

Office of the Public Advocate (Queensland) Systems Advocacy

Submission to the Australian Human Rights Commission

For the Investigation into Access to
Justice in the Criminal Justice System for
People with Disability

August 2013

Interest of the Public Advocate for Queensland

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

More specifically, the functions of the Public Advocate are:

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

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

Research suggests that individuals with a mental illness and/or intellectual disability are over-represented at all stages in the criminal justice system as both victims and defendants.³ I am committed to promoting ways in which to address this over-representation and improve the outcomes that the criminal justice system delivers for people with impaired decision-making capacity.

Position of the Public Advocate (Queensland)

1 The Convention on the Rights of Persons with Disabilities

Australia is a signatory to the *Convention on the Rights of Persons with Disabilities* (the Convention). The convention provides that people with disability must not be discriminated against and must be enabled to fully and effectively participate in society on an equal basis with others. This often necessitates *reasonable accommodation* for people with disability, meaning any “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.⁴ In order to promote equality and eliminate discrimination, signatories must take all appropriate steps to ensure that reasonable accommodation is provided.⁵

The Convention specifically recognises the right of persons with disability to equal recognition before the law.⁶ Persons with disability should be recognised as having equal legal capacity and be provided with appropriate measures that support them to exercise their legal capacity.⁷ The Convention also states that persons with disability should be provided with effective access to justice on an equal basis with others, including through the provision of procedural and age-appropriate accommodations.⁸ These accommodations must enable people to have an effective role as a direct or an indirect participant, including as a witness, in all legal proceedings including investigative and preliminary stages.⁹ In order to ensure that access is effective, those working within the administration of justice, including police and prison staff, must have appropriate training.¹⁰

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

² Office of the Public Advocate, 'The Potential Population for Systems Advocacy' (Fact Sheet, Office of the Public Advocate (Queensland), February 2013).

³ Tony Butler and Stephen Allnutt, 'Mental Illness Among New South Wales' Prisoners' (Report, New South Wales Corrections Health Service, August 2003).

⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) arts 1 -3 ('*Convention on the Rights of Persons with Disabilities*').

⁵ *Convention on the Rights of Persons with Disabilities* art 5.

⁶ *Ibid* art 12.

⁷ *Ibid* art 12(3).

⁸ *Ibid* art 13(1).

⁹ *Ibid* art 13(1).

¹⁰ *Ibid* art 13(2).

I am of the opinion that, to provide persons with disability and/or impaired decision-making capacity with equal access to the Australian criminal justice system and with the ability to exercise their legal capacity on an equal basis, adjustments and accommodations must be made within the criminal justice system. These adjustments must occur at all stages of the system including pre-offence, post-offence, whilst the matter progresses through the justice system, and during any periods of imprisonment. Without such accommodation, persons with impaired decision-making capacity will continue experiencing barriers to accessing justice.

Arguably, disability is exacerbated by the lack of reasonable accommodation by the broader community to the range and nature of differing impairments; impairments that a person may be born with or that they may acquire in the course of their life. Reasonable accommodation is not just about physical modifications to environment but also includes attitudinal considerations. The social and economic disadvantages experienced by many people with impairment, and the lack of reasonable accommodation by community mean that people with disability and/or impaired decision-making capacity are not empowered or supported to develop and/or maintain autonomy and independence. Rather, they are disempowered by a lack of support and, as a result, the practical effects of their disability and/or impaired decision-making capacity are not addressed and are often exacerbated.

The provision of reasonable accommodation for people with impaired decision-making capacity to ensure equal recognition before the law forms the basis of my submission.

2 Over-Representation in the Criminal Justice System

Adults with impaired decision-making capacity are over-represented in the criminal justice system as both victims and defendants.

2.1 Defendants

Adults with impaired decision-making capacity are particularly vulnerable to risks that may bring them into contact with the criminal justice system as a defendant. Many people with impaired decision-making capacity who have contact with the criminal justice system experience earlier disadvantages that increase their likelihood of coming into contact with the criminal justice system¹¹ such as difficulties with education, issues within their family, difficulty obtaining or maintaining employment and a lack of permanent accommodation.¹²

A study conducted in the United Kingdom concluded that “9 per cent of suspects interviewed by police had an intellectual disability and a further 42 per cent had a borderline intellectual disability.”¹³ Furthermore, research conducted in New South Wales courts revealed that 24 per cent of people appearing before a court had an intellectual disability and this figure rose to 43 percent for Aboriginal and Torres Strait Islander accused persons.¹⁴ In 2012, researchers concluded that:

“having a cognitive impairment predisposes persons who also experience other disadvantageous social circumstances to a greater enmeshment with the CJS [criminal justice system] early in life and persons with cognitive impairment and other disability such as mental health and AOD [alcohol and other drug] disorders (complex needs) are significantly more likely to have earlier, ongoing and more intense police, juvenile justice, court and corrections episodes and events. The cognitive and complex needs groups in the study have experienced low rates of disability support as children, young people and adults with Indigenous members of the cohort having the lowest levels of service and support. It is evident that those who are afforded [disability services] support do better, with less involvement in the CJS after they become clients compared with those with cognitive disability who do not receive [disability] services.”¹⁵

¹¹ Jim Simpson, ‘Participants or Policed: Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who have Contact with the Criminal Justice System’ (Practical Design Fund Project, NSW Council for Intellectual Disability, May 2013) 6.

¹² Ibid 28-35

¹³ Phillip French, ‘Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland’ (Report, Disability Studies and Research Institute, May 2007) 27; Office of the Public Advocate (Victoria), Submission No 29 to Victorian Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, 13 September 2011, 7.

¹⁴ Office of the Public Advocate (Victoria), above n 12, 7.

¹⁵ Simpson, above n 11, 6 citing E Baldry, L Dowse and M Clarence *People with Intellectual and Other Cognitive Disability in the Criminal Justice System* (2012) University of New South Wales <www.adhc.nsw.gov.au/about_us/research/completed_research>.

In 2002, research undertaken by the Queensland Department of Corrective Services identified that almost 10 per cent of prisoners achieved a score of less than 70 in a functional IQ test, which is indicative of intellectual disability. A further 29 per cent of prisoners achieved a score of 70-84, which placed them in the borderline intellectual disability range.¹⁶ Furthermore, the research indicated that over 25 per cent of prisoners had learning difficulties and over 25 per cent had literacy problems. The research also showed that more than one in 20 prisoners had attended a special school as a child and that almost 32 per cent of prisoners in Queensland had a mental illness. In comparison, only a small proportion of the general Queensland population have an intellectual disability (3 per cent) or mental illness that results in disability (6 per cent).

2.2 Victims

Adults with impaired decision-making capacity also experience a greater degree of contact with the criminal justice system as victims of crime. Many of the social and economic disadvantages experienced by persons with impaired decision-making capacity who come into contact with the criminal justice system as defendants also contribute to their risk of being victims of crime.

Research has demonstrated that people with disability are often more likely to become a victim of crime than people who do not have a disability. Most notably, between 50 and 99 per cent of people with intellectual or psychosocial impairment are subject to sexual assault at some point in their lifetime.¹⁷ Furthermore, people with intellectual disability are “twice as likely to be the victim of a crime directed against them... and one and a half times more likely to suffer property crimes than non-disabled aged-matched cohorts.”¹⁸

Despite the fact that people with impaired decision-making capacity are over-represented as victims of crime, they often experience difficulties in accessing the criminal justice system, participating in the criminal justice process and securing a satisfactory outcome. The system does make provisions designed to accommodate persons with impaired decision-making capacity, but further amendments and improvements are required in order to overcome the barriers to justice that prevail.

