No End in Sight

The imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment

A Report Prepared by the Aboriginal Disability Justice Campaign

Mindy Sotiri
with Patrick McGee and Eileen Baldry

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 is a collection of individuals and a coalition of agencies who, in a voluntary capacity, and on top of 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 are 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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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. 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 Aboriginal Disability Justice Campaign (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 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.

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) a disability justice plan is 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. 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. 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 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. Early 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. There are though 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 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. For example: community based accommodation and treatment programs in NSW; support to Indigenous women on remand by Sisters Inside in Queensland; the ‘Bridging the Gap’ pilot in Queensland; the existence of the Office of the Senior Practitioners in Victoria and NSW; the inclusion in Victoria’s Disability Act of compulsory treatment and Victoria’s Third Person Program - located in the Office of the Public Advocate; the
Aboriginal Prisoners and Offenders Service and the Exceptional Needs Unit in SA. In the NT, 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 engage in offending behaviour – 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 by Indigenous people with cognitive impairment. This group is frequently unable to connect the punitive experience of imprisonment to their offending behaviour. 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 to prevent enmeshment with the criminal justice system and provide people with genuine pathways out of the criminal justice system.
Recommendations

Legislation

1. No individual with a cognitive impairment should be detained indefinitely in prison. Each jurisdiction that currently allows for indefinite detention should legislate for the use of limiting terms for people with a cognitive impairment.

2. Indigenous people who are detained under mental impairment legislation\(^2\) are neither prisoners nor offenders. Legislation, policy and practice should reflect this.

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

4. Risk assessments should be conducted by an independent agent when they are used as the basis on which to determine if detention should be continued past the cessation of an order.

5. 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.

6. Appropriate placement should be ensured where legislation requires the least restrictive form of detention including for those for whom an application for mental or cognitive impairment has been made. For instance, if the legislation dictates that offenders should be supervised in the community, community options should be made available.

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

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

9. 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.

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

\(^2\) People with cognitive impairment are captured under mental impairment legislation although there are moves in some jurisdictions to differentiate the two as often the current arrangements mean people with cognitive impairment are ‘treated’ as if they have a mental impairment.
Policy

Prison
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. Step-down disability-specific units or placements in prison that provide programs and time out of cells equivalent to, if not more than, that available to mainstream prisoners, must be provided to preclude indefinite detention and appropriate transition to the community in the event that a person with impairment is unavoidably imprisoned.

13. All prisoners with cognitive impairment must be referred to the public advocate of that jurisdiction.

Post Release
14. 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.

Indigenous Specific Practice
15. 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.

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

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

18. 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.

19. 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.

20. 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.

21. 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.

22. Respite options should be provided to families and the members of the community supporting people with cognitive impairments on remote Indigenous communities.
23. Specialist Indigenous violence intervention programs should be linked with disability supports on Indigenous communities.

**Borderline intellectual disability, Acquired Brain Injury and Foetal Alcohol Spectrum Disorder**

24. 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 assessment should be the basis on which disability services and supports are provided.

25. Recognition, assessment, support and accommodation services for children and adults with foetal alcohol spectrum disorder should be provided. There is a particular need for early intervention programs to be established and resourced in order that this group is not ‘managed’ in criminal justice settings.

**Police and Courts**

26. Indigenous people with cognitive impairment require a disability support person and access to an Aboriginal legal service lawyer at all police interviews, and at all stages of the court process.

27. 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.

(See above for recommendation regarding specialist courts)

**Screening and Data Collection**

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

29. 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.

30. 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.

**Practice**

31. 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.

32. 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.

33. 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.

34. Jurisdictions that have legislative but no actual options for community-based accommodation and support for Indigenous Australians with cognitive impairment should redress this lack as a matter of urgency.

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

National
36. 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.

37. 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.

38. Justice, Corrections and Disability departments should work closely together to design program pathways for people with multiple needs who require support from many departments.
No End in Sight

The imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment

Full Report

Prepared by the Aboriginal Disability Justice Campaign

Mindy Sotiri, with Patrick McGee and Eileen Baldry
Background to the Report

The Aboriginal Disability Justice Campaign (ADJC) was formed in 2010 to respond to, and campaign against the indefinite detention of Indigenous people with cognitive impairment in Australian prisons. Appendix 4 of this report offers a detailed overview of the history of the campaign so far. While the plight of this population has for a long time been well known to legal advocates, public guardians, and families and communities with personal experience of this form of imprisonment, the problem of indefinite detention has only quite recently achieved a level of public interest and attention.

This report is based on analysis of interviews and surveys with over fifty organisations across Australia as well as a substantial literature review. Expert stakeholders in each state were identified by members of the Aboriginal Disability Justice Campaign. Interviews were conducted with staff in a range of government and non-government organisations, as well as with academics and independent legal and disability advocates.

“No End in Sight” offers both a snapshot of the current national situation as it relates to Indigenous people with cognitive impairment in the criminal justice system, and an overview of the ongoing critical social justice and human rights breaches for this population. Much of this is well established in the research literature.

It is intended that this report provide the starting point for urgent conversation and action. The need for the Commonwealth Government of Australia to take the lead in facilitating this process is noted throughout. It is also hoped that the National Justice Chief Executive Officers Working Group (for whom this report has been prepared) will use the research, analysis, case-studies and recommendations to formulate an action plan. Improving justice outcomes for all Indigenous people, including those with cognitive impairment in the criminal justice system, should be a national priority.

Although this report offers critique of existing services and legislative systems, it also highlights various approaches that are working well, and provides examples of best practice in this area. ADJC believes that the opportunities for the various jurisdictions to co-operate, share information, and learn from each other, are significant. As noted in the report, there is much good-will and energy amongst the many dedicated people working at the intersection of criminal justice and disabilities, but the systemic problems require a new approach. An organised, resourced, and dedicated whole of government intervention is necessary to effect substantial change. The ADJC trusts that this report will be able to assist this process.

Methodology

Interviews with stakeholders were conducted by ADJC volunteers and the author of this report. A full list of participating organisations can be found in Appendix A. The interviews used guiding questions to focus the discussion. All participants were asked to identify key issues with regard to Indigenous people with cognitive impairment in their jurisdiction, and participants were also asked to speak about their particular areas of expertise. Participants spoke as representatives of their organisations and as individuals. Participant anonymity has been respected as this gave people the freedom to speak with candour. Detailed notes from the interviews were taken. A grounded theoretical approach to the transcribed material was used for analysis. That is, the notes were read, and re-read, until a number of key themes arose. In addition to this process, a detailed literature review was undertaken. Similarly,
the notes taken from this review were subject to a grounded analysis and the themes that arose from this were combined with the themes emerging from the analysis of the interviews.

