



## **ABORIGINAL AND TORRES STRAIT ISLANDER PERSPECTIVES ON THE RECURRENT AND INDEFINITE DETENTION OF PEOPLE WITH COGNITIVE AND PSYCHIATRIC IMPAIRMENT**



**A Submission to the Senate Inquiry on the Indefinite Detention of  
People with Cognitive and Psychiatric Impairment**



**Prepared by:**

### **FIRST PEOPLES DISABILITY JUSTICE CONSORTIUM**



**An alliance of Aboriginal and Torres Strait Islander community  
organisations, disability, justice and legal researchers,  
Universities and Research Institutes.**



**An initiative of First Peoples Disability Network (Australia), its  
strategic partners and supports.**



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## Corresponding Contributors

**Scott Avery**

Policy and Research Director  
First Peoples Disability Network

**Professor Patrick Keyzer**

Head of School and Chair of Law and Public Policy  
La Trobe Law School

## Executive Summary

This submission is the result of work by an alliance of the nation's leading authorities on disability justice for Australia's First Peoples. This alliance includes three Aboriginal and Torres Strait Islander national peak bodies, and researchers from six different universities and research institutes. We have come together to present Aboriginal and Torres Strait Islander perspectives on the problem of the indefinite detention of people with cognitive and psychiatric impairment.

This submission presents the best available evidence on what the issues are, the factors that contribute, and most importantly lists the actions that can be taken to alleviate the problem and its consequences.

### A lifetime of being detained becomes the reality for too many Aboriginal and Torres Strait Islander people

By the time an Aboriginal or Torres Strait Islander person with disability first comes into contact with the criminal justice system, they will most likely have had a life of unmanaged disability. Coupled with discrimination, based on their Aboriginality and disability, they will have faced barriers from the time they are born, of poverty, early exposure to life in institutions through the child protection system, struggles at school, lack of appropriate health care and an inability to secure employment. Coming into contact with the police, courts, juvenile detention and prisons is normalized in their life trajectory.

As the chapters in our submission highlight, the justice system does little to address these factors and outcomes and in fact often makes them worse. People acquire the label of a prisoner who must be punished, not a person with disability who needs support. When released from prison, the personal, social and systemic circumstances that propelled them into detention or prison will not have changed. Thus many face a cycle of recurrent detention that goes on indefinitely.

### An issue which speaks to the heart of injustice towards Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander people with disability are the most marginalised people in Australian society. Unjust deprivation of liberty, poor health care and poor support intensify the marginalisation of Aboriginal and Torres Strait Islander people and result in serious cases of human rights abuses.

The historical exclusion of Aboriginal and Torres Strait Islander people with disability from society has meant this issue has been kept from the public eye. The resulting lack of public scrutiny has meant that little has been done to redress these abuses. Only in rare cases does such abuse become

publicly evident, usually exposed through vigilant human rights advocacy and in the media, rather than through the operation of checks and balances in the criminal justice system. Take for example the case in which an Aboriginal man with cognitive impairment was imprisoned for over a decade for an alleged offence that never went to trial.

Cases such as this point to a deeper problem of the normalised management of Aboriginal and Torres Strait Islander people with disability by the police and within the justice system. That Aboriginal and Torres Strait Islander people can be imprisoned because of their disability points to the historical injustices that have been going on since colonisation. That this is allowed to continue perpetuates that injustice and hurt.

This is what Aboriginal and Torres Strait Islander people tell the First Peoples Disability Network, the community-based organisation created by and for First Peoples with disability. This Network, with the active support and assistance of La Trobe Law School, coordinated the contributions to this submission. The mandate to take action comes directly from the First Peoples with Disability community.

### **A multi-disciplinary approach bringing together experts across life's spectrum**

Offering a new life trajectory for an Aboriginal and Torres Strait Islander person with disability requires more than a legal solution. Whilst fair laws are essential and are important checks and balances, the factors that cultivate incarceration for people with disability must also be tackled.

This submission includes contributions that explain issues experienced by Aboriginal and Torres Strait Islander people with disability across their lifecourse. Contributions are from:

- community practitioners and researchers who work with Aboriginal and Torres Strait Islander people and understand the trauma they have been exposed to;
- early childhood development experts who know what it takes to put a child with disability on the right course;
- organisations which understand the disabling impact of family violence on women;
- systems thinkers who can design early disability support for children and families and supported diversion programs as an alternative to prison;
- experts in legislation which have a solid foundation in human rights;
- researchers and practitioners who have worked with Aboriginal and Torres Strait Islander people post-prison release to prevent recidivism; and
- policy advisers who understand the mechanisms that are needed to translate the evidence into policy reform.

The strengths and support structures within First Peoples' communities have an untapped potential to drive positive change. They best understand the unique trauma that faces First Peoples and how this impacts upon their social wellbeing. Whichever part of the problem you look at, community-

based and community-directed services for First Peoples with a disability are fundamental to the solution.

## A proposal for Commonwealth leadership

This submission shows how Aboriginal and Torres Strait Islander community organisations can come together with the research community to critically evaluate the evidence and come up with the solutions needed to address the problem of recurrent and indefinite detention. All Australian Governments need to step up to support these solutions.

The reforms outlined by our alliance of experts are crucial to preventing ever more Aboriginal people being captured indefinitely in the criminal justice and reducing spiraling criminal justice costs. This reform agenda has been derived from our evaluation of the available evidence, recognises the federated nature of Australian government, and the respective roles and responsibilities of Federal, State and Territory Governments. The recommendations in this submission focus particularly on the leadership role of the Commonwealth, which can serve as a model for reform in the respective jurisdictions.

There is momentum for change. In November 2015, Ministers attending the Law Crime and Safety Council agreed to establish a working group to bring together the data and develop resources for national use in the treatment of people with cognitive disability or mental impairment unfit to plead or found not guilty by reason of mental impairment.

The Australian Government has also made a voluntary commitment in the United Nations Universal Periodic Review to improving the way the criminal justice system treats people with cognitive disability who are unfit to plead or found not guilty by reason of mental impairment.

The breadth and depth of people's contributions to this and other submissions reflect the personal and collective commitment to provide a fairer, better life for Aboriginal and Torres Strait Islander people with disability who are at risk of being or are already caught up in the justice system. Correcting this injustice is a national priority.

## Summary of Recommendations

1. A strategic approach is needed to address the factors impacting on Aboriginal and Torres Strait Islander people with cognitive impairment:
  - (i) to improve access to their rights upon coming in contact with the justice system;
  - (ii) to address the social risk factors to alter their life trajectory and reduce the likelihood of their coming in contact with the justice system in the first instance.
2. A strategic approach to the recurrent and indefinite detention of Aboriginal and Torres Strait Islander people with cognitive and mental impairment should be based on the principles of self determination; person centred care; holistic and flexible approach; integrated services; and Culture, Disability and Gender-informed practice.
3. A social model of disability, accommodating the complex social and cultural determinants, should be the basis for defining 'cognitive and psychiatric impairment' as it affects the recurrent and indefinite detention of Aboriginal and Tires Strait Islander people with cognitive impairment.
4. Systems for addressing disability in and related to the justice system must be discretionary to accommodate an individual's level of impairment as well as contributing social circumstances. The principle of discretion should apply in judicial administration as well as disability supports.
5. Aboriginal community-controlled organisations should be resourced to provide specialised and culturally appropriate support to Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments in detention.
6. Early diagnosis of Fetal Alcohol Spectrum Disorders (FASD) and intervention to prevent engagement with the law.
7. Early recognition that a young person has FASD or other neurocognitive impairments when first engaging with the law so that courts can provide alternative strategies to sentencing and appropriate management to reduce recidivism.
8. Research programs and incentives should develop resources for the better identification and management of cognitive disability, including FASD, across a range of social policy areas including early childhood and child protection, education and justice.
9. Workforce development strategies are required to increase the awareness of disability and its impact upon justice outcomes for people with disability. These strategies should include culturally compatible practice guidelines, protocols and training programs for public officers



and professionals working with Aboriginal and Torres Strait Islander people with disability in the justice and related sectors.

10. Appropriate support services should be provided to Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments who have experienced violence or trauma, including:
  - (i) screening for past experiences of trauma, including family violence, sexual assault or other forms of gender-based violence
  - (ii) counselling and emotional and psychological support to help survivors on their roads to recovery, and
  - (iii) legal support to help them access their rights and obtain justice.
11. Systems for diversion onto supported disability programs should be established at critical points of contact with the criminal justice system, with linkages to the National Disability Insurance Scheme.
12. The Commonwealth should adopt a lead role in the creation of national legislative standards for legislation and regulatory frameworks affecting individuals who have been declared mentally impaired or unfit to plea. The national standard legislation should at a minimum provide for:
  - (i) Judicial discretion to impose an appropriate order depending on the circumstances of the case, including level of impairment and contributing social circumstances.
  - (ii) Special hearings that include input from Aboriginal and Torres Strait Islander community representatives to test the evidence against a mentally impaired accused who is unfit to stand trial. This should entail a procedure for determining whether, on the evidence available, the accused committed the objective elements of the offence so that if it cannot be proven that the accused committed the objective elements of the offence, the accused is discharged.
  - (iii) Minimum procedural fairness requirements such as a right to appear, right of review, right to written reasons for decision and right to information.
  - (iv) Finite terms for custody orders (and release orders) – the duration of the order should be no longer than the duration of the sentence that would have been imposed if the accused had been convicted of the offence.
  - (v) Determinations about release of mentally impaired accused from custody or community release orders should be made by the relevant board with an annual right of review before the Supreme Court.
13. The Commonwealth should provide a support program for Aboriginal and Torres Strait Islander people with cognitive impairment, as a 'safety net' when these services are not made available at all levels of courts within the State and Territory jurisdictions.

14. Establish a working group to establish interface principles between state and territory based post-release programs with the National Disability insurance Scheme, based on the effective features of the *throughcare* model.
15. Establish a multi-disciplinary 'Policy Translation Group' including Aboriginal and Torres Strait Islander representatives to advise on translating evidence emanating from Community knowledge and academic research into policy.
16. That these recommendations form the basis of a National Disability Justice Strategy with a dedicated focus on the rights and circumstances of Aboriginal and Torres Strait Islander people.

## 1. A PREDICTABLE AND PREVENTABLE PATH: INDIGENOUS AUSTRALIANS WITH MENTAL AND COGNITIVE DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM

*Professor Eileen Baldry, Dr Ruth McCausland, Associate Professor Leanne Dowse, Elizabeth McEntyre, UNSW*

### Key issues:

- **There is a severe and widespread lack of appropriate early diagnosis and positive, culturally responsive support for Indigenous children and young people with cognitive impairment.**
  - **In the absence of holistic disability, education and human services support, the pathways into prison for Aboriginal and Torres Strait Islander people with cognitive impairment are predictable. They are also preventable.**
  - **Effective responses should be founded on the principles of: self determination; person centred care; a holistic and flexible approach; integrated services; and culture, disability and gender-informed practice.**
1. The recent report of the Indigenous Australians with Mental and Cognitive Disability in the Criminal Justice System (IAMHDCD) Project, *A Predictable and Preventable Path*<sup>1</sup> found that across Australia, thousands of Indigenous people with mental and cognitive disabilities are being 'managed' by police, courts and corrections rather than being supported in the community. This quantitative and qualitative study reveals the ways that systems of control rather than care or protection are being invoked for this group, often from a very young age. The findings of this project highlight the ways that Indigenous people with mental and cognitive disabilities experience multiple, interlocking and compounding disadvantageous circumstances.
  2. The findings of this project unequivocally demonstrate that pathways into and around the criminal justice system for many Indigenous people with mental and cognitive disabilities are embedded and entrenched by the absence of coherent frameworks for holistic disability, education and human services support. Indigenous people with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways. Although this also applies to non-Indigenous people with mental and cognitive disabilities who are highly disadvantaged, the impact on Indigenous people is

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<sup>1</sup> Eileen Baldry, Ruth McCausland, Leanne Dowse & Elizabeth McEntyre, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (University of New South Wales, 2015) <<http://www.mhdcd.unsw.edu.au>>

significantly greater across all the measures and experiences gathered in the studies across the IAMHDCD Project.

3. The serious implications of poor diagnosis and unclear definitions of mental and cognitive disability are starkly highlighted in the research. The findings demonstrate that there is a severe and widespread lack of appropriate early diagnosis and positive, culturally responsive support for Indigenous children and young people with cognitive impairment. This is connected to schools and police viewing certain kinds of behaviour through a prism of institutional racism rather than disability, as well as Indigenous community reluctance to have children assessed using particular criteria that are perceived as stigmatising and leading to negative intervention in Aboriginal families. For adults in the criminal justice system, cognitive impairment is either not recognised at all, or if recognised, it is poorly understood.
4. For many Indigenous people, diagnosis of their cognitive impairment comes with assessment on entry to prison. However such a diagnosis rarely leads to appropriate services or support while in prison; analysis of the data reveals that subsequent interventions tend to continue to foreground offending behaviour rather than complex social disadvantage or disability, mental health or alcohol and other drug support needs. The findings illuminate the particular challenges and vulnerabilities facing Indigenous women with mental and cognitive disabilities as the most disadvantaged group in terms of their multiple and complex support needs.
5. There is an urgent need for an evidence-informed response by political leaders, policy-makers, people working in criminal justice systems (police, magistrates, correctional officers, parole officers) and service providers. Fundamentally, using the law and criminal justice services as management tools for Indigenous Australians with complex support needs is bad policy and practice and having a devastating impact on the human rights and wellbeing of Indigenous people with mental and cognitive disabilities.

## Solutions from the Community

6. Based on the qualitative and quantitative findings of the study, the research team recommended the following five principles and associated strategies, derived from interviews and discussion with Indigenous people in the study, should underpin policy review and implementation.

### *Principle 1: Self-Determination*

7. Self-determination is key to improving access to and exercise of human rights and to the wellbeing of Indigenous people with mental and cognitive disability, especially for those in the criminal justice system. Strategies include:

- Indigenous-led knowledge and solutions and community-based services should be appropriately supported and resourced;
- the particular disadvantage faced by Indigenous women and people in regional and remote areas should be foregrounded in any policy response to this issue; and
- resources should be provided to build the cultural competency and security of non-Indigenous agencies, organisations and communities who work with Indigenous people with mental and cognitive impairment who are in contact with the criminal justice system.

## Principle 2: Person-Centred Care

8. Person-centred care that is culturally and circumstantially appropriate and whereby an individual is placed at the centre of their own care in identifying and making decisions about their needs for their own recovery is essential for Indigenous people with mental and cognitive disability.

Strategies include:

- disability services in each jurisdiction, along with the National Disability Insurance Scheme, should ensure there is a complex support needs strategy supporting Indigenous people with disability in contact with criminal justice agencies;
- specialised accommodation and treatment options for Indigenous people with mental and cognitive disability in the criminal justice system should be made available in the community to prevent incarceration and in custodial settings to improve wellbeing; and
- Indigenous people with mental and cognitive disability who are at risk of harm to themselves or others and who have been in the custody of police or corrections should not be returned to their community without specialist support.

## Principle 3: A Holistic and Flexible Approach

9. A defined and operationalised holistic and flexible approach in services for Indigenous people with mental and cognitive disability and complex support needs is needed from first contact with service systems.

Strategies include:

- early recognition via maternal and infant health services, early childhood and school education, community health services and police should lead to positive and preventive support, allowing Indigenous children and young people with disability to develop and flourish;
- a range of 'step-down' accommodation options for Indigenous people with cognitive impairment in the criminal justice system should be available (the New South Wales Community Justice Program provides a useful template); and

- community-based sentencing options should be appropriately resourced, integrated and inclusive so they have the capacity and approach needed to support Indigenous people with mental and cognitive disability.

#### **Principle 4: Integrated Services**

10. Integrated services are better equipped to provide effective referral, information sharing and case management to support Aboriginal and Torres Strait Islander peoples with mental and cognitive disability in the criminal justice system.

Strategies include:

- justice, corrections and human services departments and relevant non-government services should take a collaborative approach to designing program pathways for people with multiple needs who require support across all the human and justice sectors; and
- all prisoners with cognitive impairment must be referred to the public advocate of that jurisdiction.

#### **Principle 5: Culture, Disability and Gender-informed practice**

11. It is vital that Aboriginal and Torres Strait Islander peoples' understandings of 'disability' and 'impairment' inform all approaches to the development and implementation of policy and practice for Indigenous people with mental and cognitive disability in the criminal justice system, with particular consideration of issues facing Aboriginal and Torres Strait Islander women.

Strategies include:

- better education and information are needed for police, teachers, education support workers, lawyers, magistrates, health, corrections, disability and community service providers regarding understanding and working with Aboriginal and Torres Strait Islander women and men with cognitive impairment, mental health disorders and complex support needs;
- information and resources are needed for Indigenous communities, families and carers, provided in a culturally informed and accessible way; and
- the distinct and specific needs of Aboriginal and Torres Strait Islander women should be foregrounded in such education and information.

