



# **Submission**

**Forensic Disability Bill 2010 – Information Paper**

**by  
Anti-Discrimination Commission Queensland**

**October 2010**

**1. Introduction - Queensland's International obligations**

- 1.1 The Anti Discrimination Commission (the *ADCQ*) is established under the *Anti-Discrimination Act 1991* (the *AD Act*). One of the functions of the *ADCQ* is to promote an understanding and acceptance, and the public discussion of human rights in Queensland.
- 1.2 A major purpose of the *AD Act* is to promote equality of opportunity for everyone, including people with intellectual and mental health impairments, by protecting them from unfair discrimination in the areas of the provision of goods and services, accommodation and the administration of State laws and programs.
- 1.3 In passing the *AD Act* in 1991, the Queensland Parliament cited its support of the Commonwealth in ratifying a number of international instruments. Those instruments include the *Declaration on the Rights of Mentally Retarded Persons*<sup>1</sup> and the *Declaration on the Rights of Disabled Persons*.<sup>2</sup>
- 1.4 On 30 March 2007 the Australian Government signed the United Nations *Convention on the Rights of Persons with Disabilities* (the *Convention*) and Australia ratified the *Convention*, with a reservation, on 17 July 2008. On 21 August 2009 Australia ratified the Optional Protocol to the *Convention* without reservation.
- 1.5 Subject to the reservation, Australia has a duty to ensure that domestic laws conform to the obligations contained within the *Convention*. This includes any laws passed by the Queensland Parliament.

**2. Convention on the Rights of Persons with Disabilities Obligations**

- 2.1 There are a number of Articles contained within the *Convention* that have particular relevance in the context of the issues discussed in the report '*Challenging Behaviour and Disability a Targeted Response*' by the Hon. W.J. Carter QC, and the Queensland Government's response to that report.
- 2.2 Those articles with particular relevance are Articles 12, 14, 15, 17, 19 and 26.
- 2.3 Article 12 deals with equal recognition before the law and states, inter alia:
1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
  2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

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<sup>1</sup> Proclaimed by the UN General Assembly in 1971.

<sup>2</sup> Declaration of the UN General Assembly made on 9 December 1975.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

2.4 Article 14 deals with liberty and security of the person and states:

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
  - a. Enjoy the right to liberty and security of person;
  - b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

2.5 Article 15 deals with freedom from torture or cruel, inhuman or degrading treatment or punishment and states:

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.
2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

2.6 Article 17 deals with protecting the integrity of the person and states:

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

2.7 Article 19 deals with living independently and being included in the community and states:

States Parties to this Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment

by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

## 2.8 Article 26 deals with habilitation and rehabilitation and states:

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:
  - a. Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
  - b. Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.
2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.
3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

## 2.9 Australia's reservation provides:

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.

### **3. The Proposed Legislative Model**

#### ***General Principles***

- 3.1 The ADCQ makes the following comments only upon the information contained within the Forensic Disability Bill 2010 Information Paper. The comments are of a general nature only. At the appropriate time the ADCQ requests to be given an opportunity to comment on the draft Bill which attempts to implement the objectives contained within the information paper.
- 3.2 The information paper states that the general principles to guide the administration of the Bill will ensure the forensic disability service model provided for by the Bill:
1. reflects contemporary values concerning the rights of people with a disability;
  2. supports a contemporary and appropriate model of care; and
  3. acknowledges there is a need to balance the rights and needs of individuals with the needs of victims and the protection of the community, more generally.
- 3.3 It is important to note that persons the subject of a forensic order have not been convicted of an offence.<sup>3</sup> While the Mental Health Court must not make a determination that a person is of unsound mind if the court is satisfied there is reasonable doubt the person committed an alleged offence, those persons who are the subject of forensic orders are not convicted 'offenders', and are still entitled to the presumption of innocence. Further, a person the subject of a forensic order has not been found guilty of an offence and has not been sentenced to a defined period of detention. However, the Forensic order may remain in place indefinitely, and possibly for a period much longer than the term of a sentence had the person faced a court and been found guilty of the alleged offence. The involuntary and indefinite detention of persons who have not been convicted of an offence is thus a prima facie breach of the fundamental human right to liberty<sup>4</sup>.
- 3.4 The Disability Services Act 2006 contains a human rights principle which states that people with a disability have the same human rights as other members of society and should be empowered to exercise their rights.

