No End in Sight

The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment

A Report Prepared by the Aboriginal\(^1\) Disability Justice Campaign

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for The National Justice Chief Executive Officers Working Group

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\(^1\)The term Aboriginal was used in the founding of the ADJC as the campaign was originally focused on Aboriginal Australians with cognitive impairment in the Northern Territory. It has become clear though that Indigenous Australians (both Aboriginal and Torres Strait Islanders) with cognitive impairment experience high levels of imprisonment. Throughout the report therefore Indigenous Australians will be used to refer to Aboriginal and/or Torres Strait Islander peoples.

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Acknowledgements

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.

The ADJC would first and foremost like to acknowledge Indigenous people with cognitive and mental impairments, some of whose stories are included in the report, who, often in isolation and experiencing marginalisation, have weathered the community’s patchy attempts to promote and protect their rights and quality of life. Likewise we acknowledge the Indigenous families and communities across Australia who, with few options and in many situations little support, have protected and cared for their members with cognitive and mental impairments often suffering violence at their hands.

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Council of Social Services.
Executive Summary

The incarceration of Indigenous Australians with Cognitive Impairment

Indigenous Australians with cognitive impairment are over-represented in criminal justice settings across Australia. This group (compared to the non-disabled population) is more likely to come to the attention of police, more likely to be charged, more likely to be remanded in custody, and more likely to be sentenced and imprisoned. They spend longer in custody than people without cognitive impairment, have far fewer opportunities in terms of program pathways when incarcerated and are less likely to be granted parole. They also have substantially fewer program and treatment options, including drug and alcohol support, both in prison, and the community when released, than their non-disabled and non-Indigenous counterparts.

In some Australian jurisdictions, Indigenous people with cognitive impairment are detained indefinitely. Unfortunately, other than Western Australia, there is no centralised data collection process at either the state and territory level or by the Commonwealth regarding how many people are being detained past the cessation of the supervision or custody order, and how many of that group are Indigenous Australians. Anecdotally, it seems that there are at least 100 people detained across Australia without conviction in prisons and psychiatric units under mental impairment legislation; that at least 50 people from this group would be identified as Aboriginal and Torres Strait islander and that at least 20 people detained are detained indefinitely with the majority of people detained indefinitely identifying as Aboriginal or Torres Strait Islander.

In Western Australia (WA) and the Northern Territory (NT) this detention occurs in prison (generally in maximum-security settings) and in Queensland and Tasmania this detention occurs in psychiatric hospitals. The indefinite detention of this population is of deep concern and requires urgent attention and action. To this end, the ADJC has lodged a complaint with the Australian Human Rights Commission positing that Australia is in breach of its human rights responsibilities particularly with regard to the International Covenant on Civil and Political Rights, the International Convention on the Rights of Persons with Disabilities, and the International Convention on the Elimination of All Forms of Racial Discrimination. The ADJC is also facilitating a constitutional challenge in the High Court of Australia to the practice in the NT of detaining people with a cognitive impairment in prisons who have not been convicted of a crime.

However the scope of this report extends beyond the significant, although relatively small numbers, of Indigenous Australians in indefinite detention. It examines the situation of the many more Indigenous individuals with cognitive impairment in the mainstream criminal justice system, including the large number detained for shorter periods in police custody and prisons, and those who are frequently not identified as having a disability.
Although in most jurisdictions in Australia there is a policy commitment to a person-centred approach in disability services, and a theoretical human rights framework informing policy, there is still substantial work needed to address Indigenous Australians with impairment in an equitable manner within these policies and frameworks; there is a need to turn these philosophical positions into human rights and person-centred practice.

Australia has a robust and independent judiciary and a largely transparent legal system. However, within what should be a fair and just criminal justice system, the endemic over-use of imprisonment sees a group of Indigenous Australians with impairments, who are often not able to comprehend criminal justice processes, cycle in and out of various forms of custody with devastating frequency. This population becomes more damaged and disconnected from their communities and support services as a result. This report provides evidence of these practices and their consequences, and explores potential ways to address this unconscionable state of affairs.

**The need for a holistic response**

It is increasingly recognised that imprisonment and indefinite detention are entirely inappropriate and inadequate responses to the offending behaviour or behaviours of concern of people with cognitive impairment. Since the ADJC commenced, a number of encouraging policy shifts have occurred to address the use of indefinite detention. These include the announcement in WA that 18 million dollars will be spent on building Disability Justice Centres; and in the NT the imminent opening of two secure units designed for people with cognitive impairment as an alternative to incarceration in prison, and the commitment to build a new facility for up to 30 people with cognitive and mental impairments by 2015.