#### **Recommended Responses:**

12. With these five principles in mind, A Predictable and Preventable Path made wide-ranging recommendations relating to the criminal justice system, including legislation and sentencing, police, resources and support for Legal Aid and Aboriginal Legal Services, courts,

corrections, diversionary programs, post-release services and support;<sup>2</sup> as well as to community services, schools, disability models, services and support, mental and other health concerns, and housing.<sup>3</sup>

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<sup>2</sup> Ibid, 164-166.

<sup>3</sup> Ibid, 166-168.

## 2. THE LIFE TRAJECTORY FOR AN ABORIGINAL AND TORRES STRAIT ISLANDER PERSON WITH DISABILITY

*Scott Avery, Policy and Research Director, First Peoples Disability Network (Australia)*

### Key issues:

- **Aboriginal and Torres Strait Islander people with disability are at heightened risk of encountering indefinite detention due to the complex interaction of personal and social factors affecting both their Indigenous and disability status.**
  - **By the time that an Aboriginal or Torres Strait Islander person has come into contact with the justice system, they are likely to have had a lifetime of unmanaged disability.**
  - **A strategic approach is needed to address the factors impacting on Aboriginal and Torres Strait Islander people with cognitive impairment:**
    - (iii) **to improve access to their rights upon coming in contact with the justice system;**
    - (iv) **to address the social risk factors to alter their life trajectory and reduce the likelihood of their coming in contact with the justice system in the first instance.**
1. An Aboriginal or Torres Strait Islander person with disability is a member of two communities; one pertaining to their identity as an Indigenous person and another pertaining to their disability. Addressing one aspect of a person rights in isolation from the composite rights can leave them excluded from another aspect of society important to their sense of identity.
  2. Intersectionality is a field of human rights research which is an emerging influence on public policy. Intersectionality acknowledges there are multiple dimensions of a persons identity as a frame for understanding the layers in which social inequity can accumulate. This involves understanding the rights to cultural inclusion as an Indigenous person as well as the rights of inclusion as a person with disability. A failure to understand both dual access rights for Indigenous and the rights of a person in effect creates a minority group within a minority group.
  3. The social exclusion that can occur because someone is both Aboriginal or Torres Strait Islander *and* has disability has colloquially been referred to as experiencing a ‘double discrimination’ by Aboriginal and Torres Strait Islander people with disability. Whilst more overt forms of discrimination (such as vilification) are more easily detectable, there is also institutional or systemic biases which act against the rights and inclusion of Aboriginal and Torres Strait Islander peoples. For example, the incidence and impact of institutional racism



in the health sector has been well documented, and its findings could readily apply to the justice system.<sup>4</sup>

4. Institutionalised forms of discrimination sits within the subconscious of those charged with responsibility for undertaking public functions – a policy which is not intended to be discriminatory can become discriminatory when interpreted by an official based on their own levels of awareness, assumptions and subconscious prejudices about Aboriginal and Torres Strait Islander people and/or people with disability.
5. Failures in addressing the rights of an Indigenous person in their early years can lead to a further, and often rapid, deterioration in rights over the course of a lifetime. Here is one scenario as an example;
  - An Indigenous mother living in poverty and in a community with inadequate public health facilities is more likely to have a low-birth weight baby compared to non-Indigenous people.
  - Low birth weight is a known risk factor for childhood disability and learning impairment.
  - The rate of removing a child from their families is significantly higher for Indigenous children compared to non-Indigenous children. In Australia, this disparity is a 10-fold increase in the rate of child removal for Indigenous children.
  - Clinical protocols for the assessment for disability, particular cognitive impairments, can require a stable home environment to enable an accurate assessment. If shifting from home to home in an out-of home-care system continually disrupts a child, then an assessment of disability may not occur.
  - Medical-based models of disability (not just in health, but also in education) require a diagnosis to trigger supports for a child.
6. So, when the barriers to access the right to health for an Indigenous person interact with those for a person with disability, the consequence for a child who is Indigenous *and* with disability is that they are at heightened likelihood of going through their early childhood with an undetected and unsupported disability. The effects of this carries forward into their schooling years and places them on a trajectory where they are more likely to matriculate into prison than into tertiary education.
7. Whilst this particular perspective emphasises disability as an intersectional risk to the rights, health and wellbeing for Aboriginal and Torres Strait Islander people, the concept also

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<sup>4</sup> A Larson et al, 'It's enough to make you sick: the impact of racism on the health of Aboriginal Australians' (2007) 31(4) *Australian and New Zealand Journal of Public Health* 322; N Priest et al, 'Experiences of racism, racial/ethnic attitudes, motivated fairness and mental health outcomes among primary and secondary school students' (2014) 43(10) *Journal of Youth and Adolescence* 672-876; A Ferdinand et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey* (The Lowitja Institute, 2012).

applies in relation to other risk factors which can have a cumulative detrimental impact.

These risk factors can include:

- Gender
- Children and young people
- Exposure to trauma, both acute and inter-generational
- Psychiatric and mental health conditions
- Lesbian, gay, bisexual, and transgender
- Drug and alcohol dependence
- Exposure to family violence
- Deprivation of liberty.

**Table: The deterioration of rights across the life trajectory of Aboriginal and Torres Strait Islander people with disability**

LIFE-STAGE	Peri-Natal	Early childhood	Schooling years	Young people	Justice	Health	Ageing
ASPECT							
Indigenous	Low awareness of disability  Environmental factors, increased likelihood of low birth-weight	Low awareness of disability  Exposure to trauma  Increased likelihood of OOHC – off country, unstable home setting	Low awareness of disability  “Bad black kid syndrome” – punitive schooling over supported disability	Less likely to secure employment  Increased likelihood of police contact	Denial of rights-over incarceration	Subconscious bias – institutional racism	Reduced life expectancy  Disability happens earlier in life and with more co-morbidities.
Disability	Low birth weight and environmental factors in developmental disability	Disability assessments aren't carried out to the extent that they need to be	Undiagnosed and unsupported disability	Less likely to secure employment  Communication impairments, reduced capacity to negotiate conflict	Denial of rights – indefinite detention and fitness to plea for people with cognitive and psychiatric disability	Subconscious bias – diagnostic over shadowing	Inadequate public infrastructure especially in remote communities.

### 3. FRAMING RECURRENT AND INDEFINITE DETENTION FROM A DISABILITY PERSPECTIVE

*Associate Professor Leanne Dowse, Chair in Intellectual Disability Behaviour Support*

#### Key issues:

- **Understanding cognitive impairment from purely a medical model – ie. where a medical diagnosis is needed to access supports, will narrow access to supports for those most in need.**
- **A social model of disability will better accommodate the complex social and cultural determinants affecting the recurrent and indefinite detention of Aboriginal and Torres Strait Islander people with cognitive impairment.**
- **The social model approach will lead to a more discretionary support system that will be more effective in addressing the factors affecting individuals who are detained over the longer term.**

#### Overview

1. The recognition of cognitive disability within the criminal justice system is a matter of some contention. This reflects the unsettled nature of terminology, variation in approaches to assessment and the historical conflation of mental health disorder and cognitive impairment. Cognitive impairment is a term utilised to encompass a variety of diagnostic labels including intellectual disability, borderline intellectual disability, acquired brain injury, autism and dementia. Cognitive disability is used to denote the social understanding that impairment entails a range of social exclusions that attend to the presence of impairment. Generally, having a cognitive impairment means that a person will have difficulty with things such as self-management, decision-making and communication. This means that this group have significant difficulty operating in the world.
2. While many people with cognitive disability may seem outwardly independent, when we drill down to their functional capacity it is clear that their disability is directly related to the likelihood of offending. Their risk of offending is in fact out of proportion but it is difficult to separate disability and offending. Cognitive impairment is also recognised to be associated with a range of social disadvantage including poor educational outcomes, unemployment and economic disadvantage, the risk of a higher incidence of mental health problems and co-existing mental illness or drug and alcohol issues. Commonly they come from situations where they fundamentally lack social support. Key challenges in this area are that people with cognitive impairments may be reluctant to accept a disability label, recognition of disability in one service does not readily transfer to another, and that individuals do not fit

into the limiting categories required for a disability service. This means that many in this group are not recognised as having a disability until they are assessed in prison.

3. People with cognitive impairment in the criminal justice system are a very diverse group with a broad spectrum of offending, ranging from minor trouble to serious and major violent and sexual offences. Offending often begins at a young age, with early police contact – typically from the early teens, and with contact frequent and extending for longer over their lifetime. In relation to the nature of detention experienced by this group, their propensity for low level offending and their inability to comply with bail conditions and community orders means that for many, frequent short sentences combined with remand see them regularly cycling between prison and the community. So while detention for many may not be in the form of a single indefinite long- sentence, the inevitability of their cycling in and out of prison means, frequent and recurrent detention throughout the lifecourse.

## Complex Support Needs

4. In relation to human lives and support needs, ‘complexity’ is a product of the compounding of individual life situations and the lack of capacity of support structures to respond appropriately over time, that is, they are creations of social systems and organisation, not the fault of an individual person.<sup>5</sup> In applying a complexity analysis to the lived experience of Indigenous Australians with MHDCD in contact with the criminal justice system, an applied conceptual framing of the multiple domains of disadvantage identified as ‘complex support needs’ has been utilised in the research. While there remains a lack of agreement around terminology in the area, the term ‘complex support needs’ moves beyond limited categorizations defined by the presence of a primary medical diagnosis, and which attributes the presence of a particular characteristic, impairment or dysfunction or combinations to the individual.
5. As an overarching concept, complex support needs provides a framework for understanding multiple interlocking<sup>6</sup> experiences and factors that span disability, health and social issues, and captures their nature as simultaneousness, multifaceted and compounding.<sup>7</sup> Broadly those with complex support needs are seen as people who require high levels of health, welfare and other community based services and include individuals who experience various combinations of mental illness, intellectual disability, acquired brain injury, physical disability, behaviours that are a risk to self or others, social isolation, family dysfunction, have problematic drug and/or alcohol use, insecure or inadequate housing; cultural,

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<sup>5</sup> Margaret Hamilton, ‘People with Complex needs and the Criminal Justice System’ (2010) 22 2 *Current Issues in Criminal Justice* 307.

<sup>6</sup> Jennifer Rankin and Sue Regan, ‘Disabilities and Offending Behaviour’ (2004) 7 3 *Meeting complex needs in social care, Housing, Care and Support* 4.

<sup>7</sup> Eileen Baldry and Leanne Dowse, ‘Compounding mental and cognitive disability and disadvantage: police as care managers’ in Duncan Chappell (ed) *Policing and the Mentally Ill: International Perspectives* (CRC Press, Taylor and Francis Group 2013) 219, 222-223.

circumstantial or intergenerational disadvantage; family and domestic violence and contact with the criminal justice system.<sup>8</sup>

6. Important for the analysis presented in this report is the recognition that complex support needs are not static and have a temporal dimension, such that heightened need for support is more likely to emerge during certain situations, episodes or life stages including transitions around out of home care, engagement with or release from the criminal justice system, in times of family stress such as illness, death, family conflict, or removal of children. The experience is particularly characterised by lack of support in a crisis and may be exacerbated in situations, which require negotiation of multi-agency support. Those with complex support needs are also frequently defined in the context of their relationship or otherwise to service systems. These systems, such as the child protection, health, housing and criminal justice systems struggle to work collaboratively with and support effectively such individuals and so people with complex support needs are often marginalised and disadvantaged within the service system and in the community.<sup>9</sup>

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<sup>8</sup> Eileen Baldry, Leanne Dowse and Melissa Clarence, 'People with mental and cognitive disabilities: Pathways into Prison' (2012) *Background Paper for Outlaws to Inclusion Conference*; Terry Carney, 'Complex needs at the Boundaries of Mental Health, Justice and Welfare: Gatekeeping Issues in Managing Chronic Alcoholism Treatment?' (2016) 17 3 *Current Issues in Criminal Justice* 347; Draine, J et al, 'Role of social disadvantage in crime, joblessness, and homelessness among persons with serious mental illness' (2002) 53 5 *Psychiatric Services* 565; Margaret Hamilton, 'People with Complex needs and the Criminal Justice System' (2010) 22 2 *Current Issues in Criminal Justice* 307.

<sup>9</sup> Margaret Hamilton, 'People with Complex needs and the Criminal Justice System' (2010) 22 2 *Current Issues in Criminal Justice* 307; above n 7.

## 4. ADDRESSING COGNITIVE DISABILITY IN CHILDREN AND YOUNG PEOPLE

*Professor Carol Bower, Senior Principal Research Fellow; Noni Walker, Senior Research Fellow; Sharynne Hamilton, Researcher Banksia Hill FASD Project; Glenn Pearson, Head, Aboriginal Research Development, Telethon Kids Institute.*

### Key issues:

- If unmanaged, cognitive disability can contribute to lower attainment in education, employment and increased contact with police.
  - Childhood disability is under-identified in Aboriginal and Torres Strait Islander communities. This is due to a range of social factors including relatively low levels of disability awareness and stigmatisation. This is particularly the case with Foetal Alcohol Spectrum Disorders.
  - Research on an Australian diagnostic instrument for FASD is close to completion. Wide dissemination and use of the diagnostic instrument should lead to better identification and management of cognitive disability across a range of social policy areas including early childhood and child protection, education and justice.
  - Complementary research is developing a strengths-based model for the management of disability within juvenile justice (the Banksia Hill FASD Project). This research shows the great potential for the integration of disability expertise within a justice setting, for adoption by justice and disability agencies including the National Disability Insurance Agency.
1. The goal of the Telethon Kids Institute is “.. to build on our success and create a research institute that makes a real difference in our community, with a renewed focus on translation and discovery, which will benefit children and families everywhere. We will do this together - unified in our leadership, excellence, passion, and vision.”
  2. Addressing this goal is a major program of research at the Telethon Kids Institute on alcohol use in pregnancy and Fetal Alcohol Spectrum Disorders (FASD).
  3. The aims of this program of research are to:
    - prevent alcohol use in pregnancy and its effects on child health;
    - decrease the incidence of FASD;
    - improve FASD diagnostic capacity; and
    - improve management of children and young people with a FASD through effective interventions.

4. We are working with community groups, including Aboriginal communities, health, justice and education professions to change the way FASD is prevented, diagnosed and treated.
5. FASD are characterised by central nervous system dysfunction giving rise to developmental, sensory, learning and behavioural difficulties. Although only about 30% of **children with FASD** have an intellectual disability (IQ <70), **all have neurocognitive deficits that are permanent, resulting in lifelong progressive and complex impairment.**
6. These impairments have a negative impact upon the life trajectory of children and young people with FASD including: impaired early attachment and psychosocial development, impaired attention, increased impulsivity and memory and learning difficulties. They can often lead to secondary problems including poor educational outcomes, social exclusion, low self-esteem, mental health disorders, substance misuse and dependence, and contact with the law.
7. FASD can lead to socially unacceptable harmful behaviours, antisocial activities, violent crime, and being subject to or committing sexual predation. Deficits associated with FASD such as memory, understanding abstract concepts, reasoning, understanding cause and effect, learning from past mistakes, and understanding and meeting social norms and expectations have specific relevance to youth engaging and interacting with police, lawyers and judicial officers.
8. Young people with FASD are easily led and coerced by their peers and may also be victimized both outside and inside the justice system. They may be unable to provide a record of events, names of people involved and timelines, and they may provide different versions of the story for police at different stages of the interview or arrest process leading to allegations of confabulation and possible false confessions. These deficits also inhibit their ability to provide instruction to their lawyer, understand the court process and proceedings and decision made by the magistrate such as meeting bail conditions or parole orders.
9. All aspects of the FASD research at the Telethon Kids Institute - prevention, diagnosis and management - are relevant to this Inquiry, but three research focus areas are particularly pertinent.

## Diagnosis of FASD

10. The Telethon Kids Institute has developed an **Australian FASD diagnostic instrument**, on contract to the Federal Department of Health, which will be disseminated Australia-wide (from May 2016) along with on-line training modules for health professionals. Diagnosis of FASD in Australia has been limited by lack of knowledge and experience of health professionals and an absence of accepted national diagnostic criteria. With greater national capacity for diagnosis, FASD will begin to be diagnosed earlier in life, providing opportunities



for earlier intervention and reduction in secondary disabilities, such as engagement with the law.

