



Queensland Advocacy Incorporated

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

Systems and Individual Advocacy for vulnerable People with Disability

Penalties for assaults on public officers

**Submission by
Queensland Advocacy Incorporated**

Queensland Sentencing Advisory Council

25 June 2020

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

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

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

Patron: His Excellency The Honorable Paul de Jersey AC

Summary of recommendations

1. The seriousness of an offence should not be linked to the victim's employment.
2. Any considerations of sentencing must be cognisant of the relevance of provocation and unconscious or deliberate bias towards a potential offender.
3. Safeguards need to be implemented to cease the over-policing of trivial public order offences which can provoke or trigger the commission of a more serious offence.
4. Offenders should not be punished for offences stemming from lack of cognition and appropriate education or which result from violence, abuse, neglect or exploitation.
5. The current range of sentencing options do not provide an adequate or appropriate response to offenders who commit assaults against public officers and that there is a pressing need for sentencing reforms.
6. The criminogenic effect of incarceration must be acknowledged and addressed.
7. There is a need for improved education and training for all public officers. In particular, there is a need for improved de-escalation training for police and emergency response workers. Police need comprehensive education, training and support that provides them with alternative ways of interacting with people with intellectual or cognitive impairment and mental illness.

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland. QAI's board is comprised of a majority of persons with disability, whose wisdom and lived experience of disability is our foundation and guide.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for over a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program and, more recently, the National Disability Insurance Scheme Appeals Support Program, Decision Support Pilot Program, Disability Royal Commission Advocacy Program and Education Advocacy Service. Our individual advocacy experience informs our understanding, and prioritisation, of systemic advocacy issues.

Introduction

QAI has previously made a submission to the Queensland Sentencing Advisory Council's inquiry into penalties for assaults of public officers.¹ In that submission, we noted that the current maximum sentences for serious assault provide adequate scope for courts to impose sentences of appropriate length; supported the removal of the maximum penalty provision contained in s 340(a)(i) of the *Criminal Code Act 1899* (Qld); called for better training in de-escalation techniques and involvement of professionals with mental health training with a view to reducing risks to emergency service workers; and called for police powers around public nuisance and order offences to be used judiciously and, in some cases, curtailed.

In this submission we confine our contribution to addressing the following discrete issues, of which we have direct knowledge and experience:

1. The relevance of the employment of the victim to the perceived gravity, and resulting sentencing, of an offence;
2. Other principles relevant to sentencing people who commit assaults against public officers;
3. Over-policing and criminalisation of behaviour; and
4. Whether existing offences, penalties and sentencing practices in Queensland provide an adequate and appropriate response to assaults against public officers.

The relevance of the employment of the victim

QAI recognises the vulnerability of people working in high risk jobs, including but not limited to public officers. We acknowledge that particular occupations are associated with higher risk of harm, including police officers, corrective services officers and emergency service workers. Yet we submit that it is important that the risk inherent to a particular vocation is separated from a consideration of the severity of sentencing that should be applied to an offender for an offence against a high risk worker. While we acknowledge the importance of protecting more vulnerable members of our community, and also acknowledge that this vulnerability can result from the nature of the person's employment, we do not agree that this justifies a more punitive sentencing response. To do so would be to disregard the innate vulnerability of the majority of perpetrators of offences against public officers, and the drivers for their offending.

Linking the occupation of the victim with the seriousness of the offence is inappropriate and can have serious implications. For example, re-categorising a common assault as a serious assault under the *Criminal Code Act 1899* (Qld) by virtue of the recipient being a public officer can mean the difference between the jurisdiction in which the charge is heard and whether the offence is considered an indictable offence.

Offenders with intellectual or cognitive impairment and/or mental illness are significantly over-represented within the criminal justice system.² Those with multiple vulnerabilities are particularly

¹ Queensland Advocacy Incorporated. Submission to the Inquiry into Penalties for Assaults of Public Officers. Queensland Sentencing Advisory Council. 20 February 2020.

² While there is a dearth of accurate, recent statistics, approximately 10% of people in Queensland prisons were found to have an intellectual disability during the most recent comprehensive survey in 2002: Based on figures from the most recent comprehensive survey (Corrective Services Queensland. 2002. Intellectual Disability Survey) and on comparable data from a number of NSW studies. Available interstate data suggests that this may be an underestimate – the 2010 national prisoner health census determined that 33% of people in Australian prisons had a mental illness: Australian Institute of Health and Welfare. 2011. The Health of Australia's Prisoners 2010. Australian Institute of Health and Welfare. Hayes' research at NSW country courts determined that 56.9% of defendants had intellectual disability or borderline intellectual disability: Hayes, S & McIlwain D. The prevalence of intellectual disability in the New South Wales prison

over-represented – Aboriginal or Torres Strait Islander persons with cognitive impairment or mental illness were the most common alleged offenders in a study of defendants at NSW country courts.³ A 2012 survey of Queensland prisons documented alarmingly high rates of imprisonment of Aboriginal men and women with mental illness.⁴ In view of this intersectional over-representation, QAI is concerned that an increase in penalties around assaulting police will primarily serve to disadvantage Aboriginal people, whose relations with police have historically been strained, and continue to be.

