

3 June 2020

Our ref: MC-LP

Royal Commission into Violence, Abuse,
Neglect and Exploitation of People with Disability
GPO Box 1422,
Brisbane, Queensland 4001

By email: [REDACTED]

Dear Sir/Madam,

Criminal Justice System Issues Paper

Thank you for the opportunity to provide feedback on the Criminal Justice System Issues Paper in relation to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. The Queensland Law Society (**QLS**) appreciates the opportunity to comment on the important issues which are under review. QLS also intends to make further future submissions on other matters to the Commission.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the QLS Human Rights and Public Law Committee, QLS First Nations Committee, QLS Health and Disability Law Committee and QLS Criminal Law Committee. These committees are comprised of legal practitioners who are experts in the areas of criminal law and human rights, and who interact with the criminal justice system on a daily basis.

Question 1 - What experiences related to violence, abuse, neglect or exploitation have you, a family member with disability, or someone with disability you support, had in the criminal justice system?

QLS Members have provided a range of examples demonstrating the experiences of their clients.

Case Study One

In 2016 the Owners Corporation of a residential apartment building sought orders that one of the residents in their building be held in contempt of Court for failing to comply with earlier Court orders requiring him to give peaceful access to builders to undertake repairs to the

Criminal Justice System Issues Paper

common property balcony attached to his home unit. The breach by the resident, Jim, was that Jim had put the hose on the builders who were trying to work off scaffolding to carry out the necessary repairs. The builders left the site due to WHS issues arising from Jim's actions, thereby preventing the Owners Corporation from being able to discharge its statutory duty to keep the building in a safe condition.

When the case came before the Supreme Court, Counsel for the Owners Corporation sought that Jim be held in contempt, and mentioned to the Presiding Justice, that an appropriate sentence would be 3 weeks' full time imprisonment. At a directions hearing the Court indicated it was inclined to put Jim in gaol.

Jim was 85, lived alone with no family or friends, spoke very little English and had limited literacy skills. The Court originally began to hear the case on the contempt charge until an issue with the interpreter arose, and the Court then sought for Jim to have legal representation (ultimately, a pro bono lawyer was able to be obtained). After the lawyer came into the matter, he sought some of Jim's medical records and it turned out that there happened to be evidence of Jim being diagnosed with a form of dementia, years before the breach of Court orders which founded the contempt charge. The lawyer brought an application for the charge to be permanently stayed on the basis that Jim lacked legal capacity to stand trial. Counsel for the Owners Corporation resisted the application and sought to prosecute the contempt charge. Ultimately, the Court sided with Jim and found he was not fit to stand trial, thus permanently staying the contempt charge and preventing Jim from being convicted and sentenced.

Jim's case stands as a very close call, only avoided by the good fortune of the right pro bono lawyer being able to be found at the eleventh hour, who in turn was lucky enough to come across medical records pre-dating the relevant contempt period. But for either of those things, Jim's mental capacity would never have been questioned and he would have become another statistic of a person with disability in the prison system.

Case Study Two

Although not criminal but civil this case study highlights what can be done

Peter is 50 years old and he had a motor vehicle accident ten years ago.

He received his lump sum payment, sanctioned in the Supreme Court of approximately \$3 million, and a private trustee company was appointed as his financial decision maker for the lump sum.

He had a "stroke" whilst he was in the trauma unit soon after his accident, and he developed aphasia, a communication impairment that has not impacted on his intelligence. His verbal communication is very limited and often incongruent with his intention. He best communicates with prepared cardboard laminated signs (pictures and slogans) and electronically, via written word, apps on his phone and via electronic drawing devices. Communication needs to be broken into small sentences, to ensure he agrees or approves. He also uses devices to read out aloud to him his written communication. He is able to use body language and gestures and has limited speech ('Yes / No / It's OK').

When he was in the Tribunal, the Tribunal employed a court reporter to teletext onto a computer screen in big font what was being said and who said it, so that he could follow proceedings. When asked a question, the Tribunal member slowed their speech, Peter waited for the question to be typed, then he would answer the Tribunal member who would, if necessary, clarify his response by paraphrasing or asking another question which would be via teletext typing again. Peter also had the support of an advocate who had previously spent time with him and understood his communication strategies, and could also assist the Tribunal, by helping Peter to clarify his response, rephrase questions, and build topics piece by piece instead of only using full complicated sentences.