Addressing the imprisonment of Indigenous Australians with cognitive impairment extends well beyond the construction of new units and requires building capacity within communities and organisations outside of the criminal justice system. This report argues that resources should be directed into supporting Indigenous people with cognitive impairment outside of institutional settings, which are considered an inadequate and inappropriate response to needs.

In addition to the WA and NT announcements, people with cognitive impairment in criminal justice settings have received political and policy attention recently in most other states and territories. In New South Wales (NSW), the Law Reform Commission is conducting a detailed inquiry into ‘People with mental and cognitive impairment in the criminal justice system’ and has just released the first of its reports on this reference. In Victoria, the Parliamentary Law Reform Committee has completed a similarly comprehensive investigation into ‘Access to, and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers’. In South Australia (SA) the Gaps In Secure Services Project is underway to discuss the needs in order to address gaps in service provision for people with cognitive disability deemed unfit to plead or not guilty under the Mental
Impairment Provisions of the Criminal Law Consolidation Act, 1935 (Part 8A, CLCA). Additionally, disability justice plans in development, and the NT, Tasmania and WA are all either in the process of or have recently completed reviews of their disability policies.

**Jurisdictional differences**
While there are some common threads across Australia in terms of the issues for Indigenous people with cognitive impairment enmeshed in the criminal justice system, there are vast differences between the states and territories in terms of how they go about meeting the needs of this population. These differences are themselves complex, but relate in part to the extent to which services have historically identified and worked with this group, in part to political will, in part to geography and in part to structural issues such as funding and capacity to resource programs. Demographic and geographic particularities influence the way in which services have been, and will be able in the future, to be delivered. For instance, the provision of services in metropolitan Sydney is significantly different to that in remote communities in the NT where the relatively small population, the enormous distances, and the long histories of fraught relationships Indigenous communities have with white government departments, make for a particularly challenging service provision environment.

**Indigenous Australians’ Concepts of Disability**
The concept of disability is a western one and views regarding its consequence in Indigenous culture vary. On the one hand many Indigenous organisations pointed out that Indigenous people often do not use, or recognise, the term ‘disability’. People in communities frequently recognise that someone is ‘different’, but this difference tends to be accommodated where possible. When a person’s difference is manageable their various impairments are viewed as simply one part of the person, but are often not considered central or core to one’s identity. On the other hand, other stakeholders were keen to point out that although disability is not an Indigenous concept, it is crucial that this lack of labelling, and the non-judgement by Indigenous communities is not romanticised. The absence of support due to the lack of identification and understanding of Indigenous needs and approaches to disability continues to be a serious cause for concern, especially in criminal justice settings. Indigenous stakeholders also noted, that in some communities, the presence of disability is viewed as simply one more disadvantage in a whole raft of disadvantages, and tends not to warrant particular attention. When compared with suicide rates, imprisonment rates, levels of violence experienced in communities and institutions, drug and alcohol misuse, and other issues reflecting the challenges faced by colonised and severely traumatised communities, disabilities were often considered to be fairly low on the scale of priorities.

**Pathways into the Community**
The imprisonment of this group of Indigenous Australians reflects a variety of negative systemic human service arrangements and failures, and highlights the
challenges in providing clinical and social support *in the community*. The obstacles to ensuring existing human service systems meet the multiple and complex support needs of these Indigenous Australians must be addressed. A strong theme in the interviews for this report was that the prison is too often the institution of default; the place people end up because there is nowhere else for them to go. But the ADJC argues that prisons are increasingly the institution of *choice* by government for the ‘management’ of complex needs populations.

When people *do* become involved in the criminal justice system, and when patterns of offending, imprisonment and re-offending become entrenched and cyclical, building pathways *out* of this system and into the community, while not the ideal site for intervention, is still a necessary one. Immediate identification of impairment, early intervention, and then ongoing quality support for Indigenous people with cognitive impairment who are at risk of contact with the criminal justice system must be undertaken. However it is not ‘too late’ by the time someone has been imprisoned. In fact there are programs effectively facilitating change and reducing re-offending even amongst the most complex populations. However, there are significant structural challenges in designing effective interventions for people who have already spent significant time in custodial settings.