## FASD in the juvenile justice system

11. A project at the **Banksia Hill Detention Centre** in Western Australia aims to determine how common Fetal Alcohol Spectrum Disorders are in young people in detention, develop a FASD screening tool appropriate for young people entering the juvenile justice system, and develop appropriate management strategies for these young people. The project is funded by the NHMRC Targeted Call for Research: Fetal Alcohol Spectrum Disorder among Aboriginal and Torres Strait Islander Peoples.
12. Seventy percent of young people in the juvenile justice system are Aboriginal and reported rates of FASD are greater in Aboriginal compared with non-Aboriginal children. The outcomes of the research will establish the first Australian estimate of FASD among young people in detention to compare with overseas data that 20% young people in juvenile detention have FASD.
13. Young people at Banksia Hill (between 10 and 17 years) who choose to participate, and whose parent / guardian consents, are interviewed by the project research assistant and are assessed by a paediatrician, neuropsychologist, occupational therapist and speech pathologist to provide information that may identify FASD or other conditions or impairments.
14. A report for each young person provides assessment findings, a provisional diagnosis if identified, their individual strengths and difficulties with recommendations for improved management strategies for the young person and referrals if appropriate. Discussion with the young person, their parent / guardian / carers and detention centre staff about their strengths and difficulties aims to facilitate improved support for young people with FASD and other impairments during detention and in the community following their release.
15. Data will also be analysed to develop a FASD screening tool appropriate for use among young people entering juvenile detention in Australia. Improvements in the identification and management of individuals with FASD in the justice system have the potential to be cost-effective and improve wellbeing through the provision of services and support that is more appropriate to the needs of these young people.
16. Exploring how the recommended strategies match with existing communication and management pathways at Banksia Hill and with professional development and training for custodial officers is underway in the workforce development component of the project. Intervention resources developed will be made available for use nationally.

17. **Resources for justice professionals** available currently were developed from research by the Telethon Kids Institute to identify:
  - what justice professionals knew about FASD;
  - how this impacted on their work;
  - what information they required; and
  - how this information should be delivered.
18. Resources include a series of 5 online presentations and an overview: FASD and issues in the justice system. A continuing professional development module for lawyers is also available free online: <http://alcoholpregnancy.telethonkids.org.au/fasd-justice/professional-development/>
19. FASD information provided by the Telethon Kids Institute to the Department of the Attorney General for Western Australia was included in Chapter 4 'People with disabilities' in the **Equality before the Law Bench Book**.
20. Telethon Kids Institute also contributes to advocacy for improvements to the way youth justice is delivered in WA through its representation by Professor Jonathan Carapetis (Director, Telethon Kids Institute) on the **Youth Justice Board**.

## Management and support for people with FASD and their families

21. Funding from the National Disability Insurance Agency (NDIA) has provided Telethon Kids Institute with the opportunity to conduct a comprehensive review of the information available on services and supports for people living with FASD to inform the development of draft best practice guidelines for NDIA planners. The project has led to development of:
  - a draft functional severity index for people with FASD to assist planners in decision making around the level and type of services and supports required; and
  - principles that provide a foundation for workforce requirements.The NDIA Expert Panel has assessed these draft guidelines and functional severity index for consideration of **support for impairments from FASD in the NDIS**.
22. The **Alert Program**® Study is taking place in the Fitzroy Valley which is located approximately 400km east of Broome in the remote Kimberley region of Western Australia. The Valley is home to approximately 3500 predominantly Aboriginal people belonging to four language groups and living in more than 45 remote communities, some up to 190 km from the main town of Fitzroy Crossing. After implementing alcohol restrictions in 2007, the community turned their attention to the issue of fetal alcohol spectrum disorders (FASD) and early life trauma (ELT), which posed a threat to intergenerational transfer of language and culture. This led to the initiation of a comprehensive, multifaceted program, the Marulu FASD Strategy, which included Australia's first study into the prevalence of FASD (the Lililwan Project). Since the Lililwan Project, attention has been focused on how to support children, families and teachers impacted by FASD and ELT.

23. Children with FASD and ELT can experience difficulties with their self-regulation and executive functioning. This can impact on children's ability to plan, organise, maintain attention and choose an appropriate level of alertness to suit a particular task or situation. The Alert Program® is based on the analogy of the body being like a car engine to teach self-regulation and improve executive functioning. The body can run at different levels of alertness such as high, low or just right. Children are taught five ways to change their level of alertness through listening, moving, touching, looking or putting something in their mouth.
24. The goal of the research is to develop, implement and evaluate a curriculum version of the Alert Program®, to be delivered by teachers and school staff to improve impairments in self-regulation and executive functioning of primary school aged children in the Fitzroy Valley with and without FASD.
25. Another area of research that is relevant to the Inquiry is to identify changes in the mental health system in order to improve service delivery to Nyoongar people with mental illness. The **Looking Forward Aboriginal Mental Health Project** is a participatory action research project aimed at increasing access to and the responsiveness of the mental health and drug and alcohol service system for Nyoongar families living in the south-east Perth metropolitan corridor whose lives are affected by mental illness. The research revealed that the Nyoongar community would prefer mental health services to be delivered in a way that demonstrates a comprehensive understanding and respect for a Nyoongar worldview, incorporating its protocols, practices and cultural contexts. Organizational change practices are directly informed by the partnership between Elders and service staff based on shared histories, respectful understanding, and open, authentic relationships.
26. A key outcome of the project is the development and implementation of a culturally secure systems change framework for mental health service delivery, the *Minditj Kaart-Moorditj Kaart* ('Sick head, Good Head') Engagement Framework, which enhances the knowledge and skills base of the mental health workforce by bringing them together with Elders so as to better respond to the mental health needs of Aboriginal families. Nyoongar Elders, ensure that service staff (1) have an understanding a Nyoongar worldview and the enduring impact of Colonisation, (2) are developing ways to work with the needs and aspirations of the community, (3) are building service capacity to work more confidently, competently and culturally securely with Nyoongar families. Together, Elders and services commit to devising new ways in which families can better access services and services be more responsive to their needs.

#### **Recommendations:**

27. We will learn from experience about how best to translate knowledge into action – we do not need to wait for more research!

- i) Early diagnosis of FASD and intervention to prevent engagement with the law.
  - ii) Early recognition that a young person has FASD or other neurocognitive impairments when first engaging with the law so that courts can provide alternative strategies to sentencing and appropriate management to reduce recidivism.
- 28. By identifying young people with FASD or cognitive disabilities (the earlier the better) and providing them and their families with the necessary supports and appropriate methods to understand police interviewing, court processes, bail conditions and other youth justice processes, the chance of ending up in indefinite detention is greatly lessened.

## 5. THE IMPACT OF TRAUMA AND FAMILY VIOLENCE UPON ABORIGINAL AND TORRES STRAIT ISLANDER WOMEN WITH DISABILITY

*Elise Thomas, National Secretariat Support Officer, Family Violence Prevention Legal Services*

### Key issues:

- **Aboriginal and Torres Strait Islander women with cognitive and psychiatric impairments face multiple forms of intersecting disadvantage, discrimination and marginalisation.**
  - **These barriers, which women face on both individual and systemic levels, effectively close the doors on alternative pathways and funnel them down an increasingly narrow road of options which, for many, sadly ends with incarceration.**
1. Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments are subject to discrimination and disadvantage as a result of the legacies of colonisation; the Stolen Generation; past and present traumas of child removal and severed family ties; racism; ableism; high levels of undiagnosed disability; and frequently, intergenerational cycles of low socioeconomic status, unemployment, substance abuse and incarceration. These intersecting traumas and vulnerabilities on their own are more than enough to place individuals at high risk. When “woman” is added into this mix, with all of the gender-specific barriers and vulnerabilities that entails, this risk becomes magnified.
  2. These systemic factors mean that Aboriginal and Torres Strait Islander women with cognitive and psychiatric impairments are often caught in a nexus of vulnerability, victimisation and criminalisation. As Baldry, McCausland, Dowse and McEntyre indicate in their report on Aboriginal people with mental and cognitive disabilities in the criminal justice system, it is not disability alone but rather the combination of complex forms of disadvantage which places particular individuals at very high risk of victimisation.<sup>10</sup> Their report also found that Aboriginal and Torres Strait Islander women within the study experienced the highest rates of complex needs, including multiple contacts with the police, having been in out of home care as children, having been homeless and having been victims of crime.<sup>11</sup>
  3. Multiple studies have also indicated a staggering rate of mental illness and psychiatric impairment amongst Aboriginal and Torres Strait Islander women in detention. For example, a recent study by Beyond Blue found that up to 47% of Aboriginal and Torres Strait Islander

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<sup>10</sup> Eileen Baldry, Ruth McCausland, Leanne Dowse & Elizabeth McEntyre, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (University of New South Wales, 2015) 75, <<http://www.mhdc.d.unsw.edu.au>>.

<sup>11</sup> Ibid, 45.

women in detention suffer from post-traumatic stress disorder (PTSD). 70% were suffering from anxiety disorders and 39% with depression. 63% of Aboriginal and Torres Strait Islander women in the study were also struggling with substance abuse,<sup>12</sup> which it seems reasonable to think might be both caused by and contributing to their poor mental health.

4. Many Aboriginal and Torres Strait Islander women in detention have themselves been victims of multiple forms of trauma, including family violence, rape, sexual assault, gender-based and/or racialised violence. Frequently women are also re-traumatised by the very systems and institutions which should be supporting them, including by police, courts and child welfare systems. These often unresolved and untreated experiences of trauma contribute, directly and indirectly, to the circumstances which set Aboriginal and Torres Strait Islander women on the road to detention.
5. Addressing the multiple and complex needs of that Aboriginal and Torres Strait Islander women with cognitive and psychiatric impairments in detention requires a culturally appropriate, trauma informed and gender aware approach. It is not enough to address their needs as Aboriginal and Torres Strait Islander people; as women; as people with disabilities; and as victims of trauma separately. The compounding and intersectional nature of their disadvantage and the barriers they face must be recognised, and an effective response to it must be equally intersectional and multifaceted.
6. The National Family Violence Prevention and Legal Services Forum therefore recommends:
  - That Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments in detention be screened for past experiences of trauma, including family violence, sexual assault or other forms of gender-based violence.
  - Appropriate support services should be provided to Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments who have experienced violence or trauma. This should include both counselling and other emotional and psychological support to help survivors on their roads to recovery, and legal support to help them access their rights and obtain justice.
  - In particular, the gender-specific needs of Aboriginal and Torres Strait Islander women with cognitive and psychiatric impairments must be recognised and responded to.
  - Aboriginal community-controlled organisations should be resourced to provide specialised and culturally appropriate support to Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments in detention.

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<sup>12</sup> E Heffernan, K Andersen, S Kinner, A Aboud, C Ober, A Scotney, *The Family Business: improving the understanding and treatment of post-traumatic stress disorder among incarcerated Aboriginal and Torres Strait Islander women* (Beyond Blue, 2015) 5.

## 6. DIVERSION

*Dr Linda Steele, Lecturer, School of Law University of Wollongong*

### Key issues:

- **Diversion should address the deep entrenchment in the criminal justice system of Indigenous Australians with cognitive and psychiatric impairment and their indefinite cycling in and out of multiple forms and episodes of punishment over their lifecourse.**
  - **Diversion which has punitive, coercive and/or supervisory dimensions will not only fail to address the issues of entrenchment and cycling but likely exacerbate them.**
  - **Diversion should trigger appropriate disability and social support, rather than be an out-of-prison form of punishment.**
  - **As a signatory to the *Convention on the Rights of Persons with Disabilities* the Commonwealth has an obligation to ensure diversionary schemes do not breach human rights, including the right to equality and non-discrimination.**
1. Diversion into supported disability programs as an alternative to imprisonment is a critical process to stem the unnecessary incarceration of people with cognitive and psychiatric impairment. The use of diversion is an underutilised opportunity across the jurisdictions, used in an ad hoc and inconsistent manner. The Senate Inquiry presents an opportunity to establish a nationally consistent model for diversion, so long as it is based on supporting people with disability and not creating an alternative form of punishment.
  2. Diversion must be considered in the context of the bigger picture of the complex ways in which Indigenous Australians with cognitive and psychiatric impairment are deeply entrenched in the criminal justice system and subjected across their life course to an ongoing cycle of multiple forms and episodes of punishment. The core issues of criminalisation, incarceration and marginalisation which are apparent in this bigger picture will not be addressed if the 'problem' of indefinite detention is seen as becoming 'fixed' if it is replaced with yet *another* form of punishment.
  3. Diversion should address the *deep entrenchment* in the criminal justice system of Indigenous Australians with cognitive and psychiatric impairment and their *indefinite cycling* in and out of multiple forms and episodes of punishment over their lifecourse. Diversion which has punitive, coercive and/or supervisory dimensions will not only fail to address these issues of entrenchment and cycling but likely exacerbate them. It is particularly important the Senate Committee is mindful of these risks when considering diversion because of the typical positive perception that diversion is non-punitive, therapeutic and beneficial.

## What is Diversion?

4. In the context of alleged offenders with cognitive and psychiatric impairment, diversion typically involves shifting an individual from their passage along the criminal justice continuum from charge, conviction, sentence and punishment into an alternative system of disability and mental health services.
5. There is no uniformity across jurisdictions (both internationally and within Australia) in relation to the service, institutional or legal form that diversion takes. For example, diversion might involve an individual court having an informal practice of using generalist bail and sentencing legislation to attach conditions relating to disability or mental health service engagement to alleged offenders' bail or community sentencing orders ('informal or ad hoc diversion'). At the other extreme diversion might involve a special legislative scheme applicable exclusively to people with cognitive and psychiatric impairment which provides for specific legal orders compelling engagement with disability and mental health services ('formalised legal diversion').<sup>13</sup>
6. While diversion can mean many things, it is important to be clear about the institutional, service and, most importantly, *legal* forms that a particular diversionary scheme takes. Formalised legal diversion has generally been supported in past law reform inquiries<sup>14</sup> and by legal stakeholders because its formal legal status suggests it will be more accessible across courts and provide greater certainty of access to support services. Yet, by very reason of its formal legal nature, this form of diversion is also the most difficult form of diversion to remove or change once in place and has significant legal ramifications on individuals subjected to diversionary orders (eg coerced engagement with treatment and services, supervision by service providers of compliance and reversion back to criminal charges if orders are breached). As such, this submission focuses on a discussion of formalised legal diversion.

## What Happens Without Diversion?

7. Research led by Eileen Baldry and Leanne Dowse et al on the MHD CD dataset<sup>15</sup> establishes that Indigenous Australians with cognitive and psychiatric impairment who are in the

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<sup>13</sup> See, eg, *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32. For a discussion of some examples see Elizabeth Richardson and Bernadette McSherry, 'Diversion Down Under — Programs for Offenders with Mental Illnesses in Australia' (2010) 33(4) *International Journal of Law and Psychiatry* 249; Richard D Schneider, 'Mental Health Courts and Diversion Programs: A Global Survey' (2010) 33 *International Journal of Law and Psychiatry* 201.

<sup>14</sup> See, eg, the New South Wales Law Reform Commission: New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (Report No 135, 2012).

<sup>15</sup> See generally *Australians With MHD CD in the CJS Project* (29 June 2012) Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System <<http://www.mhdcd.unsw.edu.au/australians-mhdcd-cjs-project.html>>.



criminal justice system as alleged offenders experience ongoing criminalisation and punishment across their life, which for many individuals generally begins in childhood. Moreover, their research highlights the significance to this ongoing criminalisation and punishment of disability and Indigeneity, compounded by dynamics such as marginalisation, institutional failure, victimisation and lack of appropriate supports, as well as colonialism, historical injustices and intergenerational trauma. Moreover, their research emphasises the contribution of the criminal justice system, including incarceration and community-based interventions, to the ongoing criminalisation and punishment.<sup>16</sup>

8. Yet, paradoxically, the *ongoing* nature of many of these individuals' contact with the criminal justice system is not typically viewed by the criminal justice system and criminal law as a systemic problem (in which the criminal justice and other institutions are complicit) requiring solutions which operate at a systemic and individual level and which support rather than punish individuals. Instead, the ongoing nature of contact with the criminal justice system is individualised and typically viewed as a problem of the *failure of the individual* to rehabilitate and engage constructively with criminal justice and welfare agencies and in turn becomes an indicator that the individual is a higher risk and in need of more serious forms of punishment. Moreover, when the individual has a disability, their ongoing contact with the criminal justice system is attributed to internal, pathological characteristics associated with their disability and divorced from social, historical and political circumstances. Mainstream and conventional forms of punishment that individuals become increasingly subjected to as they become further entrenched in the criminal justice system fail to address the systemic, complex and historical circumstances which have compounded over time to shape the criminal justice pathways of Indigenous Australians with cognitive and psychiatric impairment.
9. Diversion – if understood as a method of shifting individuals from the *cycle* of punishment and criminalisation and addressing systemic causes of criminalisation (as opposed to a method of shifting an individual away from conventional punishment in relation to one instance of a specific criminal charge) provides the possibility of intervening in this cycle. Diversion can do this if it is an alternative to punishment per se and an alternative to entrenchment in the criminal justice system as opposed to an alternative form of punishment – if it operates in a legal and institutional framework which is not punitive, coercive or supervisory. Moreover, diversion can address some of the systemic issues related to disadvantage if it provides access to disability and social support services and provides pathways to access to justice for past experiences of victimisation, institutional failure and historical injustice.

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<sup>16</sup> Eileen Baldry, Ruth McCausland and Leanne Dowse et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, October 2015).