3 Pre-Offence

3.1 Prevention and early intervention

A key area that must be addressed when seeking to accommodate persons with impaired decision-making capacity is in addressing the risks that increase the likelihood of contact with the criminal justice system, and increasing the availability of supports that may prevent or reduce contact with the justice system. Intervention at this stage is particularly beneficial because no harm is done to the community if an offence is prevented and no cost is incurred by the state in policing, processing and incarcerating an offender. It is also likely that the cost of intervention programs would be less than the total cost of the criminal justice process, from apprehension to incarceration. This approach may also reduce or prevent criminal socialisation and the cycle of recidivism.

Programs or intervention strategies should be targeted both at addressing the disadvantages experienced by adults with impaired decision-making capacity and increasing opportunities for meaningful participation in the community, as well as addressing ‘challenging’ behaviours that may heighten the risk of contact with the criminal justice system. While, in many cases, the person themselves would not consider their behaviour to be challenging in that it provides a means by which to communicate their feelings and/or achieve a desired goal, family, service providers and the community may find such behaviours to be challenging in the sense that support often needs to be provided differently and/or differing levels of accommodation need to be made to address the causal factors underpinning the behaviour. They are also deemed challenging because, if the behaviours are not addressed, they can create system risks that may negatively impact upon the individual.

Improved access to education and training, supporting and increasing the resilience of families, increasing the number and accessibility of youth diversion programmes such as Police Citizens Youth Centres and increasing, enhancing and improving the targeting of employment services will assist people with impaired decision-making capacity to be contributing members of society, and reduce the likelihood of them coming into contact with the criminal justice system.

¹⁶ Department of Corrective Services, ‘*Intellectual Disability Survey 2002*’ (Report, Queensland Department of Corrective Services 2002) 17-18.

¹⁷ French, above n 13, 18; Office of the Public Advocate (Victoria), above n 13, 7.

¹⁸ Office of the Public Advocate (Victoria), above n 13, 7.

Where people exhibit challenging behaviours that risk harm to themselves or others, then more specialised supports and interventions are required. People should have access to comprehensive assessments that seek to determine the underlying causes of 'challenging' behaviours. The outcomes of such assessment processes should inform the development of personalised plans that detail the way in which supports and environments should be tailored to meet the needs of the person and minimise or eliminate the need for the person to engage in behaviours that put themselves and others at risk. Known as positive behaviour support, this evidence-based approach has proven successful in reducing behaviours of harm exhibited by some people with disability.¹⁹

The provision of additional support may also assist in reducing the risk of people becoming victims of crime. A recent study has highlighted that many current approaches are reactive, with a general focus on responding to instances of abuse or neglect. There is a lesser focus on promoting personal safety strategies and proactive approaches to enable people with intellectual disability and/or impaired decision-making capacity to protect themselves from abuse, neglect and violence, including in their home. Whereas at a broader level, preventative health, community health and community service messages are often not tailored to or inclusive of the needs of people with intellectual disability and/or impaired decision-making capacity.²⁰

Strategies or programs to educate people about safety and ensure that service providers allow people to implement safety measures would not only increase the feeling of security for persons with disability and/or impaired decision-making capacity, but would also increase their actual security and potentially decrease levels of victimisation.

3.2 Alternatives for Police

In Queensland, where a person with impaired decision-making capacity has committed or is at risk of committing an offence, there are options available to police to prevent or decrease that risk or to avoid that person being charged with an offence. I strongly support the availability and implementation of options such as these as part of the reasonable accommodation that should be provided to ensure persons with impaired decision-making capacity have equal access to justice.

Examples of these options include:

- (a) **SupportLink** - The Queensland Police have developed a voluntary e-referral program that operates state-wide and links to over 200 registered local, state and national support service agencies. Using the SupportLink e-referral program, police are able to refer people to services for a wide range of issues, including "domestic violence, drug and alcohol abuse, crime prevention, elder abuse and neglect, victim support and counselling, road and other trauma support as well as suicide prevention and support following suicide".²¹ It is not necessary for a person to have committed an offence in order for a referral to be made.

The SupportLink service can be used by police who identify persons with disability and/or impaired decision-making capacity who are at risk of becoming the victim of, or involved in, criminal behaviour. Police can then refer that person to appropriate supports and services with the aim of providing assistance to and diverting the person away from potentially dangerous or criminal behaviour. The SupportLink service is of particular assistance to police because it provides a single gateway to numerous external support agencies and therefore enables police to make better use of those external agencies.²²

In 2012, 36,571 e-referrals were made and research indicates that, as a result of the positive effects of the e-referral system, there have been reduced calls for service in some areas.²³ Initiatives such as SupportLink could potentially be extended to include responses to people with impaired decision-making capacity, including those with intellectual disability, who are in crisis and who come into contact with the criminal justice system.

¹⁹ Edward G Carr et al, 'Positive Behaviour Support: Evolution of an Applied Science' (2002) 4(1) *Journal of Positive Behaviour Support Interventions* 4, 4-5.

²⁰ Sally Robinson, 'Safe at Home? Factors Influencing the Safety Strategies Used by People with Intellectual Disability' (2013) *Scandinavian Journal of Disability Research* 1.

²¹ Queensland Police Service, *QPS Makes 50,000th SupportLink Referral* (24 January 2013) Queensland Police Service News <<http://mypolice.qld.gov.au/blog/2013/01/24/qps-makes-50000th-supportlink-referral/>>.

²² *Ibid.*

²³ *Ibid.*

(b) Mental Health Intervention Project - The Queensland Mental Health Intervention Project is a divisionary programme that aims to prevent and safely resolve mental health crisis situations through enhanced co-operation, collaboration and understanding between the Queensland Police Service, Queensland Health and the Queensland Ambulance Service.²⁴ Officers are trained to identify, provide support, intervene and de-escalate situations that may otherwise result in mental health incidents.²⁵ It focuses on recognising and de-escalating crisis situations in which mental illness is a factor and coordinating inter-agency activities both at the point of the initial crisis response and also in subsequent follow up supports such as case management, communication, collaborative service and community development, training and evaluation, assessment and support and crisis intervention.²⁶

This type of intervention could be extended to and be responsive to people with intellectual disability, cognitive impairment and other conditions that impact on or impair decision-making capacity. However, it requires appropriate service responses to be made available. In many cases, Police have said that they would like to provide a response such as this to people with intellectual disability, but the services and supports are not readily accessible or available. For example, it is not appropriate to take a person with intellectual disability to a hospital or a mental health service, unless they are evidencing symptoms that would make it appropriate to do so.