It is important to note the role of stereotypes and provocation. The current ‘Black Lives Matter’ campaigns are shining light on the continuing perpetuation of negative racial stereotypes and generational disadvantage that shape behaviour, in particular police brutality. In Australia, the perpetuation of Aboriginal deaths in custody, notwithstanding the 1991 Royal Commission, has been noted as an issue of enduring relevance that demands an urgent response. The majority of these victims are those experiencing intersectional disadvantage of which disability is part.

More broadly, it is important to acknowledge the context which gives rise to offences. People with disability and mental illness have and continue to face significant restrictions and violations of fundamental human rights. Denials of liberty and autonomy can provoke offending behaviour. The Disability Royal Commission is currently receiving evidence of violence, abuse, neglect and exploitation perpetrated on some of the most vulnerable people in our community, many of whom ultimately became offenders themselves, either against their abuser or as a result. In this context, it is clear that a punitive approach to sentencing reinforces the adage of blaming the victim.

Sentencing principles

A strong body of research establishes that increased penalties have little deterrent effect.⁵ While rational choice has been the theoretical assumption behind calls for a strengthened deterrent component, offender behaviour is often impulsive and irrational, driven by immediate physical, emotional and physiological circumstances. This is particularly so for perpetrators with intellectual or cognitive disability or mental illness, where rational and logical processing is often impaired and understanding of relevant information may be limited.

Evidence from empirical studies of deterrence suggests that while the threat of imprisonment generates a small general deterrent effect, increases in the severity of penalties have no corresponding effect on offending.⁶

The offences for persons with intellectual and cognitive disability are incarcerated disproportionately fall within the lowest severity categories of offences, such as ‘public nuisance’ offences, which can

population: an empirical study (Criminology Research Council, Canberra, 1988). The most recent comprehensive survey of Victorian prisoners found that 42 per cent of male prisoners had an acquired brain injury: M Jackson et al. *Acquired Brain Injury in the Victorian Prison System*. Corrections Research Paper Series No. 04 (Department of Justice, Melbourne, 2011).

³ Hayes S. Prevalence of intellectual disability in local courts (1997) *Journal of Intellectual and Developmental Disability* 22(2) 71-85.

⁴ E Heffernan, K Andersen, A Dev, S Kinner. 2012. ‘Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons’. *Medical Journal of Australia*. 197(1):37-41.

⁵ See for example, Donald Ritchie, Sentencing Advisory Council. 2011. *Does Imprisonment Deter?: ‘there are significant limitations on general deterrence and [on] the type of offenders that the threat of punishment can possibly deter’*, p 2.

⁶ , Donald Ritchie, Sentencing Advisory Council. 2011. *Does Imprisonment Deter?*.

be repeated many times and lead to imprisonment.⁷ By punitively responding to the commission of these offences with a term of imprisonment, the offender is being punished for offences which often stem from lack of cognition and appropriate education.

Case studies

Sally, a young woman with disability who has experienced a highly prejudicial childhood, was waiting for her name to be called at the Magistrates Court. She complained to a police officer (who was familiar to her) that she didn't understand why she had been charged with assault. The police officer told her that she was lucky she had not touched a police officer, as placing her hand on the arm of a police officer would have constituted serious, rather than common, assault. The police officer demonstrated this by enacting the very behaviour she was speaking of (taking the young woman's arm), for which there was no consequence.*

Eddy, a 25 year old Aboriginal man who has an acquired brain injury (which was acquired during an incident that occurred inside a prison when he was 19) which has led to a mild intellectual disability, has just had an argument with his father and has temporarily left the family home "to cool down". Concerned members of the public observe him muttering to himself and kicking tyres of cars he passes as he is walking down the street, occasionally veering off the footpath and onto the heavily-trafficked road. Police are called and, in line with internal risk management policies, five police officers attend. The officers surround him. Unfortunately this has a triggering effect on Eddy's behaviour and he panics. He attempts to run away and, in the process, pushes one of the female officers on the chest, knocking her down. He is subsequently arrested and charged with serious assault. His disability is not significant enough to support a determination that he was of unsound mind at the time he committed the offence, so Eddy's matter proceeds in the criminal courts.*

** Names have been changed*

Over-policing and criminalisation of behaviour

QAI frequently observes an over-policing of our clients, many of whom are Aboriginal persons with intellectual or cognitive impairment and/or mental illness. In particular, we note an over-policing of trivial public order offences, which can provoke or trigger the commission of a more serious offence. For example, a minor public order offence such as urinating in public may, following police intervention, escalate to a more serious charge, such as assault and resisting arrest.

