

9 August 2013

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Our ref 328-16

Dear Ms Ricci

Issues Paper: Access to justice in the criminal justice system for people with disability

Queensland Law Society writes to provide comments on the issues paper "Access to justice in the criminal justice system for people with disability". Please note that in the time available to the Society and the commitments of our committee members, it is not suggested that this submission represents an exhaustive review of all issues relating to access to justice in the criminal justice system for people with a disability and associated issues. We make the following comments for your consideration.

The Society notes three publications relating to the matters discussed in the issues paper, namely:

- Toombs, D. (2012) *Disability & the Queensland Criminal Justice System*. Pymont, NSW: Thompson Reuters.
- Mason, C., Robb, W. (2010) *Preparing Pathways to Justice: Intervening early for vulnerable people with impaired capacity*. A report for Queensland Advocacy Incorporated.¹
- French, P. (2007) *Disabled Justice: the barriers to justice for persons with disability in Queensland*. Queensland Advocacy Incorporated.²

¹ Available at:

http://www.qai.org.au/images/stories/docs/2010/QAI_Pathways_Report_August_2010.pdf

² Available at:

http://www.qai.org.au/images/stories/docs/1987-2007/doc_199.pdf

These publications offer detailed examination of some of the barriers explored in the issues paper, as well as the practical considerations for legal practitioners who deal with people with disability in criminal justice.

1. Barriers 1 and 5: Legal Aid Queensland screening tool

We note that Legal Aid Queensland were involved in a project to identify an appropriate tool that could be used by Queensland Government agencies to identify intellectual disability/cognitive impairment in clients. A pilot project was run by Legal Aid Queensland to trial the screening tool the "Hayes Ability Screening Index" developed by academic Professor Susan Hayes.³ The project and subsequent trial aimed to map 'appropriate responses and pathways and the development of a generic training package for use by justice system agencies to raise the awareness of staff.'

2. Barrier 2 - Children with a disability

The Society notes that there are a number of barriers to justice and representation facing children with a disability:

- There is inadequate resourcing and funding for mental health and disability assistance. In particular, there are inadequate assessments available for all children in the criminal justice system. Research suggests that a large number of young people in detention suffer from a disability however there is no systematic assessment undertaken.
- A child with disability in the care of Child Safety Services is not able to gain access to a specialised disability support worker until they are an adult.
- Disabled children subject to orders in the criminal justice system receive no specialised support. Children are only able to receive the support Child Safety can provide.
- Parents are occasionally advised that, where disability services cannot provide an adequate level of support, they should involve Child Safety to obtain better funding. We note this has been the subject of comment in the Carmody Report.
- There are often issues arising from reports, where capacity is found to be a concern. It is difficult to appoint an advocate in circumstances where the report determines there to be issues of capacity.
- Young people who are not Australian citizens are often unable to obtain appropriate services to address their disability. Whilst this is the case for all non-citizens, children and young people do not generally determine their country; this decision is undertaken by their parents/guardians.

³ Hayes, S., & Bleakley, B. (2006). People with intellectual disabilities and cognitive impairments in the justice system: responding to the legal needs of people with intellectual disability or cognitive impairment. Centre for Behavioural Sciences in Medicine, University of Sydney: Collaborative Project led by Legal Aid Queensland.

3. Barrier 4: Special Circumstances Court diversion program

Queensland's Special Circumstances Court diversion program demonstrated positive effects of a specialised mechanism to deal with barriers to justice for people with a disability in the justice system. The Special Circumstances Court was disbanded following legislative reform in 2012. However, the court serves as an example of the effectiveness that similar programs may be able to offer, and may provide valuable insight into options to overcome barriers for people with a disability.

The Special Circumstances Court convened three days a week at the Brisbane Magistrates Court and provided a separate path through the court process for adults pleading guilty to summary offences who were:

- Homeless, or at risk of being homeless; or
- Suffered from impaired decision-making capacity as a result of mental health issues, intellectual disability or brain/neurological disorders.

