

Chapter 9

Recommendations

9.1 This is the first major inquiry that has focused solely on the specific question of the indefinite detention of people with a cognitive or psychiatric impairment. However, this issue has arisen in the course of other inquiries and reports into disability or justice issues.

9.2 These inquiries and reports include the committee's 2015 inquiry report 'Violence, abuse and neglect against people with disability in institutional and residential settings'¹ (abuse inquiry), the Australian Law Reform Commission 2014 report 'Equality, Capacity and Disability in Commonwealth Laws'² (Law Reform Commission report) and the Australian Human Rights Commission 2014 report 'Equal Before the Law: Towards Disability Justice Strategies'³ (Human Rights Commission report).⁴ There have also been state or territory level health or justice reviews, as well as complaints using United Nations mechanisms.

9.3 Each of those inquiries or reports made a series of recommendations to address broader mental health, justice or disability issues. It is clear to the committee that although the recommendations were drafted to address wider problems in the disability or justice space, had they been fully implemented they would have largely addressed many of the causes of indefinite detention of people with cognitive and psychiatric impairment.

The Australian Government's role

9.4 A key consideration in formulating recommendations to address an issue such as this is determining the appropriate responsibility for each level of government.

9.5 As noted in Chapter 2, the Australian Government is a signatory to the United Nations *Convention on the Rights of Persons with Disabilities* (Disability Convention).⁵ As a signatory to the Disability Convention, the Australian Government is responsible for ensuring the treatment of people with disability in Australia is compatible with the provisions of the Convention. The committee is aware of the recent ruling by the Committee on the Rights of Persons with Disabilities (UN

1 Community Affairs Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, (Abuse inquiry)* November 2015, pp 267–283.

2 Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws', August 2014, pp 11–21.

3 Australian Human Rights Commission, 'Equal Before the Law: Towards Disability Justice Strategies', February 2014.

4 The full list of relevant recommendations from those inquiries and reports can be found in Appendix 3.

5 United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 25 November 2016).

Disability Committee), on the indefinite detention of Mr Marlon Noble, which noted that he has 'never had the opportunity to have the criminal charges against him determined' yet has spent over a decade in prison.⁶ He remains on conditional release from prison. The committee is also aware of a number of pending cases before the UN Disability Committee relating to the indefinite detention of people with cognitive and/or psychiatric impairment. The ruling on Mr Noble was directed to the Australian Government as the signatory to the UN Disability Convention. When rulings are made in respect to the other cases, these rulings will also be directed to the Australian Government.

9.6 The committee acknowledges that it is the states and territories that have primary carriage of forensic legislation, and the delivery of corrective services and disability services. This does not absolve the Australian Government of any responsibility in this area. The Australian Government must do more than simply facilitate a response from the relevant state government to the UN.

9.7 In addition, in 2009 the Australian Government voluntarily assumed certain responsibilities for disability services under the National Disability Agreement, such as 'investing in initiatives to support nationally agreed policy priorities, in consultation with States and Territories.' The committee notes the reform priorities of that agreement specifically include reference to 'people at risk of interaction with the criminal justice system (including those on forensic orders), and those who require support due to challenging behaviours, including those who are subject to restrictive practices.'⁷

9.8 The committee makes the following recommendations taking into account the rights and responsibilities of the states and territories, and the Australian Government.

Committee recommendations arising from the abuse inquiry

9.9 The committee notes that one year on from the tabling of the previous committee's 2015 abuse inquiry report, many of the key issues in relation to the indefinite detention of people with cognitive and psychiatric impairment identified in that report remain the same. The committee therefore wishes to highlight the following recommendations, made in that 2015 report.

Access to justice

9.10 Access to justice for people with a disability, as eloquently put in evidence to the committee, is more than simply providing a wheelchair ramp into a courtroom⁸. It

6 United Nations Office of the High Commissioner, *Australia urged to amend laws that lead to people with mental disabilities being detained indefinitely*, 23 September 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20566&LangID=E> (accessed 13 October 2016).

7 Council of Australian Governments, *National Disability Agreement*, 1 January 2009, http://www.federalfinancialrelations.gov.au/content/npa/national_agreements/national-disability-agreement.pdf (accessed 25 November 2016.)