This scenario demonstrates the accommodation that is both possible and required in order to include someone with moderate to severe aphasia in their own proceedings.

Peter was able to obtain a declaration of capacity for all his personal decisions.

Question 2:

A. What do you think causes violence, abuse, neglect and exploitation of people with disability in the criminal justice system? What can be done to stop this from happening?

B. In particular, what changes would help people with disability avoid the criminal justice system in the first place?

Persons with disability are significantly over-represented as victims of crime, persons of interest to police and as defendants in the criminal justice system. Persons with a cognitive or psychosocial disability, comprise around 18 per cent of the Australian population but almost 50 per cent of Australia's prison population.¹ It is arguable that this overrepresentation can be attributed to a lack of identification of the disability at an early stage and inadequate measures being implemented at all levels of the criminal justice system to respond to the varying needs of persons with disability.

Some common characteristics between those who have a cognitive impairment and those who may come into contact with the criminal justice system may include:

- A greater propensity for impulsive behaviour;
- Less ability to manage extreme emotions, such as anger;
- Less ability to understand and relate to the emotions of others;
- Less inhibition;
- Greater suggestibility;
- Limited intellectual ability (ability to learn, comprehend, retain, and apply information);
- Poor problem solving skills;
- Limited volition;
- Poor memory; and

¹ Law Council of Australia, 'People with Disability, The Justice Project Final Report – Part 1' (2018) 19 citing Human Rights Watch, *'I Needed Help, Instead I Was Punished': Abuse and Neglect of Prisoners with Disabilities in Australia* (2018) 2 (*'I Needed Help, Instead I Was Punished'*).

Criminal Justice System Issues Paper

- Distorted perceptions of reality (persons experiencing acute mental illness).²

A person with disability can continue to experience disadvantage throughout all stages of the criminal justice process, particularly where cognitive impairments remain undiagnosed or untreated.

The initial stages involving interaction with law enforcement officers may be difficult for people with a disability where given the disability and officer's lack of awareness of it there are inappropriate responses to the person's behaviour by law enforcement officers. Appropriate identification of persons with a cognitive impairment during early interactions with police or when they are taken into police custody can assist (where appropriate) in diversion from the criminal justice system.³

Where it is inappropriate to divert persons from the criminal justice system or where persons with disability are not identified or diagnosed, persons with cognitive impairment can experience disadvantage throughout the court process as a result of: -

1. a lack of understanding of the criminal justice process itself;
2. a lack of knowledge about where they can go to seek assistance in relation to their legal problem;
3. the inability to effectively communicate when required; and
4. a lack of understanding of the person's needs by frontline staff such as defence lawyers, prosecutors, court support workers and even judicial officers;

These barriers prevent persons with a disability from participating in the criminal justice system on an equal basis compared to others who experience the same or a similar legal problem. This leads to inappropriate and unjust outcomes such as fines which the person has no means to pay, orders with which the person cannot comply and custodial periods of imprisonment where the person is placed in an environment that cannot cater for their complex needs.

In Queensland, the *Human Rights Act 2019* ('the Act') assists those who come into contact with the criminal justice system by providing the right to a fair hearing and a number of other specific rights for persons involved in criminal proceedings.⁴ In addition, the Act contains a number of other rights which may become relevant within the context of the criminal justice system.⁵ For example, in Queensland where a person is charged with a criminal offence that person is entitled to be tried without reasonable delay.⁶ Our members report that people with disability often face longer waiting periods for their matters to be finalised. This is caused by a number of factors including difficulties for defence lawyers in taking instructions and arranging

² Queensland Advocacy Incorporated, 'Disabled Justice: The barriers to justice for persons with a disability in Queensland' (2007) 29.

³ Dr Grazia Catalano (PhD), 'Submission to the Queensland Productivity Commission's Inquiry on Imprisonment and Recidivism' (2018) The University of Queensland, pg. 4.

⁴ *Human Rights Act 2019* (Qld) s 31, s 32.

⁵ *Ibid* s 15, s 17, s 23, s 29, s 30.

⁶ *Ibid* s 32(2)(c).

Criminal Justice System Issues Paper

funding for necessary medical and psychological assessments, which often require multiple applications and reviews where funding is denied. Where funding is approved by legal aid agencies it is often nominal and prices clients out of the market causing further delays.

Ultimately, early identification of a person's disability assists in ensuring the provision and tailoring of necessary supports for the person from the outset. This includes diversion from the criminal justice system, use of therapeutic jurisprudence to divert the person from the prison system or the provision of appropriate supports as the person progresses through the general criminal justice process.

