol dependency or misuse
- physical and/or mental health issues
- impaired decision-making capacity
- homelessness or risk of homelessness.¹³⁹

A referral to Court Link can be made when a person appears before the Magistrates Court charged with any criminal offence. To be eligible for the program, people must have been granted bail, but unlike some of the other diversionary programs (e.g., QDAC, Murri Court) there is no requirement for the person to plead guilty to participate in the program.¹⁴⁰

People may be referred to the program by a Magistrate, the police, a person's legal representative, family or other supports, or they may self-refer.¹⁴¹ The court will then decide whether a person is admitted to Court Link case management.

Following a referral, Court Link officers assess a person's level of risk and needs to determine the services required.¹⁴² People assessed as low risk, or as having lower level needs, may be referred to appropriate community-based services as required. Those deemed to be at moderate to high risk and

¹³⁵ The State of Queensland (Department of Justice and Attorney-General), *Better Justice Together: Queensland's Aboriginal and Torres Strait Islander Justice Strategy 2024-2031*.

¹³⁶ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *First Nations people with disability*, Final report, Volume 9 (2023), p. 8.

¹³⁷ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8 (2023).

¹³⁸ Queensland Courts, Court Link, (15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

¹³⁹ Queensland Courts, Court Link, (15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

¹⁴⁰ Queensland Courts, Court Link, (15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

¹⁴¹ Queensland Courts, Court Link, (15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

¹⁴² Queensland Courts, *Court Link*, fact sheet, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0008/583172/cip-fs-court-link.pdf>.



need may be admitted by the court to case management, where they receive support from qualified Court Link case managers and their progress is monitored by the court.

During this process, a case manager will work with the person to develop a case plan and assist with the coordination of referrals to community-based support services.

Court Link case managers can also provide support to collect information (including supporting the participant to complete relevant psychological assessments) to apply to access NDIS supports and services. If a participant already has NDIS access, but they do not have a plan or their plan does not meet their needs, Court Link case managers can provide support to enable the participant to exercise choice and control around their disability support and goals. (Further information about Court Link, participation in the program and the types of services available can be found on page 51.)

Court Link case managers provide progress reports for the court to assist with judicial monitoring. These reports include information about the person's level of engagement with the program. At the final Court Link mention, a final report on the adult's participation will be provided to the court, which may be considered during sentencing if the person is found guilty of an offence.

Court Link commenced in Brisbane in 2017, and has since been made available in Caboolture, Cairns, Holland Park, Ipswich, Maroochydore, Mount Isa, Pine Rivers, Redcliffe, Rockhampton, and Southport.¹⁴³

An evaluation of Court Link, commissioned by the then Department of Justice and Attorney-General (now the Department of Justice) and published in 2023, found that it was having 'significant and positive impacts on the health and wellbeing of people who participate in the program'.¹⁴⁴ Court Link was also found to reduce the frequency and seriousness of offending.

Stakeholders reported that there were 'no program-related barriers which negatively impacted outcomes for any specific population group'¹⁴⁵ including adults with disability or mental health concerns. However, it was noted by stakeholders that local service availability could limit access to required, appropriate services for these groups.

A recommendation of the evaluation was that the then Department of Justice and Attorney-General:

strengthen the capability of Court Link to deliver accessible services that respond to the individual needs of participants, including Aboriginal and Torres Strait Islander peoples, LGBTQIA+ people, people with disability, women, and people from culturally and linguistically diverse backgrounds and young adults.¹⁴⁶

As noted above, in response to a recommendation from the Disability Royal Commission, the Queensland Government has agreed to pilot a disability stream of Court Link in the Brisbane Magistrates Court, with the aim of providing support for adult defendants who have a diagnosed, or suspected, cognitive disability.¹⁴⁷

Adult Restorative Justice Conferencing

Adult Restorative Justice Conferencing (ARJC) (previously called 'justice mediation') aims to provide a victim with an opportunity to tell their story and hold the person who caused the harm accountable, while also providing the offender with an opportunity to take responsibility for their actions.

¹⁴³ Queensland Courts, *Court Link*, (15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

¹⁴⁴ Department of Justice and Attorney-General, *Final Outcomes and Impact Evaluation Report, Evaluation of Court Link*, report prepared by Deloitte Access Economics, 2023, p. 13.

¹⁴⁵ Department of Justice and Attorney-General, *Final Outcomes and Impact Evaluation Report, Evaluation of Court Link*, report prepared by Deloitte Access Economics, 2023, p. 77.

¹⁴⁶ Department of Justice and Attorney-General, *Final Outcomes and Impact Evaluation Report, Evaluation of Court Link*, report prepared by Deloitte Access Economics, 2023, p. 14.

¹⁴⁷ Queensland Government, *Queensland Government response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 2024, p. 103.



ARJC involves a facilitated meeting between the person who has caused the harm, and those affected by it, to discuss what occurred and determine an outcome that meets the needs of the victim, and is also 'safe, legal, achievable and fair'.¹⁴⁸

The conference may also be attended by the families or communities of support who have been affected or who can provide support.¹⁴⁹

During this discussion, the offender is expected to accept responsibility for their actions and acknowledge the impact that these actions have had on the victim.

The parties involved may reach an agreement on steps that can be taken to work towards repairing the harm caused. Compliance with the agreement is monitored by the ARJC convenor.¹⁵⁰

Participation in ARJC is voluntary. Cases can be referred to ARJC by the court, police, prosecutors or corrective services. The offender or their lawyer can also suggest a referral to conferencing.

With the consent of those involved, the referrer is advised that the conference has occurred so that they may decide how to proceed, including whether matters before a court should proceed, or what effect it will have on the sentence imposed.¹⁵¹

There is limited publicly available information on outcomes from the Queensland ARJC, and limited research on the use of conferencing with offenders who have a cognitive disability.

The *Hear Her Voice* report (report two, volume one) produced by the Women's Safety and Justice Taskforce notes that:

To some extent, ARJC and youth justice conferencing rely on victims (and offenders) being able to articulate their experiences, to have the confidence to raise concerns about the process and to identify and assert their desired outcomes. While working well for empowered and educated participants, these processes may disadvantage some victims and offenders who find it difficult to communicate, or who struggle to understand the concepts involved.¹⁵²

While recognising these current limitations, it would be possible to facilitate the participation of adults with cognitive disability in ARJC through adjustments to the process. For example, staff involved in restorative justice programs in Canada have reported success with cases involving people with Fetal Alcohol Spectrum Disorder, by adapting processes to meet the needs and challenges of this cohort. Strategies included increasing the number and length of pre-conference meetings, using clear and simple language, using more visual aids, adapting the meeting space, and ensuring that agreements are realistic.¹⁵³

Further information about ARJC, including which matters may be considered suitable for this process, is provided on page 50.

¹⁴⁸ Queensland Government, *Restorative justice for people who have been harmed*, (10 September 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/victim>>.

¹⁴⁹ Queensland Government, *About adult restorative justice*, (10 September 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.

¹⁵⁰ Queensland Government, *Restorative justice for adults who have caused harm*, (25 July 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/offender>>.

¹⁵¹ Queensland Government, *Restorative justice for adults who have caused harm*, (25 July 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/offender>>; Legal Aid Queensland, *Adult restorative justice conferencing*, (13 April 2021), <<https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Diversion-and-referral-options/Adult-restorative-justice-conferencing>>.

¹⁵² Women's Safety and Justice Taskforce, *Hear her voice*, Report two, Volume one, Women and girls' experiences across the criminal justice system, 2022, p. 392.

¹⁵³ J Evans and N Bourgon, Department of Justice Canada, *Exploring the use of restorative justice practices with adult offenders with fetal alcohol spectrum disorder*, 2020



Queensland Drug and Alcohol Court

The Queensland Drug and Alcohol Court (QDAC) operates at the Brisbane Magistrates Court and deals with offences related to serious drug and alcohol use.¹⁵⁴

There are a number of requirements that a person must meet to be considered eligible for QDAC, including that the person must be charged with an offence (not a sexual offence) in the Magistrates Court and plead guilty to the charges.¹⁵⁵

The court can make a Drug and Alcohol Treatment order, which aims to:

- a) facilitate the rehabilitation of the offender by providing a judicially supervised, therapeutically oriented, integrated treatment regime; and
- b) reduce the offender's severe substance use disorder; and
- c) reduce the level of criminal activity associated with the offender's severe substance use disorder; and
- d) reduce the health risks to the offender that are associated with the offender's severe substance use disorder; and
- e) assist with the offender's integration into the community.¹⁵⁶

Offenders are monitored by the court as they undergo their treatment, including through:

- regular and random drug testing
- regular court appearances to ensure offenders stay on track
- incentives for offenders to continue to engage with treatment.¹⁵⁷

This specialist court commenced in Brisbane in 2018 in response to the *Queensland Drug and Specialist Courts Review: Final Report*.¹⁵⁸ It was recommended that the program be trialled in one location and that expansion be considered after the model has been evaluated and refined.¹⁵⁹

Further information about QDAC is provided on page 72.

Drug and Alcohol Diversion programs

The Drug and Alcohol Assessment Referral Program (DAAR) and Illicit Drugs Court Diversion Program (CDP) are available for eligible people who 'identify drug and/or alcohol use as a contributing factor to the offences they have been charged with'.¹⁶⁰

Both programs involve participating in a 60-90 minute course that provides information and education about drug and alcohol use and access to treatment.¹⁶¹

For those who participate in either program, a conviction is not recorded for those related charges.¹⁶²

These programs, including the eligibility criteria, are discussed further on page 52.

¹⁵⁴ Legal Aid Queensland, Queensland Drug and Alcohol Court, (13 April 2023), <<https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Diversion-and-referral-options/Queensland-Drug-and-Alcohol-Court>>; Queensland Drug and Alcohol Court, Queensland Drug and Alcohol Court Information Handbook, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/770406/qdac-information-handbook.pdf>.

¹⁵⁵ Queensland Courts, *Queensland Drug and Alcohol Court*, (14 August 2023), <<https://www.courts.qld.gov.au/courts/drug-court>>.

¹⁵⁶ *Penalties and Sentences Act 1992* (Qld) s 151c(2).

¹⁵⁷ Queensland Courts, *Queensland Drug and Alcohol Court*, 1. *What is the Queensland Drug and Alcohol Court?*, (14 August 2023), <<https://www.courts.qld.gov.au/courts/drug-court>>.

¹⁵⁸ Queensland Courts, *Magistrates Courts of Queensland annual report 2020-2021*, p. 38.

¹⁵⁹ Queensland Courts, *Queensland Drug and Alcohol Court*, 5. *Why is the Queensland Drug and Alcohol Court only in Brisbane?*, (14 August 2023), <<https://www.courts.qld.gov.au/courts/drug-court>>.

¹⁶⁰ Queensland Courts, *Drug and Alcohol Diversion programs*, (8 May 2024), <<https://www.courts.qld.gov.au/services/court-programs/drugalcohol>>.

¹⁶¹ Queensland Courts, *Drug and alcohol diversion programs*, fact sheet, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/725226/Drug-and-alcohol-programs-factsheet.pdf>.

¹⁶² Queensland Courts, *Drug and alcohol diversion programs*, fact sheet, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/725226/Drug-and-alcohol-programs-factsheet.pdf>.



Specialist domestic and family violence (DFV) courts

A specialist DFV court, which is part of the specialist DFV court justice response, was established as a trial in Southport in 2015.¹⁶³ The DFV court has since been made a permanent specialist court, and has been expanded to six additional locations, in Townsville, Beenleigh, Mount Isa, Palm Island, Cairns and Brisbane.¹⁶⁴

The aims of the specialist DFV court justice response are to:

- provide a coordinated, respectful, and fair justice response to DFV
- enhance safety and wellbeing and provide a better court experience for victim-survivors including children
- support increased accountability for persons using violence, compliance with court orders and demonstrated behavioural change.¹⁶⁵

To support these aims, the specialist DFV court justice response includes:

- dedicated magistrates
- a DJAG [now DoJ] DFV court coordinator to oversee operations and the continuous improvement of the specialist DFV courts approach, including stakeholder engagement
- a specialist DFV court registry where specialist court staff are trained to offer support and information to people involved in DFV court matters
- dedicated prosecutors
- specialist DFV duty lawyers to provide advice and representation for people involved in DFV court matters
- specialist DFV court support services for people involved in DFV court matters
- dedicated Queensland Corrective Services' officers (where coordination of criminal and civil matters is in place)
- cross-agency governance groups (Operational Working Groups [OWG])
- infrastructure and security features to support safety (including security officers)
- on-site triage and reception connecting clients to specialist services.¹⁶⁶

An evaluation of the Southport DFV Court commissioned by the then Department of Justice and Attorney-General (now Department of Justice) found that the court was fulfilling its purpose.¹⁶⁷

However, the evaluation report also noted that while the court was 'reasonably well equipped to support people with disabilities', there was 'very little evidence of how the court addresses the needs of this group'.¹⁶⁸ This included a lack of information in the training manual for staff about how to support people with disability, and a lack of specific organisations for clients with a disability to be referred to, although the evaluation report does note that this may reflect the availability of suitable services in the area.

The evaluation report concluded that 'There is more work required to make the court equally accessible for, and responsive to, the needs of people with disability'.¹⁶⁹

Further evaluation of the legal frameworks in the domestic and family violence laws may be required in relation to people with disability. Potential concerns include the absence of guidance in determining whether a person with disability who may not have the capacity to enter a plea of guilty, is able to consent to domestic and family violence orders.

¹⁶³ Queensland Courts, *Specialist Domestic and Family Violence Court*, (6 January 2025), <<https://www.courts.qld.gov.au/courts/domestic-and-family-violence-court>>.

¹⁶⁴ Queensland Courts, *Magistrates Court of Queensland annual report 2022-23*.

¹⁶⁵ Queensland Courts, *Specialist Domestic and Family Violence Court*, (6 January 2025), <<https://www.courts.qld.gov.au/courts/domestic-and-family-violence-court>>.

¹⁶⁶ Queensland Courts, *Specialist Domestic and Family Violence Court*, (13 September 2023), <<https://www.courts.qld.gov.au/courts/domestic-and-family-violence-court>>.

¹⁶⁷ Queensland Department of Justice and Attorney-General, *Southport Specialist Domestic and Family Violence Court, Process and outcomes evaluation 2017-21*, report prepared by ARTD consultants, 2021.

¹⁶⁸ Queensland Department of Justice and Attorney-General, *Southport Specialist Domestic and Family Violence Court, Process and outcomes evaluation 2017-21*, report prepared by ARTD consultants, 2021, p. 100.

¹⁶⁹ Queensland Department of Justice and Attorney-General, *Southport Specialist Domestic and Family Violence Court, Process and outcomes evaluation 2017-21*, report prepared by ARTD consultants, 2021, p. 100.



Queensland Intermediary Scheme (QIS)

The QIS involves impartial intermediaries facilitating communication between 'vulnerable witnesses' and the police and/or courts.¹⁷⁰

The QIS aims to:

- improve the quality of evidence
- give police officers, the legal community and the courts a better understanding of the needs of vulnerable witnesses
- improve access to justice
- reinforce the importance of effectively and respectfully responding to child sexual offence allegations.¹⁷¹

Intermediaries engaged in court proceedings will conduct an assessment and produce a report with information about the communication needs of particular witnesses and recommend how communication can be facilitated to obtain the best evidence from the witness.¹⁷² These recommendations are considered at a 'directions hearing'.