The passage of the *Summary Offences Act 2005* (Qld), which increased the range and scope of public nuisance offences, the typical consequence of the commission of which is imposition of a fine which may carry a default period of imprisonment, has led to an increase in people with intellectual or cognitive impairment being charged with public space offences.⁸

⁷ J Simpson, 2014. Participants, or Just Policed? Guide to the role of the NDIS - people with intellectual disability who have contact with the criminal justice system.

⁸ Monica Taylor (Coordinator, Homeless Persons' Legal Clinic, Queensland Public Interest Law Clearing House) And Dr Tamara Walsh (T.C. Beirne School Of Law, University Of Queensland) With: Megan Breen, Binny De Saram, Lindsay

People with intellectual or cognitive impairment are subject to a higher level of police surveillance and suspicion than most members of the public, who are more likely to experience discomfort in the presence of people who are perceived as different or dangerous and may seek police assistance in moving them on. Many people with disability also experience intersectional disadvantage, including homelessness and unemployment, with the result that they are in public spaces more frequently. Persons with disability are therefore particularly susceptible to being charged with public nuisance offences, whether or not there has been wrongdoing.

Public space policing typically involves verbal directions to take certain action, such as to move on. Persons with disability may find it difficult to comprehend directions, remember them or act in accordance with them, leading to an escalation in law enforcement interventions based on the mistaken belief that the person is wilfully disobeying a police instruction. For some people with intellectual or cognitive impairment or mental illness, talking loudly, calling out or other forms of verbalising are means of communication and not intended to offend or annoy anyone. 'Resisting arrest' can simply be being loud or yelling out - something that a person with cognitive impairment or mental illness may do when apprehended by more than one officer.

The adequacy of the current response to offenders

QAI submits that the current range of sentencing options do not provide an adequate or appropriate response to offenders who commit assaults against public officers and that there is a pressing need for sentencing reforms.

Prison has a widely-recognised criminogenic effect: time spent in prison increases the probability that a person will commit another offence upon release, so any policy consideration that anticipates an increased use of prison would need to factor in the likely increases in risk to the community in the medium to longer term. Longer sentences may improve community safety in the very short term, but the trade-off is institutionalisation, recidivism, wasted lives, broken families and generational trauma. This is particularly so for offenders with intellectual or cognitive disability, who may have impaired capacity to be criminally responsible yet become caught in a perpetuating cycle of criminology.

There is a need for improved education and training for all public officers. In particular, there is a need for improved de-escalation training for police and emergency response workers. Preventing offending by changing police procedures on the targeting of people with mental illness, people with cognitive disabilities and Aboriginal and Torres Strait Islander people is likely to be a more effective tactic to reduce assaults on public officers than increasing the severity and scope of serious assault provisions.

Nicholson, Hillary Nye, Marianna O'gorman And Davina Wadley. 2006. Nowhere To Go: The Impact Of Police Move-On Powers On Homeless People In Queensland Monica Taylor (Coordinator, Homeless Persons' Legal Clinic, Queensland Public Interest Law Clearing House) And Dr Tamara Walsh (T.C. Beirne School Of Law, University Of Queensland) With: Megan Breen, Binny De Saram, Lindsay Nicholson, Hillary Nye, Marianna O'gorman And Davina Wadley.

While police frequently deal with offenders and potential offenders with mental illness,⁹ surprisingly few police are trained to deal with mentally ill people in crisis; fewer than 10% of frontline officers in New South Wales, for example, have had mental health training, and the Queensland Coronial Inquiry into the Death of Laval Zimmer heard evidence of the same in Queensland, and made recommendations for improvement.¹⁰

QAI submits that police need comprehensive education, training and support that provides them with alternative ways of interacting with people with intellectual or cognitive impairment and mental illness.

Conclusion

QAI thanks the Productivity Commission for the opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.

⁹ Estimates range from 10% of their time (Godfredson JW, Ogloff JP, Thomas SDM & Luebbbers S. 2010. 'Police discretion and encounters with people experiencing mental illness'. *Criminal Justice and Behaviour* 37(12): 1392) to 20% of potential offenders (Kesic D, Thomas SDM & Ogloff JP. 2010. 'Mental illness among police fatalities in Victoria 1982-2007: Case linkage study'. *Australian and New Zealand Journal of Psychiatrists* 44(5): 463), to an average of one person every two hours (LR Steele, L Dowse & J Trofimovs. 2013. Section 32: A Report on the Human Service and Criminal Pathways of People Diagnosed with Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Under the Mental Health (Forensic Provisions) Act 1990 (NSW)).

¹⁰ Queensland Coroner. 2016. Inquest into the death of Laval Zimmer:
https://www.courts.qld.gov.au/__data/assets/pdf_file/0011/466373/cif-zimmer-ld-20160503.pdf.