## Why Are Aboriginal-Specific Solutions to Diversion Necessary?

10. Additionally, diversion must involve Aboriginal-specific solutions. This is not only to ensure cultural and geographic appropriateness, but also because of the intensified marginalisation and criminalisation of Indigenous Australians with cognitive and psychiatric impairment who are in the criminal justice system when compared to their non-Indigenous counterparts. This is demonstrated by a brief discussion of the findings of a study of all individuals in the MHDCD dataset (referred to above) who had ever been diverted pursuant to section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) ('section 32 cohort'). This section 32 cohort consisted of a cohort of 149 individuals with diagnosed cognitive and psychiatric impairment who have been in custody in a NSW prison and have received a section 32 order at some point in their lives.<sup>17</sup> Below is a summary of the key findings which compare the situation for Indigenous and non-Indigenous cohort members.

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<sup>17</sup> See, generally, Linda Steele, Leanne Dowse and Julian Trofimovs, 'Who is Diverted?: Moving Beyond Diagnosis Towards a Social and Political Analysis of Diversion' (2016) 38(2) *Sydney Law Review* (forthcoming); see also Linda Steele, Leanne Dowse and Julian Trofimovs, 'Section 32: A Report on the Human Service and Criminal Pathways of People Diagnosed With Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Under the Mental Health (Forensic Provisions) Act 1990 (NSW)' (University of New South Wales, 2013) [http://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/Steele%2C%20Dowse%20and%20Trofimovs%20\\_MHDCD%20Section%2032%20Report.pdf](http://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/Steele%2C%20Dowse%20and%20Trofimovs%20_MHDCD%20Section%2032%20Report.pdf).

	<b>Indigenous Australian members of section 32 cohort (42)</b>	<b>Not-Indigenous Australian members of section 32 cohort (107)</b>
<b>Diagnosis</b>		
Percentage with cognitive impairment diagnosis (either single diagnosis of CD or complex diagnosis of CD-MHD)	95%	83%
Percentage with complex diagnosis (CD-MHD)	71%	50%
Average age when data drawn	31.74 years	36.62 years
<b>Childhood social disadvantage</b>		
Percentage in out of home care (OOHC) as child	21%	11%
Percentage who left school without qualifications (ie HSC, VCE, Leaving Certificate)	45%	40%
<b>Disability support</b>		
Ever received disability services (ADHC support)	19%	36%
<b>Contact with criminal justice system</b>		
Average age of first police contact (FPC)	14.9 years old	17.4 years old
Percentage who were DJJ clients (whether in DJJ custody or not)	57%	27%
Percentage who were in DJJ custody	48%	19%
Average number of contacts with police as a person of interest (POI)	106	110
Average number of convictions	34	27
Average number of adult custody episodes (DCS)	14 episodes	12 episodes
Average total number of custody days across all DCS custody episodes	1259	944
Percentage who have a reported self-harm in DCS custody	76%	57%
Average number of contacts with police as a victim of crime	11	17

Percentage who have had contact with police under civil mental health legislation	50%	22%
Diagnostic break down of group who have had contact with police under civil mental health legislation  Note: single CD indicates no MHD diagnosis	Complex CD-MHD diagnosis: 43%  Single MH diagnosis: 5%  Single CD diagnosis: 52%	Complex CD-MHD diagnosis: 54%  Single MH diagnosis: 8%  Single CD diagnosis: 38%
<b>Diversion under section 32 of the <i>Mental Health (Forensic Provisions) Act 1990 (NSW)</i></b>		
Diverted as a child	0	1
Average number of diversion orders	1.9	1.6

**Table 1: Diagnostics, Demographics and Criminal Justice Pathways of a Cohort of Indigenous Australians and Not-Indigenous Australians Diverted Pursuant to Section 32 of the *Mental Health (Forensic Provisions) Act 1990 (NSW)***

11. Table 1 indicates that the Indigenous Australian cohort members are subjected to more intense criminalisation (on average earlier entry, more time in custody and more convictions) than their non-Indigenous counterparts. Thus, in general, these findings indicate the extreme importance that diversion focus not merely on shifting an individual away from conventional punishment vis-à-vis one specific criminal offence, but be focused on providing an alternative to punishment per se and aim to intervene in the entrenchment in the criminal justice system. Furthermore, the more deeply entrenched nature of Indigenous Australian cohort members in the criminal justice system illustrates that lengthy criminal histories must not become a contra-indicator of suitability for diversion. Instead, this fact alone should indicate the great need to interrupt the *cycle* of punishment and to avoid *any* further criminal justice orders (including forensic mental health orders) and punishment of any sort which will ultimately exacerbate this cycling.
12. Table 1 indicates that none of the Indigenous cohort members were diverted as children, even though on average they were already in the criminal justice system at an earlier age and potentially incarcerated in juvenile custody when compared to their non-Indigenous counterparts. The data illustrates the need to consider how diversion will operate in the juvenile jurisdiction, including its interface with out of home care and education (given higher incidence of OOHC and poor educational outcomes).
13. Table 1 also illustrates that Indigenous Australian cohort members experienced lower access to disability support services when compared to their non-Indigenous counterparts. Thus, a

diversion scheme must ensure equity of access to disability services for Indigenous Australians with cognitive and psychiatric impairment. Moreover, Table 1 indicates social disadvantage experienced by Indigenous Australian cohort members, such that through diversion Indigenous Australians with cognitive and psychiatric impairment must have equitable access to social support services and access to justice and support to address institutional injustices related to past social service provision.

14. To the extent that Table 1 illustrates high victim contact with police as well as high incidence of OOHC and poor educational outcomes, diversion should provide access to justice and support to address institutional injustices and institutional or personal violence experienced by Indigenous Australians with cognitive and psychiatric impairment. On a similar note, this access should extend to addressing past injustices and violence which have occurred in the criminal justice system.
15. Table 1 also illustrates the significance of civil mental health legislation to the police contact of Indigenous Australians with disability. Surprisingly, this includes a higher proportion of Indigenous than non-Indigenous individuals who do not even have a diagnosed mental illness and hence do not fall within the jurisdiction of this legislation. This indicates the risk that the use of civil mental health services in diversion (particularly where the individual does not consent to treatment or detention) might provide an additional means of criminalisation.

### Why Must Diversion Be Done Properly?

16. The service, institutional and legal dimensions of a diversion scheme must be carefully considered, because there are unforeseen ramifications of poorly implicated diversion or of diversion that operates pursuant to coercive court orders. While the linking of people with disability support services is positive if it is what an individual wants and chooses and is focused on intervening in their entrenchment in the criminal justice system and in addressing systemic factors, the legal framing of a formal legal diversion scheme can undercut any service benefits of diversion. This is because formal legal diversion can involve court orders which require the individual to comply with services and failure to do so can result in their charges being brought back and hence possible conviction and punishment. Furthermore, the use of guardianship and civil mental health orders as an additional way to coerce individuals in relation to treatment, lifestyle or accommodation can provide additional opportunities for contact with police because the retrieval orders or coercive orders associated with these civil law frameworks.
17. Poorly implicated diversion that does not involve services which are appropriately resourced or staff who are appropriately trained and who do not hold prejudices concerning disability, Indigeneity or criminality, can result in volatile situations which can result in conflict and additional contact with police. Related to this, consideration must be given to how service

governance, risk management, work health and safety and duty of care frameworks provide additional opportunities for individuals to have contact with the criminal justice system.

18. Diversion which involves coercion of individuals who have not been convicted (where individuals without disability are beyond the scope of punishment pursuant to criminal or forensic mental health law) or which involves coercive engagement with treatment or services is discriminatory and breaches human rights of non-discrimination, legal capacity and personal integrity.<sup>18</sup> Diversion must also have maximum involvement of place-based, community owned Indigenous services to ensure its maximum effectiveness.<sup>19</sup>

## How Should Diversion Be Viewed?

19. In considering the 'role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system' (as per term of reference (i)) the Senate Committee should consider the following principles:

- Commonwealth inter-jurisdiction consistency in the institutional, service and legal form of diversion.
- Diversion should be governed by overriding principles of self-determination and non-discrimination and equality, and be directed towards addressing the entrenchment of Indigenous Australians with cognitive and psychiatric impairment in the criminal justice system.
- Diversion should not involve coercion, punishment or supervision. Diversion should not only avoid coercion by criminal law or forensic law orders, but also avoid the use of coercion via civil guardianship or mental health laws.
- Diversion should be directed to avoiding *any* form of punishment, rather than merely being an alternative to purportedly more severe forms of punishment. Diversion not just be an *alternative* to indefinite detention but an alternative to punishment and alternative to a life entrenched in the criminal justice system
- Diversion must also have maximum involvement of place based, community owned Indigenous services.
- Diversion should provide culturally and geographically appropriate disability and social support services and individuals should only be expected to engage with these services if they choose.

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<sup>18</sup> On regulatory and coercive and punitive use of civil orders, see eg Claire Spivakovsky, 'From Punishment to Protection: Containing and Controlling the Lives of People With Disabilities in Human Rights' (2014) 16(5) *Punishment & Society* 560; Claire Spivakovsky, 'Making Dangerousness Intelligible in Intellectual Disability' (2014) 23(3) *Griffith Law Review* 389.

<sup>19</sup> Harry Blagg, Tamara Tulich and Zoe Bush, 'Diversiory Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives' 40(4) *Alternative Law Journal* 257.

- Diversion should provide ways to consider impact of institutional and criminal justice failures on the individual's current situation and opportunities to consider justice and other avenues for redressing these
- Diversion needs to address the needs of young Indigenous Australians with cognitive and psychiatric impairment, and also ensure that longer or entrenched criminalisation is not a counter-indicator to suitability for diversion.
- If diversion does have a legal order attached including coercing engagement with services or is otherwise punitive, it must be viewed as a form of criminal punishment and be subjected to human rights, civil liberties and social justice scrutiny as are other forms of punishment.
- If diversion does have a legal order attached including coercing engagement with services or is otherwise punitive, it is pertinent that support services are appropriately resourced and staff be appropriately trained to minimise volatile situations and additional contact with police. It is also vital that the legal process for determining breaches of diversionary orders give consideration to the place of services' legal, resource and staff dynamics in the circumstances giving rise to the alleged breach. Diversion should address social, institutional and political factors, as well as legal factors (the *role of law and justice system* themselves), in the entrenchment of Indigenous Australians in the criminal justice system. Diversion should not only provide access to disability and social services to address current circumstances, but also provide access to justice and support to address past injustices, including those which have occurred in the criminal justice system.

## 7. TOWARDS NATIONAL STANDARDS FOR LAWS AND REGULATIONS AFFECTING INDIVIDUALS WHO HAVE BEEN DECLARED MENTALLY-IMPAIRED OR UNFIT TO PLEAD (PART A)

### *National Aboriginal and Torres Strait Islander Legal Services*

#### Key issues:

- Legislation and regulations affecting people who have been declared mentally impaired unfit to plea are inconsistent across the State and Territory jurisdictions.
- Even the best practice legislative models do not contain adequate safeguards against the indefinite detention of people with cognitive impairment.
- The Commonwealth has a role in leading legislative reform to secure the rights of people with cognitive impairment in the justice system through national legislative standards.
- The National Aboriginal and Torres Strait Islander Legal Services proposes five core principles for minimum nations standards for legislation affecting mentally impaired and unfit to plea.

1. This section of the submission briefly highlights a number of issues with legislation relating to accused who are found not guilty by reason of unsoundness of mind (insanity or mental impairment) or unfit to stand trial. NATSILS recommends that minimum standards be introduced in legislation in all states and territories. Currently, there are significant differences in the legislative frameworks between jurisdictions and consequently we are unable to provide a thorough analysis of jurisdictional differences and specific needed reforms. However, we have provided examples from particular jurisdictions in order to demonstrate the need for recommended minimum standards. For analysis of jurisdictional specific issues, NATSILS notes that there are a number of significant reports including those produced by the Victorian Law Reform Commission<sup>20</sup>, the New South Wales Law Reform Commission<sup>21</sup> and the Government of Western Australia's discussion paper on the *Criminal Law (Mentally Impaired Accused) Act 1996*.
2. It should be stressed that in making these recommendations, we note the important role that the COAG's Standing Council on Health could play. As argued in the Australian Law Reform Commission (ALRC) report on disabilities, the COAG's Standing Council on Health has

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<sup>20</sup> Victorian Law Reform Commission, Consultation paper on the Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997

<sup>21</sup> New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (May 2012); New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* (June 2013).



long overseen developments in mental health laws, and may be able to advance the review and amendment of legislation in this area.<sup>22</sup>

## Minimum Standards

3. Based on NATSILS' analysis and the first hand experiences of our members, the following have been identified as minimum standards that all legislation for mentally impaired accused should adhere to. At a minimum legislation should provide for:
  - Judicial discretion;
  - Special hearings to test evidence;
  - Procedural fairness;
  - Finite terms for custody orders (and release orders); and
  - Rights of review.

These are explored below.

## Judicial discretion

4. *Recommendation: There should be judicial discretion to impose an appropriate order depending on the circumstances of the case and, as such, there should be no provision for mandatory custody orders for mentally impaired accused.*
5. A critical issue with legislation in this area is the lack of judicial discretion to make appropriate orders. For example, in Western Australia, under the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* ('the CLMIA Act (WA)') a court dealing with a person who has been found to be unfit to stand trial has one of two options: indefinite custody or unconditional release.<sup>23</sup> In contrast, a mentally impaired accused who is acquitted on account of unsoundness of mind may be placed on a community-based order, conditional release order or an intensive supervision order.<sup>24</sup> However, the court must impose an indefinite custody order for a mentally impaired accused, who has been acquitted on account of unsoundness of mind, if the offence committed is listed in Schedule 1 of the CLMIA Act (WA). While Schedule 1 includes offences such as murder, manslaughter and sexual penetration, it also includes offences such as assault occasioning bodily harm and criminal damage. This lack of judicial discretion is a major obstacle to the courts making appropriate orders, as appropriate resolutions will seldom be reached by either of the extreme options of unconditional release or indefinite detention. This can be compared with legislation in Victoria where there are no mandatory orders for mentally impaired accused under criminal legislation. Instead, treatment, custodial and judicial monitoring

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<sup>22</sup> Australian Law Reform Commission, *Discussion Paper: Equality, Capacity and Disability in Commonwealth Laws* (May 2013, Canberra), 233.

<sup>23</sup> *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* ("CLMIA Act (WA)"), ss 16(5) and 19(4).

<sup>24</sup> CLMIA Act (WA), ss 21(b) and 22(b). These orders are only applicable if the offence committed is not listed in Schedule 1 of the CLMIA Act (WA).

orders are at the court's discretion. Likewise, in South Australia, the courts have wide discretionary powers to make appropriate orders.<sup>25</sup>

## Special hearings to test evidence

6. *Recommendation: There should be special hearings to test the evidence against a mentally impaired accused who is unfit to stand trial. This should entail a procedure for determining whether, on the evidence available, the accused committed the objective elements of the offence so that if it cannot be proven that the accused committed the objective elements of the offence, the accused is discharged.*
7. A serious issue in Western Australia is that orders can be made against accused under the CLMIA Act even though evidence against the accused may be substantively lacking. In Western Australia the court must not impose a custody order unless satisfied that it is appropriate to do so having regard to the strength of the evidence against the accused; the nature of the alleged offence and the alleged circumstances of its commission; the accused's character, antecedents, age, health and mental condition; and the public interest.<sup>26</sup> However, the assessment of the strength of evidence against the accused is only undertaken by reference to the written brief of evidence – no witnesses are called to give evidence, nor can they be cross-examined.
8. This can be compared with the Northern Territory<sup>27</sup> and Victoria<sup>28</sup> where there are special hearings before a jury to determine whether the person is not guilty of the offence, not guilty because of mental impairment, or committed the offence charged.<sup>29</sup> A finding of "not guilty" and "not guilty because of mental impairment" are to be taken for all purposes as if they were findings made at a criminal trial.<sup>30</sup> Findings that the accused "committed the

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<sup>25</sup> For example, in South Australia, under Division 4, Section 269O(1) of the Criminal Law Consolidation Act 1935 (SA) "**CLC Act (SA)**", the court by which the person is declared to be liable to supervision has three discretionary powers:

1. 269O(1)(a): to release the defendant unconditionally
2. 269O(1)(b)(i): to make a supervision order committing the defendant to detention
3. 269O (1)(b)(ii): to make a supervision order releasing the defendant on license, subject to certain conditions.

<sup>26</sup> CLMIA Act (WA), ss 16(6) and 19(5).

<sup>27</sup> In the Northern Territory, the regime for dealing with questions of fitness to be tried is found under Part IIA of the Criminal Code Act (NT) ("**Criminal Code (NT)**"). In both the Northern Territory and Victoria, the matter must go before a special hearing within 3 months. (CMI Act (Vic) s 12(5); Criminal Code (NT) s 43R(3)).

<sup>28</sup> See *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* ("**CMI Act (Vic)**"), ss12, 15 and 18(1),(2).

