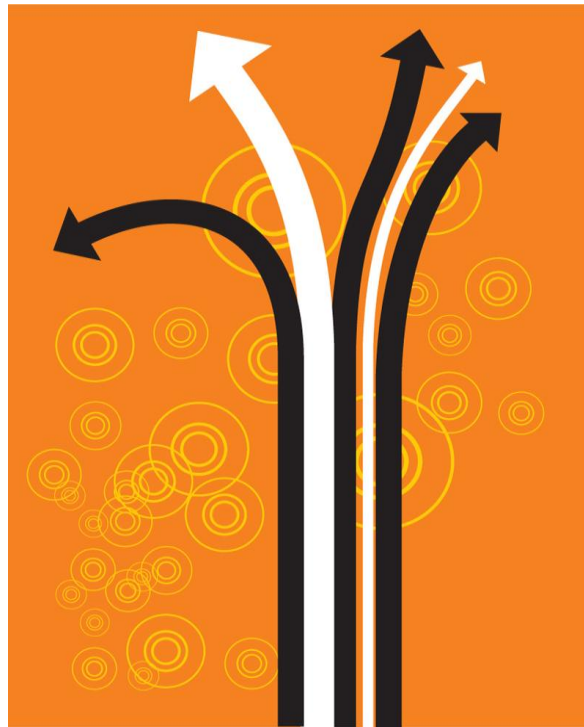


# “Which Way is Justice?”

A Practice Manual for supporting people  
with an intellectual disability in the  
criminal justice system



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**Community Living Association, Inc.**

**VOICES Project, 2008**

## ***Thanks and Appreciation***

**To the young people and constituents who shared their experiences in the criminal justice system, and thereby enhanced workers' ability to assist people with intellectual disabilities to access justice.**

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We hope your wisdom travels widely via the pages of this resource.**

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# Part 1: Introduction

## 1.1 Practice Manual Purpose

The VOICES Practice Manual is designed to assist support workers who are helping a person with an intellectual disability who is involved in the criminal justice system, either as a victim or as an offender. The manual will also assist workers supporting people with other impaired decision-making capacity, including people with non-specific cognitive disabilities, acquired brain injury, autism, cerebral palsy, and mental health issues.

From the outset, it is important to state that the Practice Manual is not a substitute for legal advice and expertise. Rather, the purpose of the resource is to give workers an insight into the complexity of the criminal justice system.

The Manual provides the reader with:

- basic information on the Queensland Criminal Justice System, and the broader national and international context in which it is located;
- a review of key national and international literature on the experiences of people with intellectual disability in the criminal justice system; and
- suggested practice responses for workers who are supporting a person with an intellectual disability through the Queensland criminal justice system.

Within the complex and highly specialised context of the criminal justice system, the key task of a support worker is to engage at the earliest opportunity with those people who have the power, expertise, and/or knowledge that can assist or affect the experience of the person with an intellectual disability. The support worker, alongside the person with an intellectual disability, must proactively communicate to these people an understanding of the person, their intellectual disability, their lifestyle, and their needs, so that these sit at the centre of all ensuing decisions and processes. To do this, workers themselves need to understand the nature of the system and the processes they will encounter. It is our aim that this Practice Manual will help equip workers with that knowledge.

## 1.2 History of the VOICES Project

The VOICES Project developed in the late 1990's in response to experiences and concerns shared by workers at Community Living Association (CLA), Alina Families Program and WWILD-SVP<sup>1</sup>. Workers at these services had witnessed the over-representation of people with an intellectual disability as victims of crime, and the difficulties people faced within the criminal justice system.

In 1998, the VOICES Project received funding from the Queensland Department of Justice and Attorney-General to develop and disseminate a practice workbook addressing the issue of people with an intellectual disability who are the victims of crime. Sandra Sewell (VOICES Project Worker) gathered together literature, practice wisdom from workers, and advice from specialist services to develop "People with an Intellectual Disability and the Criminal Justice System: A Workbook". The workbook and workshops were designed to assist direct service staff, carers and families to support people with intellectual disabilities through police, court and legal proceedings.

In 2007, CLA secured funding from the Department of Justice and Attorney-General to update and expand the content of the 1998 Workbook to include comprehensive information on people with intellectual disability who enter the criminal justice system as suspects or alleged offenders. The newly titled "*Which Way Is Justice?*": *A Practice Manual for supporting people with an intellectual disability in the criminal justice system* updates the 1998 Workbook with:

- a review of key literature published over the past decade;
- information on changes to Queensland legislation, the legal system, and legal procedures;
- material from twenty interviews conducted with support workers, legal professionals, and people with an intellectual disability who have experienced the criminal justice system.

In updating this resource, we appreciate the progress of the past decade in legislation, legal systems, and practice. While we celebrate these improvements, we are also mindful that research and practice experience continue to demonstrate that the criminal justice system is a confusing, overwhelming, and

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<sup>1</sup> CLA works with people with an intellectual disability living in the community; Alina works with families where one or both parents have an intellectual disability; WWILD-SVP works with women with an intellectual disability who have been sexually assaulted.

frightening system for people with an intellectual disability. Without support, people find this system impossible to navigate, and very often experience little by way of meaningful justice. Support workers can play a key role in assisting people with an intellectual disability to achieve justice.

### 1.3 Updating the VOICES Workbook

In 2007, Sarah MacDonald (CLA Research Worker) began the process of updating the 1998 VOICES Workbook. The update has involved four main areas of work:

- 1. Literature review:** The Research Worker scanned key national and international research (published since 1998) addressing the issues of people with intellectual disability in the criminal justice system. Details of this literature are outlined in the Bibliography. The original VOICES Workbook focussed primarily on the experiences of people with intellectual disability as victims of crime. In this updated Practice Manual, we have broadened our focus to include working with people with an intellectual disability who are suspects and offenders.
- 2. Legislative and service review:** The Practice Manual provides up-to-date information on the post-1998 changes in the Queensland criminal justice system to law, procedures, and service delivery that are of relevance to people with intellectual disability.
- 3. Interviews with practitioners:** Seventeen workers from a range of organisations (government and non-government) and professional disciplines (primarily, law and social work) participated in individual interviews with the VOICES Project Worker. They shared a wealth of professional experience about how best to assist people with intellectual disability to negotiate the criminal justice system, including provision of information, advice, advocacy and direct support. Workers also shared their experiences of developing policies and services to respond to the needs of this group. Their interviews have contributed practice wisdom and technical knowledge to the updated Practice Manual.

Participant organisations included:

- *Queensland Advocacy Incorporated (QAI)*
- *Youth Advocacy Centre (YAC)*



- *Women working alongside Women with Intellectual and Learning Disabilities – Sexual Violence Prevention(WWILD) and Disability Training Program – Victims of Crime*
- *Homeless Persons Court Diversion Program, Brisbane*
- *ARROS (formerly known as At Risk Resource and Outreach Service)*
- *Community Living Program (CLP)*
- *Department of Communities, Court Services*
- *SUFY (Standing Up For You)*
- *Queenslanders with a Disability Network (QDN)*
- *Queensland Department Justice and Attorney-General, Strategic Policy*
- *Micah Projects*
- *Legal Aid Queensland*
- *Justice Mediation Program*
- *Anam Cara (Centrecare)*
- *University of Queensland (PhD Research Student)*

**4. Case Studies:** Three people with intellectual disability who have been involved in the criminal justice system as offenders shared their experiences in one-on-one interviews with a Community Living Program worker. They gave permission for the content of their interviews to be included in the Practice Manual.

## 1.4 Intellectual Disability: Definitions and Prevalence

### **DEFINITIONS**

'Intellectual disability' is a term used to convey various meanings in various settings. The legal system has its own set of meanings of 'intellectual disability', and it is useful at the outset to make a distinction between legal, medical, and self-definitions of intellectual disability.

#### **Legal Definition**

The Queensland Criminal Law Code (July 1997) uses the term 'intellectually impaired person'. Specifically, section 229F states:

*"A person is an "intellectually impaired person" if the person has a disability -*  
*(a) that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and*  
*(b) that results in –*  
*(i) a substantial reduction of the person's capacity for communication, social interaction and learning; and*  
*(ii) the person needing support."*

#### **Medical Definition**

In medical terms, 'intellectual disability' is variously defined, but usually describes some degree of impairment of intellectual functioning, with the degree of disability ranging from borderline to profound intellectual impairment. An individual may have an intellectual disability alone, or may also have other disabilities, including a physical disability. An individual may or may not have a distinguishing physical appearance (Villamanta Legal Service, 1993: 6).

The American Association on Intellectual and Developmental Disabilities (formerly American Association on Mental Retardation) defines intellectual disability as:

*Significantly sub-average intellectual functioning (that is, reasoning, memory, and other cognitive skills), existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics (basic literacy and numeracy), leisure, and work. The condition arises prior to the age of 18.*

The World Health Organisation, in the *International Classification of Diseases and Related Health Problems* (ICD-10: 10<sup>th</sup> Revision, 2007), defines intellectual disability (referred to as mental retardation) as:

*A condition of arrested or incomplete development of the mind, which is especially characterized by impairment of skills manifested during the developmental period, skills which contribute to the overall level of intelligence, i.e. cognitive, language, motor, and social abilities.*

The American Psychiatric Association, in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (DSM-IV-TR), defines intellectual disability (referred to as mental retardation) as follows:

- *significantly sub-average intellectual functioning - an intelligence quotient (IQ) of approximately 70 or below;*
- *concurrent deficits or impairments in adaptive functioning in at least 2 of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety;*
- *onset before age 18 years.*

### **Self-definitions**

Self-definitions are valuable because they give us insights into the impact of intellectual disability on individuals. Such perspectives enable people without an intellectual disability to gain an appreciation of the experience of living with an intellectual disability.

The following self-definitions are from constituents of Community Living Program (1994):

*(I'm) someone who takes a while to learn things.*

*I think it's being slow, and they think very simple.*

*I've got a disability and it takes me longer to work things out. But just because it takes me longer doesn't mean that I can't do it!*

Self-definitions from constituents of WWILD-SVP (1994: 11-12) include:

*Sometimes you can't even see the disability inside you. You can't tell.*

*The public don't understand. Some people with intellectual disability, it could be the way they look or they might have some sort of behaviour problem and the public just make fun of it.*

## **PREVALENCE**

It is estimated that between 1% and 3% of the general population have an intellectual disability, not including borderline disability (Legal Information Access Centre, 2002). According to 2003 Australian Bureau of Statistics figures, 45,700 people in Queensland under the age of 65 have intellectual and developmental disabilities (Hayes & Bleakley, 2006: 12).

## **Part 2: The Legal Context**

To provide effective support to people with intellectual disabilities who enter the criminal justice system, it is essential that workers understand the context of their experiences. For the purposes of this Practice Manual, the context is the Queensland criminal justice system, which operates within the broader framework of the Australian and International systems of law. These are all exceedingly complex systems, and only the briefest overview of each is possible here. One of the key roles of workers supporting a person through these systems is to locate the information and expertise they need to best assist the person with an intellectual disability to understand and navigate the legal processes they encounter.

## **2.1 International Law: The Human Rights Framework**

Australia is a party to an extensive range of international treaties which are the formal instruments of international law.

### Universal Declaration on Human Rights

2008 marks the 60<sup>th</sup> anniversary of the Universal Declaration on Human Rights. The principles contained within this Declaration are incorporated into two Covenants to which Australia is party - the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

### United Nations Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities both sets out how the rights enshrined in the Universal Declaration on Human Rights apply specifically to people with disabilities, and provides an international framework for the protection of those rights. The United Nations Convention on the Rights of Persons with Disabilities was ratified on April 3 2008, and came into force thirty days later. Australia signed the Convention in 2006, but has not yet ratified it.

*The Convention sets a new international standard for the promotion, protection, and fulfilment of the human rights of persons with disability. Key focus areas of the Convention are law and justice. The Convention reaffirms that persons with disability have the right to recognition everywhere as persons before the law. However, it goes further, requiring states to ensure effective access to justice for persons with disability (French 2007, 3).*

Briefly summarised, the key articles in the United Nations Convention on the Rights of Persons with Disabilities (UN Enable website, 2008) address legal and justice issues as follows:

#### Article 5 - Equality and non-discrimination

- All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
- Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
- Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
- Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

#### Article 12 - Equal recognition before the law

- Persons with disabilities have the right to recognition everywhere as persons before the law.
- Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

#### Article 13 - Access to justice

- Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
- Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Under Australian law, international treaties are not binding without supporting domestic legislation. The principles enshrined in the Universal Declaration of Human Rights are translated into Australian domestic law via the following pieces of legislation:

- *Human Rights and Equal Opportunity Commission Act 1986*
- *Disability Discrimination Act 1992*
- *Age Discrimination Act 2004*
- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*

### Disability Discrimination Act 1992

The *Disability Discrimination Act 1992* makes disability discrimination unlawful, aims to promote equal opportunity and access for people with disabilities, and has as its major objectives to:

- eliminate discrimination against people with disabilities;
- promote community acceptance of the principle that people with disabilities have the same fundamental rights as all members of the community; and
- *ensure as far as practicable that people with disabilities have the same rights to equality before the law as other people in the community* (emphasis added, Human Rights and Equal Opportunity Commission (HREOC), 2008).

Individuals can lodge a complaint of discrimination with HREOC who will mediate the complaint where appropriate. Otherwise the matter is heard in the Supreme Court of Australia (HREOC, 2008).

## **2.2 The Australian Legal System**

All offences, criminal or otherwise, are defined under either State or Territory law, or Commonwealth law. Australian State and Territory courts have 'original jurisdiction' (meaning power and authority) in all matters brought under State or Territory laws. They also have jurisdiction in matters arising under Commonwealth laws where jurisdiction has been conferred on them by the Commonwealth Parliament (which the Parliament is empowered to do under the Australian Constitution). In practice, most criminal matters are dealt with by State or Territory courts, whether they arise under Commonwealth, State or Territory law. The High Court of Australia is the final court of appeal in respect of all matters, whether decided in Commonwealth or State jurisdictions (Queensland Department of Justice and Attorney-General, 2008a; Queensland Courts, 2008).

### **Commonwealth Offences**

The Federal Government is responsible for creating laws about Commonwealth offences, which include:



- Centrelink (social security) fraud;
- serious drug offences (e.g. importing illegal drugs);
- destroying or damaging Commonwealth property;
- forging any Commonwealth document (e.g. passports);
- stealing or receiving stolen Commonwealth property (including items in the post);
- offences committed by using the post (e.g. to make a menace or to threaten someone, or send offensive material to someone);
- offences committed by using the phone (e.g. making a threatening phone call, making a hoax threat, not using the emergency service number properly);
- offences committed by using the internet (e.g. possessing, controlling, supplying, or obtaining child pornography);
- computer offences (e.g. interfering with, modifying or destroying computer equipment which is owned by a Commonwealth agency or department);
- terrorism offences (including acts of terrorism and membership or association with terrorist organisations);
- war crimes, crimes against humanity;
- money laundering;
- people smuggling, slavery, sexual servitude offences.

In relation to Commonwealth criminal offences, Legal Aid Queensland states:

*If you are to be questioned about any of these offences you should get legal advice first. The laws covering Commonwealth offences can give enforcement officers broad powers to search, detain and seize things. If you are found guilty of any of these offences, the penalties for breaking these laws can be severe, that is, heavy fines or you could go to jail (Legal Aid Queensland, 2006a).*

## 2.3 The Queensland Criminal Justice System

The criminal justice system in Queensland has three components:

1. **Police** (who investigate crime, and lay charges where there is sufficient evidence that a crime has been committed);
2. **Courts** (who hear cases where a crime is alleged to have been committed, determine whether the accused is guilty (by magistrate or jury), and impose a penalty where guilty); and
3. **Corrections** (who manage probation, community service orders, and custodial sentences when offenders are found guilty of an offence).  
(Australasian Police Multicultural Advisory Bureau, 2003).

### 2.3.1 Police

The stated functions of the Queensland Police Service are:

- the preservation of peace and good order in all areas of Queensland;
- the protection of all communities in Queensland;
- the prevention of crime;
- the detection of offenders and bringing of offenders to justice; and
- upholding the law generally and providing policing services in an emergency.

(Queensland Police Service, 2007).

When police receive a complaint or otherwise become aware that a crime or alleged offence has been committed, they must investigate the matter. If the police determine there is enough evidence to prove someone has broken the law, they will charge a person with an offence (the person is then called the defendant or the accused). Police powers with respect to investigating and prosecuting criminal offences are governed by the Police Powers and Responsibilities Act (2000) (Department Justice and Attorney-General, 2008a).

Police must ensure that the defendant appears in a Magistrates Court as soon as possible after they are charged. In the interim, the accused may be detained in the watch house, or released on bail with a Notice to Appear at Court on a particular date. For minor offences, the accused may not be arrested, but simply given a Notice to Appear in Court, or a complaint and summons may be mailed to them, notifying them of the offence charged and a date to appear at Court (Legal Aid Queensland, 2006a).

### 2.3.2 Courts<sup>3</sup>

The role of the Queensland courts is to decide if a defendant is guilty of the offences they have been charged with, and, if so, what the penalty will be. Queensland has its own independent system of courts, consisting of:

- Supreme Court
- District Court

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<sup>3</sup> Information on the Queensland system of courts was compiled from the following sources: Queensland Department of Justice and Attorney-General website, [www.justice.qld.gov.au](http://www.justice.qld.gov.au), viewed 4 June 2008; Legal Aid Queensland website, [www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au), viewed 19 June 2008; Queensland Courts website, [www.courts.qld.gov.au](http://www.courts.qld.gov.au), viewed 19 June 2008.

- Magistrates Court

The **Supreme Court** is the highest court in Queensland. The Supreme Court has a trial division which hears the most serious criminal cases, including murder, manslaughter and serious drug offences. A jury determines whether the accused (defendant) is guilty. The trial division also hears civil matters involving matters of more than \$250,000. The Court of Appeal is the other part of the Supreme Court, and hears appeals against District and Supreme Court decisions or sentences.

The **District Court** is an intermediate court hearing serious 'indictable' criminal offences, such as rape, armed robbery, or fraud. If the defendant pleads not guilty, a trial before a jury takes place. If the defendant pleads guilty, the judge determines the sentence. The District Court also hears appeals on matters determined by the Magistrates Court.

The **Magistrates Court** hears minor 'summary' criminal offences, including traffic infringements, shoplifting or disorderly behaviour, and less serious burglary, assault, fraud and drug offences. The Magistrates Court also holds committal hearings to determine whether more serious matters should be sent to the District Court for trial. There is no jury in a Magistrates Court.

*Magistrates Courts are the courts of the first instance in the judicial structure throughout Australia. The Queensland Magistrates Court is often referred to as "The People's Court". This is because it is the court that the majority of people who come before Queensland Courts will have contact with. Approximately 96% of people who are charged with criminal offences come before it. Therefore it is the court where most of the community form their impression of the Queensland criminal justice system (Irwin, 2006).*

### **Matters involving indictable offences<sup>4</sup>**

#### **a. Mention**

A mention is the first stage in the hearing of an indictable offence, and is usually held in the Magistrates Court. Bail is decided and a committal date set. The complainant (victim) is not required to be at the Mention. If the defendant is not granted bail, they are remanded into custody.

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<sup>4</sup> The information on court hearings was sourced from The Department of Justice and Attorney-General website, viewed 18 September 2008, [www.justice.qld.gov.au](http://www.justice.qld.gov.au).

### **b. Committal Hearing**

Before a case goes to the Supreme Court or District Court, there is a hearing in a Magistrates Court to determine whether there is enough evidence for a trial to be held. The police prosecutor or a prosecutor from the Office of the Director of Public Prosecutions presents the case against the accused.

### **c. Trial**

If the accused pleads not guilty and the magistrate decides there is enough evidence, the accused is sent to trial in the Supreme Court or District Court. The trial is held before a judge and a jury of twelve people.

### **d. Sentence Hearings**

If the accused pleads guilty at any stage or is found guilty by the jury, the judge passes sentence. A separate hearing is held for the sentencing if the accused pleads guilty, and sometimes also if the jury reaches a verdict of guilty. At the sentence hearing, the prosecutor outlines the circumstances of the crime and gives details of any injury, property damage, or harm or loss that the victim has suffered. The prosecutor suggests what the punishment should be, but the judge decides the sentence.

### **e. Appeals**

A person convicted of a crime has the right to appeal against both the conviction and/or the sentence imposed.

### **Diversions programs and other mainstream court alternatives**

Sometimes people who become involved in the criminal justice system are diverted from the mainstream court system to alternative processes. The most common alternatives to mainstream court are:

1. Homeless Persons Court Diversion Program, Brisbane
2. Justice Mediation
3. Mental Health Court

### **Homeless Persons Court Diversion Program, Brisbane<sup>5</sup>**

The Homeless Persons Court Diversion Program (HPCDP) in Brisbane is part of the Brisbane Magistrates Court. The program commenced as a pilot in 2006. The HPCDP aims to respond to the underlying issues contributing to offending behaviour amongst homeless populations, for example, unsafe, unstable or no accommodation, unmanaged physical and mental health issues, intellectual disability and cognitive impairment, drug and alcohol issues, legal support needs.