**Key Themes**
Three key themes emerged and are examined at depth:

1. The impact of existing legislation on Indigenous Australians with cognitive impairment.
2. The way in which Indigenous people with cognitive impairment interact at various points with the criminal justice system.
3. The way in which the service systems outside of the criminal justice system are able to meet the needs of this population.

In relation to these areas, there are four distinct groups that require attention.

1. Indigenous people with cognitive impairment who are subject to indefinite detention. This group includes forensic patients or prisoners who are subject to indefinite detention after having been found unfit to plead or not guilty as a consequence of mental impairment.
2. Indigenous people with cognitive impairment who are forensic patients or prisoners, but are *not* subject to indefinite detention. People in this group have usually also been found unfit to plead or not guilty as a consequence of mental impairment, but unlike the first group live in jurisdictions which do not allow indefinite detention.
3. Indigenous people with cognitive impairment who are identified as having a disability at court (or before) and are sentenced with their disability recognised but are considered ‘fit to plead’ by the courts.
4. Indigenous people with cognitive impairment who do not have their disability identified and are sentenced to mainstream imprisonment.

Within the broad category of cognitive impairment, there are four ‘types’ of impairment discussed in this report: intellectual disability, borderline intellectual disability, acquired brain injury and foetal alcohol spectrum disorder. Each of these conditions has distinct features, and some important support need differences. There is, in most jurisdictions in Australia, significant support, pathway, resources, options and identification inequities for people who have cognitive impairment other than intellectual disability. While distinctions between the needs of people with various types of cognitive impairment should continue to be made, similarities amongst the barriers to justice for all people who have cognitive impairment should be recognised.

**Key Themes Arising from the Interviews**
Key themes that have arisen from the interviews and literature review (and have provided the framework for this report) include:

**Barriers**
- The particular barriers to justice for Indigenous people with cognitive impairment who are indefinitely detained.
- The particular barriers to justice for Indigenous people with cognitive impairment in police stations.
- The particular barriers to justice for Indigenous people with cognitive impairment in courts.
- The particular barriers to justice for Indigenous people with cognitive impairment in prisons.
- The particular barriers to justice for Indigenous people with cognitive impairment in the community including the absence of community based services.
**Indigenous People and Disability**
- Indigenous concepts of disability
- The masking of disability and impairment in Indigenous populations
- The need for Indigenous community involvement, but the recognition that communities must be resourced in order for involvement to be meaningful
- The need for early intervention

**Service Systems**
- The conflation between mental illness and cognitive impairment in legislative frameworks
- The differing philosophical approaches of Justice and Disability Services
- The difficulty but necessity of establishing truly cooperative inter-departmental working relationships
- The barriers created by siloed service systems
- The difficulties involved in the collection of data about this population

**Special Needs Groups**
- The particular issues and obstacles for people with Acquired Brain Injury
- The particular issues and obstacles for people with Foetal Alcohol Spectrum Disorder
- The particular issues and obstacles for people living in remote areas
- The particular issues and obstacles for people who have borderline intellectual disability
Overview

Indefinite Detention, Human rights and Complex Needs
In some Australian jurisdictions, Indigenous people with cognitive impairment are detained indefinitely. In WA and the 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 requires urgent attention and action.

However the scope of this report extends beyond the significant, although relatively small, numbers of Indigenous people in this situation, and seeks to look more broadly at the issues for Indigenous people with cognitive impairment in the criminal justice system, including the significant numbers of people who are housed in mainstream prisons, and those who are frequently not identified as having a disability.

It is suggested that, although in most jurisdictions in Australia there is a strong policy commitment to person-centred approaches in disabilities, and a strong theoretical human rights framework under which this approach is positioned, there is still substantial work necessary to turn these philosophical positions into human-rights and person centred practice. It is also suggested that while we have a robust and independent judiciary, a largely transparent legal system and a relatively thoughtful (if over-used) system of imprisonment, we have the anomaly within these ostensibly fair systems of a group of people (who are often not even able to comprehend its processes) cycling in and out with devastating frequency, and becoming more damaged and disconnected from their communities as a consequence.

Although the impetus for the Aboriginal Disability Justice campaign came from concerns surrounding the issue of indefinite detention, in many jurisdictions people who have never had their cognitive impairment identified, or responded to by any service face serious barriers to justice. People in this group include the many Indigenous people who come before the courts regularly, and are frequently imprisoned, yet have never had any contact with, or support from disability services. The majority of people in this situation tend to have ‘complex needs’. Their disability or impairment exists alongside other forms of disadvantage and they have multiple support needs. Commonly their disability is masked as a consequence of these other factors. For instance, when disability co-exists alongside mental illness, drug and alcohol addictions, homelessness and a history of trauma, it can be very difficult to unpack the various causes of offending behaviour, and it can be very difficult for services to know how they should be responding. The majority of Indigenous people with cognitive impairment who are imprisoned have combinations of disadvantage. However many services have specific entry criteria. This population faces significant difficulties accessing services that address only one form of disadvantage. For instance, it is often the case that one person requires support with

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cognitive impairment, mental illness and drug and alcohol misuse yet services that work with all three issues are rare and in many parts of Australia non-existent. Similarly services that are able to address any combination of these problems in a way that is Indigenous specific, or even culturally aware are most uncommon.

The problem of service systems being ‘siloed’ and as a consequence, unable to work with people holistically constitutes a major theme in this report. In some jurisdictions there is recognition of the limitations of the siloed service approach at senior governmental levels. NSW, Victoria, Queensland and the Northern Territory all have inter-departmental working groups that are attempting to respond to the complexity of need of this population. This style of collaboration and cooperation is to be applauded. The, at times divergent philosophical approaches of disability and justice agencies has the potential to undermine reform, especially if the security, risk management and community protection focus of most justice agencies, is unable to be reconciled with the person centred, support needs focus of disability services. These key government departments require proactive attention to develop ways of working that benefit Indigenous Australians with disability at risk of criminal justice involvement.

Jurisdictional Differences

While there are some common threads across the various Australian jurisdictions in terms of the issues for Indigenous people with cognitive impairment who are involved in the criminal justice system, there are vast differences in how they best meet 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, and in part to the structural issues of funding and capacity to resource programs. It is also the case that the demographic and geographic particularities of each jurisdiction significantly influence the way in which services have been, and are able in the future, to be delivered. For instance, the provision of services in metropolitan Sydney is significantly different to the provision of services in remote communities in the Northern Territory. In the Northern Territory for example, the relatively small population, combined with the enormous distances necessary to travel to provide support, and the complexities of working within communities who have long histories of fraught relationships with white government departments, make for a particularly challenging service provision environment.

