



NATSILS

**NATIONAL ABORIGINAL & TORRES
STRAIT ISLANDER LEGAL SERVICES**

Submission to the Disability Royal Commission's Criminal Justice Issues Paper

National Aboriginal and Torres Strait Islander Legal Services

May 2020

About NATSILS

NATSILS is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia.

NATSILS was established as the peak body for ATSILS in 2007. Initially we operated as a body to share best practice in the provision of legal assistance services to Aboriginal and Torres Strait Islander people. Over time we have evolved and grown into a highly coordinated body with an expanded sphere of influence to also include broader systemic issues of injustice.

We are the experts on the delivery of effective and culturally responsive 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 people.

We bring 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 legal system.

We proudly represent the following ATSILS around Australia:

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

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Introduction

The National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) is pleased to make this submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability.

The legal system is a very broad term that describes the processes and systems of the laws we have across the country, how those laws are made, reviewed or changed, and what mechanisms exist to make sure those laws are followed.

The Australian federation is composed of one Commonwealth Government and separate state and self-governing territory governments, each with their own responsibility to make their own laws and regulations. Each one of these governments also have their own agencies, departments, organisations, and bodies that investigate and judge criminal offences and ensure community accountability for people who commit those offences.

The legal system is complex, with laws varying across jurisdictions meaning that people with disability, particularly Aboriginal and Torres Strait Islander people with disability, can have vastly different experiences depending on what jurisdiction they are in and if they live in major cities, or in rural, remote or very remote communities.

It's important to note from the outset that the Australian legal system was not designed to recognise Aboriginal and Torres Strait Islander people, from its very beginning.¹ European colonisation has had and continues to have devastating effects on Aboriginal and Torres Strait Islander people and their communities.

This manifests in different ways, one of the most evident is the imprisonment rates of Aboriginal and Torres Strait Islander adults, children, and young people. Aboriginal and Torres Strait Islander people are imprisoned at the highest rates of any other people in the world.² Despite making up about 2% of the overall Australian population, Aboriginal and Torres Strait Islander people make up 28% of all prisoners in Australia.³ Aboriginal and Torres Strait Islander children and young people are imprisoned at 28 times the rate of non-Indigenous young people in Australia.⁴

¹ State Library of New South Wales, *The Law Handbook 15th Edition*, 2019, Redfern Legal Centre Publishing

² Mike Roettger, Krystal Lockwood, Susan Dennison, *indigenous People in Australia and New Zealand and the Intergenerational Effects of Incarceration*, 26 December 2019
<<https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/intergenerational-effects-of-incarceration-fa.pdf>>

³ Australian Bureau of Statistics, *4517.0 - Prisoners in Australia, 2019*, 2019 (Report)
<<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2019~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13>>

⁴ Australian Productivity Commission, *Report on Government Services 2020, Report 23 January 2020, 17.1*, 2020, (Report)

The complex system of Aboriginal and Torres Strait Islander law, including the complex cultural and personal obligations to land, country and community that Aboriginal and Torres Strait Islander people are required to follow, has not been given due recognition by the Australian legal system until relatively recently.⁵

Forced family separations, dispossession of land, systematic attempts to destroy culture and language, and disregarding Aboriginal and Torres Strait Islander customary law continue to influence how Aboriginal and Torres Strait Islander people experience the legal system today.⁶

Due to Australia's federation, the organisations, institutions, or departments involved in the administration of the criminal legal system are numerous and complex, they include but are not limited to:

- State and Commonwealth police services.
- The legal profession, including lawyers, prosecutors, legal assistance services, and defence lawyers.
- Courts and tribunals, including the judiciary and court staff.
- Community corrections.
- Diversionary programs.
- Victim support groups and support professionals like counsellors or advocates.
- Prisons and youth detention facilities.
- Post release throughcare programs for offenders.
- Social connection and reintegration programs for offenders.
- Public agencies and bodies like the Parliaments of the states and territories and the media.

This submission will answer **question six** of the Disability Royal Commission's Issues Paper only, focusing on the experiences of Aboriginal and Torres Strait Islander people with disability.

This submission will focus particularly on the societal and systemic barriers that lock Aboriginal and Torres Strait Islander people out of accessing justice. This submission will then consider the experiences of imprisoned Aboriginal and Torres Strait Islander people with disability.

⁵ For example, Native Title has been considered and recognised in a number of cases before the High Court of Australia, including: *Koowarta v Bjelke-Petersen* (1988) 92 FLR 104, *Mabo v Queensland (No 2)* [1992] HCA 23, (1992) 175 CLR 1, *Mabo v Queensland (No 1)* [1988] HCA 69, (1988) 166 CLR 186, *Wik Peoples v Queensland* (1996) 63 FCR 450; 134 ALR 637, *Akiba v State of Queensland (No 2)* [2010] FCA 643. *The Commonwealth v Akiba* [2012] FCAFC 25, (2012) 204 FCR 260. The relationship between First Nations people and the Federation has been considered and upheld in: *Love v Commonwealth of Australia*; *Thoms v Commonwealth of Australia* [2020] HCA 3.

⁶ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws (ALRC Report 31)*, 2010, (Report) <<https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/3-aboriginal-societies-the-experience-of-contact/impacts-of-settlement-on-aboriginal-people/>>

Summary of Recommendations

NATSILS makes the following recommendations:

- The Australian Government needs to build upon Indigenous led or controlled research to further understand the number and the needs of Aboriginal and Torres Strait Islander living with disability in Australia, including the numbers of people in rural, regional, remote and very remote communities. Aboriginal and Torres Strait Islander people with disability, including the Aboriginal Community Controlled Organisations (ACCOs) that advocate with them, must be meaningfully involved in all aspects of research design, execution, and data interpretation and data ownership.
- All Australian jurisdictions need to take a human rights focused approach to eliminating laws, policies, procedures, and guidelines that are discriminatory against Aboriginal and Torres Strait Islander people with disability. This approach must be intersectional, having regard to how disadvantage compounds when issues like race, ethnicity, sexuality, and gender intersect.
- All Australian jurisdictions need to harmonise their legislation with the Convention on the Rights of Persons with Disabilities as recommended by the United Nations Committee on the Rights of Persons with Disabilities.⁷
- The Australian Government needs to withdraw its interpretative declarations on articles 12, 17 and 18 on the Convention as recommended by the United Nations Committee on the Rights of Persons with Disabilities.⁸
- Across Australia, all Aboriginal and Torres Strait Islander people with disability need to have the right to participate in all developments and implementation of laws, policies, and procedures relating to the legal system that affect their lives in any way. This is particularly important for any legislative, administrative or policy development relating to the accessibility (including physical and procedural accessibility) of the legal system.
- All people with disability who are consulted in the development and implementation of laws, policies, and procedures relating to the legal system need to always be adequately remunerated for their time and their expertise.

⁷ United Nations Convention on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3

⁸ United Nations Convention on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3

- All jurisdictions need to ensure that Aboriginal and Torres Strait Islander people with disability are always be empowered to assert their human rights at all levels of the legal system, including developing joint decision-making structures that meaningfully include Aboriginal and Torres Strait Islanders with disability.
- All areas of the legal system and in all jurisdictions, service providers, and governments need to uphold the human rights of Aboriginal and Torres Strait Islander people with disabilities. This includes ensuring Aboriginal and Torres Strait Islander people with disabilities are informed of their rights in a timely manner and in a way that is meaningful and easy for them to understand, including how these rights will be upheld when accessing support or services and how breaches will be remedied.
- All Australian jurisdictions need to give Aboriginal and Torres Strait Islander people with disability all the resources and assistance they need to participate in the legal system and their own legal processes. This includes that they are provided with all the support, aids, services, and accessible and appropriate information always. This includes information that is not in English if it is required. This includes funding the co-location of disability support workers at ATSILS.
- All Australian jurisdictions need to provide Aboriginal and Torres Strait Islander people with disability all the modifications and adjustments they need to have effective and equitable access to justice. Including but not limited to: physical access modifications to buildings, adjustments in court proceedings, adjustments to the language the legal system uses so it can be understood by people with disability, adequately trained and available interpreters, and any other procedural and age-appropriate changes to the criminal legal system that someone with a disability might need so that they can meaningfully participate.
- The Commonwealth Government needs to commission independent studies on the conditions of imprisoned people with disability, particularly Aboriginal and Torres Strait Islander people with details on the numbers of imprisoned people, their ages, cultural backgrounds, types of disability and their support needs. Aboriginal and Torres Strait Islander people with disability, including the Aboriginal Community Controlled Organisations (**ACC**Os) that advocate with them, must be meaningfully involved in all aspects of research design, execution, and data interpretation.
- All Australian jurisdictions need to require that all people entering adult or children's prisons are screened for disability, particularly psychosocial or cognitive disabilities using tools like the Australian Guide to Diagnosis of FASD⁹, or similar.

