

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
ATTORNEY-GENERAL'S DEPARTMENT

**Group 2**

**Output 1.1**

**Question No. 117**

**Senator Boyce asked the following question at the hearing on 24 May 2012:**

- a) Given that Custodial Supervision Orders were introduced to protect the rights of people with a mental or intellectual disability presenting in the criminal justice system, have they in fact worked to protect those rights especially if you consider the situation in the Northern Territory and Queensland?
- a) In a recent episode of Background Briefing on the ABC there was mention of a case of a young indigenous individual with an alcohol dependency and some cognitive impairment who was charged with assault – according to his lawyer he would have more than likely received a custodial sentence if found guilty of 4 months but because of his disability it was decided he was unfit to plead and he was then placed in gaol, in maximum security for an indefinite period- he's been there now for five years – would you like to comment and to your knowledge how common is this situation?
- b) Is it true that some individuals have been dealt with in this matter simply because they were deaf?
- c) Is this a widespread problem in all states?
- d) How does this situation square with our commitments under international human rights agreements we have signed?
- e) In that this situation has a disproportionate impact on our indigenous citizens is this situation truly closing the gap?
- f) Has this situation been exacerbated in the Northern territory by the application of the Intervention?
- g) The defence is often put that there is simply nowhere else to send these people so is this a failing of the criminal justice system or the resourcing of disability services in this country?

**The answer to the honourable senator's questions is as follows:**

*Custodial Supervision Order*

The Department understands the term Custodial Supervision Order to refer to orders under State and Territory Sentencing Acts. There is no reference to such orders in the *Crimes Act 1914* (Cth). Instead, Part 1B of the Commonwealth Act sets out specific provisions that relate to court orders that can be made in relation to federal offenders who are found unfit for trial or acquitted because of mental illness. Although federal offenders would be detained in State or Territory prisons or psychiatric hospitals in such cases, the orders authorising their detention would have to be made under the *Crimes Act 1914* (Cth).

The Department is not in a position to comment on the various laws and practices, including custodial arrangements, that apply when a State or Territory offence is in question.

### *Frequency of cases*

Therefore, the Department is not in a position to comment on the frequency of cases such as that outlined in a recent episode of Background Briefing on the ABC. Likewise, the Department is not in a position to comment on what factors may be considered in such cases, such as whether being deaf is a contributing factor.

### *International Law Obligations*

The Department is unable to provide legal advice to the Committee, but provides the following information on Australia's obligations under international law.

Australia has international obligations concerning detention under a number of human rights treaties to which it is a party. The most relevant of these treaties is the Convention on the Rights of Persons with Disabilities. Under Article 14 of the Convention, Australia has an obligation to ensure that persons with disabilities, on an equal basis with others,

- (a) enjoy the right to liberty and security of the person; and
- (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.

Australia also has an obligation to 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 the Convention, including by provision of reasonable accommodation.

### *Indigenous Disadvantage*

Australian governments have, through the Council of Australian Governments, committed to closing the gap in Indigenous disadvantage. The Department recognises that Indigenous Australians are over-represented in the criminal justice system. It also recognises that alcohol and substance abuse is a key influence in Indigenous Australians' contact with the criminal justice system, and a factor in the incidence of cognitive disabilities.

The Department is not aware of any evidence suggesting that the Northern Territory Emergency Response has exacerbated the situation concerning Indigenous Territorians with cognitive disabilities and their contact with the criminal justice system. There have, however, been a number of encouraging signs in relation to alcohol consumption in the Northern Territory with the implementation of the NTER. If these indications continue, there may be a positive impact on the incidence of cognitive disabilities.

### *Intersection between Justice and Disability*

The broader issue of improved outcomes for people with mental illness and/or cognitive disability in the criminal justice system is a complex problem which requires cooperation between the disability and justice portfolios at all levels of Government. The Department is committed to maintaining a dialogue with Australia's disability portfolios.