



Criminal Procedure Review – Magistrates Courts

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About TASC National Limited

TASC Legal and Social Justice Services is a not-for-profit organisation that serves over 3000 people per year across more than 400,000 square kilometers of Ipswich and South West Queensland. Now in our 40th year, TASC has developed from a small community legal center to a committed provider of high quality legal advice, social justice and advocacy services. TASC is one of the largest regional community legal and advocacy services in Queensland, where the community and staff work together in partnership to continue to enable justice and change lives.

We are focused on social justice and support, and advocate for our clients, who are culturally and linguistically diverse, and come from the most vulnerable and marginalized sectors of our community. They include First Nation people, refugees and those with disabilities, mental illness and financial disadvantage. We do our best to support the community we work with to promote, protect and preserve their legal and human rights.

TASC welcomes the opportunity to provide submissions to the Criminal Procedure Review. We outline our response, to key areas of the review, based on the available information and evidence, with a strong focus on the impacts, rights and outcomes for our clients.

Inclusion for the neurodiverse

The United Nations Conventions on the Rights of Persons with Disabilities (CRPD) define persons with disabilities as those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹ That barrier cannot be access to justice, and the criminal procedural laws in the Magistrates Court must reflect the accommodation required to ensure justice is available to every person, including those with disabilities.

A significantly high amount of Australian adult prisoners represent as having intellectual disabilities, twenty-eight percent, identifying with impairments that limit their education and employment.² Surveys and reports across all Western jurisdictions have evidenced the large numbers of individuals incarcerated with cognitive disability.³ In the United States, one in fifty prisoners represent with a cognitive disability, and in Australia those with multiple impairments, particularly the indigenous have been involved in the criminal justice system since childhood.⁴

By far the largest population of defendants that present in the criminal justice system are those with intellectual or cognitive disabilities. These individuals are effected in two ways; firstly, their intellectual function, which includes, their ability to learn, use their judgment and problem solve and their adaptive functioning, used in communication.⁵ Neurodiversity is a term used to describe a differing mental or neurological function than what is considered neurotypical, meaning, information is processed differently, which may result in behaviors that differ from the actual or perceived norm.⁶

Neurodiversity is characterised as a lifelong developmental condition displayed by neurologically atypical patters of thought or behavior.⁷ Identified in conditions such as Attention Deficit Hyperactivity Disorder (ADHD) and Dyslexia, neurodiversity is seen in a

¹The UN Convention on the Rights of Persons with Disabilities (CRPD) The United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106), article 1.

² Australian Institute of Health and Welfare 2015. The health of Australia's prisoners 2015. Cat. no. PHE 207. Canberra: AIHW

³ Ruth McCausland and Eileen Baldry, "I Feel Like I Failed Him by Ringing the Police: Criminalising Disability in Australia" (Punishment & Society, 2017)19 3.

⁴ Ibid.

⁵ <https://www.psychiatry.org/patients-families/intellectual-disability/what-is-intellectual-disability>.

⁶ Oxford Dictionary of Languages.

⁷ Prof Amanda Kirby, "Neurodiversity: Embracing inclusivity in the magistrates' court" (doitprofilercom3, 9 December 2020).

court setting most frequently in individuals with ASD or Autism Spectrum Disorder.⁸

Individuals diagnosed with high functioning ASD are seven times more likely to intersect with the criminal justice system, compared to someone who does not have ASD.⁹

One in every seventy Australians, predominantly males, are on the autism spectrum, which represents over 300,000 people. Defined as “a grouping of complex neurodevelopment symptoms,” and signifying no two autistic people are the same, each have their own different experiences with their environment, which affects how they think, feel and interact with those around them.¹⁰ Characterised by difficulties with communication and social interaction, with restricted and repetitive interests, behaviors and sensory sensitivities.¹¹

“If I don’t understand something someone has said, or worse, if someone wants me to do something I don’t understand, I only have two reactions, and I either shut down or melt down”.

Wayne (ASD)

Communication requirements

Although each person with ASD experiences their own neurodiversity individually, a shared trait amongst them is their neurological inconsistency. Demonstrated in the way they respond and perform, dependent on their sensory experience, emotional state and whom they are with in that moment.¹² By far, their largest challenge lies with communication, and the difficulty they have with both, the quality and style of verbal and non-verbal. The inability in reading and understanding facial expressions or cues, body language, and gesturing, make visual communication difficult.¹³ Verbally, they experience difficulties with the tone and volume of those who are speaking to them, and may need to take extra time to understand spoken information, with delays or a lack of response.¹⁴ Some experience Echolalia, a need to talk

⁸ Prof Amanda Kirby, “Neurodiversity: Embracing inclusivity in the magistrates’ court” (doitprofilercom3, 9 December 2020).