⁹ Carol Bower, Elizabeth Elliott, *Report to the Australian Government Department of Health: "Australian Guide to the diagnosis of Foetal Alcohol Spectrum Disorder (FASD), 2016)*

- In line with our human rights obligations internationally and domestically, all Australian jurisdictions need to provide all of the support, services, aids, and adjustments to enable imprisoned people with disability to meaningfully participate in prison life, through education or employment, for example.
- All Australian jurisdictions need to review, with a view to repealing, laws, policies, procedures, practices, or customs that have the effective purpose or effect of denying or diminishing the recognition or equality of any person with disability before the law. This recommendation is in line with the concluding observations on the combined second and third periodic reports of Australia under the Convention on the Rights of Persons with Disabilities¹⁰
- All Australian jurisdictions need to ensure that all state, territory and federal legislation, including criminal laws and policies, are brought in compliance with the Convention to ensure people with disability are given due process guarantees. This recommendation is in line with the concluding observations on the combined second and third periodic reports of Australia under the Convention on the Rights of Persons with Disabilities¹¹
- All Australian jurisdictions need to develop training modules for people working in the legal system. Including courts, police, prison officers, lawyers, and legal support services, on working with people with disability and working under the Convention on the Rights of Persons with Disabilities. All training modules need to include strong components on cultural safety for Aboriginal and Torres Strait Islander people. Where possible, training modules need to be co-designed, co-delivered, and evaluated by and with meaningful involvement from people with disability.
- All Australian jurisdictions, with Commonwealth Government leadership, need to harmonise their laws that govern solitary confinement, in all its forms.
- All Australian jurisdictions need to ensure that people with disability are not subject to solitary confinement.
- All States and Territories need to implement the Optional Protocol on the Convention Against Torture by immediately establishing effective National Preventative Mechanisms that comply with the NPM Criteria (as specified by the Sub-committee on the prevention of torture) and include Aboriginal and Torres Strait Islander organisations, such as ATSILS and NATSILS, to ensure that the conditions and treatment of Aboriginal and Torres Strait Islander people with disability is adequately monitored.

¹⁰ United Nations Convention on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3

¹¹ United Nations Convention on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3

- All Australian governments, at all levels, need to properly resource and fund adequate, culturally appropriate, accessible and competent support services for people with disabilities. This includes fully resourcing ATSILS to provide holistic, responsive, and culturally safe care to Aboriginal and Torres Strait Islander people with disability.
- All Australian governments, led by the Commonwealth, need to immediately develop strategies that will provide for reasonable adjustments to legal procedures and processes, including court procedures and processes, for people with disability. This will ensure that people with disability can fully participate in the legal system. This includes providing adequate and culturally safe support to defendants with disability.
- All Australian jurisdictions need to amend their respective unfit to plead tests so that judges need to consider whether an accused person can participate in a trial if they were provided with adequate and culturally safe support, services, modifications, and assistance.
- All Australian jurisdictions that allow for people to be imprisoned after a finding of unfitness to plead or to stand trial, or by verdict of not guilty due to mental impairment need to impose effective limits on the total period of imprisonment that person can be subject to. All jurisdictions need to require regular reviews of the need for someone's imprisonment after a finding of unfitness to plead as well as mandating a rehabilitation plan developed by appropriately qualified professionals that progresses a person through less restrictive environments and eventually back to their communities..
- All state and territory governments need to immediately resource and fund the expansion or construction of suitable, adequate, and culturally safe facilities to accommodate people unfit to stand trial or found not guilty due to mental impairment.

Q6: What are the experiences of First Nations people with disability engaging with the legal system?

Disability in Australia

The 2018 summary of findings by the Australian Bureau of Statistics' (**ABS**) from the *Survey of Disability, Ageing and Carers (SDAC)* found that 4.4 million Australians reported disability, approximately 17% of all Australians.¹² The SDAC found that the prevalence of disability increased with age, with one in nine Australians aged 0-64 years reporting disability and one in two Australians reporting disability aged 65 years and over, with the prevalence being similar across genders.¹³

From the 4.4 million people reporting disability in Australia, 5.7% of them had a profound or severe disability and 23.2% of all people with disability reported a psychosocial disability, noting that this has increased since the last SDAC in 2015 where 21.5% reported a psychosocial disability.¹⁴

Aboriginal and Torres Strait Islander prevalence of disability

There is no focused, population-based survey that captures the prevalence, profile, and outcomes for Aboriginal and Torres Strait Islander people with disability.¹⁵ As noted above the ABS' SDAC provides one primary source of population data. The ABS' *National Aboriginal and Torres Strait Islander Social Survey (NATSISS)* provides another.

There are significant differences between the NATSISS and the SDAC in how they estimate how many Aboriginal and Torres Strait Islander people there are with disability. The NATSISS estimates that 45% of Aboriginal and Torres Strait Islander people report disability or long-term health conditions, whereas the 2015 SDAC finds that 23% of Aboriginal and Torres Strait Islander people report disability.¹⁶

Some of the factors that can explain this discrepancy include the way the questions are framed in the respective surveys, particularly the cultural and systemic factors that affect how Aboriginal

¹² Australian Bureau of Statistics, 4430.0 - *Disability, Ageing and Carers, Australia: Summary of Findings, 2018, 2019*

¹³ Australian Bureau of Statistics, 4430.0 - *Disability, Ageing and Carers, Australia: Summary of Findings, 2018, 2019*

¹⁴ Australian Bureau of Statistics, 4430.0 - *Disability, Ageing and Carers, Australia: Summary of Findings, 2018, 2019*

¹⁵ Scott Avery, *Culture is Inclusion: a narrative of Aboriginal and Torres Strait Islander people with disability*, First Peoples Disability Network (Australia), 2018

¹⁶ Scott Avery, *Culture is Inclusion: a narrative of Aboriginal and Torres Strait Islander people with disability*, First Peoples Disability Network (Australia), 2018

and Torres Strait Islander people answer the surveys. Another factor that might explain this discrepancy is involvement (or lack thereof) of Aboriginal and Torres Strait Islander people involved in the research process, including data collection.¹⁷

The self-assessed nature of the survey, and the SDAC does not investigate remote or closed communities, coupled with the potential lack of Aboriginal and Torres Strait Islander participation at all levels contribute to the limitations of these surveys. Aboriginal and Torres Strait Islander people may find Western frames and concepts of disability used in these surveys difficult to understand, which means that recording rates of self-reported disability is difficult.¹⁸

The FPDN has stated that '*in traditional language there was no comparable word for disability which suggests that disability may have been accepted as part of the human experience.*'¹⁹ This is because Aboriginal and Torres Strait Islander people have a different cultural understanding of disability and inclusion. Many of the diagnostic labels used to refer to disability do not readily translate into Indigenous languages or concepts which can become a barrier to accessing supports.²⁰

Knowing the prevalence of severe and profound disability in Aboriginal and Torres Strait Islander communities is critical to providing the care and support people may need to participate in their communities.²¹ Based on the latest general population estimates of the Aboriginal and Torres Strait Islander population, the best available estimate of Aboriginal and Torres Strait Islander people with disability is 60,144 using the prevalence rates in the NATSISS, and 57,019 using the rates from the SDAC.²²

The full findings of the 2018 SDAC will be made public by the ABS in due course. The latest data from the SDAC suggests that Aboriginal and Torres Strait Islander people had higher rates

¹⁷ Scott Avery, *Culture is Inclusion: a narrative of Aboriginal and Torres Strait Islander people with disability*, First Peoples Disability Network (Australia), 2018

¹⁸ Law Council of Australia, *The Justice Project Final Report - Part 1 Aboriginal and Torres Strait Islander People*, 2018 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf>>

¹⁹ First People's Disability Network, *Submission No 542 to the Productivity Commission, Inquiry into Disability and Care Support*, August 2010, 8, quoted in Law Council of Australia, *The Justice Project Final Report - Part 1 Aboriginal and Torres Strait Islander People*, 2018 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf>>

²⁰ See: Scott Avery, *Culture is Inclusion: a narrative of Aboriginal and Torres Strait Islander people with disability*, First Peoples Disability Network (Australia), 2018

²¹ Scott Avery, *Culture is Inclusion: a narrative of Aboriginal and Torres Strait Islander people with disability*, First Peoples Disability Network (Australia), 2018

²² Scott Avery, *Culture is Inclusion: a narrative of Aboriginal and Torres Strait Islander people with disability*, First Peoples Disability Network (Australia), 2018

of disability that non-Indigenous people across all age groups. Aboriginal and Torres Strait Islander people were 1.7 times more likely to report disability than non-Indigenous people.²³

Some forms of disability are reported to be more prevalent in Aboriginal and Torres Strait Islander children and young people than their non-Indigenous counterparts. For example, Aboriginal and Torres Strait Islander children and young people are 12 times more likely to have a hearing impairment than non-Indigenous children and young people.²⁴ The Australian Bureau of Statistics reports that 43% of Aboriginal and Torres Strait Islander people have hearing loss, this number is higher (59%) for people living in remote areas.²⁵ Aboriginal and Torres Strait Islander children are also more likely to be born with FASD²⁶ and almost a third of Aboriginal and Torres Strait Islander adults experienced high levels of psychological distress, more than twice the rate of non-Indigenous people.²⁷

Demographics of Aboriginal and Torres Strait Islander people with disability

The 2015 SDAC found that a majority (42.7%) of people with disability were likely to live in a major city and 30.4% reported living in outer regional and remote areas.²⁸ Noting again that the SDAC did not survey people living in very remote communities, discrete Aboriginal and Torres Strait Islander communities, or those in closed environments like prisons.