(c) Cautioning by Police - In some situations, where the appropriate criteria are met, it may be possible for a police officer to caution a person instead of charging a person with impaired decision-making capacity with a criminal offence. A caution is generally “given in exceptional circumstances where it is in the public interest” and for the purpose of “deter(ring) minor criminal behaviour... and prevent(ing) the disproportionate use of prosecution resources for minor matters.”²⁷ Police may use the option to caution in relation to an adult who is “intellectually disabled or infirm to the extent that there is no real risk of repetition of the offence.”²⁸

However, this strategy must be accompanied by appropriate access to support and legal advice, particularly for people with impaired decision-making capacity, given the person must admit that the offence has occurred and consent to receiving a caution. Whenever possible, police should also refer a person who has been cautioned to SupportLink or other services for appropriate assistance.²⁹

4 The Criminal Justice System

4.1 Interactions with Police

When an individual is a victim, a defendant or a witness in a criminal matter, quite often the first person with whom they interact regarding that matter is a police officer. Therefore, it is important that police are appropriately trained so that they are able to identify and properly accommodate persons with disability³⁰ and/or impaired decision-making capacity and that persons with disability and/or impaired decision-making capacity are provided with adequate legal and emotional support so that they have equal access to justice.

Examples of how this may be achieved include:

(a) Policies and guidelines - The Queensland Police Service (QPS) Vulnerable Persons Policy applies to people who may be vulnerable, including those with intellectual disability and/or impaired decision-making capacity.³¹ The policy notes that victims and witnesses must be empowered and supported to assist them to participate in the criminal justice system. The policy also notes that defendants must be ensured procedural fairness, meaning that they should be able to understand what is happening and participate in their defence. The policy indicates that police have employed a range of specialist officers

²⁴ Queensland Police Service, *Mental Health Intervention Project* (18 November 2011) Queensland Police Mental Health Intervention Project <<http://www.police.qld.gov.au/programs/cscp/mentalHealth/>>.

²⁵ Queensland Police Service, *Operational Procedures Manual* (18 January 2013) Queensland Police Service Operational Procedures Manual (Public Copy) <<http://archive.sclqld.org.au/qps-manuals/opm/current-issue/>>, 6.6.20.

²⁶ Queensland Police Service, above n 24.

²⁷ Queensland Police Service, above n 25, 6.5.1.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Convention on the Rights of Persons with Disabilities* art 13(2).

³¹ Queensland Police Service, *Vulnerable Persons Policy* (30 July 2013) Queensland Police Service – Our Policies <<http://www.police.qld.gov.au/Resources/Internet/rti/policies/documents/QPSVulnerablePersonsPolicy.pdf>>.

and implemented a number of training programs, including training specifically related to disability, intellectual disability and mental health. Data regarding vulnerable persons will also be recorded by police.

The QPS Operations Procedures Manual (OPM) also makes provision for persons with impaired decision-making capacity. A person with intellectual disability and/or impaired capacity is considered to be a person “with a special need”, unless the contrary is proved.³² Where a person has a special need, an officer who intends to interview that person must “take whatever action is necessary to compensate for that special need or to comply with any relevant legislative requirements.”³³ Where a witness has an ‘impairment of the mind’,³⁴ which would arguably include many people with impaired decision-making capacity, then their evidence will often be recorded.³⁵ If there are no legislative requirements, actions to accommodate may include obtaining an interpreter or an independent person to assist, and phrasing questions in an appropriate manner.³⁶ Officers must avoid any form of unfair treatment and provide a person with sufficient legal assistance if necessary.³⁷

(b) Police Training in Identifying and Engaging with Persons with Disability or Impairment -

Research has shown that if police are not properly trained in recognising, understanding and interacting with people with intellectual disability and/or impaired decision-making capacity, this may have negative consequences for individuals and for the justice system. This is important for complainants and for people who have been alleged to have committed crimes. Reports from other jurisdictions have indicated the importance of training in the following areas:³⁸

- Identifying people with intellectual disability and/or impaired decision-making capacity, including indicators of these conditions, may be of particular assistance in instances where disability and/or impaired decision-making capacity is not immediately apparent.³⁹ Research has indicated that many officers are unaware of potential indicators of disability and/or impaired decision-making capacity.⁴⁰
- Implementation of simple screening tests to determine whether a person may have intellectual disability and/or impaired decision-making capacity, such as the Hayes Ability Screening Index (HASI), which would take police only five minutes to administer and could point to the need for further assessment or advice.
- How best to engage with people who have disability and/or impaired decision-making capacity. This could include hands-on training with a particular focus on communication or interviewing techniques.⁴¹ For example, a limited understanding of intellectual disability may mean that police officers incorrectly interpret certain behaviours as a sign of guilt,⁴² or a person with intellectual disability who makes a complaint to police may be considered an unreliable or untrustworthy witness and therefore their evidence will not be regarded as credible.

Police could also be provided with access to a support service, such as a disability liaison officer, to assist in the assessment of and responses to persons with intellectual disability and/or impaired decision-making capacity.

³² Queensland Police Service, above n 25, 6.3.1.

³³ Queensland Police Service, above n 25, 6.3.3.

³⁴ *Evidence Act 1977* (Qld) sch 1; ‘*person with an impairment of the mind*’ means a person with 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.

³⁵ *Evidence Act 1977* (Qld) s 93A, and see heading 4.3 of this submission.

³⁶ Queensland Police Service, above n 25, 6.3.3.

³⁷ *Ibid.*

³⁸ Victorian Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and the Families and Carers*, Parliamentary paper No 216 (2013) 102.

³⁹ *Ibid.* 115, citing New South Wales Police Force, Code of practice for CRIME (custody, rights, investigation, management and evidence) (2011) NSW Police Force, 144-145.

⁴⁰ Lyn Douglas and Monica Cuskelly, ‘A Focus Group Study of Police Officers’ Recognition of Individuals with Intellectual Disability’ (2012) 19(1) *Psychiatry, Psychology and Law* 35.

⁴¹ Victorian Law Reform Committee, above n 38, 125-126; Douglas and Cuskelly, above n 40; BL Spivak and SDM Thomas, ‘Police Contact with people with an Intellectual Disability: The Independent Third Person Perspective’ (2013) 57(7) *Journal of Intellectual Disability Research* 635, 635.

⁴² Office of the Public Advocate (Victoria), above n 13, 25; Victorian law Reform Committee, above n 38, 103-104; Lorana Bartels, *Police Interviews with Vulnerable Adult Suspects*, Australian Institute of Criminology Report No 21 (2011) 2.

The use of a disability and/or impaired decision-making capacity identification card or database, which could be carried by the person or accessed by police respectively, and which would give details of the person's impairment and required contact person has also been suggested by some in the sector. While this would assist police to identify persons with disability and/or impaired decision-making capacity and to ensure that they were provided with appropriate support at a very early stage, research has shown that the system may not effectively include all persons with disability and/or impaired decision-making capacity and that many people would be unwilling to carry or unable to utilise this card.⁴³ Further, I am of the opinion that such a system may be disadvantageous in that it may lead to negative 'labelling' of people.

I recommend that further options for police training, policies, and guidelines for police that are inclusive of appropriate and supportive responses for people with disability and/or impaired decision-making capacity be explored by the Commission. The absence of such supports can have serious consequences. For example if a complaint is not taken or properly pursued, supports may not be provided and compensation may not be available to that person, and data regarding crimes against persons with disability and/or impaired decision-making capacity will be impacted.⁴⁴ As previously noted, a limited understanding of intellectual disability and/or impaired decision-making capacity may mean that police officers wrongly interpret behaviours as signs of guilt and this may lead to wrongful convictions.

