



Aboriginal Disability Justice Campaign

16th January 2012

Submission to the Federal Parliamentary Inquiry into Foetal Alcohol Disorder from the Aboriginal Disability Justice Campaign (ADJC)

The Aboriginal Disability Justice Campaign seeks the end of the widespread and unwarranted use of prisons for the management of unconvicted Aboriginal persons with cognitive impairments.

ADJC is made up agencies and individuals who are concerned about the detention of Aboriginal people with cognitive impairments such as Intellectual Disability, Acquired Brain Injury, Foetal Alcohol Disorder and Mental Illness who commit crimes or are considered a risk of harm to others. The ADJC is particularly concerned about Aboriginal people with cognitive impairments who are assessed as mentally impaired and then found unfit to plead when they come before the courts for criminal matters.

It seems that the indefinite detention of Aboriginal people with cognitive impairments is a national issue, as the ADJC has now been made aware of people with cognitive impairments being indefinitely detained in the Northern Territory, Queensland, Western Australia and the Australian Capital Territory. You may be aware of Mr Marlon Noble who has recently come to the attention of the media and who has now been released on a Conditional Release Order, which it seems is indefinite. Of particular concern to this campaign is the fact that Aboriginal people in the Northern Territory are being indefinitely detained in maximum security prisons however as you can see by the range of agencies involved in this situation this concern extends more broadly to people with cognitive impairments across Australia.

ADJC is currently composed of a broad range of individuals and agencies including: Northern Australian Aboriginal Justice Agency; Central Australian Aboriginal Legal Aid Service; Darwin Community Legal Centre; People with Disabilities Australia; First People's Disability Network; Maurice Blackburn Legal Firm of Melbourne; Blake Dawson Legal Firm of Sydney; Brain Injury Australia; Synapse of Queensland; National Council of Intellectual Disability; New South Wales Council for Intellectual Disabilities; the Alice Springs office of the Northern Territory Public Guardian; Queensland Advocacy Inc, NT Legal Aid, NT Chapter of Australian Lawyers for Human Rights, Criminal Lawyers Association of the Northern Territory, Western Australian Mental Health Law Resource Centre, Criminal Lawyers Association of the Northern Territory and the Northern Territory Council of Social Services.

Individuals supporting the campaign include Professor Eileen Baldry of the University of New South Wales and President of the New South Wales Council of Social Services, Doctor Leanne Dowse of the University of New

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Alice Springs Office of the NT Public Guardian

Northern Territory Council of Social Services
Northern Australian Aboriginal Justice Agency
Central Australian Aboriginal Legal Aid Service
Darwin Community Legal Centre
Maurice Blackburn Legal Firm of Melbourne
Blake Dawson Legal Firm of Sydney
Queensland Advocacy Inc.

South Wales, Alison Xamon - Member of Western Australian Parliament and the retired Chief Justice of the Family Court, The Honourable Mr Alistair Nicholson.

Currently, when Aboriginal people with a cognitive impairment come before the Northern Territory courts under Part IIA of the NT Criminal Code they are detained in maximum-security prisons in both Alice Springs and Darwin. At this point in time, all of the people detained under Custodial Supervision Orders are Aboriginal men. The ADJC believes that there are currently nine Aboriginal men under guardianship (5 in Alice Springs and 4 in Darwin) who are detained under Part IIA of the NT Criminal Code. All are subject to indefinite detention as a result of the fact that there are no accommodation and treatment options for them to go to once their sentences are finished.

One young Aboriginal man has been in the Alice Springs Correctional Centre for four years on a minor assault charge. There seem to be some differences in the experiences of Aboriginal people with a cognitive impairment and access to resources in terms of available community based options between Darwin and Alice Springs. Also whilst the ADJC is advising you of the fact of the nine people currently incarcerated, exact numbers remain unclear because information relating to this group of people is very difficult to obtain.

Given the fact the NT correctional system does not screen for cognitive impairment it is likely that the numbers of people with a cognitive impairment in jails in the NT is quite a lot higher. If you include people with a mental illness alongside people with an intellectual disability and acquired brain injury (from foetal alcohol syndrome: FASD) then there is serious concern about how to best respond and how large the problem.