QLS strongly supports additional funding for legal representation for people with disability. Importantly, people with disability may require additional assistance and additional time with legal practitioners to properly provide instructions and to ensure advice is understood as highlighted by the two case studies mentioned above. The provision of Legal Aid assistance may need to be increased where a client requires additional support. Broadly, there must be better funding for the various support systems and structures in place which assist persons with a disability avoid coming into contact with the criminal justice system in the first place.

Further urgently needed reforms include:

- better integration with NDIS assessment and how to practically get the skills to defence lawyers on how to access those assessments; and
- tools to enable better identification on when a disability may be relevant to a matter at all levels of the dispute process, including specialist training in the courts – this relates to improving NDIS assessment, access, integration and processes.

Question 3:

A. What do you think prevents people with disability who have experienced violence, abuse, neglect, or exploitation from getting protection or justice from the police or the courts?

Persons with a physical disability may avoid making a complaint to police as not all police stations may be physically accessible to persons who use mobility devices or aids.⁷ Typically, where offences are committed against persons with a disability, they are more likely to be reported to police where the offences are more serious, for example sexual offences will generally be reported to police more often than property crime.⁸

Unfortunately, persons with a disability may struggle to access justice on the same terms as the general population due to a wide range of structural and systemic factors. These limitations can be summarised generally as:

- physical accessibility (inappropriate environments);

⁷ Above n 2, 65.

⁸ People with disability are more likely to be victims of crime – here's why (22 February 2019) Swinburne University of Technology <<http://www.swinburne.edu.au/news/latest-news/2019/02/people-with-disability-are-more-likely-to-be-victims-of-crime--heres-why.php>>.

Criminal Justice System Issues Paper

- access to information, communications, and proceedings (e.g. the availability of online court resources for the vision impaired or audio resources for the hearing impaired);
- the nature of the adversarial system (formality, requirement for expediency and disinclination to embrace flexibility);
- negative attitudes and lack of understanding of disability (stigma/inadequate training of frontline staff in the criminal justice system); and
- lack of critical support services (victims' advocates and support persons)⁹

The ability to report can also be challenging where the perpetrator is in a position of power, or where a person may not recognise that what is happening would constitute abuse or neglect or exploitation. Even where reported, victims of crime who have a disability may feel disempowered as participants in the criminal justice due to their disability categorising them as a less competent witness or a lack of support being provided throughout the process.¹⁰ Where capacity is questioned, it can be difficult to progress a complaint.

Despite these issues, persons with a disability are still significantly overrepresented as victims of crime. Where a person with a disability who is a victim of crime has managed to navigate the judicial system to a point that a matter is before a court or tribunal, complex challenges may be encountered relating to:

- if the person is suffering from a cognitive disability when giving evidence and in having that evidence accepted. It can be difficult to discharge the evidentiary burden in these circumstances while also ensuring the accused has a right to a fair trial;
- issues of stigma and bias with respect to the decision to put people on the stand to give evidence; and
- the design and facilities of the court room, which may not adequately provide for the needs of a person with a disability. For example, the room can be a difficult forum when witnesses and complainants are hearing impaired and normal procedural rules do not appropriately accommodate the needs of these persons.

There is a trend towards accommodating a person to engage in the process of giving evidence, such as providing frequent breaks, avoiding complex questions, providing a support person. QLS considers a handbook or bench book to guide the courts and prosecutors on navigating these issues would assist, similar to the bench books which have been developed in relation to elder abuse¹¹.

QLS submits that measures implemented as a result of the COVID-19 pandemic such as the Disability Information Helpline be extended beyond the pandemic to continue to provide information and referrals for people with disability.

⁹ Ibid 1, 27-52.

¹⁰ Above n. 1, 45.

¹¹ See for example: <https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf>; <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/NCSC-Prosecuting-Elder-Abuse-Cases-Basic-Tools-and-Strategies.pdf>.

Question 4:

A. What supports do people with disability need to participate in the criminal justice system on an equal footing as others without disability?

