



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Individual Advocacy for vulnerable People with Disability

Friday, 20 September 2019

Dear Minister

Thank you for the opportunity to make this submission in regard to the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill ('the Bill').

Yours sincerely,

Michelle O'Flynn, Director

Ph: (07) 3844 4200 or 1300 130 582 Fax: (07) 3844 4220 Email: qai@qai.org.au Website: www.qai.org.au

2nd Floor, South Central, 43 Peel Street, STH BRISBANE QLD 4101

QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About QAI

Queensland Advocacy Incorporated (QAI) is a member-driven, non-profit advocacy organization for people with disability. Our mission is to promote, protect and defend, through advocacy, the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland.

Our Human Rights and Mental Health legal services offer advice and representation on guardianship, administration and mental health matters. Our Justice Support and NDIS advocacy programs provide non-legal advice and support to people with disability in the criminal justice system and the NDIS. This individual advocacy informs our campaigns at state and federal levels for changes in attitudes, laws and policies and assists us to understand the challenges, needs and concerns of people with disability.

QAI's constitution holds that every person is unique and valuable and that diversity is intrinsic to community. People with disability comprise the majority of our board and their lived experience of disability is our foundation and guide.

Recommendations

- QAI supports the measures in the Bill.
- The State Government must do more to ensure that people with intellectual disability who have committed very minor sexual offences get better support in the community rather than detention.
- Take steps to improve the supports, particularly behaviour supports, available to people with intellectual disability who have been convicted of child sexual offences.

QAI Comments on the Bill

QAI supports the proposed provisions in the Bill but we would like to offer some additional comments about the people with disabilities affected by the proposals, whether as complainants, suspects or offenders.

International and Australian research, including the Royal Commission's¹ own contracted research, suggests that women and girls with disabilities, particularly with cognitive disabilities, are subjected to sexual abuse at higher rates than women and girls generally. Although there is scant Australian research on this, the same is likely to be true for male victims.²

Precise figures are difficult to determine, because child sexual abuse already is underreported for a variety of reasons including offenders' threats of violence or other forms of retaliation, shame and children's fears of damaging valued relationships. Rates of investigation, prosecution and conviction too are lower compared to other kinds of crime, but for child victims with disabilities the rates of reporting through to conviction are even lower because for children with disabilities, the already formidable barriers faced by victims are even more complex, and the bars set by our rules of evidence and legal procedures are even more difficult for children with disability to surmount.

Link Between Abuse and Disability

In addition to our concern for victims we want to highlight the particular situation of people with disabilities who have sexually offended with children. People with disability are overrepresented in the criminal justice system as suspects, defendants and offenders,³ including as sex offenders. People with intellectual disability make up only about 2% of the general population but about 10% of the Queensland prison population⁴ and while research appears to have established no consensus on the numbers, people with cognitive impairments probably are overrepresented as child sex offenders, too.

There is not a lot of Australian research on this, but work elsewhere suggests that 10-15% of sex offenders are intellectually impaired;⁵ the percentage of intellectually disabled offenders dealt with

¹ Royal Commission into Institutional Responses to Child Sexual Abuse.

² For example, Llewellyn G, Wayland S and Hindmarsh G *Disability and child sexual abuse in institutional contexts* Sydney, N.S.W. : Royal Commission into Institutional Responses to Child Sexual Abuse, 2016.

³Dowse L, Cumming L, Strnadová I, Jung-Sook L & Trofimovs J 2014. Young people with complex needs in the criminal justice system. Research and Practice in Intellectual and Developmental Disabilities 1(2): 174-185; Eileen Baldry, Ruth McCausland, Leanne Dowse, Elizabeth McEntyre and Peta MacGillivray 'It's Just A Big Vicious Cycle That Swallows Them Up': Indigenous People With Mental And Cognitive Disabilities In The Criminal Justice System by in INDIGENOUS LAW BULLETIN January / February, Volume 8, Issue 22; Overrepresentation of People with Intellectual Disabilities in Prisons: Based on IQ testing, 9.8 % of persons in Queensland prisons scored in the intellectual disability range, and 28.6% scored in the 'borderline' intellectual disability range (Queensland Department of Corrective Services, 2002).

⁴ Queensland Corrective Services. 2002. *Intellectual Disability Survey*.