<sup>29</sup> CMI Act (Vic), s 15; Criminal Code (NT), ss 43G(2)(c),(d),(e). In Victoria and the Northern Territory, where a jury at a special hearing finds that the accused person is not guilty of the offence due to mental impairment, or that the person committed the offence, the court must make a custodial supervision order, a non-custodial supervision order or release the accused person unconditionally: Criminal Code (NT), ss 43X(2)(a), 43X(3) and 43ZA; CMI Act (Vic), ss 18(4), 23(a) and 26(2).

<sup>30</sup> CMI Act (Vic) ss 18(1), (2); Criminal Code (NT), ss 43X(1), (2)).

offence charged" must be proven to the criminal standard of beyond reasonable doubt.<sup>31</sup> This finding is subject to appeal in the same manner as if the accused had been convicted of the offence in a criminal trial.<sup>32</sup> In NSW, if a Mental Health Review Tribunal makes a finding that a person will not become fit to be tried within 12 months, the court must hold a special hearing to test the evidence against the accused as soon as practicable unless DPP advises no further proceedings will be taken.<sup>33</sup> In these hearings the prosecution must prove beyond reasonable doubt that the accused committed the offences(s) charged.<sup>34</sup> However, evidence may be limited in various ways including accused may be unable to give evidence or accused may be unable to adequately instruct their lawyer.

9. In South Australia the law provides a division between objective elements and subjective elements of an offence. Under the objective elements of the offence the court hears evidence and representations by the prosecution and the defence on whether the court should find that the objective elements of the offence are established.<sup>35</sup> If the court is satisfied beyond reasonable doubt that the objective elements of the offence are established, the court must record a finding to that effect, but otherwise the court must find the defendant not guilty of the offence and discharge the accused.<sup>36</sup>

## Procedural fairness

10. *Recommendation: Legislation should ensure minimum procedural fairness requirements such as a right to appear, right of review, right to written reasons for decision and right to information.*
11. In Western Australia, there is no statutory right for a mentally impaired accused or his or her advocate/representative to appear before the Mentally Impaired Accused Review Board and/or to provide written submissions to the Mentally Impaired Accused Review Board. In addition to making recommendations for the release of mentally impaired accused,<sup>37</sup> the Mentally Impaired Accused Review Board also makes recommendations as to whether it should be granted the power to make a leave of absence order.<sup>38</sup> Furthermore, apart from the requirement to provide a copy of a written report of the Mentally Impaired Accused Review Board (such report either recommending or not recommending the release of the

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<sup>31</sup> CMI Act (Vic), s 17(2); Criminal Code (NT), s 43V(2)). Such a finding is not the same as a verdict of guilty, but a qualified finding of guilt, and does not constitute a conviction in law (CMI Act (Vic) s 18(3)(a); Criminal Code (NT) s 43X(3)(a)).

<sup>32</sup> CMI Act (Vic), ss 18(3)(b), (c); Criminal Code (NT), s 43X(3)(c).

<sup>33</sup> S 19(1).

<sup>34</sup> S19(2). Verdicts available are not guilty, not guilty by reason of mental illness, or on the limited evidence available, the accused committed the offence or an alternative offence (s 22(1))

<sup>35</sup> CLC Act (SA), s 269NA(1).

<sup>36</sup> CLC Act (SA), s 269NA(2).

<sup>37</sup> CLMIA Act (WA), ss 33(2), (3).

<sup>38</sup> CLMIA Act (WA), s 27(1).

mentally impaired accused) there is no further statutory right to the provision of information.

12. This can be compared with legislation in NSW legislation which provides important safeguards to ensure procedural fairness, including provisions that a person must be legally represented at any matter before the Mental Health Review Tribunal (MHRT)<sup>39</sup> and that anyone deemed unfit to stand trial must be legally represented at a special hearing. Legislative provision that an accused must have legal representation at a special hearing also exists in the Australian Capital Territory (ACT).<sup>40</sup>
13. Furthermore, in NSW all matters in the MHRT are to be recorded<sup>41</sup> and any person with a matter before the MHRT, or their representative, is entitled to inspect and have access to any medical records relating to the person.<sup>42</sup> In NSW there are also rights to appeal to the Supreme Court against a determination of the Tribunal or the failure or refusal of the Tribunal to make a determination.<sup>43</sup>

### Finite terms for custody orders (and release orders)

14. *Recommendation: The duration of the order should be no longer than the duration of the sentence that would have been imposed if the accused had been convicted of the offence.*<sup>44</sup>
15. A major issue is that in some states and territories, there are no finite terms for orders made for people with mental impairments. For example, custody orders in Western Australia are indefinite and a mentally impaired accused can only be released from a custody order by an order of the Governor.<sup>45</sup> The effect of a custody order is that the mentally impaired accused must be detained in an authorised hospital, declared place, prison or detention centre.<sup>46</sup>

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<sup>39</sup> Unless over the age of 16 and does not want to be represented (s 154 MHA).

<sup>40</sup> S 316(6).

<sup>41</sup> S 159 MHA.

<sup>42</sup> S156 MHA.

<sup>43</sup> S 163 MHA.

<sup>44</sup> This recommendation has also been made by the Australian Law Reform Commission: Proposal 7–3: “State and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention (for example, by reference to the maximum period of imprisonment that could have been imposed if the person had been convicted) and for regular periodic review of detention orders.” Australian Law Reform Commission, ‘Access to Justice’, *Equality, Capacity and Disability in Commonwealth Laws* (Australian Law Reform Commission, No 124) 156, 167, <[https://www.alrc.gov.au/sites/default/files/pdfs/publications/dp817.\\_chapter\\_7\\_access\\_to\\_justice.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/dp817._chapter_7_access_to_justice.pdf)>.

<sup>45</sup> If the Governor makes an order for the release of a mentally impaired accused from a custody order, the Governor may release the person unconditionally or make a release order with conditions. See CLMIA Act (WA), s 35.

<sup>46</sup> CLMIA Act (WA), s 24. Until recently there was no ‘declared place’ in Western Australia to provide an alternative to prison for people with intellectual disability or cognitive impairment who are found unfit to plead to criminal charges and have been deemed to be ‘mentally impaired accused’ because of their disability. In August 2015 the first declared place the Bennett Brook Disability Justice Centre opened.

16. As a consequence there have been a number of high profile cases of mentally impaired accused being detained in prison for many years and far longer than they would have spent in custody had they been convicted of the offence. As noted by the Western Australian Chief Justice, Wayne Martin, the effect is that:
- “lawyers do not invoke the legislation even in cases in which it would be appropriate because of the concern that their client, might end up in detention, in custody, in prison, for a lot longer period than they would if they simply plead guilty to the charge brought before the court.”<sup>47</sup>
17. In Victoria, there are finite terms for court secure treatment orders where an accused has been found guilty through ordinary trial procedures.<sup>48</sup> However, for an accused found unfit to stand trial or found not-guilty by reason mental impairment, there are no finite terms for the supervision orders to which they may be subject. This includes custodial supervision orders.<sup>49</sup> The paradoxical result is that there are rightfully limits on the time spent in custody for those convicted of crimes, including those who are mentally impaired, whilst the current legislation allows for indefinite detention, of those mentally impaired accused who are not convicted in law of any crime.
18. In the Northern Territory, custodial supervision orders have no expiry date.<sup>50</sup> The only way for an order to cease is if the Court accepts expert evidence that the person subject to the order is no longer a serious risk of harm to the community or themselves.<sup>51</sup> The result is that once people are put on custodial supervision orders, there is a real risk of being held indefinitely.<sup>52</sup> Our member organisation Central Australian Aboriginal Legal Aid Service (CAALAS) and North Australian Aboriginal Justice Agency (NAAJA) both have clients who have been detained on supervision orders for years beyond the likely length of sentence they would have received if they were fit or not mentally impaired at the time of offending.
19. This can be compared with legislation in South Australia which expressly provides that court orders cannot exceed that which would have been imposed if the accused had been found guilty and sentenced for the offence. In particular, the legislation provides that in order to

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<sup>47</sup> Bronwyn Herbert, ‘Urgent reform needed in how justice system treats people with mental impairment, says Chief Justice’ *ABC News* (10 July 2015).

<sup>48</sup> Detention pursuant to a court secure treatment order can only be imposed where, but for the person having a mental illness, a court would have sentenced the person to a term of imprisonment: *Sentencing Act 1991* (Vic), s 94B(1)(a). A court secure treatment order is for a fixed term, and its duration must be no longer than the period of imprisonment that would have been imposed had the order not been made: *Sentencing Act 1991* (Vic), s 94C(3).

<sup>49</sup> See CIM Act (Vic), s 27. The court has the power to vary a supervision order, including the power to direct that the matter be brought back before the court (CIM Act (Vic), ss 32(1), 32(5), 33(1) and 33(5)) more than once (CIM Act (Vic), ss 32(6) and 33(3)). Since there is no limit to the number of times a matter may be brought back before the court, there is no limit to the effective length of a supervision order.

<sup>50</sup> Criminal Code (NT), s 43ZC.

<sup>51</sup> Criminal Code (NT), ss 43ZN(1)-(2), 43ZJ and 43ZK.

<sup>52</sup> See Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with a Cognitive Impairment* (September 2012), 66.

make a supervision order,<sup>53</sup> the court has to set a “limiting term” which is “equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment or supervision) that would, in the court’s opinion, have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established.”<sup>54</sup> After the limiting term, the supervision process lapses<sup>55</sup> and the person is released into the community unless there is a supervening guardianship or mental health order. The law in the ACT also provides that the Supreme Court must not order that an accused be detained for a period greater than the nominated term.<sup>56</sup>

## Rights of review

20. *Recommendation: Determinations about release of mentally impaired accused from custody or community release orders should be made by the relevant board with an annual right of review before the Supreme Court.*
21. Another issue is the lack of review available for custody or supervision orders. In Western Australia where decisions for release from custody orders are made by the Mentally Impaired Accused Review Board or in the alternative the Governor-General, there is no right of review or appeal about the merit of decisions.<sup>57</sup> In Victoria there are some rights of review under the current legislation which allows a new application for the variation of an order within three years or a lesser period at the court’s discretion. However, three years is too far too long for a periodic review process.
22. This can be compared with the Northern Territory where there is a right of appeal with the review process being undertaken by the Supreme Court and where accused are legally represented. The first major review is determined according to the nominal sentence, but there is scope for annual review. In NSW there are also rights to appeal to the Supreme Court against a determination of the Tribunal or the failure or refusal of the Tribunal to make a determination.<sup>58</sup> In South Australia persons subject to detention have annual reviews by psychiatrists and there are provided to the judge who set the limiting term.

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<sup>53</sup> Pursuant to s 269O(1)(b)(ii) or 269O(b)(iii) of the CLC Act (SA), as discussed in footnote 8.

<sup>54</sup> CLC Act (SA), s 269O (2).

<sup>55</sup> CLC Act (SA), s 260O(3).

<sup>56</sup> Crimes Act 1900 (ACT) s 301 and 302.

<sup>57</sup> For support of this position see comments by the Chief Justice of Western Australia, Wayne Martin. ABC News, 'Urgent need' for law change as mentally-impaired accused detained indefinitely, WA Chief Justice Wayne Martin says' 10 July 2015.

<sup>58</sup> MHA, s 163.

## 8. IMPLEMENTING A NATIONAL STANDARD FOR LEGISLATION

*Professor Patrick Keyzer, Chair of Law and Public Policy and Head of School, La Trobe Law School  
and Darren O'Donovan, Senior Lecturer in Law at La Trobe Law School*

### Key issues:

- **Processes are required to establish legislation within all State and Territories that is human rights compliant.**
  - **Legal researchers have proposed pro forma legislation which demonstrates that a national approach to legislative reform under the leadership of the Commonwealth is an achievable objective.**
1. The Senate Inquiry provides an excellent opportunity for the stories of Marlon Noble, Rosie Ann Fulton and many other indigenous (and non-indigenous) Australians to be heard. These people have languished in prisons for years because there are an insufficient number of secure care facilities available for people with cognitive impairment in the community. The Federal Parliament now has a wonderful opportunity to address the significant human rights issues raised by the Australian Human Rights Commission in their July 2014 report on this topic.
  2. Some of the ways in which the challenges in this area can be addressed may already be known. In November 2014, the La Trobe University “Transforming Human Societies” Group supported the “Line in the Sand” Conference in order to generate possible solutions to the overrepresentation of indigenous Australians with cognitive impairment in prison. The conference brought together sixty indigenous and non-indigenous disability, legal and human rights advocates from around the country, who were recruited on the basis that they have direct experience working with indigenous people with cognitive impairment in the criminal justice system.
  3. To generate data from this unique gathering, a focus group technique called nominal group technique (NGT) was used. In an NGT session, participants are asked to provide responses to a particular issue or question, pool their responses, and then a secret ballot is conducted to list and rank responses in order of importance. Group consensus is reached without being hampered by uneven group dynamics or power relationships. NGT enables the generation of data that is free from confirmation bias and also enables the development of follow-up questionnaires that have content and construct validity.
  4. Conference participants were first asked to identify the six most significant challenges facing indigenous Australians with cognitive impairment who come into contact with the criminal

justice system. These challenges, in the order in which they were ranked by the stakeholders, are as follows:

- i. There is a lack of distinctive, culturally-responsive sentencing and service outcomes other than prison for people with cognitive impairment: there is a need for sustainable, stable, secure, individualised (non-congregate) culturally-responsive accommodation, community supports and transitional options that are specifically funded, and staffed by independent, culturally-responsive caseworkers for people with cognitive impairment that recognise the effect of systems and agencies and their interactions, makes them responsive, and that adopt systemic case and risk management approaches using non-punitive, therapeutic, least restrictive practice frameworks that leverage support from families and other relevant social services.
  - ii. There is a need for early assessment, diagnosis, support and intervention (including in the juvenile justice system) that prevents criminalization and that is capable of identifying and addressing root causes of offending/anti-social behaviour.
  - iii. There is a need for targeted, uniform, human-rights focused law reform that acknowledges individual needs, accommodates both support for people with cognitive impairment with protection of the community that addresses the needs for tests of capacity to be nuanced, that ensures terms are limited and regularly reviewed, that incorporates a complaints mechanism, and ensures access to justice and procedural fairness are provided.
  - iv. There is a need for integrated, long-term political will and public sector leadership to respond to the crisis of overrepresentation of indigenous people with cognitive impairment in the criminal justice system by building an appropriate framework of responsive policies, administered by agencies that are accountable.
  - v. There is a need for identification and recognition of people with cognitive impairment by the justice system (e.g. lawyers, police, corrections, guardians) that acknowledges individual differences (e.g. gender, language) and diversity of situations, conditions and needs.
  - vi. There is a need to raise public awareness and knowledge in the community, within and across the criminal justice system and service systems (including among corrections, among lawyers), to better understand why and how indigenous people with cognitive impairment come into contact with the criminal justice system.
5. Researchers in the La Trobe Law School have also developed Draft Minimum Legislative Standards for the Senate Inquiry to consider, and are well advanced in administering a national survey which will produce additional useful data for the Inquiry. The legislation could be supported by using the external affairs power (s 51(xxxix) of the Constitution).



## Proposed draft legislation: Mental Impairment and Cognitive Disability (Treatment and Support) Bill

*Obligation to provide appropriate services.* An identified Minister in every State or Territory ('the Minister') shall be responsible for ensuring provision of reasonable access to a secure care facility or other supported accommodation and care and treatment for a person accused of an offence who is found unfit to plead ('the relevant person') by any court of that State or Territory by reason of cognitive disability or mental impairment. For the avoidance of doubt, this provision confers jurisdiction on every court of a State or Territory, including all inferior and superior courts, to determine for these purposes that a person is unfit to plead by reason of cognitive disability or mental impairment.

*Assessment of Needs.* Each State and Territory will provide adequate resources for the provision of expert reports, where this is required, in order to assess the cognitive disability and/or mental impairment of the relevant person and their needs ('the assessment'). An application for an assessment can be made by the Court or by the legal representative of the accused person. A fresh assessment may be undertaken where the previous assessment was made more than 12 months previously annually.

*Obligation to develop and implement Service Plan.* The Minister has an obligation to develop and implement a service plan ('the service plan') which must provide detailed particulars of what measures will be taken and the timeframe for action, and any steps they have already taken, to ensure that the person has reasonable access to a secure care facility or other supported accommodation and care and treatment. Taking assessments into account, the service plan must detail how the relevant person will have reasonable access to less and least restrictive environments over a reasonable period of time. A court officer of that court shall cause the relevant Minister for Health of the State or Territory in which an accused person has been charged to be notified of making of the order and its return date, so that the service plan can be prepared and furnished to the court.

Programmes and services for residents in secure facilities or those subject to community supervision are to be designed and administered so as to be sensitive and responsive to the individual's circumstances and needs. They shall in particular take into account their age, gender, spiritual beliefs, cultural or linguistic background and family relationships.

