# What is your experience?

The questions in this section will help you to share your experiences and knowledge of the criminal justice system for people with disability who need communication supports or who have complex and multiple support needs.

You don’t have to answer all these questions if they are not relevant to you.

**Questions**

1. What are the biggest barriers for you or other people with disability in the criminal justice system?

* When apprehended by police and later questioned, a person with an intellectual disability is more likely to admit to offences, including those offences that they may have not committed, due to a desire to please an authority figure (police) or a desire to conceal the fact they do not understand the questions being asked.
* People with a disability, in particular those with an intellectual disability; an acquired brain injury and /or mental illness (relevant disability) face barriers to justice because in many cases their rights are not explained to them in a way they can understand. E.g. their “rights”, such as the right to silence.
* People with a relevant disability are often not provided with appropriate support person at interview/s.
* Often people with a mental illness sometimes do not know that they are mentally unwell. So, they will go to court and they will not tell anyone that they have a mental illness. Therefore the court remains unaware that their disability may afford them a defense or provide mitigating circumstances.
* It is often the case that people with a mental illness, intellectual disability or acquired brain injury plead guilty (are ‘plead out’) by duty lawyers who may not identify the disability and thus, be oblivious to whether or not the disability is related to the alleged offending. This lack of identification is further exacerbated by the lack of time available to a duty lawyer to properly and thoroughly investigate a matter prior to entering a plea.
* The issue is further compounded if the duty lawyer lacks understanding of disability generally and more particularly legislative avenues that are available to minimize the risk of a disabled person being entrenched in the criminal justice system.
* Defendants that presented at the Magistrates Court who by virtue of their mental illness were subject to Chapter 7 Part 2 of the *Mental Health Act 2000* but were unaware of the operation of section 237 of the Act and the associated process. They may be fearful that notification of criminal charges against them to the treating health service may result in hospitalization. In the event that a duty lawyer does not inquire as to whether the defendant is being involuntary treated the matter will proceed by way of law and not be availed the process and ‘protection’ that Chapter 7 Part 2 of the Act affords.
* Defendants with a disability are less likely to plea-bargain.
* Defendants with a relevant disability are more often refused bail, often as a result of previous breaches of conditions, or lack of support and resources enabling them to obtain bail, or inadequate supervisory arrangements which do not satisfy the court’s requirements.
* Defendants with a relevant disability often have bail conditions imposed upon them which are, in many cases, ‘setting’ them up to fail. Mentally unwell people and those with an intellectual disability may not be able to ‘remember’ or comprehend their bail conditions. Breaches then follow and compound the situation.
* Defendants with a relevant disability often receive more custodial sentences, often because of the lack of alternative placements in the community; and tend to serve longer sentences or a greater percentage of their sentence before being released on parole.
* People with a relevant disability face problems with the criminal justice system as victims and witnesses. They are often ‘dismissed’ as unreliable or poor witness, suffering from memory problems etc and appropriate investigations are therefore often not undertaken. Their rights and access to justice can thereby be denied.
* Defendants with a disability due to their vulnerability as result of their disability often face abuse and exploitation by their ‘associates’ –they are often the ‘bunny’ for the offence/s.
* In many cases the defendant with a disability has insufficient supports in the community to ensure court attendance at the next mention date, which results in further breaches and charges.
* In matters where unsoundness of mind or unfitness for trial may be an issue, there are often time delays and difficulties in securing prompt psychiatric consultation. Accordingly, it is often the case if bail is refused that a defendant may spend at least three or more months in custody awaiting consultation.
* There needs to be an increased awareness by police and judiciary that the absence of an Involuntary Treatment Order (IT0) does not negate the existence of a mental illness.

1. What could be done to remove these barriers and help people with disability in the criminal justice system?

* Legislative reform:

As addressed in *R v AAM; Ex parte Attorney General* (QLD) [2010] QCA 305, if a person with an intellectual disability or mental illness is charged with a summary offence in Queensland, magistrates do not have any legislative powers to determine their fitness to plead and the charges cannot be referred to the Mental Health Court for determination.

The Court of Appeal proposed reform. The Honorable Justice McMurdo P stated that:

*“It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offence. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system”.*

*Recommendation:*

Proposed legislative amendment to clearly identify the manner in which Magistrates determine matters relating to fitness in relation to summary matters.

It is suggested that a provision similar to s 11 (1) (a) of the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA*) form the framework for the legislative amendment. This section provides that fitness to plead can be raised in the Magistrates Court at any time prior to, or during, the trial.

