Submission by

QAI's recommendations for law reform

To Queensland Law Reform Commission

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advocacy for people with disability

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Introduction

Queensland Advocacy for Inclusion (QAI) is a Disabled Peoples Organisation. We are an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the needs, rights, and lives of people with disability in Queensland.

QAI submits that the following topics require urgent law reform in Queensland:

1. Section 216 of Queensland's Criminal Code
2. Legislative framework for the use of school suspensions in Queensland state schools
3. *Residential Services (Accreditation) Act 2002* (Qld)
4. The indefinite detention of people with disability
5. Civil Domestic Violence Orders and how they apply to people with impaired decision-making capacity

1. Section 216 of Queensland's Criminal Code

QAI has long called for the abolition of Section 216 of Queensland's Criminal Code which criminalises the sexual activity of a broad group of people with disability even when they have capacity to consent. This infringes the human rights of people with disability and arbitrarily limits their right to sexual expression.

Under Section 216, it is a crime to engage in sexual activity with a person who is classified as having an 'impairment of the mind.'[1] The Criminal Code defines a person with an 'impairment of the mind' as "a person with a disability that, a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and, b) results in i) a substantial reduction of the person's capacity for communication, social interaction or learning; and ii) the person needing support."[2]

QAI has numerous concerns with this definition and its use throughout the Criminal Code, including its application to laws regulating the sexual activity of people with disability.

Firstly, the scope of the definition is so broad that it includes people with a disability whose impairment may not impact their decision-making capacity. For example, a person may have a neurological impairment that impacts how they communicate and may result in the person requiring support for various activities of daily living, however they may retain the capacity to

[1] *Criminal Code Act 1899* (Qld) s 216
[2] Ibid, Section 1 - Definitions

make their own decisions, particularly in the presence of support. Section 216 nonetheless criminalises any sexual contact with that person, even when they have the capacity to consent to and understand the nature of such activities.

Although Section 216 provides a defence if the conduct did not constitute 'sexual exploitation'[3], this term is ambiguous and subject to varying interpretations. The provision still has the effect of criminalising all sexual contact with a 'person with an impairment of the mind' unless proven otherwise.[4] This creates a situation where, even if the sexual activity involved people who were capable of giving consent, the onus is on the alleged perpetrator to prove that their relationship was not one of sexual exploitation and that they believed, on objectively reasonable grounds, that the other person was not impaired. This involves invasive scrutiny of the 'victim' and their impairments to assess whether the conduct was sexual exploitation.

Secondly, the definition does not reflect the widely accepted position that decision-making capacity, including in relation to sexual activity, is contextual. In other words, capacity is decision, time, and situation (or 'domain') specific, whereby a person's ability to make decisions and communicate them can fluctuate and change depending upon the nature of the decision required and the circumstances in which it is made. Assumptions about a person's capacity cannot and should not be drawn simply from the presence of an impairment. All adults at law are presumed to have decision-making capacity until proven otherwise and capacity should be assessed on a decision-by-decision basis. This means that capacity must be assessed every time a person makes a decision, including decisions about engaging in sexual relationships.

This position is adopted in other Queensland legal contexts, such as the Queensland Capacity Assessment Guidelines 2020 and their role alongside the *Guardianship and Administration Act 2000* (Qld). Moreover, the courts have ruled that a person with intellectual impairment *can* have the capacity to consent, thereby reinforcing the position that capacity should be assessed on an individual and case by case basis.[5]

Thirdly, the definition is not congruent with contemporary understandings of, and approaches to, supported decision-making as per Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD). Through ratification of the CRPD, Australia has committed to ensuring a model of supported decision-making whereby

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[3] *Criminal Code Act 1899* (Qld) s 216 (4)(b).

[4] Public Advocate (Qld), *A discussion of section 216 of the Queensland Criminal Code: A call to review the criminalisation of sexual relationships for people with disability* (report, January 2022), p7.

[5] *R v Mrzljak* at [16] 'The absence of consent is not an element of an offence under s 216 Criminal Code and it is rightly uncontentious that an intellectually impaired person as defined can have the cognitive capacity to consent and can give consent within the meaning of "consent" in s 348.'

people with disability are assisted to maintain and develop their legal capacity through the assistance of informal supporters to understand, consider and communicate their decisions rather than have this right arbitrarily taken away from them.[6] Only in limited and extremely rare circumstances is the denial of this right legally justified and this must always be a measure of last resort. The focus has therefore shifted away from making arbitrary conclusions about a person's capacity due to the presence or not of an impairment and our laws must reflect this change accordingly. Whether a person can consent to engaging in sexual activity is related to the way in which the person is supported to understand the nature of the sexual activity and to communicate their preferences, not simply attributable to the presence of a disability.

Fourthly, singling out people with an 'impairment of the mind' and denying their right to sexual expression is discriminatory to people with disability in the sense that they are treated less favourably than others by the law. This is contrary to various legal instruments, including section 15(3) of the *Human Rights Act 2019* (Qld) and Article 5 of the CRPD. It also interferes with the right not to have one's privacy, family or home arbitrarily interfered with as per section 25(a) of the *Human Rights Act 2019* (Qld). If people can be supported to provide consent to sexual activity, section 216 is neither reasonable, proportionate nor justifiable.