It seems clear to the ADJC that indefinite detention as a result of being assessed as mentally impaired and then found unfit to plead is having a disproportionate impact on Aboriginal people with a cognitive impairment. Legal representatives seem to be caught in an ethical dilemma: submit their clients to legislation that enables an assessment of mental impairment that can lead to the person being found unfit to plead but which inevitably results in indefinite detention in a prison or a psychiatric unit. Alternatively, legal representatives can have their clients plead guilty to charges, ensuring a criminal conviction which may not be appropriate given the cognitive capacity issues of the person concerned.

Mr Jim Gibney, the former principal solicitor from Queensland Advocacy Inc., has indicated that in Queensland, it is possible there may be over 100 people with an Intellectual Disability who have come before the courts and are assessed as mentally impaired and then found unfit to plead who are held in either jails or psychiatric institutions.

It seems to be the case in both Queensland and Western Australia that Aboriginal people subject to mental impairment / unfit to plead provisions of state based legislation are indefinitely detained in jails whilst non-Aboriginal people seem to be detained in psychiatric institutions. In Western Australia,

approximately 30 people a year are detained as a result of being found mentally impaired and therefore unfit to plead. In Queensland it is also the case that many people with a mental illness are detained, waiting up to twelve months for a report on their psychiatric condition in order to progress the process towards a finding of mental impairment which can then lead to .

The indefinite nature of the detention of people with a cognitive impairment who are assessed as mentally impaired and then found unfit to plead comes about because at the end of their supervision order. At this time individuals are assessed as either posing a risk to the safety of the community and need to be exited to options that can manage that risk or provide structured support and accommodation services to manage the interface between cognitive impairment and society. Because there are few such options, and none in the Northern Territory, people, mostly Aboriginal people, continue to be held in jails and psychiatric units.

1. Please see the attached ADJC Campaign Statement
2. Please see attached legal advice to the ADJC by Mr Phillip French of the Australian Disability Law Centre concerning how indefinite detention may breach Australia's domestic and international human rights obligations.

Management issues – including access to appropriate community care and support services across education, health, community services, employment and criminal justice sectors for the communities, families and individuals impacted by FASD.

This submission by the ADJC provides a narrative of our collective perceptions and experiences about what happens to children with Foetal Alcohol Disorder as they grow up to be adults with a cognitive impairment. It particularly addresses how Aboriginal people with cognitive impairments which often stem from Foetal Alcohol Disorder become involved in the criminal justice system and end up indefinitely detained in either jails or psychiatric units.

The aim of this narrative is to provide the inquiry with an understanding how a lack of early intervention and support as a result of Foetal Alcohol Disorder ends with an Aboriginal person with complex cognitive, social and risk presentations being embroiled in the criminal justice system.

Management Issues

Many children with foetal alcohol disorder as they grow older through adolescence and into early adulthood present with a range of complex cognitive conditions such as intellectual disability, acquired brain injury or mental illness.

As they grow older, individuals face many complex social sets of circumstances that lead them to rely on services such as disability services, child protection, adult guardianship, mental health and drug and alcohol services. In rural areas and remote communities these services cannot provide the level of intervention and support that is required and necessary.

Case Study One

Jack has had a life-course common to many Aboriginal young people. Born to into a family with intergenerational alcohol problems, Jack's mother abandoned him in a community hospital when he was a few months old from where he was adopted by an Aboriginal grandmother who was married to a heavy drinker and child abuser. Jack's new mother died when he was about 9 years old and his biological father living in another community hanged himself around the same time. Illiterate, prone to wandering, sniffing paint, addicted to alcohol, cigarettes and cannabis, Jack soon became acquainted with the juvenile justice system.

During a brief respite from the detention centre, and with the full support of the centre's psychiatrist, Jack was diagnosed with a foetal alcohol spectrum disorder (FASD). He was fourteen at the time. Having his disability recognised did nothing to access meaningful support services nor did it prevent Jack's constant re-offending, mostly stealing, using illicit substances, being a passenger in stolen cars and ram raiding liquor stores. All dumb convictions because he tagged along with someone else, was hungry or because he was off his face due to substance use. Jack is inside again completing his last sentence as he was unable to manage his parole orders when he was released early.