Education is an important factor in a person's participation in society and their ability to contribute to their community, as well as important in developing personal life skills. Almost half (46.4%) of Aboriginal and Torres Strait Islander respondents who are aged over 15 years had completed year 10 or below as their highest level of education. With 21.4% of respondents completing advanced diplomas, diplomas or Certificate III or Certificate IV as their highest level of education, an increase from the 21.4% of respondents to the 2012 SDAC.²⁹

²³ Australian Bureau of Statistics, *4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015*, <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4430.0Main%20Features802015?open=document&tabname=Summary&prodno=4430.0&issue=2015&num=&view=t>>

²⁴ Australian Institute of Health and Welfare, *Australia's Health 2018*, Australia's health series no. 16. AUS 221. C (Report) <<https://www.aihw.gov.au/getmedia/12c11184-0c0a-43ad-8386-975c42c38105/aihw-aus-221-chapter-6-4.pdf.aspx>>

²⁵ Australian Bureau of Statistics, *4715.0 - National Aboriginal and Torres Strait Islander Health Survey, 2018-19, 2020*

²⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *The Hidden Harm Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders* (2012)

²⁷ Australian Bureau of Statistics, *4704.0-The Health and Welfare of Australia's Indigenous and Torres Strait Islander People 2010* <<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/3C18155D35250456CA2574390029C0E5?OpenDocument>>

²⁸ Australian Bureau of Statistics, *4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015*, <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4430.0Main%20Features802015?open=document&tabname=Summary&prodno=4430.0&issue=2015&num=&view=t>>

²⁹ Australian Bureau of Statistics, *4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015, 2015*

The ability to derive an income from well-paid employment contributes to better health outcomes, social inclusion, community participation and, of course, economic independence. However, Aboriginal and Torres Strait Islander people of working age (15-64 years) with disability are less likely to be in employment than non-disabled Aboriginal and Torres Strait Islander people, 41.7% compared with 75.7% respectively.³⁰

In the 2015 SDAC, most Aboriginal and Torres Strait Islander people with disability (32.6%) were living in households that had the lowest 20% of all incomes, with only 4.8% living in households in the top 20% of all incomes.³¹

More good-quality research is needed to be able to capture a fuller picture of how many Aboriginal and Torres Strait Islander people have disability, including where and how they live, what supports they can access, and what supports they have been denied.

More importantly, more research is needed in those places that the SDAC and the NATSISS do not cover, including but not limited to: the number, needs, and outcomes, of Aboriginal and Torres Strait Islander people living in very remote communities and in closed institutions like prisons and youth detention facilities.

Recommendations

- The Australian Government needs to build upon Indigenous led or controlled research to further understand the number and the needs of Aboriginal and Torres Strait Islander living with disability in Australia, including the numbers of people in rural, regional, remote and very remote communities. Aboriginal and Torres Strait Islander people with disability, including the Aboriginal Community Controlled Organisations (**ACCOs**) that advocate with them, must be meaningfully involved in all aspects of research design, execution, and data interpretation and data ownership.

<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4430.0Main%20Features802015?open=document&tabname=Summary&prodno=4430.0&issue=2015&num=&view=t>

³⁰ Australian Bureau of Statistics, *4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015*, 2015,

<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4430.0Main%20Features802015?open=document&tabname=Summary&prodno=4430.0&issue=2015&num=&view=t>

³¹ Australian Bureau of Statistics, *4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015*, 2015,

<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4430.0Main%20Features802015?open=document&tabname=Summary&prodno=4430.0&issue=2015&num=&view=t>

Disability and disadvantage in the legal system

“...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.”³²

Types of legal problems people with disability experience

Due to ableism,³³ systematic racism and the ongoing impacts of colonisation, Aboriginal and Torres Strait Islander people with disability experience compounding disadvantage that manifests in higher rates of homelessness, mental and physical illness, unemployment or under-employment, abuse and exploitation.³⁴ In some cases, people with disability are subjected to unnecessary medical procedures that do not have a therapeutic benefit without their knowledge or consent.^{35 36}

People with disability are also at higher risk of experiencing legal problems. The *Legal Australia Wide (LAW)* survey, the first comprehensive quantitative assessment of legal needs in Australia found that people with disability are the most socially excluded group of all people experiencing disadvantage in Australia.³⁷

The LAW survey found that across Australia, people with disability are more likely than any other group to have a significantly higher prevalence of legal problems, including a higher prevalence of substantial legal problems and are more likely to have multiple problems at once.³⁸

³² Scott Avery, ‘The life trajectory for an Aboriginal and Torres Strait Islander person with disability’ in First Peoples Disability Justice Consortium, Submission No 39 to the Senate Community Affairs References Committee, *Indefinite Detention of People with Cognitive and Psychiatric Impairment*, April 2016, 17, quoted in Law Council of Australia, *The Justice Project Final Report - Part 1 Aboriginal and Torres Strait Islander People*, 2018 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28Part%201%29.pdf>>

³³ The discrimination in favour of able-bodied people.

³⁴ Law Council of Australia, *The Justice Project Final Report - Part 1 People with Disability*, August 2018: <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>

³⁵ Organisation Intersex International Australia, *Shadow Report submission to the Committee on the Rights of Persons with Disabilities on the situation of intersex people in Australia*, 2017

³⁶ Also, see: *The Darlington Statement, a joint statement by Australia and Aotearoa/New Zealand intersex community organisations and independent advocates*, 2017: <<http://darlington.org.au/statement/>>

³⁷ Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey Legal Need in Australia*, 2012, 77

³⁸ Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey Legal Need in Australia*, 2012, xv

The LAW survey also found that legal problems add up, so if a person has one legal problem they are likely to experience an additional legal problem which can lead to the accumulation of further, more severe legal problems, particularly if the problems are not addressed.³⁹

The types of legal problems that people with disability experience are similar to the legal problems that the broader community experience: consumer law issues, government/administrative, personal injury matters, social security, housing and tenancy, and criminal law issues.⁴⁰ Other types of legal problems that relate directly to people with disability include legal capacity and guardianship matters, National Disability Insurance Scheme related matters, substitute decision making matters, and discrimination matters.⁴¹

The intersection of race and disability

For Aboriginal and Torres Strait Islander people, the intersection of the racism they experience coupled with discrimination because of their disability⁴², and their often undiagnosed or underreported disabilities lead them to be trapped in the quicksand of the criminal legal system early, and more often, than their non-Indigenous counterparts.⁴³

For example, Aboriginal and Torres Strait Islander children exposed to alcohol in the womb can develop FASD, a spectrum of conditions that are unique to an individual but can be a combination of physical and neurobehavioral characteristics.⁴⁴ These include impairment in executive function, and adaptive function.⁴⁵

Because FASD can disrupt brain development and other organs, people with FASD may also have developmental delays, intellectual and memory impairments and present as aggressive or

³⁹ Law Council of Australia, *The Justice Project Final Report - Part 1 People with Disability*, August 2018: <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>

⁴⁰ Law Council of Australia, *The Justice Project Final Report - Part 1 People with Disability*, August 2018: <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>

⁴¹ Law Council of Australia, *The Justice Project Final Report - Part 1 People with Disability*, August 2018: <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>

⁴² Scott Avery, *Culture is Inclusion: a narrative of Aboriginal and Torres Strait Islander people with disability*, First Peoples Disability Network (Australia), 2018

⁴³ Law Council of Australia, *The Justice Project Final Report - Part 1 People with Disability*, August 2018: <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>

⁴⁴ The Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry on the value of a justice reinvestment approach to criminal justice in Australia*, (Report) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/c04>

⁴⁵ Hayley Passmore et. al., Foetal Alcohol Spectrum Disorder (FASD): Knowledge, attitudes, experiences and practices of the Western Australian youth custodial workforce, *International Journal of Law and Psychiatry*, Volume 59, July–August 2018, Pages 44-52

uncooperative.⁴⁶ This causes some people with FASD to skip or avoid school, interrupting their education, misuse alcohol and other drugs, be discriminated against because they are seen as 'aggressive', 'temperamental', or their slurred or unclear speech might be mistaken for drunkenness which makes them targets for over-policing.⁴⁷

The odds of escaping these adverse life outcomes are increased up to fourfold if a person receives a diagnosis of FASD at an early age, and if they are cared for in a good, stable environment that is supportive of their FASD.⁴⁸

However, due to a lack of enough screening for FASD, and appropriate supports provided, people are falling through the cracks.⁴⁹

Rosie Fulton, a 21-year-old Aboriginal woman with FASD and significant intellectual impairment, was arrested last year after stealing and crashing a car. Declared unfit to stand trial, Rosie was sent to Western Australia's Kalgoorlie Prison for lack of alternative accommodation.

She stayed in jail for 21 months with no trial or conviction. Only after her story broke, mounting pressure on the health ministers of Western Australia and the Northern Territory led to Rosie being transferred to supervised community accommodation close to her family in Alice Springs.

NATSILS member, NAAJA, reports that in their legal practice they have seen an increase in FASD diagnoses through specialist reports prepared for their clients by paediatricians and other health experts.⁵⁰ Screening for FASD, through the Paediatric Child Health and Education Services (PATCHES) for example can cost up to \$3,000 per child, while Medicare benefits can

⁴⁶ [Elizabeth Elliott](https://theconversation.com/young-offenders-must-be-screened-for-fetal-alcohol-spectrum-disorders-before-sentencing-48659), Young offenders must be screened for fetal alcohol spectrum disorders before sentencing, *The Conversation*, 2015: < <https://theconversation.com/young-offenders-must-be-screened-for-fetal-alcohol-spectrum-disorders-before-sentencing-48659>>

⁴⁷ Parliament of Australia, Senate Standing Committee on Finance and Public Administration's *Access to Legal Assistance Services Review*, 2015, (Report), < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Legalassistanceservices/Report/c05>

⁴⁸ Streissguth et.al, 'Risk factors for adverse life outcomes in fetal alcohol syndrome and fetal alcohol effects, *US National Library of Medicine National Institutes of Health*, 2004 Aug;25(4):228-38

⁴⁹ [Elizabeth Elliott](https://theconversation.com/young-offenders-must-be-screened-for-fetal-alcohol-spectrum-disorders-before-sentencing-48659), Young offenders must be screened for fetal alcohol spectrum disorders before sentencing, *The Conversation*, 2015: < <https://theconversation.com/young-offenders-must-be-screened-for-fetal-alcohol-spectrum-disorders-before-sentencing-48659>>

⁵⁰ NAAJA, *Submission of the North Australian Aboriginal Justice Agency to the Standing Committee on Community Affairs Inquiry Into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, 2016.

offset some of these costs, they remain prohibitively expensive, particularly for families living in remote communities and/or people on income support.⁵¹

Where these reports are needed in legal proceedings and the family is otherwise unable to pay for them, the cost of these reports falls on NAAJA. NAAJA is not resourced with enough public funds to provide these necessary reports.⁵²

The prevalence of FASD, and unfit to plead laws will be discussed in greater detail, below.