The amendment should also provide that if a person’s fitness to plead is raised and there are reasonable grounds to suspect the person is unfit to plead, the court is required to adjourn the matter and conduct an investigation via its powers under Section 83A of the *Justice Act 1886 (Qld).*

In a practical sense, this section may be broad enough to allow Magistrates to hear relevant evidence and representations from the prosecution and defence and allow Magistrates to call evidence; order the defendant to undergo psychiatric or psychological assessment and inform him/herself of the support arrangements for the defendant within the community.

* The *Mental Health Act 2000* does not provide for non-indictable offences to be referred to the Mental Health Court for issues of soundness of mind and fitness for trial.
* Persons with previous mental health histories and not on a current ITO require a mechanism for referral of their matter to the Attorney General for determination, based on current medical report/s indicating a mental health involvement at the time of the offence.
* Police protocols and procedures regarding police discretion in diverting a suspected mentally ill person to the appropriate mental health service – these procedures may need reassessment. Consideration for providing specialised Police Liaison Officers trained in the field of intellectual disability and mental illness (attending with Mental Health nurse to situations where mental illness suspected.). Provides timely medical interventions and de-escalation procedures by officer –often results in medical and support interventions as opposed to charges and placement in watch houses.
* Mental health services should have a legislative obligation to keep the defence lawyer informed of their client’s situation -currently there is no requirement
* Police ensuring implementation of the police manual protocols for people with a relevant disability in their observations and during questioning. Review of Police procedures and protocols regarding police discretion in such situations where a person is profoundly intellectually disabled.
* Review of Police procedures, interviewing protocols and techniques when dealing with the mentally ill, suicidal persons and those under the influence of drugs.
* Ensuing that a support person or family member is contacted prior to the interview with police and present at the interview when a relevant disability is suspected.
* When a person with a disability presents as ‘unwell’, ensure that an evaluation by the TACT team from Acute Mental Health Unit for their mental health status occurs prior to police interview.
* Consideration to establishment of a police database notation ‘flagging’ existence of a diagnosed mental illness and available supports in community to support them (ie Support link).
* Reduction in time frame to obtaining Freedom of Information documents regarding a client’s mental health history to assist the defence lawyer. Lengthy delays result in numerous adjournments causing the matter at times to take months to finalise.
* Consideration of a Special Court List to reduce the associated costs and resources necessary to establish a client’s intellectual disability and fitness for trial.

3. Can you provide information about support that has helped you or other people with disability to participate in the criminal justice system?

In 2005, The Advocacy and Support Centre (TASC) successfully applied for funding from Legal Aid Qld for the purpose of addressing the inequities faced by people with a mental illness, intellectual disability and/or acquired brain injury (relevant disabilities) facing charges in the criminal justice system.

This program was named The Disability Law Project (DLP). The DLP operates from the time when a disabled client is charged by police and given a ‘notice to appear’ to the time when the client is dealt with or not dealt with by the court

Not only does the project provide legal representation to these defendants; it addresses the ‘whole’ person’s circumstances. By addressing the client’s supports needs and any necessary interventions to address the client’s offending behaviours emanating from his/her disability, a holistic service is provided to the client.

This ‘holistic’ approach has proven highly successful in reducing the recidivism rate.

By addressing the underlying contributing factors, the DLP‘s success in this area is reflected in a sample survey of 150 defendants where the recidivism rate was reduced to average of 10% -a massive decline from the average.

The multi-disciplinary approach means that the lawyer and advocate work very closely together. A disability advocate works with the lawyer by identifying and implementing a range of appropriate interventions consisting of mental health treatment, supported housing services, substance abuse treatment (residential and out-patient), or integrated treatment for people with co-occurring mental illness and substance abuse. The advocate obtains confirmation of the services /interventions that the client receives from the various agencies and includes this information in a report to the DLP lawyer for submission to the Court.

This enables the legal representative to present to the court a complete ‘picture’ of the client’s improved circumstances and supports – a picture often dramatically different to the client’s situation prior to the DLP interventions.

The DLP has found that people with disabilities are often not succinct or direct in their instructions. Clients may lack understanding; they may be confused. To a system that can not always afford time, clients may be overwhelmingly time consuming. As a result, the DLP seek to ensure proper and effective legal representation

In summary, the DLP objectives are to:

* Improve the criminal justice system’s ability to identify, assess, evaluate and monitor offenders with a mental disability;
* Use the court’s authority to link mentally disabled offenders to high quality treatment and appropriate community based support services provided by government and non-government agencies;
* Enhance understanding and effective linkages between criminal justice and mental health systems;
* Improve public safety by reducing recidivism rates of mentally disabled offenders and improving the psychosocial functioning of those who come before the courts; and ultimately to
* Enhance the community’s level of net health.

