

Chapter 1

Introduction

1.1 Recognition of the need for this inquiry grew out of this committee's 2015 inquiry into violence, abuse and neglect against people with disability (abuse inquiry), during which a range of evidence was presented on the indefinite detention of people with cognitive or psychiatric impairment.¹ The committee heard that people who have been charged with a criminal offence and found unfit to plead, or not guilty by reason of mental incapacity, can find themselves detained for the purpose of involuntary therapeutic treatment. This form of detention is indefinite, as it has no specified end date. Detention often occurs in prison, even though the person has not been found guilty of any offence, and too often the therapeutic intervention, the purported reason for the detention, is either not adequately provided or not provided at all.

1.2 In its report for that inquiry, the committee wrote:

The indefinite detention of people with disability is an issue of serious concern to the committee. This is made more serious by the sometimes arbitrary nature of such detention without appropriate periodic review, and where that detention occurs in a criminal justice facility.²

1.3 Concurrent to the 2015 inquiry, two cases received greater media and advocacy attention: that of Mr Marlon Noble³ in Western Australia, and Ms Rosie Ann Fulton⁴ in the Northern Territory—both Aboriginal people deemed unfit to plead due to intellectual impairment, both imprisoned indefinitely without trial.

1.4 The terms of reference (ToR) for this current inquiry take account both the evidence presented during the abuse inquiry as well as the mounting public evidence on the issue of indefinite detention. The ToR (which are provided in full at the end of this chapter) direct the committee to investigate aspects of the indefinite detention of people with a cognitive and/or psychiatric impairment, including: the prevalence, the experiences of individuals, the legal frameworks, the quality of therapeutic treatments, diversion programs to reduce the number of people entering detention and programs and pathways to assist people to transition from indefinite detention.

1.5 This inquiry deals with two discrete groups of people who are subject to indefinite detention. There are two common pathways by which a person with a cognitive or psychiatric condition may find themselves in indefinite detention:

1 Senate Community Affairs References Committee, *Inquiry into Violence, abuse and neglect against people with disability (Abuse inquiry)*, November 2015, pp 179–181.

2 Community Affairs Committee, *Abuse inquiry*, November 2015, p. 180.

3 See: Malarndirri McCarthy, 'Indigenous Australian disabled man wrongfully jailed, UN hears', *SBS TV*, 18 November 2015.

4 See: ['Urgent need for law change as mentally-impaired accused detained indefinitely, WA Chief Justice Wayne Martin says'](#), *ABC News*, 10 July 2015, (accessed 23 November 2015)

- a forensic (or criminal) order;⁵ or
- a civil route via a scheduled order under mental health, disability or guardianship frameworks (the more common pathway)⁶.

1.6 This chapter outlines the structure of the report, provides a number of definitions and a summary of how the inquiry was conducted.

Structure of the report

1.7 As the two pathways to indefinite detention are subject to different legislation and processes, the Senate Community Affairs Reference Committee (committee) has chosen to write this report in two parts to discuss the pathways separately. Accordingly, the report is structured as two parts with nine chapters.

1.8 Chapter 1 is an introductory chapter which outlines the context and administrative details of the inquiry.

Part A (Chapters 2–5): Forensic orders

- Chapter 2 provides background and context to forensic orders with a summary of the pathways, a description of the statistics and the people being detained, relevant legislation and recent reviews.
- Chapter 3 examines issues relating to sentencing and access to justice for people with cognitive impairment including law reform options and additional legal support for people with cognitive and psychiatric impairment to negotiate the legal system.
- Chapter 4 looks at the experiences of people who are indefinitely detained in prison, the treatment options available, and how to improve the transition of people out of prison.
- Chapter 5 focuses on alternatives to prison for secure treatment delivery, pathways back into the community and the role of the National Disability Insurance Scheme (NDIS).

Part B (Chapters 6–8): Involuntary mental health orders, involuntary treatments and other involuntary detentions

- Chapter 6 provides background and context to mental health treatment orders with a summary of statistics, relevant legislation and recent reviews.
- Chapter 7 considers involuntary mental health orders with a focus on the use of emergency services as transports for mentally ill patients, review

5 A forensic or criminal mental health detention order can be placed on an individual alleged to have committed a crime who is deemed 'unfit to plead' or 'unfit to stand trial'.