The intermediary will usually sit with the witness while they give evidence to ensure that the recommendations for communication that have been approved by the court are followed.¹⁷³

In Queensland, the program is limited to:

prosecution witnesses in child sexual offence matters who:

- are under 16, or
- have an impairment of the mind, or
- have difficulty communicating.¹⁷⁴

However, out-of-scope referrals may also be considered.

The QIS was established as a two-year pilot program and commenced in Brisbane and Cairns in July 2021.¹⁷⁵ It has since received funding to continue until June 2025.¹⁷⁶

Intermediary programs (also called communication partners) have been trialled or implemented in numerous locations in Australia and overseas. While many programs focus on facilitating communication with witnesses and victims of crime, some programs, including in the Australian Capital Territory and the UK, also provide services to vulnerable defendants.¹⁷⁷

The *Criminal Procedures Review* report notes that stakeholders suggested that there could be potential to expand the QIS to include support for defendants.¹⁷⁸

¹⁷⁰ Queensland Courts, *Who are intermediaries*, (4 October 2023), <<https://www.courts.qld.gov.au/services/queensland-intermediary-scheme/who-are-intermediaries>>.

¹⁷¹ Queensland Courts, *Queensland Intermediary Scheme*, (18 November 2024), <<https://www.courts.qld.gov.au/services/queensland-intermediary-scheme>>.

¹⁷² Queensland Courts, *Who are intermediaries*, (4 October 2023), <<https://www.courts.qld.gov.au/services/queensland-intermediary-scheme/who-are-intermediaries>>.

¹⁷³ Queensland Courts, *Who are intermediaries*, (4 October 2023), <<https://www.courts.qld.gov.au/services/queensland-intermediary-scheme/who-are-intermediaries>>.

¹⁷⁴ Queensland Courts, *Queensland Intermediary Scheme*, (30 August 2024), <<https://www.courts.qld.gov.au/services/queensland-intermediary-scheme>>.

¹⁷⁵ Department of Justice and Attorney-General, *Intermediaries to assist vulnerable witnesses to give their best evidence*, media release, 1 December 2020.

¹⁷⁶ The State of Queensland (Queensland Treasury), 2024-25 Queensland Budget, Budget paper no. 4. <https://budget.qld.gov.au/files/Budget_2024-25_BP4_Budget_Measures.pdf>.

¹⁷⁷ ACT Human Rights Commission, *Australian first as ACT intermediary program expands to support communication needs of vulnerable accused*, 13 March 2024, <[https://www.hrc.act.gov.au/news-and-events/news/australian-first-as-act-intermediary-program-expands,-supporting-communication-needs-of-vulnerable-accused#:~:text=The%20ACT%20Intermediary%20Program%20has,sexual%20offence%20and%20homicide%20matters](https://www.hrc.act.gov.au/news-and-events/news/australian-first-as-act-intermediary-program-expands,-supporting-communication-needs-of-vulnerable-accused#:~:text=The%20ACT%20Intermediary%20Program%20has,sexual%20offence%20and%20homicide%20matters;)>; HM Courts & Tribunal Service, *HMCTS intermediary services*, (28 September 2022), <<https://www.gov.uk/guidance/hmcts-intermediary-services>>.

¹⁷⁸ M Shanahan, *Criminal Procedure Review — Magistrates Courts*, Volume one: Summary report, 2023, p. 69.



Murri Court

The Murri Court is a network of courts that aims to:

- encourage members of the Aboriginal and Torres Strait Islander community to participate in the Murri Court process
- deliver a culturally appropriate court process that respects and acknowledges Aboriginal and Torres Strait Islander cultures
- refer defendants to support services that address the underlying contributors to their offending
- give magistrates detailed information about defendants' personal and cultural circumstances.¹⁷⁹

The Murri Court operates differently to traditional Magistrates Courts.¹⁸⁰ This includes flexibility around the formal uniforms worn, and differences in the physical setting and seating arrangements in the court room to support participation and deliver a culturally appropriate process. Elders, Respected Persons and Community Justice Groups also play a critical role in the Murri Courts. Further information about the processes associated with the Murri Court are provided on page 53.

To be eligible for the Murri Court, a person must:

- identify as an Aboriginal or Torres Strait Islander person,
- plead guilty, or intend to plead guilty, to offences that can be finalised within the Magistrates Court,
- have been granted bail, and
- consent to participate in the Murri Court.¹⁸¹

An evaluation of the Murri Court found that it was 'effective in creating a Court environment and process that is less intimidating, more approachable and accessible to Aboriginal and/or Torres Strait Islander people.'¹⁸² The evaluation report also identified a number of opportunities to strengthen the operations of the Murri Court.

Community Justice Groups

Community Justice Groups (CJGs) are non-government organisations that provide support to Aboriginal and Torres Strait Islander peoples who are in contact with the criminal justice system.¹⁸³ They provide a community-based response to local crime and justice issues.

CJGs were introduced in Queensland in 1993 to address recommendations from the Royal Commission into Aboriginal Deaths in Custody.¹⁸⁴

There are now CJGs operating in 41 communities across Queensland, as well as 11 CJGs operating across 10 locations on the outer islands of the Torres Strait.¹⁸⁵

CJGs are involved in activities related to mainstream courts and Murri Courts, including:

- preparation of bail and sentence submissions to the court
- attending court sittings
- supporting victims and offenders through the court process
- referring victims and offenders to support and legal services;
- providing cultural advice and community input on justice related issues and

¹⁷⁹ Queensland Courts, *About Murri Court*, (29 September 2020), <<https://www.courts.qld.gov.au/courts/murri-court/about-murri-court>>.

¹⁸⁰ Queensland Department of Justice and Attorney-General, *Evaluation of Murri Court*, report prepared by the Ipsos consortium, 2019.

¹⁸¹ Queensland Courts, *Going to Murri Court*, (6 October 2021), <<https://www.courts.qld.gov.au/courts/murri-court/going-to-murri-court>>.

¹⁸² Queensland Department of Justice and Attorney-General, *Evaluation of Murri Court*, report prepared by the Ipsos consortium, 2019, p. 109.

¹⁸³ Queensland Courts, *Community Justice Group Program*, (25 September 2024), <<https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>>.

¹⁸⁴ Queensland Courts, *Community Justice Group Program*, (25 September 2024), <<https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>>.

¹⁸⁵ Queensland Courts, *Community Justice Group Program*, (25 September 2024), <<https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>>.



- supporting the operation of Murri Courts.¹⁸⁶

They also provide services across the broader criminal justice system including activities focused on prevention and education, early intervention, support for Aboriginal and Torres Strait Islander peoples in custody, and support for people transitioning back into the community.¹⁸⁷

A 3-year evaluation of the CJG program has been completed, with a report on program outputs highlighting the breadth of locally tailored activities undertaken by the CJGs.¹⁸⁸ The final evaluation report describes CJGs as 'a cost effective, place-based, community-driven response to the justice challenges in Indigenous communities' and makes a number of recommendations to enhance the program.¹⁸⁹

Further information about CJGs is provided on page 56.

Advocacy and other support

A number of services provide information, support, and advocacy services, which can assist people with cognitive disability who are engaging with the criminal justice system. This includes support during their engagement with the system, and support to address the factors that have contributed to their offending.

The following sections provide examples of some of the programs that are provided, or have been provided, in Queensland.

Justice Support Program

The Justice Support Program, operated by QAI, provides 'non-legal advocacy for people with disability who are involved in the criminal justice system'.¹⁹⁰ This includes assisting people with cognitive disability to access legal services, supporting them to understand and comply with court processes and directions, and advocating for appropriate supports and adjustments. The program advocate can also advocate for changes and supports to help prevent reoffending.

In the 2023-2024 financial year, the Justice Support Program provided 173 services to 166 people.¹⁹¹

The program has one full-time non-legal advocate.¹⁹²

Bail Support programs

Previously, a bail support program for men was provided by Caxton Legal Centre.¹⁹³ Through this program, lawyers and social workers assisted men on remand to apply for bail and access services to assist them to comply with bail conditions, avoid reoffending, and support their social inclusion. However, government funding for this program ceased in August 2022.

Sisters Inside also provided a bail support program for women, which was also discontinued due to a lack of funding.¹⁹⁴

The Queensland Supreme Court Annual Report for 2023-24 notes that:

¹⁸⁶ Queensland Courts, *Community Justice Group Program*, (25 September 2024), <<https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>>.

¹⁸⁷ Queensland Government, *Framework for stronger Community Justice Groups*, p. 17.

¹⁸⁸ Myuma, *Phase 2 annual report: Evaluation of Community Justice Groups*, reported prepared for the Department of Justice and Attorney-General Queensland, 2022.

¹⁸⁹ Myuma, *Final report: Evaluation of Community Justice Groups*, reported prepared for the Department of Justice and Attorney-General Queensland, 2023, p. 14.

¹⁹⁰ Queensland Advocacy for Inclusion, *Criminal justice, Justice Support Program*, <<https://qai.org.au/criminal-justice/>>.

¹⁹¹ Queensland Advocacy for Inclusion, *Annual report 2023-2024*, <https://qai.org.au/wp-content/uploads/2024/10/2024-Annual-Report_Accessible.pdf>, p. 22.

¹⁹² Queensland Advocacy for Inclusion, *Submission to the Women's Safety and Justice Taskforce*, April 2022.

¹⁹³ Caxton Legal Centre, *Annual Report 2021-2022*, p. 9.

¹⁹⁴ Supreme Court of Queensland, *Annual Report 2023-24*.



The assistance previously provided to [self-represented bail applicants] by Caxton Legal Centre and Sisters Inside, when their bail assistance programs were funded, was valuable and worthwhile, assisting with the efficient disposition of the applications. The absence of this assistance, since the programs were discontinued due to lack of funding, has been noticeable.¹⁹⁵

Court Network

Court Network is a service that provides free information, support and referral services to court users. The program operated in Queensland Courts for 14 years, however funding for the service in the Brisbane, Townsville and Cairns Magistrates Courts ceased in June 2022.¹⁹⁶

The Magistrates Court Annual Report 2021-2022 noted that:

Along with the withdrawal of the Salvation Army Chaplaincy Services in courts, this creates significant gaps for court users ...¹⁹⁷

The Court Network support service in the Specialist DFV courts at Southport, Brisbane, Beenleigh and Ipswich and Cairns, remains ongoing.¹⁹⁸

Questions

1. How might court processes for criminal matters be made more accessible for adults with cognitive disability?
2. Should intermediaries be made available to all adults with significant cognitive disability who are charged with serious offences?
3. What other supports should be made available to adults with cognitive disability to enable them to better understand and participate in court processes?
4. Are there particular reforms that would make court processes more accessible to First Nations adults with cognitive disability?
5. What evidenced-based diversionary programs for adults with cognitive disability should be considered by Queensland?

¹⁹⁵ Supreme Court of Queensland, *Annual Report 2023-24*, p. 7.

¹⁹⁶ Magistrates Courts of Queensland, *Annual report 2021-2022*, p. 48.

¹⁹⁷ Queensland Courts, *Magistrates Courts of Queensland annual report 2020-2021*, p. 48.

¹⁹⁸ See www.courtnetwork.com.au for further information.



Appendix 1: Key legislation and policies – legal representation

Like many other areas of law, the criminal justice system can be complex and confusing to most people without legal training. People with impaired decision-making capacity are in a particularly vulnerable position when in contact with the criminal justice system, which may lead to inconsistent outcomes.

Lawyers and other types of representation can assist people with impaired capacity to understand and navigate the criminal justice system.

This section of the paper explores the responsibilities of lawyers in relation to clients with impaired capacity, and some of the options available when seeking to determine a client's capacity, specifically in relation to legal instruction.

Lawyers

Queensland Handbook for Practitioners on Legal Capacity

Lawyers (both solicitors and barristers) are at the frontline of the criminal justice system, representing and advancing their clients' interests.

The overrepresentation of people with disability within the criminal justice system¹⁹⁹ means that lawyers will often represent and take instructions from clients whose ability to provide legal instructions and participate in decision-making is unclear.

The *Queensland Handbook for Practitioners on Legal Capacity* is a guide endorsed by the Queensland Law Society. It was developed by Allens (a law firm), in conjunction with Queensland Advocacy for Inclusion (QAI). It also includes contributions from the University of Queensland and the Queensland Law Society's Ethics Centre.²⁰⁰

This handbook is currently in the early stages of a planned review and update as it was originally published in 2014.

The purpose of the handbook is to provide lawyers in Queensland with a framework to use to assess whether a client has the ability to provide legal instructions, and the steps to take when a client's ability may be in doubt.²⁰¹ Various issues around capacity are explored, with the goal of the handbook being that some of the most vulnerable members of society are still able to access legal advice and representation.²⁰²

The handbook explores the concept of capacity in detail, as a lawyer's client must have capacity to give lawful, competent and proper instructions. Lawyers also have a legal and ethical duty to ensure that they are not accepting instructions from a client who does not have the capacity to do so.²⁰³ It is noted that capacity is domain and time specific and the relevant test to determine capacity can depend on the type of decision a person is required to make. The handbook also recognises that a person's capacity can fluctuate over time.²⁰⁴

¹⁹⁹ Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice and people with disability*, Final report, Volume 8, (2023), p. 247.

²⁰⁰ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 2.

²⁰¹ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 6.

²⁰² Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 6.

²⁰³ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 12.

²⁰⁴ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 12.



Determining capacity can therefore be a complex issue for lawyers. The handbook notes that this complexity can lead to lawyers refusing to take instructions where there is any belief that a client does not have capacity to give instructions.²⁰⁵

Ethical duties

The ethical duties noted in the handbook that a lawyer has when the capacity of a client may be in doubt include:

- A duty to follow lawful, competent and proper instructions. This duty means that a lawyer's ability to assess and determine whether a client's capacity is in doubt is vital.
- A paramount duty to the court and the administration of justice. This includes ensuring that when a lawyer is acting on a client's instructions, that a client has the requisite capacity to give those instructions and raise with the court any concerns.
- A duty to act in the client's best interests. This includes respecting a client's autonomy and making reasonable adjustments, such as allowing more time for particular clients to make decisions if required.
- A duty not to discriminate and to be honest and courteous in dealings with clients. This includes making adjustments to accommodate a client's need for assistance with some aspects of their matters, always being 'honest and courteous', and seeking to maximise the client's capacity.
- A duty of confidentiality. This duty notes that only the client can consent to the disclosure of confidential information.²⁰⁶

A lawyer's failure to comply with ethical duties can have consequences, including claims related to professional misconduct or unsatisfactory professional conduct. This may lead to a lawyer being subject to professional disciplinary procedures.²⁰⁷

In Queensland, professional conduct rules for lawyers do not contain any specific provisions as to how lawyers should act if they have concerns regarding their client's capacity.

Therefore, the ethical duties outlined above are recommended for use by lawyers if there are concerns regarding a person's capacity.²⁰⁸

The handbook does note, however, that a lawyer is not making a binding determination when enquiring about a client's capacity - it instead provides a process that lawyers should take when assisting clients whose capacity to make relevant decisions is in question.²⁰⁹

Basic Principles of Legal Capacity

The handbook also summarises the principles of law surrounding capacity, including that:

- All adult persons are presumed to have the capacity to make all decisions, unless there is contrary evidence to say otherwise.
- Capacity can fluctuate over time and be time-specific, with capacity loss potentially being temporary.
- Capacity can be domain-specific, with capacity varying between the type of subject matter to which the decision relates. The law has some differing tests for capacity depending on subject matter, such as the making of a will requiring a higher level of capacity than entering into a contract.
- Even within a 'domain', the level of ability required to make specific decisions can vary and therefore be decision specific.
- Ability to decide cannot be judged based upon the decision made, in that what is considered a 'bad' decision is not indicative of a lack of capacity.