8 Dr Piers Gooding, Disability Research Initiative, Melbourne Law School, University of Melbourne, *Committee Hansard*, 25 October 2016, p. 2.

is about fully supporting a person with a disability to appropriately intersect with all aspects of criminal justice systems, including identifying disability, provision of supported decision making and providing appropriate exit mechanisms.

Recommendation 1

9.11 The committee recommends the Australian Government work with state and territory governments on the implementation of initiatives to improve access to justice for people with disability contained in the reports by the Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, the Human Rights Commission, *Equal Before the Law* and Productivity Commission, *Access to Justice Arrangements*, with particular focus on:

- **better intervention and support services;**
- **expanded Community Visitor's schemes;**
- **improved witness support services to people with disabilities;**
- **creation of an assessment protocol that assists police, courts, and correctional institutions in identifying people with disabilities. Where identified, a trained officer will provide support;**
- **transparent, effective and culturally appropriate complaints handling procedures;**
- **training for police, lawyers and others in justice in needs of people with disability; and**
- **where a person who has been found unfit to plead is to be held in detention, demonstrate that all reasonable steps have been taken to avoid this outcome, and that person must be held in a place of therapeutic service delivery.⁹**

Recommendation 2

9.12 The committee also recommends that each state and territory implement a Disability Justice Plan.¹⁰

Recommendation 3

9.13 The committee believes that there is a need for further investigation of access to justice issues, with a focus on:

- **the implementation requirements for supported decision-making;**
- **investigating the potential for the UK system of registered intermediaries; and**
- **the indefinite detention of people with cognitive impairment or psychiatric disabilities.¹¹**

9 Abuse inquiry, Recommendation 6.

10 Abuse inquiry, Recommendation 7.

Oversight

9.14 It is clear to the committee that improved oversight of facilities would provide another avenue through which situations of indefinite detention could be identified; particularly as such detention often starts from an initial period of time-limited detention which is then continually reaffirmed. Regular oversight would address this form of indefinite detention.

Recommendation 4

9.15 The committee recommends the Australian Government work with state and territory governments on a nationally consistent approach to existing state and territory disability oversight mechanisms, to include;

- **increased funding for community visitor schemes, with consideration these schemes be professionalised in all jurisdictions and with a mandatory reporting requirement for suspected violence, abuse or neglect; and**
- **greater crossover in oversight and complaints mechanisms between aged care and disability.**

9.16 A nationally consistent approach to disability oversight mechanisms is best overseen by the national disability watchdog.¹²

Supported decision-making

9.17 Evidence was presented to the inquiry that supporting a person with a cognitive or psychiatric impairment to be involved in decision-making about their own treatment, is not only a matter of justice and human rights, but it can often lead to increased voluntary participation in therapeutic intervention, resulting in fewer instances of involuntary detention.

Recommendation 5

9.18 The committee recommends that the Australian Government drive a nationally consistent move away from substitute decision-making towards supported decision-making models.¹³

Recommendation 6

9.19 The committee recommends that the Australian Government work with state and territory governments to implement the recommendations of the Australian Law Reform Commission report *Equality, Capacity and Disability in*

11 Abuse inquiry, Recommendation 8.

12 Abuse inquiry, Recommendation 9.

13 Abuse inquiry, Recommendation 10.

Commonwealth Laws, in relation to legal capacity and supported decision-making.¹⁴

Recommendation 7

9.20 The committee recommends the Australian Government work with state and territory governments to create national consistency in the administration of guardianship laws to ensure:

- **public advocate and guardianship functions are separate to ensure independent oversight;**
- **mandatory training on supported decision-making for guardians;**
- **that service delivery organisations or accommodation providers are never given guardianship;**
- **automatic increased oversight where service delivery organisations or accommodation providers recommend families lose guardianship; and**
- **that Aboriginal and Torres Strait Islander peoples' particular circumstances are taken into account in developing guardianship systems.**

New recommendations—Forensic orders

9.21 The following recommendations relate to people held under forensic orders.

Quantifying and establishing national principles

9.22 Earlier in Chapter 2 of the report, the committee noted that official statistics on the issue of indefinite detention are largely piecemeal and inconsistent between the states. In 2014, the Disability Justice Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner called for an audit of all people being held in prison who had not been found guilty of a crime. This call was directed specifically at the NT and WA Governments; however, the call is applicable to all Australian jurisdictions.