NAAJA reports that remoteness and rurality, particularly in the Northern Territory is a huge issue for Aboriginal and Torres Strait Islander people with disability. Aboriginal and Torres Strait Islander people living in remote and very remote communities do not have the same level of access to services, service providers, and physical supports like hearing aids or wheelchairs available to people living in urban areas.⁵³ In fact, there are few disability support and advocacy services in the Northern Territory, and none that are for Aboriginal people that are Aboriginal controlled or owned. Similarly, there are no diversionary programs that cater to the needs of Aboriginal and Torres Strait Islander people with disability.⁵⁴

Where funding grants are available for the provision of children and family services in the Northern Territory these tend to be small and given for short terms.⁵⁵ The Productivity Commission has found that the median grant payment for children and family services in the Northern Territory is \$225,000, with a quarter of all grants being less than \$100,000.⁵⁶ The Productivity Commission found that 43% of grants had terms of less than two years and 97% of them had terms of five years or less.⁵⁷

The heavy administrative burden of short-term funding grants means that service providers that are already under-resourced and stretched need to expend their time and resources on preparing numerous funding applications, instead of focusing on their critical service delivery. For example, NAAJA has had to apply for and compete for \$6.5 million in public funding from 11

⁵¹ PATCHES, *Medicare Benefits Information Sheet*, (Factsheet)

<<https://uploads.strikinglycdn.com/files/8c7c8255-a058-4472-8244-2f15f0713dce/PATCHES%20Medicare%20Benefits%20Information%20Sheet%202018.pdf>>

⁵² NAAJA, *Submission of the North Australian Aboriginal Justice Agency to the Standing Committee on Community Affairs Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, 2016

⁵³ NAAJA, *Submission of the North Australian Aboriginal Justice Agency to the Standing Committee on Community Affairs Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, 2016.

⁵⁴ Australian Productivity Commission, *Expenditure on Children in the Northern Territory*, 2020, (Report) <<https://www.pc.gov.au/inquiries/completed/nt-children/report/nt-children.pdf>>

⁵⁵ Australian Productivity Commission, *Expenditure on Children in the Northern Territory*, 2020, (Report) <<https://www.pc.gov.au/inquiries/completed/nt-children/report/nt-children.pdf>>

⁵⁶ Australian Productivity Commission, *Expenditure on Children in the Northern Territory*, 2020, (Report) <<https://www.pc.gov.au/inquiries/completed/nt-children/report/nt-children.pdf>>

⁵⁷ Australian Productivity Commission, *Expenditure on Children in the Northern Territory*, 2020, (Report) <<https://www.pc.gov.au/inquiries/completed/nt-children/report/nt-children.pdf>>

different grants rounds, all from the same department, and for the sole purpose of providing legal assistance services.⁵⁸

The Productivity Commission recommended that funding for Aboriginal and Torres Strait Islander communities should give preference to service providers that can deliver culturally appropriate services. The Commission also recommends that governments fully support and resource Aboriginal Community Controlled Organisations (**ACCOS**) and build their capacity over time to take over the delivery of services from non ACCOs.⁵⁹

The patchy, inconsistent funding for support services, rurality and remoteness contribute to causing the disadvantage that Aboriginal and Torres Strait Islander people experience in the criminal legal system in the Northern Territory. As one of NAAJA's lawyers stated in an interview in preparing this submission:

“the real issue in the NT is society’s failure to adapt to the needs of Aboriginal people with disability. At every step in the legal process that you can think of, people in the NT are disadvantaged, this is made worse if *you are* Aboriginal and have disability. This is just the truth.”

This lack of accessible support is not exclusive to the Northern Territory. In Victoria, NATSILS member, VALS reports similar experiences. VALS reports that a person on a community corrections order is only eligible for a Justice Plan⁶⁰, which provides them additional supports to comply with their community corrections order and reduce reoffending, if they have an intellectual disability that was diagnosed before they turned 18 years old.

Anyone with an acquired brain injury or cognitive disability diagnosed after they turned 18 does not qualify for this extra level of support despite them needing it because they are unable to understand and comply with their orders or conditions otherwise. This further entrenches disadvantage and has the effect of trapping people in the criminal legal system.⁶¹

⁵⁸ Australian Productivity Commission, *Expenditure on Children in the Northern Territory*, 2020, (Report) <<https://www.pc.gov.au/inquiries/completed/nt-children/report/nt-children.pdf>>

⁵⁹ Australian Productivity Commission, *Expenditure on Children in the Northern Territory*, 2020, (Report) <https://www.pc.gov.au/inquiries/completed/nt-children/report/nt-children.pdf>

⁶⁰ A Victorian Justice Plan is a special plan that is available when sentencing an offender with an intellectual disability it imposes conditions requiring offenders to comply with the plan of available services that are designed to reduce the likelihood of offending. See: Parliament of Victoria, *Law Reform Committee Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, 2013 (Report) <https://www.parliament.vic.gov.au/file_uploads/Law_Reform_Committee_-_Access_to_and_interaction_with_the_justice_system_by_people_with_an_intellectual_disability_and_their_families_and_carers_-_Final_report_76JG2vK1.pdf>

⁶¹ Victorian Aboriginal Legal Service, *Submission to Sentencing Act Reform Project*, April 2020, (Submission) <<https://vals.org.au/assets/2020/04/Sentencing-Act-Reform-Project-VALS-submission-2020.pdf>>

For example:⁶²

Aaron, a 32-year-old Aboriginal man from rural Victoria with a significant history of drug addiction and mental health issues and a mild intellectual disability which means he has problems with literacy issues. His disability impacts how easily he can navigate public transport and keep track of his appointments with service providers.

Aaron faced charges in the Victorian County Court for attempted armed robbery. For the purposes of sentencing, the Judge ordered that Aaron be assessed for a Justice Plan. However, because Aaron's intellectual disability was not diagnosed before he turned 18, he did not meet the definition of intellectual disability under the *Disability Act 2006* (Vic) so he did not qualify for a Justice Plan.

Aaron was sentenced to a period of imprisonment and a two-year Community Corrections Order. Although he does not qualify for a Justice Plan, the Victorian Department of Health and Human Services have advised VALS that he may be able to access the same services if he consents to do so.

If Aaron is not able to access this additional support, he is likely to miss relevant appointments. This is seen by Corrections Victoria as a reluctance to engage with his Order and would lead him to be in breach of the Order.

The consequences of breaching his Order will include resentencing on his original offending and a possible 3-month prison sentence for failure to comply with the order.

Additionally, a breach of his Order means that he is unlikely to be eligible for a further Order should he be reoffend in the future

⁶² Noted in: Victorian Aboriginal Legal Service, *Submission to Sentencing Act Reform Project*, April 2020, (Submission) < <https://vals.org.au/assets/2020/04/Sentencing-Act-Reform-Project-VALS-submission-2020.pdf>>, name has been changed.

Removing the barriers to justice

People with disability face numerous, broad and deep barriers to accessing justice for their legal problems either as complainants or defendants.⁶³

The Australian Human Rights Commission (**AHRC**) has identified five key barriers that, if removed, would greatly facilitate people with disability accessing justice and having a better experience of the legal system⁶⁴:

- The lack of community support, programs and assistance services to prevent violence and disadvantage towards people with disability that also address the range of interrelated health and social risk factors they may experience.
- The lack of support, adjustments or aids people with disability need to meaningfully access protection and support while beginning or defending criminal matters, or to participate in criminal legal processes.
- The prevalence of negative attitudes and assumptions about people with disabilities that result in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.
- Specialist support, accommodation and programs may not be provided to people with disabilities when they are considered unable to understand or respond to criminal charges made against them.
- Support, adjustments and aids may not be provided to imprisoned people with disabilities so that they can meet their basic human needs and allow them to participate in prison life meaningfully through education or employment, for example.

The barriers for people with disability outlined above are not meant to be an exhaustive list and they exist at every level of the legal system. From police, to accessing legal assistance services, to court proceedings, in prisons and post release programs, or the lack thereof.

The legal system does not belong to lawyers alone, it belongs to everyone, therefore we all must have an interest in making sure that all aspects and all levels of the legal system are accessible to everyone. A failure to do so is a grave injustice to everyone.

⁶³ Law Council of Australia, *The Justice Project Final Report - Part 1 People with Disability*, August 2018: <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>

⁶⁴ Australian Human Rights Commission, *Equal before the law: towards disability justice strategies*, February 2014, (Report)

A holistic, human rights focused approach is necessary

To improve the legal system for people with disability a human rights approach is fundamental.