B. When would these supports be needed to assist people with disability who are:

- (i) victims of crime**
- (ii) witnesses required to give evidence**
- (iii) accused or suspected of criminal offences**
- (iv) convicted of criminal offences or**
- (v) jurors?**

Victims of crime and witness required to give evidence

In Queensland, legislative provisions exist to attempt to alleviate the stress the giving evidence has on persons as a result of a mental, intellectual or physical impairment and who are likely to suffer severe emotional trauma or intimidation if they are required to testify in the ordinary way.¹² This includes persons who may be intellectually impaired.¹³ This is critical and must be maintained and ideally expanded to include the provision of additional support prior to, and post court appearances for victims of crime who are required to give evidence or provide victim impact statements at trial.

Accused persons

For those accused of criminal offences, it is important that appropriate screening processes are developed that will assist police and other front line staff in the criminal justice system identify persons who may have a cognitive impairment early. Disability awareness training for frontline officers would ensure that persons with a disability are supported appropriately throughout the criminal justice process and ensure that appropriate supports are implemented from the outset. This training, coupled with the provision of appropriate critical care services such as: accessible accommodation whilst on bail; health and allied health services; and rehabilitation and diversionary options holistic approach will give persons with disability the basic support needed to participate in the criminal justice process in a meaningful way and ensure unjust outcomes are avoided.

Convicted persons

Further, where persons are convicted, appropriate support must continue beyond the court stage to ensure that court orders are complied with, thereby limiting the number of breach matters before the court which often require the person to be re-sentenced. Maintaining support will ensure that persons with a disability can participate and engage with probation and parole

¹² Evidence Act 1977 (Qld) s 21A(1) definition of 'special witness'.

¹³ R v RAI [2011] QCA 64.

Criminal Justice System Issues Paper

services and the general population in a more needs oriented way. For example, it is well recognised that the prison population are disproportionately affected by cognitive impairment and poor comprehension skills, and often experience difficulties reading and understanding legal documents. Despite the simplified parole process that was implemented following the Queensland Parole System Review, many prisoners do not understand parole processes or how best to improve their prospects of release. Another example is that in Queensland, an incarcerated person is not able to facilitate an application for the disability support pension (DSP) whilst in custody. What this means is that a person who would ultimately be entitled to the disability support pension is released into the community with no support, no means of earning an income and the added difficulty of having to navigate the social security system which ultimately results in significantly increasing the prospect of reoffending. Appropriate resources should be made available for the DSP to be applied for and assessed prior to release so that people can enter the community and transition out of the criminal justice system with appropriate basic essential support.

Jurors

The ability for persons with a disability to participate in the administration of justice by serving on a jury should also be considered.

The issue was examined in *Lyons v Queensland* which examined whether a deaf juror was able to serve on a jury.¹⁴ The High Court confirmed that there was no provision under the *Jury Act 1995* (Qld) to administer an oath to an interpreter for a juror or allow an interpreter to be present in the jury room during deliberations. The phrase '*perform the functions of a juror*' in the *legislation* includes both listening to oral evidence and participating in the deliberations in the jury room without the need for non-jury members to be present. It was submitted that a deaf juror who is required to have their evidence mediated through an interpreter is not able to give a true verdict based upon his or her assessment of the evidence.

It is not negotiable there should be no prejudice to a defendant's right to a fair trial, however regard should be had to how courts can better support and facilitate the proper involvement and inclusion of persons with a disability in the criminal justice process, including, in appropriate circumstances, as a juror. The development of handbooks and bench books would be a valuable resource to the courts and to practitioners who are assisting in these matters.

Mental Health Court and Mental Health Review Tribunal

As mentioned, in order to facilitate a fair and accessible criminal justice system for persons with a disability, the system must be properly resourced with appropriately qualified experts to assist the court, the victim and the accused. Under resourcing of appropriately qualified experts is particularly noted in the context of the Mental Health Court and the Mental Health Review Tribunal.

QLS submits that a broader range of experts must be trained and available to the court and tribunal. The current primary reliance on psychiatrists can be problematic, for example, in

¹⁴ [2016] HCA 38.

the case where a cognitive disability has not be diagnosed, or even if it has, a psychiatrist alone may not be an appropriate expert to assist the court in determining the best outcome for the administration of justice and for the person's rehabilitation.