Fifthly, denying certain people with disability their right to sexual expression simply due to the presence of an 'impairment' exemplifies antiquated attitudes towards people with disability and perpetuates harmful stereotypes that conceptualise people with disability as 'victims' or asexual, unable to enjoy autonomy over their bodies and unable to exercise self-determination and personal control over their own lives. Such attitudes are extremely destructive and have no place within today's society. The disability rights movement has worked tirelessly over recent decades to dispel such attitudes. Governments must therefore take the opportunity to reconsider the assumptions, values and beliefs underlying our laws and policies and consider the extent to which they reflect a human rights framework. These provisions of the Criminal Code are grounded in ableist attitudes, reflect archaic assumptions about the capabilities of people with disability and have no place within contemporary Queensland legislation.

Finally, case law shows that the courts are struggling to interpret and apply the legislation. For example. in *R v Little*[7], the complainant, a person with an intellectual disability, entered a relationship with the defendant, a person without a disability. The defendant was charged and convicted with two counts of rape, two counts of attempted carnal knowledge of an intellectually impaired person and two counts of indecent dealing with an intellectually impaired person. Upon appeal, the judge considered the definition of 'sexual exploitation' to

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[6] Convention on the Rights of Persons with Disabilities, Article 12(3)
[7] *R v Little* [2013] QCA 223

determine the reasonable grounds of whether the appellant's conduct constituted exploitation.[8] The judge stated that it required the jury to make 'value judgments about the notoriously difficult matter of the nature of other people's intimate relationships.'[9] The judge also gave consideration to the right of the person with an intellectual disability to make decisions about her own relationship, and found that the complainant was able to 'give informed consent to sex and had adequate understanding of sexuality and relationships', further stating that 'she was entitled to make her own decisions about forming intimate relationships'.[10] Despite the fact that the judge considered she was capable of informed consent, consent is not considered a defence for this offence.

R v Mrzljack took a similar approach, stating that the broad nature of the definition of impairment of the mind can include persons with cerebral palsy who may have a 'genius IQ'.[11] The judge found that a person with a so called 'impairment of the mind' may still withhold or provide consent regardless of their condition.

QAI acknowledges that the purpose of Section 216 is to ensure vulnerable people with disability are protected against abuse and exploitation. However, despite these benevolent intentions, the consequences of Section 216 are far reaching. Queensland is the only jurisdiction that imposes an absolute prohibition on all sexual activity with a person with an intellectual disability. The Public Advocate has said that Section 216 is "the most restrictive of this type of offence provision among Australian states and territories."[12] Less arbitrary alternatives are possible and are apparent in other jurisdictions across Australia, all of which adopt a consent-based approach with an offence committed if the victim cannot give full and free consent.

The law should be changed to uphold the rights of people with disability to engage in sexual relationships when they have the capacity to decide to do so, while still criminalising sexual activity in situations of sexual exploitation, such as when sexual relations occur between a person with disability and a support worker, or in situations where the person with disability does not have capacity to consent. Indeed, sexual assault laws already ensure that non-consensual based sexual activity is a criminal offence. Additional provisions, such as Section 216 are therefore unnecessarily paternalistic and arguably redundant as non-consensual based sexual activity is already an offence under the law.[13] Consideration could be given to alternatives, such as including a circumstance of aggravation in the *Penalties and Sentences Act 1992* (Qld), whereby additional criminal penalties occur if an offence is committed, and the lack of consent is a result of the victim's impaired decision-making capacity.

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[8] Ibid at [28].
[9] Ibid
[10] Ibid
[11] *R v Mrzljak* [2004] QCA 420 at [68].
[12] Ibid.
[13] *R v Hansen* [2018] QCA 153

Sexual consent laws must respect the human rights of people with disability and must be accessible to, and appropriate for, all people with disability. We need a more nuanced approach that neither limits the right to consensual sexual expression nor unreasonably exposes people with intellectual or cognitive impairments to sexual exploitation. The law should be updated to reflect contemporary human rights principles while remaining responsive and alert to situations of exploitation and power imbalances that leave people with disability vulnerable to abuse.

2. Legislative framework for the use of school suspensions in Queensland State Schools

Education is fundamental to socialising children and preparing them for adulthood, teaching essential skills and facilitating pathways to employment and the realisation of a meaningful life. However, students who receive school disciplinary absences (SDAs) are denied these opportunities. "School disciplinary absences" is a term used by the Department of Education and includes suspension, exclusion and the cancellation of enrolment following instances of behaviour that a school deems to be unacceptable. The legislative framework for the use of SDAs in Queensland state schools is contained in the *Education (General Provisions) Act 2006* (Qld) (EGPA).

Since 2022, QAI, together with the Aboriginal and Torres Strait Islander Legal Service (ATSILS), Youth Advocacy Centre (YAC), PeakCare Qld and Youth Affairs Network Qld (YANQ), have been leading the *A Right to Learn* campaign which seeks to address the disproportionate use of school suspensions and exclusions on students with disability.[14] This is based upon research by QAI and the Centre for Inclusive Education (C4IE) which found evidence of disproportionate and excessive suspensions for First Nations students, students with disability and students in out of home care. For example, students with a disability made up only 18.9% of enrolments in 2020 yet received 49.2% of all short suspensions (1-10 days). This equates to 2.18 suspensions on average per student.[15]

Our research also showed:

- When students are in more than one of these groups, the risk of suspension is even greater.

[14] A Right to Learn. [online] Available at: https://www.arighttolearn.com.au/ [Accessed 19 Mar. 2024].
[15] Graham, L.J., Callula Killingly, Alexander, M. and Wiggans, S. (2023). Suspensions in QLD state schools, 2016–2020: overrepresentation, intersectionality and disproportionate risk. Australian Educational Researcher. doi:https://doi.org/10.1007/s13384-023-00652-6.