6 A person may be scheduled or involuntarily detained under a state or territory mental health act for their safety, the safety of others or for recovery purposes. Similar orders can also be given under state and territory disability and guardianship frameworks, and these are more generally for issues around cognitive impairment.

mechanisms for involuntary mental health orders and transition back to the community from involuntary detention.

- Chapter 8 focuses on guardianship and the use and regulation of involuntary treatments and restrictive practices in the aged care and disability sectors.

Report conclusion (Chapter 9)

- Chapter 9 draws together the committee's conclusions and recommendations from both parts of the report.

Definitions

1.9 The terms 'mental illness', 'mental disorder', 'psychiatric impairment' and 'psychiatric disability' and 'cognitive impairment' are viewed similarly by state and territory mental health legislation and all may lead to an individual being placed into indefinite detention. The Australian Institute of Health and Welfare (AIHW) has outlined some of the difficulties in fleshing these concepts out into discrete definitions⁷ and this is discussed in greater detail below.

Cognitive impairment

1.10 Cognitive impairments are permanent conditions which can be acquired such as resulting from traumatic brain injury or through substance abuse, or genetic conditions that people are born with such as downs syndrome. People with cognitive impairments such as intellectual disabilities 'are highly likely to have severe limitations in all three core activities of daily living—self-care, mobility and communication'. The AIHW noted that even for people with cognitive impairment who can:

function relatively well in the familiar routines of self-care and domestic life, and be independently mobile, people with intellectual disability often have considerable difficulty in managing emotions and relating to other people. It is therefore important to also consider the level of support that is needed in non-core activity areas, especially making friendships, maintaining relationships and interacting with others.⁸

1.11 Cognitive impairments can co-exist with psychiatric impairments. The next section will explore the conflation of cognitive and psychiatric impairments within legislation.

Conflation of psychiatric and cognitive impairment

1.12 Psychiatric and cognitive impairment are interchangeable within all state and territory mental health and forensic mental health legislation. In a paper entitled *Disability at the margins: limits of the law*, Professor Eileen Baldry notes that:

7 Australian Institute of Health and Welfare, *Disability prevalence and trends*, December 2003, pp 31–33, <http://www.aihw.gov.au/publication-detail/?id=6442467543> (accessed 14 December 2015).

8 AIHW, *Disability in Australia: intellectual disability*, Bulletin 67, November 2008, p. 2.

Generally, cognitive impairment is elided in the law with mental health impairment: that is, people with cognitive impairment usually have been dealt with under mental health legislation. This regularly results in cognitive being thought of as an illness, similar to mental illness, and therefore to be treated in the same way.⁹

1.13 The *No End in Sight* report by the Aboriginal Disability Justice Campaign points to significant problems created by the conflation of psychiatric and cognitive impairment within the forensic mental health framework. The report found that most mental health legislation is founded on the idea of treatable illness, whereby initial detention, treatment and pathways to release are based on the premise that a person has a treatable condition which rendered them unfit to plead or not guilty of the offence. This premise is incompatible with the issue of cognitive impairment, which is generally a permanent condition that is not treatable in the same way as a mental illness. As such, a person with a cognitive impairment cannot meet the basic requirements of release from an indefinite forensic mental health order, which is an improvement in their condition.¹⁰

1.14 With this in mind, the NSW Law Reform Commission offers two separate definitions for these concepts that reflect the respective temporary and on-going nature of each condition. "Mental illness" (or psychiatric impairment) as a:

temporary or continuing disturbance of thought mood, volition perception or memory that impairs emotional wellbeing, judgment or behaviour so as to affect functioning in daily life to a material extent...

It may arise from anxiety, affective, and substance induced disorders or psychoses (although not limited to these), but excludes personality disorders.¹¹

1.15 And "cognitive impairment" as an:

ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, dysfunction, developmental delay or deterioration of the brain or mind. It may arise from but is not limited to intellectual disability, borderline

9 Eileen Baldry, 'Disability at the margins: limits of the law', *Griffith Law Review*, volume 23, no. 3, pp 372–373, <http://www.tandfonline.com/doi/pdf/10.1080/10383441.2014.1000218> (accessed 14 December 2015).

10 Aboriginal Disability Justice Campaign, *No End in Sight: The imprisonment, and indefinite detention of Indigenous Australians with a Cognitive Impairment*, September 2012, pp 46–47, www.pwd.org.au/documents/pubs/adjc/NoEndinSight.pdf (accessed 11 February 2016).