The offence must also have arisen in circumstances that were connected to the person's homelessness and/or impaired decision making capacity. The program's objective was to divert people assessed as eligible for the Special Circumstances Program, who were charged with summary offences, to the relevant support services, such as health and accommodation services, and to interrupt the cyclical nature of their offending by addressing the underlying causes of their offending behaviour.⁴ Participants in the program could be referred by any of the following:

- Police
- Defendants
- Defendants' legal representatives (including Duty Lawyers)
- Community organisations
- State Government agencies; and
- Magistrates.

The role of the court was to focus on addressing the underlying reasons for the offending behaviour and the personal circumstances of the offender. We also note the Special Circumstances Court could consider alternatives through diversion from the criminal justice system for those who may otherwise have become entrenched in the system and aimed to decrease the cost to the community that would have arisen by detaining these individuals. A report by Sisters Inside, noted that 'only 9 (4%) of the 240 women participants in the [Sisters Inside Special Circumstances Court] Program over a 3 year period, were imprisoned for new offences committed since commencement of their involvement.'⁵ Further, the report stated: 'of

⁴ Magistrates Court Annual Report 2010-2011, http://www.courts.qld.gov.au/data/assets/pdf_file/0012/131610/mc-ar-2010-2011.pdf , page 29

⁵ How we do it: Sisters Inside Special Circumstances Court Diversion Program, 2011 page 21 at: http://www.sistersinside.com.au/media/A_How%20we%20do%20it%20SIS%20SCC%20Program%20Report.pdf

the 240 participants in the SIS SCC Program, all but one (239 women) have demonstrated a reduced rate of offending since beginning the Program.⁶

The current Courts Innovations Program 'Queensland Courts Referral' (QCR) 'enables defendants to engage with government agencies and non-government organisations to address the causes of offending behaviour by assisting defendants who come into contact with the criminal justice system as a result of (for example) mental illness, intellectual disability and cognitive impairment.'⁷ Our members report that compared to the previous Special Circumstances Court, the new QCR program is not performing as well for those at risk, is more difficult for defendants to access, and is unable to offer the same benefits as the previous program.

4. Barrier 4: R v AAM; ex parte A-G (Qld) [2010] QCA 305

We refer to the comments made by the Queensland Supreme Court in the case of *R v AAM; ex parte A-G (Qld) [2010] QCA 305*:

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. [references omitted]

The Society echoes these concerns and considers that law reform in this area is vital, particularly with regard to the treatment of summary offences which involve mental health issues. Despite clearly being raised in this case in 2010, Queensland is yet to see legislative reform in this area.

The Society advocates for better treatment of people suffering from mental health issues and impaired decision-making capacity in the criminal justice system (particularly in relation to summary offences). Specifically what is required is:

- The implementation of processes and programs to identify mental health issues and impaired decision-making capacity in people accused of criminal offences at an early stage, including court diversion programs aimed at addressing the underlying causes of a person's offending behaviour.

⁶ Ibid, 22.

⁷ See <http://www.courts.qld.gov.au/courts/courts-innovation-programs/queensland-courts-referral>

- Assistance for the accused and their family through court processes.
- Assistance for the accused and their family to access existing mental health services and treatment facilities in order to reduce rates of recidivism.
- Awareness raising of:
 - mental health issues in the community; and
 - the various processes within the criminal justice system to deal appropriately with people suffering from mental illness.