9.23 The committee acknowledges the work being undertaken by the Council of Australian Governments (COAG) Law, Crime and Community Safety Council (LCCSC). The LCCSC has recognised that there is a lack of consistent statistics in this area and is working on collating a consistent national data-set. The committee agrees that this is an important initiative to quantify the extent of indefinite detention in Australia. The LCCSC is also considering a draft of the 'National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty by Reason of Cognitive or Mental Health Impairment' (National Principles). The committee considers the LCCSC as an appropriate forum within COAG to discuss and advance many of the committee's concerns relating to the indefinite detention of forensic patients.

14 Abuse inquiry, Recommendation 11.

Recommendation 8

9.24 The committee recommends that the forthcoming national statement of principles adopt the position that indefinite detention is unacceptable and that state and territory legislation be amended in line with this principle.

- The committee recommends that the LCCSC endorse and adopt the National Principles at its earliest opportunity.

Recommendation 9

9.25 The committee recommends that the LCCSC complete its data collection project at its earliest opportunity.

Screening and diagnosis

9.26 The committee notes that many alleged offenders are people with undiagnosed cognitive and/or psychiatric impairments that continue to remain undiagnosed. The committee is of the view that all people in the justice system should be screened for cognitive and psychiatric impairment at multiple points throughout the criminal justice system to ensure that people with disability are provided with therapeutic and other supports, and diverted from the criminal justice system where appropriate. The committee notes the disability screening approach used by the NSW Government.

Recommendation 10

9.27 The committee recommends that the COAG develop and implement a disability screening strategy (including hearing assessments) for all Australian jurisdictions. This screening strategy would apply to all people (adults and minors) who engage with the criminal justice system. The strategy would be applied at multiple points throughout the criminal justice system such as first contact with police, courts, prisons and related facilities.

9.28 The committee makes the following recommendation on the issue of specialist diagnosis tools.

Recommendation 11

9.29 The committee recommends that the COAG work together to ensure that recently developed tools such as the FASD diagnosis tool are provided as a supported resource to police, courts, legal aid and other related groups.

Supported decision-making

9.30 The committee makes the following recommendations on the issue of supported decision-making, making particular note of the Unfitness to Plead project as a useful model for the delivery of such services.

Recommendation 12

9.31 The committee recommends that the Australian Government, through the COAG, actively encourage support worker programs which assist people with cognitive and psychiatric impairment to engage with and participate in the court process. The Australian Government should work closely with the states and territories to identify suitable programs to be funded for expansion where they are currently being trialled, and establish new programs where they currently do not exist.

Aboriginal and Torres Strait Islander peoples

9.32 The committee considers that Aboriginal and Torres Strait Islander forensic patients should have access to culturally appropriate therapeutic and support services. It is imperative that Aboriginal and Torres Strait Islander peoples with cognitive and/or psychiatric impairment are able to communicate effectively with service providers, police and the judiciary.

Recommendation 13

9.33 The committee recommends that COAG develop a range of culturally appropriate resources for Aboriginal and Torres Strait Islander peoples that can be deployed to service providers, police and the judiciary. These resources will assist the service providers, police and the judiciary to communicate more effectively with Aboriginal and Torres Strait Islander peoples engaged in the criminal justice system.

9.34 The committee recommends that the Australian Government, through COAG, fund a number of Aboriginal and Torres Strait Islander identified support worker positions across a number of population centres, particularly in the NT and WA. This would include positions or funding for signing and translation services.

9.35 The committee recommends that Aboriginal controlled organisations should be resourced to provide specialised and culturally appropriate support to Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairments in detention and community care.