A human rights approach centres people with disability not only as holders of inalienable human rights but also as true experts in the approaches and improvements to the legal system that are likely to work for them. As noted by the AHRC: *“far too often people with disabilities are consulted to identify the barriers that exist but are absent from any genuine process to identify and develop solutions, and only consulted in the final stage, if at all.”*⁶⁵

Providing a strong social safety net early ensures that people are kept from being trapped in the criminal legal system. The Royal Commission into the Protection and Detention of Children in the Northern Territory has found that providing early support and early intervention is critical to reducing over-imprisonment and child removals.⁶⁶ The Royal Commission found that in many cases the removal of children if the first time a family has experienced any ‘support’ from the system.⁶⁷

A major driving force for everyone is a desire for optimal health, better living conditions and a good quality of life for oneself and for one’s family and community.⁶⁸ Alleviating poverty, ensuring there are enough good jobs that pay a living wage, a good education, and strong social and family connections are important in keeping people away from the criminal legal system.⁶⁹

Aboriginal and Torres Strait Islander culture also has a critical role to play in preventing crime and promoting rehabilitation and healing.⁷⁰ Developing Aboriginal and Torres Strait Islander people’s sense of identity and their connection to culture is a core component of holistic health and acts as a protective factor from anti-social behaviour. It also allows children and young people to maintain and develop a healthy, strong relationship to their Indigeneity.⁷¹

⁶⁵ Australian Human Rights Commission, *Equal before the law: towards disability justice strategies*, February 2014, (Report)

⁶⁶ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, 2018 (Report), < <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-1.pdf>>

⁶⁷ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, 2018 (Report), < <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-1.pdf>>

⁶⁸ Australian Bureau of Statistics, 1370.0 - *Measures of Australia's Progress, 2010*, 2010 < [https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Society%20\(4\)](https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Society%20(4))>

⁶⁹ Australian Bureau of Statistics, 1370.0 - *Measures of Australia's Progress, 2010*, 2010 < [https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Society%20\(4\)](https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Society%20(4))>

⁷⁰ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, 2018 (Report), < <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-1.pdf>>

⁷¹ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, 2018 (Report), < <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-1.pdf>>

A submission to the Royal Commission noted that⁷²:

‘For us culture is about our family networks, our Elders, our ancestors. It’s about our relationships, our languages, our dance, our ceremonies, our heritage. Culture is about our spiritual connection to our lands, our waters. It is in the way we pass on stories and knowledge to our babies, our children; it is how our children embrace our knowledge to create their future.

Culture is how we greet each other and look for connection. It is about all the parts that bind us together. It is the similarities in our songlines.’

A holistic and human rights-based approach is also in line with Australia’s responsibilities as a signatory to the *Convention on the Rights of Persons with a Disability (the Convention)*, and its Optional Protocol. Australia has an obligation under international law and a moral obligation to its people to give effect to the General Principles of the Convention, which are⁷³:

1. Respect for the inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.
2. Non-discrimination.
3. Full and effective participation and inclusion in society.
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.
5. Equality of opportunity.
6. Accessibility.
7. Gender equality.
8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Noting that while Australia is a signatory to the Convention, Australia has issued interpretative declarations on articles 12, 17, and 18 of the Convention. An interpretative declaration is a unilateral statement by a signatory to the Convention that seeks to clarify how it chooses to interpret articles in the Convention.⁷⁴

Australia has made the following interpretative declarations to the Convention:

⁷² Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, 2018 (Report), < <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-1.pdf>>

⁷³ United Nations, *Convention on the Rights of Persons with Disabilities (CRPD)*, Article 3 – General principles

⁷⁴ Australian Human Rights Commission, *Equality, Capacity and Disability in Commonwealth Laws (DP 81)*, 2014 <<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/2-conceptual-landscape-the-context-for-reform/international-context-2/>>

- Australia recognises that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life [Art 12]. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.
- Australia recognises that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others [Art 17]. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.
- Australia recognises the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others [Art 18]. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.⁷⁵

These interpretative declarations may further compound the barriers in the legal system for people with disability as they allow Australia to legislate for substituted decision making on behalf of people with disability and their compulsory treatment, while also disadvantaging migrants and people seeking asylum.

It is critical to remember that people with disability did not cause the barriers in the legal system that lock them out of justice. These barriers are caused by mainstream society failing to change the physical and cultural environments of the legal system, as well as a societal failure to change attitudes and beliefs towards people with disability.⁷⁶ A human rights focused approach to eliminating discrimination is necessary to correct this.

For example, NATSILS has been working with the University of Melbourne, our ATSILS members around the country and the First Peoples Disability Network (**FPDN**) to demonstrate the importance of disability support workers being co-located in each of the ATSILS and in FPDN to provide holistic, wrap-around care to people with disability who have legal issues.

⁷⁵ International Law Commission, *Guide to Practice on Reservations to Treaties (2011) [1.1]–[1.3]. An Interpretative Declaration can be modified at any time: [2.4.8].*

⁷⁶ Phillip French, *Disabled Justice*, 3; Australian Law Reform Commission, *Pathways to Justice; Consultation*, 23/08/2017, quoted in Law Council of Australia, *The Justice Project Final Report - Part 1 People with Disability*, August 2018: <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>>

The support workers would assist young people and adults with cognitive and/or psychosocial disability, and people who are at risk of being found unfit to stand trial or of being unable to participate in legal proceedings against them.

Our proposal builds on existing, evidence-based programs for providing support to accused people with cognitive and psychiatric disability while also bridging a gap in providing legal assistance services to Aboriginal and Torres Strait Islander people.

This proposal brings together and builds upon the expertise the legal assistance sector has in providing legal help and the experience the disability sector has in advocating for and advancing the rights of people with disability to create a nationally consistent model of support for people with cognitive and psychosocial disability in contact with the legal system.

The support workers would also provide critical case work and assistance to Aboriginal and Torres Strait Islander people with disability as well as helping them with communicating their needs, counselling, mentoring, emotional support, and family support. The support workers would also organise referrals to other community-based services like health services, drug and alcohol support services, mental health services.

The support workers would be part of a broader care team that will assist lawyers and legal support staff to recognise the support needs of the person with disability while also assisting the person with disability in understanding the legal processes they are involved with.

The support workers would also act as a central point between the person with disability and other service providers so that they can jointly propose tailored support packages to courts on how best to support a person with disability during a trial and after.

Recommendations

- All Australian jurisdictions need to take a human rights focused approach to eliminating laws, policies, procedures, and guidelines that are discriminatory against Aboriginal and Torres Strait Islander people with disability. This approach must be intersectional, having regard to how disadvantage compounds when issues like race, ethnicity, sexuality, and gender intersect.
- All Australian jurisdictions need to harmonise their legislation with the Convention on the Rights of Persons with Disabilities as recommended by the United Nations Committee on the Rights of Persons with Disabilities.⁷⁷

⁷⁷ United Nations Convention on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3

- The Australian Government needs to withdraw its interpretative declarations on articles 12, 17 and 18 on the Convention as recommended by the United Nations Committee on the Rights of Persons with Disabilities.⁷⁸
- Across Australia, all Aboriginal and Torres Strait Islander people with disability need to have the right to participate in all developments and implementation of laws, policies, and procedures relating to the legal system that affect their lives in any way. This is particularly important for any legislative, administrative or policy development relating to the accessibility (including physical and procedural accessibility) of the legal system.
- All people with disability who are consulted in the development and implementation of laws, policies, and procedures relating to the legal system need to always be adequately remunerated for their time and their expertise.
- All jurisdictions need to ensure that Aboriginal and Torres Strait Islander people with disability are always be empowered to assert their human rights at all levels of the legal system, including developing joint decision-making structures that meaningfully include Aboriginal and Torres Strait Islanders with disability.
- All areas of the legal system and in all jurisdictions, service providers, and governments need to uphold the human rights of Aboriginal and Torres Strait Islander people with disabilities. This includes ensuring Aboriginal and Torres Strait Islander people with disabilities are informed of their rights in a timely manner and in a way that is meaningful and easy for them to understand, including how these rights will be upheld when accessing support or services and how breaches will be remedied.
- All Australian jurisdictions need to give Aboriginal and Torres Strait Islander people with disability all the resources and assistance they need to participate in the legal system and their own legal processes. This includes that they are provided with all the support, aids, services, and accessible and appropriate information always. This includes information that is not in English if it is required. This includes funding the co-location of disability support workers at ATSILS.
- All Australian jurisdictions need to provide Aboriginal and Torres Strait Islander people with disability all the modifications and adjustments they need to have effective and equitable access to justice. Including but not limited to: physical access modifications to buildings, adjustments in court proceedings, adjustments to the language the legal system uses so it can be understood by people with disability, adequately trained and available interpreters, and any other procedural and age-appropriate changes to the criminal legal system that someone with a disability might need so that they can meaningfully participate.

⁷⁸ United Nations Convention on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3

Imprisoned Aboriginal and Torres Strait Islander people with disability

Numbers of people

Aboriginal and Torres Strait Islander people are significantly overrepresented in the criminal legal system. Despite being approximately 2% of the Australian adult population, Aboriginal and Torres Strait Islander people make up 27% of the national adult population.⁷⁹

Aboriginal and Torres Strait Islander children and young people are imprisoned at 28 times the rate of non-Indigenous young people.⁸⁰ Young Aboriginal and Torres Strait Islander people made up more than half (56%) of all imprisoned young people in 2018.