5. Barrier 4: Forensic orders

The Society notes that forensic disability orders in Queensland are governed by the *Forensic Disability Act 2011*. This legislation was enacted to establish a forensic disability service model to provide for involuntary detention, care and protection of persons with intellectual disabilities. The legislation was based on a report entitled "Challenging Behaviour and Disability: A Targeted Response" (the Carter Report).⁸ The Carter Report 'examined a targeted service and legislative response for adults with an intellectual or cognitive disability who present with challenging behaviour of such a nature, intensity or frequency to put themselves or others at risk.'⁹

The Society specifically notes the purpose of the legislation stated in section 3 of the *Forensic Disability Act 2011* -

The purpose of this Act is to provide for the involuntary detention, and the care and support and protection, of forensic disability clients, while at the same time –

- (a) Safeguarding their rights and freedoms; and
- (b) Balancing their rights and freedoms with the rights and freedoms of other people; and
- (c) Promoting their individual development and enhancing their opportunities for quality of life; and
- (d) Maximising their opportunities for reintegration into the community.

The Society considers that generally this has been a progressive step in the advancement of protections for individuals under forensic orders. However, we note that the fact the Forensic Disability Service is purpose built and away from the mainstream community which may hinder the opportunities for reintegration, a noted purpose under s3(d) of the *Forensic Disability Act*.

Separate facilities

Due to the vulnerability of individuals under forensic orders, we consider it is inappropriate to allow contact with the general prison population. We consider there is a strong need for services to be within close proximity to the patient's home region to ensure patients are kept

⁸ J. Carter QC, 2006, "Challenging Behaviour and Disability: A Target Response" found at <http://www.courts.qld.gov.au/courts/courts-innovation-programs/queensland-courts-referral>

⁹ Explanatory Notes, *Forensic Disability Bill 2011*

near their support network. We also note that in Queensland, this facility is located in Brisbane and rehabilitation services are needed by forensic patients to assist them towards living in the community.

Restrictive practices

The Society believes that it is important that all appropriate persons readily have access to information, notice of decisions, and an opportunity to request review with regard to seclusion and mechanical restraint practices. We are supportive of the reduction of the use of restrictive practices. We consider that a guardian should be appointed for restrictive practice matters. This guardian should be consulted on the approval, review and use of restrictive practices by disability service providers.

In this regard, we consider that it is important to keep a restrictive practice register in order to accurately record and monitor the use of these practices.

We consider that the use of mechanical and/or chemical restraints should require:

- The consent of the adult or their legal guardian or the Queensland Civil and Administrative Tribunal;
- The approval of the Director;
- That a report be provided to the Director on the use of the restrictive practice; and
- The recording of the use of the restrictive practice on an accessible register.

We support the use of Positive Behaviour Support Plan (PBSP) to deal with the application of restrictive practices. As recommended in the Carter Report¹⁰, the disabled adult, his or her parent or guardian, and appropriate specialists should also have the opportunity to participate in the development of the PBSP. We consider that notifications should be made to relevant persons, such as concerned adult or his or her guardian as this is essential to adequately protect the rights of these persons. These comments also apply to both forensic orders in relation to people with mental illness and forensic orders in relation to people with intellectual disability.

Allied persons

The Act allows for allied persons to help the client to represent the client's views, wishes and interests relating to the client's assessment, detention, care and support and protection under the *Forensic Disability Act 2011*.¹¹ The Queensland Law Society agrees with the concept of an allied person being appointed to assist the person who is held under a forensic order. An allied person has the right to all documents considered by the Tribunal at the Tribunal hearings. The allied person has the right to attend Tribunal hearings to represent the client's view, wishes and interests, and yet they do not have the right to see the documents considered by the Tribunal. Even though the person under the forensic order has a right to see these documents, they are often not given a copy, or have limited time or means, to pass it on to their allied person.

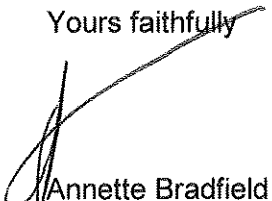
¹⁰ Ibid

¹¹ *Forensic Disability Act 2011* s24

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Thank you for considering our comments in relation to this issue. Please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au ; or Policy Solicitor Ms Jennifer Roan on (07) 3842 5885 or j.roan@qls.com.au for further inquiries.

Yours faithfully



Annette Bradfield
President