²⁰⁵ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 13.

²⁰⁶ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 14-16.

²⁰⁷ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 17.

²⁰⁸ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 17.

²⁰⁹ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 18.



- Ability should not be assessed solely based on a person's appearance, age, behaviour, disability or impairment.
- Ability can be increased if there is adequate and appropriate support available to the person. Substitute decision-making (under guardianship or an enduring power of attorney) is a last resort as people should be free to make their own decisions.²¹⁰

Practical Matters to Consider in Taking Instructions

When taking instructions, the handbook includes some practical steps that a lawyer can take if there are issues or concerns associated with a client's capacity.

These include:

- Determining who the client is – it could be that the person whose capacity is in question may be the client, or their family or support person is the client. If it is the person whose capacity is in question, then the lawyer can only take instructions from the client themselves, and not the support persons. This may be different if the support person is a legally appointed substitute decision-maker, but in this case the lawyer must ensure they understand in what role the substitute decision-maker is giving instructions;
- Identifying the decision required, and if the client has the ability to make the particular decision at the particular time;
- Assessing the client's capacity if required. A number of questions can be used as a screening tool by lawyers to determine if further investigation is required. These include asking the client if they:
 - have been diagnosed with a mental illness, intellectual disability, acquired brain injury, learning disability or other cognitive impairment;
 - experience any difficulty learning or have received specific supports in their education;
 - receive the disability support pension;
 - receive supports for day-to-day activities;
 - have lived in institutions, disability-funded accommodation or been admitted into a mental health unit; and,
 - have ever been the subject of a guardianship or administration order, an involuntary treatment order or a forensic order.
- Maximising the client's ability if there are indications of impaired capacity. Some suggestions include:
 - meeting with the client in person and alone;
 - considering the optimal time and place to meet with the client;
 - focusing on the client as an individual, and not making assumptions based on a person's age, mental health, intellectual impairments, emotional distress, eccentricities or cultural differences;
 - establishing trust and confidence by ensuring the client knows that the lawyer is working to help them, and has duties related to loyalty and confidentiality; and,
 - using a variety of methods to enable improved communication with the client, such as adapting communication styles when necessary;
 - ensuring that there are no communication challenges such as hearing or reading problems;
 - including a trusted support person with the client's consent.

After attempting to maximise the client's capacity, a preliminary assessment can be made by the lawyer to determine whether further assessment should be made. This involves asking the client questions to determine whether they have:

- a basic understanding of the relevant facts and issues, the options available and their consequences;
- the ability to use the information to make an informed decision and state the reasoning;
- a degree of consistency in their views and preferences, as well as their decisions and desired outcomes; and,

²¹⁰ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 19.



- some awareness of their abilities and limitations.²¹¹

Specific actions are required during this assessment, including having another lawyer present and taking comprehensive file notes.

If the client has capacity

If a lawyer is satisfied that a client has capacity related to the decision to be made, they must ensure that the client does not lose this ability while they are acting for them, as the client must have capacity at the time the lawyer acts on their instructions.

If the client's capacity is likely to diminish over time, the lawyer should raise the potential of making appropriate arrangements such as assisting in the completion of an enduring power of attorney or an advance health directive.

If the client has a substitute decision-maker appointed for matters in relation to which the client has capacity, the lawyer should consider assisting to have the substitute decision-maker's appointment terminated or varied.

If a client appears to lack capacity

The handbook also explores actions that may be available to a lawyer if they believe that their client may lack capacity for the matter at hand.²¹²

Lawyers are reminded, however, that although they must act in their client's best interests, they cannot act without express instructions or seek instructions from a third party without permission from the client.

If there is already a substitute decision-maker appointed, such as through an enduring power of attorney or a tribunal guardianship appointment, then the lawyer will need to determine whether a decision-maker's appointment covers the legal decisions to be made, and, if so, take instructions from the substitute decision-maker.

If there is no decision-maker, the lawyer may seek the client's consent to complete a formal assessment by a suitably qualified medical professional. If this assessment finds that the client does not have capacity to make particular decisions, then the lawyer may consider whether it is appropriate for a substitute decision-maker to be appointed.

In this area, the handbook also discusses when it may be appropriate for a lawyer to cease to act for a client if the client lacks capacity and a substitute decision-maker cannot be appointed.

Consequent sections of the handbook discuss issues regarding costs for maximising and assessing a person's capacity,²¹³ and remind lawyers that the QLS Ethics Centre (now the QLS Ethics and Practice Centre) can provide guidance services to navigate the potential ethical complexities in situations involving capacity.²¹⁴

Criminal Law Duty Lawyer Handbook

The Criminal Law Duty Lawyer Handbook is a resource created by Legal Aid Queensland. The handbook is intended to act as a guide for duty lawyers appearing in Magistrates and Childrens courts in Queensland.²¹⁵ Duty lawyers are criminal defence lawyers who are rostered at courts to provide some limited services for defendants in criminal matters, generally for more simple types of matters and first court appearances.²¹⁶

²¹¹ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 33.

²¹² Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 39.

²¹³ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 54.

²¹⁴ Allens & Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity Handbook*, p. 56.

²¹⁵ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 19.

²¹⁶ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 20.



The handbook includes general information that may be of assistance to duty lawyers, including laws around bail, Magistrates Court processes, more common offences that people are charged with under the *Criminal Code*, Commonwealth offences, and sentencing.

A section of this handbook is devoted to issues associated with mental health and capacity. The handbook notes that there will often be occasions where a defendant may have a mental illness or an intellectual disability and provides instructions as to how to address any issues that may arise.²¹⁷

A duty lawyer's principal role is to obtain a defendant's instructions, and if 'coherent and rational' instructions are obtained, then to act upon them.²¹⁸ If there is doubt about the defendant's ability to give instructions and fitness to plead, then no plea should be entered and instead an adjournment should be sought to enable the defendant to seek more extensive legal advice.

If coherent or rational instructions cannot be obtained, a solicitor-client relationship is not considered to have been established, and the lawyer has a duty to inform the court that instructions cannot be obtained due to concerns about the defendant's fitness.²¹⁹ The court can then take the appropriate steps to determine the defendant's fitness.

The handbook outlines various characteristics indicative of a person with a mental illness or intellectual disability, including:

- avoidance of eye contact;
- difficulty understanding the motivation, perspectives or feelings of others;
- difficulty coping with changes;
- decreased ability to learn new skills; or
- coordination problems.²²⁰

Other considerations include:

- whether the defendant can recall significant details about themselves or what has been said by the lawyer;
- circumstances that may indicate a lack of capacity, such as the defendant's experience attending or living in institutions (eg. a special school), if they have or have had a carer, or been placed under an involuntary treatment order;²²¹ and,
- if the defendant has a substitute decision maker in place, like the public guardian.²²²

Specific tests, like the *Presser* test, are also highlighted as methods by which a lawyer can determine whether they should take instructions from a defendant.²²³ The *Presser* test is a set of criteria that is used in common law to determine whether a person is fit for trial and asks whether the person has the ability to understand and undertake the processes and procedures of the court.²²⁴

A special note is made in the handbook that not all people with an impairment are unfit to plead or of unsound mind, as a presumption of capacity is always applied, and the lawyer should be respectful of the person's rights. Written notes should record any issues that may be associated with a client and should address:

- why the lawyer believes the client has a cognitive impairment;
- what inquiries were made to ascertain whether a substitute decision-maker is in place for the client or whether they are currently under an involuntary treatment order;
- an assessment based on the *Presser* criteria; and,

²¹⁷ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 208.

²¹⁸ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 209.

²¹⁹ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 209.

²²⁰ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 209.

²²¹ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 210.

²²² Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 210.

²²³ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 210.

²²⁴ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 210.



- the results of discussions with the client regarding their capacity for this matter.²²⁵

If a lawyer believes a client has a potential defence of unsoundness of mind, the lawyer should advise the client. However, if a client wishes to plead guilty and has the capacity to do so, then the lawyer should advise them about the advantages and disadvantages of each course of action.²²⁶

The handbook then outlines what needs to be considered if there is a question about the client's capacity, and whether the lawyer should consider seeking a referral to the Mental Health Court.²²⁷

The handbook also addresses referrals to the Mental Health Court and the provisions of the *Mental Health Act 2000* as they apply to court proceedings. However, this Act has now been superseded by the *Mental Health Act 2016* and the handbook has not been updated.

Director of Public Prosecutions

The Director of Public Prosecutions along with their office, the Office of the Director of Public Prosecutions (ODPP), has the responsibility of prosecuting crimes on behalf of the State of Queensland.

The ODPP primarily functions in the higher courts, such as the District Court, Supreme Court, Children's Court of Queensland, Mental Health Court, Court of Appeal and the High Court of Australia.²²⁸ The ODPP is also involved in the prosecution of offences in Magistrate Courts located in Brisbane, Ipswich and Southport.²²⁹

The Director of Public Prosecutions can issue guidelines to the ODPP in relation to the prosecution of offences.²³⁰ The guidelines are not directions but are designed to 'assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice.'²³¹

The guidelines do not contain information regarding every step of a prosecution, but rather guide prosecutors in what to consider regarding key parts of a proceeding, as well as specific scenarios or issues that they may encounter.

There is some limited guidance in relation to offenders with impaired decision-making capacity. The first is a reference to 'Aged or Infirm Offenders'. The guidelines state that prosecuting authorities 'are reluctant to prosecute the older or more infirm offender' unless there is a risk that the offence would be repeated or is serious.²³² It is not clear whether this guideline is discouraging prosecution unless the offending will be repeated or is serious, as it is written as a general statement. Further, proceedings should not be started or continued if the penalty is likely to be 'nominal'.²³³ No information is given as to what would be considered nominal in such cases.

If the offender or their lawyer suggests that the health of the offender will be 'detrimentally affected' by proceeding to a trial, medical evidence should be obtained.²³⁴ The guidelines do not state what should be done with the medical information, and whether the prosecution should be continued or discontinued based on it.

There is a further guideline in relation to mental illness.²³⁵ This guideline is potentially clearer than the above example, stating that 'mentally disordered people' are not to be prosecuted for 'trivial offenses which pose no threat to the community.' However, prosecution may still occur where there is

²²⁵ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 211.

²²⁶ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 211.

²²⁷ Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook*, 6th edition, 2014, p. 212.

²²⁸ Office of the Director of Public Prosecutions, *Annual Report 2022-2023* 7.

²²⁹ Office of the Director of Public Prosecutions, *Annual Report 2022-2023* 4.

²³⁰ *Director of Public Prosecutions Act 1984* (Qld) s 11(1).

²³¹ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 1.

²³² Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 6.

²³³ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 6.

²³⁴ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 6.

²³⁵ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 7.



a risk of reoffending by a person who has offended in the past with 'no viable alternative to prosecution', taking into account the details of past and present offences, the offender's condition, and their risk of reoffending.²³⁶

The guidelines also state that a prosecution should not proceed if it may 'so seriously aggravate a defendant's mental health' that this outweighs any benefits of a prosecution.²³⁷

The guidelines further state that the ODPP can refer a person to the Mental Health Court, however there is an outdated reference to the *Mental Health Act 2000* (which has been superseded by the *Mental Health Act 2016*) in describing how to do so.

According to the guidelines, the Director is to be informed of 'relevant issues' and referrals to the Mental Health Court are more likely to occur where:

- the defence is relying on expert reports that suggest issues that the Mental Health Court will need to determine (such as unsoundness of mind or fitness to plead); and
- the matter has not already been determined by the Mental Health Court; and
- the defence has declined to refer the matter.²³⁸

If the offence is 'disputed', the Director will not refer the case to the Mental Health Court unless there is an issue about fitness for trial.²³⁹ This section of the guideline again contains an outdated reference to the old *Mental Health Act 2000* in relation to disputed facts (section 268 of the old legislation is referred to, the equivalent provision of section 117 of the *Mental Health Act 2016*).

If, during a trial, a significant issue is raised regarding the offender's fitness for trial, the prosecution is to seek an adjournment to obtain an independent psychiatric assessment, and should refer the matter to the Director to consider a referral if:

- the expert concludes the offender is unfit for trial and unlikely to become fit after a 'tolerable' adjournment; or
- the expert is uncertain about the person's fitness for trial; and
- the defence will not refer the matter to the Mental Health Court.²⁴⁰

If the matter is not referred to the Mental Health Court, the prosecution can consider alternatives in the *Criminal Code*, such as under section 613 (this being a way to raise with the court whether the person has the ability to understand proceedings, which will be explored further in a separate discussion paper).²⁴¹

Guardians and Enduring Powers of Attorney

Guardians under the *Guardianship and Administration Act 2000* and attorneys appointed through an enduring power of attorney under the *Powers of Attorney Act 1998* can play important roles in legal matters involving adults with impaired decision-making capacity. As substitute decision-makers, they have the responsibility to make decisions on behalf of an adult in a large range of areas.

Guardians can be appointed for an adult with impaired decision-making capacity by the Queensland Civil and Administrative Tribunal (QCAT) for personal matters, provided the tribunal is satisfied that:

- the adult's capacity for a particular matter is impaired;
- a need exists for a decision in relation to the particular matter; and, without an appointment,
- the adult's needs and interests will not be adequately met and protected.²⁴²

²³⁶ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 7.

²³⁷ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 7.

²³⁸ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 8.

²³⁹ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 8.

²⁴⁰ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 8.

²⁴¹ Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 8.

²⁴² *Guardianship and Administration Act 2000* (Qld) s 12.



Attorneys appointed by an enduring power of attorney may make decisions for personal matters if the enduring power of attorney allows them to do so, once the adult loses the ability to make these types of decisions.²⁴³

The particular 'personal matters' in relation to which a guardian or attorney can make decisions depends upon the terms of the appointment by QCAT or the enduring power of attorney. However, personal matters can include legal matters, as long as they do not relate to the adult's financial or property matters.²⁴⁴ Personal matters do not extend to 'special personal matters', which includes entering a plea to criminal charges.²⁴⁵

In many cases concerning people with impaired decision-making capacity, criminal charges will not require the entering of a plea, as the matter will be diverted through the *Mental Health Act 2016* (discussed in more detail in a later paper) to the Mental Health Court. However, there can be circumstances where the conditions detailed in the *Mental Health Act* do not apply to an individual, and they must proceed through the mainstream criminal justice system.

In those circumstances, although a guardian or attorney cannot enter a plea of guilty or not guilty, they could be expected to support an adult through the process and instruct an adult's lawyers.

For substitute decision-makers in this situation, there is little guidance as to how they should participate in this process. The Office of the Public Guardian has a legal team that can assist in navigating legal issues and instructing lawyers for an adult under public guardianship, however this resource is not available to private guardians or attorneys.

This is further complicated by the fact that defendants in criminal matters have the right to represent themselves, which might (where a person expresses this wish) lead to a guardian or attorney choosing to not instruct lawyers.

²⁴³ Powers of Attorney Act 1998 (Qld) s 32.

²⁴⁴ Guardianship and Administration Act 2000 (Qld) sch 2, Powers of Attorney Act 1998 (Qld) sch 2.