It is also the case or course, that history cannot be escaped. The current political, legislative and policy environments in each jurisdiction require that current governments and policy makers either build on – or change – inherited disability and justice frameworks. In jurisdictions like NSW and Victoria, there are relatively solid foundations on which current change and growth is occurring. Victoria has been providing specialist services to people with cognitive impairment in prison for over two decades and as a consequence has developed a strong level of familiarity and expertise with the issues. NSW has also a relatively lengthy history of identifying the particular needs of this group (in prison, screening of some form for disability has occurred for around 11 years) and a comprehensive system of post-release accommodation has been operational for over five years. Other jurisdictions, for a broad range of social, political and environmental factors (such as those outlined above) have only much more recently started developing targeted programs for this population.

Potential for Improvement/Cause for Optimism

It should also be noted from the outset, that although the challenges involved in effecting change in this area are considerable, there is much cause for optimism in terms of the possibilities for breaking the cycle of offending, imprisonment, release and re-offending. During the course of the interviews for this report it became evident that in spite of the enormity of the structural obstacles interfering with service provision in some jurisdictions, there exists a multitude of hopeful stories of individual
change, successful advocacy, and solid community capacity building. It is also evident there are across Australia, many skilled and dedicated workers operating within incredibly difficult institutional settings, and with communities that are often severely impoverished, and seriously fractured. The criticism of various systems in this report in no way reflects on the commitment and skill of the majority of workers on the ground (including in disability, legal and prison settings) who are frequently making profound differences in the lives of a population who all too often fall through the gaps of mainstream service provision.
What is the size of the problem?

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

From the outset it is important to recognise there are limitations in terms of concrete data collection in this area. Although it is possible to obtain figures regarding the numbers of forensic patients in each jurisdiction (although not all states and territories keep breakdowns of people on the basis of Aboriginality) this in no way represents the numbers of Indigenous people with cognitive impairment in the criminal justice system. The fact that disability is often unrecognised clearly impacts on the collection of accurate data. What is clear however, is that people with cognitive impairment who have also been to prison are more likely (than other ex-prisoners) to have been in out of home care, more likely to have a mental illness, more likely to have struggled with a substance abuse problem, more likely to have come from a disadvantaged community and more likely to be an Indigenous person. In the NSW context it has been found that this population are not more likely to have previously been a client of ADHC.

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8 Martin, W (2011) Mental Health and the Judicial System, A paper presented as part of the ARAFMI break-through series, August 2011, WA (pp11-15)

9 Victoria Legal Aid (2011) Access to and interaction with the Justice System for People with an intellectual disability and their families and carers; Submission to the Victorian Parliamentary Law Reform Committee, 2011 (p21); Victorian Aboriginal Legal Service Co-op Ltd (VALS) Access to Justice for People with a Cognitive Impairment, Submission to the Victorian Parliamentary Law Reform Committee, 2011 (p40)

10 Rushworth, N with Brain Injury Australia (2011) People with ABI and the Criminal Justice System, A policy paper for Brain Injury Australia (pp25-28)

The over-representation of Indigenous people in prison across Australia has now been the subject of numerous government inquiries and reports. This over-representation both reflects, and reproduces a raft of Indigenous disadvantage. Across Australia, 27% of the prisoner population is Indigenous, compared to 2% of the general population. Of the 7,873 Indigenous people imprisoned across Australia, 73% of them are imprisoned in Western Australia, Queensland and New South Wales. Western Australia has the highest rate per 100,000 of imprisonment (3,991 per 100,000) followed by the Northern Territory (2,645 per 100,000). The average rate per 100,000 in Australia is 167.3 per 100,000. In some states, particular populations are over-represented. In NSW for instance, Indigenous people make up around 2% of the population, yet constitute over 23% of the adult prisoner population and in the Juvenile Justice System, 53% of young people in custody are Indigenous.

It is also the case that people with cognitive impairment are over-represented in the prisoner population. Again, there are varying estimates depending on a range of factors including the style of data collection in the prisons. Estimates of intellectual disability in the general population tend to be between 1-3%. In the criminal justice system, estimates vary considerably. In NSW, research suggests that people with intellectual disability constitute between 7.65% and 20% of the prisoner population. In the most recent NSW Inmate Health Survey, it was found that 52% of male prisoners had sustained a head injury resulting in loss of consciousness, suggesting a higher rate of brain injury amongst that population also.

It is also the case that cognitive impairment is more common in Indigenous populations. The most recent ABS data indicates the 8% of Indigenous people have an intellectual disability. This data does not, of course, reflect the numbers of Indigenous people with other forms of cognitive impairment. The higher rates of impairment in Indigenous populations are attributable to the various forms of disadvantage and poverty that increase the likelihood of cognitive impairment. For instance drug and alcohol misuse clearly has an impact on the incidence of Foetal Alcohol Spectrum Disorder. Volatile substance and alcohol use have an impact on levels of brain injury, and exposure to both community and institutional violence has an impact on the levels of brain injury in this population.

Given the over-representation of Indigenous people in the criminal justice system, the over-representation of people with cognitive impairment in the criminal justice system, and the over-representation of people with cognitive impairment in Indigenous communities, it is not surprising that Indigenous people with cognitive impairment are also over-represented in Australian prisons. In NSW for instance, it was identified in the interviews for this research that 112 out of the 285 people identified as having a cognitive disability in prison, are Indigenous. In terms of indefinite detention, although this practice is clearly not just limited to Indigenous people, there is no doubt that Indigenous people are massively over-represented.

In the Northern Territory, all of the 9 people currently on supervision orders are Indigenous.

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17 Indig et al (2009) 2009 NSW Inmate Health Survey, Justice Health, NSW (p63)
In Western Australia 11 out of the 33 people under the Mental Impaired Accused Review Board are Indigenous.\textsuperscript{19} In Queensland, it was estimated during research for this report that there were over 100 people with cognitive impairment currently detained indefinitely in psychiatric hospitals. However there is no data available about this specific population (in terms of Aboriginality). Similarly, there was very little data available in the ACT, South Australia and Tasmania about this population.