(c) Questioning People with Intellectual Disability or Impaired Decision-Making Capacity - In Queensland when a person with intellectual disability and/or impaired decision-making capacity is suspected of committing an offence, police must comply with certain policy, procedural⁴⁵ and legislative⁴⁶ requirements for questioning those persons. These provide some important procedural safeguards including:

- An officer must not start to question that person until they have, if practicable, allowed the person to speak to a support person privately and the support person is present whilst questioning takes place.⁴⁷
- The QPS OPM also provides that when a person "with a special need" is to be interviewed, an independent person should be present to assist the person "with a special need" in overcoming the condition or circumstance that is creating the special need. This may include safeguarding the rights of a person who cannot effectively look after or manage their own interests. An independent person includes, but is not limited to, a support person.

These additional procedural requirements are important but may provide limited protections if the police officer is not able to identify the person has an intellectual disability and/or impaired decision-making capacity (as discussed in section 4.1) or the support person is not trained or skilled in dealing with the criminal justice system. An unskilled support person may unintentionally undermine a person's legal rights, for example by encouraging a person to talk to the police or to give their account of events.⁴⁸ The use of a skilled volunteer will mitigate against such issues and, it is to be hoped, result in a more favourable outcome for the person in question.

The concept of an independent person is one that is used in Victoria and NSW. However, in those jurisdictions persons with intellectual disability are also offered the opportunity of being supported by a trained volunteer.⁴⁹ The Intellectual Disability Rights Service (IDRS) in NSW provides 24 hours/7 days a week availability of legal representation for people with intellectual disability who are arrested by the police.

It should be noted however that neither the OPM nor the Vulnerable Persons Policy used in Queensland defines the term 'impaired capacity' or provides guidance as to indicators or identifiers of 'impaired

⁴³ Victorian Law Reform Committee, above n 38, 119-122.

⁴⁴ Office of the Public Advocate (Victoria), above n 13, 26; Victorian Law Reform Committee, above n 38, 104; Bartels, above n 42, 2.

⁴⁵ See heading 4.1(a) of this submission.

⁴⁶ *Police Powers and Responsibilities Act 2000* (Qld) s 422.

⁴⁷ *Ibid.*

⁴⁸ French, above n 13, 70.

⁴⁹ Victorian Law Reform Committee, above n 38, 138-139; French, above n 13, 69.

capacity'.⁵⁰ Additionally, these procedures only apply to indictable offences, which suggests that persons are not offered the same protections when they are suspected of having committed a summary offence.⁵¹ This may be because fewer interviews occur in relation to summary offences, but it is nonetheless problematic because the potential for an unfair interview exists.

I respectfully suggest that the Commission consider making recommendations for the use of trained support persons in all Australian jurisdictions. I am of the opinion that trained support workers and/or legal representation is a reasonable accommodation that all State parties must make to enable equality for people with intellectual disability and/or impaired decision-making capacity within the criminal justice system.

4.2 Complaints by Third Parties

Many people with impaired decision-making capacity experience significant difficulties with communication or are unable to communicate. If those people were the victim of an offence, it is likely that they would be unable to make a complaint to the police. It may be the case, amongst other things, that the victim lacks the ability to communicate with others or that their communication skills are insufficient to enable them to adequately explain what occurred.

However, in some instances, that offence may be witnessed by another person. Where there is a witness to the offence, it must be the case that the witness is able to make a complaint on behalf of the victim. Further, it must be ensured that the complaint by the witness is properly investigated and, if warranted, the alleged offender is prosecuted.

I have recently been informed of an incident in Queensland whereby a member of the public witnessed a physical assault committed against a person with disability. The member of the public took down specific details to assist in the identification of the perpetrator and, with these details on hand, approached police to make a complaint regarding the assault. However, she was unable to successfully file the complaint and was told by police that the victim was required to make the complaint. It should never be the case that a victim with disability or impaired decision-making capacity is required to personally make a complaint before an alleged offence against a person is investigated.

It should be noted that the QPS OPM states "members receiving a complaint or report of a suspected offence where a person with impaired capacity is a victim are to ensure that such offence is investigated and where appropriate, prosecution action taken against the offender".⁵² Compliance with this requirement is essential not only by police but also by all persons making decisions regarding the prosecution or progress of a matter involving persons with disability and/or impaired decision-making capacity. Such provisions should be available and applied in all Australian jurisdictions.

4.3 The Court Process

In Queensland, the giving of evidence by witnesses is governed by the *Evidence Act 1977* (Qld). That Act provides that every person is presumed to be competent to give evidence and competent to give evidence on oath,⁵³ but if a doubt is raised then the court will make a determination about a person's competency. A person will be deemed competent to give evidence if they are "able to give an intelligible account of events which he or she has observed or experienced."⁵⁴ A person will be competent to give evidence on oath if they understand that "the giving of evidence is a serious matter and in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth."⁵⁵ If a person is competent to give evidence, but not to give evidence on oath, then the court must explain to the person the duty of telling the truth.⁵⁶

Therefore, it does not automatically follow that if a person has impaired decision-making capacity, intellectual disability or mental illness they will be incapable of giving evidence, nor would they necessarily be considered incompetent to give evidence under the *Evidence Act 1977*. However, they may have difficulties in demonstrating their competency due to the inherent nature of the legal process. For example, persons with disability may be

⁵⁰ *Police Powers and Responsibilities Act 2000* (Qld) s 422; Bartels, above n 42, 2.

⁵¹ *Police Powers and Responsibilities Act 2000* (Qld) s 414.

⁵² Queensland Police Service, above n 25, 6.3.12.

⁵³ *Evidence Act 1977* (Qld) s 9.

⁵⁴ *Evidence Act 1977* (Qld) s 9A(2).

⁵⁵ *Evidence Act 1977* (Qld) s 9B(2).

⁵⁶ *Evidence Act 1977* (Qld) s 9B(3).

intimidated or confused by cross-examination, may perceive the defence lawyer as an authority figure and give answers they think will please that person, may become confused by court processes, may not understand the language or terminology used in court and may become tired and confused without frequent breaks. These issues may be used or exacerbated by defence lawyers to discredit the person as a competent and credible witness.⁵⁷

The *Evidence Act 1977* provides some of the following special procedures that may be used when taking evidence from a person with disability or impaired decision-making capacity, which may assist to overcome any issues raised about that person's competency or credibility:

(a) Evidence-in-Chief - When a person has an 'impairment of the mind',⁵⁸ which arguably includes many people with impaired decision-making capacity, a police officer taking their evidence at first contact may interview the person and record their evidence on video, as opposed to taking a written statement.⁵⁹ This may assist in overcoming any difficulties that a person with impairment has in making a written statement, illustrate more clearly the person's understanding and non-verbal responses and, particularly if the person has difficulty with later recall, allows their evidence to be preserved.⁶⁰ The recording of their evidence may later be admitted and used in trial as the person's evidence-in-chief. However, it is still a requirement that the person be called as a witness at trial and be subject to cross-examination.⁶¹

(b) Cross-Examination and Re-Examination - A person with impaired decision-making capacity could be declared by the court to be a special witness,⁶² and some of the following special provisions may apply for that person's evidence:

- that the defendant or another party be excluded from the room or obscured from the view of the witness provided that there is some provision, by electronic device or otherwise, for the defendant to see and hear the witness whilst they are giving evidence;
- that, during the witness' evidence, everyone except those specified by the court be excluded from the courtroom;
- that the special witness give evidence in a separate room and with others excluded;
- that the witness have a person with them to provide emotional support
- that the witness' evidence be video-taped and that the recording be viewed at trial instead of the witness testifying directly (and at any subsequent re-trial, hearing or related matter);
- anything else the court considers appropriate such as:
 - rest breaks;
 - directions that questions are kept simple;
 - limitation as to the length of time for questioning; and
 - limitation as to the number of questions that can be asked about a particular issue.⁶³

It should also be noted that, although the term used is 'special witness', a defendant in a criminal proceeding can also be classed as a special witness and provided with special provisions if required.⁶⁴

(Note: these provisions could also apply to evidence-in-chief if a person's initial statement was not recorded)

⁵⁷ Victorian Law Reform Committee, above n 38, 271-272.