⁹ Monique Chiacchia, “Criminal Justice Autism & the Criminal Justice System” (Purdue University April 2016).

¹⁰ Monique Chiacchia, “Criminal Justice Autism & the Criminal Justice System” (Purdue University April 2016);Cohen, Dickerson and Forges 2014.

¹¹ Autismspectrum.org.au “What is Autism”.

¹² Autism speaks.org/What-is-ASD.

¹³ Ibid.

¹⁴ Asdatoz.com/ASD explained.

out loud for self-regulation, and most find it hard to predict others behavior or surmise their intentions.¹⁵

In addition, the neurodiverse, have difficulty processing non-verbal communication and may lack the ability to use eye contact, or misunderstand gestures. Socially, those with ASD have an inability to recognize small talk, sarcasm and understand social cues, such as when it is their turn to talk, or make conversation.¹⁶ Many times these inability go undetected from young and coping mechanisms replace meaningful conversation. The absence of socially normal nonverbal communications create an unconscious bias toward the person, such as the perception that the avoidance of eye contact, equals ignorance, shame, or critically in court, guilt.

These are all communication skills the neurotypical take for granted, and day-to-day systems such as the justice system, has been established for only their understanding. In a court setting, individuals who lack the ability to understand long or complex sentences, physical gestures and suffer social naiveté, are unable to truly understand the proceedings, to evaluate their position and comprehend their outcomes. This means they unfairly have a reduced or diminished opportunity for justice, which is their fundamental human right.

“Going to court is shit, nobody listens to you. I just agree to anything because I need to just get out of there”.

Lachlan – (ADHD & Asperger’s)

Human Rights

In June 2020, the Equality and Human Rights Commission reported that the criminal justice system was failing those with neurodivergence, specifically autism.¹⁷ Additionally, there is a high representation of those with intellectual disabilities within the system.¹⁸ It was found that due to the difficulties with their cognitive and communicative abilities they struggle with

¹⁵ Asdatoz.com/ASD explained.

¹⁶ Ibid.

¹⁷ Rachel Slavny et al, “Autism and the Criminal Justice System: An analysis of 93 cases (onlinelibrary.wiley.com/doi/10.1002/aur.26980).

¹⁸ Rachel Slavny et al, “Autism and the Criminal Justice System: An analysis of 93 cases (onlinelibrary.wiley.com/doi/10.1002/aur.26980; Gulati.et al. 2018).

‘constructing a clear and consistent narrative of events’,¹⁹ and “misunderstand their legal rights and the implications of what they say to the police”.²⁰ A comparison between autistic and non-autistic people found that those with autism had an increased likelihood of being arrested and higher rates of interactions with the criminal justice system.²¹ The report reflects that a defendant with neurodiversity in a court setting who is responsible for communicating effectively and providing evidence in court under stress, may be at a ‘significant disadvantage’.²² Defendants with these needs may not be able to contemplate the consequences of legal steps or actions, with no understanding of the importance of timely action.²³

“I did not think it was my fault, but I just couldn’t argue with it, I just agreed with everything cause I just wanted to get out of there”.

Matthew (ASD)

In response to question three – TASC recommends the implementation of the following procedures:

- “Peaceful Proceedings”- individual and separate court days or times to accommodate only neurodiverse individuals. Similar to “quiet hour” in the supermarkets, which includes lower lighting, quieter surroundings and minimal staff, in an effort to reduce sensory overload
- Green or quiet rooms – A secluded space away from the generally hectic energy and noise of the Magistrates Court environment. A space where the accused may wait until their matter is heard or use noise-cancelling headphones.
- Court Support – specifically trained support people who are educated in the communication requirements of the neurodiverse and can recognise signs of “shut

¹⁹ Rachel Slavny et al, “Autism and the Criminal Justice System: An analysis of 93 cases (onlinelibrary.wiley.com/doi/10.1002/aur.26980; Cusack 2018.

²⁰ Rachel Slavny et al, “Autism and the Criminal Justice System: An analysis of 93 cases (onlinelibrary.wiley.com/doi/10.1002/aur.26980; Erickson, Salekin, Johnson and Doran 2020.

²¹ Ibid.

²² Equity and Human Rights Commission, ‘Inclusive Justices: A system designed for all’ (Report, 2020).

²³ International Principles and Guidelines on Access to Justice for Persons with Disabilities.

down or meltdown?”. They are able to attend a hearing with the accused and facilitate the information between those involved.

- A pre-court educator – a person who is able to explain the full court procedure before the hearing using step-by-step visuals to ensure the accused understands.
- Informal seating arrangements such as those in the Murri Court.
- The use of simple language and terms, and allowance of extra time for the accused to understand and respond.

