

Aboriginal Disability Justice Campaign: Submission to the Expert Mechanism on the Rights of Indigenous People

The Aboriginal Disability Justice Campaign (ADJC) is a collection of individuals and a coalition of agencies who, in a voluntary capacity, and in addition to existing roles and responsibilities have come together in a common belief that Australia and the federation of states and territories can, and should, do better in response to people with cognitive and mental impairments who commit crimes and/or pose a risk of harm to others.

Access to Justice Issues for Indigenous Australians with a Cognitive Impairment

I am writing to you as the coordinator of the Aboriginal Disability Justice Campaign (ADJC) to express to the Expert mechanism on the Rights of Indigenous People our concern about the detention of people with a cognitive impairment (intellectual disability/ acquired brain injury) in prisons and psychiatric units across Australia as a result of mental impairment assessments resulting in unfit to plead findings. Three factors about this practice are particularly alarming:

1. Across all states and territories of Australia this practice disproportionately affects Indigenous Australians with a cognitive impairment
2. People who are detained under this regime are unconvicted and cannot be considered offenders
3. Detention often becomes indefinite
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The picture for Indigenous Australians with cognitive impairments such as intellectual disability (ID), acquired brain injury (ABI) and foetal alcohol syndrome disorder (FASD), who commit crimes or are considered a risk to others, is complex. Many Australian Indigenous communities do not have a word for disability and do not discriminate against their members with disabilities: nonetheless, behaviours often associated with impairment, may mean that individuals become marginalised and isolated, often being teased mercilessly by other children from community when growing up. The drinking culture in many Indigenous communities is also impacting heavily upon the numbers of children being born with foetal alcohol spectrum disorder (FASD) which often leads to intellectual disability, acquired brain injury or mental health issues. A recent survey in Fitzroy Crossing (a community in Western Australia) estimated that over half of the children on community were being born with FASD.

Often individuals with cognitive impairments, particularly Indigenous Australians, are not in contact with disability services until their contact with the criminal justice system, which usually occurs as teenagers or young adults. This often means that there has been no assessment and early intervention; they have often had limited access to education; they may be both victims and perpetrators of violence – particularly towards their family members who have often suffered harm at their hands whilst being the sole providers of support; and often exhibit entrenched and complex patterns of behaviour (resulting from a combination of impairment, cultural and historical responses to disability and a general lack of targeted behaviour intervention and support). Many Indigenous Australians with cognitive impairments also live outside of the major metropolitan cities where the provision of ongoing and consistent support and specialist intervention can be problematic.

The Aboriginal Disability Justice Campaign arose out of longstanding concerns held by volunteer guardians that unconvicted Indigenous Australians with cognitive impairments were being detained in maximum security prisons in the Northern Territory. This practice is still occurring, as you read this letter, with appalling consequences. Consequences for individuals in the Northern Territory include the use of mechanical and chemical restraint in the prison setting – one young Aboriginal man with a moderate intellectual disability has been belted into a restraint chair and injected with tranquilisers as

a response to behaviour that breached security procedures in a maximum security prison seventeen times since 2012. The same young man was chemically restrained seventy seven times in 2012.

Another area of significant concern is the weighting towards the protection of the community at the expense of the access to justice rights of individuals. Whilst there are individuals who represent a serious risk of harm to others and engage in repeated criminal acts of a serious nature requiring detention in a secure setting, the majority of people who constitute this group engage in low level criminality such as stealing or assaults or nuisance crimes. Often the severity of their sentences is disproportionate to the nature of the acts committed. A current example of this occurs in Western Australia under the Mentally Impaired Accused Review Board Act which dispenses with the justice process once a person who has committed a crime and is found mentally impaired, often resulting in detention. In 2010, under this Act, there were thirty three people detained of which 11 were Indigenous Australians with a cognitive impairment. One third of the thirty three detainees were detained in a community setting but only one of those people was an Indigenous Australian. Even in New South Wales, which has a comprehensive and sophisticated community based program responding to this issue, over half of the participants are Indigenous Australians with a cognitive impairment.

Whilst the Northern Territory provides the most extreme examples that the ADJC is concerned about the situation affecting largely Indigenous Australians with cognitive impairments in Queensland, Western Australia and South Australia is unacceptable. The following situation from Queensland recently provided to the ADJC, exemplifies some of our concerns:

George is an Indigenous Australian with an intellectual disability living in Queensland. George got into serious trouble with the law in 2001 for an indecent dealing with a person under the age of sixteen. George was charged and went to court where he was found unfit for trial and placed under the Mental Health Act on a limited community forensic order and allowed to come home. Four years later George received a letter stating that the charges had been dropped.*

A month after George received this letter he was charged with the rape of a child under the age of sixteen and detained in a rehabilitation unit to await his court case. George was again found unfit to plead. Two years later the charges were dropped and George was again allowed to return home.