9.36 The committee is concerned that nearly 12 per cent of Aboriginal and Torres Strait islander peoples have a disease of the ear with at least seven per cent reporting some form of hearing loss. This is nearly double the rate of the non-indigenous population. The committee notes evidence received which indicates that Aboriginal and Torres Strait islander peoples with hearing loss can face many challenges when communicating with the dominant form of English, especially when a person is not competent in signing. These challenges are compounded when hearing impairment is combined with an intellectual disability and/or cultural differences. The committee notes the committee's 2009 Inquiry into Hearing Health in Australia, which focused on the importance of the diagnosing hearing impairment. Current interview guidelines for police in the NT leave the decision of providing an interviewee with an interpreter

up to the discretion of individual police officers. The committee considers that these guidelines must go further.

Recommendation 14

9.37 The committee recommends that the COAG work together to modify guidelines for police interrogation of Aboriginal and Torres Strait Islander peoples in each state and territory to include a requirement that a hearing assessment be conducted for any Aboriginal and Torres Strait Islander person who is having communication difficulties, irrespective of whether police officers consider that the communication difficulties arise from language and cross-cultural issues.

Specialist courts

9.38 The committee received a range of evidence which highlighted the use of specialist courts in many Australian jurisdictions which led to diagnosis and diversion from the criminal justice system. In some cases, the use of specialist courts has improved the participation in legal proceedings by alleged offenders with cognitive and psychiatric impairments.

9.39 The committee also heard evidence which noted the need for specialist courts for Aboriginal and Torres Strait Islander peoples, particularly in remote parts of WA. Importantly, the committee considers that such courts have the capacity to deal with alleged criminal activity in a culturally appropriate way that both acknowledges the inappropriateness of any proven negative behaviours and then provides a suitable therapeutic on-country pathway forward.

Recommendation 15

9.40 The committee recommends that the COAG consider an appropriate mechanism for jurisdictions with specialist courts to share their expertise and experience with other jurisdictions.

9.41 The committee recommends that the COAG develop and implement appropriately resourced mobile courts for remote parts of WA and the NT.

State and territory law reform

9.42 The committee has received evidence noting that the judiciary in WA and the NT have limited options when choosing to issue a forensic order. The most compelling element of this evidence came from the Chief Justice of WA, the Hon Wayne Martin AC. The committee agrees with the Chief Justice's position that the judiciary needs to have legislated options beyond unconditional release and prison for forensic patients. These options should include secure care and transitional placements which provide a therapeutic, non-punitive environment consistent with the purpose of the forensic order. The committee makes the following recommendation on the issue of state and territory law reform which relates to the issuing of forensic orders.

Recommendation 16

9.43 The committee recommends that the COAG ensures a consistent legislative approach across all Australian jurisdictions to provide a range of options for the placement of forensic patients beyond unconditional release and prison.

9.44 As noted in Chapter 3 and 4, the committee does not consider prison to be a suitable place for forensic patients. Notwithstanding this, the committee has received significant evidence noting the importance of limiting terms as a means to place an upper limit on the time a person may spend in prison, and as a result put an end to indefinite detention. In so far as the limiting terms may assist in this process, the committee recommends the adoption of limiting terms in the NT, WA and Victoria.

Recommendation 17

9.45 The committee recommends that the COAG ensures a consistent legislative approach with respect to limiting terms for forensic patients in all Australian jurisdictions.

Recommendation 18

9.46 The committee recommends that the COAG works together to cease the use of mandatory sentencing.

Accommodation

9.47 The committee is concerned about the placement of forensic patients in prison and the lack of therapeutic support in this environment. Placement of forensic patients unnecessarily exposes them to physical risk and to isolation—both within the prison and from the community. The following recommendations focus on what needs to change so that forensic patients can transition from prison, or ideally bypass prison, and live in a secure forensic facility or live supported in the community.

9.48 The committee has noted earlier that where no supported accommodation placements exist, a person cannot be transitioned from prison or secure care to a less restrictive environment in the community. The committee is concerned that there is a lack of facilities that provide supported accommodation in the community. A logical extension of the data collection project being undertaken by the LCCSC is to for it to identify where gaps exist in the supply of forensic placements in secure care facilities or supported accommodation in the community.

Recommendation 19

9.49 The committee recommends that the LCCSC extend its data collection project to identify and quantify the supply shortfall for forensic accommodation placements in secure care facilities and supported accommodation in the community.