The service plan developed by the Minister shall also address the goals of:

- a) promoting the individual's development; and
- b) providing for the individual's management, care, support and protection; and
- c) supporting the individual's reintegration into the community.

*Circumstances when custodial order can be made.* An Australian court must not make a custodial supervision order committing an accused person found unfit to plead to custody in a prison or

remand facility unless it is satisfied that there is no reasonable or practicable, less restrictive alternative, in the circumstances. The relevant Court shall ensure:

- a) that its decision should take into account not only the advice of a Minister and/or relevant health authorities, but also independent evaluations by persons qualified in risk assessment of the facilities or services the individual requires.
- b) that it considers any less restrictive options available before making a supervision order and not declare someone liable for a custodial order unless satisfied on the evidence that the person would be likely to seriously endanger the community if not declared liable to supervision.

*Return date within three months, and annually.* An Australian court that makes a custodial supervision order committing an accused person found unfit to plead to custody in a prison or remand centre must set a return date for a review of the order within three months to ascertain progress in developing and implementing a service plan. The court must also set return dates for annual reviews for the same purpose.

In recognition of the unique and abiding nature of mental impairment, which is distinct from mental illness, there shall be a rebuttable statutory presumption that at review, a person shall transition to a less restrictive order. This presumption is applied to ensure that the focus of the review process shall not be merely upon the management of risk, but upon the obligation to ensure that treatments and supports remain appropriate and are the least restrictive possible in all the circumstances.

All reports prepared for the review hearing shall be provided to all parties at least 21 days prior to any review hearing.

*Review on application.* The guardian or legal representative of a relevant person committed to prison or remand by a court may, unless a similar application has been made within the previous 3 months, make an application to that court, or may seek leave to have a special hearing, seeking review of their continued detention on the basis that the Minister for Health of the State or Territory in which the accused person has been charged has failed to meet their obligation to ensure that an accused person has reasonable access to a secure care facility or other supported accommodation and care and treatment. The Minister may be ordered to pay the reasonable costs of such applications.

*Applications for leave.* Both community and residential patients shall have the right to apply for a leave of absence from place of residence or other restrictive conditions of their orders. A leave application may be made where it promotes greater participation in the community and life skills. Decisions on leave applications are subject to the guiding principle that the least restrictive approach to the individual's liberty shall be adopted. Applications for leave shall therefore be approved, absent the prospect of serious endangerment to the community, where the leave period enables the individual in question:

- a) to access medical services not otherwise available;
- b) to attend court;

- c) to attend significant family events and otherwise further significant family and other social and cultural relationships;
- d) to prepare the individual in question for reintegration into the community or to transition to a lower level of order.

In assessing applications for leave, the relevant decision-maker shall recognise and respect the distinct culture, history and way of life of indigenous peoples, and shall ensure leave decisions properly respect the need to practice cultural traditions, relationships and customs.

*Non-compliance with community supervision orders.* In circumstances where an individual fails to comply with the terms of their community supervision order, a court shall also have the right to delay proceedings in relation to non-compliance, where this is reasonable in order to afford the individual in question an opportunity to resume compliance.

## Recognising and Closing the Gaps in the Criminal Justice System

6. This proposed legislation aims to combat the bureaucratic gaps through which indigenous Australians such as Marlon Noble and Rosie Ann Fulton have passed. Yet beyond the details of legal wording, any statutory intervention also has to trigger a broader conversation about how social class interacts with the criminal justice system. As Baldry et al<sup>59</sup> argue, prevailing approaches see indigenous young people often being characterised as being ‘a risk’ rather than being ‘at risk’.
7. Legislative reform in this area must ensure that engagement with the individual’s specific circumstances and capabilities replaces the bureaucratic drift and defaults caused by institutionalised failings, time and resource pressures. The changes proposed above are motivated by a desire to avoid the false isolation of courtroom proceedings from the individuals’ other contacts with government services – from unstable, inappropriate accommodation placements, a history of poor educational experience or health supports.
8. The issue of intellectual disability and the criminal justice system cannot be detached from broader challenges around the recognition of self-determination or the need for the National Disability Insurance Scheme to allow indigenous peoples to design flexible, culturally appropriate, community-based services. Committing Australian governments to designing pathways back home for those indigenous people whose complex support needs have not historically been met, can thus be an important step to practical, not merely, symbolic recognition.

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<sup>59</sup> Eileen Baldry, Ruth McCausland, Leanne Dowse & Elizabeth McEntyre, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (University of New South Wales, 2015) <<http://www.mhdc.d.unsw.edu.au>>

## 9. SUPPORTING ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE WITH MENTAL HEALTH CONDITIONS IN COURT

*Associate Professor Thalia Anthony, Faculty of Law University of Technology Sydney; and Professor Elena Marchetti, School of Law University of Wollongong*

### Key issues:

- **Community input in sentencing processes facilitates a greater understanding of the cultural social factors that affect an individual's case.**
  - **Access to adequate support services during the court processes are not always made available at all level of courts, particularly for Aboriginal and Torres Strait Islander people with mental health conditions. This contributes to unnecessary incarceration.**
  - **As signatory to the *Convention of the Rights of Persons with Disabilities*, *Convention on the Elimination of Racial Discrimination* and other human rights instruments, the Commonwealth has a responsibility to safeguard the rights of an accused to support services necessary for their defence.**
1. Often Indigenous people in prison have 'complex needs' due to the coexistence of multiple mental and cognitive issues.<sup>60</sup> This submission addresses the limitations of current processes and the need for culturally competent and community-based input into the sentencing hearing and decisions for Indigenous people with mental health issues. This information would be equally relevant for mental health tribunal processes that review the imprisonment of people with psychiatric illnesses.
  2. We focus on the following terms of reference in relation to Indigenous defendants:  
*(h) access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants;*  
*(j) the availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment.*

### Need for systemic understanding of mental health issues

3. For Indigenous people, mental (and physical) health issues are often intimately tied to intergenerational trauma flowing from colonial and postcolonial practices and policies.<sup>61</sup> Sherwood states,

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<sup>60</sup> Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (University of New South Wales, 2015) 19, <<http://www.mhdcd.unsw.edu.au>>.

<sup>61</sup> See Juanita Sherwood, 'Colonisation – it's bad for your health: the context of Aboriginal health' (2013) 46(1) *Contemporary Nurse* 28.

*This has resulted in well-being co-morbidities that are directly linked to trauma and loss (mhfa, 2008). Trauma is a normal and predictable response to overwhelming distress resulting from an event which is left untreated or, at worst, ignored. It leads to intergenerational hopelessness and unresolved grief (mhfa, 2008, p. 2). Reviewing the evidence, it is clear that it has not been just one act; it has been a sustained and merciless process. Acknowledging the deeply etched impact the last 200+ years of colonisation has had on the health and well-being of Indigenous Australians, the significance of this process can begin to be appreciated.*<sup>62</sup>

4. Indigenous healing and well-being, according to health research, requires strengthening of cultural identity.<sup>63</sup> When it comes to justice processes, cultural identity is strengthened by providing access to community-based services and local community resources such as 'elders, cultural activities and families'.<sup>64</sup> It also requires improving housing conditions<sup>65</sup> and building connections to Country for Indigenous, including, where relevant, access to Indigenous homelands.<sup>66</sup> The healing of the individual is intimately linked to the healing of the community<sup>67</sup> and requires self-determination in the healing process.<sup>68</sup>

### Lack of judicial recognition of systemic factors in criminal sentencing

5. In 2013 the High Court of Australia, in its decision of *Bugmy*,<sup>69</sup> rejected the submission that Indigenous systemic factors are relevant sentencing considerations. These include over-imprisonment of Indigenous people, over-representation of Indigenous children removed from their families, socio-economic disadvantage, poor health status, lack of access to health services, institutional discrimination and the restraints on self-governance within Indigenous societies due to colonisation.

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<sup>62</sup> Ibid, 36.

<sup>63</sup> R Hinton et al, 'Developing a best practice pathway to support improvements in Indigenous Australians' mental health and well-being: a qualitative study' (2015) 5(8), *BMJ Open*.

<sup>64</sup> Ibid.

<sup>65</sup> R S Bailie, M Stevens and E L McDonald, 'Impact of housing improvement and the socio-physical environment on the mental health of children's carers: a cohort study in Australian Aboriginal communities' (2014) 14, *BMC Public Health* 472.

<sup>66</sup> C P Burgess et al, 'Healthy Country: Healthy People? Exploring the health benefits of Indigenous natural resource management' (2005) 29(2) *Australian and New Zealand Journal of Public Health*, 117; Stephen T Garnett et al, 'Healthy Country, Healthy People: Policy Implications of Links between Indigenous Human Health and Environmental Condition in Tropical Australia' (2009) 68(1) *Australian Journal of Public Administration*, 53; Christopher P Burgess et al, 'Healthy country, healthy people: the relationship between Indigenous health status and "caring for country"' (2009) 190(10) *Medical Journal of Australia* 567.

<sup>67</sup> R Wild and P Anderson, 'Ampe Akelyernemane Meke Mekarle 'Little Children Are Sacred', Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse' (Northern Territory Government, 2007) 175.

<sup>68</sup> D Cox, M Young and A Bairnsfather-Scott, 'No Justice without Healing: Australian Aboriginal People and Family Violence' (2009) 30 *Australian Feminist Law Journal* 151.

<sup>69</sup> (2013) 249 CLR 571.

6. This judicial outcome defies substantial evidence, emerging with the Royal Commission into Aboriginal Deaths in Custody, that systemic factors are relevant to the collective and individual circumstances of the Indigenous offender.<sup>70</sup> For Indigenous people with complex needs, they are increasingly being “managed” by police, courts and prisons due to a critical lack of appropriate community-based services and support.<sup>71</sup> Exacerbating this trend is the characterisation of individual Indigenous people with complex needs as a high risk that requires containment in penal detention. Such characterisation neglects the contribution of systemic factors to their condition and offending, the role of the criminal justice system in reproducing a notion of an Indigenous crime problem, and the role of community in assisting Indigenous peoples’ healing and rehabilitation.

### Need for community input in sentencing processes

7. The similar situation in Canada in relation to the imprisonment of First Nations people, including overwhelmingly with mental health issues, precipitated an amendment to the Canadian Criminal Code that required that sentencing courts account for the unique circumstances facing First Nations defendants. This led to the introduction of reports, known as Gladue Reports, produced by Aboriginal organisations on the circumstances of the offender and his/her community, including as they affect mental health. They address community programs and family support structures for offenders with a wide spectrum of needs, including relating to FASD, post-traumatic stress, addiction issues, anxiety and depression. These reports are submitted to the court prior to sentencing and constitute an important consideration in the sentencing outcome. They help promote non-prison outcomes. The community case worker preparing the report also has responsibility in following up the offender, assisting compliance of orders and facilitating access to community programs and other services.
8. Across Australia, with exceptions in some courts in Queensland and the Northern Territory, pre-sentence reports do not generally include the perspectives of Indigenous community organisations, respected persons or Elders. They are produced by Corrective Services staff for offenders who are likely to face a prison sentence. To address this shortcoming, Indigenous Law and Justice Groups in the Northern Territory and Community Justice Groups in Queensland have endeavoured to supplement the information with community reports. Their reports can explain the connections between the offender’s mental health and wellbeing to systemic and community factors, as well as opportunities for healing and support in the community. Information is also provided through Aboriginal field officers,

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<sup>70</sup> Richard Edney, ‘Imprisonment as a Last Resort for Indigenous Offenders: Some Lessons from Canada?’ (2005) 6(12) *Indigenous Law Bulletin* 23, 23.

<sup>71</sup> Baldry et al, above n 48, 19. See also, Eileen Baldry, Leanne Dowse and Melissa Clarence, ‘People with mental and cognitive disabilities: pathways into prison’ (Background Paper for the National Legal Aid Conference Darwin, 2011) 16.

employed by Aboriginal Legal Services. While they only occasionally provide information to courts, due to limited resources, they can critically affect sentencing outcomes.

9. Another court initiative that goes some way in allowing Indigenous community input in a sentence hearing occurs in court sites that offer Indigenous sentencing courts. These courts were first established in 1999 in Port Adelaide, South Australia, and since then have been operating in every jurisdiction aside from Tasmania in some form or another. Indigenous sentencing courts involve one to four Elders or Community Representatives sitting with the magistrate (or other judicial officer, where the courts operate at higher levels) in the sentencing process, whereby they have the opportunity to participate in a frank discussion with the offender about their offending behaviour. Not only does this process better engage the offender in the sentencing process, making them more likely to understand and accept the penalties imposed, and to leave court with an improved perception of justice,<sup>72</sup> it also provides the court with information about an offender's rehabilitation needs as a result of the input of Elders and Community Representatives who know the offender and his community. Indeed, in an evaluation of the County Koori Court in Victoria, a legal practitioner whose client had an intellectual impairment that was diagnosed as a result of the Indigenous sentencing court process made the following comments:

*The thing that blew me away the most was that this client had an intellectual disability, he was [a young man], and he had been diagnosed five (5) years before but none of that information had come through to me, and none of that information had actually been recorded within the system. So the Judge didn't know, I didn't know, nobody knew about it, except Corrections. But what had happened was the Judge said 'I want him assessed', then they came back and said 'Oh he has an intellectual disability', from this passing comment in their report, and then we all went, "What?!" And the thing that I liked about this system was that as soon as this issue was identified the Judge, myself and the client then sat down and started discussing where to go with it. Because all of a sudden the ballgame changes doesn't it? I mean here's a kid with an intellectual disability so he needs to be dealt with quite differently to an ordinary punter who's committing offences. The Judge came back down and said 'I understand how angry and frustrated you are about not finding out about this information, I am too'. So we came up with a formula together to sentence him, and I reckon this whole thing would never have happened in an ordinary court, we would never have been able to get the information out, which is why my one experience in the County Koori Court has really highlighted how the ordinary system is so inconclusive in that it doesn't allow information to come out. But by having this discussion, a very relevant piece of information came out which is going to affect this kid for the rest of his life. But no one knew about it, not his mum, no-one, and for five (5) years nothing was being done for him, he was*

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<sup>72</sup> E Marchetti, 'An Australian Indigenous-Focused Justice Response to Intimate Partner Violence: Offenders' Perceptions of the Sentencing Process' (2015) 55(1) *British Journal of Criminology* 86.

*committing serious offences; and he had an intellectual disability, and it was this system that found it out.*<sup>73</sup>

10. We suggest that a similar provision to that in the Criminal Code in Canada, enacted uniformly through COAG, would help prevent unnecessary prison detention for Indigenous people with mental illness. Crucially, this should be supplemented with support for a community pre-sentence reporting strategy, support for field officers to provide in-court statements on relevant Indigenous community conditions, and Indigenous sentencing courts.
11. Ultimately, a holistic approach is needed to decarcerate Indigenous people with mental illnesses from prison. This requires appropriate services and programs for Indigenous people with mental health issues and, importantly, addressing systemic issues including institutional discrimination (eg in the over-policing Indigenous people on streets; disproportionately removing Indigenous children from families rather than supporting families), socio-economic disadvantage and providing substantive access to early-intervention services<sup>74</sup> as well as adequately resourced community-based sanctions in the form of rehabilitative programs and services (such as drug, alcohol or mental services). There is also a need for greater specialised sentence options that accommodate the intersections of Indigenous background *and* gender and/or mental, cognitive or physical impairment. For example, services that accommodate Indigenous women's circumstances of ongoing victimization to family violence; the traumatic effects of removal of Indigenous women's own children; and/or their 'complex needs' where a cognitive disability coexists with a mental health and/or addiction issue and/or other disorder.<sup>75</sup>

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<sup>73</sup> Z Dawkins et al, *County Koori Court: Final Evaluation Report* (County Court of Victoria and the Victorian Department of Justice, 2011), 29.

<sup>74</sup> Hinton, above n 63.

<sup>75</sup> See Juanita Sherwood and Sacha Kendall, 'Reframing spaces by building relationships: Community collaborative participatory action research with Aboriginal mothers in prison' (2013) 46(1) *Contemporary Nurse* 83; Baldry et al, above n 48.



## 10. SUPPORTED TRANSITION FROM PRISON TO COMMUNITY

*Dr Megan Williams, Senior Research Fellow, University of Western Sydney*

### Key issues:

- **Assessment of needs in making transition from prison to Community are not always culturally relevant nor suited to the complex needs of people with cognitive impairment. This contributes to recidivism.**
  - **Models of *throughcare*, with integrated and tailored services, are an effective means for supporting people with complex needs post-release, although jurisdictional commitment to the *throughcare* concept is sporadic.**
  - **Specific action is required to integrate state and territory based post-release programs with the National Disability Insurance Scheme based on the desirable features of the *throughcare* model.**
1. While rates of incarceration of Aboriginal and Torres Strait Islander people are among the highest in the world, these belie an even greater problem: that when released, a majority (77%) face the likelihood of being reincarcerated, often multiple times.<sup>76</sup> This is not to suggest that people should not be released on the basis of failing at community reintegration. Rather, high recidivism rates highlight the urgent need to address underlying factors and make available more support services. The following pages outline important features of recidivism prevention and post-prison release care in culturally sensitive ways for and by Aboriginal and Torres Strait Islander people.