Potential HPCDP participants are initially assessed by the HPCDP Court Liaison Officer to confirm their eligibility for the program, to gather information and understanding of their lifestyle and support needs, and to locate appropriate services to work with the person to assist them to address their needs, with the aim of preventing further offending behaviour. Participation in the HPCDP is voluntary, and participants can withdraw at any time (however, the matter is then returned to court).

If assessed as eligible by the Court Liaison Officer, the defendant appears before a magistrate who hears the matter. In determining bail and/or sentencing arrangements, the magistrate considers the information presented by the HPCDP Court Liaison Officer and other support workers. If the magistrate makes an order that the person participate in the HPCDP, the Court Liaison Officer thereafter monitors the person's ongoing engagement with support services and treatment programs. The defendant may also be required to report back to the court regularly on their progress and life situation.

People can be referred to the program if they are:

- homeless;
- charged with offences such as public order/related policing offences or procedural offences such as breaching bail or failing to appear in court (for public order/policing related matters);
- pleading guilty or indicating no contest to the charges; and
- aged 17 years or older.

Referrals to the HPCDP can be made by:

- magistrates and duty lawyers
- police

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<sup>5</sup> Information on the Homeless Persons Court Diversion Program was compiled from the following sources: "Queensland Public Interest Law Clearing House (QPILCH) Street Law", Homeless Person's Legal Clinic Newsletter, Edition 5, Oct/Nov 2005; "Homeless Persons Court Diversion Program (Brisbane)", Queensland Government, Department of Justice and Attorney-General Factsheet, September 2006; VOICES Project Interview with Phil Macey, Court Liaison Officer, Homeless Persons Court Diversion Program, 2 November 2007.

- Legal Aid Queensland and other legal services
- community organisations supporting homeless people
- homeless people (referring themselves or other homeless people).

### **Justice Mediation<sup>6</sup>**

Justice mediation is a diversionary program run by the Queensland Department of Justice and Attorney-General, Dispute Resolution Branch. Most offences that would otherwise be heard by a magistrates court can be referred for mediation (except for stalking cases and most domestic violence matters). Defendants are usually first time offenders. Referrals can be made by police, police prosecutor, magistrate or officers of the Department of Public Prosecutions, and are assessed for suitability by Justice Mediation staff. Both the complainant (victim) and defendant (offender) must agree to participate in the justice mediation, and should both seek legal advice before making that decision.

In a justice mediation, the complainant and defendant meet to discuss the offence the defendant has committed against the complainant. The complainant explains how they have been affected by the offence, and can ask the defendant to make amends for the damage or harm they have caused. 'Making amends' requires the defendant to accept responsibility for their actions, acknowledge the harm they have caused, and promise not to repeat the offence. The complainant may ask the defendant to agree to a particular undertaking, for example, returning stolen property, repairing damage, attending counselling, or making an apology. Justice mediation cannot order an outcome more onerous than a court would give for the offence in question, and cannot order a defendant to participate in voluntary work.

All mediations are run by trained mediators who assist both the complainant and defendant through the process. Both the complainant and defendant must have a support person participate in the process alongside them. About 70% of the mediation process involves pre-mediation preparation. During this part of the process, the mediator meets with each participant and their support person to hear the participant's story, and explain the mediation process and requirements. The mediators may meet with participants more than once to give them time to seek advice, consider their commitment and ability to participate in the process, and make decisions. High quality preparatory work is essential to maximise the chances of a successful mediation as it ensures both complainant and defendant come to the mediation adequately prepared and with realistic expectations of the process.

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<sup>6</sup> Information on Justice Mediation was compiled from the following sources: Justice Mediation Factsheet, Department of Justice and Attorney-General, Queensland Government, April 2007; VOICES Project Interview with Dean Corliss, Co-ordinator, Justice Mediation Program, 3 January 2008.

A mediator facilitates the formal mediation process using a structured process that enables both complainant and defendant to tell their story. The complainant has the opportunity to express how they have been harmed by the offence, and to ask the defendant to remedy this harm. The defendant has the opportunity to share some of their own story (not to excuse their actions, but to help the victim understand something of the context of their offending behaviour), and accept responsibility for what they have done. The mediator then assists both parties to reach a workable agreement to repair the harm the defendant's actions have caused.

For the following reasons, justice mediation can offer people with an intellectual disability a more meaningful and participatory experience of justice than a court hearing:

- mediation takes place in a less formal, stressful and alienating environment than a courtroom;
- the pace and language of the mediation process can be adjusted to suit the individual needs of participants;
- participants are well prepared prior to the formal mediation and are actively supported through the process by a support person and the mediator;
- a person who has been the victim of an offence can be empowered by telling the person who has harmed them how they have been hurt and how they would like the offender to make amends for that harm;
- whilst confronting, it can be transformative for an offender to sit down with the person they have harmed, acknowledge and apologise for what they have done, and agree to make amends. The defendant can also be supported to consider how they can make changes in their life to ensure they do not re-offend.

No process is perfect, and it is important that support workers recognise and respond to the difficulties people with an intellectual disability may face in justice mediation.

- Complainants may feel anxious or frightened at the prospect of meeting the person who harmed them. Their anxiety may impair their ability to communicate effectively in the mediation, and their fear should not be minimised. It is important to remind the person that they do not have to agree to a mediation.
- Defendants may feel anxious having to sit before the person they have harmed and be confronted with what they have done.
- Some defendants may have difficulty understanding that their actions constitute a criminal offence.
- Some defendants may feel (legitimately or not) they are not totally to blame for an offence and may struggle with having to formally accept responsibility for

causing the harm, and having to apologise/make amends. For example, the defendant and complainant may have an ongoing relationship characterised by conflict or abuse of power, or the defendant may feel they were provoked.

Where such issues exist, the mediator must determine whether they will prevent a person being able to successfully participate in the mediation. If the mediation proceeds, the mediator and support worker should work to assist the person to overcome these difficulties through the pre-mediation preparation process. If the mediation does not proceed, the matter is returned for hearing by a court.

### **Mental Health Court<sup>7</sup>**

A criminal matter may be referred to the Mental Health Court when the alleged offender has a mental illness and/or an intellectual disability that limits their capacity to be held criminally responsible for their actions. The Mental Health Court decides matters where a person is charged with an indictable offence or is charged with both simple and indictable offences. The Mental Health Court is constituted by a supreme court judge assisted by two experienced psychiatrists. A case can be referred to the Mental Health Court by:

- the alleged offender or their legal representatives;
- the Director of Public Prosecutions;
- the Director of Mental Health (where the person is receiving treatment for a mental illness);
- the Attorney-General;
- the District Court or Supreme Court.

The Mental Health Court is not bound by the same strict rules of evidence as other courts hearing criminal matters. In making their decision, the court can consider a wide variety of material, including:

- police reports;
- expert reports;
- submissions from the Director of Public Prosecutions;
- submissions from the Director of Mental Health;
- submissions from the alleged offender's legal representatives;
- submissions from the assisting psychiatrists;
- submissions from the victim of the crime.

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<sup>7</sup> Information on the Mental Health Court was compiled from the following sources: Mental Health Court Factsheet, Queensland Government Department of Justice and Attorney-General website, [www.justice.qld.gov.au/courts](http://www.justice.qld.gov.au/courts), viewed 2 September 2008 ; Mental Health Act 2000 Fact Sheet 1: Purpose, principles and definitions, Fact Sheet 5: Forensic provisions, Fact sheet 6: Mental Health Review Tribunal, Queensland Government, Queensland Health, [www.health.qld.gov.au/mha2000](http://www.health.qld.gov.au/mha2000), viewed 2 September 2008.



The Mental Health Court is given investigative powers under the *Mental Health Act 2000* to determine issues such as an alleged offender's soundness of mind, fitness for trial, and whether they can be held criminally responsible for an offence.

*Unsound of mind* refers to a person not having the capacity to understand what they are doing, control their actions, or know that they should not do the act or make the omission, due to their having a mental disease or natural mental infirmity. Where the court finds a person was of unsound mind at the time of an offence, all criminal proceedings against them are discontinued. In the case of serious offences, the court will usually make a forensic order directing the person to be detained in an authorised mental health service for involuntary treatment or care. For less serious offences, where the alleged offender is determined not to pose a risk to the safety of themselves or others, a community-based treatment order may be made. Where a person has been charged with an offence of violence, the court can make a non-contact order prohibiting the person from having contact with a nominated person or persons.

*Unfit for trial* is declared where a person is determined to be unable to:

- understand the nature of the trial proceedings;
- understand the meaning of entering a guilty or not guilty plea;
- instruct their legal representatives.

Unfit for trial may also mean the person is unable to endure a trial without serious deterioration of their mental state. Where the court determines a person is permanently unfit for trial, all criminal proceedings against them cease. The court may also make a forensic order for the person, either community-based treatment or treatment in an authorised mental health service.

A court may find a person to be *temporarily unfit for trial*, in which case the court makes a forensic order until the person becomes fit for trial. The person's fitness for trial is regularly reviewed by the Mental Health Review Tribunal. Where a person is determined to be fit for trial, the case returns to a criminal court. If a person remains unfit for trial for a period of three years (or seven years in the case of offences carrying a maximum sentence of life imprisonment), all criminal proceedings are discontinued, although the forensic order may continue in force.

*Diminished responsibility* is determined when a person, although not of unsound mind, had a substantially impaired capacity to:

- understand what they were doing;
- control their actions;

- know that they should not do the act or make the omission.

When a person is determined to have diminished responsibility, they are considered to bear less criminal responsibility for their actions because of their impaired capacity.

There is debate about the ethics of referring matters involving people with an intellectual disability (but not mental illness) to the Mental Health Court. Generally, people are referred when they demonstrate significant 'challenging behaviours', and are considered to be a risk to themselves and others. In the absence of any appropriate community-based accommodation and support alternatives for such people, detention in a mental health facility is seen as the best option to guarantee community safety, if not the safety of the individual. Russ Scott (Victorian Institute Forensic Mental Health) argues:

*That persons found to be unfit for trial should become subject to a forensic order because of an intellectual disability and be diverted to mental health services (including secure facilities) is clearly anathema to the intent of the Mental Health Act 2000. The care and treatment needs of people with an intellectual disability do not come correctly within the purview of the Act...There is general disquiet in both psychiatric and legal disciplines in Queensland over the inappropriateness of detention and treatment of persons with intellectual disabilities under involuntary treatment provisions of mental health legislation. Having been found 'unfit' to stand trial and having never been convicted of any offence, let alone had the opportunity to have the allegations against them tested in criminal proceedings, these persons become subject to forensic orders with very little prospect of the order ever being revoked (2007, 346).*

### 2.3.3 Sentencing and Corrections<sup>8</sup>

*...data demonstrates that while people with an intellectual disability are no more likely to be arrested than others in the population, at first arrest, they are more likely to be charged with more serious offences, receive disproportionately more severe sentences, are four times more likely to be sent to prison, and are significantly more likely to be rearrested than cognitively unimpaired offenders (Cockram, 2005: 75).*

When a person is found guilty of a criminal offence by a court, or pleads guilty to a criminal offence:

- the court may or may not record a conviction;
- the court imposes a penalty or sentence.

In deciding on a sentence, the court considers:

- the type and seriousness of the offence;
- the age of the defendant;
- the defendant's level of education and employment history;
- the defendant's criminal history, including whether they have committed similar offences before;
- what sort of punishment will stop the defendant from re-offending;
- what sort of help the defendant needs to refrain from re-offending.

#### Penalties

The type of penalty or sentence imposed by the court depends on the type of offence the person has committed – the more serious the offence, the more serious the sentence. The court can order one or more of the following penalties:

1. A monetary fine

If the court orders a fine, the fine must be paid within a time period set by the court. If the fine is not paid within this period, it is referred to the State Penalties Enforcement Registry (SPER), who contact the defendant to arrange payment. Payments can be made in regular instalments – weekly, fortnightly, monthly. A defendant can apply to SPER for a Fine Option Order if they can't afford to pay a fine, which means that they do community service in place of paying the fine. A Fine Option Order can be a

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<sup>8</sup> The information on Sentencing and Corrections is compiled from the following sources: Legal Aid Queensland website, *What happens after I have been convicted*, viewed 17 September 2008, [www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au); Queensland Corrective Services website, *Myths and Frequently Asked Questions*, viewed 14 October 2008, [www.correctiveservices.qld.gov.au](http://www.correctiveservices.qld.gov.au).

more concrete and meaningful sentence option for a person with an intellectual disability than a monetary fine, particularly when a person's money is managed by the Public Trustee and the person is not responsible for the fine, or even aware when payments are made. If the defendant does not pay the fine, or complete community service, they can be sent to jail for being 'in default'.

## 2. Good behaviour bond

A good behaviour bond orders a person to be of good behaviour – that is, not break the law – for a set period of time. The defendant must sign a recognisance (document) in which they promise to be of good behaviour, and they must pay a sum of money (surety) as a guarantee that they will keep their promise. If the person breaks the law while on a good behaviour bond, they are returned to court for the original charges (and may be re-sentenced), they lose the surety, and they face charges for the new offence.

## 3. Probation

A probation order can be made for a period of between six months and three years. The defendant must be assessed as suitable for the order, and must agree to the order being made. The defendant receives a copy of the probation order before leaving court, and must report to a corrective services officer soon after.

During the period of probation, the defendant must report regularly (between daily and monthly) to a probation officer at a corrective services office. All probation orders include the conditions that the defendant must not break the law or leave the state without permission. The probation order may also include other conditions. If a person breaks the law or any of the probation order conditions during the probation period, they are charged with breach of probation. They are also charged with any new offences. The probation order may then be cancelled, and the defendant returned to court to be re-sentenced on the original charges.

## 4. Community Service Order (CSO)

A Community Service Order directs a person to do between 40 and 240 hours of unpaid work for the benefit of the community. These hours are usually worked one or two days a week. The defendant must be assessed as suitable for the order by a corrective services officer, and must agree to the order being made. The defendant

receives a copy of the CSO before leaving court, and must report to a corrective services officer very soon after court.

Community service hours usually have to be completed within a year of the order being made, though a court may order the hours be completed in less time, or may extend the order beyond 12 months. CSOs carry the conditions that the defendant must not break the law or leave the state without permission. If the defendant breaches the CSO, they are returned to court, face charges for any new offences, and may be re-sentenced for the original offence.

#### 5. Intensive Corrections Order (ICO)

An Intensive Corrections Order is a jail sentence served in the community. A court only orders an ICO for a jail sentence of one year or less. The offender receives a copy of the ICO before they leave court, and must report to a corrective services office very soon after court. A person on an ICO is subject to intensive supervision. They must report to a corrective services officer twice weekly, attend rehabilitation programs or counselling as directed, and perform community service. If the offender breaches the ICO, they usually have to serve the remainder of their sentence in jail.

#### 6. Jail sentence (wholly or partly suspended)

Where a court orders a jail sentence of five years or less, they can wholly or partly suspend the sentence. A wholly suspended sentence means the defendant does not go to jail at all, unless they break the law during the sentence period. A partly suspended sentence means the defendant spends some time in jail, then leaves and returns to the community (unless they break the law, when they return to jail).

### **Prison<sup>9</sup>**

The operations of Queensland prisons are governed by the *Queensland Corrective Services Act 2006* and the *Corrective Services Regulation 2006*. Chapter 1 of the *Corrective Services Act 2006* states:

*(1) The purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders.*

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<sup>9</sup> The information on prison has been sourced from Mulligan, 2007, "Justice Behind Bars", Prisoners' Legal Service, Inc., Brisbane.

*(2) This Act recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.*

*(3) This Act also recognises -*

*(a) the need to respect an offender's dignity; and*

*(b) the special needs of some offenders by taking into account -*

*(i) an offender's age, sex or cultural background; and*

*(ii) any disability an offender has.*

The total prison population can be divided into two groups:

- People who have been charged with a criminal offence and refused bail. This group are held in custody until they appear in court or are sentenced. This is called being on remand.
- People who have been found guilty of a criminal offence by a court (or who have pleaded guilty to a criminal offence) and have been sentenced to a term of imprisonment.

### **Entry into the prison system**

- Upon being admitted to a prison, a prisoner, under Section 50 (1) of the CSA 2006, is entitled to:

*(a) at the chief executive's expense, make one phone call on admission to a corrective services facility; and*

*(b) at the prisoner's own expense, phone approved persons at approved telephone numbers.*

These provisions enable prisoners to inform family, friends, or other significant people of their whereabouts.

- The procedure for entering prison is known as 'admission' or 'reception', and is the same whether the person is on remand, or has been found guilty of a criminal offence. The Prisoner's Legal Service (Mulligan 2007: 30/1) describes the procedure for admission/reception to prison as follows (these procedures should be completed within 24 hours of the person's arrival at prison):
  - *The 'warrant of detention' (either refusal of bail or conviction) is read to the prisoner to confirm their identity and details of their sentence or remand.*
  - *The prisoner's property is received from the police and recorded on a 'property card' which the prisoner is asked to sign and confirm that the property was received at the prison listed. This property will be searched by prison officers.*

- *The prisoner will be strip searched and asked to shower.*
- *Prison officers will record a physical description of the prisoner, inclusive of any tattoos and/or distinguishing features (such as birthmarks or scars).*
- *The prisoner is issued with prison clothing, a 'reception pack' including toiletries and their authorised personal property. Women prisoners are able to access sanitary products free of charge for their entire sentence.*
- *The CSA 2006 provides that for the purposes of identification a prison officer may take a photograph, footprint, fingerprint, palm print, toe print, eye print, or voice print of the prisoner. All such identification taken by the prison must be destroyed if the prisoner is found guilty of the offence or if the proceedings against them are dismissed or discontinued. The exception to this is if someone has been found not guilty on the grounds of unsoundness of mind.*
- *An interview is conducted by a qualified and specialist staff member to determine the prisoner's immediate risk or needs including escape risk, dysfunctional behaviour, risk of self harm or suicide, immediate individual needs and acute medical needs. The interviewing officer is responsible for following up on these needs, for example, by referring the prisoner to specialist staff such as psychologists or counsellors.*

### **Induction**

- Within two days of entering the prison system (or seven days of being transferred from one prison to another), the prisoner should be provided with an induction program of easy to understand information about the prison and the prison system, including:
  - *the laws, rules and regulations regarding prisoner conduct (such as what constitutes a 'breach' etc);*
  - *the mail system, prisoner visits, and telephone calls;*
  - *avenues for complaints, such as to the ombudsman and official visitor;*
  - *legal services for and processes for bail, appeals etc;*
  - *sentence management processes, including security classification; and*
  - *procedures for applying for leave (Mulligan 2007: 34).*
- All prisoners should receive a QCS Prisoner Information Booklet, along with the prison information booklet for that prison. Prison staff must take "reasonable steps" to ensure prisoners who are illiterate or do not speak English understand this information (Mulligan 2007: 35).

### **Security Classification**

- There are three levels of security classification in the Queensland prison system – low, high and maximum (most prisoners receive a 'high' security classification).

The level of security classification determines where a person is housed, their access to 'leave, and other 'privileges'. The following criteria are used to determine a prisoner's level of security classification:

- *the kind of offence for which the prisoner has been either charged or convicted;*
- *the risk of the prisoner escaping, or attempting to escape from custody;*
- *the risk of the prisoner committing another crime, and if so, what the impact of the crime would be on the community; and*
- *the level of risk that the prisoner poses to themselves, other prisoners, prison staff, and to the security of the prison itself (Mulligan 2007: 36).*

### **Living arrangements**

- Section 18 (1) of the Corrective Services Act 2006 states that *whenever practicable, each prisoner in a corrective services facility must be provided with his or her own room.*
- A prisoner assessed as being at risk of suicide or self-harm may be placed in a "Safety Unit" or "observation cell" for monitoring by prison staff (Mulligan 2007: 32).
- A prisoner at risk of harm from other prisoners can apply to be placed on protection, which means they will be accommodated separately from the mainstream prison population. A request for a prisoner to be placed on protection can be made by:
  - a court
  - a solicitor
  - police or another law enforcement agency
  - the prisoner themselves
  - a family member
  - staff at the prison

If there are no protection places available within the prison they are in, the prisoner can be transferred to another prison anywhere in the state. A prisoner's protection status is reviewed at least every 12 months, and may be withdrawn if the General Manager of the prison feels it is no longer necessary (Mulligan 2007: 32-34).

### **Education, Work and Rehabilitation**

- Upon entry into the prison system, all prisoners are assessed for reading, writing and numeracy skills, along with their general level of education. 'Basic adult education' is stated to be a Queensland Corrective Services priority, and



available at all prisons. However, QCS also states participation is based on each prisoner's assessed needs (Mulligan 2007: 125).

- To assist in their rehabilitation, prisoners are required to complete offender programs designed to address their offending behaviour, and are expected to work in prison industries (for which they are paid). Prisoners can also access educational or vocational courses, including TAFE courses (Mulligan 2007: 120).
- Prisoners can be classified as unemployed (and paid an unemployment allowance of \$1.26 per day) if:
  - they are medically unfit for employment and have a doctor's certificate or opinion stating this;
  - there is no work position available; or
  - they are on remand (Mulligan 2007: 122).
- All prisoners serving sentences of twelve months or longer are placed on an Offender Management Plan (OMP) which sets short and long term goals for the prisoner's sentence. The OMP also recommends programs and education options to assist the prisoner's rehabilitation, including:
  - medical or religious welfare services;
  - skill acquisition programs that will help reintegration into the community after release;
  - relationship programs to assist offenders to initiate, keep, and improve their relationships with family members and the community; and
  - rehabilitation programs.