The special services and lifestyle assistance needed to support Jack's behavioural disabilities while incarcerated still do not exist. On a number of occasions when he responded angrily to

orders he was placed in 'lockdown' for several months with only two hours access daily to a caged area outside his cell. During these times his privileges were withdrawn and he spent the remaining 22 hours in his cell without television or interaction with others. Unable to read or write he would spend his days either sleeping or doing push ups on the floor. Some of Jack's recollections of inside are quite positive especially for the older lifer who regularly shared his drugs with him and another who wrote letters for him to a girl who came to visit.

Now 24 years of age why was Jack invisible to help from before birth and what could have been accomplished for him had he been diagnosed earlier? It may never be possible to cater adequately for Jack because he will always need an "external brain" for every waking moment to manage his "secondary behavioural characteristics" which present the greatest challenges¹. Last time he was released these traits were all too obvious and demonstrated the day to day vulnerabilities of a person with FASD. Sadly too, Jack has almost certainly got another five younger siblings to replicate his hapless lifecourse as his mother continues to drink.

There are best practice models which if applied well could give Jack a stimulating and rewarding pathway from here on. He is a charmer, loves to shop for food, organise and cook meals, care for animals, fish and watch nature documentaries. Most of all Jack wants to care for his friends hanging out on the streets. Is it not possible for him to be a youth work albeit an illiterate one?

Aboriginal children with foetal alcohol disorder often live in rural centres and remote communities where access to these early intervention services, generalist support services, as well as specialist support services is extremely problematic or non-existent. Consequently, as they grow older they can present with a range of behaviours of concern that may be challenging to their families and their communities.

Many children with foetal alcohol disorder who begin showing behaviours of concern, associated with their disability, are often excluded from attending school and as they grow older are marginalised within their communities. Due to not receiving early intervention, generalist or specialist support, the presentation of their issues and behaviours of concern becomes ever more complex and for some, behaviours of concern develop into violence that is threatening and presents a risk of harm to others. As their circumstances become more complex the possibility of integrating them into either Aboriginal or mainstream supports and services becomes more remote.

This set of circumstances for individuals can become a cycle of exclusion and marginalisation. For many children with foetal alcohol disorder who become young adults with significant behaviours of concern (including property destruction, harm to self and harm to others) often they come to the attention of the criminal justice system.

¹ Diane Malbin, 2002. *Fetal Alcohol Spectrum Disorders: Trying Differently Rather Than Harder*. www.fascets.org.

Case Study Two

M is a nineteen year old Arrente man with autism and acquired brain injury from foetal alcohol disorder and epilepsy. M lived on his community cared for by his uncle.

In September 2007, M was arrested and charged with the murder of his uncle on community and taken into custody. In June 2009 – at a special hearing under Part 2A of the NT Criminal Code, M was given a qualified finding of manslaughter with diminished responsibility. M was given Custodial Supervision Order to be reviewed in 8.5 years plus the two years already served. Judge Mildren ordered M to be detained in a maximum security prison called the Alice Springs Correctional Centre.

Between May 1997 and August 2007, there were six Child Protection notifications for M with no systemic response from Child Protection

In 2005, the Department of Health and Families divested itself of responsibility for the care and support of M and funded M's community to provide support to him. His uncle was identified by the community as the person who had responsibility for caring for M – this man was a good man but he was also an alcoholic.

In early January 2007, M was again found dismembering animals on community – no critical incident response and no escalation of the issue to disability management. In late January, M stabbed his aunt on community fracturing her arm – no critical incident response and no escalation of the issue to disability management. This situation involved 'payback' from the community to M and his uncle – they were both beaten up by members of the community as a result.

A psychiatrist's report at this time stated that M's uncle was unable to provide care and support for M and had asked that M be taken off community – Disability Services advised that there was no alternative accommodation for M.

In April 2007, M destroyed all the property in his uncle's house, throwing a metal tool at his uncle, which embedded itself in the fridge door – no critical incident response and no escalation of issue to management. Later in May 2007, M assaulted a young girl with a pick-axe – no critical incident response and no escalation of issue to disability management

Finally, in September 2007, M stabbed to his uncle to death

Young adults with foetal alcohol disorder who present with complex social circumstances and behaviours of concern whilst being known to the services such as child protection, disability services or mental health services may require adult guardianship because there is no one who can make decisions for them. This further alienates them from their families and communities.