- Students receiving social-emotional adjustments at school, such as neurodiverse students, are issued *repeat* suspensions at a higher rate than students with other types of disability; and

- Disability is the most common factor among suspended students, raising urgent questions as to whether students with disability are receiving the adjustments and support to which they are entitled under legislation.

While SDAs may be appropriate as a last resort in very limited circumstances, evidence suggests they are being used more frequently than is required.[16] Further, it might be assumed that the number of SDAs reflects the prevalence of challenging behaviour within a school, however there are numerous reasons why SDAs are used, some of which do not directly correlate to the behaviour of the student concerned.[17] For example, a suspension may be used as a 'warning' to other students.[18]

Whilst some schools provide exemplary support to students with disability, others appear to reject or misunderstand the values of inclusion and operate practices that are discriminatory towards students with disability. For example, unreasonably denying requests for reasonable adjustments that would ensure students with disability can access education on the same basis as others. The absence of reasonable adjustments for many students with disability, particularly students with autism and/or attention deficit hyperactivity disorder (ADHD), can lead to escalations in behaviour that would otherwise be avoided if reasonable adjustments appropriate to their needs were in place. Failing to ensure teachers are adequately skilled and equipped to support a classroom full of diverse learners means both students and teachers are being set up to fail and can lead to further escalations in the child's behaviour, resulting in disciplinary absences and/or the use of restrictive practices, further entrenching the child's segregation within the school community.[19]

All of this is occurring despite overwhelming evidence as to the ineffectiveness of SDAs in reducing behaviours of concern. Graham highlights the fundamentally flawed assumption upon which SDAs are based – that is, that challenging behaviour is a conscious choice

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[16] Graham, L. (2020) Questioning the impacts of legislative change on the use of exclusionary discipline in the context of broader system reforms; a Queensland case study; International Journal of Inclusive Education, 24:14, 1473-1493

[17] Ibid

[18] Parsons (2018) cited in Graham, L. (2020) Questioning the impacts of legislative change on the use of exclusionary discipline in the context of broader system reforms; a Queensland case study; International Journal of Inclusive Education, 24:14, 1473-1493

[19] See Graham et al. (2020). Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian government schools: Final Report. The Centre for Inclusive Education, QUT: Brisbane, QLD, p362 – Finding 5.1

enacted by individuals who can self-regulate their emotions.[20] Therefore by punishing students who exhibit challenging behaviours, it is presumed that SDAs will act as a deterrent and change the student's decision-making prior to 'choosing' their behaviour in future. While this may be true for *some* students, notably students *without* disability who are statistically less likely to receive multiple suspensions[21], it is too simplistic an explanation for all 'challenging behaviour' which is often a reflex communication strategy for students with communication difficulties in situations of heightened distress or those experiencing overwhelm. It can also be a manifestation of a person's disability.

While departmental policy reportedly states that the use of SDAs is a last resort measure, this does not reflect current practice nor provide sufficient accountability given the extraordinary discretion exercised by principals when issuing SDAs and the minimal level of guidance and oversight of SDA decision-making provided for within the EGPA.

Currently, principals have unfettered discretion to issue SDAs, including unfettered discretion to issue multiple and repeat SDAs to the same student. There might be internal policy guidance as to the matters a principal should consider when making a decision to issue an SDA, but this is not transparent for students and their families and is not able to be used to hold principals to account. Further, suspensions of up to 10 school days cannot be appealed at all. These suspensions can only be the subject of a complaint which is dealt with internally, not by an independent authority. The lack of legislative guidance for SDA decision-making also means students have no legal basis to assert their procedural rights, such as the right to be consulted before a decision to issue an SDA is made by a principal. Moreover, while Departmental policy may state that SDAs should only ever be a last resort measure, the EGPA permits the use of SDAs at a much lower threshold – that of "best interests".

The EGPA also contains confusing provisions regarding appeal rights for different SDAs. For example, permanent exclusions can be reviewed initially and then annually;[22] yet a refusal-to-enrol decision can be reviewed externally by Queensland's Civil and Administrative Tribunal (QCAT) following an unsatisfactory internal review and the issuance of a 'RTE-11: Notice - Outcome of a review of a decision re refusal to enrol'.[23] There is a right to external review at QCAT for a 'review of the review decision',[24] or from a decision to exclude a student from all

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[20] Graham, L. (2020) Questioning the impacts of legislative change on the use of exclusionary discipline in the context of broader system reforms; a Queensland case study; International Journal of Inclusive Education, 24:14, 1473-1493

[21] See Graham, L.J., Callula Killingly, Alexander, M. and Wiggans, S. (2023). Suspensions in QLD state schools, 2016–2020: overrepresentation, intersectionality and disproportionate risk. Australian Educational Researcher. doi:https://doi.org/10.1007/s13384-023-00652-6.

[22] *Education (General Provisions) Act 2006* (Qld), ss 312, 315; Department of Education (January 2021); https://behaviour.education.qld.gov.au/procedures-guidelines-and-forms/disciplinary-consequences/appeals

[23] Department of Education; https://behaviour.education.qld.gov.au/procedures-guidelines-forms/disciplinary-consequences/Documents/reviews-against-refusal-of-enrolment-decision.pdf

[24] *Education (General Provisions) Act 2006* (Qld), s 394.

state schools.[25] However this right is not acknowledged or referenced in resources provided by the Department in relation to review and appeals processes, which instead cite the Queensland Human Rights Commission and Queensland Ombudsman as the appropriate external bodies to review unsatisfactory internal review decisions. This is concerning as many parents and students will not have obtained or have access to legal advice and will therefore not be aware of this right to external review.