⁵⁸ *Evidence Act 1977* (Qld) sch 1; 'person with an impairment of the mind' means a person with 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.

⁵⁹ *Evidence Act 1977* (Qld) s 93A.

⁶⁰ Victorian Law Reform Committee, above n 38, 273-274.

⁶¹ *Evidence Act 1977* (Qld) s 93A.

⁶² *Evidence Act 1977* (Qld) s 21A. *Special witness* includes a person who, in the court's opinion would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court. A *relevant matter* includes a person's level of understanding.

⁶³ *Evidence Act 1977* (Qld) s 21A.

⁶⁴ *Evidence Act 1977* (Qld) s 21A(1B).

(c) Improper Questions - Legal representatives are not permitted to ask improper questions. A question is improper if it uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive. In deciding if a question is improper, one of the matters that the court will consider is any mental, intellectual or physical impairment the witness has or appears to have or any other relevant matters, such as level of understanding.⁶⁵ This provision also protects persons with impaired decision-making capacity who are required to give evidence in court.

The combined effect of the above provisions is that in many instances a person with disability and/or impaired decision-making capacity will not need to enter a courtroom or attend a trial. While the person will still be subject to cross-examination and may still experience confusion with the legal process, they can nonetheless be well accommodated as witnesses. The person can be supported throughout and the legal process can be adapted to better accommodate needs specific to their disability or impairment such that witnesses may be less stressed or confused, their evidence can be preserved at an early opportunity, and they can have the opportunity to demonstrate their competence and credibility in a more suitable environment than a traditional courtroom.

While these existing provisions, if applied appropriately, may go some way towards accommodating people with disability and/or impaired decision-making capacity, there is room for further accommodation through some of the following suggested initiatives:

(a) Identification of People with Intellectual Disability or Impaired Decision-Making Capacity in the Lower Courts - At present in Queensland, there is no systematic approach to identifying people with intellectual disability and/or impaired decision-making capacity who appear in the lower courts (Magistrates Courts) charged with simple offences.

There is, however, a system of mental health liaison officers in the lower courts who assist to identify people with a mental illness or those who may be subject to an involuntary treatment order or forensic order under the *Mental Health Act 2000*. Early identification can assist with appropriate responses, including referral to appropriate supports and diversion. It is not necessary that people undergo comprehensive assessments, which can be expensive and time consuming, but rather that relatively simple screening processes are utilised to identify people who may have intellectual disability and/or impaired decision-making capacity. Once people are identified, there should be appropriate coordination of referrals to appropriate support services and a mechanism to bring this to the attention of the appropriate personnel including their lawyers.

(b) Legal Personnel - As with police officers, it is important that lawyers be appropriately trained to identify and properly accommodate persons with disability and/or impaired decision-making capacity.⁶⁶ For example, I have noted that Legal Aid Queensland, which assists many persons with intellectual disability who are charged with an offence, makes effort to identify those people who have a disability. First, the 'Application for Legal Aid' form asks whether a person has a disability. The Duty Lawyer Handbook also provides guidelines to assist in identifying persons who may have mental illness, intellectual disability or cognitive impairment. These types of strategies should arguably be augmented by training and guidelines.

(c) Communication and Interpreters - Many people with impaired decision-making capacity communicate through means other than speech, such as by writing, typing, using symbols or pointing to words on a communication board. A particular difficulty may arise when a person with impaired decision-making capacity can speak but is only properly understood by those with whom he or she is in close contact or can only understand things said by others if they are carefully explained by a person with whom they can communicate effectively. In the United Kingdom, a witness intermediary may be used.⁶⁷ In that instance:

“the function of an intermediary is to assist intellectually disabled and other ‘vulnerable’ witnesses to communicate by explaining the questions being asked of them and in turn explaining to the court the answers given by the witness. An intermediary effectively acts as a ‘go-between’ to facilitate communication between the witness and the court.”⁶⁸

⁶⁵ *Evidence Act 1977* (Qld) s 21.

⁶⁶ *Convention on the Rights of Persons with Disabilities* art 13(2).

⁶⁷ Victorian Law Reform Committee, above n 38, 283.

⁶⁸ *Ibid.*

A witness intermediary can also be used before trial to improve the person's understanding of court processes and improve the person's ability to be involved in court proceedings. The use of a witness intermediary arguably enhances a person's ability to be a witness.⁶⁹ Witness intermediaries must be trained, accredited, assessed and registered and often come from professional backgrounds.⁷⁰

I believe there is benefit to further investigation of such an approach in Australia as it is unacceptable that people with impaired decision-making capacity should be excluded from giving evidence due to communication issues. Just as we make accommodation for people who speak a language other than English, such accommodation should also be provided for people with impaired decision-making capacity.

Some provision has been made for an interpreter or witness intermediary in some Australian states. In New South Wales, a vulnerable person,⁷¹ which could include a person with impaired decision-making capacity, who is giving evidence in court may be permitted to have a support person (for example, a friend, relative or another chosen person) present if it would enable the facts of the case to be better ascertained.⁷² The support person "may be with the vulnerable person as an interpreter, for the purpose of assisting the vulnerable person with any difficulty in giving evidence associated with an impairment or a disability, or for the purpose of providing the vulnerable person with other support."⁷³ Further, in criminal proceedings a witness who has difficulty communicating is entitled to use a person who, or a communication aid that, may assist the witness with giving evidence, if the witness ordinarily receives that assistance or uses that aid on a daily basis.⁷⁴

Similarly, in Western Australia, a person who is a special witness,⁷⁵ which could include a person with impaired decision-making capacity, may have a communicator appointed.⁷⁶ The communicator will, if requested by the Judge, communicate and explain to the person questions that were put to the person, and to the court evidence that was given by the person.⁷⁷ Concerns have been raised that New South Wales and Western Australia do not utilise these provisions fully.⁷⁸

In Queensland, "in a criminal proceeding, a court may order the State to provide an interpreter for a complainant, defendant or witness, if the court is satisfied that the interests of justice so require."⁷⁹ The legislation does not make specific reference to alternate communication methods but does not restrict the means by which a person could give evidence. This suggests that in Queensland a person can (and should be permitted to) give evidence using alternative means of communication. Further, it is arguable that if the person was declared a special witness, then the court could make an order that the person give their evidence in the preferred style of communication.⁸⁰ An argument could reasonably be made that the legislation regarding the provision of an interpreter and the making of suitable arrangements for special witnesses are broad enough to permit an interpreter to be used for a person with impaired decision-making capacity.⁸¹ However, to my knowledge, the provisions have not been used to this effect.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ *Criminal Procedure Act 1986* (NSW) s 306M. A "vulnerable person" means a child or a cognitively impaired person. A "cognitive impairment" includes any of the following:

- (a) an intellectual disability,
- (b) a developmental disorder (including an autistic spectrum disorder),
- (c) a neurological disorder,
- (d) dementia,
- (e) a severe mental illness,
- (f) a brain injury.