TASC supports recommendations from the Human Rights Commission to ensure a neurodiverse defendant is treated fairly; the criminal justice system should adapt to facilitate their effective participation.²⁴

In-Court Diversion

The Queensland Productivity Commissions reported that diverting offenders from the criminal justice system resulted in benefits for both the system and the individual. The benefits include a reduction in escalating interactions with the system, and costs in ratio to harm for minor offences.²⁵

The opportunity for Queensland adult offenders to be diverted out of the traditional criminal justice system into a diversion program before a summary hearing or guilty plea allows for an alternate future devoid of potential stigma a conviction attracts. New South Wales currently recognises diversion with the MERIT program through the Local Court, for adults who have alcohol and drug related issues. The program has been operational for twenty-two years and is available to 4/5 of charged defendants. The benefits include a reduction in the offender’s drug/alcohol use and re-offending, and an increase in their health and wellbeing.²⁶

The Queensland Productivity Commission report recommends the criminal justice system ensure that diversionary options are available and used to reduce recidivism.²⁷ Additionally, the key elements to assist individuals avoid behaviors that can lead to crime and imprisonment are early intervention and prevention. Recommendations include opportunities

²⁴ Equity and Human Rights Commission, ‘Inclusive Justices: A system designed for all’ (Report, 2020).

²⁵ The Queensland Productivity Commission, Inquiry into Imprisonment and Recidivism (Final Report, August 2018).

²⁶ New South Wales Government, ‘Magistrates Early Referral into Treatment: An overview of the MERIT program as at June 2011.

²⁷ Queensland Productivity Commission, ‘Inquiry into: Imprisonment & Recidivism, (Final Report, August 2019).

to enable communities to develop their own solutions, such as the Murri court, which is highly valued by all stakeholders.²⁸

Currently in Queensland, options away from the criminal justice system are mostly in the hands of the police, through Diversion and Caution (D&C), of which, the decision to utilise is at the officer's discretion. Research indicates that cautioning slows the escalation of people through the criminal justice system into prison, which is an advantage to both the individual and the system, by reducing the use of valuable resources for low harm, victimless crime.²⁹ To improve the reduction of recidivism, the process for cautioning should also include effective treatment and support.³⁰ The largest problem with the current system of C&D is that Queensland Police Service (QPS) makes the least use of the non-court proceedings, in comparison with New South Wales, Victoria and South Australia, at 17% for QPS, compared to 59% by the NSW police.³¹

"I only had 5g of cannabis and I gave it to the police as soon as they asked if I had anything on me. They laughed at me and said I should have kept it in my shoe. I haven't been in trouble before for anything, but because I have dreadlocks, they didn't believe I wasn't more heavily into drugs. They charged me, and now I have to face maybe having something on my record. The police had the power to divert me away from the courts but did not care".

Kieran

New Zealand initiated a similar program of D&C, called the New Zealand Policing Excellence Program, which ran from 2009 – 2014, and achieved great results, including a 40% reduction in prosecutions and 20% reduction in recorded crime overall.³² As Queensland's imprisonment rates have increased by 164% over the last 30 years, 1/3 of those offences being for illicit drugs, there is a need for action.³³ The productivity commission believes similar results are achievable in Queensland to better treat offending behavior and

²⁸ Ibid.

²⁹ Ibid.

³⁰ Queensland Productivity Commission, 'Inquiry into: Imprisonment & Recidivism, (Final Report, August 2019).

³¹ Ibid.

³² Queensland Productivity Commission, 'Inquiry into: Imprisonment & Recidivism, (Final Report, August 2019).

³³ Ibid.

prevent unnecessary interactions with the criminal justice system.³⁴ The potential for success, is by developing a public interest test for police, to encourage and guide the use of discretion, and establishing key performance indicators for efficient use of D&C. An incentivised program may be necessary to ensure discretion is applied in the best interest of the public, as the current arbitrary procedure followed by QPS is failing.



Perhaps the success of the MERIT program is due in part to decisions of discretion being made by a “merit team”, who determine suitability, approved by a Magistrate.³⁵ The new Queensland criminal procedure seeks to divert offenders out of the court system without a summary hearing, plead or sentence. Measures to ensure this occurs should include taking the discretion away from the individual police officer, who is trusted to make decisions in consideration of Human Rights and Anti-discrimination best practice.

Tasc recommends, a system of diversion where assessment is made by an independent third party, who is properly trained and working within the guidelines and provisions of Human Rights and Anti-Discrimination legislation. Additionally, Tasc recommends that all diversion programs are made available in rural and remote locations.

TASC recommends a criminal justice procedure in keeping with the human right, that everyone has the right to be treated fairly and equally by the law.

³⁴ Ibid.

³⁵ New South Wales Government, ‘Magistrates Early Referral into Treatment: An overview of the MERIT program as at June 2011.