Lengthy, complex, and cumbersome review processes exacerbate the harm caused by the disproportionate use of SDAs on students with backgrounds of disadvantage. Such practices raise concern regarding due process and the transparency and accountability of decision-making within the Department. They bring into question key issues of procedural fairness which must remain at the very core of government decision-making.

The disproportionate and excessive use of SDAs that subsequently occurs creates various problems for individuals, families and the broader community. Students removed from school following a suspension or exclusion are denied access to educational materials, learning opportunities and critical chances for relationship building and skill development. Students do not always receive work to complete at home or appropriate support to continue their education.[26] They report feeling anxious, humiliated, and isolated from their peers, all of which then impacts their ability to successfully reintegrate back into school following their absence.

Sometimes students are forced to move schools but struggle to enrol in other schools due to enrolment management plans and gatekeeping practices of some school principals, leaving the student faced with either Special Education (if it is even an option due to restricted eligibility) or home schooling and thus reinforcing the segregated model that inclusive education policies are seeking to overcome. This is particularly problematic for students in rural or remote parts of Queensland, where there are limited or no other schools in which to enrol.

Immediate consequences for parents can also be significant, with many reporting elevated levels of psychological distress as well as financial hardship and risks to the sustainability of their employment. This occurs due to being unable to attend work and/or being forced to take leave whilst tending to their children unexpectedly. These risks are especially high for low-income or single-parent families with limited supports.

The long-term impacts of school disciplinary absences can also be significant. Research has demonstrated that students who have received SDAs can go on to experience poorer mental

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[25] *Education (General Provisions) Act 2006* (Qld), s 402.
[26] Quin, D., & Hemphill, S. A. (2014). Students' experiences of school suspension. Health Promotion Journal of Australia, 25(1), 52-58

health, prolonged unemployment, increased stigma and feelings of rejection, and an increased risk of homelessness.[27]

Despite education being fundamentally about socialising students and preparing them for adult life, for some it is the beginning of the 'school-to-prison pipeline' where marginalised and excluded young people are at greater risk of incarceration.[28] The association between SDAs and antisocial behaviour resulting in prison sentences is well established, both in Australia and overseas. The lack of supervision that occurs following a school disciplinary absence increases the likelihood of students engaging in risk taking behaviour and therefore coming into contact with the criminal justice system.[29] This is particularly concerning for students with disability and Aboriginal and Torres Strait Islander students, given the overrepresentation of both people with disability and First Nations Australians in Queensland's correctional facilities. The long-term costs can be very high. For individual students, they can become alienated from school and engage in behaviours that become 'an entrenched lifestyle'. For society, there are repercussions for community safety and a need for increased expenditure on an ever-growing prison population.

In addition to the personal costs of overusing SDAs, many of the consequences bring economic costs to students, families, teachers and governments alike. This is particularly concerning in the current housing and cost of living crisis where economic impacts are compounded and social inequality is increasing in our community. Recent research commissioned by QAI examined some of the economic impacts of disproportionately suspending students with disability in Queensland state schools. Our key findings were:

- In 2023, Queensland students with disability were denied over 107,000 days of education due to suspensions.
- In one year, about 3,000 Queensland students with disability will miss out on completing year 12 because of suspensions. These students then go on to experience an income gap, costing $41 million in lost income each year.
- Parents and carers of students with disability suspended from school miss up to 76,000 days of work each year, costing $14 million of lost income to these families.

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[27] Graham, L. (2020) Questioning the impacts of legislative change on the use of exclusionary discipline in the context of broader system reforms; a Queensland case study; International Journal of Inclusive Education, 24:14, 1473-1493

[28] Australian Institute of Criminology (2017) Trends and issues in crime and criminal justice; https://www.aic.gov.au/sites/default/files/2020-05/tandi531.pdf

[29] Hemphill S, Broderick D & Heerde J 2017. Positive associations between school suspension and student problem behaviour: Recent Australian findings. Trends & issues in crime and criminal justice no. 531. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/tandi/tandi531

- Suspensions are expensive: 440 664 teacher hours are spent managing student behaviour at a cost of $20.1 million per year.
- Up to 300 students with disability will be incarcerated after school suspensions before they turn 18. Disabled students who have been suspended cost taxpayers between $5.5 – $10 million in youth justice costs each year.[30]

In April 2024, the *Education (General Provisions) and Other Legislation Amendment Bill 2024* was passed. It originally contained modest reforms that would have enhanced the accountability of principal decision-making regarding the use of SDAs. Proposed reforms included changing timeframes regarding SDA decision-making, introducing an appeal right for short-term suspensions (suspensions of up to 10 school days) in certain circumstances and prescribing the matters to be considered by a principal when making an SDA decision in a regulation. However, following fierce opposition from the Queensland Teacher's Union of Employees and the Queensland Secondary Principal's Association, among others, the reforms were withdrawn from the Bill.

Despite the numerous individual and social costs associated with overusing SDAs, we are yet to see the necessary legislative and policy reform that would ensure SDAs are truly only ever used as a last resort measure. The strongly contested nature of this issue resulted in the parliamentary inquiry into the *Education (General Provisions) and Other Legislation Amendment Bill 2024* failing to produce any relevant legislative reform at all.