⁷² *Criminal Procedure Act 1986* (NSW) s 306P(2).

⁷³ *Criminal Procedure Act 1986* (NSW) s 306ZK(3).

⁷⁴ *Criminal Procedure Act 1986* (NSW) s 275B.

⁷⁵ *Evidence Act 1906* (WA) s 106R(3). A person is declared a special witness if, in the courts opinion, if the person was not treated as a special witness he or she would:

- (a) by reason of physical disability or mental impairment, be unlikely to be able to give evidence, or to give evidence satisfactorily; or
- (b) be likely –
 - (i) to suffer severe emotional trauma; or
 - (ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily,

by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.

⁷⁶ *Evidence Act 1906* (WA) s 106R(4)(b).

⁷⁷ *Evidence Act 1906* (WA) s 106F.

⁷⁸ Terese Henning, "Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments – "Plus Ça Change" or Prospects News?" (2013) 37 Criminal Law Journal 155, 165.

⁷⁹ *Evidence Act 1977* (Qld) s 131A.

⁸⁰ *Evidence Act 1977* (Qld) s 21A(f).

⁸¹ Henning, above n 78, 16-167.

I am of the opinion that the Commission should investigate the approaches utilised in the United Kingdom, as well as those Australian jurisdictions that are indicative of good practice, and assess their applicability to all Australian jurisdictions. However, in order to reduce the potential risks of an interpreter drawing any inferences during translation or attempting to exert any influence over the witness and to enable greater validation of interpretations, I would recommend that only independent third parties fulfil this role. The use of independent persons would allow for people with disability and/or impaired decision-making capacity to be accommodated whilst giving their evidence, but still allow the justice system to operate and to be seen to operate on an unbiased and independent basis.

(d) Weight of Evidence - The foregoing has demonstrated that, given appropriate support, many persons with impaired decision-making capacity are able to give evidence in criminal proceedings, both as witnesses and as defendants, and that there are means by which the justice system can and does accommodate them to do so. The question then becomes one of the degree of weight to be ascribed to the person's evidence. This is a question that must be considered in relation to the evidence of every person who gives evidence in a criminal proceeding, whether they have impaired decision-making capacity or not.

The criminal justice system must always ensure that provisions are made for people with impaired decision-making capacity to give evidence in court proceedings. The system must also ensure that persons with impaired decision-making capacity are identified, that these provisions are utilised for their benefit and that these provisions are utilised in the way that will best accommodate them within the criminal justice system. If a person is properly accommodated within the justice system and is able to give their evidence to the best of their ability, then their evidence can and should be considered in the same way as the evidence of all other witnesses.

4.4 Court Diversions

It is arguable that, to properly accommodate many people with impaired decision-making capacity in the justice system, there must be the ability to divert the person away from traditional criminal justice responses and toward alternative and therapeutic approaches that are aimed at addressing the underlying causes that led to the offending behaviour. I am particularly interested in this strategy because the over-representation of people with intellectual disability and/or mental illness in the criminal justice system suggests that traditional criminal justice responses may not be as effective with this offender group.

Specialist mental health courts and diversion programs have proven to be effective alternatives to traditional criminal justice processes.⁸² In order to accommodate persons with impaired decision-making capacity within the criminal justice system, these options must be utilised and potentially expanded.

(a) The Mental Health Court - The Queensland Mental Health Court is a specialist court that diverts people who have committed an indictable offence away from the criminal justice system if it is determined that the person was of unsound mind at the time of the offence or is deemed unfit for trial.

If a person is found to have been of unsound mind or unfit for trial, then the Mental Health Court may make a forensic order. If the person's unsoundness of mind or unfitness for trial is a consequence of a mental illness, the person may be made subject to a forensic order (Mental Health Court), which authorises that the person be detained in an authorised mental health service for involuntary treatment and care. If the person's unsoundness of mind or unfitness for trial is a consequence of an intellectual disability, the person may be made subject to a forensic order (Mental Health Court - Disability), which authorises that the person be detained in an authorised mental health service or the forensic disability service for care. The nature of either order may also allow the person to reside in a community living arrangement, but in such instances the order will be overseen by an authorised mental health service.⁸³

However, the treatment, care and rehabilitation needs of people with intellectual disability are different to those with a mental illness. In recognition of this, in 2011, Queensland introduced the forensic order (Mental Health Court - Disability) and the Forensic Disability Service, which provides for more appropriate

⁸² Australian Institute of Criminology, *Court-Based Mental Health Diversion Programmes*, Australian Institute of Criminology Tip Sheet No 20 (2011) 1-2.

⁸³ *Mental Health Act 2000* (Qld) s 288.

care and support for people with intellectual disability subject to a forensic order (Mental Health Court - Disability). This recognises that people with intellectual disability do not require treatment for an illness and that accommodation in a mental health service is not necessarily the most appropriate environment. However, the Forensic Disability Service is limited to only ten residents at any time. Therefore, there are many people subject to a forensic order (Mental Health Court - Disability) who continue to be detained in mental health services in Queensland.

While this system of diversion provided by the Mental Health Court provides an alternative to the traditional justice system for many persons with intellectual disability or mental illness, a forensic order (Mental Health Court) or forensic order (Mental Health Court - Disability) is potentially unlimited in duration and can therefore place restrictions on a person for unduly long periods. In many cases people with mental illness or intellectual disability may be subject to a forensic order for much longer periods of time than if they had been convicted of a criminal offence and served a sentence. Further, where persons are subject to a forensic order (Mental Health Court - Disability) but are detained to an authorised mental health service, there is an expectation that they will still be provided with more appropriate care and support though there is a concern that the provision of such care and support is not occurring in practice.

(b) The Magistrates Court - At present, the Queensland Magistrates Court does not offer a diversionary option equivalent to the Mental Health Court for people who have committed a summary offence and were of unsound mind or are unfit for trial. In *re AAM*,⁸⁴ the Queensland Court of Appeal noted that this is particularly problematic, stating:

“It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The Magistrates Court has attempted to meet this problem through its Special Circumstances Court Diversion Program which apparently presently operates only in the Brisbane area. This program assists categories of vulnerable people including those with impaired decision-making capacity because of mental illness, intellectual disability, cognitive impairment, or brain and neurological disorders. This commendable initiative, which allows for suitable compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases, may well be effective in assisting these vulnerable people. But it does not and cannot provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system.”⁸⁵

The Special Circumstances Court no longer exists, having been discontinued in 2012. Therefore, in the Magistrates Court there remains no equivalent to the Mental Health Court and no ability to divert persons with disability and/or impaired decision-making capacity who have committed summary offences away from the criminal justice system.

Reform is required in order to correct this deficit in the Queensland criminal justice system. Similarly to Queensland, Victoria and the Northern Territory do not have legislation that allows a Magistrate to determine the issue of fitness to plead. In the ACT, Tasmania, Western Australia and South Australia, Magistrates Courts are given power to determine if a person is fit to plead.⁸⁶

The Commonwealth and New South Wales (NSW) legislation does not allow a Magistrate to determine a person’s fitness to plead, but does give Magistrates a discretionary power when a person charged with a summary offence appears before the court and it appears to the Magistrate that they are intellectually or developmentally disabled.⁸⁷ In NSW, a Magistrate has the power to adjourn or dismiss matters, grant a person bail or make another appropriate order if a person has a developmental disability, mental illness

⁸⁴ *R v AAM*; Ex parte A-G (Qld) [2010] QCA 305 (5 November 2010) [9] (McMurdo P).