**What works**

The criticism of service systems in this report in no way reflects on the commitment and skill of workers on the ground (including in disability, legal and prison settings), who make profound differences in the lives of certain individuals. What is emphasised is the systemic nature of the problem: Indigenous Australians in many jurisdictions are not provided with preventive, appropriate or accessible disability services as children, youth or adults, with the result that they are being managed via the criminal justice system in a quite deliberate manner.

There is however some cause for optimism regarding the possibilities for breaking the cycle of offending, imprisonment, release and re-offending. Hopeful stories of individual change, successful advocacy, and solid community capacity building exist. Skilled and dedicated workers across Australia operate within difficult institutional settings, and with communities that are often severely impoverished, and seriously fractured. There are models and programs offering a just, rights based and compassionate approach to those in this category of need. Examples of successful programs include:

1. The Community Justice Program which provides community based accommodation and treatment programs in New South Wales;
2. Support to Indigenous women on remand by Sisters Inside in Queensland;
3. ‘Bridging the Gap’ pilot in Queensland;
4. The existence of the Office of the Senior Practitioners in Victoria and New South Wales;
5. The inclusion in Victoria’s *Disability Act 2006* of compulsory treatment
6. Victoria’s Third Person Program - located in the Office of the Public Advocate;
7. The Aboriginal Prisoners and Offenders Service and the Exceptional Needs Unit in South Australia.

In the Northern Territory, the disability forensics team, based in Darwin, is providing pathways out of maximum-security prisons into the community. These programs are changing the need for indefinite detention of Indigenous people with a cognitive impairment, as well as the service landscape for this population. There is still however, clearly, a long way to go

Conclusion
There is a need for significant structural change in the way states and territories respond to Indigenous people with a cognitive impairment who are engaged in the criminal justice system due to offending behaviour or displaying behaviours of concern— it is urgent. Whilst state-based legislation governs this response, the Commonwealth needs to lead a national conversation on why mental impairment legislation leads to indefinite detention or serial incarceration and why it is having a disproportionate impact on Indigenous Australians. The Commonwealth also needs to address the issue of the over-representation of Indigenous people with cognitive impairment inside prisons, and examine the absence of options for this population in the community.

ADJC takes the position that prison is the wrong institution and an ethically unacceptable environment in which to respond to offending behaviour and behaviours of concern by Indigenous people with cognitive impairment. This group is frequently unable to connect the punitive experience of imprisonment to their offending behaviour, or they may have not been found guilty of committing an offence. As a result, they are unable to address offending behaviour while in prison, or to transpose or generalise that learning to a community setting.

There is no question that the protection of the community, and the management of risk must be a priority when designing both justice and disability system responses to offending by Indigenous people with cognitive impairment. A range of equitable and rights based approaches and services are required to meet the multiplicity and complexity of need amongst this group. These approaches should address the causes of offending behaviour or behaviours of concern to prevent enmeshment with the criminal justice system and provide people with genuine pathways out of the criminal justice system.
Indigenous Australians with cognitive impairment: Police and Courts

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. Adequate and skilled interpreting services for Indigenous people with cognitive impairment who are subject to the criminal justice system and who do not have English as their first language must be provided.

3. The same principles that people without a cognitive impairment enjoy when the criminal justice system is applied to them should be enjoyed by people with a cognitive impairment: low level crime should be heard at a magistrates court level; access to bail should be an option; and maximum sentences should not be applied in the first instance.

4. Mental illness and cognitive impairment should not be conflated in mental impairment legislation. There is the need for specific processes and service pathways for people with cognitive impairment.

5. Investigation of the provision of a specialist court or list for cognitive impairment should occur in jurisdictions where it does not exist.

6. Jurisdictions that have legislative but no actual options for community-based accommodation and support programs should redress this lack as a matter of urgency.

7. People with a cognitive impairment who are detained on orders should have those orders reviewed by the courts at least annually.

8. All relevant mental health and forensic legislation should comply with the Convention on the Rights of Persons with Disabilities.

Indigenous Australians with Cognitive Impairment: Imprisonment

9. 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.
10. Detention in a prison for a person with a cognitive impairment subject to a custody or supervision order should always be a last resort. A continuum of service options that include including intensive and supported community supervision should always be available as an alternative option to custody.

11. The principle of imprisonment as the last resort should apply to everyone including people with cognitive impairment and people considered unfit to plead under mental health legislation.

12. When Indigenous Australians with cognitive impairment are imprisoned, a plan should be developed that includes a service pathway out of the prison.

