



## **Indefinite detention of people with cognitive and psychiatric impairment in Australia**

People with intellectual or cognitive impairment are more likely to experience barriers and disadvantages when seeking access to and interacting with the justice system.<sup>1</sup> They are over-represented as both victims and offenders<sup>2</sup> and may also experience mental illness and substance abuse. The picture is similar for people with a psychiatric illness. The complex needs of these people highlight the inappropriateness of ‘one size fits all’ policy and service response.

‘Rights protection, justice and legislation’ is one of six policy areas identified in the National Disability Strategy 2010–2020 (endorsed by the Commonwealth, and State and Territory governments) that sets out a plan for improving life for Australians with disability, their families and carers.<sup>3</sup> It identifies one policy direction as the need for “more effective responses from the criminal justice system to people with disability who have complex needs or heightened vulnerabilities”.

Our submission is predicated on a belief that detaining a person in prison who is unfit to stand trial by reason of cognitive or psychiatric impairment should be a last resort. Strengthening links between the disability sector and the justice system will help deliver better responses.

### **Prioritise implementing improved arrangements for managing people with cognitive and psychiatric impairment who are unfit to stand trial**

Article 14 of the United Nations Convention on the Rights of Persons with Disabilities<sup>4</sup> states that:

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.

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<sup>1</sup> Law Reform Committee, Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families, March 2013, xix

<sup>2</sup> Commonwealth of Australia 2011, National Disability Strategy 2010–20120, FaHCSIA, p. 39

<sup>3</sup> Ibid

<sup>4</sup> UN Convention on the Rights of Persons with Disabilities (Article 14 - Liberty and security of the person)

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While all Australian jurisdictions have in place legislation that addresses determining whether a defendant within the criminal justice system is fit to stand trial, the outcome of these processes is often far from ideal. People with cognitive or psychiatric impairment who have been accused of a crime but not tried or convicted are being detained in prisons for long periods (sometimes longer than if they had been convicted of the crime). This is unacceptable.

A determination of unfit for trial should immediately trigger a process to decide the best options (detention; accommodation; programs) for that individual.

The COAG document 'Principles to Determine the Responsibilities of the NDIS and Other Service Systems' attempts to articulate the interactions of the National Disability Insurance Scheme (NDIS) with justice systems<sup>5</sup> but does note that the interface is complex and likely to need refining as the NDIS is implemented. People who are indefinitely detained and likely to be eligible for the NDIS should be prioritised for the application of these principles. They make up one of the most vulnerable and disadvantaged groups in our community (Aboriginal and Torres Strait Islander people with disability are disproportionately represented among them).

### **Develop an individual service or support plan**

One of the core features of the NDIS is individual assessment and the determination of the 'reasonable and necessary' level of support required. This approach should underpin the development of an individual service or support plan as soon as a person with a cognitive or psychiatric impairment is found unfit for trial.

#### **1. Appoint a nominee or representative for the person**

As the person has been found unfit for trial, another individual should be appointed as their representative and actively engaged in decisions about future options.

#### **2. Undertake relevant assessments**

Assessment should consider the individual's needs and circumstances; their likelihood to re-offend; the community safety risk; and what sort of disability-related support or other support is required.

#### **3. Develop a service or support plan**

A critical aspect of a plan should be the determination of the appropriate accommodation or detention arrangements for the individual, based on the seriousness of the crime and the individual's risk of re-offending. The plan should also address disability support needs, consider the involvement of family and other informal supports, accommodate cultural or linguistic needs, acknowledge spiritual beliefs and be appropriate to age and gender.

The service plan should articulate the goals for:

- supporting the individual's development
- providing for the individual's management, care, support and protection
- assisting the individual's reintegration into the community.

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<sup>5</sup> COAG, NDIS – Principles to Determine the Responsibilities of the NDIS and Other Service Systems, November 2015

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The service plan should detail the restrictive practices that may be applied to the individual, how they will be monitored, and the plan for reducing their use over time.

### **4. Identify support providers**

Appropriately skilled services and support providers should be identified and the funding for service delivery established.

### **5. Establish review processes**

An independent person responsible for overseeing the wellbeing of the individual and the appropriateness of their detention or other support arrangements needs to be appointed, and the process for conduct of regular plan reviews needs to be articulated. Review process should include regular reassessment of the individual's disability support needs.

NDS highlights the recent independent review of the operations of the Bennet Brook Disability Justice Centre<sup>6</sup>. Recommendations to improve service delivery for residents include the development of clear individual development plans and goal setting, and better provision of activities and development opportunities.

### **Invest in alternative accommodation and support options**

People with disability are vulnerable in prisons. Those who have been found unfit to plead may be subjected to harmful practices such as chemical and physical restraint and seclusion. They may experience degrading treatment from other prisoners, and the support, adjustments and aids they need may not be provided.

Unfortunately, there is a lack of alternatives. There is an urgent need for the justice system and the disability system to work together to develop better accommodation and support options.

Currently, access to processes to divert people with disability out of the criminal justice system varies considerably. And even when options are present, their use can depend on the attitudes of court officials and their willingness to use discretionary processes. Information about the benefits of using alternatives to detention should be promoted.

Governments in the Northern Territory and Western Australia have recently invested in building Disability Justice Centres, a positive step but not without risk. Escapes from the Bennett Brook Centre—built to provide secured living arrangements for people with intellectual and cognitive disability as an alternative to holding them in prison—prompted an independent review. Findings from this review endorsed the operations of the facility and its suitability as a better option than indefinite custody (with recommendations to improve security).

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<sup>6</sup> Government of Western Australia, 2016, Bennett Brook Disability Justice Centre review, found at [http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3913904cd41e4fa388cefc5348257f7a0009e7d4/\\$file/tp-3904.pdf](http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3913904cd41e4fa388cefc5348257f7a0009e7d4/$file/tp-3904.pdf)

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More options are also needed for people found unfit to stand trial but who are assessed as being of relatively low risk of harming people in the community or themselves. Many disability service providers already support people who have had contact with the justice system. There is capacity within the disability services sector to provide more support to this group; this should be explored.

### **Build knowledge about what works**

A systematic approach to the collection of data about people with disability who are charged with an offence, found guilty, imprisoned or found unfit to stand trial is needed. Lack of data was highlighted as an area of concern by the Victorian Law reform Committee in its 'Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers'.<sup>7</sup>

Research is also required on questions including: how to identify people with disability who are at risk of offending; interventions that work to reduce offences from occurring; the best diversion programs; how to reintegrate offenders with disability into the community.

## **April 2016**

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**National Disability Services** is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes 1100 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

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<sup>7</sup> Law Reform Committee, Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families, March 2013, xix