Prisoners who achieve the goals set out in their OMP are more likely to be looked upon favourably when applying for leave or parole (Mulligan 2007: 129).

### **Visitors**

- Section 153 of the CSA 2006 entitles prisoners to receive a personal visitor and a legal visitor once a week.
- There are two types of visits in prison:
  1. Contact visits - where the visitor and prisoner are allowed to be in physical contact. Contact visits are classed as a 'privilege' and can be suspended as part of prison discipline for breaches of prison rules.
  2. Non-contact visits - where the visitor and prisoner are separated by a clear partition, with no physical contact allowed. Non-contact visits occur until a visitor has gained security clearance, where a contact visitor has breached prison visiting rules, or where a prisoner has lost contact visit privileges as a result of a prison breach (Mulligan 2007: 108/09).
- To visit a prisoner, visitors must complete and lodge an *Application to Visit a Prisoner Form 27* (available from either the prison or QCS website

<http://www.correctiveservices.qld.gov.au>). A security check on the visitor's criminal history is conducted, which can take six to eight weeks. During this time, only non-contact visits are permitted. Once a visitor gains security clearance, they can book a contact visit through the prison (all personal visits must be booked in advance). Visitors must produce identification at each visit, and must abide by dress and behaviour codes (Mulligan 2007: 111-112).

- To make phone calls, prisoners must apply to be on the Prison Telephone System by lodging a written application listing no more than ten people (including name, address, telephone number and relationship to the prisoner). QCS checks this information and obtains each person's consent to have the prisoner call them. Prisoners' phone calls are time limited (usually seven to fifteen minutes), and prisoners must pay for their calls at normal Telstra rates (Mulligan 2007: 101-102).

### **Breaches of Discipline**

- Behaviour that can result in a prisoner being disciplined for a breach of prison rules includes:
  - *disobeying a lawful direction of a prison officer;*
  - *making, possessing or consuming something that has not been approved by the General Manager of the prison;*
  - *using abusive, indecent, insulting, obscene, offensive or threatening language in another person's presence;*
  - *acting in an indecent or offensive way in another person's presence;*
  - *acting in a way that is contrary to the security or good order of a prison;*
  - *making a frivolous or vexatious complaint;*
  - *organising or taking part in gambling;*
  - *wilfully consuming or inhaling anything that is likely to induce an intoxicated state, other than medication taken as prescribed by a doctor;*
  - *altering your own or another prisoner's appearance without a corrective service officer's approval;*
  - *wilfully damaging, destroying, removing or otherwise interfering with a device that monitors an offender's location, unless expressly approved by the General Manager; or*
  - *attempting to do any of the above (Mulligan 2007: 75-76).*
- Prison officers can take proceedings against a prisoner for either a 'major' or 'minor' breach of discipline. If a matter could be dealt with as a breach, or a criminal offence, the prison must notify the police who will then decide whether they will prosecute the matter. A matter cannot be dealt with (and punished) twice, that is, as both a prison breach *and* as a criminal offence (Mulligan 2007: 76-77).

- All breaches are recorded on the prisoner's file and may be considered in relation to decisions about security classification, leaves of absence, or parole. There are three punishments available for breach of discipline:
  1. Reprimand; or
  2. Loss of privileges; or
  3. Separate confinement (for up to seven days) in a detention unit (Mulligan 2007: 80).

### **Gradual Release**

- Prisoners (who meet eligibility requirements) can be released from prison through a phased process known as Gradual Release. This includes programs such as:
  - Work Orders. Prisoners are transferred from prison to community-based work camps where they are supervised by prison officers. Prisoners must be classified as low security, and must have completed all of the recommended intervention programs (Mulligan 2007: 132-134);
  - Leave of Absence, including:
    - community service leave
    - compassionate leave
    - educational leave
    - health leave
    - reintegration leave
    - resettlement leave

There are restrictions on the type of leave available to prisoners who are serving life sentences or who are declared serious violent offenders (Mulligan 2007: 134-135).

### **Parole**

- A parole order is an order made by the Parole Board that allows a prisoner complete their sentence in the community, under the supervision and case-management of Community Corrections.
- Prisoners sentenced to prison for a period of three years or less (after 28 August 2006), who aren't serious violent offenders or sexual offenders, have an automatic parole date set by the court when they are sentenced. They will automatically get parole on this date, usually with conditions. It is important that prisoners understand and comply with all parole conditions, because a breach of conditions can lead to them being returned to prison for the remainder of their sentence (Mulligan 2007: 145-146).
- Prisoners sentenced to three or more years (after 28 August 2006) are eligible for parole at the date set by the court, or after serving half their sentence (Mulligan 2007: 146).

- Serious violent offenders, prisoners sentenced to serve a minimum of fifteen years life imprisonment, and prisoners sentenced to serve a minimum of twenty years for murder, are not automatically eligible for parole. These prisoners must apply to the parole board by completing an *Application By Prisoner For Parole Order / Approval for Resettlement Leave Program*, no earlier than 120 days before their parole eligibility date. The prisoner should attach any supporting documentation that demonstrates they will not be a risk to the community if released.
- "The safety of the community" is the parole board's highest priority. In making a decision on a parole application (Mulligan 2007: 149). To guide their decision making, the parole board will consider the prisoner's past offending behaviour, prison breach/incident history, program participation reports, residential and release plans, and other material such as psychiatric evaluations (Mulligan 2007: 146-147).
- If a parole board does not make a decision on a parole application within 120 days, they are taken to have refused the application. The parole board must then give the applicant written reasons for the refusal and a date within six months when they will consider a new application (Mulligan 2007: 147).

### **Recidivism**

In general terms, "recidivism" refers to repeat offending by a person who has previously been charged and convicted of a criminal offence. Recidivism is also more or less defined as a person being re-imprisoned, re-convicted, or re-offending.

Judith Cockram (2005) states "high rates of reconviction have been noted in overseas follow-up studies of people with intellectual disability who have been institutionalised following a conviction", and cites a range of international research in support of this claim (23). French (2007) cites a New South Wales Department of Corrective Services study, which found *prisoners with an intellectual disability had a 78% higher rate of re-imprisonment than that of the total population of offenders... [with] the rate of recidivism for first offenders with intellectual impairment with no prior conviction... 139% higher than that of the total population of offenders with no prior conviction* (102).

In seeking to explain the high rates of recidivism amongst offenders with an intellectual disability, Baldry (2007) and French (2007) name the custodial experience, coupled with poor post-release community supports, as a recipe for repeat offending. Baldry (2007) declares prison 'criminogenic' [producing or tending to produce crime], and claims *...serving time in prison greatly increases the chance of being re-incarcerated somewhere down the track compared to not ever having*

been incarcerated (Baldry 2007: 2). French (2007) supports this, stating *...the incarceration of persons with disability in correctional facilities is much more likely to...intensify the psychological and environmental factors that expose persons with disability to offending behaviour, typically diminishing their prospects of rehabilitation and positive reintegration into the community upon release (102).*

Baldry (2007) states *...although there are many ways and points to intervene to help prevent offending or re-offending, including during early childhood, support for disadvantaged families, parenting support, court diversion, restorative justice approaches and alcohol and other drug rehabilitation, a crucial period...is post release (2).* Baldry (2007) continues, *declaring the first month or two is a crucial time during which releasees, especially those with mental health, intellectual disability and drug problems, are often re-arrested or breached for parole infringements (3).*

Baldry (2007) identifies the following supports as integral to people successfully transitioning from prison to the community, and refraining from re-offending:

- stable housing – ex-prisoners are over-represented amongst homeless populations, and homeless people are more likely to be imprisoned;
- access to work, education, and vocational training opportunities whilst in prison – ex-prisoners with post-release employment or who are studying are more likely to stay out of prison;
- maintenance of relationships with families throughout incarceration – participants in a 2003 study of ex-prisoners' were more likely to stay out of prison if they were living with their parents, a partner, or close family member;
- immediate welfare needs met at the time of release – this includes money for clothes, food, household items, medication, phone calls, and transport from prison to home;
- provision of aftercare support services – including community based support and rehabilitation programs to address issues such as poor mental health, drug and alcohol addictions, domestic violence, isolation and loneliness;
- reintegration into the community using gradual release processes – including parole, home detention, or release to community-based halfway houses(4/5).

# Part 3: Literature Review

If we are to provide effective support to people with an intellectual disability in the criminal justice system, it is necessary that we understand and respond to the particular experiences, and disadvantages, faced by this group within that system. The literature identifies a number of key issues that impact on both the likelihood that a person with an intellectual disability will have contact with the criminal justice system as well as the experiences they will probably have:

- Over-representation
- Increased vulnerability
- Differential treatment
- Identification of intellectual disability
- Communication difficulties
- Legal capacity

### **3.1 Over-Representation**

*Persons with disability are significantly over-represented as both victims of crime, and as suspects, defendants and offenders in the criminal justice system. Although there isn't comprehensive and reliable quantitative evidence of the proportions available for Queensland specifically, there can be no doubt that the problems evident elsewhere in Australia and internationally are at least as severe in Queensland (French, 2007: 3).*

There is limited Queensland-specific research into the experiences of people with intellectual disabilities who come in contact with the criminal justice system as victims, witnesses, suspects or alleged offenders. Nationally and internationally, however, there is a large body of quantitative and qualitative research into the experiences of this group, from which we can extrapolate a likely picture of people's experiences in the Queensland context (French, 2007: 16).

#### **Victims**

*People with an intellectual disability are more vulnerable than most members of the public to criminal victimisation (Wilson et al, 1996: 2).*

People with an intellectual disability are more likely to be victims of crime than other members of the community (French, 2007: 16). Research into the criminal victimisation of people with an intellectual disability shows:

- People with intellectual disability are more likely than their non-disabled counterparts to have been the victim of multiple instances of domestic violence or sexual abuse and, in both disabled and non-disabled groups, women are more likely than men to have been the victims of violence (Hayes, 2004a – cited in Hayes and Bleakley, 2006: 12).
- People with an intellectual disability (compared to members of the general population) are:
  - 2.9 times more likely to be assaulted;
  - 10.7 times more likely to be sexually assaulted; and
  - 12.7 times more likely to be the victim of robbery (Petersilia, 2000: 1).
- The majority of women with an intellectual disability are sexually exploited by the time they reach adulthood (Keilty and Connelly, 2000).
- Children with any type of disability are 3.4 times more likely to be abused compared to children without disabilities (Sullivan & Knutson, 2000).
- People with an intellectual disability are 1.5 times more likely to be the victims of household crime, including break and entering and property theft (Wilson et al, 1996: 2).
- People with intellectual disabilities are 4-10 times more likely to become victims of crime than people without disabilities (Sobsey, 1994).
- Between 50%-99% of persons with intellectual and psychosocial impairments are subject to sexual assault at some point in their lifetimes (Carmody, 1990; Firsten, 1991; Hard, 1986; McCarthy, 1996; Muccigrosso, 1991; Mulder, 1996; Sobsey and Doe, 1991, cited in French, 2007).

It is sobering to note that a 1992 Victims of Crime study administered by the Australian Bureau of Statistics found auto theft to be the only crime where people with intellectual disabilities were less vulnerable than members of the general population – due to the fact that few people with intellectual disabilities have cars to be stolen (Wilson and Brewer 1992, cited in Wilson et al, 1996: 2).

### **Suspects/Alleged Offenders**

*There is a growing body of international and Australian research that suggests persons with a disability are significantly over-represented as suspects, defendants, and offenders in the criminal justice system (French, 2007: 25).*

Research demonstrates that people with an intellectual disability are most likely to commit offences involving impulsive or unpremeditated behaviour, rather than crimes involving planning and foresight. Offenders with intellectual disability are also



more likely to commit relatively minor offences, but they commit these repeatedly. Offenders with an intellectual disability who commit major violent crimes usually do so as a consequence of their "lack of ability to inhibit expression of aggressive impulses", rather than as premeditated actions (NSW Law Reform Commission, 1996). People with intellectual disability are also more likely to be charged with public order offences (French 2007: 37/8).

Many people with intellectual disability experience wide-ranging psychological and socio-economic disadvantages which can predispose them to being charged with public order offences. Examples of the relationship between disadvantage and crime include:

- poor ability to manage daily life activities, such as budgeting for food and maintaining accommodation, which leads to "survival crimes";
- poor organisational skills and memory, leading to failure to meet minor legal obligations;
- lack of education and knowledge about socially acceptable behaviours and behaviours that constitute a crime;
- limited sex education and poor ability to discriminate between 'public' and 'private' behaviours;
- visibility in public spaces, as a result of poverty, homelessness, lack of daily occupation, which attracts high levels of surveillance;
- congregation amongst high need populations and "survival cultures" where conflict, abuse and exploitation are common;
- learned behaviours resulting from life experiences that include lack of dignity and privacy, lack of respect afforded to their person and property, and victimisation. (NSW Law Reform Commission, 1996, Chapter 2: 6, 7; French, 2007: 31-32).

Judith Cockram, a West Australian researcher who has published widely on people with intellectual disability in the criminal justice system, has demonstrated:

- offenders with an intellectual disability *are more likely to be male, not resident in specialist disability accommodation, not receiving services, and in the borderline/mild categories rather than in the more serious [sic] categories of intellectual disability/cognitive impairment* (cited in Hayes and Bleakley, 2006: 12);
- *while people with an intellectual disability are no more likely to be arrested than others in the population, at first arrest they are more likely to be charged with more serious offences, receive disproportionately more severe sentences, are four times more likely to be sent to prison, and are significantly more likely to be rearrested than cognitively unimpaired offenders* (Cockram, 2005: 75);

- *while the rate of offending among women with intellectual disabilities is quite low, women with intellectual disabilities are increasingly over-represented in the penal system (Cockram, 2005: 76).*

Other Australian research into people with intellectual disability in the criminal justice system as suspects and alleged offenders includes the following:

- A 2006 NSW study of young offenders on community service orders found between 11%-15% had an intellectual disability; 40% reported severe symptoms consistent with a clinical disorder (most commonly, conduct disorder and substance abuse disorder); and 25% reported symptoms suggestive of a depressive or anxiety-related disorder (Kenny et al, 2006, cited in French, 2007: 26);
- A South Australian study showed a 10% rate of intellectual disability and a 23% rate of borderline intellectual disability amongst a prison remand population (Parton, Day and White, 2004, cited in Hayes and Bleakley, 2006: 12);
- A 2003 NSW Department of Juvenile Justice study of young people in juvenile detention found that 10%-13% were assessed as having an intellectual disability (cited in French, 2007: 27);
- A 2002 Queensland Department of Corrective Services study found that 4.8%-14.8% of prisoners of adult correctional facilities may have an intellectual disability; 9.8% of prisoners scored in the intellectual disability range, and 28.6% of prisoners scored in the 'borderline' intellectual disability range (cited in French, 2007: 27);
- A 1993 NSW Law Reform Commission study found that 23% of people appearing before Local Courts on criminal charges had an intellectual disability. A follow-up study published in 1996 found that 51.5% of people appearing before Local Courts on criminal charges had an intellectual disability (New South Wales Law Reform Commission, 1993).
- In the USA, a 1996 survey of all federal and state prisons estimated that 4.2% of all prison inmates were mentally retarded [sic] and 10.7% were learning disabled (Petersillia, 1997: 5).

### **Prisoners**

French (2007) argues that *persons with disability may experience much more intense negative outcomes from incarceration than other persons, and advocates ...as far as possible, offenders with disability, those on remand, and those found unfit to be tried, should be subject to community-based detention in custodial accommodation*

*options integrated into local communities (101/106)*. The intense negative outcomes to which people with intellectual disability are exposed in prison include:

- Particular vulnerability to physical violence and abuse from other offenders, including sexual assault;
- Increased risk of emotional and psychological abuse, leading to or exacerbating psychosocial impairment, alienation, social withdrawal and anti-social behaviour;
- Vulnerability to ongoing influence by negative role models, and role expectations, in the correctional environment, leading to the intensification of offending and anti-social behaviour;
- Engagement in relationships with other offenders that may continue a cycle of criminal and anti-social behaviour post release;
- Unmet need resulting from inadequate, poorly adapted or inaccessible corrections-based counselling or rehabilitation programs; education programs (such as literacy and numeracy education); and employment and vocational education programs;
- More likely to be stigmatised as a result of their incarceration, due to their status as both ex-prisoner and person with a disability, both groups which suffer the effects of negative stereotypes and community prejudices (French, 2007: 101/102).

### **3.2 Increased Vulnerability**

A range of factors increase the vulnerability of people with intellectual disabilities both to criminal victimisation and to offending behaviours. These factors interact together in complex ways:

#### **1. The characteristic features of intellectual disability. These include:**

- impaired ability to learn, comprehend, retain and apply information;
- poor adaptive skills needed for effective social functioning, such as communication, self-care, home living, social and interpersonal interaction, use of community resources, self-direction, academic achievement, work, leisure, health, and safety;
- maladaptive behaviours, including:
  - impulsivity
  - limited ability to manage extreme emotions
  - limited ability to understand and relate to the emotions of others
  - limited inhibition
  - suggestibility
  - poor problem-solving skills
  - limited volition

- poor memory
- poor literacy and communication skills (French, 2007: 29; Hayes, 1992: 203).

## **2. Exposure to high risk environments:**

- congregated accommodation with high need populations (boarding houses, hostels, and group homes);
- service systems with high need populations, such as people who are homeless, and/or who have drug and alcohol, mental health, disability issues, and/or are in supported employment;
- service environments targeted by perpetrators seeking vulnerable victims.

## **3. Poor experiences of relationships:**

- dependence on others, often for life basics such as personal and physical care, accommodation, financial management;
- lack of supportive relationships, independent of services;
- abuse, neglect or exploitation by unscrupulous care-givers, friends, family members, or community members.

## **4. Learned behaviours:**

- compliance;
- passivity;
- helplessness;
- dependence on others;
- de-sensitised to or tolerant of abusive behaviours.

## **5. Social disadvantage:**

- isolation and loneliness, with few positive role models;
- limited education, including sex and relationships education;
- lack of awareness of rights and criminal behaviours;
- unemployment;
- homelessness;
- poverty (French, 2007: 23-25).

## **6. Negative beliefs and stereotypes:**

People with intellectual disability are also affected by negative stereotypes. These stereotypes may not be voiced, but nevertheless influence the way in which society views and relates to people with an intellectual disability. Some examples include beliefs that people with intellectual disability are:

- psychologically unstable, unpredictable, predatory and dangerous;

- manipulative and exploitative in their relationships and interactions;
- untrustworthy, deceptive, and 'cunning';
- bestial, sexually lascivious and predatory;
- a general menace to the community, needing to be contained;
- asexual, eternally childlike, or eternally innocent;
- so unattractive that they would not be the subject of sexual desire;
- so unattractive that they should be grateful for any sexual contact;
- less sensate than others, and so do not suffer the same level of psychological and physical trauma as other victims of sexual assault (French, 2007: 21, 30).

### 3.3 Differential Treatment

People with intellectual disability face significant barriers to gaining justice within the criminal justice system, both as victims and as alleged offenders.

#### **As Victims:**

*One of the greatest challenges for the prevention of crimes against persons with disability is the general failure of the community, and of social service and law enforcement agencies in particular, to characterise particular conduct towards persons with disability as criminal behaviour (French, 2007: 17).*

Whilst being over-represented as victims of crime, people with intellectual disability are, paradoxically, distinguished from the general population by the low reporting rates of crimes perpetrated against them. A 1992 Victims of Crime Survey conducted by the Australian Bureau of Statistics found that *40% of the crimes against people with mild mental retardation [sic] went unreported to the police, and 71% of those against people with severe mental retardation [sic] went unreported (Petersilia, 2000: 1-2).* American researcher Dick Sobsey found that abuse against disabled persons is reported at a much lower rate, and results in fewer prosecutions and convictions, than crimes against non disabled persons (cited in Petersilia, 1997: 4).

#### **As Offenders:**

A number of researchers have suggested that negative stereotypes about people with intellectual disability also underpin the differential treatment of this group when they enter the criminal justice system as suspects and/or alleged offenders. The New South Wales Law Reform Commission (1996) refers to a body of research that

demonstrates people with an intellectual disability, in contrast to the general population:

- are more likely to be arrested, questioned and detained for minor infringements of public order law;
- are more likely to come before the courts;
- may be persuaded to confess to a crime they have not committed;
- may not have their 'rights', such as the right to silence, explained in a way they can understand;
- may be convicted more easily as they tend to confess rather than plea-bargain;
- may be more often refused bail;
- may receive more custodial sentences, because of the lack of alternative placements in the community;
- tend to serve longer sentences or a greater percentage of their sentence before being released on parole;
- may require maximum security facilities for segregation and 'protection'.