**The Queensland Criminal Justice Centre (QCJC),**

The QCJC is a web based resource with very detailed guidance through this complex area and is available to lawyers, students, professionals working in this filed, individuals, families and carers. Available on this site is a free download and guide.

The QCJC has provided information and referrals to broad cross section of people as above across the State; has assisted many individuals and their families to obtain assistance and provides a toll free number for anyone seeking help for people with a relevant disability facing criminal charges in the Qld Magistrates Courts.

1. Please tell us about any time that you or another person with disability experienced barriers to justice.

Please go to [***www.qcjc.com.au***](http://www.qcjc.com.au) for a number of videos which provide case studies for individuals and families.

Further case studies available if required.

1. Do you have any other thoughts, ideas or comments you would like to make about people with disability and the criminal justice system?

RECOMMENDATION 1

*R v AAM; ex parte A-G* (Qld) [2010] QCA 305

The Honourable Justice McMurdo stated in the Court of Appeal’s decision in this matter that;

*“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.3 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. “*

This statement supports the need for legislative reform.

RECOMMENDATION 2

A fundamental principle of our justice system is that anyone charged with an offence is entitled to a fair trial, and if that person is unfit for trial there cannot be a fair trial. This was enunciated by Chesterman J in *Re NGW (2005)* QMHC 001.

The expression “fit for trial” is defined in the schedule of the *Mental Health Act 2000* as “fit to plead at the person’s trial, and to instruct counsel, and endure the person’s trial with serious adverse consequences to the person’s mental condition unlikely.” This question of fitness to plead and to instruct counsel is determined by reference to tests applied in *R v Presser* (1958) VR 45.

Whilst ‘fitness for trial’ issues are largely matters dealt with by the Mental Health Court, given that these matters are summary offences, defence lawyers are barred from referral to that jurisdiction. Section 256 of the *Mental Health Act 2000* states: -

*“This part applies if there is reasonable cause to believe a person alleged to have committed an indictable offence--*

*(a) is mentally ill or was mentally ill when the alleged offence was committed; or*

*(b) has an intellectual disability of a degree that issues of unsoundness of mind, diminished responsibility or fitness for trial should be considered by the Mental Health Court.*

In an attempt to have matters dealt with at the Magistrates Court, it would seem that defence lawyers are similarly barred by virtue of section 613 of the Criminal Code that states: -

*“(1) If, when the accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether the person is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, a jury of 12 persons, to be chosen from the panel of jurors, are to be empanelled forthwith, who are to be sworn to find whether the person is so capable or no.*

*(2) If the jury find that the accused person is capable of understanding the proceedings, the trial is to proceed as in other cases.*

*(3) If the jury find that the person is not so capable they are to say whether the person is so found by them for the reason that the accused person is of unsound mind or for some other reason which they shall specify, and the finding is to be recorded, and the court may order the accused person to be discharged, or may order the person to be kept in custody in such place and in such manner as the court thinks fit, until the person can be dealt with according to law.*

*(4) A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence. “*

Section 1 of the *Criminal Code 1899* (Qld) states that an “indictment" means a written charge preferred against an accused person in order to the person's trial before some court other than justices exercising summary jurisdiction.

On this basis, it would seem that section 613 is not applicable. Defence lawyers are further barred, given the nature of the charges, to have them referred to the District Court by virtue of section 60 of the *District Court of Queensland Act 1967.*

Further, s 613 *Criminal Code 1899* provides for accused persons, when they are called on to plead to an indictment, to have a jury determine whether they are capable of understanding the proceedings at the trial so as to be able to make a proper defence (that is, the issue of fitness to plead).

However there is no corresponding section in the *Justices Act 1886* (Qld), nor in any other Act, to allow for the determination of the issue of the accused person's fitness to plead to summary offences.

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.

Accordingly, it would seem that in light of this there is an apparent need to widen existing relevant legislation.

RECOMMENDATION 3

That the Queensland Legislature makes the necessary amendment to Chapter 7 Part 2 of the *Mental Health Act 2000* to allow appeal provisions to the Mental Health Court for indictable matters and the Mental Health Magistrates Court for summary matters.

There presently exists no right of appeal against the decision of the Attorney General with respect to references made under Chapter 7 Part 2 of the *Mental Health Act 2000.*

The Disability Law Project has found on a number of occasions an alternate psychiatric opinion, which challenges the opinion of the psychiatric report relied upon by the Attorney General in considering the matter.