13. Step-down disability-specific units or placements in prison that provide appropriately targeted programs that are accessible for people with a cognitive impairment including time out of cells equivalent to, if not more than, that which is available to mainstream prisoners, must be provided to preclude indefinite detention and ensure appropriate transition to the community.

14. In-prison programs addressing offending behaviour including alcohol and other drug rehabilitation, should be designed for people with a cognitive impairment.

15. All prisoners with cognitive impairment detained under mental impairment legislation must be referred to the public advocate of that jurisdiction.

16. 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.

17. Detention of Indigenous people with cognitive impairment under mental impairment legislation must be accompanied by a justice plan that identifies pathways from high security to low security detention and from the most restrictive to the least restrictive arrangement.

18. Mandatory sentencing has significant negative impacts on people with a cognitive impairment and its application to this group should be repealed.

19. A national standard for screening for cognitive impairment in prisons should be established.

20. Any person with a cognitive impairment should only be made subject to an order for indefinite detention in a prison as a last resort and where there is no practicable less restrictive alternative available.
Detention in these situations should be consistent with disability focussed best practice for the management of people detained under mental impairment legislation and not breach Australia’s human rights obligations.

Orders allowing the indefinite prison-based detention of persons under a cognitive impairment should not be made where practicable less restrictive measures are available or could be made available.

Persons under a cognitive impairment should not be indefinitely detained in a prison except where no practicable alternative is available or can reasonably be made available.

Indigenous Australians with Cognitive Impairment: Transition to Community and Alternatives to Custody

21. Indigenous People with cognitive impairments who are at risk of harm to themself or others, and who have been in the custody of police or corrections should not be returned to their community without specialist support.

22. A range of ‘step-down’ accommodation options for people with cognitive impairment leaving prison should be available. The NSW Community Justice Program (CJP) provides a useful template. ADJC recommends the adaptation of such a community-based model of care and support in all jurisdictions.

23. Resources and funding should be provided to Indigenous organisations to ensure the building of skills and capacity to work with people with a cognitive impairment returning to community after completing criminal justice orders or sentences.

24. Resources to build the cultural competency of non-Indigenous agencies, organisations and communities who work with Indigenous people with a cognitive impairment who are in contact with the criminal justice system should be provided as a matter of urgency.

25. Accommodation and treatment options for Indigenous Australians with cognitive impairment in the criminal justice system should be made available in both custodial and non-custodial settings.

Indigenous Australians with cognitive impairment: Early Intervention and Community Capacity Building

26. Indigenous community health care clinics should be resourced to assess and respond to Indigenous children and adults, in particular to children with foetal alcohol spectrum disorder.
27. Schools where there are enrolments of Indigenous children with cognitive impairments should be linked with agencies to provide specialist behaviour interventions where those behaviours are assessed as behaviours of concern.

28. Assessment, early intervention, support and accommodation services for children and adults with foetal alcohol spectrum disorder should be funded and provided. There is a particular need for early intervention programs to be established and resourced in order that people with foetal alcohol spectrum disorder and cognitive impairments are not ‘managed’ in criminal justice settings.

29. More respite options for Indigenous Australians with a cognitive impairment should be provided to families and the members of the community supporting people them particularly targeting remote Indigenous communities.

30. Specialist Indigenous violence intervention programs should be linked with disability supports on Indigenous communities.

Indigenous Australians with a cognitive impairment: Additional principles and directions for change

31. 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.

32. Provision for the needs of Indigenous Australians with a cognitive impairment who come into contact with the criminal justice system should be made in the National Disability Insurance Scheme, the National Disability Strategy and the National Disability Agreement.

33. Justice, Corrections and Disability departments should work closely together to design program pathways for people with multiple needs who require support from many departments.

34. A review all Indigenous prisoners detained under mental health legislation is required to determine their cognitive disability status and their eligibility for the Disability Support Pension.

35. 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 impairments.
impairment as well as recognition of the co-occurrence of mental illness and cognitive impairment.

36. Government departments should provide greater transparency of, and accessibility to, their data collections on Indigenous people with cognitive impairment, including data on the numbers of people who participate in their programs. Where data is not collected, this should be stated.

37. The continued restriction on access to disability services based on strict IQ measures, age and other excluding criteria significantly disadvantages Indigenous Australians with ‘borderline intellectual disability’, acquired brain injury or other forms of cognitive impairment who do not meet the criteria for ‘intellectual disability.’ A needs based culturally relevant assessment should be the basis on which disability services and supports are provided.

38. 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.

39. The particular disadvantage faced by remote Indigenous communities should be recognised in any policy response to this issue.