²⁴⁵ Guardianship and Administration Act 2000 (Qld) sch 2, Powers of Attorney Act 1998 (Qld) sch 2.



Appendix 2: Key legislation and policies regarding courts

Magistrates, District, and Supreme Courts

Queensland's criminal justice system includes three main levels of court, the Magistrates, District and Supreme Courts. In almost all cases, criminal matters will be first heard in the Magistrates Court, with the matter either being finalised in that jurisdiction or committed up to the District or Supreme Court, depending on the seriousness of the offence.²⁴⁶

If a person charged with an offence does not have capacity for legal matters, alternatives exist to the mainstream court system, which are generally covered by the *Mental Health Act 2016*.²⁴⁷

In some other cases, special accommodations are also made through alternative sentencing pathways once a finding of guilt is made, such as in the Drug and Alcohol and Murri Courts.

It is normal practice in most courts that magistrates and judges have little direct contact with accused persons. This means that they do not have the opportunity to directly determine whether a court needs to make accommodations for an accused person with cognitive disability.

Instead, lawyers, who speak to, and obtain instructions from, those they represent, will generally inform the court if they believe that alternative arrangements, including a referral to the Mental Health Court, are required.

Additional information regarding the obligations of, and interactions between, lawyers and accused persons who may have impaired capacity is included on page 40.

This section details how mainstream courts are guided in relation to people with cognitive disability should they progress through this system as an accused person.

Challenges confronting adults with cognitive disability who appear in mainstream courts as victims and/or witnesses will be the subject of a separate discussion paper in this series.

Equal Treatment Benchbook

The *Equal Treatment Benchbook*, published by the Supreme Court of Queensland, aims to assist in the delivery of equal justice in courts and tribunals, and is intended to provide judges and lawyers with information that may be of assistance in the conduct of cases.²⁴⁸

The information included in the benchbook is not binding, however its purpose is to share information among judges so they can manage matters before them in ways that are fair to all court participants. However, each judge still has the discretion to take any action necessary in any individual case, although they should be informed by the benchbook.²⁴⁹

The benchbook includes information to provide context and material that may be relevant to the matter before the court.

²⁴⁶ Queensland Courts, *What happens at the Magistrates Court*, (8 July 2019) <<https://www.courts.qld.gov.au/courts/magistrates-court/what-happens-at-magistrates-court>>.

²⁴⁷ *Mental Health Act 2016* (Qld).

²⁴⁸ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 1.

²⁴⁹ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 1.



Information included in the benchbook covers a range of areas including:

- ethnic, religious, spiritual and linguistic diversity;
- religions in Queensland;
- family diversity;
- effective communication on court proceedings;
- Aboriginal and Torres Strait Islander peoples of Queensland;
- persons with disability;
- self-represented litigants;
- children;
- gender equality; and
- gender identity and sexual orientation.

The benchbook is currently in its second edition, which was published in 2016.

An overview of information included in the benchbook is provided below, highlighting those sections that relate to criminal justice processes concerning adults with impaired decision-making capacity.

Persons with disability

The benchbook includes a chapter regarding people with disability in court settings and covers general information, acknowledging that persons with disability may play any role, including lawyers, parties, witnesses, jurors, judges or court staff.²⁵⁰

Included are general statistics about the prevalence of disability, and the overrepresentation of people with intellectual and mental health conditions in all stages of the criminal justice system, both as victims and defendants.²⁵¹

The benchbook acknowledges Australia's ratification of the United Nations *Convention on the Rights of Persons with Disabilities*, with article 13 of the Convention being specifically referenced, which articulates the right of persons with disability to have effective access to justice on an equal basis with others.²⁵²

The *Federal Disability Discrimination Act 1992*, as well as the *Queensland Anti-Discrimination Act 1991* and *Disability Services Act 2006* are also referenced, in relation to:

- the requirements for reasonable adjustments to be made to enable people with disability to participate on an equal basis as others;
- the prohibition of direct discrimination; and
- the need for agencies and organisations within the criminal justice system to prepare disability services plans.²⁵³

The benchbook also refers to the appropriate terminology and language that should be used when referring to disability in the court. This includes, for example, taking care with descriptions, such as referring to a person as a 'person with disability' rather than a 'disabled person'.²⁵⁴ Various explanations are also provided to appropriately define various types of disability, distinguishing the terms 'physical disability', 'sensory disability', 'intellectual disability', 'Foetal Alcohol Spectrum Disorder', 'Acquired Brain Injury', and 'Psychiatric Disability'.

²⁵⁰ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 ch. 11.

²⁵¹ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 115.

²⁵² Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 116.

²⁵³ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 117.

²⁵⁴ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 118.



Key elements that a judge may need to consider during a trial involving a person with disability include:

- such persons may need more time than is common with persons without disability;
- the stress of coming to court may exacerbate their symptoms;
- making any special arrangements in advance will save time and embarrassment at the trial;
- the person with a disability may not be able to hear, read or be understood whilst in court, or to fully comprehend what is taking place; and
- some ailments may make it impossible to attend court at all.²⁵⁵

Aboriginal and Torres Strait Islander peoples

The benchbook includes multiple chapters relating to Aboriginal and Torres Strait Islander peoples.²⁵⁶ While these provisions apply to people with and without cognitive disability, a significant proportion of Aboriginal and Torres Strait Islander people before the court will be likely to have a cognitive disability.

The benchbook includes;

- population data, including about demographics, geographic distribution, socio-economic status, health, education and employment. This data highlights housing issues experienced by Aboriginal and Torres Strait Islander peoples and a lack of community infrastructure available in communities;²⁵⁷ and,
- an explanation about Aboriginal and Torres Strait Islander culture, family and kinship,²⁵⁸ including the impact of colonisation, changes over time, and various aspects of culture, including spirituality and beliefs, social organisation and expression through art.

Specific notes in relation to Aboriginal and Torres Strait Islander language and communication are also included,²⁵⁹ with the historic diversity in language explained and commentary on how Aboriginal-English may manifest as its own dialect. Other communication challenges are also noted, including risks associated with misinterpretation due to a different understanding of English.²⁶⁰

Examples of non-verbal communication are also provided, including the avoidance of eye contact, silence, sign language and gestures, all of which need to be understood in the different context of Aboriginal and/or Torres Strait Islander cultures.²⁶¹

Other specific issues noted include:

- family or kin relationships affecting how evidence is given;
- indirect questioning being the norm in Aboriginal cultures, meaning that 'question-and-answer' interviews are often contrary to culture;
- the concept of 'gratuitous concurrence or suggestibility' where a person agrees to propositions put to them regardless of whether they agree to or even understand the proposition;
- scaffolding, where a non-native English speaker adopts the wording of the other speaker in reply;
- a seeming unwillingness to answer as a result of a cultural misunderstanding;
- asking for quantitative estimates - in Aboriginal societies, certain details may appear vague or inaccurate, however this reflects a culturally normal description, as details are traditionally

²⁵⁵ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 122.

²⁵⁶ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 chs 7 – 10.

²⁵⁷ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 ch 7.

²⁵⁸ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 ch 8.

²⁵⁹ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 ch 9.

²⁶⁰ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 87.

²⁶¹ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 88.



specified in terms relative to geographical, climatic or social matters (rather than numerical measures);

- the high incidence of speech and hearing impairments in Aboriginal and Torres Strait Islander communities;
- the possibility of the court hearing from an expert linguist or anthropologist to explain any potential issues in witness evidence;
- the difficulties associated with sourcing Aboriginal interpreters, which may mean that unaccredited interpreters are used that could potentially impact questioning (eg. leading questions); and
- apparent fluency in English possibly being misleading and leading to interpreters not being employed where available.²⁶²

Various strategies for improved communication with Aboriginal and Torres Strait Islander peoples identified in the benchbook include:

- the use of indirect questions;
- not using 'either-or' questions; and
- the use of appropriate descriptions and names, so that Aboriginal and Torres Strait Islander peoples are not conflated as being of the same culture.²⁶³

The benchbook also suggests that there are two key functions for judges in criminal trials involving Aboriginal and Torres Strait Islander peoples; firstly to exercise the discretion to allow what may be perceived to be unfair questions, and the second to give suitable directions to the jury before the opening of the case.²⁶⁴ Other directions given to the jury may include potential issues in linguistic and cultural matters.²⁶⁵

The benchbook concludes with information regarding specific issues Aboriginal and Torres Strait Islander peoples may experience in interactions with the criminal justice system.²⁶⁶

Issues addressed include:

- the admissibility of confessions;
- particular difficulties for Aboriginal and Torres Strait Islander women;
- imprisonment; and
- the role of Community Justice Groups.

In relation to confessions, as previously noted, Aboriginal and Torres Strait Islander persons may be particularly susceptible to suggestions when being questioned by police. The *Anunga Rules* are discussed in the benchbook in relation to this issue, which were developed to provide specific guidelines for police when interviewing Aboriginal and Torres Strait Islander peoples.

The *Anunga Rules* come from a Supreme Court of Northern Territory case,²⁶⁷ that has been adopted in Queensland,²⁶⁸ as matters relevant to consider in determining whether it is fair to admit the questioning of an Aboriginal and Torres Strait Islander person into evidence.

Most of the rules have now been transformed into legislation through various provisions of the *Police Powers and Responsibilities Act 2023* (PPRA). The benchbook provides guidance as to the relevant Act provisions that align with the *Anunga Rules* as follows (although it should be noted that many of the

²⁶² Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 pp. 89 – 102.

²⁶³ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 104.

²⁶⁴ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 105.

²⁶⁵ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 105.

²⁶⁶ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 ch 10.

²⁶⁷ *R v Anunga* (1976) 11 ALR 412.

²⁶⁸ *R v Wilson* [1997] QCA 265.



provisions of the legislation apply to all suspected offenders and not specifically to Aboriginal and Torres Strait Islander persons):²⁶⁹

| Anunga Rules | | PPRA Provisions | |
|--------------|--|-----------------|--|
| 1 | Right to an interpreter during police questioning | s 433 | Right to interpreter |
| 2 | Right to communicate with a friend | s 418 | Right to communicate with friend, relative or lawyer |
| 3 | Appropriate cautioning | s 413 | Cautioning of persons |
| 4 | Appropriate questioning | - | |
| 5 | Continued investigation of matters despite receipt of a confession | - | |
| 6 | Availability of refreshments and facilities | - | |
| 7 | Questioning when person is intoxicated or tired | s 423 | Questioning of intoxicated persons |
| 8 | Legal assistance | s 420 | Questioning of Aboriginal and Torres Strait Islander peoples |
| 9 | Preserving personal dignity during searches | s 630 | Protecting the dignity of persons during search |

In relation to specific issues faced by Aboriginal and Torres Strait Islander women when interacting with the criminal justice system, the benchbook notes and provides details regarding:²⁷⁰

- Aboriginal and Torres Strait Islander women as victims of violence, where long-term violence has caused low self-esteem and feelings of fear and shame, compounded by cultural factors including the nature of women's business, community pressure and mistrust of police and the criminal justice system;
- an explanation of women's business and community pressure, where women's issues are only discussed between women and the cultural pressure to not pursue matters involving Aboriginal or Torres Strait Islander partners for fear of bringing shame;
- mistrust of police and the criminal justice system, which may contribute to a reluctance to report violence due to the fear of harassment or a perceived lack of care and sympathy from police;
- feelings of intimidation in the court room during proceedings; and,
- a lack of awareness from the legal profession, where lawyers may not have an appreciation of issues facing Aboriginal women in a legal context.

Moving on to Community Justice Groups, the benchbook notes that these groups consist of elders, traditional owners and community members that provide support to Aboriginal and Torres Strait Islander peoples interacting with the criminal justice system.²⁷¹ It is noted that judges can obtain assistance when sentencing from a Community Justice Group, with a provision in the *Penalties and Sentences Act 1992* stating:

In sentencing an offender, a court must have regard to—

...

(p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—

(i) the offender's relationship to the offender's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates.²⁷²

²⁶⁹ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 108.

²⁷⁰ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 108.

²⁷¹ Supreme Court of Queensland, *Equal Treatment Benchbook*, second edition, Supreme Court Library Queensland, 2016 p. 112.

²⁷² *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).



Diversionsary processes

The following are several potential diversionsary processes available in the mainstream criminal justice system that aim to provide other options than the usual processes and that may better facilitate the person's rehabilitation and/or address the causes of offending.

Adult Restorative Justice Conferencing

Adult Restorative Justice Conferencing (ARJC) (previously called 'justice mediation') is a meeting between the offender and victim.²⁷³ The purpose of the meeting is to provide the victim with an opportunity to tell their story and hold the person who caused the harm accountable.

The meeting is facilitated by a mediator appointed under the *Dispute Resolution Centres Act 1990*,²⁷⁴ allowing for a discussion of what happened during the offence, the impact the offence has had, and what remedies may be available to the victim.²⁷⁵

The offender is provided with an opportunity to take responsibility for the offence and to understand the impact and harm caused to the victim. The meeting can also allow the parties to reconnect, maintain or strengthen their relationship with their communities of support, such as family, friends and other members of the community, who may also be able to attend the conference.²⁷⁶

Participation in ARJC is always voluntary, with mediators meeting with all parties involved prior to the conference to establish the suitability of the matter for this process.²⁷⁷

The key objective of the conference is to determine an outcome that meets the needs of the victim and starts to repair the harm and impact caused by the offence. This may involve:

- the return of stolen property;
- an agreement to pay for any losses incurred;
- an apology;
- an assurance that the behaviour will not be repeated; and/or
- the offender attending counselling or courses regarding their behaviour.²⁷⁸

Cases can be referred to ARJC by the court, police, prosecutors or corrective services, while victims, the offender or their lawyer can suggest a referral to conferencing.²⁷⁹

The Operational Procedures Manual (OPM) developed for the Queensland Police Service includes information about when police may refer a matter to ARJC, with particular requirements set out to ensure that the matter is suitable for conferencing.

These requirements include that the offence:

- (a) is an offence which is dealt with summarily or, where appropriate, an indictable offence which cannot be dealt with summarily;
- (b) does not involve a breach of a domestic violence order and is not otherwise related to a domestic violence application; and

²⁷³ Queensland Government, About adult restorative justice, (10 September 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.

²⁷⁴ *Dispute Resolution Centres Act 1990* (Qld).

²⁷⁵ Queensland Government, About adult restorative justice, (10 September 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.

²⁷⁶ Queensland Government, About adult restorative justice, (10 September 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.

²⁷⁷ Queensland Government, About adult restorative justice, (10 September 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.

²⁷⁸ Queensland Government, About adult restorative justice, (10 September 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.

²⁷⁹ Queensland Government, About adult restorative justice, (10 September 2024), <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>>.



(c) can be substantiated by sufficient evidence.²⁸⁰

Meanwhile ARJC can be sought if the offender:

- (a) was an adult at the time of the offence;
- (b) accepts the general circumstances of the matter and expresses a willingness for the matter to be referred for a restorative justice conference (RJC); and
- (c) is not, at the time of the commission of the offence:
 - the subject of a community-based order;
 - serving a term of imprisonment and is not on parole; or
 - subject to a suspended sentence.²⁸¹

The victim must also be willing to proceed to ARJC, and there must not be a court order that prohibits the victim and the offender having contact.²⁸²

Despite the above criteria in the OPM, the Office in Command (OIC) of the relevant police prosecution corps can also authorise referral to ARJC.²⁸³

The Magistrates Court also has the power to refer a matter to mediation. The clerk of the court or a magistrate can order a referral to ARJC if they consider the matter is better resolved in this way, or the complainant consents to the order.²⁸⁴

Court Link

Court Link is a program that provides an integrated court assessment, referral and support for accused persons by connecting them with treatment and support services.²⁸⁵ Support and assistance is provided to address the risk of re-offending in accordance with a person's needs and ability and willingness to receive help.