⁸⁵ *R v AAM*; Ex parte A-G (Qld) [2010] QCA 305 (5 November 2010) [9] (McMurdo P).

⁸⁶ ACT (*Crimes Act 1900* (ACT) div 13.2), Tasmania (*Criminal Justice (Mental Impairment) Act 1999* (Tas) pt 2), Western Australia (*Criminal Justice (Mentally Impaired Accused) Act 1996* (WA) pt 3) and South Australia (*Criminal Law Consolidations Act 1935* (SA)).

⁸⁷ Betheli O’Carroll, ‘Intellectual Disabilities and the Determination of Fitness to Plead in the Magistrates’ Courts’ (2013) 37 *Criminal Law Journal* 51, 61.

or treatable mental condition.⁸⁸ The Magistrate may dismiss a charge or charges and discharge the defendant unconditionally, discharge the defendant into a responsible person's care or discharge the defendant on the condition that the person attends for assessment, treatment or both. In order to discharge the matter in this way, the Magistrate must be of the opinion that this is the most appropriate course of action.⁸⁹ The Commonwealth provides Magistrates hearing federal offences of a summary nature with the same powers in relation to a person with intellectual disability or mental illness.⁹⁰

I am of the opinion that a consistent approach to the disposition of summary offences for persons with disability and/or impaired decision-making capacity should be adopted in all Australian jurisdictions. This would allow all persons with disability and/or impaired decision-making capacity to have access to the same diversionary options in order to adequately and appropriately finalise summary offences. The current approach is inequitable because it does not provide everyone with access to diversionary options and because the options differ between states, likely resulting in differing outcomes.

The approach taken by NSW and the Commonwealth may be preferable in that it allows for speedy resolution of a matter, particularly where it is very clear that a person has disability and/or impaired decision-making capacity. Further, this approach allows people to be discharged into a safe environment or, if an order for treatment is made, to be discharged with some support services that may assist in reducing the risk of further offending. The primary difficulty is that there may not be sufficient support services with sufficient resources and capacity to adequately meet the volume of orders and the specific needs of each person. Without the existence of adequate support services, the value of discharging a person with an order for treatment is greatly reduced.

5 Imprisonment

5.1 Entry into Prison

When a person with intellectual disability and/or impaired decision-making capacity is imprisoned, it is very important that the disability or impairment is identified and made known to staff at the correctional centre. If additional measures enabling police and lawyers to identify disability or impairment are put into place, it is to be hoped that any identification would have occurred prior to the person's entry into prison. Whether or not additional measures for police and lawyers are implemented, it must be ensured that corrective services staff are also adequately trained in recognising and communicating with people with disability or impairment. The provision of adequate and ongoing training will further ensure that disability or impairment does not go unrecognised and that people are treated in a manner that is both suitable and appropriate.

The routine application of screening tests may be appropriate. For example, Queensland Corrective Services is currently in the process of trialling the Intellectual and Cognitive Impairment Screen (ICIS) tool in two correctional centres. It is proposed that this screening tool would be administered to all prisoners at the time of admission to a correctional centre, with Queensland-wide implementation anticipated in 2013-14.⁹¹

It is likely that people with disability and/or impaired decision-making capacity will require additional supports when they initially enter prison. For example, persons with disability or impairment may have difficulty grasping the procedures or the rules that are to be observed within the prison. If they cannot understand the rules and procedures, they cannot reasonably follow them. If a person skilled in communicating with people with disability or impairment was available to explain the rules initially and to reinforce explanations later as required, this would arguably improve a person's understanding of the rules and avoid or reduce any unintentional breaches.

5.2 Programs in Prison

In the same way as any prisoner *without* disability and/or impaired decision-making capacity, prisoners *with* disability and/or impaired decision-making capacity must be provided with adequate access to programs whilst in custody. Without equal access to appropriate programs, people with disability or impairment may be unfairly impacted upon in relation to rehabilitation and access to parole.

⁸⁸ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32; O'Carroll, above n 37, 61.

⁸⁹ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32; O'Carroll, above n 37, 61.

⁹⁰ *Crimes Act 1914* (Cth) s 20BQ; O'Carroll, above n 37, 61.

⁹¹ Simpson, above n 11, 50.

Several instances have been reported where people with disability or impairment have been unable to access programs. For example, a male with an IQ of 70 convicted of a sex offence and imprisoned was ineligible to participate in a sexual offender treatment program because corrective services only allowed those with an IQ above 85 to complete the course. However, a sex offender who has not completed such a program may be viewed less favourably by the parole board and therefore not placed onto parole. An anti-discrimination case was made and a program suitable for a person with intellectual disability and tailored to this man's circumstances was created. However, the creation of this individualised treatment program did not take into account the many other persons with intellectual disability who would also benefit from access to this and other programs.⁹²

A study conducted by the Queensland Department of Corrective Services in 2002 stated the following:

“The government has an expectation of the Department that offenders with disabilities will gain equitable access to programs and services. It is highlighted that two thirds of persons who had an IQ of greater than or equal to 70 indicated that they gained nothing from attendance at core programs. Fourteen percent of prisoners scoring between 71-100, who had attended programs, also indicated that they felt that they gained nothing from such attendance. Anecdotal information from prisoners indicated that current level of programs may be too difficult for some persons to understand, particularly in relation to the understanding of the meaning of words, literacy levels required and higher level concepts.”⁹³

To provide equitable access to justice for persons with disability and/or impaired decision-making capacity in the criminal justice system, it is necessary to provide programs that are appropriate and accessible to this cohort.

There appears to have been advances in the programs offered to persons with intellectual disability. Literacy, education and vocational programs suitable for persons with disability are now provided in Queensland correctional centres⁹⁴ and steps have been taken by some Australian correctional centres to provide persons with disability with access to programs, most notably sexual offender treatment programs. In Victoria, NSW and Western Australia, correctional centres offer sexual offender treatment programs that have been written specifically for persons with intellectual disability.⁹⁵ Similarly, in South Australia the Sexual Behaviours Clinic-Me pilot program has been developed. This program recognises that persons with intellectual disability have difficulty with concepts and learning methods used in standard sexual offender treatment programs and has adapted the standard program accordingly. The success of this program is currently under review.⁹⁶

It may be that more targeted and suitable programs could be offered to people with disability and/or impaired decision-making capacity if they were grouped together in certain units or correctional centres. This approach may enable targeted programs to be offered to more prisoners, encourage a focus on the needs of persons with disability or impairment and facilitate further improvement or expansion of those programs. It would also have the benefit of avoiding or minimising any negative influence on persons with disability or impairment by other offenders or by the correctional system as a whole.⁹⁷ For example, a dedicated accommodation unit has been established at Woodford Correctional Centre, which focuses on the management and ‘throughcare’ planning for offenders impacted by impaired cognitive functioning.⁹⁸ Of course, any grouping together of persons must be done in a way that complies with the Convention and does not negatively impact upon the rights of those persons.