QLS is also concerned that there is a significant lack of funding to ensure persons with a disability are housed appropriately and that court ordered programs, and individually developed plans, are adhered to. In this regard, QLS has long held concerns that persons who are the subject of a Forensic Order (Disability) are mismanaged by a system that is under resourced and insufficiently coordinated with broader health and community support systems. As a result these persons are rarely provided with the accommodation and treatment programs which are prescribed under the *Forensic Disability Act* and *Mental Health Act*. An example of the depth of these issues is demonstrated in the recent matter before the Supreme Court of Queensland in *Attorney-General v McCann*.¹⁵

In that case, Justice Applegarth concluded that ultimately, the system failed the respondent and the community as the respondent was not provided with consistent access to a bed in a secure unit. In our view, Justice Applegarth's concluding observations¹⁶ are relevant not only to a person the subject of a continuing detention order but also to those persons who are the subject of FDOs:

"I am conscious that this case is symptomatic of wider systemic problems which include:

- (a) The burden of prisoners with severe mental health problems;*
- (b) Too few places in facilities like the Park, with the Prison Mental Health Service having to prioritise the most acute cases for such a facility;*
- (c) Secure mental health facilities face the burden of widespread mental illness in the general community;*
- (d) 'Temporary' accommodation at 'the precinct' of individuals subject to supervision orders under the [Mental Health] Act is, in reality, a place of long-term accommodation because individuals who are subject to orders under the Act struggle to find appropriate and approved accommodation in the general community."*

Question 5 - How does violence, abuse, neglect or exploitation in the criminal justice system vary for particular groups of people with disability? For example, how does a person's gender, race, age, cultural or sexual identity, or geographic location (metropolitan, regional, remote) impact on their experiences of violence, abuse, neglect and exploitation?

The Justice Project Final Report noted intersectional disadvantage for LGBTI+ people, with stakeholders describing systemic barriers. One submission to the Justice Project noted:

¹⁵ *Attorney-General v McCann* [2018] QSC 115.

¹⁶ *Ibid* [79].

LGBTI people living with a psychosocial disability requires negotiating multiple marginalised identities that attract stigma, which often results in an increase in stress related to the likelihood of prejudice and discrimination both within the LGBTI communities and within the broader population. These experiences of stigma have been shown to increase the likelihood of depression and/or anxiety, alongside having a detrimental effect on treatment outcomes, hindering efficient and effective recovery from mental illness.¹⁷

The Justice Project Final Report went on to say:

Particular concerns were raised about LGBTI+ people with intellectual disability in care/support settings, highlighting the need for greater policy focus on this area.¹⁸ A 2016 literature review found that this group is 'initially marginalised by their disability and pushed farther from social 'acceptability' because of their sexual orientation or gender expression. This position can render some people in this cohort as powerless' and therefore subject to disproportionate control over their familial and social relationships.¹⁹

Research indicates that 'throughout history both LGBTI people and people with disability have had their reproductive and sexual rights ignored and denied'.²⁰ One study noted that there are 'currently no Australian health education resources that provide comprehensive information about sexual orientation, gender identity and intersex status for people with intellectual disability'.²¹ Those working within the disability sector may also have insufficient training on LGBTI+ issues. The 2016 literature review found that where policies are not in existence or not clearly defined, service providers may impart their own prejudices onto LGBTI+ people in their care.²² For example, this may lead to service providers becoming hesitant in allowing same-sex interactions, for fear of breaching their duty of care.²³

These intersectional disadvantages are compounded when it is understood that:

People with disability, especially women, have heightened vulnerability to crime and abuse. For example, people with an intellectual disability are ten times more likely to experience violence and three times more likely to be victims of assault, sexual assault

¹⁷ National LGBTI Health Alliance, Submission to Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Mental Health Terms of Reference*, February 2017, 5.

¹⁸ Consultation, 18/08/2017 Melbourne (LGBTI Network).

¹⁹ Nathan J Wilson et al, 'A narrative review of the literature about people with intellectual disability who identify as lesbian, gay, bisexual, transgender, intersex or questioning,' (2016) *Journal of Intellectual Disability*, 1-26, 17 ('A narrative review of the literature')

²⁰ Family Planning NSW, *Love and Kisses: Taking action on the reproductive and sexual health and rights of people with disability 2014-2018* (2014) 25.

²¹ Ibid.

²² Wilson et al, 'A narrative review of the literature', 2.

²³ Ibid.

and robbery compared to those without an intellectual disability. Prisoners with disability are particularly vulnerable to violence, abuse and mistreatment in custody.²⁴

There is generally a lack of expertise in rural and remote areas to effectively diagnose disability, and the framing of questions with respect to a person's ability to rehabilitate.

People with disability living within more remote communities are highly vulnerable to violence, abuse, neglect or exploitation, yet access to enforcement authorities who are specially trained, resourced and supported, to receive reports of such crimes, is very limited.