Referrals to Court Link can be made when a person appears before the Magistrates Court charged with any criminal offence regardless of whether the person will plead guilty or not guilty. Referrals can be made by a magistrate, a police officer, the person themselves or their supports including lawyers and family.²⁸⁶

The person should require support with issues that contribute to their offending, including:

- drug and alcohol issues;
- physical and/or mental health issues;
- impaired decision-making ability; and,
- homelessness or risk of homelessness.²⁸⁷

Participation is voluntary, and a person can be referred to the service any number of times.

People referred to Court Link are first assessed to determine the level of service required based on their risks and needs, and then either referred to appropriate community-based services or more intensive case management for approximately 12 weeks.²⁸⁸ Case management, which is only available to those on bail, includes working with the person to create a case plan and coordinating referrals to community-based services for assistance and support.

²⁸⁰ Queensland Police Service, *Operational Procedures Manual, Issue 99, 2024*, ch. 3 p.10.

²⁸¹ Queensland Police Service, *Operational Procedures Manual, Issue 99, 2024*, ch. 3 p.10.

²⁸² Queensland Police Service, *Operational Procedures Manual, Issue 99, 2024*, ch. 3 p.10.

²⁸³ Queensland Police Service, *Operational Procedures Manual, Issue 99, 2024*, ch. 3 p.10.

²⁸⁴ *Justices Act 1886* (Qld) s 53A(2); Queensland Police Service, *Operational Procedures Manual, Issue 99, 2024*, ch. 3 p.11.

²⁸⁵ Queensland Courts, Court Link, ((15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

²⁸⁶ Queensland Courts, Court Link, ((15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

²⁸⁷ Queensland Courts, Court Link, ((15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

²⁸⁸ Queensland Courts, Court Link, ((15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.



Participation in the program is regularly monitored by the court, with Court Link officers providing progress updates at court mentions.²⁸⁹

The court will receive a final report at the conclusion of the program. At this time, the court can consider a person's positive engagement with the program when sentencing. Alternatively, a lack of engagement by the person with the program may result in the matter being returned to the mainstream criminal justice system.²⁹⁰

For a person to participate in the Court Link program, they must:

- give written, informed consent to participate, which includes agreeing to the sharing of personal information between program staff, support services and the court
- treat Court Link staff with respect
- follow all reasonable directions of their case manager in relation to their case plan
- make a genuine effort to engage with treatment and support services, their case manager and the court process
- attend any appointments as directed by the court or their case manager
- tell their case manager if their contact details change
- attend court as directed.²⁹¹

Although there are no limits to the community-based organisations that a person can be referred to through Court Link, some of the agencies that are involved include:²⁹²

- Micah Projects
- Richmond Fellowship Queensland
- Brisbane Youth Service
- Hart 4000
- Department of Health
- The Salvation Army.

Drug and Alcohol Diversion Programs

There are two drug and alcohol diversion programs available in the Magistrates Court:²⁹³

- the Drug and Alcohol Assessment Referral Program (DAAR); and,
- the Illicit Drugs Court Diversion Program (CDP).

Eligibility for CDP requires that the person enters a plea of guilty to certain offences, and eligibility for DAAR requires acknowledging a link between drug/alcohol use and the offences with which the person is charged.²⁹⁴ The person may also be provided with access to further treatment.²⁹⁵

Each program consists of a 60-90 minute course regarding the harm caused by using drugs and/or alcohol and the connections between substance misuse and the committing of offences. Courses are available either face-to-face or over the phone.²⁹⁶

If the court agrees to allow participation in the programs, then a conviction will not be recorded for the offences with which the person has been charged.²⁹⁷ However, if the person does not participate

²⁸⁹ Queensland Courts, Court Link, ((15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

²⁹⁰ Queensland Courts, Court Link, (15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

²⁹¹ Queensland Courts, Court Link, (15 October 2024), <<https://www.courts.qld.gov.au/services/court-programs/court-link>>.

²⁹² Legal Aid Queensland, Court Link (13 April 2023), <<https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Diversion-and-referral-options/Court-Link>>.

²⁹³ Queensland Courts, Drug and Alcohol Diversion Programs (8 May 2024), <<https://www.courts.qld.gov.au/services/court-programs/drugalcohol>>.

²⁹⁴ Drug and Alcohol Diversion Programs, Referral Form, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0007/725227/drug-and-alcohol-diversion-referral-form.pdf>.

²⁹⁵ Drug and Alcohol Diversion Program, Factsheet, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/725226/Drug-and-alcohol-programs-factsheet.pdf>.

²⁹⁶ Queensland Courts, Drug and Alcohol Diversion Programs (8 May 2024), <<https://www.courts.qld.gov.au/services/court-programs/drugalcohol>>.

²⁹⁷ Queensland Courts, Drug and Alcohol Diversion Programs (8 May 2024), <<https://www.courts.qld.gov.au/services/court-programs/drugalcohol>>.



in the program as required, they will appear in court again for offences associated with breaching the order, that could result in a conviction.²⁹⁸

To be eligible for the DAAR, a person must intend to plead guilty to all offences connected to the program and can only have completed two DAAR courses within a five-year period.²⁹⁹

For CDP, a person is only eligible to complete two programs, and must have been charged with at least one of the following offences:

- possessing dangerous drugs;
- possessing anything used in connection with the commission of a crime;
- possessing things used for the administration, consumption or smoking of a dangerous drug;
- failing to take reasonable care of a syringe; and/or
- failing to dispose of a syringe.³⁰⁰

In addition, a person must not have pending charges for sexual offences, or an indictable drug offence, to be eligible for the program.³⁰¹

Murri Court

The Murri Court is a network of courts (Magistrates Court level) that allows eligible Aboriginal and Torres Strait Islander defendants to address various factors that have contributed to their offending and allows magistrates to give broader consideration to a defendant's circumstances.³⁰²

This court was established to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.³⁰³

Murri Courts currently operate in 15 locations throughout Queensland - Maroochydore, Brisbane, Caboolture, Cairns, Cherbourg, Cleveland, Mackay, Mount Isa, Richlands, Rockhampton, St George, Toowoomba, Townsville, Ipswich and Wynnum.³⁰⁴

The court does not have any dedicated legislation that establishes its presence or its procedures. Instead, it relies upon a Practice Direction that has been issued by the Magistrates Court, which outlines the procedures in place, which are described below.³⁰⁵

The primary goals of the Murri Court are:

- a) to reduce the frequency and seriousness of any subsequent contact Murri Court defendants might have with the criminal justice system;
- b) to encourage defendants to take responsibility for their offending, and increase defendants' awareness of the consequences of their actions for victims and the community;
- c) to encourage magistrates to consider at sentence how a defendant's cultural and personal circumstances contribute to his or her offending;
- d) to encourage defendants' attendance and engagement with support services while on bail;
- e) to facilitate improvements in defendants' self-reported physical and psychological health, and quality of life;
- f) to improve defendants' engagement with, and understanding of, the court process;

²⁹⁸ Drug and Alcohol Diversion Program, Factsheet, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/725226/Drug-and-alcohol-programs-factsheet.pdf>.

²⁹⁹ Queensland Courts, Drug and Alcohol Diversion Programs (8 May 2024), <<https://www.courts.qld.gov.au/services/court-programs/drugalcohol>>.

³⁰⁰ Drug and Alcohol Diversion Program, Factsheet, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/725226/Drug-and-alcohol-programs-factsheet.pdf>.

³⁰¹ Drug and Alcohol Diversion Program, Factsheet, <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/725226/Drug-and-alcohol-programs-factsheet.pdf>.

³⁰² Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 2.

³⁰³ IPSOS, *Evaluation of Murri Court*, (Jun 2019), p. 5.

³⁰⁴ Queensland Courts, Murri Court (4 March 2024), <<https://www.courts.qld.gov.au/contacts/murri-court>>.

³⁰⁵ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017).



g) to improve Aboriginal and Torres Strait Islander Elders' and Respected Persons' confidence and knowledge in the court process.³⁰⁶

To be eligible for assessment to appear in the Murri court, a referral can be made with the defendant's consent through the defendant, their representative or by the magistrate.³⁰⁷ The following must apply:

- the defendant must identify as Aboriginal and/or Torres Strait Islander or have a kinship or other connection to such a community;
- the offence must be of the type that can be finalised in the Magistrates Court jurisdiction; and
- the defendant will be pleading guilty, has been granted bail and consents to participate in the Murri Court process.³⁰⁸

A Community Justice Group (CJG) representative plays a critical role in the Murri Court referral and hearing process. CJGs are Aboriginal and/or Torres Strait Islander organisations funded by the Queensland Government to support Aboriginal and/or Torres Strait Islander peoples when interacting with the criminal justice system.³⁰⁹

In the context of the Murri Court, a CJG representative undertakes activities including:

- referring the defendant to the Murri Court process;
- making submissions regarding bail for the defendant;
- participating in the assessment process;
- approving support persons to be part of the assessment panel;
- providing the name of the defendant to the Murri Court Elder and/or Respected Persons and vice versa;
- convening the assessment panel; and
- identifying Elders or Respected Persons for the Murri Court and arranging their participation.³¹⁰

Additional information regarding CJG representatives can be found in the 'Legal Representation' section of this discussion paper.

An assessment panel, consisting of up to three Murri Court Elders or Respected Persons, determines whether the defendant is suitable to participate in the Murri Court. As part of this process, the panel will prepare a report detailing the defendant's suitability to participate in the process, including information relevant to the defendant's cultural and personal circumstances, and the identification of treatment and support services to which the defendant will be referred.³¹¹

A copy of this report will be provided to the defendant, the prosecutor, the Murri Court, Corrective Services, and other service providers as required before the defendant appears before the Murri Court.³¹²

The Murri Court is conducted in a manner that:

- a) enables Murri Court to address the factors contributing to a defendant's offending;
- b) enables Murri Court to take into account personal, family and cultural considerations when dealing with the defendant, and to balance the needs of the defendant's community and the wider community generally;
- c) encourages the full participation of the defendant and enables him or her to have input during Murri Court mentions and sentence;
- d) uses simple terms and confirms the defendant's understanding of the process; and

³⁰⁶ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 3.

³⁰⁷ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 4.

³⁰⁸ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 4.

³⁰⁹ IPSOS, *Evaluation of Murri Court*, (Jun 2019), p. 25.

³¹⁰ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017).

³¹¹ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 7.

³¹² Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 7.



e) provides all Murri Court participants, including the victim when present, with an opportunity to address the court about the defendant's offending.³¹³

Murri Courts provide a space designed to engage with participants where they can feel that they are fully participating in the court process. All participants in the court, including the magistrate and Murri Court Elders or Respected Persons, typically sit at the same level and in a circle when hearing Murri Court matters.³¹⁴ A Murri Court panel sits with the magistrate, consisting of one or two Murri Court Elders and/or Respected Persons.³¹⁵

Other measures allowing the defendant to feel more equipped to participate in the process include less formality, with participants being able to remain seated when making submissions, and police prosecutors not being required to appear in uniform.

At a Murri Court hearing, the entry report prepared by the assessment panel is presented to the Murri Court magistrate to confirm the person's suitability to participate in the Murri Court pre-sentence referral process, having regard to the report and any other submissions made by the parties.³¹⁶

The magistrate can then grant bail or vary the defendant's bail conditions to allow the person to participate in the pre-sentence program, where the defendant engages with various support services and Elders while on bail, under the supervision and direction of the Community Justice Group.³¹⁷

The Murri Court then monitors the defendant's progress through the program, with reports provided at various intervals to update the court as to the defendant's progress. These reports also make recommendations regarding the defendant's continued participation in the Murri Court process and can note whether any changes are required to the supports being provided.³¹⁸

At the conclusion of the pre-sentence program, the Murri Court assessment panel prepares a Murri Court Sentence Report. In this report, information is provided about the defendant's progress with treatment and support services, and about whether there are any changes in the defendant's personal and cultural circumstances. This information may assist the court to better understand the defendant's offending behaviour.³¹⁹

At the sentencing of the defendant:

- the magistrate will explain the charge in simple terms and confirm the defendant's understanding of the process;
- the prosecution will outline the facts of the offending and the defendant's lawyers are provided with the opportunity to make submissions;
- the magistrate and the Murri Court panel encourage the defendant themselves to speak to the court about the offence, the steps taken to address the factors contributing to the offending and their motivation to address these issues, as well as to comment on the effects the offending may have had on the victim and/or the community;
- the panel will speak directly to the defendant, explaining what impact the offending has had on the community and the defendant's family, and acknowledge the steps taken by the defendant to address the factors contributing to their offending;
- any other participants at the court will be invited to provide the court with relevant information about the defendant's offending and progress in addressing the contributing factors;
- the magistrate will ask the defendant how the court can assist to further address the factors leading to the offending; and
- the prosecution and the defendant's representatives are then given further opportunities to make submissions.³²⁰

³¹³ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 8.

³¹⁴ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 8.

³¹⁵ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 8.

³¹⁶ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 9.

³¹⁷ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 10.

³¹⁸ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 11.

³¹⁹ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 12.

³²⁰ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 12.



The magistrate will then sentence the defendant, taking into consideration their participation and progress in the pre-sentencing programs, along with other various reports that have been provided. At this stage the Murri Court panel will also be invited to address the defendant.³²¹

Community Justice Groups (CJGs)

CJGs are NGOs that receive funding from the Queensland Government to provide support for Aboriginal and Torres Strait Islander peoples who come into contact with the criminal justice system.³²²

The general focus of CJGs is to support people in court, with the 'key tasks' under the CJG program identified as:

- preparation and presentation of bail submissions to the court;
- preparation and presentation of sentencing submissions to the court;
- attend court sittings when Aboriginal and Torres Strait Islander offenders and victims are attending;
- support victims and offenders through court processes;
- refer victims and offenders to support and legal services; and
- attend meetings and community events to provide advice on cultural issues and communicate community views on justice related issues.³²³

CJGs currently operate in 41 communities throughout Queensland, as well as 11 CJGs operating across 10 locations on the outer islands of the Torres Strait.³²⁴

In court processes, CJGs operate in the Magistrates Court jurisdiction, supporting people in mainstream Magistrates Courts, the Murri Court, Domestic and Family Violence Specialist Courts and the Remote Justice of the Peace program.³²⁵

However, the role of CJGs are broader than activities that involve court processes, as the support provided can also include other aspects of the criminal justice system such as:

- Prevention, awareness and education – men's and women's groups, education programs (including in schools), healing programs, sporting activities and assistance with licences and Blue Card applications.
- Early intervention – Mediation and peacekeeping activities within communities, home visits by Elders and CJG members, yarning circles, and programs such as on-country healing.
- In custody and under supervision – Prison visits from Elders and CJG members, preparation of support letters for parole and watch house cell visits.
- Transitioning back into the community – Assistance in transition from custody back into the community, including prisoner reintegration programs, referrals for support services and transport from custody.³²⁶

CJGs were first introduced in 1993 under a pilot program to address recommendations following the Royal Commission into Aboriginal Deaths in Custody and have expanded with the goal of reducing the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.³²⁷

CJG staff and members, including volunteers, Elders and Respected Persons support Aboriginal and Torres Strait Islander peoples in the criminal justice system by delivering prevention, awareness, education, early intervention services, attending court sittings, preparing bail and sentencing

³²¹ Magistrates Court, Practice Direction No. 2 of 2016 (16 May 2017), p. 13.