### **3.4 Poor Identification of Intellectual Disability**

*At the present time there is no systematic identification of people with ID/CI [Intellectual Disability/Cognitive Impairment] in the justice system, at any of the entry points through Legal Aid, Corrective Services, Police, Courts or other agencies. As a result, many people with ID/CI are not recognised as having a disability and therefore miss out on relevant protections of the law, diversions from the criminal justice system and other appropriate assistance (Hayes and Bleakley, 2006: 16).*

To ensure people with an intellectual disability receive appropriate supports and have access to justice as either a victim or an offender, it is critical that their intellectual disability be identified as early as possible upon contact with the criminal justice system. Hayes and Bleakley note in their report prepared for the 2006 Collaborative Project<sup>10</sup> that, where a person's intellectual disability is not identified, the ensuing consequences are likely to include:

- police interviewing the person with an intellectual disability without an independent third person present, as required by the Queensland Police Powers and Responsibilities Act (2000);

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<sup>10</sup> A joint research project undertaken by Legal Aid Queensland, Disability Services Queensland, Queensland Department of Corrective Services, Office for Women, Department of Local Government, Planning, Sport and Recreation, Department of Justice and Attorney-General, and Queensland Police considering the legal needs of people with an intellectual disability or cognitive impairment.

- lawyers not using available defences or diversions that would be of greatest assistance to the person with an intellectual disability;
- corrective and community services not assisting the person with an intellectual disability to access tailored programs designed to assist rehabilitation (17).

There are specific consequences for each individual whose intellectual disability is not identified, but failure to *systematically* identify intellectual disability amongst populations who become involved in the justice system also has consequences. Currently, there is no reliable data on the prevalence of intellectual disability in the Queensland criminal justice system, and therefore limited information on which to base interventions, service development, and allocation of resources.

There are many factors that can impede timely identification of a person's intellectual disability.

- Intellectual disability is often not obvious from a person's appearance, and may not be obvious during limited or brief contact with a person.
- People with intellectual disability may be adept at hiding their disability, out of shame, embarrassment, or fear, or because of past negative experiences.
- Some people with intellectual disability may have strong verbal skills and they may 'present well', or they may deny they have a disability, even when explicitly asked.
- Many people with an intellectual disability do not have a formal diagnosis.
- Behaviours that may indicate intellectual disability can be misinterpreted by others as the person having a 'bad attitude'; as story-telling; or as indicators of guilt. Examples of such behaviours include aggression, joking and other inappropriate behaviour, evasive or inconsistent answers, and difficulties with time or sequencing events.
- Limited understanding of intellectual disability and limited ability by most members of the community to recognise when a person has an intellectual disability.

## **POLICE**

Section 422 of the Police Powers and Responsibilities Act 2000 (PPRA, 2000) states that police must not question a person whom they "reasonably suspect...is a person with impaired capacity" unless—

(a) before questioning starts, the police officer has, if practicable, allowed the person to speak to a support person in circumstances in which the conversation will not be overheard; and

(b) a support person is present while the person is being questioned.

Police must also comply with these procedures if it becomes apparent during questioning that the person being questioned is a person with impaired capacity.

Section 422 offers additional protection to people with impaired capacity, above the general safeguards afforded to all people under the PPRA, 2000. The general safeguards include:

- s416: Police must not obtain a confession by threat or promise.
- s418: Before being questioned, a person may phone or speak to
  - a friend or relative, and ask the person to be present during questioning;
  - a lawyer and arrange for the lawyer to be present during the questioning.Police must delay questioning for a reasonable time (usually no more than 2 hours) to allow the person to contact these persons, or to allow time for the support person to arrive.
- s419: Police must provide reasonable facilities to enable the person to speak to a friend, relative or lawyer and, where practicable, to speak to their lawyer in circumstances in which the conversation cannot be overheard.
- s420: Police must allow the support person to be present and give advice to the person during the questioning (unless police consider the other person is unreasonably interfering with the questioning, when they may exclude the person from being present during questioning).

It is important to note that s441 (PPRA, 2000) outlines a number of circumstances when the provisions of s418-422 *do not apply*, including:

- where a police officer reasonably suspects that compliance with the section is likely to result in:
  - an accomplice or accessory of the relevant person taking steps to avoid apprehension; or
  - an accomplice or accessory being present during questioning; or
  - evidence being concealed, fabricated or destroyed; or
  - a witness being intimidated;
- where police, with regard to the safety of other people, reasonably suspect questioning is so urgent that it should not be delayed (in which case they are not required to delay questioning, for example, to await the arrival of a support person).



## LAWYERS

The failure of legal services and lawyers to identify that a person has an intellectual disability compounds the disadvantages experienced by this group within the criminal justice system. Philip French, in his 2007 report on the experiences of people with a disability in the Queensland criminal justice system, states *failure to identify that a defendant has a cognitive impairment is one of the most significant access to justice issues for this population group (90)*. In exploring this issue, French highlights the following:

- *Most lawyers are not skilled in identifying persons with impairment, where that impairment is not physically obvious;*
- *...even where the legal practitioner may suspect that a defendant has an impairment that may have significant implications for their defence, this suspicion is often left unexplored.* French posits a lack of time and resources to pursue the matter, or an ill-informed view that the person is well-advised to plead guilty and get on with their lives, as two possible explanations for this scenario.

(French, 2007: 90-92)

As noted previously, where a person's intellectual disability is not identified in a timely manner upon their entry into the criminal justice system, their access to legal representation, diversionary options, and specialist supports designed to meet their specific needs is severely compromised. Where lawyers are skilled in identifying intellectual disability, they can positively influence the outcomes and experiences of people with intellectual disability in the criminal justice system. French (2007) declares it essential that *lawyers are equipped with the tools, and develop the skills, to screen those persons with whom they have contact in relation to possible impairment and disability (92)*.

The New South Wales Intellectual Disability Rights Service (2004) provides the following information to assist lawyers to identify whether a person they are representing has an intellectual disability:

- *You cannot tell whether a person has an intellectual disability by their appearance. You will need to observe the client for yourself.*
- *If you suspect that your client might have an intellectual disability you could ask them. If they do not know, aren't sure, or do not identify as having an intellectual disability, you could ask:*
  - *Did they go to a special school or were they in a special class?*

- Do they receive services from the Department of Ageing, Disability and Home Care (DADHC) [or Disability Services Queensland]?
- Do they live in a group home or residential centre?
- Do they have a case or key worker?
- Do they receive the Disability Support Pension?
- Do they work in a sheltered workshop?

## **COURTS**

French (2007) outlines a range of disadvantages people with an intellectual disability face in court (when their disability is not identified), stating that these compound the pre-existing disadvantage with which they come to court, further diminishing their prospects for access to justice (94):

- information about court processes, and initiating forms, etc may not be available in accessible formats...persons with disability may therefore find it difficult to obtain information about, or comprehend or comply with, required administrative processes;
- court officers manage the court flow by issuing rapid verbal cues to what may be a crowded waiting room (for example, calling a matter on the list). It may be impossible for a person with a hearing impairment or cognitive disability to hear or comprehend these instructions;
- [a person with cognitive disability]...may not comprehend why they must wait (sometimes several hours) for their matter to be called. They may become confused, frustrated or lose concentration and leave the court. The experience of sitting for several hours in a crowded waiting room may also be very anxiety provoking...;
- ...persons with intellectual impairment may be easily confused during cross-examination, and are particularly susceptible to leading questions. The credibility of their evidence is therefore often easily undermined;
- court time is usually under great pressure, and consequently there is typically an associated pressure to move through a case expeditiously. This may present great difficulties...for a person with intellectual disability who requires regular breaks in order to maintain concentration;
- due to poor self-esteem and self-image persons with disability are often easily intimidated by the courtroom and courtroom players, making it more difficult for them to assert and explain their account of a set of events (French, 2007: 94-95).

Furthermore, unless a person's intellectual disability is identified to the court, the court is unlikely to consider issues of legal capacity, fitness for trial, eligibility for special witness provisions, and/or appropriate diversion and sentencing options.

### **CORRECTIVE SERVICES**

As discussed previously, corrective services agencies in Queensland do not routinely screen offenders to identify intellectual disability (this is also the case across Australia and internationally). Failure to identify people with intellectual disability within the corrective services system has several implications:

- people with intellectual disability are not provided with appropriate protection, services and supports within correction environments, including prison;
- rehabilitation and positive re-integration into the community is seriously inhibited by a lack of expertise within corrective services in relation to impairment, disability and offending;
- social services and other agencies fail to participate in appropriate post-release planning and service provision;
- capacity to develop effective strategic policy and develop innovative programs targeting this group is significantly compromised in the absence of accurate and reliable data (French, 2007: 104).

The Department of Corrective Services (DCS) assesses all offenders on admission to prison with the *Immediate Risk/Needs Assessment (IRNA)* screening tool. This tool is not administered to offenders in community-based correctional settings. The IRNA is administered in a one-on-one interview by specially trained staff, and screens prisoners for a number of risks, including:

- *Dysfunctional behaviour, such as history of custodial breaches and incidents*
- *Public risk, including risk of escape*
- *Individual risk of self-harm or suicide*
- *Immediate individual needs*
- *Acute medical needs*

(Hayes and Bleakley, 2006: 18)

The following questions are asked to screen for intellectual disability:

- *Has attended special school? Yes/No*
- *Has attended sheltered workshop? Yes/No*
- *Receiving a pension for sickness or disability prior to imprisonment? Yes/No*
- *Unable to write name and address on a sheet of paper? Yes/No*

If 'yes' is answered to one or more of these questions, it is DCS procedure that:

- the prisoner is referred to a psychologist;
- their placement within the prison is discussed;
- any ongoing intervention requirements are to be documented and forwarded to the Offender Management Co-ordinator (Hayes and Bleakley, 2006: 19).

Whilst the INRA might, at first, appear to be an appropriate way to screen for intellectual disability amongst inmates in Queensland prisons, Hayes and Bleakley (2006) suggest that, upon closer examination, the INRA is a scientifically unproven tool that yields little in the way of reliable data, and even less in the way of beneficial outcomes for prisoners with an intellectual disability (and in the longer-term, for the communities to which they will ultimately be released). Hayes and Bleakley's (2006) key criticisms of this screening process are:

- *No information was available from DCS on the reliability or validity of these four questions, their correlation with standardised tests of intelligence and adaptive behaviour, the accuracy of diagnosing possible ID/CI [Intellectual Disability/Cognitive Impairment], and the rate of false positives and false negatives.*
- *The waiting period before the inmate receives an appointment with a psychologist is likely to be weeks.*
- *[Upon seeing a psychologist] the range of psychometric testing that would routinely be administered varies from centre to centre and would depend upon presenting issues.*
- *There is little in the way of systematic outcomes for this cohort, for example, the placement of prisoners who are diagnosed as ID/CI and the services which are routinely available to them in either mainstream or special units (19).*

This ultimately disappointing reality echoes French's (2007) assessment that *of course, it is widely recognised that the realities of correctional facilities and corrective interventions are often very different from their stated purpose and objectives*(101).

### **3.5 Communication Issues**

The barriers people with an intellectual disability face in accessing justice within the criminal justice system include those resulting from communication issues - including both the communication and comprehension skills of the person with an intellectual disability, as well as those of non-disabled people within the criminal justice system, in their interactions with people with an intellectual disability.

A person with an intellectual disability may have the following communication issues:

1. They may not understand a crime has been committed (against them or by them), due to their:
  - lack of education and knowledge of rights and responsibilities;
  - history of victimisation, resulting in tolerance or 'normalisation' of abuse.
  
2. They may not report a crime due to:
  - not knowing where to get help;
  - not being able to overcome fear of the consequences of reporting the crime (be those real, threatened, or imagined);
  - fearing the police or those in authority.
  
3. They may face difficulties being believed, due to:
  - not being able to explain that a crime has occurred;
  - not having their complaint taken seriously;
  - not having their word believed over that of perpetrator (who may be a staff member, friend or family member, or other person in authority);
  - not remembering and communicating detailed evidence;
  - prejudicial beliefs about people with intellectual disabilities.
  
4. They may face difficulties in pursuing legal redress, due to:
  - police and legal representatives assuming that people with an intellectual disability do not make good witnesses (Armstrong, 1997: 1).

5. They may have memory and recall difficulties:

People with an intellectual disability can experience difficulty recalling dates, times and sequences of events. In legal and court proceedings, it is therefore important that officers take care to ensure that information is not considered inadmissible solely because a person's statement or report contains apparent inconsistencies in details of time, dates and sequences of events. These inconsistencies may need to be considered in terms of the person's intellectual disability, rather than in terms of vague, evasive, or misleading evidence.

6. They may have difficulties with concentration:

People with an intellectual disability may have difficulties maintaining concentration for an extended period of time, and may require regular breaks when engaging in any form of cognitive activity, for example, giving statements or evidence, or being cross-examined.

7. They may have poor literacy skills:

The majority of people with an intellectual disability have poor literacy skills (that is, reading and writing skills), with the degree of the problems varying with the severity of the intellectual disability. Written materials are likely to confuse people with an intellectual disability, and some may attempt to mask their lack of comprehension by, for example, agreeing with police or court officers that they have read and understood, and can sign, written statements as a true and accurate record of what they have said.

8. They may have difficulties with comprehension and abstract understanding:

People with an intellectual disability can hide that they are having difficulties understanding what is happening because they want to “fit in” and not be seen as “different”. Their verbal and/or non-verbal cues to indicate understanding and agreement (“Yes, Your Honour”, nods of the head) may need to be checked by asking the person to say in their own words what they think the judge, police, or court officer has said.

9. They may be easily suggestible:

Research demonstrates that people with an intellectual disability *are more likely to admit to offences, including ones they did not commit, perhaps from a desire to please the police officer or because they do not want to acknowledge that they did not understand the police officers' questions* (Beyond Bars: alternatives to custody, Fact Sheet 10, March 2007). It is common for people with an intellectual disability to tend to agree with what others say or suggest, and to be easily influenced by external factors. In many situations, their level of frustration diminishes their self-confidence and induces them to rely on the suggestions of others (Baroff, 1991: 63). They may also tend to agree with authority figures because they want to please or placate them. They may therefore be more likely than others to be influenced by the suggestions of authority figures, such as police officers, judges and barristers.

### **3.6 Legal Capacity**

Legal Aid Queensland defines legal capacity as *the ability to make binding legal arrangements, sue and make other decisions of a legal nature. It is linked to whether you have the mental capacity to understand the significance of what you are doing* (Legal Aid Queensland 2008b). The law assumes that all people over the age of 18 have legal capacity unless a Court or the Guardianship and Administration Tribunal has ruled they do not have capacity (*Guardianship and Administration Act 2000*;

Villamanta Disability Rights Legal Service Inc, Information Sheet: "Capacity and Consent", September 2004).

It is a fundamental principle of the common law justice system that an accused person must not be subjected to trial and punishment that they do not understand. Though not specifically defined in the Queensland Criminal Code or Mental Health Act, to be considered 'fit for trial' an alleged offender must have the legal capacity to:

- understand the charges against them;
- respond to those charges with a plea;
- have a basic understanding of the court process and be able to participate in proceedings; and
- be able to assist their legal representation with their defence or answer to the charge (Scott, 2007: 327).

In Queensland, when there are concerns that an alleged offender does not have legal capacity, there are two systems for determining whether a person is 'fit for trial'. Section 613 of the *Criminal Code Act 1899* requires a jury to be empanelled to find whether the accused is capable of understanding the proceedings at the trial so as to be able to make a proper defence (Scott, 2007: 328). Alternatively, the matter can be referred to the Mental Health Court to determine whether the alleged offender is fit for trial (see pages 24-26 of this manual for further information on the Mental Health Court).

The National ProBono Resource Centre states that *in most cases intellectual disability will not affect legal competence although by definition cognitive capacity is limited* (Anderson, 2005). Even where a person with an intellectual disability has legal capacity and is able to participate in a court process, there are some common difficulties people with intellectual disabilities experience in court proceedings:

- **Swearing the Oath.** The common law requires that a person taking an oath understands its nature and implications. People with an intellectual disability may misconstrue their involvement as a victim or witness to mean that the court case is, in essence, a competition between themselves and the alleged offender. They may believe that, if the alleged offender is found to be innocent of the charges, then they will automatically be found guilty and sent to prison. Checking that a person with an intellectual disability understands the oath needs to be done carefully, so as not to cause fear and anxiety.

- **Judge's Clarification.** The judge may ask questions to clarify whether or not a person understands a question or an implication. Given the tendency for intellectually disabled people to agree with authority figures and to mask misunderstanding, they may indicate that they do understand a question whereas, in fact, they do not. It is helpful if the judge can ask the witness or claimant to say what they understand, *in their own words*.
- **Cross-examination.** Stressful and anxiety-provoking for anyone involved in the adversarial justice system, cross-examination can cause extreme confusion and distress for people with intellectual disabilities. They may require frequent rest intervals to aid concentration, and prior preparation with a worker to understand why and how this legal process occurs.



# Part 4: Supportive Practice

## 4.1 Holistic Support Framework

People with an intellectual disability require informed holistic support to participate meaningfully in the criminal justice system, experience fair and just outcomes, and reduce the chances of their ongoing involvement in this system. There are two essential elements:

**1. Support to participate meaningfully in criminal justice system processes. This includes:**

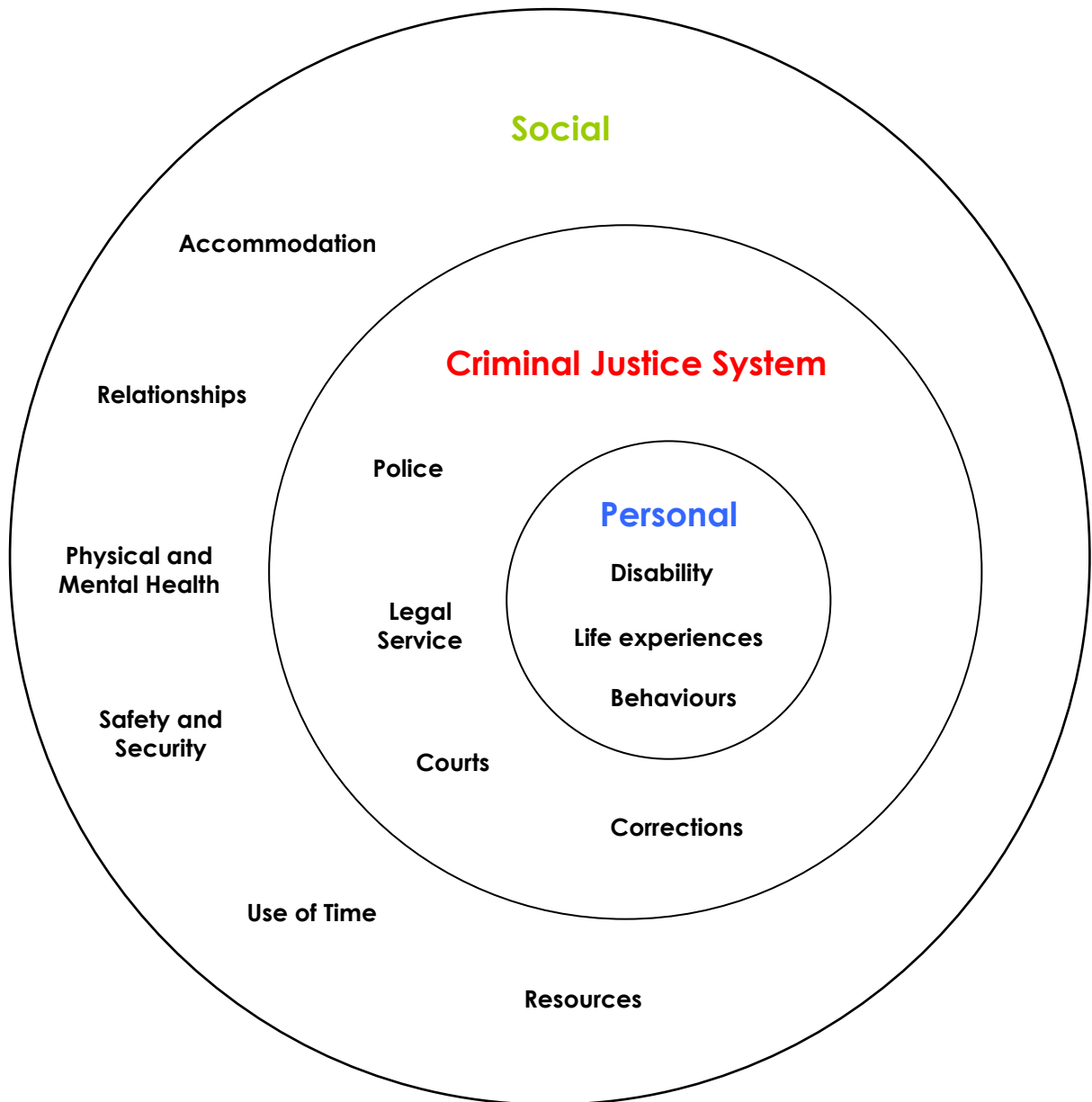
- supporting the person to obtain the legal advice, expertise and information they need to understand and make decisions in relation to the legal processes they are involved in;
- supporting the person to understand and participate meaningfully in any processes affecting them, including giving accurate information in language the person understands;
- assisting police, legal representatives, and court officials to understand the needs of the person, their disability, their lifestyle;
- assisting the person with an intellectual disability to communicate with police, legal representatives, and court officials, and assisting these people to understand what the person has said.