Numerous studies have attempted to understand and quantify the number of Aboriginal and Torres Strait Islander people disability in the criminal legal system. However, because of the difficulties of accessing prisons, particularly for people on remand as well as a lack of routine screening for disabilities, particularly psychosocial and cognitive disability, it is currently not possible to quantify the number with certainty.⁸¹

The National Prisoner Health Data Collection (**NPHDC**) only included information on disability on imprisoned people in 2015.⁸² These data were collected using the Australian Institute of Health and Welfare's *Standardised Disability Flag*, a self-reported set of questions to identify disability and chronic health issues that mean a person requires assistance with daily living, self-care, mobility, communication and learning.⁸³ The NPHDC found that 30% of newly imprisoned people reported a long term health condition or disability that impacts their lives in some way.⁸⁴

Another study found that up to 12% of all imprisoned people in Australia had a psychosocial disability and up to 30% had a borderline psychosocial disability. Those with psychosocial disability are more likely to be male, Aboriginal or Torres Strait Islander, have less than 10 years

⁷⁹ Australian Law Reform Commission, *Pathways to Justice- Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)* (Report, 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/over-representation/>>

⁸⁰ Australian Productivity Commission, *Report on Government Services 2020*, Report 23 January 2020, 17.1

⁸¹ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report)

⁸² Australian Institute of Health and Welfare, *The Health of Australia's Prisoners*, 2015 (Report) <<https://www.aihw.gov.au/reports/prisoners/health-of-australias-prisoners-2015/contents/disability-status>>

⁸³ Australian Institute of Health and Welfare, *The Health of Australia's Prisoners*, 2015 (Report) <<https://www.aihw.gov.au/reports/prisoners/health-of-australias-prisoners-2015/contents/disability-status>>

⁸⁴ Australian Institute of Health and Welfare, *The Health of Australia's Prisoners*, 2015 (Report) <<https://www.aihw.gov.au/reports/prisoners/health-of-australias-prisoners-2015/contents/disability-status>>

of formal education, insecure housing immediately before being imprisoned, a history of juvenile detention, poor self-assessed health, depression and substance abuse.⁸⁵

Imprisoned people with acquired brain injuries

A study found that 33% of imprisoned women and 42% of imprisoned men in the state of Victoria had an acquired brain injury (**ABI**), compared to 2% of people with an ABI in the general population.⁸⁶ Those with an ABI that were trapped in the quicksand of the criminal legal system also experienced mental illness, homelessness, family violence and substance abuse, further compounding their disadvantage in the system.⁸⁷

Another study referenced by the Royal Australian and New Zealand College of Psychiatrists to the Commonwealth Parliament's Legal and Constitutional Affairs Committee's (**the Committee**) inquiry on the *Value of a justice reinvestment approach to criminal justice in Australia*, found that 9% of imprisoned people in Queensland had an intellectual disability.⁸⁸

Imprisoned people with FASD

Due to a lack of national data, the Committee's inquiry could not establish the number of imprisoned people with FASD in Australia. One study, the first to estimate the prevalence of FASD in imprisoned children and young people in Western Australia, found that 89% of participants (76% of whom were Aboriginal) had at least one domain of severe neurodevelopmental impairment and 36% of participants were diagnosed with FASD.⁸⁹

As noted above, someone with FASD has an increased probability of being involved in the criminal legal system because of the characteristics or behaviours displayed by someone with FASD. Like, a lack of impulse control, trouble identifying future consequences of actions and behaviours, difficulty planning, difficulty connecting cause and effect, difficulty empathising with others and taking responsibility for actions, tendencies to explosive or violent episodes and a vulnerability to social influence and peer pressure.⁹⁰ Understanding the prevalence of FASD is critical so that appropriate early support and assistance can be provided to people with FASD

⁸⁵ Australian Institute of Health and Welfare, *The Health of Australia's Prisoners*, 2015 (Report) <<https://www.aihw.gov.au/reports/prisoners/health-of-australias-prisoners-2015/contents/disability-status>>

⁸⁶ RMIT University Centre for Innovative Justice, Recognition, *Respect and Support, Enabling Justice for people with an Acquired Brain Injury full report – September 2017*, 2017 (Report) <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>

⁸⁷ RMIT University Centre for Innovative Justice, Recognition, *Respect and Support, Enabling Justice for people with an Acquired Brain Injury full report – September 2017*, 2017 (Report) <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>

⁸⁸ The Royal Australian and New Zealand College of Psychiatrists, Submission to the Value of a justice reinvestment approach to criminal justice in Australia Inquiry, Submission 19, 2014

⁸⁹ Carol Bower et. al., Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia. *BMJ Open*, 2018;8

⁹⁰ The Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry on the value of a justice reinvestment approach to criminal justice in Australia*, (Report) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/c04>

before they enter the criminal legal system and to ensure that if they are in contact with the system, that they can have good outcomes prior.

In the Western Australian study investigating FASD in imprisoned children and young people, 51% of the youth prison workforce was surveyed about their awareness of FASD. A majority (77%) had heard of FASD and understood it is relevant to the criminal legal system (74%). However, most of the people surveyed (53%) were unaware that FASD caused permanent brain damage and (57%) were unaware that it cannot be outgrown.⁹¹

This poor lack of disability awareness further compounds the disadvantage of imprisoned people and denies them the care they need which may contribute to re-offending behaviour, further trapping them in the quicksand of the criminal legal system.

Imprisoned people and hearing loss

In its report, the Committee found that it was not possible to establish how many imprisoned people in Australia are affected by hearing loss.⁹² With figures reported being as high as 90% of imprisoned Aboriginal and Torres Strait Islander people in the Northern Territory having significant hearing loss.⁹³ The Committee also reported that 11% of all Aboriginal and Torres Strait Islander people, report having chronic *otitis media*, a group of inflammatory diseases of the middle ear.⁹⁴

People with hearing loss are particularly disadvantaged in the criminal legal system as they often face more severe penalties if they are unable to communicate effectively with police or cannot understand their bail conditions or parole orders.⁹⁵

In conclusion, very little is known about the numbers of imprisoned people with a disability, including the types of disability they have and their outcomes during and after imprisonment.

⁹¹ Hayley Passmore et.al, Fetal Alcohol Spectrum Disorder (FASD): Knowledge, attitudes, experiences and practices of the Western Australian youth custodial workforce, *International Journal of Law and Psychiatry*

Volume 59, July–August 2018, Pages 44-52

⁹² The Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry on the value of a justice reinvestment approach to criminal justice in Australia*, (Report)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/footnotes#c04f60>

⁹³ The Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry on the value of a justice reinvestment approach to criminal justice in Australia*, (Report)

<<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/footnotes#c04f60>>

⁹⁴ The Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry on the value of a justice reinvestment approach to criminal justice in Australia*, (Report)

<<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/footnotes#c04f60>>

⁹⁵ The Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry on the value of a justice reinvestment approach to criminal justice in Australia*, (Report)

<<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/footnotes#c04f60>>

This makes it difficult to provide them with the care, support, accessibility, and aids to allow them to be included in daily activities virtually impossible.

Supporting people early keeps people out of the criminal legal system

As noted above, there is no nationally consistent data on the number of people with disability in prison, available data *does* suggest a significant over-representation, particularly for people with cognitive and psychosocial disability.⁹⁶ Some data suggests that up to 50% of imprisoned people may have a psychosocial or cognitive disability.⁹⁷

The Australian Medical Association (**AMA**) has noted that there is a link between health issues and the imprisonment of Aboriginal and Torres Strait Islander people.⁹⁸ The AMA went on to note that a diversionary, not a punitive, approach is required for Aboriginal and Torres Strait Islander people that focuses on the underlying, undiagnosed and unaddressed health needs, like disability, of Aboriginal and Torres Strait Islander people before the criminal legal system.⁹⁹

Again, it is important to note that being an Aboriginal and/or a Torres Strait Islander person with disability is not a disadvantage. It is the compounding and ongoing effects of colonisation, ableism, and the soft bigotry of low expectation, that forces Aboriginal and Torres Strait Islander people to be disadvantaged.¹⁰⁰

As mentioned earlier, Aboriginal and Torres Strait Islander people may have grown up with undetected disability which means they do not get the support they need to fully participate in their community. Even when they do get these supports, they may not be readily available in their communities, be difficult to access or culturally unsafe. For example, the National Disability Insurance Scheme (**NDIS**), a Commonwealth scheme that funds the costs associated with disability for people with permanent or significant disabilities¹⁰¹, is not properly accommodating the unique needs of Aboriginal and Torres Strait Islander people with severe disability.¹⁰²

⁹⁶ Disability Rights Now 2019, *Australian Civil Society Shadow Report to the United Nations Committee on the Rights of Persons with Disabilities: UN CRPD Review 2019, In response to the List of issues prior to the submission of the combined second and third periodic reports of Australia [CRPD/C/AUS/QPR/2-3]* (Report) <<https://www.afdo.org.au/wp-content/uploads/2019/08/CRPD-Shadow-Report-2019-English-PDF.pdf>>

⁹⁷ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

⁹⁸ Australian Medical Association, *2015 Indigenous Health Report Card—Treating the High Rates of Imprisonment of Aboriginal and Torres Strait Islander Peoples as Symptom of the Health Gap: An Integrated Approach to Both* (2015)

⁹⁹ Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, 2018, (Report)

¹⁰⁰ Cape York Partnership, *Noel Pearson: The Soft Bigotry Of Low Expectations*, 2018, <<https://capeyorkpartnership.org.au/speeches/noel-pearson-the-soft-bigotry-of-low-expectations/>>

¹⁰¹ *National Disability Insurance Scheme Act 2013* (Cth)

¹⁰² Scott Avery, *Indigenous people with disability have a double disadvantage and the NDIS can't handle that*, 2018, *The Conversation*, <<https://theconversation.com/indigenous-people-with-disability-have-a-double-disadvantage-and-the-ndis-cant-handle-that-102648>>

Dr Scott Avery, a proud Worimi Man, has undertaken research consisting of statistical data and personal testimonies of 47 Aboriginal and Torres Strait islander people with disability.^{103 104} His findings reveal that even when the NDIS is approving support packages to Aboriginal and Torres Strait Islander people, in some cases around \$50,000 per person, per year, these don't translate to expenditure as there are no disability services operating in that person's community.¹⁰⁵

Another participant in Dr Avery's research reported that some families need fundamental basics like food, shelter, and blankets because they are homeless and hungry. While the NDIS provides 'reasonable and necessary' support for people with disability, food and blankets do not meet these requirements.¹⁰⁶ An Aboriginal Elder stated that:

*"Swags and blankets are something that our families ask for all the time, help with making sure that they've got somewhere warm and safe to sleep, and that's a real practical thing [...] And now the NDIS is saying 'No, we don't buy swags and blankets for people. That's not reasonable and necessary'. But if you have got nowhere to sleep, of course blankets and swags are necessary."*¹⁰⁷

In another remote Aboriginal community, Dr Avery found that wheelchairs provided under the NDIS were designed for urban environments and not suitable for remote or very remote communities that don't have footpaths or where the heat would melt away their tyres.¹⁰⁸ These health inequalities drive disadvantage, like low incomes, limited education and homelessness that then contribute to the high rates of Aboriginal and Torres Strait Islander people's imprisonment.¹⁰⁹

¹⁰³ Scott Avery, *Culture is inclusion: a narrative of Aboriginal and Torres Strait Islander people with disability*, 2018, First Peoples Disability Network (Australia)

¹⁰⁴ Dr Avery's research did not investigate the experiences of Aboriginal and Torres Strait Islander people in closed institutions like adult and child prisons due to limited resources and the complexity in accessing closed environments.