11 Eileen Baldry, 'Disability at the margins: limits of the law', *Griffith Law Review*, volume 23, no. 3, p. 372. Other useful definitions for 'mental illness' can be found at: NSW Mental Health Review Tribunal, *Civil Hearing Kit: Involuntary Patient Reviews*, August 2015, p. 2, http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/HearingKit_Section1_%20InvoluntaryDetention_Aug15.pdf (accessed 7 December 2015); ABS 4326.0, *National Survey of Mental Health and Wellbeing: Summary of Results*, October 2008, [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6AE6DA447F985FC2CA2574EA00122BD6/\\$File/43260_2007.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6AE6DA447F985FC2CA2574EA00122BD6/$File/43260_2007.pdf) (accessed 7 December 2015).

intellectual functioning, dementias, acquired brain injury, drug or alcohol related brain damage and autism spectrum disorders.¹²

1.16 The terms "mental illness", "mental disorder" and "cognitive and psychiatric impairments" are umbrella terms used to describe a range of symptoms and illnesses that impact on a person's mental processes of perception, memory, judgement and reasoning, or describe a clinical diagnosis of a disease or disorder. Although legislation relevant to this inquiry will be examined in later chapters, it is useful to highlight here that this legislation does not specify the types of 'cognitive and psychiatric impairments' that may lead to indefinite detention.

1.17 For the purposes of this inquiry:

- cognitive impairments or conditions may include (but are not limited to) acquired conditions such as acquired brain injuries (ABI) and traumatic brain injuries (TBI) and progressive and degenerative neurological diseases such as dementia and Parkinson's disease; intellectual disabilities such as Downs syndrome, specific learning or attention deficit disorder, developmental delay and severe autism; mental and behavioural disorders caused by substance abuse (including foetal alcohol spectrum disorder); and
- psychiatric impairments may include (but are not limited to) bipolar affective disorder, schizophrenia, and major depressive episodes leading to psychosis.¹³ It is also possible that some psychiatric conditions lead to, or may co-exist with cognitive impairments.

1.18 The committee also notes that for the purposes of this inquiry:

- (a) indefinite detention includes all forms of secure accommodation of a person without a specific date of release; and
- (b) this includes, but is not limited to, detention orders by a court, tribunal or under a disability or mental health act and detention orders that may be time limited but capable of extension by a court, tribunal or under a disability or mental health act prior to the end of the order.¹⁴

The inquiry

Background

1.19 In the committee's recent abuse inquiry (November 2015), the committee noted evidence about the extent to which people with cognitive and psychiatric

12 Eileen Baldry, 'Disability at the margins: limits of the law', *Griffith Law Review*, volume 23, no. 3, pp 372–373.

13 Australian Institute of Health and Welfare, *Disability prevalence and trends*, December 2003, p. 6.

14 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Indefinite_Detention

impairment were being indefinitely detained. Box 1.1 details the evidence and view on this issue.

Box 1.1: Extract from the Senate Community Affairs References Committee's Final Report of the Inquiry into Violence, Abuse and Neglect against people with disability

Indefinite detention

The issue of the indefinite detention of people with disability was raised as an issue with the committee, particularly when people with a mental health or cognitive disability intersect with the criminal justice system. The Disability Alliance outlined the process by which people with a mental health condition or cognitive impairment who have been charged with an offence and found not fit to stand trial or not guilty by reason of their disability, are then detained indefinitely, sometimes within the prison environment itself:

All Australian jurisdictions have in place legislation that addresses a defendant within the criminal justice system and their fitness to stand trial. These justice diversion provisions are applied when people with cognitive or psychosocial disability are deemed 'unfit' to stand trial. An unfitness test may arise as an issue before or during the trial process. These justice diversion provisions have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence.

The Human Rights Commission expressed concern with the negative consequences this has for vulnerable people:

The Commission is also concerned that the practice of indefinite incarceration in prison, if not considered to be a form of violence, exposes people with disability to violence in an institutional setting. This practice is particularly experienced by Aboriginal and Torres Strait Islander people with cognitive impairment and was reported on by the Social Justice Commissioner in his 2012 Social Justice Report.