**2. Support to address personal and social issues contributing to involvement in the criminal justice system (which, left unresolved, could lead to ongoing engagement with this system). These issues include:**

- Homelessness
- Poor physical and mental health
- Lack of safety and security
- Limited meaningful use of time
- Insufficient material and financial resources
- Abusive and exploitative relationships (current or past)
- No meaningful social role
- Drug and alcohol issues
- Parenting issues, including involvement in the child protection system (as a child and/or a parent)

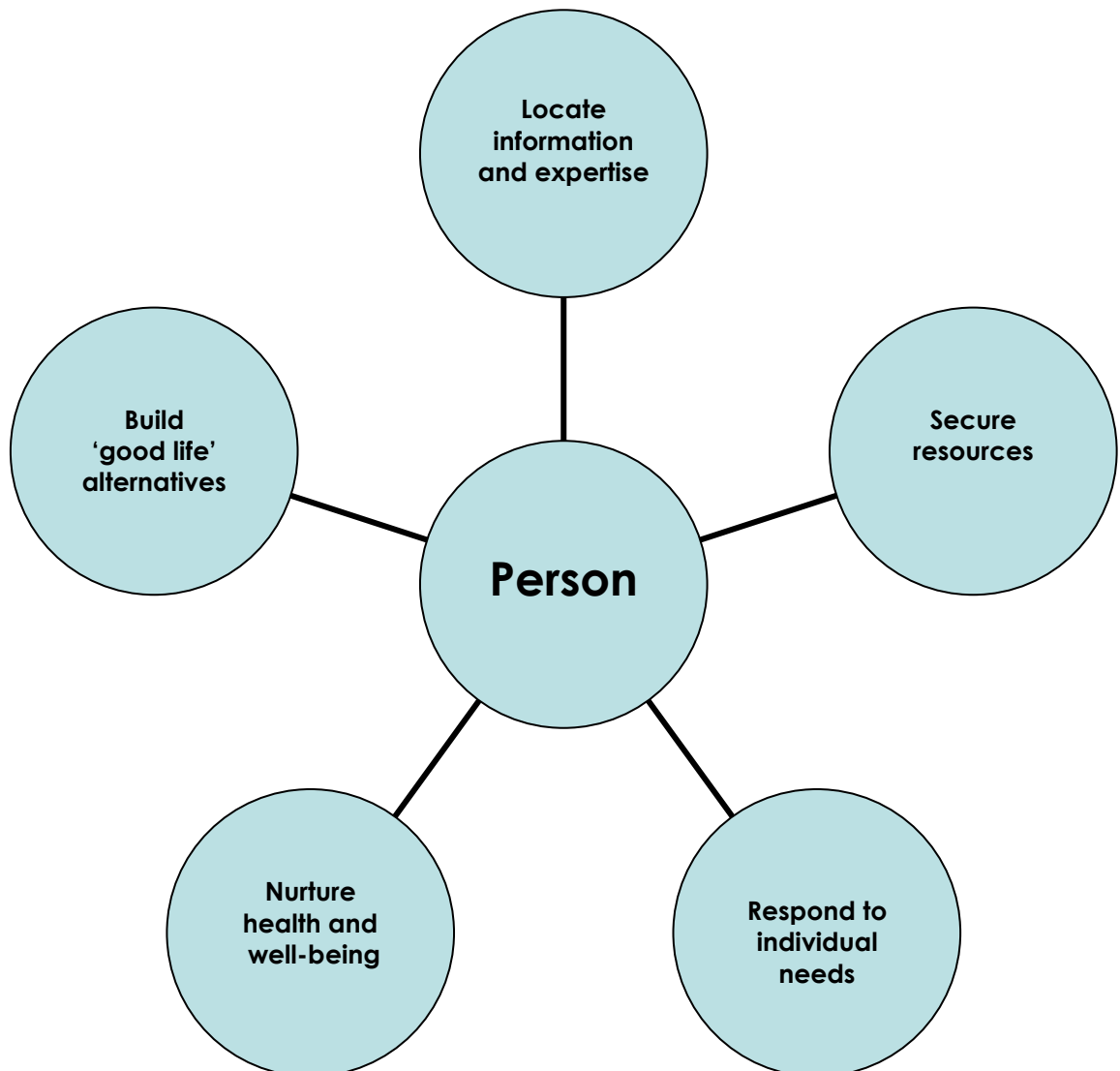
## Support Contexts

The following diagram depicts some of the issues and contexts a support worker may need to address:



## Intervention Framework

The intervention framework below is a tool to assist support workers to formulate a comprehensive response to those issues impacting on the person's entry into the criminal justice system, and their experiences within that system.



The five elements of the intervention framework are as follows:

## **1. Locate information and expertise**

People with an intellectual disability need access to a range of information and expertise to give them the best chance of achieving fair and just outcomes in the criminal justice system, and to prevent their ongoing involvement in this system. It is of critical importance that support workers assist the person to obtain legal advice before making any decisions that have legal consequences. Workers can also assist people to obtain and understand more general information and advice on processes and procedures they are involved in, for example, what will happen at court.

Beyond legal information and expertise, people can also be assisted by specialised supports, such as:

- Counselling
- Mental Health services
- Drug and alcohol services
- Accommodation services
- Financial and material aid services
- Disability support
- Employment support
- Parenting support

*It is important to note*, that simply giving a person with an intellectual disability information, or providing them with a referral to an appropriate support service is, alone, unlikely to result in great change or improved outcomes. For many reasons – including fear, lack of confidence, intimidation, poor literacy, comprehension and communication skills, learned helplessness, systemic prejudice and discrimination, poverty and social exclusion – people with an intellectual disability are unlikely to be empowered by information alone. It is the presence of an active, engaged and supportive person alongside the person with an intellectual disability that is key to their being able to take advantage of relevant knowledge and information.

## **2. Secure resources**

People with an intellectual disability experience significant social and material disadvantage which increases their vulnerability to involvement in the criminal justice system. Left unresolved, these issues can result in ongoing involvement in the criminal

justice system. Support workers can assist people to break this cycle by supporting them to:

- locate and maintain appropriate accommodation;
- apply for financial assistance, such as Disability Support Pension;
- negotiate transport needs that might lead to people missing appointments, court dates, probation meetings (for example, no money for train fare).

### **3. Respond to individual needs**

People with an intellectual disability have individual needs associated with their disability that impact both on their entry into the criminal justice system and their experiences within that system. Support workers can assist people to explain their disability to the different people and organisations working within the criminal justice system. They may need to address the following:

- Communication needs: for example, using appropriate language, checking understanding, allowing plenty of time to process information, being aware of people's tendency to agree with authority figures.
- Emotional needs: for example, signs of stress and anxiety (and managing these), desire to be seen as competent leading to reluctance to admit disability or lack of understanding.
- Planning and organisational skills: for example, poor time management, poor short term memory, literary and numeracy difficulties.
- Lifestyle issues: for example, impact of homelessness, vulnerability to exploitation and abuse, lack of supportive relationships.

### **4. Nurture health and well-being**

Many factors contribute to the over-representation of people with an intellectual disability in the criminal justice system, both as victims and offenders (see Part 3: Literature Review). Social disadvantage associated with unmanaged health issues, addictions, trauma, experiences of exploitation and abuse, and lack of accommodation all impact on the entry and continued involvement of people with intellectual disabilities in the criminal justice system. Supporting the person's health and well-being is integral to effectively supporting that person through the system, and (perhaps more so) supporting them to avoid ongoing engagement. Support may need to include:

- physical and mental health treatment
- drug and alcohol treatment
- adequate food and nutrition

- counselling support to assist trauma recovery
- lifestyle changes to promote safety and security (for example, safe and appropriate accommodation).

## **5. Build 'good life' alternatives**

Many people with an intellectual disability have had little opportunity to experience social contribution, achievement and recognition, and little encouragement to set life goals or chase dreams. Oftentimes people have few supportive adult relationships in their lives, and are excluded from opportunities for positive connection with others. Many people with an intellectual disability have experienced exploitation, exclusion, and abuse. Without aspirations, people lose motivation and hope. Without friends and positive relationships, people don't value themselves or their gifts. Within this impoverished life context, people with an intellectual disability can become extremely vulnerable to entanglement in negative and exploitative relationships. It is often through or within these relationships that they become involved in criminal behaviours – as a victim, an offender or, at different times, both.

Both victims and offenders with an intellectual disability require a sense of hope and support to overcome their challenging experiences in the criminal justice system. To avoid becoming trapped or defined as either 'victim' or 'offender', people need both to heal from experiences of victimisation and to take responsibility for having perpetrated a crime. Both victims and offenders can be supported to dream and build an alternate 'good life'.

Key elements in supporting a person to dream and build a 'good life' include:

- supportive adult relationships (this can include family, friends, neighbours, community of interest, work colleagues);
- meaningful use of time (this might be paid employment, voluntary work, or an engaging hobby);
- valued social role (this may be as worker, daughter, neighbour, friend); and
- aspirations and dreams (everything that gives hope for the future and brings positive meaning to each day).

## 4.2 The Support Worker Role<sup>11</sup>

It is widely accepted that people with an intellectual disability are disadvantaged in criminal justice processes, and require supports and safeguards to ensure they are treated fairly within that system.

*An intellectual disability makes it harder for a person to understand, and protect his or her interests in dealings with police and courts. In particular, the reliance on verbal communications in police interviews and court processes severely disadvantages people with intellectual disabilities, who tend to have major deficits in communication skills (Legal Information Access Centre, 2002).*

Many states, including Queensland, have responded by legislating that people with an intellectual disability must have a support person present during a police interview.

There are, of course, many processes within the criminal justice system, in addition to police interviews, where people with an intellectual disability require support. A range of people can provide support - social workers, disability support workers, police, lawyers, court staff, volunteers, family members, and friends. Many workers and professionals interviewed for the VOICES 2008 project said it is imperative that people providing support understand the responsibilities of their role and the legal consequences of their actions - consequences that will be borne by the person with an intellectual disability, not the support worker.

Whilst the need for support workers is clear, we must also be aware of the potential pitfalls associated with the role.

- Support workers need to be aware that their actions can have significant legal consequences. Unless they are working in a legal advice role, the golden rule is **support workers do not give legal advice**. This includes much less obvious advice than "You should plead guilty". Statements and questions such as "I don't think you need a lawyer", "You should answer all the police questions", or "Was the man wearing a blue shirt?" can all have significant consequences within the criminal justice system - by compromising the person's legal rights, in the case of the first two statements, or tainting evidence, in the case of leading questions such as the second.

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<sup>11</sup> For the purposes of this Practice Manual, *support worker* is a social worker (or other relevantly qualified professional) with a considered practice framework who is providing support to a person with an intellectual disability involved in the criminal justice system.



- Support workers should take care not to speak *for* the person with an intellectual disability. The role of the support worker is to assist the person to understand the process, be understood, and have their rights protected. When a support worker influences, or is perceived to have influenced, a person's statement, this can damage the person's credibility as a witness and the reliability of the person's evidence.
- Support workers must also take care not to disadvantage the person with an intellectual disability. Their role is not simply one of silent observer. They must provide active support when this is called for - for example, where they think the person with an intellectual disability does not understand a question, is giving inaccurate information, or is distressed or tired. A Victorian review of an independent third person scheme (which provided trained support people to assist people with an intellectual disability in police interviews) found that the presence of a support person could lead suspects "to dispense with his or her rights and created a false impression of a fair and voluntary interview" (Legal Information Access Centre, 2002).

The following sections 4.2.1 to 4.2.5 provide an overview of the different stages people can move through in the criminal justice system, and outline suggested practice responses.

### **4.2.1 First Response**

It is not uncommon for a support worker to be the person to whom an alleged crime is first disclosed – by either a victim or an offender. Support workers occupy a position of trust in the lives of the people they work with, and are - by their very title - a provider of assistance. Furthermore, many people with an intellectual disability have few supportive relationships in their lives, and many have few other options when it comes to a trusted person with whom to share difficult information.

Workers can also become aware of an alleged offence indirectly, through their involvement in the life of a person with an intellectual disability and/or their contacts with other people, services and systems involved with the individual. Whatever the circumstances, from the moment a support worker receives information of an alleged offence, they take the first step on a very particular practice journey. Depending on whether the person they are supporting is the victim of a crime or the alleged offender, they will travel different, but associated, paths.

The following practice advice is based primarily on information shared by the legal and social work practitioners interviewed during the research phase of this Practice Manual, along with the suggested practice outlined in the original VOICES Workbook.

## **A. Supporting a person who discloses they have been the victim of a crime**

### **1. Offer emotional support**

- Listen to the person's disclosure. Comfort the person and offer them emotional support. Reassure them that what has happened to them is not their fault.
- Provide the person with information about appropriate victim counselling and support services, and assist the person to access these if they wish.

### **2. Consider safety and security**

- Encourage the person to consider their safety and security. Are they at risk of further victimisation? Do they need to move to a different physical location?
- Where the person has sustained injuries and has not sought medical intervention, support the person to seek medical attention, and explain the role/responsibilities of the Government Medical Officer and the official report the Officer will make.

### **3. Provide information**

- Inform the person of any obligations you have to report the information the person has disclosed. Name any confidentiality issues. Explain that you may be called as a witness if the matter proceeds to court.
- Support the person to clearly describe what has occurred. Be mindful of not asking leading questions. Ask open questions (What/When/Who/Where). Diary the exact words the person uses to describe the incident, preferably at the one sitting, along with the time between the event's occurrence and the time when the person first discusses the event. The purpose of this task is not to interview the person or interpret their information, rather it is to clearly document their account of events at the time of first disclosure (the person's capacity to retain or recall this information may reduce as time passes).
- Discuss and clarify the options of reporting/not reporting the incident to the police, and the likely course of events associated with each option.
- Support the person to consult a lawyer or a specialist agency, if they wish.
- Support the person to make a complaint to the police, if they wish.

### ***Practice Wisdom...***

Martha disclosed sexual abuse by her mother's partner to Elizabeth (support worker). She had disclosed a number of times previously, and went to [Support Service], but she didn't want to take action. The abuse increased and Elizabeth phoned Martha's dad. Martha, Elizabeth and Dad went to the Police Sexual Assault Unit at Roma Street. At this time Martha was still staying at her Mum's, and the sexual abuse was continuing. Interview 17

If a young person wants to make a complaint to the Police, they should get advice beforehand to help them understand what might be in store for them. Legal processes can be lengthy and traumatic. Interview 2

If a young person makes a first complaint to a worker, and you go with them to the Police, then the worker can be called as a witness, and you then can't provide court support to the young person. Interview 2

## **B. Supporting a person who discloses they have committed a criminal offence, or is alleged to have committed a criminal offence**

Advocacy organisations unanimously advise that a person who is alleged to have committed a criminal offence should not speak to police without first seeing a lawyer. In addition to supporting the alleged offender to obtain legal advice, support workers should also undertake the following:

### **1. Consider any ethical issues**

- Reflect on any personal and/or professional values which may limit your capacity to provide effective support to the person. Where you cannot provide effective support, you should arrange alternative support options.
- Inform the person of any obligations you have to report disclosure of the alleged offence (taking care not to compromise the safety of yourself or any other person). Where obligations are not clear, seek guidance through reflecting with colleagues on the circumstances of the matter and the professional and ethical obligations of the worker.

### **2. Consider safety and security**

- Encourage the person to consider their own safety and security. Are they at risk of victimisation from any third party? Do they need to move to a different physical location?

- Consider the safety of others, including yourself, and take any necessary precautions to ensure the person does not commit further offences.
- Assess the person's risk of self-harm, and take precautions to avoid this.

### **3. Provide information**

- Inform any lawyer or legal service that the person has an intellectual disability. Explain what this means for the person, and what they find difficult.
- Support the person to effectively communicate all relevant information in any legal interviews, and to understand any information and advice the lawyer provides.

### **4. Offer emotional support**

- Listen to the person's disclosure and acknowledge any distress they are experiencing.
- Where the person makes an informed decision to go to the police to report the matter, support them to do this.

### ***Practice Wisdom...***

Inform them not to say anything. Don't admit anything. Don't try to help the police get information. For more heinous crimes, support should be negotiated until a lawyer is engaged. Supporters need to ensure that the person's rights are upheld in an interview until a lawyer gets there. Interview 1

The person should be supported to get legal advice before saying anything. Tell the person they don't have to say anything (and that it might be better if they don't). If they police have a case against you, they will charge you. You can make a statement through your lawyer later. Interview 9

When a person is interviewed by police, the support worker's key role is to get the person legal representation. Tell the person to wait for a lawyer before they are questioned. Sometimes people already have a lawyer. Involve them quickly if the person is on probation. Interview 13

Betty (Landlady) told Anna (support worker) that Dave had committed a number of offences. Betty had encouraged Dave to confess to the police. Betty called the police and they came to the house and took Dave to the Station. The next day Dave drove around with the police and showed them the location of all the offences. Sometime during the next couple of days the police re-interviewed Dave. Dave had no support during these police interviews. Dave was charged with 22 offences. The police gave Dave a charge sheet and a copy of the tapes to Betty. By the time Anna had heard about the situation, Dave had been charged. Interview 8

## **4.2.2 Police**

In most circumstances, police are the first point of contact a person has with the criminal justice system – either as a victim or an alleged offender. Following police contact, a person may move, variously, through subsequent contact points, depending on:

- the nature of the offence;
- whether they are a victim or an alleged offender;
- whether police are able to gather enough evidence to lay charges;
- the type of court proceeding they participate in; and
- the outcome of these proceedings.

At each contact point, there are supportive practices that can be tailored to the needs of the individual.

### **INITIAL CONTACT WITH POLICE**

#### **A. Person with an intellectual disability initiates contact (with or without support)**

Sometimes a person with an intellectual disability (or their significant others) will initiate contact with police by reporting an incident. This is most likely to occur where the person has been the victim of a crime, but a person can also contact the police to report their involvement in a criminal offence as an offender. When supporting a person with an intellectual disability to report a crime to police, the support worker should do the following:

1. Explain any obligations you have, as a support worker, to report the incident.

2. Discuss the possible consequences of making a report to the police. Where the person has been involved in committing an offence, support them to obtain legal advice before speaking with the police. Explain to the person the process they will experience when they go to the police station.
3. If the person wants to proceed with going to the police, or you are obligated as a support worker to report the incident, you can offer to accompany the person to the police (giving consideration to any safety issues). Discuss with the person ways how you might support them in their communications with the police.
4. Introduce yourself to the police as the support worker for the person with an intellectual disability. Name the organisation you work for. Give the police your business card if you have one. Explain your support role, and how you can assist the person in their communications with the police.
5. Support the person to inform the police that they have an intellectual disability. In addition to sharing the basic information that a person has an intellectual disability, explain what this means for the person's behaviours and interactions, including :
  - communication style
  - stress behaviours
  - capacities and challenges
  - lifestyle issues
  - suggestibility - vulnerable to agreeing with authority figures.

## **B. Police initiate contact**

Police contact may begin with police stopping a person (often in a public place) to ask them questions, usually because they suspect them of committing a criminal offence. Support workers are generally not present, and do not become aware of police contact until later.

Support workers can provide proactive support by discussing with people what they can do if they are ever approached by police and questioned. For example:

- "Police have the right to approach and question any person at any time. This does not mean you are under arrest."
- "Anything you say to police can be used as evidence by police at a later time."

- “You must answer certain police questions (especially where police reasonably suspect that you have broken the law):
  - You must give police your correct name and address. Police must warn you that it is offence to give a false name and address.
  - You must give police your date and place of birth (if you are involved in a drug matter).
  - You must answer police questions if police suspect you have broken traffic laws or if you have seen an accident”.
- “Aside from the above questions, you generally have the right to remain silent and not answer further police questions.”
- “It is a good idea to ask a lawyer for legal advice before answering any police questions beyond those questions outlined above”.

(Legal Aid Queensland, 2006b)

*An important caveat* on proactive information-sharing is that research and practice experience consistently demonstrate that people with an intellectual disability (along with many other members of the general population) are unlikely to remember this information in a situation where they are stressed or fearful - having been stopped and questioned by the police, or asked to go with the police. In this situation, most people with an intellectual disability do whatever the police tell them to do, and answer whatever questions the police ask. Where people don't acquiesce to police requests, the other likely scenario is that their stress and anxiety cause them to act out verbally or physically, thereby worsening their situation.

The key piece of proactive advice workers should offer (and reiterate) to people with an intellectual disability in relation to possible contact with police is to tell the police they have an intellectual disability (though many people will not do this), and ask for a support person as soon as possible. It may assist some people to carry the contact details for their support person with them at all times.

### **C. Support worker initiates contact**

Support workers can also proactively initiate contact with police, with the aim of making police aware of a vulnerable person with an intellectual disability living in the community. The support worker can give police key information about the person, their particular vulnerabilities and/or behaviours that might place them at risk of harm or involvement with police. When police are aware of the person, they can help prevent incidents involving the person from escalating. If they have contact details

for a support worker, they may contact the worker as an independent support person to be present at a police interview.