¹⁰⁵ Scott Avery, *Indigenous people with disability have a double disadvantage and the NDIS can't handle that*, 2018, The Conversation, <<https://theconversation.com/indigenous-people-with-disability-have-a-double-disadvantage-and-the-ndis-cant-handle-that-102648>>

¹⁰⁶ Scott Avery, *Indigenous people with disability have a double disadvantage and the NDIS can't handle that*, 2018, The Conversation, <<https://theconversation.com/indigenous-people-with-disability-have-a-double-disadvantage-and-the-ndis-cant-handle-that-102648>>

¹⁰⁷ Scott Avery, *Indigenous people with disability have a double disadvantage and the NDIS can't handle that*, 2018, The Conversation, <<https://theconversation.com/indigenous-people-with-disability-have-a-double-disadvantage-and-the-ndis-cant-handle-that-102648>>

¹⁰⁸ Scott Avery, *Indigenous people with disability have a double disadvantage and the NDIS can't handle that*, 2018, The Conversation, <<https://theconversation.com/indigenous-people-with-disability-have-a-double-disadvantage-and-the-ndis-cant-handle-that-102648>>

¹⁰⁹ The Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry on the value of a justice reinvestment approach to criminal justice in Australia*, (Report) <<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/footnotes#c04f60>

Numerous inquiries have investigated the over imprisonment of Aboriginal and Torres Strait Islander people¹¹⁰. However there is still very little information about the experiences and outcomes of Aboriginal and Torres Strait Islander people in prison, particularly those with disability.¹¹¹ A recent report commissioned by international NGO, Human Rights Watch, investigated the experiences of imprisoned people in Western Australia, Queensland, New South Wales and Victoria. Human Rights Watch found that governments in those jurisdictions have failed to fulfil their international human rights obligations to imprisoned people, particularly those rights protected in the Convention.¹¹²

Prisons are inherently violent, traumatic places. More so for people with disability. Human Rights Watch found that imprisoned people with disability are viewed as easy targets and are at serious risk of violence and abuse, including bullying, harassment, and verbal, physical and sexual violence.¹¹³

Sexual violence in prisons against people with disability

Sexual violence is present in all prisons.¹¹⁴ It is a hidden but a constant reality and because stigma or fear of reprisal it is extremely difficult to document sexual violence in prisons. Human Rights Watch documented 32 cases of sexual violence, from rape to sexual assault, perpetrated by other prisoners or staff.¹¹⁵

Aboriginal and Torres Strait Islander women are particularly vulnerable to sexual violence in prison, many of whom had experienced family and sexual violence multiple times prior to their imprisonment.¹¹⁶

¹¹⁰ For example: the Australian Law Reform Commission's: *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)*, the *Royal Commission into Aboriginal Deaths in Custody*, the AHRC's *Bringing Them Home Report*, the *Royal Commission into the Detention and Protection of Children in the Northern Territory*, the Victorian Government's *Access to Justice Review*, the Law Council of Australia's *Justice Project*, among many others.

¹¹¹ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹¹² Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹¹³ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹¹⁴ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹¹⁵ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹¹⁶ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

This cycle of violence that Aboriginal and Torres Strait Islander women are subjected to is perpetuated further by staff in prisons, including through strip searches.¹¹⁷

One woman with disability told Human Rights Watch: *“The officers [use] intimidation tactics. Especially for us girls, that just reminds us of our domestic violence back home, it scares us. If you want to get through to us, they should be nice to us.”*¹¹⁸

In another case reported by NATSILS member, VALS¹¹⁹:

Steve is a middle-aged Aboriginal man who has an acquired brain injury. He was caught in the criminal legal system early in his life. When he was imprisoned as a young person, he was assaulted by prison guards, which led him to develop his injury. Steve has reported that, as an adult, he was placed in solitary confinement and was denied regular meals.

During this time Steve reports that he was fed sporadically, about once a day, and always at different times. Steve also reports being denied the medication he needs to treat his depression which has made him suicidal.

Steve reported to VALS that he has heard about similar things happening to other imprisoned Aboriginal people.

Physical violence in prison against people with disability

Human Rights Watch documented 41 cases of physical violence on imprisoned people with disability in the 14 prisons they visited around the country, noting that this figure is likely higher.¹²⁰

The physical violence is perpetrated by other imprisoned people and prison staff. Due to fear of reprisal and a lack of faith that they will be believed or treated seriously, imprisoned Aboriginal

¹¹⁷ In New South Wales alone, 22 percent of all recorded strip searches in custody are of Aboriginal or Torres Strait Islander people (financial years 2016-2017 to 2018-2019) with a majority of these searches not finding any contraband, see: *Rethinking Strip Searches by NSW Police*: Authors: Dr Michael Grewcock and Dr Vicki Sentas, <<https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web.pdf>>

¹¹⁸ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia, 2017* (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹¹⁹ The name has been changed.

¹²⁰ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia, 2017* (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

and Torres Strait Islander people do not report physical violence, particularly if it is perpetrated by prison staff.¹²¹

An imprisoned Aboriginal woman with psychosocial disability told Human Rights Watch: *“I’m an easy target because of mental illness... If we get caught fighting, they will tell the officer, ‘She hit first because the voices told her.’”*¹²²

Other types of violence in prison against people with disability

Imprisoned people with disability are repeatedly bullied, harassed, picked on and demeaned by other imprisoned people and prison staff. As noted above, the fear of reprisal, of not being believed and not being protected means these other types of violence also go unreported.¹²³

Some imprisoned people, particularly those with psychosocial or cognitive disability are often forced into solitary confinement for 22 hours a day, or more. Many are denied meeting their basic needs like toileting, showers, and exercise.¹²⁴ This is harmful for any person, but particularly harmful and traumatic for imprisoned children and young people.¹²⁵

Across Australia multiple terms are used to describe certain detention practices that amount to solitary confinement, including isolation, segregation, seclusion and separation¹²⁶. Because there is no single definition of solitary confinement across the country, it is difficult to know with certainty how many people are affected and how long they have been in solitary confinement.

For example, in the state of Western Australia, two young people were held in solitary confinement at the Banksia Hill Detention Centre for 10 days in 2017. An independent investigation by the Western Australian Office of Custodial Services found that their solitary confinement did not satisfy the protections that are given to imprisoned young people in *The Young Offenders Act 1994 (WA)* because the provisions in the Act did not protect young people

¹²¹ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹²² Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹²³ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹²⁴ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹²⁵ Human Rights Law Centre, *Explainer: Solitary Confinement*, 2018, <<https://www.hrlc.org.au/news/2018/2/7/explainer-solitary-confinement>>

¹²⁶ Australian Children’s Commissioners and Guardians, *Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices*, 2016 (Report)

in solitary confinement if they were in solitary confinement subject to a 'Personal Support Plan'¹²⁷.

In another instance a teenager was held in solitary confinement for 328 days at Banksia Hill in a cell no bigger than a car parking space. He claims to also have been subjected to degrading treatment, the refusal of basic hygiene, of having to 'earn' bedding materials and having to kneel for his food or being fed through a grill in the door.¹²⁸

Human Rights Watch reported on the case of an imprisoned woman with a psychosocial disability who was put in solitary confinement for 28 days:¹²⁹

She was allowed exercise after a week of being in solitary confinement, however she was placed in handcuffs that connected to her body by a belt, designed to restrict her movement.

During her exercise, prison officers mocked her and whistled at her like a dog and told her to crawl on her hands and knees. While she was in solitary confinement, she was not given access to a toilet but was forced to use cardboard containers to relieve herself.

The use of solitary confinement for imprisoned people with disability, particularly for those with psychosocial or cognitive disabilities is incredibly damaging and leads to the deterioration or the death of imprisoned people.

¹²⁷ Office of Custodial Services Western Australia, *Directed Review of Allegations made by Amnesty International Australia about ill-treatment at Banksia Hill Detention Centre*, (Report), June 2018

¹²⁸ Amnesty International Australia, *Teenager in Banksia Hill Asking to go to Adult Prison After 328 Days in Isolation*, (Web Page, 20 March 2018) <<https://www.amnesty.org.au/teenager-in-banksia-hill-asking-to-go-to-adult-prison-after-328-days-in-isolation/>>

¹²⁹ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

Human Rights Watch reported on an imprisoned person who was taunted and threatened by prison staff while he was in solitary confinement. He reported that:¹³⁰

“The staff terrorise people in the [solitary detention unit]. ‘Heel, dog, heel,’ they said to me. ...They opened the grate [in the cell door] and laughed at me. I swallowed batteries in front of them.

[One officer] spat in my face. He said, ‘I will punch your teeth all over the cell.’ Seven other officers were there. They said I was being disruptive. I cut my wrists open. They did nothing, just sat on the bed. [Later] they took me to hospital.”