**Pathways to Prison, Pathways to the Community**

The imprisonment of Indigenous people with complex needs and cognitive impairment (both indefinitely, and as sentenced prisoners) often reflects a variety of failures in terms of human service provision. It also highlights the challenges involved in providing ongoing solid clinical and social support \textit{in the community} to this population. In conjunction with investigating the manner in which this group interacts with the criminal justice system, it is also necessary to investigate the obstacles involved in ensuring existing human service systems meet the multiple and complex support needs of this population. A strong theme in the interviews for this report was that prisons are too often institutions of default – the place people end up because there is nowhere else for them to go. In some jurisdictions, the absence of services in the community is so acute that prison is considered by many to in fact be \textit{the} place to go to receive medical care, stabilise mental illness, or detox from alcohol and drugs, and receive other forms of support. There is no doubt that some prisons perform all of these functions, and there is also no doubt that this support is essential. However it is argued in this report, that when support is offered \textit{only} in the context of prison environments, this ultimately operates to cement the disconnection and lack of participation of vulnerable groups in the broader community. It consigns them an identity which is necessarily reliant on institutionalisation, and as a consequence is fundamentally disempowering. Further, prisons are usually unable to provide programs where treatment of significant benefit is the focus of the detention.

Of course when people \textit{do} become involved in the criminal justice system, and when patterns of offending, imprisonment and re-offending become entrenched and cyclical, building pathways \textit{out of} this system and into the community – while not the ideal site for intervention – is still a necessary one. There clearly \textit{does} need to be some serious improvements in early identification of impairment, early intervention, and then ongoing quality support for Indigenous people with cognitive disability who are at risk of contact with the criminal justice system. However it is not the view of this report that it is ‘too late’ by the time someone has been imprisoned (in fact there are numerous programs operating in Australia that would attest optimistically to the range of programs that \textit{are} able to effectively facilitate change and reduce re-offending even amongst the most complex populations). Yet there are certainly significant structural challenges in designing effective interventions for people who have already spent significant time in custodial settings.

Service responses are complicated not just because of entrenched and habitual offending behaviour, but by the vastly different ideologies and ambitions of the government departments charged with responding to this group. While Justice agencies are necessarily concerned with community protection and the management of risk, disability and welfare services tend to be committed to a framework which prioritises rights and person-centred approaches to addressing offending behaviour. Yet the complexity of the needs of this population requires a truly cooperative inter-departmental approach.

\textsuperscript{19}Information provided in e-mail correspondence between ADJC and the Mentally Impaired Accused Review Board, WA (2012)
Defining the Terms

What is Cognitive Impairment?
Within the broad category of cognitive impairment, there are four ‘types’ of impairment discussed in this report; intellectual disability, borderline intellectual disability, acquired brain injury and foetal alcohol spectrum disorder. Each of these conditions has distinct features, and some important differences in terms of support needs.

Foetal Alcohol Spectrum Disorder
Foetal Alcohol Spectrum Disorder is an umbrella term covering a range of different disorders which occur as a consequence of foetal exposure to alcohol.\(^{20}\)

Acquired Brain Injury
Acquired Brain Injury (ABI) is any kind of damage to the brain that occurs after birth. Traumatic Brain Injury is the term that tends to be used for brain injuries that occur through accidents, falls, or assaults. Other kinds of acquired brain injury are acquired through things like; strokes, loss of oxygen to the brain, degenerative neurological diseases, and (significantly in the context of this project) drug and alcohol abuse.\(^{21}\)

Intellectual disability
Intellectual disability describes an impairment that is either present from birth, or acquired during the childhood developmental period before the age of 18 (sometimes as a result of childhood diseases). There are many different reasons for intellectual disability occurring (genetic conditions, problems during birth and pregnancy) but in many cases the reason for the condition is unclear. People with an intellectual disability have an IQ of 70 or below (the average IQ is 100) and have deficits in two or more areas of adaptive behaviour (this refers to everyday skills like personal hygiene and communication).\(^{22}\)

Borderline Intellectual Disability
In this report, ‘borderline intellectual disability’ is treated as a separate category. People with borderline intellectual disability also have problems with adaptive functioning, but have an IQ of between 70 and 80 and so are not eligible to participate in many disability support programs. As a consequence, the support needs of this group tend to go unmet. Details of the features of each of these conditions, and the impact that they have on Indigenous people are discussed further in this report.

There are four different groups that this report is concerned with.

1. Indigenous people with cognitive impairment who are subject to indefinite detention (this group are forensic patients or prisoners– and are subject to orders, some of which result in indefinite detention after having been unfit to plead or not guilty as a consequence of mental impairment)
2. Indigenous people with cognitive impairment who are forensic patients or prisoners, but are not subject to indefinite detention (this group have usually also been found unfit to plead or not guilty as a consequence of mental impairment, but unlike the first group live in jurisdictions which do not allow indefinite detention)

3. Indigenous people with cognitive impairment who are identified as having a disability at the point of court (or before) and are sentenced with their disability recognised (but are considered ‘fit to plead’ by the courts)

4. Indigenous people with cognitive impairment who do not have their disability identified and are sentenced to mainstream imprisonment

In the context of these groups, there are different kinds of offending. Three categories of offender emerged in this research.

- Those who committed fairly low level crime regularly
- Those who committed serious crime and constituted a serious risk of harm to others
- Those who engage in sexual offending behaviour

Although it was not possible in the time-frame of this report to attempt to gather data pertaining to offence types and categories, the theme that arose in the interviews was that the majority of crime committed by Indigenous people with cognitive impairment tended to be of the less serious variety. The particular issues for people who committed sex offences require specific attention. There is considerable debate in this area around the extent to which sexual offending in this population is at least partially attributable to an absence of adequate sex education, and a related absence of an understanding of issues related to personal boundaries, and more significantly, issues of consent. The extent to which this group of sexual offenders have also been victims of sexual assault was an issue raised by stakeholders in the interviews for this report as needing further investigation.

For the group that commit very serious crime, and are considered to be dangerous to the communities, the theme that arose consistently was if there had been adequate intervention earlier in the person’s life, then the seriousness of the offending could relatively easily have been curbed.

**Separating the Issues: Cognitive Impairment and Mental Illness**

This report is focused on the issues for Indigenous people with cognitive impairment in the criminal justice system. Cognitive impairment and cognitive disability are umbrella terms used in this report to cover the following:

- Intellectual disability (including borderline intellectual disability)
- Acquired brain injury and
- Foetal alcohol spectrum disorder.

Each of these is discussed separately also. Although these are all different conditions with their own distinct origins and features, there are some general characteristics that are shared that enable them to be grouped together for the purposes of this report. (Specific attention is paid to each of these also within this report).