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<sup>3</sup> Section 268 Mental Health Act 2000

<sup>4</sup> *Universal Declaration of Human Rights*, article 3

It further states that people with a disability have the right to:

- (a) respect for their human worth and dignity as individuals; and
- (b) realise their individual capacities for physical, social, emotional, cultural, religious and intellectual development; and
- (c) live lives free from abuse, neglect or exploitation; and
- (d) participate actively in decisions affecting their lives, including the development of disability policies, programs and services.

When using disability services people with a disability have the right to:

- (a) services supporting their achieving quality of life in a way that supports their family unit and their full participation in society; and
- (b) receive services in a way that results in the minimum restriction of their rights and opportunities; and
- (c) receive services in a way that respects the confidentiality of their information; and
- (d) receive services in a safe, accessible built environment appropriate to their needs; and
- (e) pursue grievances about services without fear of the services being discontinued or recrimination from service providers; and
- (f) support to enable them to pursue grievances about services; and
- (g) support and access to information, to enable them to participate in decisions affecting their lives.

The *Disability Services Act 2006* states that persons are encouraged to have regard to the human rights principle in matters relating to people with a disability<sup>5</sup>, and requires a person performing a function or exercising a power in relation to the use of restrictive practices to have regard to the human rights principle<sup>6</sup>.

- 3.5 The ADCQ suggests the Forensic Disability Bill include a human rights principle in similar terms to the principle in the Disability Services Act 2006.

#### ***Forensic disability service model***

- 3.6 The Information Paper is premised on there being an alternative place of involuntary detention and care for people with a disability on a forensic order. The information paper indicates that there will be one facility intended to be declared as an authorised forensic disability service – a 10 bed facility at Wacol in Brisbane.

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<sup>5</sup> Section 18

<sup>6</sup> Section 123C

- 3.7 The ADCQ is concerned that the model appears to primarily based upon the creation of an intensive, residential rehabilitation and care service in a secure facility. The ADCQ'S understanding of the principles outlined in the Carter report is that best practice should be based upon the premise that detention and institutionalisation of this cohort of people with intellectual disabilities in a facility that has a number of references similar to a prison, should be a last resort.<sup>7</sup> The Carter Report states:

The fact is that those in the cohort have individual needs that have to be addressed if the proper development of the person is to be optimally supported. It was said earlier that these persons are not in terms of their personal characteristics, static and intransigent and once categorised are then able to be the subject of a common management plan. Rather each needs to be supported in a way which individualises their needs and provides an individual response. Flexibility is therefore an essential requirement which in turn requires a specialised and comprehensive assessment of the person and his/her needs. It is presently not available.

- 3.8 The ADCQ suggests that as a starting point, the model should be based on the premise that services and facilities will be established which would give capacity for the Mental Health Act to direct the Mental Health Court to consider as a first option, a properly supported community placement. The placing a person in an institutionalised setting should only become an option for the Court if having regard to the person's intellectual disability, their placement in a well supported community situation represents an unacceptable risk to the safety of themselves or others.
- 3.9 According to the Review of the Queensland Mental Health Act 2000 Final Report – December 2006 (the Butler Report), as at 30 June 2006 23 patients on forensic orders had a sole diagnosis of intellectual disability and 12 patients had a dual diagnosis<sup>8</sup>. The ADCQ is not aware of the current number of such patients, however the Mental Health Review Tribunal reports in its 2008-2009 Annual Report:

The number of individual patients subject to an FO is increasing, and this may reflect the additional workload undertaken by the Mental Health Court since 2006, as well as the fact that revocation of FOs has slowed.

The same Annual Report also indicates that during 2008-2009 the Mental Health Court made 91 forensic orders, however the number of those orders for patients with a sole or dual diagnosis of intellectual disability is not provided.

The ADCQ is also unaware of any statistics showing the location of the patients subject to forensic orders who have a sole or dual diagnosis of intellectual disability.