9.50 The committee notes the higher levels of social disadvantage and the geographic challenges that exist in the NT and to a lesser extent in WA. It is the committee's view that the NT requires additional financial assistance from the

Australian Government in order to fund the establishment of non-prison forensic secure care facilities and the acquisition of supported accommodation options in communities across the NT, including remote areas. Further support may be necessary with respect to disability support workers for these types of accommodation.

Recommendation 20

9.51 The committee recommends that the Australian Government work closely with the NT Government to plan, fund and construct non-prison forensic secure care facilities and the acquisition of supported accommodation options in communities across the NT.

9.52 The committee recommends that the Australian Government work closely with the NT Government to ensure that all forensic facilities are appropriately staffed.

Individual support plans

9.53 Individual support plans (ISP) form a critical element of transitioning forensic patients from prison to secure care, and where appropriate, to living in supported accommodation in the community. The committee acknowledges that such plans are being developed for most forensic patients; however, questions some of the fundamental components that underpin these ISPs. As noted earlier, there are issues around lines of responsibility for the delivery of services under an ISP between corrective services and disability services, particularly in the NT.

Recommendation 21

9.54 The committee recommends that the COAG ensure that ISPs in all Australian jurisdictions have consistent objectives and are clear on who is responsible for delivery of services, regardless of where a forensic patient is housed.

9.55 Noting again the high levels of social disadvantage and geographic challenges in the NT, the committee considers that the Australian Government has a special role in assisting the NT to meet its obligations under the UN Disability Convention.

Recommendation 22

9.56 The committee recommends that the Australian Government work closely with the NT Government to ensure that its ISP (or equivalent) for forensic patients have clear objectives of transitioning a forensic patient from prison to secure care, and where appropriate, from secure care to the community.

Early intervention

9.57 The committee considers that many people with cognitive and/or psychiatric impairment who are classified as forensic patients should never come into contact with the criminal justice system. Through early intervention services, a person with cognitive and/or psychiatric impairment should be diagnosed at the earliest possible

age and provided with a range of wrap-around services that support them to live full, meaningful and productive lives. The committee heard evidence of some programs which seek to provide such interventions; however, noted that currently such programs are limited and do not appear to cater for people with cognitive impairment. These programs also do not seek to engage with children under the age of 10.

Recommendation 23

9.58 The committee recommends that COAG establish a working group:

- **to review existing early intervention programs for people with cognitive and/or psychiatric impairment; and**
- **develop and implement programs which engage with people with cognitive impairment at the youngest appropriate age.**

9.59 The committee has heard evidence about holistic community-driven early intervention strategies such as the Justice Re-Invest program in NSW. Early signs from part of this program being operated in Bourke (NSW) are promising, with the local community taking ownership and developing a holistic range of projects that will reduce the incarceration of the youth of this town. The committee also notes the justice reinvestment approach makes sense economically.

Recommendation 24

9.60 The committee recommends that the COAG develop and implement a series of justice reinvestment projects across the country to showcase the long-term social and economic benefits of justice reinvestment.

National Disability Insurance Scheme

9.61 The committee has received evidence which noted the opportunity that the National Disability Insurance Scheme (NDIS) could offer in providing specialist disability supports to forensic patients and the broader prison population. The committee was concerned with the conflicting evidence it has received regarding eligibility and access to supports through the NDIS for people held in prisons.

Recommendation 25

9.62 The committee recommends that the Joint Standing Committee on the National Disability Insurance Scheme conduct an inquiry into the issue of eligibility and access to the NDIS for people held in prisons and the criminal justice system more broadly.

Transitioning forensic patients out of prison

9.63 The committee notes that there are two new secure care forensic facilities opened late last year in WA and the NT—the Bennett Brook Disability Justice Centre (WA), and the Complex Behaviour Unit (NT). The committee notes that these facilities are not operating at full capacity; and that part of this reflects a range of practical considerations in the commissioning of new facilities that result in initial

underutilisation. Notwithstanding this, there still remain a large number of forensic patients in prisons in the NT and WA.

Recommendation 26

9.64 The committee recommends that the WA and NT Governments transition forensic patients currently held in prison to the relevant secure care forensic facility in each state as a matter of urgency.