The young Aboriginal adult with a cognitive impairment quickly learns to resort to violence in order to become heard and to have what they see other young Aboriginal adults having or to respond to vicious teasing by other children or young people.

Young adults with foetal alcohol disorder which become identified as an acquired brain injury or mental illness who present with complex social issues and significant behaviours of concern that involve the assessment of the risk of harm to others cannot be processed through the criminal justice system as would a person without such cognitive impairments. Each state and territory

has legislation that enables people with cognitive impairments to be assessed and mentally impaired and which enables them to be found as unfit to plead. In such cases there seems to be two pathways through the criminal justice system:

1. Their legal representative has the individual plead guilty to what are often low level charges of property destruction and assault. They cycle in and out of prison which involves significant risks of homelessness and harm when they are released, further adding to the viciousness of the cycle of exclusion and marginalisation.
2. Their legal representative has the individual assessed as mentally impaired and/or unfit to stand trial. In many cases this leads to detention under a custodial supervision order or its state or territory equivalent.

In the case of people subject to the second pathway, 100% of cases leads to detention under a custodial supervision order or its state or territory equivalent. This will be in a prison (in the Northern Territory this will be in a maximum security prison) and in other cases (such as people with a dual disability like as a mental illness) in a psychiatric institution.

In all cases such detention is indefinite because at the conclusion of their order individuals are assessed as remaining a significant risk of harm to others and there are no funded accommodation options that provide the necessary treatment and support to manage the risk individuals may pose to the safety of the community or their need for support.

Mr Graeme Innes (Disability Discrimination Commissioner of the Australian Human Rights Commission stated that the average cost to keep a person in prison per day is \$269.00². The ADJC would state with confidence that this figure would be more for a person with a cognitive impairment as a result of Foetal Alcohol Syndrome due to the increased level of support required around medical and behavioural management.

Case Study Three

C is a 30 year old, single Pitjantjara man and long term resident of Alice Springs. Prior to his imprisonment, he lived on the fringes of the community with some minimal support from various family members. He has been assessed as being globally cognitively impaired, the actual cause is not clear, possibly attributable to unmanaged epilepsy and chronic alcohol abuse. He also suffers from a range of physical ailments including dislocating shoulders. In 2007 he was arrested for Aggravated Assault and found unfit to be tried. He could be supervised in a less restrictive community-based setting, but is now in his 4th year of prison-based supervision.

C has an offending history dating from 2007 and has been identified as at significant risk of

² Graeme Innes, "Imprisonment Can Do a Grave Injustice to the Intellectually Disabled" The Age December 29th <http://www.theage.com.au/opinion/politics/imprisonment-can-do-a-grave-injustice-to-the-intellectually-impaired-20111228-1pcso.html>

serious harm to others. In December 2007, C was found unfit to plead in the Alice Springs Supreme Court where he was appearing on charges of assault and placed into detention on a Custodial Supervision Order for twelve months.

C is now into his 4th year of imprisonment under Section 43CZ of Part IIA of the NT Criminal Code which was reviewed in August 2010. C has no idea why he is in prison and at each annual review of his Custodial Supervision Order thinks he is to be released. C, like others on such orders is housed in the G Block of the Alice Springs Correctional Centre – a highly restrictive and oppressive block. The prison authorities do their best to provide for C offering minimal programmed activity. Out of prison activities have been promised to the Court by the Department of Health and Families but have never eventuated. Even this meagre option has now become redundant as a result of the finding in Ebatarinja vs The Queen.

Recommendations

In relation to the indefinite detention of Aboriginal people with a cognitive impairment which results from foetal alcohol disorder the ADJC would recommend:

1. Cross-departmental responsibility for a response to this issue
2. Accommodation and support programs both as an alternative to prison and post release
3. That any detention in prison be a last resort and the least restrictive option suited to the person's circumstances.
4. Skilled intervention and support to address offending behaviour being a central element of all services, whether in the community or in prison.
5. Mandatory review of orders for detention of unconvicted individuals at least annually, with a court or tribunal carrying out the review and the individual legally represented and independently assessed.

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