Question 6 –

A - What are the experiences of First Nations people with disability engaging with the criminal justice system? For example, are the processes and services culturally appropriate and safe?

A key theme of failed policy in the criminal justice system with respect to Aboriginal and Torres Strait Islander peoples is the absence of adequate engagement with Aboriginal and Torres Strait Islander peoples in proposals for reform. QLS strongly supports meaningful engagement with Aboriginal and Torres Strait Islander peoples about these issues. Approaches must be location and Community specific and such priorities determined by the Communities themselves through a process of co-design and collaboration.

The following comments are general in nature and do not supplant the absolute need to properly inquire into the lived experiences of First Nations peoples with disability who have engaged with the criminal justice system.

It is widely understood that Aboriginal and Torres Strait Islander peoples are overrepresented in the justice system, as well as other areas of socio-economic measures such as health, education, and employment outcomes.

For Aboriginal and Torres Strait Islander peoples with a disability, who encounter the justice system, our members have reported that this interaction can be impacted as follows:

- By **over policing**: that is, there is a heightened likelihood that particular conduct may result in an interaction with police, in circumstances where similar conduct by a person without a disability may not and/or there may be a lessened likelihood of an alternative to charging being used;

Aboriginal and Torres Strait Islander people with a disability in custody are also subjected to mistreatment and a lack of cultural understanding or awareness of individual conditions and needs.

- **Miscommunication** – a person being treated as a suspect when they are in fact a witness or victim of an offence; police verballing or gratuitous concurrence occurring in the context of police questioning; inaccurate or false accounts being provided/recorded where another person assumes mutual understanding where the subject person in fact does not have a clear understanding of the discussion. These are common

²⁴ Law Council of Australia: The Justice Project Final Report, August 2018, *People with Disability* pg. 4

experiences with Aboriginal and Torres Strait Islander peoples generally, therefore depending on the disability, these issues can be exacerbated.

- **Difficulty understanding and/or adhering to court orders** – for a young person generally, the criminal justice system can be overwhelming and difficult to comprehend. For Aboriginal and Torres Strait Islander young people, particularly those from disadvantaged backgrounds and/or those with a cognitive disability, our members have reported that key challenges include comprehension of court orders and their obligations – if a child is placed on a conditional bail program, they might not appreciate that such a bail order rather than a sentence concludes their matter; they might not understand the duration or frequency of those obligations; they might not be aware of what steps to take if they do breach one of the obligations. We understand that a high number of Aboriginal and Torres Strait Islander people who are subject to Dangerous Prisoner (Sexual Offenders) Act (**DPSOA**) and Child Protection Offender Registry (CPOR) have a disability and this is part of the difficulty in complying with those orders.

It is not uncommon for reports prepared for the court on a DPSOA application to cite various disabilities a person may have been disguised with as part of their assessment about the risks associated with release (conditional or otherwise).

Further, a feature of fetal alcohol spectrum disorders (**FASDs**) includes difficulties with memory. Therefore for such a person to remember without reminder an annual CPOR reporting obligations or the list of matters that must be reported when they change is unrealistic. Our members report that there are significantly more breaches of such orders which stem from 'innocent' forgetting of obligations rather than any malicious intention to conceal information.

- **Varying experiences of community based orders** – Corrective Services supervision methods and referral of persons on community based orders are continually evolving. We understand from our members that the experiences of Aboriginal and Torres Strait Islander clients seems to be very dependent on the capacity and skills of the particular case officer they are allocated to. An effective officer provides an understanding of the difficulties faced and an awareness of appropriate methods of support, often with the use of other support/case management service providers.

We understand that experiences may be more positive through the Murri Court program; as a result of the presence and engagement of community leaders and Elders within the process. The deterrence and rehabilitative effect can be greater particularly where there is engagement with Community or the Community Justice Group makes sure the family of the participant monitors their compliance with a court order and helps remind them of obligations such as reporting to probation, following up with counselling etc.

Another initiative which commenced in Brisbane in 2019 was the involvement of NDIS within the Murri Court program. The process of applying for the NDIS is complex and can be particularly difficult for a person with a disability for a variety of reasons.

The involvement of NDIS in the Murri Court program means that there can be:

- assistance offered to persons with a disability in making the application,
- guidance about how to provide supporting information, and

- information which can inform the court's decisions about bail and sentence; this can support community based sentence outcomes which reflect that the person was in need of support, which has been secured and offers reassurance that the offending in question may be addressed.