### **Practice Wisdom...**

Educate police to increase their awareness. Support workers are helpful in understanding the nuances and impact of intellectual disability, and liaising between police, lawyers, and the person with an intellectual disability. Interview 1

I have told police about communications or mannerisms that may help them to understand the person's behaviour. For example, a person was biting herself, not as self-harm, but as a response to stress. Interview 3

Be proactive and ring the police. Let them know the person has an intellectual disability, and to contact the service if any issues arise. Interview 6

Jenny and Lisa (support worker) presented at the police station. The tone the police officer used suggested that he didn't believe Jenny. After Lisa explained Jenny had a disability, the police officer took Jenny more seriously. Interview 6

If the person wants to talk to the police, attend the interview as an independent third person. Highlight with the police the person's decision making issues, and highlight issues of suggestibility. Interview 9

Bill has lots of difficulties reporting to police. He finds it hard to get his story across, and to understand what the police are saying. Henry (support worker) goes with Bill to help him negotiate this process. You need to go ASAP, otherwise Bill will go on his own, and conflict will likely ensue. Bill has become abusive towards the police when he didn't feel they were taking him seriously. The police almost arrested Bill for his abusive behaviour. Henry followed up with the police to explain and ameliorate the situation. Interview 11

Introduce yourself as a worker. Explain who you are, who you work for, the group of people you work with. Give the police your card. If things get out of hand, try to calm it down. Police appreciate it when you let them know that the person has a disability and what they find difficult as a result of this. Interview 11



### ***Lived Experience...***

They are just out to get you. If there is something they can pin you on, they will. They're out to blame you for things you haven't done. If you try and be honest with the police, and tell them what you've done, they try and put other stuff on you too. They have all the power, they don't care about trying to help you out, they just have all the power and want to do you for whatever they can. Dave

Oh, they were OK, I suppose. People say they're doing their job, I suppose. Um, but yeah – they sorta didn't give me a lift back to the car...and I ended up walking back along the Gateway Arterial, along Nudgee Road. Peter

### **ARREST AND CHARGES**

Police do not always arrest or interview a person before charging them with a criminal offence. Police can charge a person with a criminal offence in one of three ways:

- Arrest
- Complaint and summons, mailed to the person with a court date on it
- Notice to appear, issued 'on the spot' to a person who has committed a (usually minor) criminal offence, with a court date on it

If the person does not attend court on the nominated date, a warrant can be issued for their arrest (Legal Aid Queensland, 2008b).

Police can arrest a person:

- whom they catch breaking the law;
- whom they reasonably suspect has broken the law; or
- whom they reasonably suspect is going to break the law.

(Legal Aid Queensland, 2008b)

Police:

- generally do not need a warrant to arrest a person;
- should inform the person that they are under arrest and for what offence;
- should inform the person of their right to silence;
- can arrest and detain a person **without** charging them or taking them to court if police reasonably suspect they have committed an indictable (serious) offence.

Police can detain a suspect for up to eight hours while they investigate the matter, and can question the person for no more than four out of these eight hours (Legal Aid Queensland, 2008b).

When police arrest a person, they take them to a watch-house and formally charge them. The person may or may not be interviewed. The person is usually fingerprinted and photographed. In most cases, a support worker will not be present when police arrest a person with an intellectual disability. Support workers can, however, proactively share information with a person with an intellectual disability about what they should do if they are arrested (remembering the limitations of proactive information sharing, as discussed on page 70):

- “Go with police calmly and quietly. If you refuse to go with police, you are breaking the law and can be charged with resisting arrest. Police can use as much force as is reasonably necessary to arrest you.”
- “You have the right to remain silent and not answer police questions (other than those questions outlined above in *Initial Contact*).”
- “Police should take you to court as soon as possible. You have the right to ask for bail if you don't go straight to court.”
- “You have the right to contact a friend, relative or lawyer if you have been charged with an indictable (serious) offence”.

(Legal Aid Queensland, 2008b)

### ***Practice Wisdom...***

The police sent Kevin a letter instructing him to attend court. The police informed Helen (support worker) that this notice was being sent. Kevin was not questioned by the police as they had enough evidence. Interview 1

### ***Lived Experience...***

They come around, two detectives, and charge me for break and entry, with intent...two counts of fraud, two counts of stealing...They took me down to [Suburb] Police Station. Two detectives charged me. One of them took photos... They took my finger prints and did a DNA on me...saliva. Then, um, they dropped me back home. Wayne

The start of it was I had a VM Commodore, unregistered, had stolen plates on it, and... got pulled up near Toombul...Then went to the Police Station. They was finding out where I got the plates from. Peter

## **BAIL**

Bail can be granted by the police watch-house keeper. Bail releases a person charged with a criminal offence from custody. If the person is granted bail, they must sign paperwork promising to attend court on a nominated date. Sometimes bail conditions are specified, such as reporting regularly to a police station, living in a particular place, or staying away from a particular person.

If the police watch-house keeper refuses to grant bail, the person remains in custody and must be brought before a magistrate at the earliest possible opportunity (often the same day). An application for bail may be made to the magistrate if the police have not granted bail. In deciding whether to grant a person bail, the court considers:

- the nature and severity of the alleged offence;
- whether the person has somewhere to live;
- whether the person has a job;
- whether the person has a criminal record;
- if the person has failed to appear at court in the past;
- if the person is a danger to others;
- if the person is likely to break the law again.

If a person is charged with an offence for which the maximum penalty is at least 2 years imprisonment, or with an offence against the *Bail Act 1980 (Qld)*, the court or police must refuse to grant bail unless the defendant shows cause why their detention in custody is not justified (*Bail Act 1980 Qld, s16(3)(a)*).

(Legal Aid Queensland, 2006b)

### ***Bail Act 1980 (Qld): “intellectually impaired person”***

The *Queensland Bail Act* was amended in 2000. Amongst other changes, police, judges and magistrates were empowered with the discretion to release an “intellectually impaired person” without bail. Section 11A of the amended *Bail Act* allows for a person with “impaired capacity” to be released “at large”, or “into the care of another person who ordinarily has the care of the person or with whom the person resides”. When they are released, Section 11B of the *Bail Act* mandates police to give the person a written release notice detailing the offence they are charged with, when and where they must attend court, and a statement that a warrant may be issued for their arrest if they do not attend court on this date (*Bail Act Qld 1980; QAI, 2008*).

Previously, where a person was deemed not to have the capacity to undertake bail (that is, they did not understand the agreement they were undertaking) and they could not locate a support person to act for them, police and courts had no choice but to remand the person to jail (where they would be vulnerable to significant abuse, exploitation and trauma).

### ***Supporting a person with an intellectual disability in relation to bail matters***

Support workers can assist a person with an intellectual disability to be granted bail by providing information (either verbally or in a letter of support) to the police watch-house keeper or magistrates court that supports a case for bail to be made. This information should include any current and new supports that would assist the person to comply with the terms of the bail agreement, and reduce the likelihood of the person re-offending. For example:

- safe and secure accommodation;
- daily activity and meaningful use of time;
- positive, supportive relationships, including family and friends;
- material assistance, including food and rent;
- relevant health interventions, including mental health and/or drug and alcohol treatment.

When a person with an intellectual disability is released on bail, a key element of the support work is to assist them to understand and comply with the bail conditions. If the person does not attend court on the nominated date, or does not comply with all bail conditions, they are breaking the law and face additional charges. Where a person has failed to comply with the requirements of bail, they should be supported to seek legal advice immediately (Legal Aid Queensland, 2006b; AussieLegal, 2008).

### **POLICE INTERVIEW**

A person with an intellectual disability may be formally interviewed by police as a victim or witness in a criminal matter, or as a suspect in a criminal offence. The Police Powers and Responsibilities Act 2000 (PPRA) mandates that police must not question a person they reasonably suspect to have an intellectual disability unless a support person is present. Unfortunately, police often have difficulties identifying intellectual disability, and many people with an intellectual disability are interviewed by police without a support person present.

**If you become aware that a person with an intellectual disability is to be interviewed by police, you can:**

1. Inform police that the person has an intellectual disability, and explain any difficulties they experience, including:
  - comprehension
  - communication
  - difficulties with abstract concepts such as time
  - tendency to be easily suggestible
  - tendency to agree with authority figures
  - tendency to be easily coerced.
2. Inform the person they have the right to remain silent and not answer police questions. Do not tell the person whether they should answer police questions or not, simply inform them of their right to silence.
3. Advocate that the person with an intellectual disability speak to a lawyer prior to being interviewed, and have a support person or lawyer present during the interview. Support the person to communicate effectively with their lawyer if they have one.
4. If the person decides to speak to the police, you can assume the role of independent support person (with the consent of the person with an intellectual disability). Take care not to speak for the person being interviewed or influence their statement in any way, so as not to contaminate the evidence.
5. Advocate video or audio recording of the person's statement. Police officers and prosecutors are keen to word statements in as detailed a format as possible to build the best possible case for the prosecution. Problems can arise when the person being interviewed has an intellectual disability and the written statement taken at the police interview is not couched in their actual words. Later, in the courtroom, what the person says may seem to contradict the written statement because they are not familiar with the wording of the statement. Making a video tape of an intellectually disabled person's evidence can help ensure that oral and written evidence are consistent.

6. In the interview, assist to the person to:
  - understand police questions, and state if you do not think the person has understood the question or had adequate time to remember events;
  - give accurate and relevant information to police, and state if you think the person is giving inaccurate information;
  - manage stress, anxiety and fatigue, for example, request a break if you think the person is no longer functioning well;
  - manage suggestibility and any tendency to acquiesce inappropriately.
  
7. At the conclusion of the interview, ensure that the person has adequate assistance to check their statement and knows they may obtain a taped copy of the interview.
  
8. Following the interview, support the person with an intellectual disability to understand what may happen next - for example, court procedures, and when - possible timelines and dates to remember. Explain any requirements such as victims not contacting the alleged offender, or bail conditions for alleged offenders.

### ***Practice Wisdom...***

Thomas disclosed to Henry (support worker) that he had been raped. The perpetrator was an ex-hostel worker. Thomas said the perpetrator had sex with him. Henry processed with Thomas what he wanted to do. Henry rang Taskforce Argos and made a time to meet. Although Thomas was scared that going to the police might make the perpetrator come back, he went with Henry to a meeting with a police officer. When they went to the police, Thomas's story had so many variations the police said they couldn't follow up and it was unlikely to go anywhere. Thomas's story changed and he gave contradictory answers to questions. Thomas said "Yes" to whatever the police said. Thomas was very frightened throughout this process, and was confused and couldn't find the right words. Thomas's comprehension outstrips his ability to communicate. This makes it very hard for him to be a witness. Interview 11

Police can't identify when a person has an intellectual disability. Often they think they are intoxicated or drug addicted. When a person is interviewed by police, the support worker's key role is to get the person legal representation. Tell the person to wait for a lawyer before they are questioned. Interview 13

Elizabeth (support worker) supported Martha through a process of making a complaint to the police. The police officer asked Martha to tell her story. The police officer met with Martha about six times, weekly or fortnightly. Martha was interviewed by the same police officer each time. Telling the story was really hard for Martha. She wanted to leave quickly. We always encouraged her to stay a bit longer. The police officer was very patient and allowed things to move at Martha's pace. This officer treated Martha with respect and as an adult. The police officer didn't exclude Elizabeth: she worked as a team with her and was open to her being part of the process. Sometimes police don't want support workers to say anything.

The police officer was very supportive of Martha. She tried to put things in place to ensure Martha didn't go back to Mum's. The police tried to progress at Martha's pace in terms of contacting the perpetrator. Eventually the police officer made the call to bring him in for questioning when Martha couldn't make this decision. When the perpetrator was interviewed, the times and dates Martha gave didn't match. Mum gave the perpetrator an alibi. The police told Martha they couldn't proceed with the charges. Martha was very upset. Martha had to sign some paperwork indicating that she wouldn't proceed with the complaint. The police took time to explain this to Martha, and told her she could come back in the future to reactivate the complaint. The police reiterated to Martha that the perpetrator's behaviour was wrong. Interview 17

### **4.2.3 Legal Services**

*Perhaps more than any other factor, access to justice for persons with disability in the criminal justice system is dependent upon the quality of the legal information, advice and representation they receive. It is therefore quite alarming to note that access to legal services, and the quality of legal services, were identified by many stakeholders as two of the most significant barriers to justice for persons with disability in Queensland (French, 2007: 75).*

#### **A. ALLEGED OFFENDERS**

As noted previously, people with an intellectual disability are often questioned by police and charged without the knowledge or support of their support worker or another person, and without receiving any legal advice or representation. Where the support worker is involved at the point of police questioning, they need to inform the person with an intellectual disability that they do not have to answer police questions,

and support them to see a lawyer. In all other situations, the person should be assisted to seek legal advice at the earliest opportunity. Supporting a person with an intellectual disability to seek legal assistance is a two-fold task:

- i) supporting the person to locate a lawyer for advice and/or representation; and
- ii) supporting the person in legal interviews and meetings.

### ***Practice Experience...***

Lawyers will normally value the role of social workers in interviews as it is a buffer with the client. Social workers should explain their role at the beginning of the interview.

Interview 14

Support workers can't give instructions to the lawyer – only the person being represented can give instructions. Interview 9

The support worker can explain the person's situation and issues to their legal representation. They can collect and pass on relevant information about the person, for example, medical reports and assessments. This can help avoid repeat assessments, or can inform new assessment. Interview 2

It is important that lawyers get the story straight and are aware of any factors that might have led to the offence. The lawyer also needs to establish whether the person can give instructions. Interview 10

#### **i) Supporting a person to locate a lawyer for advice and/or representation**

A person charged with a criminal offence can seek legal assistance from:

- a) a private solicitor
- b) a community legal centre
- c) Legal Aid Queensland
  - Duty Lawyer Scheme
  - Legal Aid Grant

At the earliest opportunity, assist the person with an intellectual disability to decide which of these options will meet their legal needs, and is available to them.



### **a) Private solicitor**

A person can locate a private solicitor through the phone book, by contacting the Queensland Law Society, or by asking family and friends to recommend a solicitor they know. Private solicitors charge for their services and these costs may be prohibitive to a person on a Disability Support Pension.

At the initial appointment with a solicitor, support the person with an intellectual disability to request information about the solicitor's:

- *experience and expertise:*
  - does the solicitor have experience in criminal law?
- *services:*
  - what steps are involved in the matter?;
  - what 'tasks' the solicitor will undertake to perform?;
  - how long the matter will take to be finished?
- *fees:*
  - what the solicitor will charge for their legal services (some solicitors will charge a flat 'fee for service', others an hourly rate)?;
  - what other costs are involved (for example, photocopying, expert reports)?;
  - whether the client pays costs 'as they go' or at the conclusion of the case?.

Some lawyers provide an initial appointment free of charge. Others charge for it. The person needs to understand if a fee is to be charged *prior* to attending the first appointment. Where the solicitor's fees for a matter will exceed \$750, a client agreement must be prepared and signed by the solicitor and client (unless the matter is urgent). The client agreement outlines in writing what work the solicitor will do, and what fees and charges the client must pay for this work (Legal Aid Queensland, 2006c; Queensland Law Society, 2008).

### **b) Community Legal Centre**

Community legal centres are independent, non-profit organisations that work in partnership with Legal Aid. There are 34 accredited community legal centres across Queensland. Community legal centres provide a free-of-charge service and give an initial consultation to any member of the community. Ongoing assistance is only offered to people who do not qualify for Legal Aid and are unable to afford a private solicitor (where the legal centre has available resources, and considering the merits of the case).

### **c) Legal Aid Queensland**

People with an intellectual disability most commonly receive legal advice and representation through Legal Aid. This may be through the Duty Lawyer Service, or a grant of Legal Aid. In the first instance, the person who has been questioned or charged in relation to a criminal offence can call Legal Aid on 1300 65 11 88 to get initial legal advice, available either over the phone or face-to-face (an appointment is arranged by telephone).

#### **Legal Aid Duty Lawyer Service**

Legal Aid Queensland co-ordinates free duty lawyer services in 100 magistrate's and children's courts across Queensland. This service aims to ensure that people appearing in court after being charged with a criminal offence have access to independent advice and representation.

- If a person pleads guilty, the duty lawyer takes their instructions and makes submissions to the court on their behalf.
- If a person pleads not guilty, the duty lawyer cannot conduct their defence, and they have to make an application for a grant of legal aid.
- Duty lawyers do not represent people charged with drink driving or simple traffic offences, unless the person is at risk of imprisonment (Legal Aid Queensland, 2006c).

Support workers should also be aware of some of the issues French (2007: 83) has identified in relation to the Legal Aid Duty Lawyer Service:

- *In most Courts, the Duty Lawyer Service operates under significant pressure. Lawyers conducting the service must see, advise, and represent many clients in the course of the Court session.*
- *In most cases, [the duty lawyer] will not have had contact with a defendant before, and only have very limited time to gain an understanding of the legal issues and provide advice.*
- *...the Duty Lawyer's focus tends to be on the legal issues, and in the present, rather than on the personal characteristics of their client, or their past or future. Within the limited time available, and with this focus, duty lawyers often fail to identify a person with a cognitive disability, or simply do not have time to investigate the matter, even where this may be suspected.*
- *[Duty lawyers] may tend to take the view that a matter is best resolved through a plea of guilty, rather than by entering a defence, or canvassing issues relating to*

*the defendant's capacity before the court. The lawyer's focus is on the immediate resolution of the problem, as it presents on that day, by the most direct and resource un-intensive means available. This strategy is oblivious to the cumulative impact of these 'quick-fix' solutions, which can be very negative in the case of a repeat offender.*

- *...the immediate availability of a lawyer to enter a plea of guilty, but not defend a charge, creates an incentive to plead guilty...a person with a cognitive disability is more likely to do what is necessary to obtain assistance, even if the appropriate course would be to enter a defence.*

### **Assisting a person with an intellectual disability to use the services of a duty lawyer**

- After arriving at court and putting person's name on the court list, locate the duty lawyer's office and put the person's name on the duty lawyer's list. Inform the duty lawyer at the earliest opportunity that the person is appearing in court and wishes to speak with them. If the duty lawyer is busy, wait nearby until the person is called.
- Inform the duty lawyer that the person has an intellectual disability. Briefly explain the difficulties they will have understanding complex information when it is given hurriedly. Ask the duty lawyer to consider whether any defence to the charges could be mounted on the grounds of the person's cognitive impairment. Ask whether the matter can be referred to the Brisbane Magistrates Court Homeless Persons' Court Diversion Program.
- The duty lawyer will explain the charges and ask the person what they intend to plead. The duty lawyer will represent a person who is pleading guilty for most offences where they are not at risk of going to prison. Support the person to make a decision about pleading to the charges. Be aware that the person will tend to agree with the duty lawyer so, if they dispute the charges, ensure they understand that they can plead not guilty.
- If the person wants to plead not guilty, the duty solicitor can ask for an adjournment to allow the person to apply for legal aid and/or apply for bail if necessary.
- Ask the duty lawyer if you can sit with, or close behind, the defendant when they are called into court. Discuss how you will let the duty lawyer know if the defendant doesn't understand any questions asked of them, or answers incorrectly.
- Ask the duty lawyer to explain what will happen after the court appearance – based on the defendant's plea.

- Be prepared for the meeting with the duty lawyer. They have very little time to speak with each client, and the meeting will be very quick. The duty lawyer will not be interested in extensive information.
- Bring a support letter to give to the duty lawyer outlining:
  - your name and professional qualifications;
  - your organisation and the type of work you do;
  - how long you (or your organisation) have worked with the defendant;
  - the defendant's disability, and how this impacts on them;
  - information about the defendant's lifestyle, if relevant to the offence;
  - information about the support you provide to the defendant, and how this will assist them to avoid future re-offending (outline any other supports in the person's life);
  - information about the type of sentence that will be most meaningful to the person and most likely to assist them to refrain from re-offending.

*A note on the support letter:*

The points outlined above presuppose the person is pleading guilty to the charges. Where a person disputes the charges and intends to plead not guilty, the support letter is given to the defendant's legal representative at a later date (and should not discuss the offence, unless offering information to support the defendant's plea of not guilty).

### **Practice Experience...**

You meet the duty lawyer on the court day and give them as much information as possible, very quickly. The duty lawyer has very little time for each client and will be very quick. It's good to give them a letter outlining the person's current and future supports. This will be handed up to the magistrate in court and you may be asked questions. The law is often confusing, for example, it does not distinguish between a perpetrator and an accessory. It is difficult to explain this to the young person, and hard for them to understand. The young person is likely to do what the duty lawyer says. The key benefit of the support worker's contact with the duty lawyer is that the person's intellectual disability is identified, however, this won't necessarily achieve a better legal outcome". Interview 6

Initially, Anna and Martin saw the duty lawyer at court, in relation to arson charges. The duty lawyer got the matter adjourned because it was out of the ordinary. She gave Martin a Legal Aid application to complete. After Martin received a grant of legal aid, the same duty lawyer was Martin's lawyer. Interview 8

## **Legal Aid Grant**

When a person is charged with a criminal offence, they can apply for a grant of legal aid for legal representation in court. The person seeking assistance must complete an application form (available from all Legal Aid Queensland offices, online at [www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au), or from a preferred supplier law firm). A legal aid lawyer can assist the person to make an application for legal aid representation.