RECOMMENDATION 4

The Queensland Government address the lengthy delays in having matters dealt with by the Mental Health Court.

The containment of severely mentally ill or substantially impaired people in custodial environments whilst on bail for lengthy periods of time predisposes them to risk.

RECOMMENDATION 5

That the Queensland Government address the peculiarity of Chapter 7 Part 2 of the *Mental Health Act 2000* (QLD) that requires often mentally unwell people to notify their treating mental health service of criminal charges against them, before such matters can be directed to the Attorney General.

People subject to an Involuntary Treatment Order (Chapter 4 of the *Mental Health Act 2000* Qld) are often people with a florid mental illness who may have a history of non-compliance with medication. The Disability Law Project has found on a number of occasions, clients that have allegedly committed an offence while subject to an Involuntary Treatment Order have not disclosed this information to the treating health service.

RECOMMENDATION 6

The Attorney General of Queensland ensures that judicial officers are regularly trained in areas of mental illness, intellectual disability and drug addiction.

RECOMMENDATION 7

The Minister of Police ensures that Queensland Police are regularly trained in areas of mental illness, intellectual disability and drug addiction.

It is important that police have a comprehensive understanding of both mental illness and/or intellectual disability. This is particularly important for police prosecutors with issues relating to unfitness for trial and unsoundness of mind.

RECOMMENDATION 8

The Chief Magistrate provide all Magistrates with a practice direction that in matters where mental illness and/or intellectual disability are an issue, adjournments in excess of the usual three weeks be granted to allow defence lawyers time to access necessary information and medical reports.

Whilst the Disability Law Project has been afforded good judicial support with respect to seeking at times lengthy adjournments, we acknowledge that this may not be the case in some Magistrates Courts. Accordingly, given the considerable delay in accessing medical information, more notably via the *Right to Information Act 2009,* longer adjournments are necessary.

RECOMMENDATION 9

That the Queensland Legislature widens the *Mental Health Act 2000 (Qld*) to include contemporary mental health disorders.

The Disability Law Project represented a number of people that suffered from an illness not treatable under the *Mental Health Act 2000* (Qld). Accordingly, the Disability Law Project believes it may well be prudent to investigate the possible widening of the Act to allow the inclusion of contemporary mental health disorders.

RECOMMENDATION 10

That the Queensland Government considers alternate facilities conducive to the appropriate housing of people with severe mental health issues and/or cognitive deficits instead of custodial environments.

The Disability Law Project advocates for innovative housing options for significantly impaired and/or mentally ill people as an alternative to custodial settings. Consistent with the plethora of research available regarding the incarceration of such people in our prison system, the project has had first hand experience of clients being sexually assaulted, harassed and stood over by other inmates largely due to their immense vulnerability within the system.

# What will happen to your response?

Your responses and experiences will provide the Commission with a much better understanding of what is and isn’t working for people with disability in the criminal justice system in Australia. They will help the Commission to look at what can be done to remove barriers to access to justice. The Commission may publish a report and also discuss information at meetings and forums.

1. Do you give the Commission permission to use your responses or experiences as a case study in its work? Your name and any identifying information will not be used. For example, the Commission may discuss your experiences in meetings and forums or it may publish your story in its reports.
   * X **Yes,** I give the Commission permission to use my response in its work with all identifying information removed.
   * No, I do not give the Commission permission to use my response in its work. I would like my response (as well as my identity) to be kept confidential.
2. Do you give the Commission permission to publish your response on its website?
   * **X Yes** I give the Commission permission to publish my response on its website and to use the following name \_TASC\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
   * Yes, I give the Commission permission to publish my response on its website and to record my response as Anonymous
   * No, I would like my response to be kept confidential.
3. Can the Commission contact you for further information? ❑ **X Yes** ❑ No

# Some information about you

The Commission would like to know more about you. This information may help to better understand how barriers in the criminal justice system prevent people with disability achieving access to justice.

You do not have to answer all these questions.

1. Do you have a disability? ❑ Yes x**No**

If you are a person with disability, can you say what your impairment or disability is called? \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. Gender ❑ Female ❑ Male ❑ Unspecified
2. How old are you? \_\_\_
3. Do you identify as any of the following? (Please tick all that apply)
   * Aboriginal or Torres Strait Islander
   * Culturally and Linguistically Diverse / I speak a language other than English at home
   * **xI live in a regional / rural area**
   * I do not identify as any of the above
4. If you have provided information on behalf of a person with disability can you state your role?
   * Friend
   * Relative
   * **Advocate x**
   * **Legal centre x**
   * Representative organisation
   * Other (please specify \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)