This report is *not* focused on the discussion of mental illness, although it does pay attention to the complexity of presentation when people have *both* a cognitive impairment and a mental impairment. Although the issues for Indigenous people with mental illness who are involved in the criminal justice system are themselves significant and worthy of further investigation, the scope of this report is limited to cognitive impairment for the following reasons:

1. Too often mental illness and cognitive impairment are conflated (both in policy and legislative frameworks). This is problematic for people with cognitive impairment because the medical model
utilised in the treatment of people’s mental health is neither coherent nor effective when it comes to supporting or ‘treating’ people with cognitive disabilities in the criminal justice system.

2. Cognitive impairment is not ‘treatable’ in the same way that much mental illness is. While mental illness is episodic, and may respond to pharmaceutical and clinical treatment resulting in a return of capacity (leading to an ability to plead), cognitive disabilities (although involving fluctuating skill sets depending on a range of environmental and support factors) is permanent. Unlike people who are mentally ill, medication has only an ancillary role.

3. There have been significant improvements in the way that mental illness has been understood in Corrections environments over the last two decades. This has not been replicated in the area of cognitive impairment. The indefinite detention of Indigenous people with cognitive impairment is in many jurisdictions in part due to the way this group do not fit into existing clinical approaches associated with mental health pathologies.

4. It is often the case that cognitive impairment is ‘masked’. This is partly because people can become very good at hiding their disabilities in order to fit in, and partly because strategies for identification (in most jurisdictions) are not well developed (if they exist at all). Identification of cognitive disability is also complicated by the fact that some people with cognitive impairment may function very well in some areas of their lives, and not at all in others - which again may mask the impairment. It is also the case that many people with a cognitive impairment have experienced shame and humiliation as a consequence of their disability (this is particularly the case in some Indigenous communities) and, sometimes even if they are aware that they have a cognitive impairment, will not readily admit to it.

5. The issue of Indigenous people with mental illness who are detained under mental impairment legislation requires a separate investigation.
Overview of Human Rights Concerns

Current Australian legislative and administrative approaches to dealing with persons with cognitive impairment who are accused of criminal offences give rise to critical human rights concerns. There are of course differences in approach across jurisdictions, and some approaches are less worse than others. Nevertheless urgent reform is required in every jurisdiction if Australia is to comply with its international human rights obligations with respect to this population group. Detailed exposition and analysis of each area of concern is beyond the scope of this summary. Just some of the key issues are:

Equality before the law
Article 26 of the International Covenant on Civil and Political Rights (ICCPR) guarantees to every person equality before the law. Mental impairment legislation, by its very nature, applies only to persons with cognitive impairment. It subjects persons with cognitive impairment to different legal standards and different legal procedures. While the policy intention of these measures may be to benefit persons with cognitive impairment, in reality these measures are likely to result in persons with cognitive disability being treated far more harshly than another person accused of the same offence. They violate the right of persons with cognitive impairment to equality before the law.

Deprivation of liberty based upon disability
Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD) guarantees that persons with disability shall not be subject to arbitrary deprivation of liberty. Deprivation on liberty will be arbitrary if it is based upon disability. Mental impairment legislation, particularly where it does not provide for a limiting term and the individual remains detained for a period exceeding any term that could have been imposed upon conviction, results in arbitrary deprivation of liberty of persons with cognitive impairment based on their disability.

Inhumane treatment
Article 10 of the ICCPR guarantees persons deprived of their liberty freedom from inhumane treatment. Particularly where persons with cognitive impairment are held in custody in prison, mental impairment legislation is likely to result in persons with cognitive disability being exposed to inhumane treatment. Deprivation of liberty will be inhumane in circumstances where an unconvicted person is detained with convicted persons. Prison-based developmental programs are typically inaccessible to persons with cognitive disability and persons with cognitive impairment may be subject to exploitation and violence from other members of the prison population. For these and other reasons mental impairment legislation may expose persons with cognitive impairment to inhumane treatment in violation of their human rights.

Capacity for trial
Article 12 of the CRPD requires the recognition of the legal capacity of persons with cognitive impairment, and the provision of support to the person to assist them to exercise that capacity. Where support is provided, that support must be provided subject to certain substantive and procedural safeguards that prevent abuse. Mental impairment legislation results in a declaration of capacity/incapacity or fitness/unfitness. There is little or no emphasis in the process on the provision of support that may enable the person to exercise legal capacity. Once incapacity or unfitness is determined the person with disability becomes a passive object of law who is unentitled to defend the charges on which they stand accused. In these respects, mental impairment legislation violates the right of persons with disability to the exercise of their legal capacity.

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23 This section was written for ADJC by Phillip French, Director of the Australian Centre for Disability Law
Right to a fair trial

Article 14 of the ICCPR guarantees to every person accused of a criminal offence the right to a fair trial. Paradoxically (given that one of the stated reasons for mental impairment legislation is to prevent unfairness in the legal process for persons with cognitive impairment) persons with cognitive impairment who are declared incapable or unfit to stand trial are likely to be deprived of a fair trial. Once incapacity or unfitness is established, the accused person is deprived of the opportunity to enter a plea, and is effectively prevented from mounting any real defence to the charges on which they are accused. The evidence against them may be evaluated according to a different legal standard of proof than that which applies to other persons, and, in disposing of the charges, the Court may be required to fix a custodial term the equivalent of the maximum custodial term that might have been imposed had the person been convicted of the offence, rather than a custodial sentence that reflects the objective serious of the offence with which the person was actually charged.
Data Collection and Research

A strong theme in the interviews for this report was the need for better data collection and research in this area. Some argued that it was not until this information was available that it would be possible to adequately formulate a policy response. It is suggested here that although there is clearly a need for ongoing research and data collection in this area, the information that does exist is sufficient to provide a fairly solid starting point. There is increasingly solid data available in some jurisdictions with regard to the numbers of people with disability (who are identified in either health surveys, or by disability units inside prisons). In those jurisdictions where data collection has not been strong, there appears to be at this point a growing awareness of the need to attempt to incorporate this into new programs.

Both NSW and Victoria have fairly sophisticated systems of data collection, particularly with regard to people with intellectual disability who are imprisoned. However there are many jurisdictions where obtaining information about this population is complex. Obvious gaps in available data include:

- Numbers of people with cognitive impairment who are forensic patients (in many jurisdictions no distinction is made between people who have mental illness and those who have cognitive impairment)
- Numbers of Indigenous people in prison who are not forensic patients, but have cognitive impairment (both NSW and Victoria collect data on this with regard to prisoners who have identified intellectual disability but it is very difficult to access in other jurisdictions)
- Re-offending and recidivism rates for Indigenous people with cognitive impairment
- Numbers of Indigenous people with cognitive impairment participating in community based services
- Numbers of participants in community based services (including the total capacity of the services)
Indigenous Understandings of Disability – and the masking of disability in Indigenous populations.