### Assessment

2. Beginning at their entry into custody, all people are to undergo assessments to ascertain the needs and issues that are likely to impact on their transition from prison to community life and pose risks for reoffending and reincarceration. The assessments are intended to bring about an action plan for rehabilitation as well as release-planning.
3. However, reoffending risk assessment tools have often been questioned for their cultural relevance to Aboriginal and Torres Strait Islander people,<sup>77</sup> as have other assessment tools<sup>78</sup>

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<sup>76</sup> Australian Bureau of Statistics, *Prisoners in Australia Cat no. 4517.0*  
<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>

<sup>77</sup> R Jones et al, 'Culturally relevant assessment of Indigenous offenders: A literature review' (2002) 37(3) *Australian psychologist* 197; E Savina and M Williams, *Reducing Indigenous Imprisonment Forum report* (2009), ANTaR & the Bridge Network.

<sup>78</sup> M Young et al, 'SF-36: not the tool to monitor the health of subpopulations within the Queensland women's prison system' (2005) 29(5) *Australian and New Zealand Journal of Public Health* 487.

because they are not derived from the holistic notion of indigenous people's health and healing<sup>79</sup>, prioritisation of needs<sup>80</sup> nor regard for the complexity of issues experienced.<sup>81</sup> Few, if any, prison assessments and release planning tools are relevant to the lives of Aboriginal and Torres Strait Islander people generally, nor those in prison with cognitive and psychiatric disabilities.

## Rehabilitation

4. In-prison rehabilitation programs and programs that prepare people for life after prison are insufficiently designed to take into account the needs of Aboriginal and Torres Strait Islander people, or cultural protocols, processes and knowledges.<sup>82</sup> Programs rarely address unique needs of Aboriginal and Torres Strait Islander people including anger, forcible removal as a child and intergenerational trauma,<sup>83</sup> nor do they address factors contributing to incarceration including marginalised social and economic position. One decades-old study did, however, find that Aboriginal and Torres Strait Islander people's post-release participation in work-release programs, financial support and employment upon release were associated with lower recidivism<sup>84</sup> – addressing some of the determinants of both crime and health.

## Legislated and policy impetus to provide throughcare

5. One relatively recent shift in correctional programming has been the introduction of 'throughcare' programs, conceptualised as the continuous provision of support both in

<sup>79</sup> M Sheldon, 'Psychiatric assessment in remote Aboriginal communities' (2001) 35(4) *Australian and New Zealand Journal of Psychiatry* 435; L Muller, *A theory for Indigenous Australian health and human service work: Connecting Indigenous knowledge and practice* (Allen & Unwin, 2014).

<sup>80</sup> J Perkins et al, 'The development of a new methodology to assess perceived needs among indigenous Australians' (1995) 41(2) *Social Science & Medicine* 267.

<sup>81</sup> C M Schlesinger et al, 'The development and validation of the Indigenous Risk Impact Screen (IRIS): A 13-item screening instrument for alcohol and drug and mental health risk' (2007) 26(2) *Drug and Alcohol Review* 109.

<sup>82</sup> J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, 15th sess, UN Doc A/HRC/15/37/Add.4 (1 June 2010); E Baldry, 'Prisons and vulnerable persons: Institutions and patriarchy' (Conference paper presented at the Australian and New Zealand Critical Criminology Conference, Melbourne, 2009); C Cunneen, 'Criminology, criminal justice and Indigenous people: A dysfunctional relationship?' (2009) 20(3) *Current Issues in Criminal Justice* 323; E Johnston, *Report of the Royal Commission into Aboriginal Deaths in Custody* (Australian Government Publishing Service, 1991).

<sup>83</sup> A Day et al, 'The meaning of anger for Australian Aboriginal offenders: The significance of context' (2006) 50(5) *International Journal of Offender Therapy and Comparative Criminology* 520; Jones et al, above n 62; D Goulding, *Severed connections: An exploration of the impact of imprisonment on women's familial and social connectedness* (Centre for Social and Community Research, Murdoch University, 2004); P Mals et al, 'Adapting violent rehabilitation programs for the Australian Aboriginal offender' (2000) 30(1) *Journal of Offender Rehabilitation* 121; B Steels and D Goulding, 'When it's a question of social health and wellbeing, the answer is not prison' (2009) 7(12) *Indigenous Law Bulletin* 15.

<sup>84</sup> R G Broadhurst et al, 'Aboriginal and nonaboriginal recidivism in Western Australia: A failure rate analysis' (1988) 25(1) *Journal of Research in Crime and Delinquency* 83.

custody and after release into the community, including planning for prison release, and supervision or support post-release.<sup>85</sup>

6. For decades international human rights instruments have asserted the need for *throughcare*, stating that prisoners have the right to rehabilitation appropriate to their age and legal status, and with respect for their dignity<sup>86</sup> from the beginning of their sentence. Such rehabilitation includes health care, special attention to improve relationships with family and community, preparation for work life, education integrated with the community, cultural activities and coordinated after-care. These build on the 1955 UN Minimum Rules for the Treatment of Prisoners statements, which assert that post-prison release aftercare should be considered from the outset of people's incarceration.<sup>87</sup>
7. Recommended features of throughcare for the local context include 'floating care' with integrated and tailored services, a single case manager who acts as an intensive support person and a lead agency brokering appropriate services before release, and post release was found highly desirable.<sup>88</sup> Baldry et al<sup>89</sup> found that those prisoners who received post-release support in addition to accommodation were significantly less likely to return to prison, with 24% of those in contact with a service returning to custody compared to 45% who did not receive specialist accommodation support.
8. 'Front-loading' of client-centred services is recommended in the first hours, days, and weeks after release<sup>90</sup>, supporting the "person-in-context"<sup>91</sup> and based on discharge planning.<sup>92</sup> In addition, Winnunga Nimmityjah Aboriginal Health Service's<sup>93</sup> *throughcare* model

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<sup>85</sup> C Jardine and B Whyte, 'Valuing desistance? A Social Return on Investment case study of a throughcare project for short-term prisoners' (2013) 33(1) *Social and Environmental Accountability Journal* 20; S Ross, *Bridging the gap: A support program for Victorian prisoners: Final evaluation report* (Melbourne Criminology Research and Evaluation Unit, University of Melbourne, 2013); M Maguire and P Raynor, 'How does the resettlement of prisoners promote desistance from crime: Or does it?' (2006) 6(1) *Criminology and Criminal Justice* 9.

<sup>86</sup> *International Covenant on Civil and Political Rights; International Covenant on Economic, Social, and Cultural Rights*.

<sup>87</sup> *Standard minimum rules for the treatment of prisoners* (United Nations, Office of the High Commissioner, 30 August 1955) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>>

<sup>88</sup> M Borzycki and E Baldry, 'Promoting integration: The provision of prisoners post-release services' in Australian Institute of Criminology, *Trends and Issues in Criminal Justice No. 262* (Australian Institute of Criminology, 2003); E Baldry, D McConnell, P Maplestone and M Peeters, *Ex-prisoners and accommodation: What bearing do different forms of housing have on social reintegration?* (Australian Housing and Urban Research Institute, 2003).

<sup>89</sup> Baldry et al, above n 73.

<sup>90</sup> B Richie, N Freudenberg and J Page, 'Reintegrating women leaving jail into urban communities: A description of a model program' (2001) 78(2) *Journal of Urban Health: Bulletin of the New York Academy of Medicine* 290.

<sup>91</sup> A J Shinkfield, *A three-part ecological model of community reintegration of ex-prisoners* (Doctoral dissertation, 2006) 246.

<sup>92</sup> C Visser and K Mallik-Kane, 'Reentry experiences of men with health problems' in R. Greifinger (ed), *Public health behind bars: From prisons to communities* (Springer, 2007) 434-60.

<sup>93</sup> N Poroch, *You do the crime, you do the time*, Winnunga Nimmityjah Aboriginal Health Service, 2007).

incorporates health and spiritual care and family-based and less formal community-based strategies such as local sporting clubs, and the Aboriginal Medical Service of Western Sydney provided integrated primary health care.<sup>94</sup>

9. On-the-ground services have been described as often active and innovative in their responses.<sup>95</sup> They have expertise in “developing community-based solutions”<sup>96</sup> particularly because they “provide access to resources that promote reintegration”<sup>97</sup> informally in the community, in addition to formal interventions.

## Barriers to throughcare

10. Most jurisdictions have made only a relatively recent commitment to *throughcare*. Administrative data from Queensland indicated only 7% of Queensland prisoners had access to *throughcare* and numbers of Aboriginal and Torres Strait Islander people participating were even smaller.<sup>98</sup> Preparation for transition from prison is generally lacking<sup>99</sup> and arguably more so among Aboriginal and Torres Strait Islander people, particularly those with complex needs such as cognitive and psychiatric disabilities.
11. A formative evaluation of three post-prison release support services for Aboriginal women found multiple system and organisational-level barriers to throughcare, beyond the individual responsibility and power of women exiting custody.<sup>100</sup>
12. *Throughcare* models depend almost entirely on brokerage of services in the community for support of people,<sup>101</sup> rather than the provision of support as such. From the 1950s to 1970s

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<sup>94</sup> D Delaney-Thiele and J Lloyd, *SPRINT qualitative findings* (Presentation notes, 2013) <<http://files.aphcri.anu.edu.au/resources/lectures-presentations/conversations-aphcri/SPRINT%20findings%20-%20SPRINT%20TEAM%20-%2017%20Sept%202013.pdf>>; M Haswell et al, *Returning home, back to community from custodial care: Learnings from the first year pilot project evaluation of three sites around Australia* (Manuscript submitted for publication, 2014).

<sup>95</sup> Project 10%, *Submission to Queensland Government - Reducing incarceration rates in Queensland: A three year plan* (Project 10%, 2010).

<sup>96</sup> A S Krieg, ‘Aboriginal incarceration: Health and social impacts’ (2006) 184(10) *Medical Journal of Australia* 534.

<sup>97</sup> C Robbins, S Martin and H Surratt, ‘Substance abuse treatment, anticipated maternal roles, and reentry success of drug-involved women prisoners’ (2009) 55(3) *Crime & Delinquency* 388.

<sup>98</sup> L Robson and A Eugene, ‘The Offender Reintegration Support Service: Supporting throughcare with effective partnerships between the government and NGO sector’ (conference presentation, Reintegration Puzzle Conference, Melbourne, June 2008).

<sup>99</sup> P J Schram et al, ‘Supervision strategies and approaches for female parolees: Examining the link between unmet needs and parole outcome’ (2006) 52(3) *Crime & Delinquency* 450; R P Seiter and K R Kadela, ‘Prisoner reentry: What works, what does not, and what is promising’ (2003) 49(3) *Crime & Delinquency* 360; B Steels, *Declared guilty: A never-ending story: An analysis of the impact of the criminal justice system upon the self* (Doctoral dissertation, 2005)

<[http://catalogue.curtin.edu.au/primo\\_library/libweb/action/search.do?vid=CUR\\_ALMA](http://catalogue.curtin.edu.au/primo_library/libweb/action/search.do?vid=CUR_ALMA)>

<sup>100</sup> Haswell et al, above n 79.

<sup>101</sup> Robson and Eugene, above n 83.

a prisoner was thought to be closely assisted with re-entry plans and was often released to a halfway house with a caseworker, volunteer support and careful community supervision.<sup>102</sup> However, comparatively few part-time transitional release programs or halfway houses are now available, compared with the numbers of often the same people entering and exiting prisons.<sup>103</sup> Over the past few decades a weakening and reduction in availability of post-release support programs has occurred.<sup>104</sup>

13. A large US study of 7000 inmates released from Florida prisons found that any visits from family and friends were associated with a lower likelihood of recidivism over two years.<sup>105</sup> On the one hand legislation in Australia is very clear about maintaining and developing family relationships whilst a member is in custody, however in reality there are many barriers.<sup>106</sup>

### Multiple difficulties in the transition from prison to community

14. Much research demonstrates that people have complex needs and that they experience challenging obstacles when they exit prison. They face many of the same problems, or worse, that may have led to incarceration in the first place.<sup>107</sup> People exiting custody also face the reality that their families and communities have changed while they were away<sup>108</sup> and are damaged as a result of their member's absence while incarcerated.<sup>109</sup>
15. Data show that mortality rates post-release among Aboriginal people are among the highest reported in the world<sup>110</sup> and health and wellbeing decline post-prison release.<sup>111</sup>

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<sup>102</sup> Seiter and Kadela, above n 84.

<sup>103</sup> J Petersilia, *When prisoners comes home: Parole and prisoner reentry* (Oxford University Press, 2003); Seiter and Kadela, above n 84.

<sup>104</sup> J Travis, *But they all come back: Rethinking prisoner re-entry* (Sentencing and Corrections, National Institute of Justice, US Department of Justice, 2000).

<sup>105</sup> A Solomon et al, *Understanding the challenges of prisoner reentry: Research findings from the Urban Institute's Prisoner Reentry Portfolio* (Washington DC, 2006).

<sup>106</sup> M Alexander, D Martin and M Williams, *Report on Queensland Correctional Centres* (Prisoners Legal Service and Catholic Prison Ministry, 2011); Haswell et al, above n 79.

<sup>107</sup> Baldry, above n 67; Goulding, above n 68; Johnston, above n 67; S Maruna, *Making good: How ex-convicts reform and rebuild their lives* (American Psychological Association, 2001); S Rose, B Burdekin and R Jenkin, *Human rights and mental illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (Human Rights and Equal Opportunities Commission, 1993); T Walsh, *InCorrections: Investigating prison release practice and policy in Queensland and its impact on community safety* (Queensland University of Technology, 2004).

<sup>108</sup> C Uggen, J Manza and A Behrens, 'Less than the average citizen': Stigma, role transition and the civic reintegration of convicted felons' in S Maruna & R Immarigeon (eds), *After crime and punishment: pathways to ex-offender reintegration* (Willan Books, 2004) 261.

<sup>109</sup> Steels and Goulding, above n 68.

<sup>110</sup> S Darke et al, 'Heroin-related deaths in New South Wales, Australia, 1992–1996' (2000) 60(2) *Drug and Alcohol Dependence* 141; A Graham, 'Post-prison Mortality: Unnatural Death Among People Released from Victorian Prisons Between January 1990 and December 1999' (2003) 36(1) *Australian and New Zealand Journal of Criminology* 94; C McGregor et al, 'Accidental fatalities among heroin users in South Australia, 1994–1997:

16. Individuals are thought to enter a long a process of de-institutionalisation,<sup>112</sup> needing “recommunalisation”,<sup>113</sup> recovery and healing from the trauma of incarceration and removal from social, cultural and economic life.<sup>114</sup> People who have been incarcerated have been described as experiencing hostility, isolation and worry, as well as hope for the future,<sup>115</sup> albeit sometimes unrealistically given the obstacles they have to contend with.<sup>116</sup> Stigma associated with being an ex-prisoner has been described as potentially lasting a lifetime, resulting in people being further estranged from families and neighbourhoods, and limiting employment, housing and community participation opportunities.<sup>117</sup>
17. It is obvious too that there is a need for greater effort fostering relationships between correctional health services and community organisations, for continuity of care over time<sup>118</sup> and opportunities to connect with family and community.<sup>119</sup>
18. The important point here is that regardless of a person’s engagement in crime, or cognitive and psychiatric diagnoses and experiences, “it is not that ex-offenders should be left alone to get on with the business of self-change”.<sup>120</sup>
19. Willis and Moore’s<sup>121</sup> qualitative research among Aboriginal people post-prison release found that:

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Toxicological findings and circumstances of death’ (2002) 10(4) *Addiction Research and Theory* 335; L Stewart et al, ‘Risk of death in prisoners after release from jail’ (2004) 28(1) *Australian and New Zealand Journal of Public Health* 32.

<sup>111</sup> S A Kinner, *The Post-release experience of prisoners in Queensland* (Australian Institute of Criminology, 2006); M Borzycki, *Interventions for prisoners returning to the community* (Australian Institute of Criminology, 2005); Graham, above n 95.

<sup>112</sup> K Ellem, J Wilson and W H Chui, ‘Effective responses to offenders with intellectual disabilities: Generalist and specialist services working together’ (2011) 65(3) *Australian Social Work* 398.

<sup>113</sup> Steels, above n 84.

<sup>114</sup> N Morseu-Diop, *Healing injustice: An international study of Indigenous peoples’ custodial experiences of prison rehabilitation programs and the impact on their journey from prison to community* (Doctoral dissertation, 2010) <<http://espace.library.uq.edu.au/view/UQ:210170>>

<sup>115</sup> T Clear et al, ‘Coercive mobility and crime: A preliminary examination of concentrated incarceration and social disorganization’ (2005) 20(1) *Justice Quarterly* 33; A Hochstetler, M DeLisi and T C Pratt, ‘Social support and feelings of hostility among released inmates’ (2010) 56(4) *Crime and Delinquency* 588.