³²² Court Innovation Program, *Community Justice Group Program Guidelines* (1 July 2023), p. 4.

³²³ Court Innovation Program, *Community Justice Group Program Guidelines* (1 July 2023), p. 6.

³²⁴ Queensland Courts, *Community Justice Group Program*, (25 September 2024), <<https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>>.

³²⁵ Court Innovation Program, *Community Justice Group Program Guidelines* (1 July 2023), p. 11.

³²⁶ Court Innovation Program, *Community Justice Group Program Guidelines* (1 July 2023), p. 4.

³²⁷ Court Innovation Program, *Community Justice Group Program Guidelines* (1 July 2023), p. 4.



submissions to the court, referring victims and offenders to support and legal services and supporting the operation of Murri Courts in Queensland.³²⁸

The CJGs' roles that are relevant for the purposes of this discussion paper include the following:

- *Bail Act 1980*:
 - When considering the issue of bail, the court or police officer need to have regard to any submissions made by the CJG representative in the defendant's community, including information regarding:
 - The defendant's relationship with their community;
 - Cultural considerations; or
 - Considerations relating to programs and services that the CJG provides.³²⁹
 - CJGs can make an application to have access to court files that is relevant to making a submission regarding the defendant's bail.³³⁰
- *Penalties and Sentences Act 1992*:
 - Similar to the above, when sentencing an offender, a court must have regard to any submissions made by the CJG representative in the offender's community, including information regarding the offender's relationship with their community, cultural considerations or considerations relating to programs and services that the CJG provides.³³¹
 - The CJG can again apply to have access to a court file in order to make a submission about an offender's sentence.³³²

CJGs also play a key role in the Murri Court process. The Murri Court and its functions have been covered above, but specifically in relation to the role of CJGs:

- Murri Court Elders and Respected Persons are members of CJGs.³³³
- CJG representatives can refer a defendant to the Murri Court with their consent.³³⁴
- CJGs participate in the assessment process to determine a defendant's suitability to participate in the Murri Court.³³⁵
- In the assessment process, the CJGs are responsible for:³³⁶
 - Approving support persons for the defendant who will participate in the assessment process.
 - Providing the name of the defendant to the Murri Court Elders and Respected Persons and vice versa to identify any conflict of interest.
 - Nominating a replacement for a Murri Court assessment panel member if a replacement is necessary.
 - Convening the Murri Court assessment panel.
 - Providing copies of the Murri Court Entry Report to the other people involved in the proceedings and service providers.
- In Murri Court proceedings the CJG will:³³⁷
 - Identify Elders and Respected Persons to participate as Murri Court panel members who sit in the Magistrates Court.
 - Notify panel members of sitting dates.
 - Support Elders and Respected Persons.

³²⁸ Queensland Courts, Community Justice Group Program (25 September 2024), <<https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>>.

³²⁹ *Bail Act 1980* (Qld) s 16(2)(e).

³³⁰ *Bail Act 1980* (Qld) s 34C.

³³¹ *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).

³³² *Penalties and Sentences Act 1992* (Qld) s 195B.

³³³ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 1.

³³⁴ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 4.

³³⁵ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 7.

³³⁶ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 7.

³³⁷ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 8.



- During progress mentions, the CJG recommends at what intervals these mentions are conducted.
- Participate in the sentence hearing.
- CJGs will aim to ensure the defendant faces the same Elders or Respected Persons, notifying panel members of the defendant's identity and vice versa, as well as nominating replacement panel members if a replacement is necessary.³³⁸
- The defendant is subject to the supervision and direction of the CJG when being referred to service providers before sentencing, and the CJG receives progress reports from service providers, or the CJG completes the progress report if the CJG is providing the service.³³⁹
- The CJG will convene an assessment panel for the purpose of completing a Murri Court Sentence Report and provide the report to all of the relevant parties and agencies at the sentencing.³⁴⁰
- The CJG is responsible for notifying the court, the prosecutor and the defendant's lawyer if the defendant fails to engage with the CJG or no longer wishes to participate in the Murri Court.³⁴¹

³³⁸ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 9.

³³⁹ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 10.

³⁴⁰ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 12.

³⁴¹ Magistrates Court, Practice Direction No. 2 of 2016, (16 May 2017) p. 14.



Appendix 3: Key legislation regarding bail, evidence and sentencing

Bail

Bail is a written promise (or undertaking) that the offender will return to court.³⁴² Bail can generally be granted by police if they arrest the person, or by the court if the person is not given bail by police or if the person was given a notice to appear.³⁴³

The police or court must grant bail unless they believe that there is an unacceptable risk if the person is released on bail that the offender will:

- not appear before the court;
- commit further offences;
- endanger the safety of the victim or any other person; or
- interfere with witnesses or in any other way obstruct the course of justice.³⁴⁴

However, if the offender is charged with certain offences (such as an indictable offence while armed with a weapon or any indictable offence after being charged for another offence), then the offender must 'show cause' to the court as to why they should be given bail.³⁴⁵

Bail can have conditions, which can be any condition that the court or police believe will ensure that the offender appears again before court, does not commit further offences, endanger people, or interfere with proceedings.³⁴⁶ These conditions can include regularly reporting to police stations, residing at a particular address, and not contacting certain people.³⁴⁷

A condition of bail can also include a 'surety', which means that another person agrees to an amount of money that will be forfeited if the offender does not appear at court when they are supposed to.³⁴⁸ An offender can seek to change the conditions of their bail with the court,³⁴⁹ or changes may be allowed if the bail undertaking allows another entity (such as the prosecuting authority) to make changes.

The court can also impose as a condition of bail required participation in a treatment, rehabilitation or other intervention program (such as the CDP),³⁵⁰ or participation in the DAAR course.³⁵¹

If an offender does not comply with their bail, then this is an offence under the *Bail Act 1980*,³⁵² and can result in bail being revoked by the court. However, it is not considered a breach of bail if the offender fails to comply with a treatment, rehabilitation or other intervention program (such as the CDP) or the DAAR course.³⁵³

³⁴² Queensland Courts, Understanding bail, (30 June 2023) <<https://www.courts.qld.gov.au/going-to-court/understanding-bail>>.

³⁴³ *Bail Act 1980* (Qld) ss 7, 8.

³⁴⁴ *Bail Act 1980* (Qld) s 16.

³⁴⁵ *Bail Act 1980* (Qld) s 16.

³⁴⁶ *Bail Act 1980* (Qld) s 11.

³⁴⁷ Queensland Courts, Understanding bail, (30 June 2023) <<https://www.courts.qld.gov.au/going-to-court/understanding-bail>>.

³⁴⁸ *Bail Act 1980* (Qld) s 11.

³⁴⁹ *Bail Act 1980* (Qld) s 30.

³⁵⁰ *Bail Act 1980* (Qld) s 11(9).

³⁵¹ *Bail Act 1980* (Qld) s 11AB.

³⁵² *Bail Act 1980* (Qld) s 29(1).

³⁵³ *Bail Act 1980* (Qld) s 29(2).



The Supreme Court can review a decision about bail made by a Magistrate.³⁵⁴ Only the Supreme Court can grant bail in certain circumstances, such as if a person is charged with murder.³⁵⁵

The *Bail Act* contains a provision regarding persons with an 'impairment of the mind', defined as: a person who has a disability that—

- (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
- (b) results in—
 - (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and
 - (ii) the person needing support.³⁵⁶

If a police officer or court believes that the offender is such a person who does not appear to understand the nature and effect of entering into a bail undertaking, then the person can be released without bail by:

- releasing the person into the care of another who ordinarily has the care of the person or lives with the person; or
- letting the person go by themselves.

The person is then released and given a 'release notice' that states:

- the person's name and address;
- the offences that the person was charged with;
- if the person was released into the care of another person, the other person's name and address;
- the court where the person must return to; and
- the time and location of the court that the person must return to.³⁵⁷

The notice must also include a warning that a warrant will be issued for the person's arrest if they do not come to court and, if the person was released into the care of another person, a copy of the release notice must be given to the other person.³⁵⁸

Expert evidence panel in relation to affirmative consent laws

In 2024, the *Criminal Code* and the *Evidence Act 1977* were amended to include new affirmative consent and mistake of fact provisions.³⁵⁹

The *Criminal Code* was amended to specify that consent for sexual acts must involve affirmative consent, or 'free and voluntary agreement'.³⁶⁰ As part of this new framework, should the defendant wish to raise a 'mistake of fact' defence, where the defendant held 'an honest and reasonable, but mistaken, belief' that the complainant consented,³⁶¹ it would not be a reasonable belief if the defendant did not, 'immediately before or at the time of the act, say or do anything to ascertain whether' the complainant consented to the act.³⁶²

However, this requirement does not apply if the defendant had a 'cognitive impairment' or a 'mental health impairment' where the impairment was a 'substantial cause' of the defendant not saying or doing anything to ascertain whether the complainant consented.³⁶³ Therefore, such defendants are

³⁵⁴ *Bail Act 1980* (Qld) s 19C.

³⁵⁵ *Bail Act 1980* (Qld) s 13.

³⁵⁶ *Bail Act 1980* (Qld) s 11A.

³⁵⁷ *Bail Act 1980* (Qld) s 11B.

³⁵⁸ *Bail Act 1980* (Qld) s 11B.

³⁵⁹ *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld).

³⁶⁰ *Criminal Code Act 1899* (Qld) s 348(1).

³⁶¹ *Criminal Code Act 1899* (Qld) s 348A(1).

³⁶² *Criminal Code Act 1899* (Qld) s 348A(3).

³⁶³ *Criminal Code Act 1899* (Qld) s 348A(4).



not required to have said or done anything to ascertain whether the complainant consented in order to raise a 'mistake of fact' defence.

For the purposes of the above, a person has a cognitive impairment if:

- (a) the person has an ongoing impairment in adaptive functioning; and
- (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory so as to affect functioning in daily life to a material extent; and
- (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (2) or for other reasons.³⁶⁴

The legislation further sets out that a cognitive impairment 'may arise' from the following conditions or other reasons:

- (a) intellectual disability;
- (b) borderline intellectual functioning;
- (c) dementia;
- (d) an acquired brain injury;
- (e) drug or alcohol related brain damage, including fetal alcohol spectrum disorder;
- (f) autism spectrum disorder.³⁶⁵

A person has a mental health impairment for these provisions if:

- (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory; and
- (b) the disturbance would be regarded as significant for clinical diagnostic purposes; and
- (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person so as to affect functioning in daily life to a material extent.³⁶⁶

The legislation provides that a mental health impairment 'may arise' from the following conditions or other reasons:

- (a) an anxiety disorder;
- (b) an affective disorder;
- (c) a psychotic disorder;
- (d) a substance induced mental disorder.³⁶⁷

However, a mental health impairment does not arise if the impairment is caused solely by voluntary intoxication.³⁶⁸

Under the *Evidence Act*, a 'sexual offence expert evidence panel' has been established, with its pilot program starting in February 2025, which is designed to provide evidence regarding defendants with cognitive or mental health impairments as defined above, in relation to the issue of mistake of fact and affirmative consent.³⁶⁹

A person on the panel must be able to show that they have 'specialised knowledge' through 'training, study or experience' in psychiatry, neuro-cognitive psychology or a 'field of knowledge' that is relevant to making an assessment on the effects of a cognitive or mental health impairment on a person's ability to communicate.³⁷⁰

A party to the proceedings concerning the sexual offence (which could be the prosecutor or defendant) can engage a person who is on the expert evidence panel to give evidence about the defendant's ability to communicate, and whether their impairment was a substantial cause of their failure to take a positive step to ascertain whether the complainant consented.³⁷¹

³⁶⁴ *Criminal Code Act 1899* (Qld) s 348B(1).

³⁶⁵ *Criminal Code Act 1899* (Qld) s 348B(2).

³⁶⁶ *Criminal Code Act 1899* (Qld) s 348C(1).

³⁶⁷ *Criminal Code Act 1899* (Qld) s 348C(2).

³⁶⁸ *Criminal Code Act 1899* (Qld) s 348C(3).

³⁶⁹ *Evidence Act 1977* (Qld) s 103ZZH(1).

³⁷⁰ *Evidence Act 1977* (Qld) s 103ZZH(2).

³⁷¹ *Evidence Act 1977* (Qld) s 103ZZF(1).



Sentencing

Penalties and Sentences Act

If a person is found guilty of an offence (such as through a plea of guilty or being found guilty after a trial), the person will need to have a penalty or sentence imposed as a result.

The purpose of the *Penalties and Sentences Act 1992* is to have a single Act to set out the general powers of the courts when sentencing offenders.³⁷² Offences generally have a maximum penalty that applies, such as are specified in the *Criminal Code*.

Various options are found in the Act for sentencing offenders, with the main options being:

- fines
- good behaviour bond
- probation
- community service
- intensive corrections order
- suspended sentence
- jail sentence.

A court can give one or more of these sentences depending on the case.

Governing principles

The *Penalties and Sentences Act* contains a number of guiding principles for the court to take into consideration when sentencing an offender.³⁷³

The Act requires the court to only impose a sentence for one or more of the following purposes:

- (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
- (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
- (c) to deter the offender or other persons from committing the same or a similar offence; or
- (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
- (e) to protect the Queensland community from the offender;³⁷⁴

Further, the Act requires the court to consider a number of other principles and factors when sentencing an offender, including:³⁷⁵

- a sentence of imprisonment is to be imposed as a last resort,³⁷⁶ and a sentence should allow the offender to stay in the community;
- how much the offender is 'to blame for the offence'; and
- The offender's character, including intellectual capacity.

There are a large number of other factors that the court must take into consideration when sentencing under the principles of the Act such as the seriousness of the offending, and general aggravating and mitigating factors.³⁷⁷ But the Act is not a code, and therefore common law principles of sentencing still apply, with the courts having broad discretion when handing down a sentence.³⁷⁸ Common law principles are often established in sentencing, such as a court recognising that a cognitive disorder

³⁷² *Penalties and Sentences Act 1992* (Qld) s 3.

³⁷³ *Penalties and Sentences Act 1992* (Qld) pt 2.

³⁷⁴ *Penalties and Sentences Act 1992* (Qld) s 9(1).

³⁷⁵ *Penalties and Sentences Act 1992* (Qld) s 9(2).

³⁷⁶ There is an exception to this principle if the offending is of violence against a person or child sex offences: P *Penalties and Sentences Act 1992* (Qld) s 9(2A), 9(4).

³⁷⁷ *Penalties and Sentences Act 1992* (Qld) s 9.

³⁷⁸ *R v Townshend* [2021] QCAT 106 at [46].



that falls short of the defence of unsoundness of mind can lessen an offender's culpability and reduce the relevance of deterrence when sentencing.³⁷⁹

Non-custodial sentences

Non-custodial sentences are penalties and sentences that do not involve imprisonment.