New recommendations—civil systems

9.65 The following recommendations relate to the civil systems of mental health, disability, guardianship and aged care sectors.

First responders

9.66 Submitters and witnesses raised the issue that for many people, the pathway to indefinite detention begins with a police officer acting as a first responder to an incident which, rightly or wrongly, has been rated as involving risk of harm to self or others. Often, frontline police or ambulance officers lack the training necessary to de-escalate a situation involving cognitive or psychiatric impairment or do not recognise that cognitive or psychiatric impairment issues are involved in the situation at all.

Recommendation 27

9.67 The committee recommends that state and territory governments facilitate improved first responses to incidents involving people with cognitive or psychiatric impairment by ensuring:

- **Police and ambulance officers are provided with appropriate frontline training to recognise and respond to situations involving cognitive or psychiatric impairment issues.¹⁵**
- **Police and ambulance officers are provided with specialist resources, such as state-wide 24/7 access to mental health teams to provide immediate advice during first response incidents.**
- **Increased funding for health transport to ensure that police resources are not used to transport people for mental health assessments.**

Early intervention

9.68 Evidence was presented to the committee that detention is generally rationalised as being necessary where a person with a cognitive or psychiatric impairment is deemed a risk to themselves or others. Submitters argued that early intervention, taken before a person becomes a risk to themselves or others, would often address cognitive or psychiatric impairment issues before a crisis occurs. Some

15 See Abuse inquiry recommendation 6.

people have suggested this might include some form of compulsion for treatment, it should not require detention for safety issues.

Recommendation 28

9.69 The committee recommends that state and territory governments investigate the appropriateness of early intervention mental health treatment, with a specific goal to reduce 'risk-induced' treatment-related detention.

Risk assessments

9.70 The committee is concerned by the expert legal and medical evidence on the lack of consistency in assessing the level of risk of harm that can trigger an order for detention, both across jurisdictions and across specialist fields or pieces of legislation within a single jurisdiction. This leads to differing approaches for who is detained, based on where they live, or what kind of impairment they have, rather than on the actual risk of harm to themselves or others. The committee also received evidence on the differing approaches to the review of compulsory treatment orders, which highlighted that many reviews fall far short of engaging with the particular needs of the individual.

Recommendation 29

9.71 The committee recommends the Australian Government work with state and territory governments to create national consistency in the approach to compulsory treatment orders, to ensure:

- **appropriate 'risk of harm' levels are set for assessments that can result in detention for the purposes of therapeutic intervention;**
- **mandated requirements for 'least restrictive' treatment;**
- **regular reviews, including assessment of treatment against therapeutic benchmarks; and**
- **independent oversight.**

Supported decision-making

9.72 The committee considers the use of supported decision making tools such as Advance Directives as a means for people to exercise a level of control during non-consensual assessment and treatment during times of a mental health crisis. There is a need for legislative change to strengthen the effect of such tools.

Recommendation 30

9.73 The committee recommends that state and territory governments consider and implement legislative change to strengthen the effect of supported decision-making tools such as Advance Directives.

Mandated therapeutic benchmarks

9.74 The committee is greatly concerned by evidence that often there is a rush to detain a person on the grounds they require therapeutic intervention in order to address a risk of harm to self or others. However, once the individual has been detained, the impetus for the service delivery agency to provide appropriate therapeutic intervention is not as great. Alternatively, the location at which the individual is detained may limit the range of therapeutic intervention available. Submitters and witnesses pointed to the Victorian disability frameworks, which include a requirement that detention is beneficial to the individual, and contains therapeutic benchmarks that must be met.

Recommendation 31

9.75 The committee recommends the state and territory governments consider adopting elements of the Victorian disability frameworks.

Community accommodation

9.76 One of the key impediments to people being transitioned from indefinite detention in secure care to community-based accommodation is the shortage of accommodation in the community.

Recommendation 32

9.77 The committee recommends that state and territory governments proactively fund the construction or acquisition of a range of appropriate supported accommodation options across metropolitan and regional locations for people with cognitive and/or psychiatric impairments.

Senator Rachel Siewert

Chair