⁵ W Murphy, E Coleman and M Haynes "Treatment and evaluation issues with the mentally retarded sex offender" (1983) cited in W Glaser " A comparison of intellectually disabled and non-intellectually disabled sex offenders" in Freckelton., Greig and McMahon (eds) (1991) 243 at 243.

for sexual offences may be up to six times higher than the percentage for all offenders;⁶ a history of having been the victim of sexual abuse occurred in 44 percent of sexual recidivists with intellectual disability, compared with 17 percent of non-recidivists;⁷ more than a third of offenders with intellectual disability had previously been victims of sexual assault offenders with learning disabilities start offending at an early age, had a history of multiple offences, and that sexual and arson offences were over-represented;⁸ a higher proportion of sex offenders report having been sexually abused in childhood (38% versus 12.7 %)⁹ and sex offenders with an intellectual disability are more likely to have experienced significant levels of abuse, particularly while in institutional or group home settings, by family members or acquaintances, or by strangers¹⁰

Although it would be simplistic to suggest that a childhood history of abuse is the primary variable in the 'cycle of abuse', QAI's work representing people with disabilities on forensic and treatment orders gives us repeated anecdotal evidence that abusers with cognitive impairments often have been abused. We cannot disclose client details, but the High Court judgement in *Muldrock* is on public record and illustrates the point.

Mr Muldrock, who has intellectual disability, was subjected to homosexual sexual abuse at the age of ten. As an adult he showed a sexual interest in male children, and he was convicted and sentenced in relation to sexual intercourse with a minor who was ten years old too at the time of the offence. The High Court in *R v Muldrock*¹¹ considered the relevance of intellectual disability in sentencing and acknowledged that a child sex offender with intellectual disability neither punishment in the sense of retribution, nor denunciation requires significant emphasis, and general deterrence none at all in light of Mr Muldrock's limited moral culpability. There was no requirement, said the Court, for general deterrence.

The Importance of Education and Habilitation

Without in any way discounting the often permanent hurt and damage to victims, some sex offenders with intellectual disability have behaved inappropriately because they did not know what behaviours are acceptable. People with disability often have little knowledge about sexuality, reflecting the restricted life of the person with disability who may have been denied sex education in the past or denied legitimate avenues to pursue sexual interests in a safe and appropriate way.¹²

For people with intellectual disability this kind of offending often stems from a general lack of understanding of social norms and acceptable sexual behaviour, and may be attributable to

⁶ G Simon "A manual of practice" (1980) cited in M Little "Sport and recreation: Help for intellectually disabled offenders" in Challenger (ed) (1987) 113 at 117.

⁷ C Morrison. 2002. 'Characteristics of recidivist and non-recidivist sex offenders with an intellectual disability'. International Association for the Scientific Study of Intellectual Disability European Congress, Dublin.

⁸ Barron, P., Hassiotis, A. & Banes, J. (2004). Offenders with learning disability: a prospective comparative study. *Journal of Learning Disability Research*, 48, 69-76.

¹⁰ Glaser, W.F. 1997. Assessing the Dangerousness And Treatability of Sex Offenders in The Community. Paper at Australian Institute of Criminology Conference. Sydney, April.

¹¹ [2011] HCA 39.

¹² Lindsay, W (2002) 'Research and Literature on Sex Offenders with Intellectual and Developmental Disabilities', *Journal of Intellectual Disability Research*, 46(1), 74-85. Lindsay L, Law J, Quinn K, Smart N and Smith A. 2001. 'A comparison of physical and sexual abuse: sexual and non-sexual offenders with intellectual disability'. *Child Abuse and Neglect*. 25: 989-995; Lindsay, W & Smith, A (1998) 'Responses to Treatment for Sex Offenders with Intellectual Disability: A Comparison of Men with 1- and 2-year Probation Sentences', *Journal of Intellectual Disability Research*, 142(5), 346-353; Lindsay, W.R., Taylor, J.L. & Sturmey, P. (Eds.). 2004. *Offenders with developmental disabilities*. Chichester: Wiley; Lindsay, W.R. & Taylor, J.L. 2005. *A selective review of research on offenders with developmental disabilities: Assessment and treatment. Clinical Psychology & Psychotherapy*; M Ierace. 1989. *Intellectual Disability: A Manual for Criminal Lawyers*. Sydney: Redfern Legal Centre Publishing.

segregated and restricted social lives.¹³ This was a fact acknowledged by Mr Muldrock's sentencing judge when he imposed the condition that the defendant must reside at a residential treatment facility with a program designed to assist people with intellectual impairments to moderate sexually inappropriate behaviour.¹⁴

The factors that prevent sex offending include early recognition and intervention, stable home life and an absence of sexual violence. The segregation of people with impairment contributes to a lack of experience in and ignorance of social expectations with regard to some types of social and sexual relationships and interactions. That ignorance of social norms is at the root of some unlawful behaviour.