### **Assisting a person with an intellectual disability to apply for a grant of legal aid**

- Support the person to complete the legal aid application form. Where the person has poor literacy skills, read the questions aloud, discuss with the person their response, and write the information for them. You will need to indicate on the form that you have provided this assistance.
- Legal Aid application forms now include a question asking the applicant to indicate if they have an intellectual disability and, if so, to provide information about their disability. Support the applicant to provide this information.
- Support the applicant to provide the following documentation with their application:
  - a copy of health care card or pension card
  - copies of any pay slips for the past four weeks (this includes pay slips for the applicant, their spouse, and any person who gives them regular financial help – unless they are in dispute with that person).
- Support the person to lodge the legal aid application at a Legal Aid office (most legal aid applications are assessed within a week).

Legal Aid Queensland use three criteria to decide whether a person will be granted legal aid:

#### **1. Means test** – The means test considers:

- the person's income and assets;
- the income and assets of anyone who provides the person with regular financial help (including spouse, relatives, friends);
- the number of people the person supports (including partner/spouse and children).

Most people who are reliant on the Disability Support Pension (and other Centrelink payments) for their income will meet the means test requirement for a grant of legal aid.

**2. Funding guidelines** – Legal Aid funds cases on the basis of priorities set by state and federal governments. More serious matters (which have more serious consequences if the defendant is found guilty) are more likely to receive a grant of legal aid. Criminal Law priorities include:

- District and Supreme Court criminal proceedings
- Indictable offences in the Childrens Court
- Appeals to the Court of Appeal or High Court
- Magistrates court committal hearings where the maximum penalty is more than 14 years jail
- Bail applications

**3. Legal merits test** – The merits of each case are assessed by considering:

- if the case is likely to succeed or fail if it goes to court;
- if a sensible person would risk their money to take the case to court;
- if the benefit the applicant will receive from having a lawyer justifies spending limited public funds on their case.

Legal aid recognises the significant difficulties people with an intellectual disability face in the criminal justice system, and seek to fund legal representation in these matters wherever possible. It is therefore critical to note in the person's application that they have an intellectual disability.

## **ii) Supporting a person in legal interviews and meetings**

Most people with an intellectual disability benefit from having a support worker attend legal meetings alongside them. The support worker can:

- support the person to remember the date, time and place of the meeting, and assist with transport (if necessary) to ensure they attend on time;
- explain that the person has an intellectual disability, and how this impacts on their daily life and their involvement in the criminal justice system; explain any additional issues that impact on the person, their offending behaviour, and their capacity to participate in the criminal justice system, including homelessness, mental health issues, drug and alcohol issues, parenting responsibilities; support can include a phone call to the lawyer in preparation for their first meeting with the person, particularly where the person may be uncomfortable about or unable to articulate what their disability entails;
- explain the person's communication and learning style, and suggest how their needs can be accommodated in legal meetings, including:
  - use simple language and give clear and concise explanations;

- gently check the person's comprehension and understanding by asking them to explain what they have understood;
- explain any tendency the person has to agreeing with authority figures or statements they don't understand; explain any aggressive behaviours the person may enact to mask confusion, fear and lack of understanding; watch for signs of stress and tiredness; allow time for breaks, or reschedule a further meeting at another time, if possible;
- advocate for the person's requirements in relation to pace and frequency of meetings; the person may require more than one meeting to process all the information, and each meeting may take longer than usual;
- support the person to give accurate and relevant information; gently correct or clarify incorrect information, or prompt the person to give information they have omitted; in doing this, take utmost care not to take over or speak for the person;
- support the person to understand information and advice provided by the lawyer;
- provide the lawyer with information about the person's medical history and any assessments of their disability (medical, school-based, psychological) which can both assist the lawyer to understand the person and represent them most effectively, and also avoid the need for repeat assessments;
- raise with the lawyer any concerns about the person's capacity to understand the charges brought against them, to plead to the charges, or to assist in their own defence (see Section 3.6 of this Practice Manual for information on legal capacity); discuss any issues relating to the person's capacity to give evidence, including difficulties they have with memory and recalling information, vulnerability to acquiescence and agreeing with prosecution questions/statements when they don't understand or are under stress; discuss whether any special witness provisions can be requested to assist the person to give evidence;
- raise with the lawyer any diversionary options that might better meet the needs of the person with an intellectual disability, such as Homeless Person's Court Diversion Program, Justice Mediation, Mental Health Court (see Section 2.3 of this Practice Manual for information on diversionary programs within the Queensland criminal justice system);
- write a support letter for the lawyer to tender to the court; key content includes:
  - your name and professional qualifications;
  - information about the service you work for and your position in this service;
  - length of time you have provided support to the person, and/or your service has worked with the person;

- information about the person's intellectual disability, lifestyle, supportive relationships, and support needs;
- information about the support your service (and others) provide to the person (highlight how this support has impacted on the person's involvement in the criminal justice system, and note how any new or changed support will respond to the person's current involvement in the criminal justice system, most importantly, how this support will reduce the risk of re-offending);
- information about how the person's accommodation and support arrangements may warrant the person being awarded bail;
- information relating to sentencing the person, where they plead guilty or are found guilty of the charges, including discussion of those sentencing options more or less meaningful to the person and more or less likely to assist them to refrain from offending behaviours in the future, as well as sentencing options which will expose the person to increased risk of exploitation, abuse, and re-offending;
- support the person to understand what happens next, how long it is likely to take for the matter to get to court, and will happen in the interim.

### ***Practice Experience...***

Often lawyers don't pick up on the person's intellectual disability (even though the person might be on the Disability Support Pension, or have gone to Special School). Often people are not tested whether they are fit for trial. Support workers can ask whether the person is fit for trial, or whether they should be referred to the Mental Health Court. Talk to the lawyer and ask them what they are going to do. Help make the lawyer accountable. Interview 9

The role of the support worker should be to help manage the process. The worker should talk to the lawyer to establish a shared idea of the worker's role. Support workers can assist by making sure the person gets to the appointment, by writing down information and assisting in filling out forms, and by getting information to the lawyer that they need. Support workers can help facilitate and negotiate time management (for example, "Can we meet for 1 hour today, and 1 hour next week?"). Interview 14



Support workers can help get the story out, but they tread a fine line. Criminal lawyers are very concerned with corruption of evidence by persons other than the victim or offender. Assist by asking questions, rather than rephrasing. Don't say, "I think he's trying to say...", and don't answer for the person. Say "In the car, you told me about X. Why don't you tell the lawyer about this?". Support workers can educate solicitors on speaking more simply. "Can you explain that more?" Support the client when they get upset - help them to calm down. Interview 14

Martin's lawyer was really good. She talked to Martin in a way he understood. She checked in with him, even when she was talking to me [support worker]. At the beginning of the meeting she engaged in chit-chat to set Martin at ease. Towards the end she gave Martin a bit of a lecture, but in an effective way, to help him see the seriousness of his situation. Interview 8

Dave's lawyer was really rushed, and not very engaging. She said nice things, but she didn't really listen to Dave. Dave would tend to zone out at the meetings. His level of interest waxed and waned. I can tell when he's not interested: he starts fidgeting, and gets a blank or confused look. Without a support worker, the meetings with his lawyer would be very confusing for Dave, and the information he provides would be full of inaccuracies. Interview 8

Kevin's lawyer was very good at using the most basic language to impress on Kevin the seriousness of his situation. His lawyer was very direct, and was good at communicating. He didn't confuse Kevin with 'on the one hand/on the other hand' statements. Interview 16

Pat had one meeting with his solicitor to gather evidence for his appeal. Pat invited his support worker Elizabeth to attend the meeting. Elizabeth checked with Pat prior to the meeting whether she could ask questions if she didn't understand something, or she thought he didn't. Pat agreed to this. In the meeting Pat answered 'yes' and 'no' to questions the lawyer asked, but which Elizabeth believed Pat didn't understand. Elizabeth gently countered Pat's incorrect responses, asking "Is that right?"; "Did you really say that?" The solicitor was very good at allowing enough time for Pat, but he initially blocked Elizabeth. Elizabeth was assertive about making it clear to the solicitor when Pat's answers were not accurate. Interview 17

### ***Lived Experience...***

I had to apply for a lawyer through Legal Aid...A lawyer filled out an application form for Legal Aid, and they pass you to a lawyer and a lawyer works through the case with you and takes you to court and you wait for the lawyer to turn up...Sometimes it takes so long. Wayne

Interviewer: Did the lawyer explain things to you?

Dave: Hmm, yeah, they tried.

Anna (support worker): Do you remember that meeting that we went to with all those people there? That meeting with the lawyer, two Adult Guardians, Homeless Persons Court Officer [sic]. There was a room full of people talking about you. How much you it do you reckon you remember?

Dave: Oh, probably about two percent of it. They were all talking, and I think I was thinking about my music, or something.

## **B. VICTIMS OF CRIME<sup>12</sup>**

In criminal matters, it is only the alleged offender (defendant) who has legal representation. The victim of the crime is not represented *per se*, but functions as a witness for the prosecution. There are, however, pre-court legal processes which victims of a criminal offence are involved in, and which support workers can assist the person with an intellectual disability to negotiate.

When police investigate an alleged offence, they collect evidence which can include physical evidence and information from people who know something about the offence - including the victim of the offence and other witnesses to the offence. If there is enough evidence to prosecute, police lay charges. The matter is then referred either to Police Prosecutions or (in the case of indictable offences) to the Office of the Director of Public Prosecutions (ODPP). Prosecutors check the evidence is sufficient to prove the charges and, if so, the matter proceeds to court. The prosecutor in a criminal matter must prove in court that the defendant is guilty beyond a reasonable doubt (so the evidence must be sufficient to prove this).

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<sup>12</sup> The following information on victims of crime was sourced from the Queensland Government, Department of Justice and Attorney-General, [www.justice.qld.gov.au](http://www.justice.qld.gov.au), viewed 9 September 2008.

The person who has been the victim of a crime provides evidence during the police investigation by making a statement to police and/or via a police interview. They may also give evidence in court via:

- a prosecutor's submission, whereby the prosecutor tells the court about the harm that has been done to the victim;
- sworn evidence, whereby the prosecutor calls the victim of crime as a witness at the sentence hearing to tell the court how they have been affected by the crime committed against them; or
- a victim impact statement, which is a written statement in which the victim explains how they have been harmed by the crime. This statement is presented to the court when the offender is being sentenced.

A victim impact statement is written by the person who has been the victim of a crime and details how they have suffered as a result of the crime. The person does not have to describe the details of the crime, just how it has affected them. Details to include are:

- **physical injuries**, including pain suffered, medical treatment received at the time of the offence, ongoing treatment, and any long-term physical effects of the injuries received;
- **emotional harm**, including how the offence has impacted on enjoyment of life, sense of well-being, and relationships with others (noting any counselling or therapy received as a result of the offence);
- **financial loss**, including how capacity to earn money has been reduced, additional expenses that have been incurred (for example, medical or counselling), and costs associated with repairing damage to property caused by the offence.

The defendant's lawyer may question the person who has been the victim of a crime in relation to the evidence they give in court and/or in relation to information they have provided in a prosecutor's submission or victim impact statement.

### **Special Witness Provisions**

Section 21A of the Queensland Evidence Act 1977 outlines special witness provisions designed to assist vulnerable persons who “*would be likely to be so intimidated as to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court.*” Under S21A, people who can be declared a special witness include:

- a child under 16 years; or

- a person who in the court's opinion would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
- who would be likely to suffer severe emotional trauma.

Special witnesses can request arrangements to assist them to give evidence, including:

- putting up a screen between the witness and the defendant;
- allowing the witness to have a support person in the court;
- allowing the witness to give evidence via video link from a remote witness room;
- closing the court to the public.

In matters prosecuted by the Office of the Director of Public Prosecutions (ODPP), a victim liaison officer is appointed to assist the person who has been the victim of the crime. The victim liaison officer will:

- keep the person informed on when the case will go to court;
- inform the person if they need to appear as a witness;
- arrange a meeting between the person and Crown prosecutor to discuss what will happen in court;
- assist the person to write a victim impact statement;
- refer the person to specialist victim support services.

**Assisting a person who has been the victim of a crime in preparation for a criminal matter going to court. As a support worker you can:**

- contact the ODPP or the Police Prosecutor and arrange a meeting **prior** to the first court date; advocate for arrangements that meet the person's need for adequate time to give, receive, and process information;
- support the person to inform the Prosecutor of their disability and individual needs, for example, communication style, memory, stress and anxiety issues, literacy, lifestyle;
- support the person to tell the Prosecutor about the offence, in their own words. Assist the person to manage stress, anxiety, and emotions associated with giving an account of what they have experienced;
- support the person to prepare a victim impact statement, with the aid of the Prosecutor and/or Victim Liaison Officer (it is important to support the person to make this statement in their own words, as they may be cross-examined about it in court);

- find out how the court process will unfold, including whether the matter will proceed to trial, court procedures, possible timelines, dates to remember, and any requirements (for example, not to contact the alleged offender or discuss the matter with other witnesses).
- find out whether the person will be required to appear in court as witness and, if so, advocate that the Prosecutor request special witness provisions and discuss what provisions would assist the person with an intellectual disability;
- write a court report detailing information about the person, their intellectual disability, the crime committed against them, and the impact it has had on them;
- support the person to prepare for court:
  - visit the court prior to the court date to see what it looks like and how it functions;
  - read through their victim impact statement prior to the court date.

Support workers must take care not to 'coach' the person's statements or testimony, or discuss the matter in too much detail. The person may be asked under cross-examination to describe any assistance they have received in preparation for court. Any allegations of coaching could discredit the person and their evidence in court.

#### *A note on support workers as witnesses*

Where a support worker is the first person to whom a person has disclosed they have been the victim of a criminal offence, that support worker can be called as a witness at court to give evidence about the disclosure. In this situation, the support worker can no longer support the person in relation to the matter, and should assist the person to engage with an alternative support worker. The reason for this is that witnesses in a criminal matter are prohibited from discussing the matter, as this could influence and/or alter their memory of what happened, rendering their evidence unreliable.

## **4.2.4 Court**

*Some of the main effects of having an intellectual disability concern a person's ability to understand, ability to communicate and ability to adjust to new situations. Due to these constraints going to court is especially difficult for a person with an intellectual disability. Many people in these circumstances may not acknowledge that they are having difficulty. They may just try to cope and hope things turn out OK (Intellectual Disability Rights Service n.d.).*

**Assisting a person with an intellectual disability (victim or alleged offender) to negotiate the experience of going to court**

**a) Preparing for court**

- Give information about what court they are going to and why. Take the person to see the court, if this will help reduce anxiety.
- Explain what will happen at court (see below).
- Support the person to understand the importance of attending court, and the consequences of not attending.
- Assist the person to remember the court date and make arrangements to support them to get there.
- Remind the person of any papers or documents they need to take to court, or take these on behalf of the person.
- Discuss with the person how they should dress for court (and assist them to locate appropriate clothing).
- Discuss with the person how people need to behave in court.
- Explain to the person that they will need to wait around on the day of court. Explain how the court list is ordered (private solicitor's first as people are paying for them, then legal aid, then first in best dressed). Plan ideas for occupying time, for example, games, ipod, other activities.
- Remind the person to eat breakfast (or leave time for a snack prior to court).

***Practice Experience...***

[The support worker] should explain the court processes - what will happen, what will be required of the person. The worker needs to understand or find out this information in order to do this well. It is important for support workers to understand court terminology and process – if you don't get advice. Interview 2

There is lots of waiting associated with going to court (before and after) and it's not a nice environment to be waiting in. Worker's need to prepare people for a long wait (if it's quick, then this will be a pleasant surprise). Everyone has to be there at 9am. Then you have to wait your turn. Without support the person could get bored and leave, or get confused and leave (for example, they might not understand that the court session will continue after the lunch break). Support helps. The person is not alone in the scariness. Interview 6

It's very important for family to be involved, if people have family. Interview 10

"Betty (landlady) wakes Dave up. She advises him on his wardrobe and suggests he change if he's not appropriately dressed. When Dave isn't feeling confident or comfortable, he dresses 'tough' (cargo pants, bandana, chains). When Dave [committed offence], he wore tank top and chains for a week. Once things were sorted out, he dressed 'dorkier'. Betty keeps him calm. She reminds him of things like time, hygiene and appearance. Interview 8

Support the victim in the context of other life aspects; this enhances their ability to move on. If a support organisation is involved, they should continue their usual work with the person and let [support service] do their specialised work. Don't let the legal process be the dominant piece of work in the person's life. Workers can increase the stress by talking about it too much. There are always large gaps in the process where nothing is happening for the victim. Remind them that it has not been forgotten, it's just that other players are engaged in their part of the process. It is important for the person to keep doing their usual thing - go bowling, going out." Interview 3

**b) On the day of court**

- Make an early morning phone call to ensure the person is up and getting ready (if necessary).
- Transport the person to court, or meet at the arranged location.
- Assist the person to find the correct court room and get their name on the court list.
- Assist the person to locate the duty lawyer or meet with their solicitor, and communicate any necessary information to them. Ask permission to sit near the client in court.
- Negotiate how to inform the duty lawyer or solicitor in court if the person appears not to understand, is distressed, or needs a break.
- Sit with the person and help them to stay calm while they wait to be called.

### ***Practice Experience...***

There's not much signage at court. We were not sure if we were where we should be. It was stressful. You're told to be at court at 8.30am. We waited in line to see the duty lawyer for 1 hour. Interview 8

Courtroom 1 on a Monday is a circus. It's very challenging for a person with a disability to enter this. Court is poorly designed, and people are crammed in, talking about their offence. It's rough. People with a disability might not handle this well, and might leave. Interview 10

It would be helpful for inexperienced workers to go to court with another worker who has done court work before. I had to support Peter [client] to go to court. He'd been to court a few times and knew more than me about where to go and what to do. I had to ask him what we do next. Interview 11

Tell the person that they will be scanned at the entrance, so they don't freak out. Tell them not to wear lots of chains (they'll set off the metal detectors), and don't take a nail file. I [support worker] go through the metal detector first and introduce myself as a social worker, then say "I'm here with ...". This lets the court staff know the person has special needs. Court staff are more likely to listen to a service than to the person going to court. Interview 8

### ***Lived Experience...***

All courts start at 9 o'clock, between 8.30 and 9.00...What you do is, you wait outside until your lawyer comes and you go inside and sit down and wait until you get called up. You turn off your mobile phone and look at your name on the board, 'cause in courts they have your name on the board and what court you're in. 'Cause there is six courts and all that... Depends on how many names is on the list. And they got numbers. Say number one is me... I'm up first, or I wait there down the bottom of the list. Wayne



### **c) In the Court Room**

- Sit near the person (ask the duty solicitor or lawyer for advice on how close you can sit).
- Inform the duty lawyer or solicitor if the person appears not to understand, is distressed, or needs a break.

### ***Practice Experience***

Dave was really concerned about prison and fixated on being locked up, no matter what we said to reassure him. Legal talk is very confusing. Supporters really need to understand what is happening and what to expect, in order to be able to explain to and support the person. Court and the people in it move fast. The Magistrates Court is fast and furious: they say what you did, then bang, the Magistrate's judgement. It's difficult not knowing what the lawyers are doing while the person is waiting to go to court, and what the likely outcome will be. This is especially difficult if the process takes a long time – seven months of not being sure of what is hanging over your head. Interview 8

If the court sees that the person is receiving assistance from a psychologist, school/Special Education Unit, or a support worker, it will make a difference to whether they get bail, and to the outcome of their court appearance (jail or probation). Interview 7

The Magistrate spoke to Pat to get an understanding of his perspective, whether he knew he'd done the wrong thing, and whether he was remorseful. The Magistrate talked about the impact on the victim. Pat was able to empathise with this and could understand that the lady felt scared. Pat was remorseful and wanted to be punished for his wrongdoing. Pat did really well talking in court. His legal aid solicitor had indicated what the magistrate would ask, so Elizabeth [support worker] was able to prepare Pat for these questions. Elizabeth's support letter and presence at court went in Pat's favour. Interview 17

### ***Lived Experience...***

You got the Magistrate, the judge, sitting up on his high desk. And then you got the police prosecutor, he reads out all the charges when you get charged...It depends on what kind of judge you have on the day. If he's a real good judge, he might give you a lean sentence or a fine, but if he's a mean judge, he might put you in jail...I had a nice judge, a brand new judge...sort of not experienced, but I only got a fine out of it. Wayne

The mainstream court was really strict. The judges are your enemy. They see you as a criminal and want to punish you for breaking the law. They're not really caring. They don't want to know why you did it, they just know you did it. They don't really care. Dave

What I would say about that is don't do drugs, don't break the law, and don't smile in court. If you don't do drugs and don't break the law, you won't get in trouble...If you smile in court, they think you're happy about what you've done, and think you don't feel bad about it. Dave

### ***The Homeless Person's Court Diversion Program, Brisbane***

They care more about what made you do what you've done, or why you did it. The judge is a lot nicer...I got to play my single and show my art...That was to show them what I had been doing, that I'm keeping busy...The prosecutor didn't like it. The prosecutor was old and cranky; I don't think he has a girlfriend. He wasn't happy that I got a better deal. He wanted it to be worse. I got a three year probation. He wanted me to go to jail. Dave

It was a normal court room, with a prosecutor, Legal Aid lawyer, and... me. You got the judge up the front, you got the people who are gonna be up next behind ya. And what the prosecutor does is, he reads out the offences, like the drink driving offence or what the person had done, and the legal aid lawyer says this is what's happening, yada, yada, yada, and the judge makes things for a minute, and OK, you gotta sit however many months banned from driving, plus you gotta report in once a month for so many months. Peter

#### **d) Post-court**

- Discuss with the person what happened in court and the outcome of the court hearing.
- Explain to the person what will happen next (ask a legal or court representative if unsure).
- Support the person to obtain any necessary paperwork, for example, court orders must be collected before the person leaves court.
- Help the person to understand any conditions they must meet, for example, in relation to bail, probation, or other sentencing orders.
- Support the person who has been the victim of a crime to understand what will happen next, whether there will be any future court appearance (and when), and any requirements (for example, not to discuss the case with witnesses, not to contact the offender).
- Provide the person with emotional support to express any feelings they have about the court experience, or future court appearances.
- Take the person to their home, or other safe and supportive place.