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<sup>7</sup> Carter Report, page 88

<sup>8</sup> Chapter 5, page 101

- 3.10 It would appear that at any given time there may be more than 10 people with an intellectual disability who are subject to a forensic order. It is also likely that some of the patients may be from regions or areas other than Brisbane or South-East Queensland.
- 3.11 The ADCQ suggests the forensic disability services model that is adopted should enable the establishment of properly supported community based services and facilities to be utilised as authorised forensic disability services, in the South East as well as other areas of Queensland. These should be mandated as the first option placement for persons with intellectual disabilities the subject of forensic orders, as discussed in paragraph 3.8 above.

### ***Placement and Transfers***

- 3.12 It is well recognised that vulnerable persons and persons subjected to involuntary detention have better outcomes with support mechanisms that include family, friends, culture and community. Placing persons in facilities away from their support can result in unlawful discrimination on the attributes such as race, religion, and family responsibilities.
- 3.13 The ADCQ recommends that the criteria for placing in an authorised forensic disability service include considerations relating to the person's support mechanisms in their current location, and have due regard to the persons cultural, religious and family needs and supports.
- 3.14 The ADCQ recommends that criteria for transferring patients between an authorised forensic disability service and an authorised mental health service also include considerations relating to the person's support mechanisms in their current location, and have due regard to the persons cultural, religious and family needs and supports.

### ***Director of Forensic Disability***

- 3.15 The ADCQ has a number of concerns about the roles and powers of the proposed position of Director of Forensic Disability. The ADCQ is of the view that there must be a clear delineation of the administrative and operative role associated with overseeing the routine management of persons covered by the proposed legislation, and the person who ought to have the role of independently scrutinising the operations and ensuring that the rights of persons are protected.
- 3.16 To ensure the independence of the role of the person responsible for scrutinising the operations proscribed by the legislation, the person should be appointed by Governor in Council. The reporting function should not be to the Minister for Disability Services and Multicultural Affairs, but rather to the Parliament. The person appointed to oversee role should have all the functions and powers similar to an independent Chief Inspector of Prisons, including the power to perform unannounced visits to the facilities utilised for the placement of this cohort of persons under a forensic order.<sup>9</sup> How this person's role

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<sup>9</sup> See *Inspector of Custodial Services Act 2003(WA)*

interrelates with the role of the Mental Health Review Tribunal needs to be clearly defined

### **Care Plans and Restrictive Practices**

- 3.17 It is noted that the Bill will require each person to have an individualised care plan that must include, inter alia, strategies that may be used to manage challenging behaviour, including when seclusion or mechanical restraint may be used as the least restrictive way of ensuring the safety of the person or others.
- 3.18 The ADCQ agrees with the views expressed by the Hon W. Carter<sup>10</sup> that persons with intellectual disabilities who exhibit 'challenging behaviours' are vulnerable persons, and that compliance with the legislated human rights principle contained within the Disability Services Act is not negotiable. Permitting restrictive practices that impact on an individual's human rights should occur only as a very last resort.
- 3.19 An important human rights principle is that an individual should not be deprived of their liberty unlawfully or arbitrarily. The process of creating positive behaviour support plans, and having any proposed further deprivation of liberty through the imposition of restrictive practices on an individual scrutinised by an independent entity, are mechanisms for ensuring the upholding of this principle.
- 3.20 The ADCQ recommends that the use of restrictive practices should not be a compulsory inclusion in a person's individualised care plan, and that there must be an independent process and decision maker to scrutinise, and where appropriate approve the use of restrictive practices for a person.
- 3.21 In the Information paper it appears that 2 regimes will regulate prohibited seclusion and mechanical restraint- depending on whether the facility is regulated by the Mental Health Act, or by the Disability Services Act. The ADCQ submits that having two regulatory regimes for such practices is less than ideal. If possible the Disability Services Act scheme that enables QCAT to approve and review restrictive practices should be the only scheme that applies to persons subjected to forensic orders who have an intellectual disability.
- 3.22 The ADCQ also recommends that mandatory record keeping and reporting about the number of approvals granted permitting the imposition of restrictive practices upon individuals in a given year.

The ADCQ thanks the Department of Communities for the opportunity to comment on the Forensic Disability Information Paper.

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<sup>10</sup> *Challenging Behaviour and Disability A Targeted Response – July 2006*