QAI is therefore of the opinion that an independent review by the Queensland Law Reform Commission is the only way to achieve human rights respecting and evidence-based reform on this issue. It would also present an opportunity to closely examine what works and to consider progress made in other jurisdictions, such as South Australia, which had its own independent inquiry into the issue.[31]

There are also specific recommendations on the use of exclusionary discipline from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability that require review within a Queensland context and subsequent implementation. Recommendation 7.2 '*Prevent the inappropriate use of exclusionary discipline against students with disability*'[32] recommends a series of changes, including legislating the use of suspensions as a last resort and reviewing the obligations of non-government schools to ensure they are commensurate with those of the government sector. This is particularly urgent in Queensland

[30] https://qai.org.au/economic-costs-of-suspending-students-with-disability-from-school/
[31] Graham et al., (2020). Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian government schools: Final Report. The Centre for Inclusive Education, QUT: Brisbane, QLD.
[32] Volume 7: Inclusive Education, employment and housing

where private schools are currently exempt from obligations under the *Human Rights Act 2019* (Qld).

Ensuring students' rights in all educational settings is crucial for fostering an equitable and inclusive education environment for all. Whilst the Department's inclusive education policies increasingly reference human rights principles and an intention to ensure students with disabilities access an education on an equal basis with others, there continues to be a gap between policy and practice that must urgently be addressed. Policy guidance on the use of SDAs is encouraging but insufficient to truly reduce the disproportionate use of SDAs for students with disability.

3. *Residential Services (Accreditation) Act 2002*

Supported accommodation includes levels 1, 2 and 3 residential services and is regulated by the *Residential Services (Accreditation) Act 2002* (Qld). In theory, good quality hostels and boarding houses offer something unique to the accommodation sector. They can provide a useful short-term accommodation option for people with and without disability. If adequately staffed, appropriately maintained and with sufficient regulation and oversight, they could offer something unique to the accommodation sector. The reality, however, is very different.

The initial wave of the deinstitutionalisation movement failed to provide adequate community-based support for people with disability being transitioned out of large-scale institutions into the community. This, together with a housing market that continues to be inaccessible and unaffordable, has meant that many people with disability continue to reside in supported accommodation facilities, including boarding houses and hostels, as a long-term housing option because they have nowhere else to live.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability showed that congregated accommodation settings, such as supported accommodation facilities, can be unsafe for the people that live there. Supported accommodation facilities also do not meet internationally recognised standards for adequate housing nor are they appropriate for people with complex support needs, with many residents having intellectual disability, acquired brain injury, mental health concerns or issues with drug and alcohol use.

Long-held community concern about the supported accommodation sector and a landmark report by the Queensland Public Advocate in 2023 prompted the former Queensland Government to hold an inquiry into the provision and regulation of supported accommodation in Queensland (the inquiry). The Public Advocate's report '*Safe, secure and*

affordable?'[33] comprehensively outlined various problems facing the sector, including the complex interplay between National Disability Insurance Scheme (NDIS) services and personal supports provided by a residential service provider, inadequate oversight and quality assurance mechanisms and the confusing regulatory environment in which residential services operate, to name just a few.

Specifically, the report identified the following concerns:

- Complicated regulatory and legislative frameworks govern the sector and overlook key elements critical to resident wellbeing.
- Fragmented, disjointed and inadequate safeguarding mechanisms.
- Blurred lines of responsibility and potential conflicts of interest that result from the dual role of providers as accommodation and service providers. This is heightened if residents are also NDIS participants, as many residential service providers are also NDIS service providers. This is in contravention of Queensland Housing Strategy which states "where a person requires support in their home, the provision and management of their housing should be separate from the provision and management of their paid supports." [34]
- The potential for residential services to be closed environments where residents have limited or no access to externally provided services such as advocacy or legal services, or opportunities to participate in broader community life.

QAI, together with Queenslanders with Disability Network, were engaged by the Department of Housing and Public Works to support current and former residents of level 3 supported accommodation facilities to share their stories with the inquiry. Our work uncovered multiple stories of people residing in supported accommodation facilities who had been subjected to serious and multiple human rights violations. We heard of people being unable to leave their rooms. Of injuries and requests to call an ambulance that went ignored by staff. Of 30 people sharing 3 toilets and 3 showers. Of a hot water system that had not worked for more than 2 years. Of people having their access to money, phones and identification restricted. Of people being hungry and feeling lonely and disconnected. Of people self-harming and being exposed to drugs and alcohol. We saw rats and cockroaches, dirt and mould. We also felt the extremity of the summer's heatwave exacerbated by poor building design and unmitigated by fans or air conditioning.

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[33] Public Advocate (Qld), *'Safe, secure and affordable'? The need for an inquiry into supported accommodation in Queensland*, August 2023

[34] Queensland Department of Housing's "Housing Principles for Inclusive Communities"

We also discovered:

- Fees and charges for residents are not transparent, standardised or regulated.
- There is no minimum staff ratios or mandatory training in disability support service provision required of staff.
- The use of Restrictive Practices on residents in supported accommodation facilities is completely unregulated unless the resident is also an NDIS participant receiving services from a supported accommodation provider who is also registered as an NDIS provider.
- Residents have very few tenancy rights and can be evicted without notice or substantiated grounds.
- There are no minimum standards regarding the number of residents to shared facilities or regarding features such as having a fan or air conditioning or having a bedroom door that locks.[35]

The inquiry revealed the extent of the challenges facing this sector and the shocking conditions endured by many of its residents. It also took the unprecedented step of obtaining the views of residents alongside other key stakeholders.