Are the processes and services culturally appropriate and safe?

Cultural and Community Liaison Officers with QPS can assist in some cases. There have also been positive initiatives in some Departments and agencies who are becoming more aware of cultural needs. However, in many areas, culturally appropriate processes and services are lacking. In particular, our members have reported concerns about police cultures which inappropriately targets persons from disadvantaged backgrounds.

Case study Three

Dwayne is a 24 year old Indigenous man. He is homeless, resides around the city or nearby areas and is stopped by police on an almost daily basis (sometimes more than once a day). Because of the frequent interactions, he is often not polite with the police involved. Dwayne is often heard on recordings of those interactions complaining about the needless nature of the interaction or the fact that this was the third one that day.

In a recent interaction, police who knew him well, approached him and asked what he was doing. He was walking around looking for 'dumper' cigarettes at the time. Police did not detain him but asked repeatedly if they could look through his bag to confirm he didn't have anything he shouldn't have. Dwayne called the legal service who regularly represent him and whilst asking for his lawyer, the officer started physically searching him, although he was not under arrest or detained at the time. The officer located a small clip seal bag with cannabis in it, then took the phone and disconnected the call and told Dwayne he was under arrest. The officer later gave him a notice to appear for possession of dangerous drugs.

In the police summary of facts the officer stated that Dwayne had consented to the search. Dwayne asked his lawyer to look at the police officer's body worn camera footage of the interaction. The lawyer did so and it confirmed Dwayne's version of events, and the charge was later withdrawn on the basis that the search was unlawful.

Dwayne has a moderate cognitive impairment, although he has not been formally diagnosed. This often manifests in him acting responsively and aggressively, which typically is met by police with hostility, physical detention and charges – he has well in excess of 50 public nuisance offences for such conduct on his history. It is fortunate he did not react in this manner to the interaction in question.

This example is symptomatic of some of the frequent interactions with police that Aboriginal and Torres Strait peoples with a disability can face.

By contrast a 'passive' approach to policing of various orders where an Aboriginal or Torres Strait Islander person with a disability may be at an increased risk of non-compliance is also problematic. Resourcing of police and other agencies is necessary to better assist and support compliance with orders, particularly in the context of persons with a disability.

A lack of understanding and training from all stakeholders in the criminal justice sector regarding issues particular to Aboriginal and Torres Strait Islander clients is a key issue. For example:

- a judicial officer may not appreciate what gratuitous concurrence²⁵ is or how it might impact evidence being given or a confession having been tendered;
- a prosecutor dealing with a witness may not appreciate that their presentation might be an indicator of for example FASD, nor its impact on how they might give evidence;
- issues where police or others in remote communities may not appreciate:
 - the complications of inter family conflict or intergenerational trauma and how that might manifest and their impact on attempts to mediate disputes;
 - the need to locate suitable supports for young people to obtain accurate information about a matter under investigation; and
- lawyers who do not have the skills to appropriately obtain instructions from a client without unduly influencing what the client will say.

B - A high proportion of young people in detention are First Nations people with disability or with an undiagnosed disability. How can they be better supported to access justice when they are in the system? What should be done to help them transition out of the criminal justice system?

There are a number of steps which can be taken to better assist Aboriginal and Torres Strait Islander Peoples in the criminal justice system including:

- Ready access to their legal representatives.
- Legal support that is not only skilled in expeditiously resolving legal matters, but is culturally capable and culturally competent. Expedition is particularly key, in preventing unnecessary time in detention but also importantly in maintaining the focus and support of the client. Our members have reported that vulnerable Aboriginal and Torres Strait Islander clients very often simply want 'out' of the system and the pressure to 'just plead and get it over with' can be very great. Lawyers may be inclined to support that approach without giving the circumstances of the charge a robust analysis or offering such advice to the client to appropriately inform them of all options available.
- Culturally safe support staff at the detention centre – the benefit of an Aboriginal and Torres Strait Islander case workers working with a vulnerable child in detention can be great, particularly where the child has a protracted stay in the centre there and may not have ideal supports back in the community. It can offer the support needed and motivate the child to take steps they might not otherwise such as: seeking alternative places to stay when released including with family better equipped to support them and return to school or training. The presence of such a person for court appearances is also of great benefit – that is, having a culturally competent person available to the child to de-brief after an appearance can assist with understanding court processes and reinforcing court orders and obligations in a culturally safe and appropriate manner.