And in another well publicised case:¹³¹

Proud Dungatti man, Mr David Dungay, died in Long Bay Jail in New South Wales in 2015. Mr Dungay was a type-2 diabetic and he had been diagnosed with schizophrenia.

He was restrained by prison guards and sedated with 10mg of midazolam after he refused to stop eating a packet of biscuits. Footage played in the coronial inquest shows he said “I can’t breathe” 12 times just before he died in the prison cell.

¹³⁰ Human Rights Watch, *I Needed Help, Instead I was Punished, Abuse and Neglect of Prisoners With Disabilities in Australia*, 2017 (Report) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>

¹³¹ Lorena Allam, *David Dungay inquest: guards who restrained Indigenous man before his death won't be disciplined*, The Guardian Australia, 22 November 2019 <<https://www.theguardian.com/australia-news/2019/nov/22/david-dungay-inquest-guards-who-restrained-indigenous-man-before-he-died-wont-be-disciplined>>

Unfit to plead tests and indefinite detention

In Australia, people with cognitive or psychosocial disability or impairment who are charged with a crime but are found not guilty or 'unfit to plea' because of disability or impairment may be imprisoned for an indefinite amount of time. Sometimes they are imprisoned for longer than they would have been had they been convicted.¹³² For example,^{133 134}

Proud Yamatji Man, Mr Marlon Noble, contracted meningitis as a newborn and as a result developed cognitive and intellectual disability. In 2001 he was charged with sexual offences against two young women, which if convicted he would have likely served two to three years in prison.

Mr Noble was found to be 'unfit to plead' under the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) by the District Court of Western Australia and therefore he was subject to indefinite 'civil' detention and was imprisoned for over 10 years in Greenough Prison in Geraldton, without a conviction.

A psychological assessment of Mr Noble was undertaken in 2010 which found that with appropriate assistance and enough modifications, Mr Noble was capable of standing trial. His legal counsel sought orders from the District Court of Western Australia to the effect that Mr Noble was fit to plead and that an indictment or a discontinuance be presented by the prosecution.

The Western Australian Director of Public prosecutions subsequently advised the Court that it did not intend to proceed with prosecution due to the substantial amount of time Mr Noble had already been imprisoned for and that there were limited prospects of securing a conviction.

The alleged victims subsequently also refuted the accusations against Mr Noble and even supported his release from indefinite imprisonment.

¹³² Australian Human Rights Commission, Submission to: *Indefinite Detention, Senate Inquiry*, March 2016

¹³³ Bernadette McSherry et.al., *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, 2017, University of Melbourne

¹³⁴ United Nations, Committee on the Rights of Persons with Disabilities, Convention on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012*, submitted by Marlon James Noble

Reporting on Mr Noble's case, the United Nations Committee on the Rights of Persons with Disabilities stated that:

*"Throughout [Marlon Noble]'s detention in prison, the whole judicial procedure focused on his mental capacity to stand trial without giving him any possibility to plead not guilty and to test the evidence against him. The Committee also notes that [Australia] did not provide [Mr Noble] with the support or accommodation he required to exercise his legal capacity and did not analyse which measures could be adopted to do so. As a result of the application of the Act, [Mr Noble's] right to a fair trial was instead fully suspended, depriving him of the protection and equal benefit of the law."*¹³⁵

The systemic and entrenched ableism in the criminal legal system has led to people with disability who are unfit to plead to be imprisoned indefinitely. This is in breach of the Convention on the Rights of Persons with Disabilities. The AHRC has previously noted that they are particularly concerned that¹³⁶:

- The lack of support and procedural accommodations provided in the criminal legal process, and the current tests for unfitness to stand trial, are contrary to the obligations to recognise the legal capacity of people with disability, and ensure they have effective access to justice.
- The special hearings people with cognitive and/or psychiatric impairment are subject to in some jurisdictions may be contrary to the right to a fair trial.
- The lack of appropriate and effective limits on the detention orders made against people found unfit to stand trial or not guilty by reason of mental impairment are contrary to the right not to be detained arbitrarily.
- The imprisonment of people with cognitive and/or psychiatric impairment who have not been convicted is inappropriate and contrary to their right to health, habitation and rehabilitation, and may expose them to cruel, inhuman or degrading treatment.

Providing support so people with disability can participate is critical

When an Aboriginal and Torres Strait Islander person with disability is trapped in the quicksand of the criminal legal system they are not provided with adequate support and adjustments, both physical and procedural, to enable them to effectively participate in the system or to answer the charges against them. If these supports and adjustments are provided, they often do not have secure, long term funding to allow them to continue.

For example, The *Unfit to Plead Project*, was a research project conducted by the Melbourne University of Melbourne, in collaboration with our members NAAJA and VALS.

¹³⁵ Bernadette McSherry et.al., *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, 2017, University of Melbourne

¹³⁶ Australian Human Rights Commission, *Submission to: Indefinite Detention*, Australian Senate Inquiry, March 2016

As part of the project, three Disability Support Workers were employed by NAAJA, VALS and the Intellectual Disability Rights Service.

The project was designed to assess the effectiveness of disability support workers being co-located in community legal assistance services. The project found that disability support workers provided a positive benefit to justice outcomes, both in terms of supporting people while keeping them out of the legal system while providing more just and accessible outcomes for the person with disability.

The funding for these support positions unfortunately expired. VALS and NAAJA attempted to maintain the support workers after the project ended in November 2016. However, neither organisation has enough public funding and resources to support the program beyond its original funding cycle. This is despite the program achieving excellent outcomes for people.

Recommendations

- The Commonwealth Government needs to commission independent studies on the conditions of imprisoned people with disability, particularly Aboriginal and Torres Strait Islander people with details on the numbers of imprisoned people, their ages, cultural backgrounds, types of disability and their support needs. Aboriginal and Torres Strait Islander people with disability, including the Aboriginal Community Controlled Organisations (**ACC**Os) that advocate with them, must be meaningfully involved in all aspects of research design, execution, and data interpretation.
- All Australian jurisdictions need to require that all people entering adult or children's prisons are screened for disability, particularly psychosocial or cognitive disabilities using tools like the Australian Guide to Diagnosis of FASD¹³⁷, or similar.
- In line with our human rights obligations internationally and domestically, all Australian jurisdictions need to provide all of the support, services, aids, and adjustments to enable imprisoned people with disability to meaningfully participate in prison life, through education or employment, for example.
- All Australian jurisdictions need to review, with a view to repealing, laws, policies, procedures, practices, or customs that have the effective purpose or effect of denying or diminishing the recognition or equality of any person with disability before the law. This recommendation is in line with the concluding observations on the combined second and third periodic reports of Australia under the Convention on the Rights of Persons with Disabilities¹³⁸

¹³⁷ Carol Bower, Elizabeth Elliott, *Report to the Australian Government Department of Health: "Australian Guide to the diagnosis of Foetal Alcohol Spectrum Disorder (FASD)", 2016*

¹³⁸ United Nations Convention on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3

- All Australian jurisdictions need to ensure that all state, territory and federal legislation, including criminal laws and policies, are brought in compliance with the Convention to ensure people with disability are given due process guarantees. This recommendation is in line with the concluding observations on the combined second and third periodic reports of Australia under the Convention on the Rights of Persons with Disabilities¹³⁹
- All Australian jurisdictions need to develop training modules for people working in the legal system. Including courts, police, prison officers, lawyers, and legal support services, on working with people with disability and working under the Convention on the Rights of Persons with Disabilities. All training modules need to include strong components on cultural safety for Aboriginal and Torres Strait Islander people. Where possible, training modules need to be co-designed, co-delivered, and evaluated by and with meaningful involvement from people with disability.
- All Australian jurisdictions, with Commonwealth Government leadership, need to harmonise their laws that govern solitary confinement, in all its forms.
- All Australian jurisdictions need to ensure that people with disability are not subject to solitary confinement.
- All States and Territories need to implement the Optional Protocol on the Convention Against Torture by immediately establishing effective National Preventative Mechanisms that comply with the NPM Criteria (as specified by the Sub-committee on the prevention of torture) and include Aboriginal and Torres Strait Islander organisations, such as ATSILS and NATSILS, to ensure that the conditions and treatment of Aboriginal and Torres Strait Islander people with disability is adequately monitored.
- All Australian governments, at all levels, need to properly resource and fund adequate, culturally appropriate, accessible and competent support services for people with disabilities. This includes fully resourcing ATSILS to provide holistic, responsive, and culturally safe care to Aboriginal and Torres Strait Islander people with disability.
- All Australian governments, led by the Commonwealth, need to immediately develop strategies that will provide for reasonable adjustments to legal procedures and processes, including court procedures and processes, for people with disability. This will ensure that people with disability can fully participate in the legal system. This includes providing adequate and culturally safe support to defendants with disability.

¹³⁹ United Nations Convention on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3

- All Australian jurisdictions need to amend their respective unfit to plead tests so that judges need to consider whether an accused person can participate in a trial if they were provided with adequate and culturally safe support, services, modifications, and assistance.
- All Australian jurisdictions that allow for people to be imprisoned after a finding of unfitness to plead or to stand trial, or by verdict of not guilty due to mental impairment need to impose effective limits on the total period of imprisonment that person can be subject to. All jurisdictions need to require regular reviews of the need for someone's imprisonment after a finding of unfitness to plead as well as mandating a rehabilitation plan developed by appropriately qualified professionals that progresses a person through less restrictive environments and eventually back to their communities..
- All state and territory governments need to immediately resource and fund the expansion or construction of suitable, adequate, and culturally safe facilities to accommodate people unfit to stand trial or found not guilty due to mental impairment.