Disappointingly, the final report's recommendations address only a limited number of issues identified during the inquiry. The scope of some of the recommendations is also extremely vague. For example, recommendation 6 suggests the Department of Housing "consider how it can better support vulnerable tenants," including tenants issued with a Notice to Leave without sufficient notice. However, this could (and in our view, arguably should) have recommended the legislation be strengthened to empower tribunals to consider a tenant's disability when considering an eviction, as well as the likelihood of finding alternative accommodation (as per Recommendation 7.37 of the Disability Royal Commission).

Since the final report was tabled, Queensland has experienced a change in Government. One of its twelve recommendations was for the Department of Housing, Local Government, Planning and Public works to undertake a review of the *Residential Services (Accreditation) Act 2002* with a focus on improving the safeguards for residents living in residential services and the regulatory framework available to providers to effectively deliver accommodation services. While the former Queensland Government had committed to undertaking a review of the *Residential Services (Accreditation) Act 2002,* to the best of QAI's knowledge, the newly

[35] See QAI's submission to the inquiry for more detail; https://qai.org.au/inquiry-into-supported-accommodation-in-queensland/

elected Crisafulli Government has not publicly committed to implementing any of the inquiry's recommendations, including the recommendation to review the *Residential Services (Accreditation) Act 2002.*

The inquiry provided a vital analysis of a sector that is in urgent need of reform. However, there is great risk that the momentum for change will become lost among the priorities of a newly elected Government. To proactively obtain the views of residents only to then ignore them through inaction would be a great insult to the many people with disability who engaged respectfully with the inquiry and took risks to share their stories with the Committee.

Even if a review of the Act is being planned, in our view it should be undertaken by an independent body such as the Queensland Law Reform Commission instead of the Department of Housing, Local Government, Planning and Public works. This recommendation was also made by Michael Berkman MP (member of the Community Support and Services Committee which led the inquiry) in his Statement of Reservation to the final report:

> *"While I don't question the intentions or the capability of our public service to deliver a review of the RSA Act, there is an inherent risk of political interference in such a review, especially in light of the substantial cost involved in a meaningful reform of the regulatory framework and the overriding fiscal constraint imposed on our public service. This is especially the case where successive State Governments, for decades now, have been unwilling to follow through with a program of genuine redistributive justice that puts the needs of Queensland's most vulnerable people ahead of the interests of our largest, most powerful corporate actors, such as those in the resource, banking and development sectors.*
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> *In my view, the Committee should have recommended that the review be undertaken by an independent body, such as the Queensland Law Reform Commission, in consultation with the Queensland Human Rights Commission and the Public Advocate, and other key sector advocates, including SAPA, QDN and QAI. There are many excellent recommendations detailed in submissions from these and other stakeholders that could (and arguably should) have been directly adopted by the Committee. At very least, these submitter recommendations must be taken into account and adopted to the greatest extent possible in the subsequent legislative review."*[36]

The need for an independent inquiry is demonstrated further by the range of views held by stakeholders as to which direction any reform should take. For example, some stakeholders

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[36] Report No. 44, 57th Parliament Community Support and Services Committee June 2024, Inquiry into the provision and regulation of supported accommodation in Queensland

called for government investment into the sector to expand its capacity (namely the providers) while others, including QAI, called for alternatives and a pathway to help residents transition out of supported accommodation facilities into permanent, long-term housing. Regardless of the ultimate direction of reform, it is imperative that the human rights of supported accommodation residents are at the centre of any changes and in QAI's view, an independent review of the *Residential Services (Accreditation) Act 2002* is the only way to ensure the interests of providers and the Department responsible for overseeing the sector do not solely determine the future of the industry.

4. The indefinite detention of people with disability

The Forensic Disability Service (FDS) is a medium security, 10-bed facility located at Wacol in Brisbane, Queensland. The service supports up to 10 adults with an intellectual disability or cognitive impairment who are subject to an inpatient forensic order (disability) under the *Mental Health Act 2016* (Qld). A person is placed under an inpatient forensic order (disability) when they have been found to have been of unsound mind at the time of an alleged offence, or found to be unfit to stand trial, and there is an unacceptable risk to the safety of the community. QAI has represented people living in the FDS since it opened in 2011.[37]

The premise of the FDS is that each person should progress in accordance with an individualised development plan that is designed with input from the person and their family, professionals, and supporters. The individualised development plan sets out the educational and training programs that will assist the person to return to living in the community.

However, the reality of the FDS is very different. Conditions observed directly by QAI staff, along with anecdotal reports from our clients, raise questions of potential torture and cruel, inhuman, and degrading treatment. Unclean physical conditions, the use of Restrictive Practices and a lack of opportunity for social and community interaction are just some of QAI's concerns. The culture of the FDS is highly institutionalised, contrary to the United Nations' guidelines on deinstitutionalisation.[38] Disability-specific detention is also a form of discrimination under Article 5 of the Convention on the Rights of Persons with Disabilities (CRPD). The Queensland Ombudsman highlighted many of the human rights violations occurring at the FDS in its 2019 report[39], yet there has been an abject failure by the Queensland Government to respond to or implement the Ombudsman's recommendations.