Absolute discharge

The court can release a person without any penalty by making an order to release the offender absolutely.³⁸⁰

Fines

A court can order the offender to pay a fine (an amount of money), which will be received by the Queensland Government.³⁸¹ The maximum amount of the fine depends upon the offence and the court hearing the matter.³⁸² The court will generally state a time period that the fine must be paid by,³⁸³ but further options are available if the offender is unable to pay, such as: the matter being referred to the State Penalties and Enforcement Registry (SPER), which can arrange for payments over a period of time;³⁸⁴ the court ordering an instalment plan;³⁸⁵ or a fine option order where the offender can perform community service instead of making payments.³⁸⁶

If a fine is referred to SPER and payments are not made, SPER has a number of other actions that can be taken, such as:

- suspending a person's driver's licence;
- directing the offender's bank to transfer money to SPER;
- directing employers to transfer part of an offender's wages;
- immobilising the offender's vehicles;
- seizing and selling the offender's property; and/or
- issuing a warrant for arrest and imprisonment.³⁸⁷

Good behaviour bond (recognition)

A good behaviour bond is a promise made to the court, usually to take a certain action and/or to not further offend for a certain period of time.

There are a number of different good behaviour bonds:

- Bond under section 19: The offender is released on the condition that they not break the law for up to 3 years and appear before the court for conviction and sentence if called to do so in that period of time. Other conditions can be ordered, such as attending drug and alcohol diversion programs.³⁸⁸ If the offender breaches this bond, the court can forfeit the bond issue a warrant for their arrest.³⁸⁹
- Bond for property related offences: If an offender is convicted of a property related offence, a court can adjourn the sentence for up to 6 months and have the person enter into a bond. This is upon the condition that the offender appear before the court to be sentenced at a later time, with other conditions ordered including the person return the property or pay compensation to the

³⁷⁹ *R v Goodger* [2009] QCA 377 [21].

³⁸⁰ *Penalties and Sentences Act 1992* (Qld) s 19.

³⁸¹ *Penalties and Sentences Act 1992* (Qld) s 45.

³⁸² *Penalties and Sentences Act 1992* (Qld) s 46.

³⁸³ *Penalties and Sentences Act 1992* (Qld) s 51(a).

³⁸⁴ *Penalties and Sentences Act 1992* (Qld) ss 51, 52.

³⁸⁵ *Penalties and Sentences Act 1992* (Qld) s 51.

³⁸⁶ *Penalties and Sentences Act 1992* (Qld) pt 4, div 2.

³⁸⁷ *State Penalties and Enforcement Act 1999* (Qld).

³⁸⁸ *Penalties and Sentences Act 1992* (Qld) s 19.

³⁸⁹ *Penalties and Sentences Act 1992* (Qld) s 20.



victim, with the court taking into consideration what actions the offender has taken when being sentenced.³⁹⁰

- Bond upon conviction: When an offender is convicted, they can be ordered to enter into a bond for up to one year where they must not break the law. If the conviction is on indictment (a more serious offence in the District or Supreme Court), the period can be longer than one year, and the offender can be imprisoned until they enter into the bond. A bond entered for an indictment can be made in addition to, or instead of, another sentence.³⁹¹
- Bond instead of another sentence: The court can also impose a bond instead of another sentence if the person agrees to appear before the court to be sentenced in the future and not commit further offences. Any other additional conditions can also be imposed for the bond.³⁹²

Bonds can be made 'with or without sureties'³⁹³ where the person or another person acting as a 'surety' has to pay an amount if the person does not comply with the order.

Probation

A probation order can be made by the court as a sentence, which has a number of requirements that the offender must follow.³⁹⁴ A probation order can be for a period of between 6 months and 3 years, during which time the offender will be under the supervision of a corrective services officer.³⁹⁵

There are a number of mandatory requirements for the offender to follow under a probation order, where they must:

- not commit another offence during the order;
- report to the corrective services officer within the time period stated in the order;
- report to and receive visits as directed by the corrective services officer;
- take part in counselling and attend other programs as directed by the corrective services officer;
- notify the corrective services officer about any change of residence;
- not leave or stay out of Queensland without permission from the corrective services officer; and,
- comply with reasonable directions from the corrective services officer.³⁹⁶

The court can include other requirements the offender must comply with during the probation order, such as medical or psychiatric treatment, or any condition the court considers necessary to prevent further offending.³⁹⁷

Before the court can make a probation order, the court must explain to the offender the purpose and effect of the order, the consequences of not following the order, and note that the order can be changed upon application. The explanation must be provided in a way that can be understood by the offender.³⁹⁸ The offender must also agree to the probation order being made and agree to comply with the order.³⁹⁹

Community service order

The court can make a community service order where the offender must complete unpaid community service.⁴⁰⁰ The total number of hours to be performed must be at least 40 hours, and at most 240 hours, to be completed within 1 year of the order being made.⁴⁰¹

Community service orders have the following requirements, where the offender must:

³⁹⁰ *Penalties and Sentences Act 1992* (Qld) ss 23-26.

³⁹¹ *Penalties and Sentences Act 1992* (Qld) ss 29-31.

³⁹² *Penalties and Sentences Act 1992* (Qld) s 32.

³⁹³ *Penalties and Sentences Act 1992* (Qld) ss 19, 24, 30-32.

³⁹⁴ *Penalties and Sentences Act 1992* (Qld) s 96.

³⁹⁵ *Penalties and Sentences Act 1992* (Qld) s 92.

³⁹⁶ *Penalties and Sentences Act 1992* (Qld) s 93.

³⁹⁷ *Penalties and Sentences Act 1992* (Qld) s 94.

³⁹⁸ *Penalties and Sentences Act 1992* (Qld) s 95.

³⁹⁹ *Penalties and Sentences Act 1992* (Qld) s 96.

⁴⁰⁰ *Penalties and Sentences Act 1992* (Qld) s 201.

⁴⁰¹ *Penalties and Sentences Act 1992* (Qld) s 103(2).



- not commit another offence during the order;
- report to the corrective services officer within the time period stated in the order;
- report to and receive visits as directed by the corrective services officer;
- perform the community service satisfactorily;
- notify the corrective services officer about any change of residence;
- not leave or stay out of Queensland without permission from the corrective services officer; and,
- comply with reasonable directions from the corrective services officer.⁴⁰²

Like a probation order, the court must explain to the offender the purpose and effect of the order, the consequences of not following the order, and note that the order can be amended upon application.⁴⁰³ The explanation must be made in a way that can be understood by the offender.⁴⁰⁴

In most cases, the offender must agree to the community service order being made.⁴⁰⁵ However, there are a number of violent offences⁴⁰⁶ that, if committed in a public place while the offender was intoxicated, community service must be ordered in addition to any other penalties.⁴⁰⁷

This order must be made unless the court is satisfied that the offender cannot comply with the order due to a physical, intellectual or psychiatric disability.⁴⁰⁸

Breach of a community service or probation order

It is an offence under the Act to breach a community service or probation order.⁴⁰⁹ A breach may occur when a requirement of the order is not met, such as the offender committing another offence during the period of the order or not cooperating with the order.

If an offender is found to have breached an order, there are a number of options open to the courts.⁴¹⁰ The court can allow the offender to continue with their order,⁴¹¹ or effectively re-sentence the offender in the same way the offender could have been sentenced when the original order was made, while taking into consideration what the offender has done to comply with the order.⁴¹² This could then result in the community-based order being extended, or a more serious sentence being handed down, such as imprisonment.

Intensive correction order

If the court sentences an offender to a term of one year of imprisonment or less, the court can make an intensive correction order for the offender.⁴¹³ The effect is that the term of imprisonment is served in the community and not in prison, with a number of intensive conditions placed on the offender. This provides an 'opportunity to demonstrate genuine rehabilitation'⁴¹⁴ and can be seen as the final option before committing an offender to a custodial sentence.

During the order, the offender must:

- not commit another offence;
- report to the corrective services officer within the time period stated in the order;
- report to and receive visits as directed by the corrective services officer at least twice per week;

⁴⁰² *Penalties and Sentences Act 1992* (Qld) s 103(1).

⁴⁰³ *Penalties and Sentences Act 1992* (Qld) s 105.

⁴⁰⁴ *Penalties and Sentences Act 1992* (Qld) s 105.

⁴⁰⁵ *Penalties and Sentences Act 1992* (Qld) s 106.

⁴⁰⁶ These offences are: affray, grievous bodily harm, wounding, common assault, assault occasioning bodily harm, and serious assault.

⁴⁰⁷ *Penalties and Sentences Act 1992* (Qld) s 108B.

⁴⁰⁸ *Penalties and Sentences Act 1992* (Qld) s 108B.

⁴⁰⁹ *Penalties and Sentences Act 1992* (Qld) s 123.

⁴¹⁰ *Penalties and Sentences Act 1992* (Qld) ss 125, 126.

⁴¹¹ Through 'admonishing and discharging', *Penalties and Sentences Act 1992* (Qld) ss 125(2), 126(2).

⁴¹² *Penalties and Sentences Act 1992* (Qld) ss 125, 126.

⁴¹³ *Penalties and Sentences Act 1992* (Qld) s 112.

⁴¹⁴ *R v RY; Ex-parte A-G* (Qld) [2006] QCA 437.



- take part in counselling and attend other programs as directed by the court or corrective services officer;
- satisfactorily perform community service as directed by the corrective services officer;
- reside at a community residential facility for up to 7 days if directed by a corrective services officer;
- notify the corrective services officer about any change of residence;
- not leave or stay out of Queensland without permission from the corrective services officer; and
- comply with reasonable directions from the corrective services officer.⁴¹⁵

Further requirements can be imposed on the offender by the court, such as medical or psychiatric treatment, or any condition the court considers necessary to prevent further offending.⁴¹⁶ The court must explain to the offender the purpose and effect of the order, the consequences of not following the order, and note that the order can be changed upon application. As with other orders, the explanation must be made in a way that can be understood by the offender.⁴¹⁷ The offender must also agree to the order being made and to comply with the order.⁴¹⁸

If an intensive correction order is breached (such as through offending during the period of the order or non-compliance with its requirements), it can be addressed through resentencing.⁴¹⁹

However, as mentioned above, as intensive correction orders are seen as a final option before custody, the court has additional powers to imprison an offender immediately when an order is breached for the duration of the order.⁴²⁰

Imprisonment

An offender can be sentenced to imprisonment,⁴²¹ serving this time in custody (jail). However, the offender may not necessarily serve the whole sentence in actual custody depending upon the order of imprisonment.

Suspended sentence

If a court orders an offender to imprisonment for a period of 5 years or less, the court can suspend all or part of that sentence.⁴²² This means that the offender may spend some time in jail and be released on the suspended sentence, or the suspended sentence can begin immediately, with the offender not actually going to jail.

The suspended part of the sentence is suspended for a period of time, which is called the operational period.⁴²³

No supervision is provided to the offender when in the community on a suspended sentence. However, they may also be serving other, concurrent sentences where there are orders of probation or parole with supervision in the community.

If the offender commits a further offence that is punishable by imprisonment during the operational period of the suspended sentence, then the offender can be further punished.⁴²⁴ The court must order the person to serve the whole of the suspended imprisonment term unless the court believes it is unjust

⁴¹⁵ *Penalties and Sentences Act 1992* (Qld) s 114.

⁴¹⁶ *Penalties and Sentences Act 1992* (Qld) s 115.

⁴¹⁷ *Penalties and Sentences Act 1992* (Qld) s 116.

⁴¹⁸ *Penalties and Sentences Act 1992* (Qld) s 117.

⁴¹⁹ *Penalties and Sentences Act 1992* (Qld) s 125, 126.

⁴²⁰ PSA s 127.

⁴²¹ *Penalties and Sentences Act 1992* (Qld) s 152.

⁴²² *Penalties and Sentences Act 1992* (Qld) s 144.

⁴²³ *Penalties and Sentences Act 1992* (Qld) s 144(6).

⁴²⁴ *Penalties and Sentences Act 1992* (Qld) s 146.



to do so.⁴²⁵ Other options open to the court include extending the operational period for up to 1 year, or to order the offender to serve a part of the suspended sentence in custody.⁴²⁶

Parole

If a person is sentenced to imprisonment, parole is another option open to the courts.⁴²⁷ An offender is in the community while on parole but supervised and under conditions set by Corrective Services Queensland.⁴²⁸

When a person is released on parole can depend upon a number of factors. A person can have a parole release date, or an eligibility date set by the courts.⁴²⁹ A parole release date is a day that an offender will be released on parole, while a parole eligibility date is when the offender can apply to be released on parole, to be determined by the Parole Board.⁴³⁰

Whether a person is given a release or eligibility date can depend on a number of factors, such as the type of offending, the length of the sentence, and whether the person has previously had their parole cancelled.

A parole release date can be set if the period of imprisonment is less than 3 years and the offence was not a sexual, serious violence, or terrorism offence, and if the offender has not had their parole cancelled.⁴³¹

If the court is setting a parole release date, the court can do so on any day of the sentence, including the day of the sentence (where the offender will be released immediately into the community on parole) or the last day of the sentence (where the offender will spend the whole of their imprisonment in prison, then be released without parole).⁴³²

A parole eligibility date can be set by the court or by legislation, depending on the situation.⁴³³ A parole eligibility date is the day on which the offender can be released on parole after being granted parole by the Parole Board. The Parole Board is then responsible for determining whether a person is suitable to be released on parole.⁴³⁴

A parole eligibility date can be ordered when a parole release date cannot be made, such as when the sentence is longer than 3 years, or the sentence is for a sexual or serious violent offence.⁴³⁵ Like with parole release dates, the court can generally set an eligibility date for any day of the period of imprisonment, but there are some exceptions such as when a person is sentenced to life imprisonment or is convicted of a serious violent offence. With these exceptions, if the court does not set a parole eligibility date, the offender will be eligible for parole after serving half of the period of imprisonment.⁴³⁶

When a prisoner is released on parole, they are under the supervision of Queensland Corrective Services until the end of the prisoner's period of imprisonment.⁴³⁷

Standard conditions of parole under the law include:

- reporting to and receiving visits from a Corrective Services officer, as well as following any lawful instructions from the officer;

⁴²⁵ *Penalties and Sentences Act 1992* (Qld) s 147(2).

⁴²⁶ *Penalties and Sentences Act 1992* (Qld) s 147(1).

⁴²⁷ *Penalties and Sentences Act 1992* (Qld) pt 9 div 3.

⁴²⁸ *Corrective Services Act 2006* (Qld) s 200.

⁴²⁹ *Penalties and Sentences Act 1992* (Qld) pt 9 div 3.

⁴³⁰ *Penalties and Sentences Act 1992* (Qld) s 160, *Corrective Services Act 2006* (Qld) s 180.

⁴³¹ *Penalties and Sentences Act 1992* (Qld) s 160B.

⁴³² *Penalties and Sentences Act 1992* (Qld) s 160G.

⁴³³ *Penalties and Sentences Act 1992* (Qld) pt 9 div 3, CSA ch 5.

⁴³⁴ *Corrective Services Act 2006* (Qld) s 180.

⁴³⁵ *Penalties and Sentences Act 1992* (Qld) ss 160C-160D.

⁴³⁶ *Corrective Services Act 2006* (Qld) s 184.

⁴³⁷ *Corrective Services Act 2006* (Qld) s 200.