The concept of disability is a western one. Many Indigenous organisations consulted in the process of writing this report pointed out that Indigenous people often do not use, or recognise the term ‘disability.’ Within communities, there is frequently recognition that someone is ‘different’, but this difference tends to be accommodated. Various impairments are viewed as simply one part of the person, but are often not considered central or core to one’s identity. 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 of the Indigenous community is not romanticised. There is no doubt that the absence of labelling, and the absence of stigma caused by labelling is something that the broader community can and should learn from Indigenous communities. In many ways, this approach reflects the person centred ambitions of much government disability policy. However the associated absence of support that an absence of identification produces continues to be a serious cause for concern – especially in criminal justice settings.

It was also noted by Indigenous stakeholders in our conversations, that in some communities, the presence of disability is viewed as simply one more disadvantage in a whole raft of disadvantages, and it is for this reason that it tends not to warrant any 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 severely fractured communities, disabilities were often considered to be fairly low on the scale of priorities. As with disability in the wider community, the support and management of cognitive and mental impairment is often left to the family to manage. And again, as is the case with the wider community, this only changes when the person with the impairment begins to impact on the wider community through their behaviours.

For people with a cognitive impairment living on remote communities problems are exacerbated by the fact that contact with disability service systems rarely occurs prior to the age of eighteen. This means that people tend not to be eligible for disability services which require a diagnosis prior to the age of 18. This of course then has consequences in terms of accessing specialist disability justice programs.

The absence of identification also means that when Indigenous people with disabilities come into contact with criminal justice agencies, they are unlikely to reap the benefits of the support in important judicial processes because their disability is un-named and unidentified. For instance in NSW and Victoria, if somebody with an intellectual disability is in a police station (either as a victim or a witness) then they are entitled to a support person to assist them with understanding both the process and their rights. If the disability is not identified then this support is also not available.

Aside from cultural differences in terms of how disability or impairment is recognised, and absence of recognition of disability in the context of other forms of disadvantage, there are some important factors that contribute to the way in which disability is masked and un-identified in Indigenous populations. Factors that arose in our conversations with stakeholders included:

- Many Indigenous communities have a long history of fear and mistrust of government, government organisations, and the non-government agencies working for government. There are particular fears in the area of disabilities related to the removal of children who are ‘disabled’ and the institutionalisation of children and adults who are deemed unable to cope in the community.
The issue of data collection is complicated significantly by the difficulties involved in identifying disability amongst Indigenous populations. Cognitive impairment tends to be masked as a consequence of a number of factors.

There exists a deep and legitimate suspicion of what might be thought of as the ‘labelling sciences.’ In the recent past, expert opinion pertaining to intellect have frequently been based on explicitly racist ideas (as was the case with phrenology).  

Some advocates argue that screening and assessment tools are not culturally appropriate.

There are particular kinds of cognitive impairment that are frequently under-diagnosed in Indigenous communities. In South Australia for instance, the impact of petrol sniffing requires particular attention in terms of the impact this has on brain injury. Similarly Foetal Alcohol Spectrum Disorder has only in the last couple of years been recognised as impacting dramatically on the levels of cognitive impairment.

It became evident through the course of researching this report, that many Indigenous families have been providing support to their family members with cognitive impairment for many years, and sometimes in very violent situations. The pressure on Indigenous communities to ‘contain’ and care for people with complex needs is immense.

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Recent Research and Policy Shifts

There is a growing recognition in the political and policy arenas – and in the research literature – that imprisonment – and indefinite detention is an entirely inadequate response to offending behaviour in this population. There is also a growing recognition of the specific barriers to justice and services faced by this group in police stations, courts, and on release from custody. During the course of the Aboriginal Disability Justice Campaign, a number of encouraging policy shifts have occurred in relation to addressing some of the service gaps that have propagated the use of indefinite detention. This includes the announcement in Western Australia that 18 million dollars will be spent on building Disability Justice Centres that will ready for use in two years (to be used as declared places – which have until now been one of the key missing links in terms of service provision in WA). In the Northern Territory, two secure units designed for people with cognitive impairment are very close to being opened (and are intended to operate as an alternative to incarceration in prison). The outgoing Northern Territory Government had also made a commitment to building a new facility to house up to 30 people with cognitive impairment and mental health issues (by 2015).

There is however much more work to do in this area. This work extends beyond the construction of new secure buildings and hospitals and involves perhaps the more complex task of building capacity within communities and organisations outside of the criminal justice system. While ADJC recognises the importance of the recent developments in both WA and the NT, this report argues that resources also need to be directed into supporting Indigenous people with cognitive impairment outside of institutional settings.

In addition to the recent injection of funds into building secure facilities in Western Australia and the Northern Territory, it is evident that the issue of people with cognitive impairment in criminal justice settings has recently received some welcome and significant political and policy attention in most other states and territories. For instance in NSW, the Law Reform Commission is currently conducting a detailed inquiry into the issues for people with mental health and cognitive impairment in the criminal justice system. 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 other states and territories, there is much work that is currently occurring to develop disability policies and procedures to better meet the needs of this population. South Australia is involved in developing a disability justice plan, and the Northern Territory, Tasmania and Western Australia are all either in the process – or have recently completed – reviews of their disability policies, again to improve the manner in which services across a range of departments are provided.

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In 2004, Jim Simpson and Mindy Sotiri conducted a scoping project for the (now defunct) Aboriginal and Torres Strait Islander Services examining the issues for Indigenous people in the criminal justice system across Australia.\textsuperscript{32} This project involved interviews with stakeholders across Australia and highlighted many of the key issues for this population, with a focus on police stations, courts, prisons and in post release settings. This was followed in 2005 by a Human Rights Commission publication examining this issue in more detail – but with a specific focus on young offenders and Juvenile Justice populations.\textsuperscript{33} In 2008, the HRC again addressed this issue, focusing on how to best prevent crime and address the issues for this young population.\textsuperscript{34}

In addition to these national studies, there has been some significant work within most of the jurisdictions examining the issues for people with cognitive impairment in the criminal justice system. Within this work, there is usually mention of Indigenous people, but there are few reports that are specifically targeted towards this group. Key pieces of recent relevant research include:

- ‘People with Cognitive and Mental Health Impairments in the Criminal Justice System’ (This NSW Law Reform Commission investigation is a comprehensive overview of the key issues in NSW) 2012\textsuperscript{35}
- ‘Access to and interaction with the Justice System by people with intellectual disability and their families and carers’ (This Victorian Parliamentary Law Reform Commission finished their investigation last year and will be publishing their findings this year) 2012\textsuperscript{36}
- ‘People with Mental Health Disorders and Cognitive Disability in the Criminal Justice System in NSW’ ARC Linkage Project, UNSW, Eileen Baldry, Leanne Dowse, Ian Webster 2012\textsuperscript{37}

Recent seminar and conference papers of note that relate directly to this issue in other jurisdictions include:

- ‘The Effects of Petrol Sniffing. Seminar Papers’ Aboriginal Issues Committee, Law Society of South Australia’, 2005\textsuperscript{38} (This is an extensive collection of papers which looks at petrol sniffing and a range of other factors impacting on cognitive impairment in Aboriginal communities in South Australia)
- ‘Issues for People with a Cognitive Disability in the Criminal Justice System’, Office of the Public Advocate\textsuperscript{39} (Queensland)
- ‘A judge short of a full bench: Mental Impairment and Fitness to Plead in the NT Criminal Justice System’ Jonathon Hunyor & Michelle Swift, Paper presented at the Criminal Lawyers Association, 2011\textsuperscript{40} (Northern Territory)

\textsuperscript{32} Simpson, J & Sotiri, M (2004) \textit{Criminal Justice and Indigenous People with Cognitive Disabilities}. A Discussion paper prepared for the Aboriginal and Torres Strati Islander Services


\textsuperscript{36} http://www.parliament.vic.gov.au/lawreform/article/1461

\textsuperscript{37} Baldry, Dowse, Webster (2012) \textit{People with Mental Health Disorders and Cognitive Disability in the Criminal Justice System in NSW} ARC Linkage Project

\textsuperscript{38} Aboriginal Issues Committee (2005) \textit{The effects of Petrol Sniffing}, Law Society of South Australia

\textsuperscript{39} Office of the Public Advocate, QLD, \textit{Issues for people with a cognitive disability in the criminal justice system}, May 2005

\textsuperscript{40} Hunyor J & Swift M (2011) \textit{A Judge Short of A Full Bench: Mental Impairment and Fitness to Plead in the Northern Territory} Criminal Legal System, Paper Presented at the Criminal Lawyers Association Northern Territory Conference, Sanur, Bali, 20 June, 2011
‘Mental Health and the Judicial System’, Honourable Wayne Martin, Chief Justice of Western Australia, as part of the ARAFMI breakthrough series, 2011\textsuperscript{41} (Western Australia)

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\textsuperscript{41} Martin, W (2011) Mental Health and the Judicial System, A paper presented as part of the ARAFMI break-through series, August 2011, WA

\textsuperscript{42} Rushworth, N with Brain Injury Australia (2011) Out of Sight. Out of Mind. People with ABI and the Criminal Justice System, A policy paper for Brain Injury Australia
Key issues for Indigenous People with Cognitive Impairment who are detained indefinitely

Indigenous people who are detained indefinitely are not convicted of any crime, yet they often spend longer in custody than they would have, if they had been convicted. There is an important question (currently being investigated by the Human Rights Commission) as to whether or not it is in breach of the constitution for people who are not convicted of crime to be held in detention at all.

In both Western Australia and the Northern Territory, Indigenous people with cognitive impairment are detained indefinitely in prisons. In Western Australia, of the 33 people held under the Mentally Impaired Accused Act, 11 of them are Indigenous. In the Northern Territory, there are 9 people on supervision orders, all of whom are Indigenous. There was an inconsistency in the figures provided by different service providers as to the numbers of people on supervision orders in the community, and those in prison. Both the WA and NT governments are currently working to reform the legislative frameworks and service systems that give rise to this situation. Although in both jurisdictions there are a handful of people living in the community who have been found unfit to plead, the possibility of indefinite detention in maximum security prisons remains. In NSW, by contrast, if a person reaches the end of their limiting term but are still considered to be a risk (to themselves or others) they will in practice be housed by the Community Justice Program, run by ADHC (the NSW Government Disability Service Provider).

Western Australia has recently committed to building disability justice centres which will operate as declared places. This means that in the future the courts will have the option to send someone who is found unfit to plead to a place other than prison. Similarly in the Northern Territory, the building of two new secure units are intended to provide the courts – and the community with options aside from imprisonment for some of those in this category of need. There are concerns in the community about the extent to which these reforms will actually address the issue of indefinite detention – with some suggesting that building secure units simply shifts the indefinite detention into a different institution without any identified transitional pathways. This is discussed in some more detail in the over-views of the specific jurisdictions.

Participants in the interviews for this report noted that in Queensland indefinite detention occurs primarily in psychiatric hospitals. It was estimated by workers in Queensland that over 100 people with cognitive impairment were currently detained indefinitely in secure psychiatric units. It is unclear how many of this population are Indigenous.

In the ACT and Tasmania, indefinite detention is also possible. It was unclear however through the course of this research, how many people were imprisoned indefinitely in these jurisdictions.

While the legislation in Victoria allows for indefinite detention in prison, the supporting structures and services available mean that this option does not appear to be used by the courts.

To summarise, indefinite detention is possible in; Western Australia, the Northern Territory, Queensland, South Australia, the Australian Capital Territory, South Australia and Tasmania. However with the exception of Western Australia, there was very little concrete information about the exact numbers of this population.
Although there are distinct issues in the different jurisdictions where indefinite detention occurs, ADJC found that there are some themes and processes that link the experience for Indigenous people with cognitive impairment regardless of where the imprisonment or detention is taking place.