NAAJA provided evidence to the committee about the over-representation of Aboriginal and Torres Strait Islander peoples in the Northern Territory criminal justice system, pointing out that many of those people had a long history of escalation of behaviour while their underlying cognitive impairment or mental health issues went untreated. The Disability Alliance has also provided evidence that Aboriginal and Torres Strait Islander peoples are disproportionately affected by this form of arbitrary detention.

The UN Disability Committee has made comment on the practice of indefinite detention after a finding of 'unfitness' and found in relation to the Disability Convention that:

The Committee has established that declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.

Committee view

The indefinite detention of people with disability is an issue of serious concern to the committee. This is made more serious by the sometimes arbitrary nature of such detention without appropriate periodic review, and where that detention occurs in a criminal justice facility.

The committee is of the view that if a person is detained in indefinite detention, then there is an obligation on the part of the state to provide therapeutic treatment in a facility not attached to the criminal justice system. To do any less would result in the state imposing criminal justice punishment on people as a direct result of them having a disability.

Source: Senate Community Affairs References Committee, [Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability](#), November 2015, pp 179–181.

1.20 In light of this evidence, the committee made the following recommendation:

Recommendation 8

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

- The indefinite detention of people with cognitive impairment or psychiatric disabilities.¹⁵

Referral

1.21 This inquiry was referred by the Senate for inquiry on 2 December 2015. The inquiry lapsed on 9 May 2016 with the dissolution of the Senate; however, was re-referred to the committee at the commencement of the 45th Parliament. Details of the inquiry are available on the committee's [website](#).¹⁶

1.22 The terms of reference for this inquiry are:

- (1) The indefinite detention of people with cognitive and psychiatric impairment in Australia, with particular reference to:
 - (a) the prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia;
 - (b) the experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely;
 - (c) the differing needs of individuals with various types of cognitive and psychiatric impairments such as foetal alcohol syndrome, intellectual disability or acquired brain injury and mental health disorders;
 - (d) the impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead;
 - (e) compliance with Australia's human rights obligations;
 - (f) the capacity of various Commonwealth, state and territory systems, including assessment and early intervention, appropriate accommodation, treatment evaluation, training and personnel and specialist support and programs;

15 Senate Community Affairs References Committee, *Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, November 2015, p. xvii, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report (accessed 4 December 2015).

16 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention

- (g) the interface between disability services, support systems, the courts and corrections systems, in relation to the management of cognitive and psychiatric impairment;
- (h) access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants;
- (i) the role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system;
- (j) the availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment;
- (k) accessibility and efficacy of treatment for people who are a risk of harm to others;
- (l) the use and regulation of restrictive practices and their impact on individuals with cognitive and psychiatric impairment;
- (m) the impact of the introduction and application of the National Disability Insurance Scheme, including the ability of individuals with cognitive and psychiatric impairment to receive support under the National Disability Insurance Scheme while in detention; and
- (n) the prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses.¹⁷

Conduct of the inquiry

1.23 The committee received 78 submissions from a diverse range of individuals and organisations. The committee acknowledges those who contributed to the inquiry through submissions or as witnesses. A list of the individuals and organisations who provided submissions to the inquiry is available at Appendix 1.

1.24 Public hearings were held throughout Australia: Brisbane on 23 March 2016; Melbourne on 29 April 2016; Perth on 19 September 2016; Darwin on 25 October 2016; Alice Springs on 26 October 2016; and Canberra on 8 November 2016. Transcripts of these hearings are available on the committee's website, and a list of witnesses who gave evidence at the public hearings is provided at Appendix 2.

1.25 The committee acknowledges the Northern Territory (NT) Government's submission and appearance at the committee's Darwin hearing; the appearance of the Western Australian (WA) Disability Services Commission at its Perth hearing; and the submission from the NSW Government. The committee also thanks the NT Department of Corrective Services and the NT Department of Health (Office of

17 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Indefinite_Detention

Disability) for facilitating site visits for the committee to the Complex Behaviour Unit (Darwin Correctional Precinct) and the Cottages in Darwin; and the Alice Springs Correctional Centre and the Secure Care Facility in Alice Springs. The committee also thanks the WA Disability Services Commission for facilitating a site visit to the Bennett Brook Disability Justice Centre in Perth. The committee extends its sincere gratitude to all of the residents who warmly invited the committee into their homes during these visits.