During his time at home George and the family attended appointments organised through the mental health system. George and his family members were interviewed by mental health representatives who imposed a number of conditions including George not being allowed to have an advocate present at his interviews. Later it became clear that a report had been written by the mental health representatives and provided to the forensic system. George and his family were then informed that he was to be detained in a mental health unit. George and his family were never informed of the basis of this third period of detention and were refused access to his file.

This third period of detention, in which he was detained in a number of different mental health units, lasted for almost three years after which he was then transferred to a medium security gaol. After two more years George was transferred Forensic Disability Security Centre as a voluntary client. George has now been detained there for eighteen months and has made numerous requests to be transferred closer to his family, which have been refused. A lawyer hired by George's family has been refused access to George's file.

There are many disturbing elements to this story – the most disturbing is that the themes portrayed in this story are common across all states and territories of Australia for people with cognitive impairments, particularly for Indigenous Australians with cognitive impairments. Lack of culturally relevant and appropriate early intervention, lack of treatment that provides significant benefit, responses by the mental health system for people with an intellectual disability who may not meet the criteria for entry into that system, breach of natural justice processes, detention on the basis of risk,

lack of communication about the nature of the detention and equality before the law are all features with which the ADJC is familiar.

Another current example concerns an Indigenous woman from the Northern Territory of Australia

Roseanne, born with foetal alcohol related brain damage, is a twenty four year old Indigenous woman from the tri-state region of Central Australia. Her early childhood was a cycle of rescue from life-threatening neglect, being nursed back to health then returned to the same impoverished circumstances. At age 19, living alone and unsupported in Alice Springs, which she identifies as her home, she became a client of NT Health's Disability Services.

Her need for full time behavioural and disability support placing her beyond the available services, Roseanne survived living in the riverbeds and hills around Alice Springs. Her impaired cognitive functioning and lack of short-term memory left her vulnerable to years of sexual abuse in the town camps where a culture of drinking predominated. On occasions she would go missing later turning up in remote communities – it was commonly believed that during these incidents Roseanne was being shared by the men of the camps. In one instance an attempt was made to cut her Achilles tendon to keep her available. She now exhibits a range of behaviours associated with surviving her lived experience.

In 2012, following a critical incident when she suffered serious burns while alone on a hillside sniffing petrol, NT Health facilitated a number of respite placements on a remote Western Australian outstation where a family member was currently resident. On the last occasion, she was enticed away by young men to be prostituted in the larger centres. During this time Roseanne unlawfully used and damaged a motor vehicle, consistent with behaviours which had previously brought her into contact with the criminal justice system.

Roseanne was subsequently found unfit to be tried due to her mental impairment, and placed on a custodial order and under the jurisdiction of Western Australian Mentally Impaired Accused Review Board (MIARB). For the past 18 months, in the absence of any alternative, she has been kept under prison-based supervision in the Eastern Goldfield's Correctional Centre, Kalgoorlie.

In February 2009, Roseanne was designated by NT Health as a high needs client of the NT, but in the absence of any meaningful action for her support, her life changed very little – a hazardous existence of neglect and unrelenting sexual abuse. Guardian advocacy resulted in an option being put forward for access to the new Secure care Facility when it would be built (the facility did not come on line until 2013). This repeated claim was endorsed at executive level within Health and by the Minister. She was formally assessed as eligible for a placement, and this intent was conveyed to the WA MIAR Board and other authorities, who indicated their support and co-operation.

While Mr McKinlay did not regard the facility placement as ideal in Roseanne's case, he recognised it as the only option within the Central Australian Region able to offer structured behavioural and disability support and the prospect for her eventual transition to less restrictive care. It would offer the MIAR Board a viable alternative to her current prison-based support. Once it became certain an NT placement was satisfactory, MIARB could act to revoke the WA Custodial Order.

In late December 2013, the facility became fully operational. However, despite Roseanne having waited 4 years, including the last 18 months in prison for an assured placement, the Health Chief Executive stated she will not be provided a placement or any other support as she was no longer a resident of the Northern territory. This written advice was sent to Mr McKinlay, the MIARBoard, and Senator Sue Boyce (who has been following this case). Few reasons other than client incompatibility and her gender were provided to the guardian as reasons for this decision.