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[37] This is cited in the Queensland Ombudsman's report, *The Forensic Disability Service Report: An investigation into the detention of people at the Forensic Disability Service* (August 2019), page 23

[38] CRPD/C/5: Guidelines on deinstitutionalization, including in emergencies (2022)

[39] Queensland Ombudsman, *The Forensic Disability Service Report: An investigation into the detention of people at the Forensic Disability Service* (August 2019)

The FDS was never intended to be a punishment. Its stated function is to minimise the risk that people under a forensic order (disability) allegedly pose and to support them with the aim of releasing and fully integrating them back into the community. However, in its present form, the FDS is not offering a human rights compliant alternative to the mainstream criminal justice system for people with an intellectual or cognitive disability. Despite the time that has passed since it opened and the significant funding that has been invested into it, the FDS appears to be a failed model, the trial of which has been at significant human cost to the people detained within it.

Of particular concern is the fact that in Queensland, people can be held indefinitely under forensic orders at the FDS. People who are under a forensic order have been charged with an indictable offence, yet due to their disability, this charge has never been tested in a court of law. Whether in fact the alleged offence was committed at all, by the accused person, and in the specific circumstances of the alleged offending are not proven to the standard required for a criminal conviction — beyond reasonable doubt. The person is not given a trial or an opportunity to test the evidence against them, and they have not been found guilty.

Even when the person did commit the offence, if their intellectual or cognitive impairment is significant enough, the law considers them to lack the legal capacity to be held criminally responsible for their actions. It is therefore deeply concerning that Queensland law does not impose any limiting terms on how long a person with a disability who is alleged to have committed an offence can be subject to a forensic order.[40]

Once a person is placed on a forensic order by the Mental Health Court, Queensland's Mental Health Review Tribunal has responsibility for deciding when an individual may be released from that order, or when the conditions of the order can be changed. Consequently, people can be held *indefinitely* as an inpatient in a mental health service or the FDS. In many cases the person can be under the forensic order for much longer than the maximum penalty for the offence they allegedly committed.[41] Even where the person is not an inpatient (that is, not detained in the FDS or a mental health service), forensic orders can limit their human rights by imposing disproportionately restrictive conditions on what the person can do, where they can go and who they can see.

The use of forensic orders that are not time-limited is a serious human rights issue. Indefinite forensic orders are not consistent with Australia's international legal obligations not to use arbitrary detention or detain people on the basis of disability. There is also limited evidence of these orders contributing to the rehabilitation of people with disability, with more early

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[40] For discussion of nominal and limiting terms, and jurisdictions utilising them, see, Bernadette McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities* (Melbourne Social Equity Institute, 2017).
[41] Ibid 20-21; McCausland & Baldry (n 2) 298.

intervention support needed.[42] Indefinite detention denies people certainty about their future and keeps people involved in the forensic system beyond a point where it can be reasonably argued that continued detention and/or supervision is appropriate or beneficial.

The United Nations Committee on the Rights of Persons with Disabilities has condemned the indefinite detention of people with disability after a finding of unfitness to plead, stating that it is contrary to Article 14 of the CRPD regarding the right to liberty and security.[43] These types of orders are viewed as "paternalistic declarations" preventing people with disability from enjoying and exercising their autonomy on the basis of their impairment, and the Queensland Government must take urgent action to limit how long they can be used.[44]

In 2022, the United Nations Committee Against Torture also raised serious concern about Australia and Queensland's arbitrary and indefinite detention of people with disabilities. The Committee urged Australia to "*Stop committing persons with intellectual or psychosocial disabilities who are considered unfit to stand trial or not guilty due to "cognitive or mental health impairment" to custody and for indefinite terms or for terms longer than those imposed in criminal convictions.*" [45] These concerns were raised following a failed visit to Australia by the United Nations Subcommittee on the Prevention of Torture. The visit was cancelled in part due a refusal to allow visits to psychiatric facilities and the FDS in Queensland.

Most recently, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability's Final Report stated that "indefinite detention is unacceptable" and explicitly recommended that "laws providing for it should be repealed."[46] In its response to the Disability Royal Commission's recommendation, the Australian and all state and territory governments committed to "reviewing the National Principles, including aspects regarding indefinite detention."[47]

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[42] The Senate Community Affairs References Committee (November 2016) *Indefinite detention of people with cognitive and psychiatric impairment in Australia,* p118

[43] Arstein-Kerslake et al (n 45) 408; Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40 *Melbourne University Law Review* 816.

[44] Arstein-Kerslake et al (n 45) 408; Law Council of Australia (n 4) 72; Piers Gooding and Charles O'Mahony, 'Laws on
unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122, 133-4.

[45] Concluding Observations to the Review of Australia's Compliance with the Convention Against Torture November 2022 Geneva Switzerland, 32, 39 and 40.

[46] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability's Final Report: *Volume 8: Criminal Justice and people with disability*, Rrecommendation 8.12, page 22

[47] Queensland Government response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, page 97

The time for repealing laws that permit the indefinite detention of people with disability is therefore now, with reform long over-due. Queensland must develop a new model of support for people with intellectual or cognitive disabilities under forensic orders that is consistent with human rights.[48]

5. Civil Domestic Violence Orders and how they apply to people with impaired decision-making capacity

QAI has observed a trend of some people with disability being named as respondents to civil domestic violence orders (DVOs) despite not comprehending what the order requires of them. In Queensland, criminal law allows for a finding of unsound mind or unfitness for trial with alternative processes, however there are no equivalent accommodations in our civil domestic violence order legislation.

This means that people who have no capacity to understand domestic violence orders are nevertheless named as respondents in an order. They are unable to effectively engage with the court process, incur subsequent criminal convictions when the orders are inevitably breached and victims are afforded inadequate and false protection.