- notifying Corrective Services within 48 hours of changing address or employment;
- being tested for drug and alcohol use if required to do so;
- not committing further offences; and
- following any other conditions that are part of the prisoner's parole order.⁴³⁸

The parole board can amend, suspend or cancel parole if it believes that the prisoner:

- has failed to comply with the conditions of parole;
- poses a serious risk of harm to someone else;
- poses an unacceptable risk of committing an offence;
- is preparing to leave Queensland without approval; or
- if the board receives information that it should have received before the parole order was made that would have resulted in the board deciding the order differently.⁴³⁹

The parole board can amend or suspend parole if the prisoner is charged with committing a new offence. The board can also suspend or cancel parole if it believes that the prisoner poses a risk of carrying out a terrorist act.⁴⁴⁰

Concurrent and cumulative sentences

If a court orders imprisonment for more than one offence, the offender will generally serve the imprisonment terms concurrently (at the same time).⁴⁴¹ However, the court can decide, dependent on the case, that separate orders of imprisonment be served cumulatively (one after the other).⁴⁴²

There are also situations where an offender must serve sentences of imprisonment cumulatively, such as if the offender has committed certain serious offences (contained in a schedule in the *Penalties and Sentences Act*, classified as serious violent offences) and the person is:

- in prison;
- on parole or another post-prison community-based order;
- on leave of absence from imprisonment; or
- unlawfully at large by escaping while under custody.⁴⁴³

Life imprisonment

An offender can be sentenced to life imprisonment, with some offences having life imprisonment as a maximum penalty, and convictions for murder or a repeat serious child sex offence having a mandatory life imprisonment sentence.⁴⁴⁴

When serving a sentence of life imprisonment, there are minimum periods of time an offender must spend in custody before being released on parole.

This period depends upon the offence that the person has been convicted of:⁴⁴⁵

- 30 years for the murder of more than one person, or if the offender had a previous murder conviction;
- 25 years for the murder of a police officer;
- 20 years for any other single conviction of murder or a repeat serious child sex offence; or
- 15 years for a life sentence for any other offence.

⁴³⁸ *Corrective Services Act 2006* (Qld) s 200.

⁴³⁹ *Corrective Services Act 2006* (Qld) s 205.

⁴⁴⁰ *Corrective Services Act 2006* (Qld) s 205.

⁴⁴¹ *Penalties and Sentences Act 1992* (Qld) s 155.

⁴⁴² *Penalties and Sentences Act 1992* (Qld) s 156.

⁴⁴³ *Penalties and Sentences Act 1992* (Qld) s 156A.

⁴⁴⁴ *Penalties and Sentences Act 1992* (Qld) s 161E, *Criminal Code 1899* (Qld) s 305.

⁴⁴⁵ *Penalties and Sentences Act 1992* (Qld) ss 181-181A.



The offender is eligible for parole after serving the minimum period of time in custody. If released on parole, the offender will be on parole in the community for the rest of their life.

Exceptional circumstances parole

A prisoner can apply, in most cases, for exceptional circumstances parole at any time during their imprisonment.⁴⁴⁶ Although 'exceptional circumstances' are not defined and are determined at the discretion of the parole board, some examples may include a prisoner who develops a terminal illness with a short life expectancy, or a prisoner who must become the sole carer of a spouse who requires constant care.⁴⁴⁷

There is a specific test that must be applied to 'restricted prisoners', who are prisoners accused of multiple murders or of murdering a child and who have received a restricted prisoner declaration.⁴⁴⁸

A prisoner who is subject to the 'no body-no parole' rule is also prohibited from applying for exceptional circumstances parole.⁴⁴⁹

Indefinite sentence

An indefinite sentence is a term of imprisonment that continues until the court orders otherwise.⁴⁵⁰ The court can impose an indefinite sentence in relation to certain 'qualifying offences', with a list provided in legislation that generally involves serious violent or sexual offences, or offences where a person is killed.⁴⁵¹

The court must be satisfied that an indefinite sentence should be imposed, considering such factors as the offender being a serious danger to the community.⁴⁵²

To make this determination, the court considers:

- the person's age, character, health, mental condition and general background;
- the severity of the offence;
- any special circumstances;
- if the nature of the offence is exceptional;
- the risk of serious harm to the community if the indefinite sentence is not imposed; and,
- any other matters that the court believes relevant to imposing the sentence.

When sentencing the offender, the court must state what it would have imposed as a 'nominal sentence' had it not imposed an indefinite sentence.⁴⁵³ After the prisoner has served the nominal sentence with its non-parole period (which depends upon the type of offence and sentence), the court then carries out reviews at regular intervals (within 6 months for the first review, then within at least 2 years for subsequent reviews) of the indefinite sentence.⁴⁵⁴ A prisoner can also apply for a review any time after the first review if there are exceptional circumstances.⁴⁵⁵

Upon review, the prisoner can be discharged from the indefinite sentence and have imposed on them a fixed sentence, which cannot be less than the nominal sentence.⁴⁵⁶

⁴⁴⁶ *Corrective Services Act 2006* (Qld) s 176.

⁴⁴⁷ Explanatory Notes, *Corrective Services Bill 2006* (Qld) 141.

⁴⁴⁸ *Corrective Services Act 2006* (Qld) s 176A.

⁴⁴⁹ *Corrective Services Act 2006* (Qld) s 176B.

⁴⁵⁰ *Penalties and Sentences Act 1992* (Qld) s 162.

⁴⁵¹ *Corrective Services Act 2006* (Qld) s 163.

⁴⁵² *Corrective Services Act 2006* (Qld) s 163.

⁴⁵³ *Penalties and Sentences Act 1992* (Qld) s 163.

⁴⁵⁴ *Penalties and Sentences Act 1992* (Qld) s 171.

⁴⁵⁵ *Corrective Services Act 2006* (Qld) s 172.

⁴⁵⁶ *Corrective Services Act 2006* (Qld) s 173.



During an indefinite sentence, a prisoner cannot apply for parole.⁴⁵⁷ The prisoner can apply for parole to the Parole Board if they are on a fixed sentence, and the Parole Board can then set a parole period of up to 5 years or until the end of the prisoner's period of imprisonment, whichever is longer.⁴⁵⁸

Other orders

Graffiti removal order

A graffiti removal order must be made when a person is convicted of a graffiti offence and can be served concurrently with any other penalty the court imposes.⁴⁵⁹ The court does not need to make a graffiti removal order if the court is satisfied that the offender is not capable of complying with the order.⁴⁶⁰

This order has a number of conditions that the offender must follow (such as reporting to Corrective Services, not committing another offence), which are similar to those required for community service.⁴⁶¹ The number of hours that the offender must work in removing graffiti can be up to 40 hours to be completed within 1 year, unless the court orders otherwise.⁴⁶²

Restitution and compensation

The court, in addition to any other penalty given, can order restitution or compensation from the offender where the offender is required to pay for any property that was damaged or taken, or to compensate for any loss or damage caused to property or through injury to a person in the offending.⁴⁶³

Non-contact order

The court can make a non-contact order when a person is convicted of an indictable offence committed against a person.⁴⁶⁴

The order requires that the offender either:

- not contact the victim or a person the victim was with (an associate) at the time of the offence; or
- not go to a place or near that place.⁴⁶⁵

The order can be for up to 2 years at the time of conviction, or if the offender is sentenced to (not a suspended term of) imprisonment, then 2 years after the term of imprisonment ends.⁴⁶⁶

The court can make the order if it is satisfied that, if the order is not made, there is an unacceptable risk of the person:

- injuring the victim or an associate including psychologically; or
- harassing the victim or associate; or
- damaging the property of the victim or associate; or
- acting in any way to cause a detriment to the victim or an associate, including having them fear that they will be harassed or feel they have to change their actions, such as how they travel to work.⁴⁶⁷

⁴⁵⁷ *Corrective Services Act 2006* (Qld) s 179.

⁴⁵⁸ *Penalties and Sentences Act 1992* (Qld) s 174.

⁴⁵⁹ *Penalties and Sentences Act 1992* (Qld) s 110A.

⁴⁶⁰ *Penalties and Sentences Act 1992* (Qld) s 110A.

⁴⁶¹ *Penalties and Sentences Act 1992* (Qld) s 110C.

⁴⁶² *Penalties and Sentences Act 1992* (Qld) s 110C.

⁴⁶³ *Penalties and Sentences Act 1992* (Qld) s 35.

⁴⁶⁴ *Penalties and Sentences Act 1992* (Qld) s 43B.

⁴⁶⁵ *Penalties and Sentences Act 1992* (Qld) s 43C.

⁴⁶⁶ *Penalties and Sentences Act 1992* (Qld) s 43C.

⁴⁶⁷ *Penalties and Sentences Act 1992* (Qld) s 43C.



Banning order

A banning order can be made by the court if a person has been convicted of using or threatening to use violence, or of supplying or trafficking drugs, when either happened in or near licensed premises.⁴⁶⁸

A banning order can prohibit an offender, for a period of time determined by the court, from entering:

- certain licensed premises;
- locations near a licensed premises during certain times of the day; and
- events where alcohol is sold.⁴⁶⁹

The court must be satisfied that unless the order is made, the offender would be an unacceptable risk to the 'good order' or the safety and welfare of others at the premises or its surroundings.⁴⁷⁰

This order can be made in addition to any other sentence. When considering whether to make the order, the court considers a number of factors including:

- the offender's history, including whether they have had similar orders in the past;
- the offender's personal circumstances; and
- anything else the court considers relevant.

The court must explain the banning order to the offender.⁴⁷¹

Once issued, the prosecutor or the offender can apply to amend or revoke the banning order from 6 months after the order is made.⁴⁷² It is an offence to contravene a banning order.⁴⁷³

Licence disqualification

An offender can have their driver's licence disqualified if they are convicted of an offence that is connected to the operation of a motor vehicle. Disqualification can be imposed in addition to another sentence that is imposed on the offender.⁴⁷⁴

The court must be satisfied that it is in the interests of justice to disqualify the offender from holding a licence, and a disqualification can be issued for a period of time or absolutely.⁴⁷⁵

Some offences carry a mandatory disqualification of a driver's licence, such as unlawfully racing on a road,⁴⁷⁶ or dangerous operation of a vehicle.⁴⁷⁷

Other options

Apart from penalties noted above, there are some diversionary options for offenders that can result in an outcome that is not part of the usual sentencing process.

Mental Health Court (separate discussion paper)

The Mental Health Court operates under the *Mental Health Act 2016* and offers a diversionary outcome to offenders who cannot be found criminally liable due to mental illness and/or disability. As

⁴⁶⁸ *Penalties and Sentences Act 1992* (Qld) s 43J.

⁴⁶⁹ *Penalties and Sentences Act 1992* (Qld) s 43I.

⁴⁷⁰ *Penalties and Sentences Act 1992* (Qld) s 43J.

⁴⁷¹ *Penalties and Sentences Act 1992* (Qld) s 43K.

⁴⁷² *Penalties and Sentences Act 1992* (Qld) s 43L.

⁴⁷³ *Penalties and Sentences Act 1992* (Qld) s 43O.

⁴⁷⁴ *Penalties and Sentences Act 1992* (Qld) s 187.

⁴⁷⁵ *Penalties and Sentences Act 1992* (Qld) s 187.

⁴⁷⁶ *Transport Operations (Road Use Management) Act 1995* (Qld) s 85.

⁴⁷⁷ *Transport Operations (Road Use Management) Act 1995* (Qld) s 86.



noted, the Mental Health Court and forensic system will be discussed in more detail in an upcoming discussion paper.

Drug and Alcohol Court

The Drug and Alcohol Court operates in Brisbane at the Magistrates Court level and is designed to treat offenders who have a severe substance use disorder that contributes to their offending behaviour.⁴⁷⁸ The Drug and Alcohol Court's aim is to rehabilitate people convicted of offences through a treatment order that is designed to address the offender's substance use dependence.⁴⁷⁹

For an offender to be eligible for a treatment order from the Drug and Alcohol Court, the offender must plead guilty to charges at a Magistrates Court, live in the Brisbane area and have a severe substance use disorder that contributed to the offence with which they were charged.⁴⁸⁰

An offender cannot be given a treatment order if that offender is serving a term of imprisonment (generally in custody or on parole) or if they are charged with a sexual assault offence.⁴⁸¹ The court must be satisfied that the treatment order is appropriate for the offender, with a suitability assessment report prepared (by a review team) and provided to the court.⁴⁸²

The various requirements of a treatment order must be explained to the offender, and the offender must agree to the order being made.⁴⁸³

The court then orders a term of imprisonment of up to 4 years that is suspended to allow the person to stay in the community and be supervised for at least 2 years.⁴⁸⁴

The offender must then comply with the treatment order, which includes conditions such as:

- not committing further offences;
- reporting to and/or receiving visits by corrective services or a review team member;
- notifying of any change of residence;
- not leaving or staying out of Queensland without the permission of the corrective services officer;
- appearing before the court when directed; and
- complying with any reasonable direction of the corrective services officer or a member of the review team.⁴⁸⁵

The offender is monitored and supported during their treatment order by a multi-disciplinary team that includes:

- lawyers from Legal Aid to provide legal advice;
- corrective services officers who supervise and monitor;
- Queensland Health clinicians who provide alcohol and drug treatment;
- prosecutors from Queensland Police;
- court officers; and
- a Cultural Liaison Officer for Aboriginal and/or Torres Strait Islander offenders.⁴⁸⁶

Treatment programs under a treatment order can involve:

- medical, psychiatric or psychological treatment;

⁴⁷⁸ Queensland Courts, Queensland Drug and Alcohol Court, (14 August 2023), <<https://www.courts.qld.gov.au/courts/drug-court>>.

⁴⁷⁹ *Penalties and Sentences Act 1992* (Qld) s 151C.

⁴⁸⁰ *Penalties and Sentences Act 1992* (Qld) s 151E.

⁴⁸¹ *Penalties and Sentences Act 1992* (Qld) s 151F.

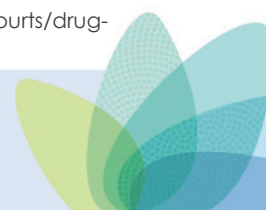
⁴⁸² *Penalties and Sentences Act 1992* (Qld) ss 151C, 151G.

⁴⁸³ *Penalties and Sentences Act 1992* (Qld) ss 151I, 151J.

⁴⁸⁴ *Penalties and Sentences Act 1992* (Qld) s 151N.

⁴⁸⁵ *Penalties and Sentences Act 1992* (Qld) s 151R.

⁴⁸⁶ Queensland Courts, Queensland Drug and Alcohol Court, (14 August 2023), <<https://www.courts.qld.gov.au/courts/drug-court>>.



- detoxification at a facility;
- counselling programs;
- meetings with review team members;
- vocational, educational or employment programs;
- alcohol and drug testing;
- devices that detect alcohol or drug usage;
- devices or equipment installed at the offender's residence; and
- residing at a place for a particular period.⁴⁸⁷

There are a number of consequences for an offender if they do not comply with certain conditions of a treatment order. They range from further penalties during the treatment order such as community service or a short period of custody, to the extension of the operational period of the treatment order or a term of imprisonment.⁴⁸⁸ The court can also revoke the order and re-order another penalty for the original offence.⁴⁸⁹

⁴⁸⁷ *Penalties and Sentences Act 1992* (Qld) s 151S.

⁴⁸⁸ *Penalties and Sentences Act 1992* (Qld) ss 151O, 151W.

⁴⁸⁹ *Penalties and Sentences Act 1992* (Qld) ss 151X, 151Y.