²⁵ <https://humanrights.gov.au/our-work/legal/commission-submission-common-difficulties-facing-aboriginal-witnesses>.

Criminal Justice System Issues Paper

For those in detention serving a sentence, the Throughcare Program of ATSILS is a key initiative which can offer:

- case management support for transitioning back to community,
- linking with support services,
- practical support such as getting Centrelink payments operational again, getting new ID documents, signing up for training courses or employment programs and other steps directed at reducing the risk of recidivism.

For Aboriginal and Torres Strait Islander persons with a disability, unless they already have a robust and skilled support network in place, such services can meet those needs in supporting the transition back to the Community.

Holistic service support for First Nations young people is needed. To effectively support a First Nation young person through the criminal justice system, other areas of service delivery such as in health and education, need to be considered in the context of holistic support and coordination. The ability of Aboriginal and Torres Strait Islander peoples and their communities to be involved in the co-design and supporting of programs that aim to reduce crime, recidivism and channel young people into training, the workforce or further education is essential in any approach to reform. This approach is a high priority for those First Nations young people who have a disability as different components of the service sector need to coordinate in order to effectively support Aboriginal and Torres Strait Islander peoples with disability to transition back into the community.

Question 7(a) - What barriers are there to effectively identify, disclose and report instances of violence, abuse, neglect or exploitation in the criminal justice system?

There are a range of barriers that people with disability face in identifying, disclosing and reporting complaints. Leaving aside the tangible barriers as have been addressed above with respect to people with physical disabilities, there are a plethora of invisible barriers which apply to persons of all types of disability, as well as others which are more disability specific.

First and foremost, people with disability may not fully appreciate a crime has been committed against them, for which police involvement should occur. This will depend on the intellectual capacity of the individual, as well as other, contributing impairments. This will be particularly relevant with children, who have yet to understand boundaries of acceptable behaviours and what is considered appropriate and normal conduct within society.

As regards disclosure, there will be reasons why certain individuals physically cannot make a disclosure, as well as other reasons why certain individuals will be too scared to make a disclosure.

For example:

- With respect to the physical impossibility for some, this will be because the perpetrator may be the sole person they interact with and there may not be opportunity for them to independently report their complaint. There may also be significant communication issues, for example people who are non-verbal and cannot convey their complaint in a

Criminal Justice System Issues Paper

way that the system is used to receiving, or those who lack mental capacity and as such, are not readily considered credible complainants.

- For those people who can physically make a disclosure, many will be too afraid to do so, out of fear that they will lose what little support or social contact they have. For others, the stigma of being a victim will be too overwhelming. For some, the likelihood of having to engage within the legal system may be a re-traumatisation of an earlier bad experience (for example, contested guardianship proceedings). Whilst, for others the prospect of giving evidence against their perpetrator will simply be too frightening, especially in circumstances where they lack confidence that they will be considered a credible witness due to their underlying disability as discussed above.

With respect to reporting such complaints, the issue of metropolitan / regional / remote geography will be highly relevant.

Question 8 (a) - What barriers are there to adequately investigate violence, abuse, neglect or exploitation in the criminal justice system?


The matters identified in response to 7(a) above, apply to investigations. Each of the areas of concern raised with respect to disclosures, will apply to investigations. Further complexity, is the issue of the ability of the investigator to properly understand the dynamics of the relationship between the person with disability and their perpetrator. This will be especially so where the crime occurs within the home / care setting.

When considering available witnesses, investigators need to be mindful of any accommodations that may be needed when those witnesses are also people with disability. Sometimes those differences will relate to a physical disability / visual / hearing / speech impairment; other times, the differences will be less obvious but no less significant, such as a cognitive impairment / brain injury / intellectual disability. Investigators will need to be trained to be sensitive to the fact that individuals with certain disabilities may be more easily led than others and in such cases, their evidence may not be as reliable as appears at first blush.

Investigators will need to be specially trained to understand the specific needs of any such complainants / witnesses and take steps to ensure their investigations take relevant factors into account in order to preserve the integrity of the evidence and of the investigative process itself. Additional care will need to be taken to ensure those individuals with a disability clearly understand both their rights and responsibilities as complainants / witnesses, to be sure that they don't contaminate their evidence, or the evidence of others with whom they might be in a close relationship.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qjs.com.au or by phone on (07) 3842 5930.

Yours faithfully


Luke Murphy
President