Based upon QAI's analysis of relevant policies and legislation in other Australian jurisdictions and overseas, it appears that the intersection of impaired capacity and people who are named as respondents in DVOs is largely overlooked in most settings and, as a result, the efficacy of DVOs in these circumstances is a falsehood.

Our key findings are as follows:

- No Australian jurisdiction currently has domestic violence legislation that expressly allows or requires for a different hearing process where the respondent to the domestic violence order has a disability or impaired capacity.
- In Queensland, disability is only considered with regards to potential conditions of an order, such as the suitability of a respondent to participate in counselling or behavioural programs or whether the respondent has any specific accommodation needs due to their disability (in relation to ouster conditions).
- Section 84 of the *Domestic and Family Violence Protection Act 2012* (DFVP Act) imposes an obligation on the court to ensure that a respondent "understands" a DVO proceeding and the order itself, but there are no consequences if this obligation is not adhered to. Further, the Act states that the court may use services or seek appropriate

[48] CRPD/C/5: Guidelines on deinstitutionalization, including in emergencies (2022)

help to achieve this objective, such as a disability case worker, but this is not mandatory and is at the discretion of the court.

- While section 163 of the DFVP Act declares "a court may inform the public guardian" about circumstances involving "an adult with impaired capacity" and domestic violence, this is optional. Even when a notification is made, the Office of the Public Guardian does not take any subsequent action. The notifications can also be in relation to individuals who are not under a guardianship order or do not have the Office of the Public Guardian appointed as a substitute decision-maker.

- While provisions exist that allow for the appointment of litigation guardians[49], there is no guidance as to how these provisions should apply in practice and the Office of the Public Guardian has publicly stated that they will not act as litigation guardians. Further, many people will not have an appropriate person to appoint as a litigation guardian and litigation guardians are typically unskilled in testing evidence and taking instructions. Litigation guardians will also not be able to assist with ensuring compliance with a DVO if the respondent does not have capacity to understand or control their behaviour.

- There are no processes in place to identify and provide appropriate responses to perpetrators of domestic violence with a brain injury who may emerge through police referrals. If anything, these individuals may be deemed unsuitable for available services.[50]

Our experience also tells us that:

- When responding to an alleged domestic violence incident, law enforcement officials can feel pressured to make instant assessments about who may be in danger, who should be arrested and who may be vulnerable to further abuse. This pressure, coupled with poor training, means disability often becomes an overlooked factor at the scene when arrests are made.

- Applications for temporary DVOs can be made against the wishes of the parties involved. In these situations, they can act as an immediate eviction notice which can be particularly problematic when the aggrieved is relied upon by the respondent for personal supports, such as medication management or personal cares.

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[49] For example, Queensland Domestic and Family Violence Protection Act Benchbook, 6.1, 15.13.
[50] Brain Injury Australia, The Prevalence of Acquired Brain Injury Among Victims and Perpetrators of Family Violence (2018), 50.

- Law enforcement officials do not provide sufficient support or accommodations to people with disability interacting with the criminal justice system. Research shows that some magistrates choose to incarcerate defendants with intellectual disability to facilitate their access to behavioural treatment or support that they perceive is not otherwise available in the community, effectively institutionalising people who lack capacity.[51]

The following case study represents a typical scenario:

> *John* is a man with an intellectual disability and Autism Spectrum Disorder level 3 who lives with his mother and guardian, Mary**. He can experience episodes of intense emotional distress. One day, John saw upsetting images on the television that prompted him to yell and exhibit aggressive behaviours towards Mary if she moved too close to him. She decided to call for help, but when the police responded, the decided to apply for a DVO against John on Many's behalf. Mary expressed her strong opposition to the order, explaining it would force her son to move out of their home, but the police proceeded with the application regardless. In court, John was confused, unable to provide his lawyer with instructions, and he appeared unfit for trial. The family and legal team contested this issue in court for almost 12 months before the police revoked their application. These events made John and Mary experience significant and prolonged distress at the threat of their separation, as well as economic hardship and emotional exhaustion. Despite their case being closed, neither the police nor members of the civil court provided John with any referral to behavioural management services or mental health support.*
>
> **Names have been changed to protect confidentiality*

All of this results in the continued overrepresentation of people with disability in the criminal justice system and an ineffective legal response to instances of domestic and family violence, perpetuating concerns about community safety. Australia's Disability Strategy and the Disability Royal Commission both note the lack of support for people with disability in the justice system but neither specifically acknowledge this particular issue. They both, however, highlight the need for diversionary approaches, community supports and early intervention measures to reduce the overrepresentation of people with disability in the criminal justice system and to better protect their rights.

Our laws need to recognise when a person who is named as a respondent on a DVO does not have the capacity to understand and comply with the order. There has been insufficient consideration in Queensland or elsewhere of appropriately adapted civil processes where a person with impaired decision-making capacity has engaged in domestic and family violence.

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[51] McCausland, R., & Baldry, E. (2017). "I feel like I failed him by ringing the police": Criminalising disability in Australia. Punishment & Society, 19(3).

Without change, protections established to keep families safe are at best ineffectual and at worst create a false sense of protection that can be dangerous.

Changes to Queensland's law are needed to ensure that domestic and family violence civil orders are only made where an act was deliberate, intentional and voluntary. To replace currently ineffective civil orders, funding for community and disability support programs and training for first responders and courts are also needed to improve community safety.