<sup>116</sup> R Burnett, ‘To reoffend or not to reoffend? The ambivalence of convicted property offenders’ in S Maruna and R Immarigeon (eds), *After crime punishment: Pathways to offender reintegration* (Willan Publishing, 2004).

<sup>117</sup> Petersilia, above n 88; Steels, above n 84; Steels and Goulding, above n 68; Uggen et al, above n 93.

<sup>118</sup> Baldry et al, above n 73; Borzycki and Baldry, above n 73, E Ogilvie, *Post-release: The current predicament and the potential strategies* (Australian Institute of Criminology, 2001); Visser, above n 77.

<sup>119</sup> M Borzycki, *Interventions for prisoners returning to the community* (Australian Institute of Criminology, 2005); J Burrows et al, *The nature and effectiveness of drugs throughcare for released prisoners* (Home Office Research, Development and Statistics Directorate, 2000).

<sup>120</sup> S Maruna, R Immarigeon and T LeBel, ‘Ex-offender reintegration: Theory and practice’ in S Maruna & R Immarigeon (eds), *After crime and punishment: Pathways to ex-offender reintegration* (Willan Books, 2004) 2, 16.

Respondents acknowledged that to stop their own violent behaviour, changes needed to occur within the family unit and within the community at large. When asked how to improve such programs, one prisoner from South Australia said:

*‘We go back to our families and we need to take the information back to the community to break the cycle of violence. We need them to stop violence too.’*

20. It is arguably also the responsibility of community members, particularly families and service providers, to create more inclusive communities and share resources with people who have been convicted and sentenced for a crime, then ‘done their time’ to also include civic participation and development of social capital.<sup>122</sup> Bazemore and Erbe<sup>123</sup> believe that opportunities in the community to build these socially supportive relationships, however, are almost entirely missing from current policy and practice about transitions from prison and preventing reincarceration.
21. Quality evidence is increasingly available about Aboriginal and Torres Strait Islander people’s community-driven collective healing programs, indicating that such programs are cost-effective and have an important role in reducing incarceration rates.<sup>124</sup>

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<sup>121</sup> M Willis and J P Moore, *Reintegration of Indigenous prisoners (Research and Public Policy Series No. 90)* (Australian Institute of Criminology, 2008) 88.

<sup>122</sup> S Farrall, ‘Social capital and offender reintegration: Making probation desistance focussed’ in S Maruna & R Immarigeon (eds), *After Crime and Punishment: Pathways to Offender Reintegration* (Willan Books, 2004) 57; Maruna, above n 92; Maruna et al, above n 105; F Taxman, D Young and A Behrens, ‘With eyes wide open: Formalizing community and social control intervention in offender reintegration programmes’ in S Maruna and R Immarigeon (eds), *After crime and punishment: Pathways to ex-offender reintegration* (Willan Books, 2004) 233.

<sup>123</sup> G Bazemore and C Erbe, ‘Operationalizing the community variable in offender reintegration: theory and practice for developing intervention social capital’ (2003) 1(3) *Youth Violence and Juvenile Justice* 246.

<sup>124</sup> Aboriginal and Torres Strait Islander Healing Foundation, *Prospective cost benefit analysis of healing centres* (Aboriginal and Torres Strait Islander Healing Foundation, 2014) <[http://healingfoundation.org.au/our-publications/?category\\_name=reports](http://healingfoundation.org.au/our-publications/?category_name=reports)>; M Whiteside et al, *Promoting Aboriginal health: The Family Wellbeing empowerment approach* (Springer, 2014).

## 11. TRANSLATION OF EVIDENCE INTO POLICY

*Scott Avery, Policy and Research Director*

### Key issues:

- **Understanding the issues affecting Aboriginal and Torres Strait Islander people with cognitive and mental health impairment requires a multi-disciplinary approach.**
  - **As Government Agencies tend to be organised along disciplinary lines (ie. separate department for justice, education, health etc), there is no natural home where analysis of the issues and policy discussions can take place, and a wealth of socio-legal research on the issue goes under-utilised.**
  - **A mechanism is needed to capture current and exiting research and knowledge, both from the Community and academic research, to advise Governments on translation of evidence into policy.**
  - **A Policy Translation Group could guide the development of these principles into a National Disability Justice Strategy which specifically addresses the rights and circumstances of Aboriginal and Torrs Strait Islander people.**
1. This composite submission has brought together contributions from three Aboriginal and Torres Strait Islander national peak bodies and thirteen of the nation's leading disability and justice researchers from six different universities and research institutes.
  2. Collectively, the expertise covered in this submission covers a breadth of disciplines including Aboriginal and Torres Strait Islander health wellbeing and culture, disability, human rights, early childhood, education, family violence prevention, gender studies, laws and legislation, court processes and sentencing, post release rehabilitation, research and data management. The breadth of this expertise reflects the complexity, which is a reality when dealing with the problem of recurrent and indefinite detention of Aboriginal and Torres Strait Islander people with cognitive and mental impairment.
  3. Contrastingly, public policy is derived from a government structure naturally organised along functional lines. There are separate departments for Attorneys General, Health, Education, and Social Services. There consequences of a functional approach mean that the issues are not comprehensively dealt with:
    - Government agency led policy solutions affecting one part of the problem. A justice led approach will naturally lead to a legal response, but risk inadequately having a balance from disability perspective; and conversely a disability led approach risks inadequately addressing laws legislation and systemic barriers in judicial



administration. Both perspectives are needed in balance with co-ordination across the spectrum of issues.

- Intersectional issues affecting people who are both Aboriginal and Torres Strait Islander *and* have disability fall into the too-hard basket. The needs and rights of the marginalised of the marginalised are ultimately ignored.
4. The complexity of this issue needs to be recognised and embraced. As there is no natural home within the government agency structure to address the breadth of issues, a mechanism needs to be created. We recommend the formation of a 'Policy Translation Group' to review the breadth of research activity and evidence, and formally advise the various government agencies on a co-ordinated approach to policy and government action plans. This should be multidisciplinary and comprise representatives from government, the research community, and Aboriginal and Torres people with disability.

## Biographies of contributors

**First Peoples Disability Network (Australia)** is a national organisation established by, for and behalf of Aboriginal and Torres Strait Islander people, families and communities with lived experience of disability. With a Board of Directors entirely comprising First Peoples with disability, we are guided by the lived experience of disability in determining our priorities and our way of doing business. FPDN is committed to research and policy development that captures the knowledge, expertise and experience of disability in our communities. FPDN aims to be the interface between the First Peoples disability community, policy makers and researchers in generating practical measures that secure the human rights of First Peoples within a social model of disability. We have a long-standing history of advocating for the rights of First Peoples with disability through high-level policy advice to Australian Governments and in international human rights forums. FPDN is undertaking a community-directed research program, which is supported through the National Disability Research and Development Scheme.

**The National Family Violence Prevention Legal Services** was established in May 2012 to coordinate and function as a united national voice for the 14 Family Violence Prevention Legal Services (FVPLS) member organisations who provide legal assistance, casework, counselling and court support to Aboriginal and Torres Strait Islander victim/survivors of family violence, including sexual assault and abuse. FVPLSs also provide community legal education, and early intervention and prevention activities. FVPLSs services are culturally inclusive and accessible to Aboriginal and Torres Strait Islander adults and children in the specified service region, regardless of gender, sexual preference, family relationship, location, disability, literacy or language.

**National Aboriginal and Torres Strait Islander Legal Services (NATSILS)** is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia. NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The ATSILS are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples. NATSILS represents the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA);
- Tasmanian Aboriginal Community Legal Service (TACLS); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

**The 'Change the Record' (CTR) Coalition** is a group of leading Aboriginal and Torres Strait Islander, community and human rights organisations working collaboratively to address the disproportionate

rates of incarceration and violence experienced by Aboriginal and Torres Strait Islander people. The Change the Record campaign has two overarching goals, to:

1. Close the gap in rates of imprisonment by 2040; and
2. Cut the disproportionate rates of violence to at least close the gap by 2040 with priority strategies for women and children.

To Change the Record, we need to work with Aboriginal and Torres Strait Islander communities to invest in holistic early intervention, prevention and diversion strategies. These are smarter, evidence-based and more cost-effective solutions that increase safety, address the root causes of violence against women and children, cut re-offending and imprisonment rates, and build stronger communities.

**Carol Bower** is a Senior Principal Research Fellow at Telethon Kids Institute with qualifications in medicine, epidemiology and public health. Her areas of research expertise include epidemiology of birth defects, including Fetal Alcohol Spectrum Disorders and neural tube defects. Her research has a strong focus on investigating causes and effects of birth defects, on translating research findings into public health policy and practice and on evaluating the effectiveness of that translation. Leading examples are the prevention of neural tube defects (promoting periconceptional folic acid supplement use and mandatory fortification of flour with folic acid) and research on prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders (FASD).

**Damian Griffis** is an Aboriginal person identifying with the Worimi people, CEO of First Peoples Disability Network (Australia) and a leading advocate for the human rights of Aboriginal people with disability. In 2004-05, Damian undertook a major consultative project visiting Aboriginal communities across the state of New South Wales discussing the unmet needs of Aboriginal people with disability directly with Aboriginal people with disability and their families. This culminated in the ground-breaking report entitled *Telling It Like It Is*. He has worked for more than 20 years in various capacities within the disability sector and has been instrumental in consolidating the development of the social movement of Aboriginal people with disability. Damian was awarded the Tony Fitzgerald Memorial Community Award at the 2014 Human Rights Awards in recognition of his advocacy for the rights of Aboriginal and Torres Strait Islander people with disability.

**Dr Darren O'Donovan** completed his PhD thesis on equality, multiculturalism and housing rights at University College Cork in Ireland in 2009. He worked at UCC as a lecturer for three years before moving to Australia. Darren will soon take up a role as senior lecturer in law at La Trobe Law School, where he will be working with La Trobe's scholars at the Living with Disability Research Centre. Darren teaches administrative law, human rights and disability law, and recently co-wrote the second edition of the Endeavour Foundation's guide to the NDIS, *Discover*.

**Professor Eileen Baldry** (BA, DipEd, MWP, PhD) is a Professor of Criminology at UNSW Australia where she has been an academic since 1993. Eileen is an esteemed researcher in the areas of Criminology, Social Policy and Social Work and was recently named as one of the inaugural PLuS Alliance Fellows in Social Justice. Eileen also holds the distinguished position of Academic Chair, UNSW Diversity and Equality Board and is the current Deputy Chair of the Disability Council NSW. In

2009, the Law and Justice Foundation of NSW recognised Baldry's "indefatigable" support for justice-related causes by awarding her its highest honour: the Justice Medal.

**Professor Elena Marchetti** is a Research Professor in the School of Law and a member of the Legal Intersections Research Centre, University of Wollongong. Her research examines the justice experiences of Indigenous Australians in the criminal justice system, how to better accommodate the justice needs of victims of Indigenous partner violence, and what methods should be used to evaluate Indigenous-focused justice processes to better reflect the Indigenous-centric nature of the programs. She was awarded an Australian Research Council, 5-year Australian Research Fellowship in 2009 and an Australian Research Council, 4-year Future Fellowship in 2014.

**Glenn Pearson**, a Nyoongar from Western Australia, is the Head Aboriginal Research Development at Telethon Kids Institute which includes managing the Kulunga Aboriginal Research development Unit (KARDU). His areas of research expertise include Aboriginal Health and Emotional Wellbeing; Aboriginal Research Methodologies; Policy and Advocacy. Glenn is a Chief Investigator in the Institute's Centre of Research Excellence in Aboriginal Health and Wellbeing and is completing a Doctorate at the University of Western Australia (UWA). He is also a member of the Health Consumer Council of WA, Curtin University's Human Research Ethics Committee and the Institute's Community and Consumer Participation Advisory Council.

**Leanne Dowse** is Associate Professor and Chair in Intellectual Disability and Behaviour Support in the School of Social Sciences, UNSW. The work of the Chair aims to expand the body of knowledge and increase capacity in the delivery of appropriate and effective services to people with an intellectual disability with complex needs through training and education, enhanced policy and service models and targeted research. Leanne's research generally seeks to understand the dynamics of gender, race and ethnicity, ageing and contemporary social, political and cultural discourses as they intersect with disability. Her recent work addresses issues for people with complex needs, particularly the intersections of cognitive and psychosocial disability with other dimensions of social disadvantage and the ways these interlock for people in the criminal justice system as both victims and offenders. She also undertakes research examining the intersection of disability, gender and violence.

**Dr Linda Steele** is a lecturer in law at the University of Wollongong where she teaches criminal law and tort law. Linda's research explores law's complex and contradictory roles in the marginalisation of people with disability. Linda's doctoral thesis was on diversion of individuals with cognitive impairment from the NSW Local Court. Her current research is focused on violence against people with disability. Linda has a professional background in social justice, including as a solicitor at the Intellectual Disability Rights Service and an executive committee member of the Women in Prison Advocacy Network.

**Dr Megan Williams**, from Muru Mari Aboriginal health unit at UNSW, is a descendent of the Wiradjuri people of central NSW through her father's family. She has qualitative and quantitative research training, specialising in using research as a tool for capacity building, and focussing on the

strengths of Aboriginal people to determine strategies to reduce recidivism, morbidity and mortality post-prison release.

**Noni Walker** is a Senior Research Fellow in the Alcohol Pregnancy and FASD Research group at Telethon Kids Institute with experience in public health and health promotion. Her role is to support the project and clinical team members working on the Banksia Hill FASD project funded by the NHMRC that aims to improve the management of young people with Fetal Alcohol Spectrum Disorder in the youth justice system.

**Professor Patrick Keyzer** is Head of the La Trobe Law School and Chair of Law and Public Policy at La Trobe University. Patrick co-coordinated the development of this Submission with Scott Avery. Patrick's contribution to this Submission, co-written with Darren O'Donovan, was recently published in slightly different form, in the *Indigenous Law Bulletin*. Patrick co-wrote the Endeavour Foundation's guide to the National Disability Insurance Scheme, *Discover*. Patrick has written or edited five books and reports on the topic of preventive detention, and in his capacity as a barrister has provided legal advice to the Aboriginal Disability Justice Campaign for some years.

**Dr Ruth McCausland** is a Research Fellow in the School of Social Sciences at UNSW. She was co-author with Eileen Baldry, Leanne Dowse and Elizabeth McEntyre of the recent report *A Predictable and Preventable Path: Indigenous people with mental and cognitive disabilities in the criminal justice system*, and an earlier study on the economic costs of the over-representation of people with mental and cognitive disabilities in prison. Her PhD was on evaluation and the diversion of Aboriginal women from prison, and developed an alternative approach to evaluation of diversionary programs that could provide more meaningful measures of impact and wellbeing. Ruth is also Vice-President of the Board of the Community Restorative Centre.

**Scott Avery** is descendant from the Worimi people and is the Policy and Research Director at the First Peoples Disability Network (Australia), a non-Government Organisation constituted by and for Australian Aboriginal and Torres Strait Islander Peoples with disability. He has an extensive career in research and public policy in Aboriginal and Torres Strait Islander affairs, health, disability, justice and education. He is undertaking a doctorate on Indigenous disability and is the lead Investigator on a community-directed research program which has been awarded funding support through the National Disability Research and Development Scheme, and is a receipt of a scholarship through the Lowitja Institute for Aboriginal and Torres Strait Islander Health Research.

**Sharynne Hamilton** is a Ngunnawal woman from Canberra. Sharynne has worked in the area of parental and family engagement in child protection for more than 20 years as a community worker, advocate and scholar. From 2010, she worked with the Regulatory Institutions Network's (Australian National University) Community Capacity in Child Protection Project team researching the experiences of community workers, working with families with child protection interventions. Sharynne joined the Telethon Kids Institute in August 2015 working the Alcohol, Pregnancy FASD Research group, undertaking research for the NHMRC screening, diagnosis and workforce development project at Banksia Hill Juvenile Detention Centre.

**Associate Professor Thalia Anthony** is a Law academic at the University of Technology Sydney. Her research expertise is in the areas of criminal law and procedure and Indigenous people and the law, Thalia Anthony's research has influenced policy development and public debate regarding remedies for wrongs inflicted on Indigenous peoples. Her work has been utilised in senate committee reports, parliamentary debate, policy announcements and law reform committee reports. She has contributed to High Court cases, the work of United Nations committees, conducted research for the Royal Commission into Institutional Responses to Child Sexual Abuse and appeared before parliamentary inquiries on Indigenous redress.

#### *Research Associates*

**Gabriella Raetz** is a Research Assistant and student at La Trobe University completing her final year of a Bachelor of Laws/Arts.

**Hanina Rind** is a Research Assistant and student at La Trobe University completing her final year of a Bachelor of Laws.