Mr McKinlay now advises that Roseanne faces indefinite imprisonment, with little prospect of any alternative to prison in the foreseeable future. He states that Roseanne, whose story is filled with neglect and disinterest represents a serious case of systemic failure and leaves the Northern Territory department vulnerable to claims of systemic abuse.

In 2013 the ADJC completed a national analysis of why mental impairment legislation is leading to detention in prisons and psychiatric units for people with an intellectual disability / acquired brain injury for the National Working Group of Justice CEO's titled, ***"No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment"*** (a copy of which is attached to this submission). Overall the ADJC report found:

- Detention as a result of mental impairment assessments / unfit to plead findings are resulting in unconvicted individuals being detained in prisons, sometimes maximum security prisons and sometimes indefinitely
- Limited data collection on people with an intellectual disability and acquired brain injury coming onto contact with the criminal justice system / how many Indigenous people with cognitive impairments are being detained
- Disproportionate impact of detention practices on Indigenous Australians with an intellectual disability / acquired brain injury
- Lack of collaboration between Justice and Disability
- Lack of programs to divert people with cognitive impairments from detention in prisons
- Lack of exit pathways for people with cognitive impairments out of prison
- Lack of specific disability accommodation and support programs for Indigenous Australians with an intellectual disability or acquired brain injury – particularly outside major metropolitan areas
- Lack of service options prioritising treatment of significant benefit
- Weighting of community protection over access to justice rights for individuals

The ADJC Report made thirty-nine recommendations some of which we outline here:

1. Indigenous people with cognitive impairment require a disability support person and access to either Legal Aid or an Aboriginal legal service lawyer during all police interviews, and at all stages of the court process
2. All relevant mental health and forensic legislation should comply with the Convention on the Rights of Persons with Disabilities
3. The Commonwealth should assist the states and territories to implement its agreement which it undertook with the United Nations Human Rights Council (response to first periodic review January 2011) that all states and territories would ensure compliance with the United Nations Standard Minimum Rules for the Treatment of Prisoners including addressing over-representation of Indigenous prisoners with a focus on diversion and reducing recidivism
4. The purpose of detention of Indigenous people with cognitive impairment under mental impairment legislation should be to provide support and intervention that *is of significant benefit* to the person with disability
5. A national standard for screening for cognitive impairment in prisons should be established
6. Commonwealth leadership is required to address the situation and needs of Indigenous Australians with cognitive impairment, for example in developing model legislation and service system standards

7. Provision for the needs of Indigenous Australians with a cognitive impairment who come into contact with the criminal justice system should be made in 'DisabilityCare Australia', the National Disability Strategy and the National Disability Agreement
8. Data on Indigenous people with cognitive impairment at court and in prison in each jurisdiction is extremely poor. Data on the prevalence of cognitive impairment, crime and recidivism amongst Indigenous Australians should be collected to inform the development and implementation of legislation, policy and practice. Distinctions in data collection must be made between mental illness and cognitive impairment as well as recognition of the co-occurrence of mental illness and cognitive impairment
9. It is vital that Indigenous understandings of 'disability' and 'impairment' inform all approaches to the development and implementation of policy and practice for Indigenous people with cognitive impairments in the criminal justice system

Finally, Concluding Observations on the initial report of Australia, adopted by the Committee for the Convention on the Rights of People with Disabilities at its tenth session (2–13 September 2013) have made specific reference to the imprisonment and indefinite detention of Indigenous Australians with a Cognitive Impairment.

Liberty and security of the person (art. 14)

31. The Committee is concerned that persons with disabilities, who are deemed unfit to stand trial due to an intellectual or psychosocial disability can be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that can significantly exceed the maximum period of custodial sentence for the offence. It is equally concerned that persons with disabilities are over-represented in both the prison and juvenile justice systems, in particular women, children and Aboriginal and Torres Strait Islander peoples with disability.

32. The Committee recommends that the State party, as a matter of urgency:

(a) Ends the unwarranted use of prisons for the management of un-convicted persons with disabilities, with a focus on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention;

(b) Establishes mandatory guidelines and practice to ensure that persons with disabilities in the criminal justice system are provided with appropriate supports and accommodation;

(c) Reviews its laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, and repeal provisions that authorize involuntary internment linked to an apparent or diagnosed disability.

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