5.3 Release from Prison

When a person is to be released from prison, support should be provided to facilitate their release and re-entry to society. This is a form of support that should be offered to all people, but may be particularly useful for people with impaired decision-making capacity. Preferably, support should begin when a person enters prison, continue throughout their time in prison and assist with their transition from prison. To be most successful, this should involve an integrated and coordinated response from government, non-government and community.⁹⁹

⁹² French, above n 13, 132-133.

⁹³ Department of Corrective Services, above n 16, 18.

⁹⁴ Department of Community Safety, ‘Department of Community Safety Annual Report 2011-12’ (Annual Report 2011-2012, Department of Community Safety, 10 September 2012) 38.

⁹⁵ Simpson, above n 11, 47; Jackie Tang, ‘Offenders with Special Needs (Intellectual Impairment)’ Paper presented at the Pacific Regional Heads of Prisons Meeting, 2005) 3.

⁹⁶ Simpson, above n 11, 55.

⁹⁷ French, above n 13, 101.

⁹⁸ Department of Community Safety, ‘Disability Service Plan 2010 – 2011’ (Service Plan, Department of Community Safety, 2010) 12.

⁹⁹ Kathy Ellem, ‘Experiences of Leaving Prison for People with Intellectual Disability’ (2012) 3(3) *Journal of Learning Disabilities and Offending Behaviour* 127, 127.

Research has indicated that prisoners with intellectual disability experience particular difficulties in participating in programs for rehabilitation, applying for and being granted parole, organising suitable accommodation prior to their release, developing daily living and social skills, developing employment skills and securing ongoing employment. It is often the case that people are denied funding from Disability Services once they enter a correctional centre, and they may have difficulty in re-applying for or obtaining funding after their release.¹⁰⁰

Considering these difficulties, two things are apparent. First, prisoners with disability and/or impaired decision-making capacity being released from a correctional centre require support, and this support must be in the form of a coordinated response that takes into account people's needs across all areas of life.

Queensland Corrective Services offered a program entitled 'Bridging the Gap: Throughcare Support for Prisoners with Impaired Cognitive Functioning', which supported a number of prisoners with intellectual disabilities for six months prior to release and nine months following release.¹⁰¹ The program provided case management support while people transitioned back into community. The support offered included improvement of basic living skills and the use of non-government organisations to assist with access to housing and employment opportunities. The aim of the program was to successfully reintegrate persons into the community and therefore reduce the risk of reoffending.¹⁰² The Bridging the Gap program concluded in June 2012, but Queensland Corrective Services continued to contract with a specialist disability non-government organisation to deliver post-release support to prisoners with impaired cognitive functioning using alternative project funding.¹⁰³

I am of the opinion that programs targeted at persons with disability and/or impaired decision-making capacity and transition programs such as Bridging the Gap are a reasonable accommodation that can be made by State parties to the Convention to assist in reducing the rate of re-offending and in successfully reintegrating people with disability and/or impaired decision-making capacity back into the community. Furthermore I believe that to maximise the chances of long-term success, these programs should provide a coordinated response and ensure that adults are linked to ongoing support and assistance before their participation is ended.

6 Post-Release

Post-release strategies may be the least effective approach to reducing offences committed by persons with impaired decision-making capacity. While these strategies are focused on discouraging recidivism, reducing community corrections costs and the rehabilitation of offenders, such strategies have minimal funding available and the target group have also had significant exposure to the criminal justice system. However, there does exist significant opportunity to provide supports aimed at linking these adults with community services to address the risks that originally led to their contact with the criminal justice system. These include access to stable accommodation, vocational training and employment services.

Although these services may be the least effective, they should not be ignored. In particular, programs within correctional centres that aim to link adults with support services should be continued following an adult's release and should not end until ongoing supportive links have been established. Further, these services should focus not only on rehabilitation, but also on daily life skills that are necessary for a person to live within the community. This will enable a person's accommodation within the wider community.

7 Australia's Obligations

In addition to Australia's obligations as a signatory to the convention to ensure that people with disability and/or impaired decision-making capacity have equal recognition before the law and effective access to justice on an equal basis with others, Australia has a clear obligation to ensure and promote the full realisation of all rights and freedoms for adults with impaired decision-making capacity in all areas of social, economic and cultural life. Among these rights are the rights to be included in the community, education and the full development of their potential, work and seeking employment, and participation in cultural life, recreation and sport.¹⁰⁴

¹⁰⁰ Ellem, above n 99, 132.

¹⁰¹ Ellem, above n 99, 128.

¹⁰² Department of Community Safety, 'Corrections NEWS: October 2009 (Newsletter, Queensland Corrective Services, October 2009) 7; Department of Communities, 'Annual Progress report 2010' (Annual Report 2010, Department of Communities, 2011) 9.

¹⁰³ Simpson, above n 11, 50.

¹⁰⁴ *Convention on the Rights of Persons with Disabilities* arts 24, 26-27.

Research undertaken by my Office has highlighted that in areas of education, employment and social inclusion, adults with impaired decision-making capacity experience alarming degrees of disadvantage and exclusion.¹⁰⁵ The lack of access to supports across these domains forms the basis of most measures of socioeconomic disadvantage, which is itself one of the principal predictors for entry into the criminal justice system. This highlights the need for policies that address the socioeconomic disadvantage of people with impaired decision-making capacity as a natural response to the over-representation of this cohort in the criminal justice system.

8 Concluding Comments

The criminal justice system has taken steps to accommodate persons with disability and/or impaired decision-making capacity. This is evident in many aspects of the system, such as the special provisions made for people when being interviewed by police, when giving evidence in court or when appearing before court. This is also becoming more evident in correctional centres, where steps are being taken to accommodate and make provision for prisoners with intellectual disability or impairment.

Although these improvements are acknowledged, further work is required to more fully realise Australia's obligations under the Convention. In some cases, although reasonable accommodations have been made at the legislative or policy level, there is evidence that they are not always implemented. This might be because criminal justice personnel are not able to identify that a person has a disability and/or impaired decision-making capacity, or do not always take the time or invest resources to accommodate them. In other cases, it is obvious that much more needs to be done in relation to providing further training of professionals, further assistance when giving evidence in court, additional options for diversion away from the current court system and the provision of increasingly more appropriate prison-based programs.

There must be a focus on continually reviewing the criminal justice system with a view to identifying further areas for improvement while ensuring that current approaches and procedures provide increasingly appropriate means of accommodation and inclusion. It is only if this ongoing commitment is pursued that Australia will demonstrate true compliance with its international obligations under the Convention.

While not a focal point for this submission, the success of any initiatives such as those proposed herein is contingent on the complementary human services systems operating in an integrated and cohesive way. Any consideration of, or recommendations for, reform with respect to the criminal justice system must take into account the supporting systems, such as disability services, housing, education and health, and what may be required from them to enable optimal responsiveness both at a preventative level but also in supporting fair and just responses and effective rehabilitation.

I am pleased to lend my support to the Commission as it progresses this important inquiry in the interests of ensuring that the criminal justice system makes appropriate accommodation for persons with impaired decision-making capacity. I would be pleased to make myself available to the Commission should there be an opportunity to further discuss the points made in this submission and/or explore opportunities for collaboration.



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¹⁰⁵ Office of the Public Advocate (Queensland), '2010-2011 Annual Report' (Annual Report 2010-2011), Office of the Public Advocate, 31 October 2011).