In most cases, both victims and defendants are free to go once the court hearing is over. The following Section 4.2.5 outlines the situation where a defendant is remanded to custody.

#### ***Practice Experience...***

Check if you need to wait and get any paperwork (Probation; Good Behaviour Bond; Community Service Order). The person may need to stay and sign a form. If you are unclear about whether you need to wait for anything, the worker should check this with court staff before the person leaves. If you don't sign required paperwork, this can put you in breach of the order. Interview 6

#### ***Lived Experience...***

At least it woke me up a bit...probably just something I went through, just your normal everyday thing. You commit a crime and you pay the consequences. Peter

## 4.2.5 Sentencing and Corrections

When a person has been found guilty of a criminal offence and sentenced in relation to the offence, the role of the support worker shifts to supporting the person to fulfil the requirements of their sentence, as well as planning and building changes in their life that will support them to be free of ongoing involvement in the criminal justice system. The work usually involves supporting the person through one of the following:

### 1. Non-custodial sentence ordered by a court

#### a) Fines

Support the person to:

- pay the fine within the time period set by the court;
- if the person can't afford to pay the fine within the time period, support them to apply to the State Penalties Enforcement Registry (SPER) to arrange a payment plan to pay their fine over a longer period (fine payment instalments can be made via Centrepay, a direct debit from the person's Centrelink payment). To arrange a Centrepay payment, support the person to complete and lodge the necessary Centrelink paperwork;
- alternatively, support the person to apply to SPER for a fine option order, whereby they can do community service in place of paying the fine.

#### b) Good Behaviour Bond

Support the person to:

- collect the paperwork relating to the order before leaving court;
- understand the conditions of the order;
- understand what will happen if they breach the conditions of the order (they may be returned to court and re-sentenced for both original and new charges);
- plan and implement changes in their environment and/or lifestyle that will assist them to refrain from re-offending (see Section 4.1 Holistic Support Framework).

#### c) Probation

Support the person to:

- collect the paperwork relating to the order before leaving court;
- contact the nominated probation office as soon as possible after court to make an initial meeting time with their probation officer;

- attend their initial probation meeting (with the person's consent); the support worker can undertake the following tasks (discuss these with the person you are supporting prior to the meeting):
  - introduce yourself and the agency you work for, and provide the probation officer with your contact details;
  - support the person to explain to their probation officer that they have an intellectual disability, and how this impacts on them (if the person is not willing or able to do this, phone the probation officer prior to the first meeting to discuss this information with them, and explain any difficulties this may pose for the person in relation to meeting their probation requirements);
  - support the person to understand the information their probation officer gives them, in particular, any requirements of the person, and any consequences of breaching these;
  - ask the probation officer to phone you if any problems arise in relation to the person's probation (with the person's consent); explain that you will support the person to meet the requirements of their probation, and will help to resolve any issues should these arise;
- attend ongoing probation meetings, including:
  - reminding the person of the dates and times of meetings;
  - assisting the person to get to the meeting (transport);
  - supporting the person in their communications with their probation officer;
- plan and implement changes in their environment and/or lifestyle that will assist them to refrain from re-offending (see Section 4.1 Holistic Support Framework).

#### **d) Community Service**

Support the person to:

- collect the paperwork relating to the order before leaving court;
- understand the conditions of the order, including:
  - the number of hours they have been sentenced to;
  - the date by which the hours of work must be completed;
  - other conditions, such as not breaking the law or leaving the state without permission;
- understand what will happen if they breach the conditions of the order (they will be returned to court and re-sentenced for both original and new charges);
- report to a corrective services office as soon as possible after court.

With the person's permission, the support worker can provide the following assistance:

- introduce yourself to the corrective services officer and name the agency you work for; give your contact details and ask the officer to contact you should any issues arise in relation to the person's community service;
- support them to inform the corrective services officer that they have an intellectual disability, and how this affects them (or do this on their behalf if they are unwilling or unable to do this themselves);
- discuss with the corrective services officer any issues that will impact on the person's capacity to meet the requirements of probation and, where possible, negotiate options that will maximise the person's chances of success; this can include discussing the type of work the person is best suited to; the location of the work (particularly where the person has to rely on public transport to get to the work site); and the number and specific week days that the person will work ;
- discuss with the corrective services officer the person's vulnerability to exploitation and negative influence from others, and any measures that might help to minimise this risk; people can meet individuals through community service who may exploit them or engage them in further criminal behaviour;
- outline any support you are able to offer the person to assist them to meet their community service obligations, including:
  - reminders to attend work;
  - wake-up calls on work days;
  - reminders to take lunch, drinks, any other necessary items;
  - transport to or from the worksite;
  - assistance with transport fares;
  - support to negotiate or remedy any issues that arise during their community service;
- attend their first day of community service (and subsequent days, as needed);
- plan and implement changes in their environment and/or lifestyle that will assist them to refrain from re-offending (see Section 4.1 Holistic Support Framework).

## **2. Agreements or orders made by a court diversion program**

Support workers usually have an ongoing relationship with the people they support, and, as such, are ideally positioned to support a person with an intellectual disability to meet the requirements of any agreement or order made by a court diversion program. Support workers can assist the person by:

- explaining the terms and conditions of any court orders or agreements to which the person is a party;

- explaining the consequences of their breaching any court order or agreements (usually this will mean the matter is returned to court and the person will be re-sentenced on both the original and new charges);
- supporting the person to complete any task or action directed by the court or agreement (for example, attending counselling, returning to Homeless Person's Court to give updates on their life; payment of restitution for damages they have caused), by:
  - making appointments;
  - remembering appointment/court appearance dates and times;
  - transport to attend appoints/court appearances;
  - emotional support following appointments/court appearances;
- supporting the person to plan and implement changes in their environment and/or lifestyle that will assist them to refrain from re-offending.

### **3. Custodial sentence ordered by a court: prison**

*Offenders with an intellectual disability often suffer from practices of exploitation and degradation whilst incarcerated on two fronts. Firstly, prisons are poorly equipped with the necessary resources to respond to treatment or the support services required to meet the needs of these offenders...Furthermore, fellow inmates also mistreat prisoners with disabilities, often making them the target of assault, exploitation, extortion and sexual abuse. When discharged, the negative effects of imprisonment combined with a lack of monitoring and support services required to assist the person's transition back into the community, often exacerbates re-offending and thereby increasing exposure to the criminal justice system (Cockram 2005: 76).*

People with an intellectual disability are particularly vulnerable amongst prison populations, and should, as French (2007) argues, *be diverted from the criminal and youth justice systems wherever possible* (100). Despite this fact, people with intellectual disabilities are over-represented in prisons. They require support to serve a prison sentence, including:

1. Support in prison;
2. Pre-release support; and
3. Post-release support.

It is, of course, important to recognise that prisons are highly controlled and regulated environments, and for the main part closed to the outside world. There are avenues

by which support workers can gain some access to prison, but the reality is that workers on the outside will be limited in the type and quantity of support they can offer to a person in prison.

Support workers can undertake the following.

### **1. Support whilst in prison:**

- Visit the person regularly. Ongoing contact will provide opportunities for the person to have a trusted and supportive person to talk to, to raise issues or difficulties with, and to problem solve options.
- Maintain or reconnect with the person's family, where this is possible. Supporting significant relationships are key to assisting the person to get through the experience of prison.
- Support the person to understand prison rules and culture. Support workers can assist the person to understand both the official prison rules (outlined on page 34), as well as the unspoken rules of prison, including no dobbing, no friendships with prison officers, keeping out of trouble.
- Liaise with the prison regarding the person's well-being (and any experiences of abuse or assault). Advocate for the person's access to resources such as counselling.
- Liaise with the prison, Department of Corrections, and/or external advocacy services to assist the person to access prison education and rehabilitation programs, or appropriate alternative options.
- Liaise with external prisoner supports such as legal services and prison ministry services for advice, information, and supports to assist the person whilst they are in prison.



## **Practice Experience...**

The following quotations are taken from Interview 4, and have been grouped into three key themes to give an insight into the experiences of people with an intellectual disability in prison:

### **Vulnerability**

People with 'intellectual disability' in prison are vulnerable due to prison culture. 'Peter thieves' [prisoners who steal from other prisoners] are well down in the prison ranks. People with intellectual disabilities may typically have these behaviours and are at the bottom of the pecking order. Many can't read the social cues like 'no dobbing'. They develop friendships with officers which causes additional problems. The closer proximity of officers hanging around causes unwanted attention to other prisoners.

One man with a friendly persona was suspected of being a drug mule, so he was subjected to lots of searches. Another man had a limping gait and couldn't keep up. With his intellectual disability he could not understand why he was being harassed.

For some people, prison can turn their lives around, but there are bad behaviours everyone can learn there.

### **Support**

[Prison staff] don't have much training around intellectual disability. It is a security framework, rather than understanding where a person is coming from. Many [prisoners] are heavily medicated. It is often obvious that a prisoner has an intellectual disability, but they still go through the system. Counsellors are stretched.

Women with intellectual disabilities have a different experience in prison. There is more surveillance. 'Support' ends up being 'in isolation'. They don't get contact with other people. For women with mental health issues this is severe. They are under 24 hour surveillance, with a constant blue light on. They have no undies on, and wear open-back gowns. They are exposed and naked under the gown - due to concerns of possible self harm. It's supposed to help them to get well? Many women have histories of sexual assault. They are strip searched each time they come in and out of the observation unit. This re-traumatises them, and can be several times a day.

## Relationships

Regular visiting is helpful. Agencies are given more access. There is not enough communication between prison, agency and workers due to the secure nature of prison.

One woman loved prison as she had friends there. They celebrated her birthday, bought her a chocolate bar. There was compassion from the other women. They were teaching her about being safe in the community.

The most painful thing for people to talk about is family. Mostly their family couldn't cope or accept the behaviours once they got to jail. There are a lot of grief and loss issues.

Often families aren't advised of the movements of prisoners. People need support around this. There was a family looking for a man in Arthur Gorrie who had been transferred to The Park. They went to Arthur Gorrie and found out he was in Toowoomba. He had no wallet, no ID. He couldn't contact anyone he needed to. He couldn't even give personal data.

## 2. Pre-release support

The Prisoners' Legal Service advise that people serving sentences of less than 12 months are not placed on an Offender Management Plan (OMP), unless they have an extensive criminal history or are convicted of sexual or violent offences. PLS describe OMPs as essentially the 'story boards' of how QCS believes a person's time should be served...the idea of OMP is to set short and long term goals, and create a plan for the prisoner's sentence (Mulligan, 2007: 41).

The Queensland Corrective Services Offenders with specific needs Policy and Action Plan 2006-09 states:

*Pre-release planning is a standard component of each prisoner's sentence. The duration of pre-release planning is determined by a range of factors including the prisoner's sentence length and their needs to reintegrate into the community such as the level of support through family, friends or community organisations.*

However, the same Policy and Action Plan 2006-09 also notes that *not all prisoners will have formalised pre-release planning*. In practice, pre-release planning is poorly resourced. Hayes and Bleakley (2007), in discussing the legal needs of people with an

intellectual disability or cognitive impairment (ID/CI), note that *many prisoners leave prison with little or no support or preparation, and post-release, DSQ [Disability Services Queensland] does not undertake residential or service placement of released prisoners with mild ID/CI, owing to lack of funding for this purpose.*

Within this context, the key tasks a support worker can undertake in relation to pre-release planning and support are:

- **Prison liaison:**

- with the person's consent, contact the prison to establish if the person is engaged in pre-release planning, and what this entails;
- if the person has a pre-release plan, support them to understand the content and implications of this; identify gaps in the plan and liaise with the prison around responding to these; liaise with community based prison support services to assist with the development of the person's pre-release plan.
- if the person is not engaged in pre-release planning, support the person to identify and plan a response to any issues that will need to be resolved for the person to access parole and/or have the best chances of successful reintegration into the community; liaise with prison, government and community agencies, along with family members and significant others to develop a holistic model of support that will best assist the person to successfully return to the community and refrain from re-offending.

- **Accessing parole:**

- support the person to understand parole processes and, where necessary, make a parole application; information and advice on parole is available from The Prisoners' Legal Service (<http://plsald.com/.html>);
- provide written information to the parole board in support of the person's parole application, detailing any post-release supports to assist the person to refrain from re-offending; research demonstrates prisoners with an intellectual disability are less likely than non-disabled prisoners to be released on parole due to low level adaptive and social skills, coupled with a lack of community supports to assist them on their release (New South Wales Law Reform Commission, 1996);
- if you are concerned about the level of support the person will have on their release from prison and/or their capacity to refrain from re-offending, you should seek professional support and guidance from colleagues and management regarding whether to support the person's parole application.

- **Organise identification:**

- it is essential to assist a person to organise their identification before leaving prison as identification is critical for accessing Centrelink supports and accommodation;
- where a person has no Birth Certificate, they can apply for one from the Registry of Births, Deaths and Marriages (or equivalent) in the state or country of their birth. If a person does not have the necessary identification documents required to apply for a birth certificate, the Registry of Births, Deaths and Marriages will accept a letter from the General Manager of the prison stating the person's name, date of birth, and that they are known to police and courts;
- a Medicare card will enable the person to access government-subsidised medical treatment, and is also an important form of identification. To apply for Medicare card, the person must fill out an application form (available from a Medicare office, online at <http://www.medicareaustralia.gov.au>, or by calling Medicare on 132 011). Along with the completed application form, the person must provide one of the following forms of identification:
  - an Australian passport;
  - a birth certificate or birth extract; or
  - Australian armed services papers;Proof of residency is also required (such as a bank card or rental agreement) which can be difficult for ex-prisoners. If this is an issue, support the person to contact Medicare to discuss proof of residency alternatives.

(Mulligan, 2007: 164-166).

- **Secure accommodation:**

- stable and supportive housing is fundamental to a person's successful transition from prison back to the community, and is one of the most significant predictors of future re-offending (Baldry, 2007: 3/4);
- accommodation with parents, partner, or close family member increases a person's chances of successful community re-integration; support workers should identify with the person any supportive family or friends with who they might be able to live with, at least temporarily, upon their release;
- if this is not possible, support the person to apply to the Department of Housing for assistance. The person will need to complete an application form and attach two forms of identification. Department of Housing waiting lists are long, so applications should be made at the earliest possible time;

- with the person's permission, contact community-based services that can provide accommodation and support to prisoners (for example, Ozcare Supported Parole Program).
- **Plan personal and lifestyle change:**
  - support the person to consider past behaviours, lifestyle issues, and relationships that contributed to their offending, and to consider and plan concrete personal and lifestyle changes they can make that will assist them to refrain from future re-offending (and a return to prison). This includes:
    - daily activity and meaningful use of time (paid work, volunteering, training, or other positive social role); explore the person's dreams and interests, then investigate options and make supportive connections that the person can engage with on their release;
    - arrange counselling and/or other health treatment (mental health; drug and alcohol rehabilitation);
    - identify, support and build positive relationships (and devise strategies for avoiding negative relationships); engage with family and significant others to strengthen their capacity to support the person on their release from prison; offer ongoing support to these relationships once the person is back in the community.

### ***Practice Experience...***

DSQ won't provide a service to people inside, which is a wasted opportunity for rehabilitation work. Interview 4

The longer people are in prison, it is more anxiety producing to leave. There has been research around this on the general prison population. One woman, a chronic shoplifter, re-offends to go back to prison. When she was 8 months pregnant, and the victim of domestic violence, she felt safer to return to prison. There are many women inside with babies. That woman lost the baby [from her care], due to her mental health issues. The Department of Child Safety removed the baby at birth. She was not allowed contact until [support service] advocated for physical contact. She now has contact 4 hours per week. Another time, when she was pregnant again and back inside, she had a late term abortion on the advice of prison counsellors.

Interview 4

### 3. Post-release support

Most people who have been released from prison will require significant holistic support to successfully reintegrate into the community, address personal or lifestyle issues that contributed to their offending, and build a positive future. As Baldry (2007) states *prisoners with such difficulties* [high levels of mental illness and intellectual disability] *do not magically shed them when released. These prisoners are coming back to disadvantaged and poorly resourced communities with serious needs that they are unlikely to be able to address themselves* (3). The Intervention Framework outlined on pages 60-63 of the Practice Manual provides an overview of the key areas of support that will assist people who are exiting the criminal justice system. Immediately upon a person's release from prison, support work should include:

- **Transport:**
  - where possible, arrange to pick the person up from the prison and transport them to their place of accommodation; alternatively, liaise with the prison regarding what post-release transport services are available.
  
- **Accommodation:**
  - support the person to get to and settle into their place of accommodation;
  - providing regular and ongoing support to the person (and engage with any landlord or co-residents) to maximise the chances of the accommodation succeeding; stable and secure accommodation is central to a person's refraining from re-offending.
  
- **Centrelink:**
  - support the person to apply for a one-off Centrelink crisis payment, available to assist prisoners facing severe hardship upon their release from prison; the payment is the equivalent of one weeks payment of the person's assessed benefit;
  - to be granted this payment the person must:
    - have served as sentence of 14 consecutive days or longer (this will be stated on their discharge papers);
    - be eligible for a Centrelink benefit;
    - be able to prove financial hardship (via a prison trust account statement and other bank account statement);
    - must apply for the payment within seven days of release ;
  - Centrelink workers outreach to some prisons, and can assist the person to apply for this payment up to 21 days before their release (Mulligan, 2007: 171/172).

- **Daily routine/meaningful use of time:**
  - support the person to build a structured daily routine;
  - support the person to engage with employment, training, volunteer work, or other meaningful social role;
  - lack of positive activity to occupy their time increases the risk that a person will re-engage in negative relationships or behaviours that increase their likelihood of re-offending.
  
- **Supportive relationships:**
  - support the person to engage (or re-engage) with existing supportive relationships, and to locate and build new positive relationships;
  - isolation and loneliness are significant issues for both people with an intellectual disability and ex-prisoners, and can increase a person's vulnerability to engagement with negative relationships which put them at increased risk of re-offending.
  
- **Parole requirements:**
  - where the person has been released on parole, support them to understand the conditions of their parole (such as not leaving the State without the permission of their Parole Officer) and to comply with these;
  - support the person to contact and meet with their Parole officer; introduce yourself to the Parole Officer as the person's support worker; explain the person's disability, how this affects their life, and the types of support work you are engaged in with them; give the Parole Officer you're contact details and encourage them to contact you if there are any issues with the person's parole; outline your preparedness to assist the person to fully comply with all parole requirements;
  - support the person to undertake any counselling, rehabilitation, and/or education programs as directed by their parole conditions; assist with making and keeping appointments, and transport to appointments; in the case of counselling or rehabilitation programs, they will have most effect where the person with an intellectual disability is supported to process and reinforce the key messages from these programs; with the person's consent, share these with significant others so they can also support the person with these issues;
  - support the person to attend community service that has been ordered as part of their parole conditions (see page 101 for further information on supporting people to attend community service).

### ***Practice Experience...***

People coming out of prison is a big issue. What happens when they are released? They can be given very short notice. They can get a taxi voucher, maybe a Centrelink voucher. They need people to help. There may be a court order regarding parole conditions. Their medication needs to be understood. People need support to link to services.

The chaplains can do practical things and are respected in the prison system. On coming out, or transferring, the chaplains can connect people to the community or look out for their stuff.

Relationships are really important on release, but it [the relationship] depends on how long they have been inside. So much changes.

Quotations from Interview 4

### ***Lived Experience...***

I've been in a watch house...Scary...'Cause you got no freedom, nothing like that.  
Wayne

The hardest thing was spending the night in the watch house, and being walked into court with hand cuffs on. The watch house was horrible. The police are watching you all the time. Even when you go to the toilet they're watching you. I think there are some really weird people who watch that place. I reckon it would be worse than jail. Dave



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