Too often, people with intellectual disability throughout their lives are treated by parents, supporters, clinicians, teachers and peers as sexless, and people without sexuality do not need sex education. People with intellectual disability, however, are like any of us. They are curious about sexual expression and want to love and be loved, like and be liked, touch and be touched.

People with intellectual disability have a right to education about and support for establishing friendships and relationships and for being a sexual person, yet Queensland is the only Australian jurisdiction in which it is unlawful for any person to have intimate relations with a person who has intellectual disability,¹⁵ or to expose a person with intellectual disability to 'indecent material'. The generality of the provision renders intimate relationships with Queenslanders who have an intellectual disability unlawful, and potentially opens their partners to prosecution.

Discriminatory provisions such as this are symptomatic of wider prejudice about disabilities, and these prejudices prevent girls and boys with disabilities from learning appropriate sexual behaviour, exposing them to social and sexual miss-expression and making them more vulnerable to predatory behaviour.

***Jayden¹⁶ has an intellectual disability.** At a church outing, he and a young girl were invited to a secluded place by an older boy (without intellectual disability). The older boy directed Jayden to expose himself, and the girl to touch Jayden's penis. The girl told her parents, and they complained to police. This was the Jayden's first and only offence. The risk to the community from this young man with an intellectual disability is low, but he is now a registered sex offender and detained in an institution. He needs training in appropriate sexual behaviour.*

Jayden's experience is indicative: in his case the problem was lack of awareness and education, but others may come from dysfunctional backgrounds and have learned inappropriate behaviour from parents and peers.

Detention in an institutional setting will cost more and often rehabilitation is not provided, for example, in remand. Prisoners who have a disabilities are at greater risk of emotional, physical

¹³ S Hayes. 2004. 'The relationship between childhood abuse and subsequent sex offending'. 12th World Congress of the International Association for the Scientific Study of Intellectual Disability. Montpellier.

¹⁴ Muldrock v The Queen. [2011] HCA 39. <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca39-2011-10-05.pdf>

¹⁵ 'Person with impairment of the mind' is the expression used in the Queensland Criminal Code. The definition is broad and captures "a person with a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these and results in a substantial reduction of the person's capacity for communication, social interaction or learning and the person needing support".

¹⁶ Not actual name.

and sexual victimisation.¹⁷ In the community, people such as Jayden can build capacity, and by building capacity will get to a point where they are less of a risk and need less support.

.....

Remedies

The Attorney-General said in relation to mistake of fact rape reform that "when you're looking at reforms to significant legislation like the Criminal Code, you need to do it carefully".¹⁸ The Bill places before parliament a slew of recommendations on the classification of child exploitation material¹⁹ and recommendations on reporting through to sentencing and appeals by the Criminal Justice Report, but it deals with only a part of the problem.

We support an increase in the rate of conviction of child sex offenders, but QAI would like the State Government do more to ensure that people who have committed very minor sexual offences such as Jayden's do get better support in the community rather than detention. We would also like to see Magistrates do more to implement the diversionary measures provided for in the *Mental Health Act 2016* (Qld) ss 172-174. According to figures from a data request to DJAG, only 20 defendants have been referred to Queensland Health or another agency pursuant to s 174 since implementation of the MHA in March 2017.

We would also like the State Government to strengthen remedial and rehabilitative measures for people with disability who have sexually offended and who are in community corrections and prisons at the other end of the criminal justice system. We note that where the state has been responsible for institutions in which abuse is known to have occurred there appears to be a moral obligation on society to provide rehabilitative and treatment-oriented dispositions for offenders rather than punishment.

For people in a custodial setting (including remand), NDIS-funded supports are limited to aids and equipment; allied health and other therapy (behaviour support); capacity and skills building supports for living in the community after release; transition supports, and training for staff. Like other potential NDIS participants, the challenge for those who live in prisons and secure facilities is to establish their eligibility and design a support plan, but with the enormous additional challenge to implement it while living in detention with all its restrictions and in an environment unaccustomed to allowing external access.

.....

¹⁷ S Hayes. 1991. 'Sex offenders'. *Australia and New Zealand Journal of Developmental Disabilities*. 17:221–227.

¹⁸ <https://www.abc.net.au/news/2019-07-09/mistake-of-fact-defence-review-queensland/11291856>

¹⁹ Recommended by the Queensland Sentencing Advisory Council