- Indefinite detention occurs when it is clear at the point of court that the person who has been charged with an offence, is either unfit to plead, or not guilty as a consequence of their impairment.
- When this occurs, an assessment is also made to determine if that person is a risk to either themselves or the community. If it is considered they are a risk, a range of different orders can be made by the court.
- Supervision orders in the jurisdictions where indefinite detention is possible do not have limiting terms but usually have some form of legislative requirement of ‘review.’
- The use of risk assessments and reviews to prolong detention beyond the cessation of a person’s order is frequently not carried out by independent bodies, and is often not subject to review.
- The time-frames, frequency and administrative and/or judicial process of ‘review’ differs widely between jurisdictions, but is one of the key areas of concern amongst advocates working in this area.
- People who are subject to custodial orders, or supervision orders where there are no limiting terms spend a disproportionate amount of time in custody compared to those who are sentenced in mainstream courts.
- Legal professionals in all states and territories where indefinite detention is possible face an ethical dilemma regarding utilising legislation which recognises their client is ‘unfit to plead’ when the likely outcome of the use of this legislation is indefinite detention. Many lawyers may hesitate to bring their client’s cognitive capacity into question. This has implications in terms of the extent to which Indigenous people with cognitive impairment are able to access any existing ‘mental impairment’ pathways through the system, and also has implications in terms of the collection of data about this population also.
- The main reason people spend time in prison on supervision orders, is because there are not adequate supported accommodation options that provide targeted behaviour intervention programs in the community.
- The conflation between mental illness and cognitive impairment in most legislative frameworks poses specific problems for Indigenous people with cognitive impairment who are indefinitely detained.
- Unlike people with mental illness, people with cognitive impairment are not able to be ‘treated’ for their condition in the same way (at least theoretically) that people with mental illness are. This means, that when they are reviewed by the various decision-making tribunals, there is usually very little shift in terms of their ‘risk’ to themselves or to the community.
- Prison offers no treatment of real benefit to people with cognitive impairment who are indefinitely detained.
Indefinite detention, and the stress caused to individuals – by both the uncertainty of the incarceration period, and the challenging environmental factors that characterise both prisons and secure psychiatric hospitals, invariably causes people’s behaviour and skills to deteriorate over time.

People who are indefinitely detained become institutionalised. This makes building pathways from prison to the community much more complex.

Marlon’s Story

Marlon’s story is in the public arena and a matter of public record. Marlon has also given us permission to use his story and his name. The ADJC gratefully acknowledges the generosity of Mr Michael Brull who has given us permission to use his story as the case study)

Marlon Noble was born on 11 February, 1982. When he was about four months old, he suffered meningitis, and spent the next eight months in hospital. As a result of this, Marlon was left intellectually impaired. He has well below average intelligence, and had cognitive difficulties. A 1995 assessment found he had problems with literacy and numeracy, and was likely to be confused by complex instructions. He also had problems expressing himself verbally.

When Marlon was 19, he was charged with sexually assaulting two children. Specifically, he was charged with two counts of sexually penetrating a child under 13 years, and three counts of indecent dealings with a child 13-16 years. The alleged victims were an intellectually impaired nine-year-old girl, and her older sister, who was about 14. That was in December 2001.

In 2002, Marlon first appeared in court, and was then held in custody for assessment. The court quickly found that he was mentally impaired. In March 2003 it was decided he was "unfit to stand trial". The court could then choose whether to release Marlon unconditionally, or to make a custody order.

It decided to hold him in custody, and his case was transferred to the Mentally Impaired Accused Review Board. That is, it decided to hold him in prison. He was not found guilty of any of the charges made against him.

Marlon was released on a Custodial Release Order in January 2012. He was never tried for these alleged crimes.

In June 2010, a forensic psychologist called Mary-Anne Martin released a report, which stated that, with assistance, Marlon was now able to plead and stand trial. His lawyer said that Marlon would like to plead not guilty to the charges.

However, he cannot do this. The charges have been withdrawn, as of late 2010. The Director of Public Prosecutions explained to the court that because Marlon had been imprisoned so long - indeed, much longer than a court could have reasonably sentenced Marlon if he had been found guilty of all charges - he would not seek to continue with the charges.

There is perhaps another reason why the charges are unlikely to be proven beyond reasonable doubt in court. The alleged victims, and their mother, denied in April this year that Marlon ever harmed them. Marlon had played with them when they were children. Their mother described him as a “big softy”, and the older sister described him as a "good bloke".
She "couldn't think of anything (he did)" when her mother pressed her to remember any wrongdoing. "I just thought of him being good to us and how we grew up together." She was also certain he did not rape her sister. According to Colleen Egan, the younger sister does not seem to remember being sexually assaulted either.

She was unable to answer detailed questions but said she did not remember Mr Noble. She did not recall a police interview in which she made allegations. The girl's 2001 interview record, which was counter-signed by a welfare worker, suggested Mr Noble had penetrated her "front and back".

There was no evidence to support or disprove the allegation from a medical examination on the day of the alleged incident. She did not have injuries.

Her mother believed Mr Noble, 29, did not rape her daughter.

Marlon has been imprisoned for 10 years, without ever being found guilty of a crime. There appears to be no evidence that the crimes which it was alleged he committed ever actually occurred.

However, it was not intended that he stay in prison forever. In 2006, the Mentally Impaired Accused Review Board endorsed a five stage plan for graduated release into the community. In 2008, he was granted day release for one day at a time. In 2010, this was increased to two consecutive days a week.

In 2010 Marlon was required to give a urine sample to prison authorities which came back with a "presumptive positive" finding for amphetamines although a subsequent test found no evidence of amphetamines. However, on 7 October 2010, Marlon was charged by a prison prosecutor with an aggravated prison offence, based on the screening test result, and an admission by Marlon. The Cock’s Report an independent inquiry into Marlon’s detention concluded a “flawed approach” to the screening test.

Duly convicted, because of this alleged amphetamine use, from 15 October, 2010, Marlon was no longer allowed Home Leave in the community.

On 21 March, the Department of Corrective Services informed the Board that the conviction of Marlon for the drug offence was “unsound”. Marlon was then granted two 48-hour leaves from the prison each week, and his conviction for the alleged amphetamine use was administratively set aside.

This all might be considered startling. In his ninth year of imprisonment for a crime there is no evidence he committed, and which probably never occurred at all, he was convicted of another crime there is no evidence he committed, and which probably never occurred at all.

Approaching his tenth year of imprisonment in November 2011, the Board referred him to the national sex offenders registry, as it considered conditionally releasing him in January. This is despite the perhaps trivial fact that he was never found guilty of any sexual offence, that the DPP withdrew the charges, and that the alleged victims don’t seem to believe he sexually assaulted them.

The Board proposed releasing Marlon, with 10 stringent conditions. For example, he will not be allowed "to enter licensed premises, including restaurants, nor leave his home at Geraldton, 400 kilometres north of Perth, overnight without permission". He would be subject to random drug and alcohol testing.
Key Issues for Indigenous People with Cognitive Impairment in Prison

Some jurisdictions do not have disability specific units inside their prisons. Others have some specific units, but no pathways from maximum security settings to less restrictive environments, and most have very little in the way of targeted programs that are accessible and relevant to people with cognitive impairments. There are however some prisons that do exceptional work in this area. Victoria (for instance) has a range of targeted programs, and clear pathways for prisoners who are identified as having an intellectual disability. As noted in the previous section, there is a distinction that must be made between forensic prisoners and sentenced prisoners. Forensic prisoners are not offenders. They have not been convicted. They are people with disability who require specialist support. Prison environments frequently struggle to provide this style of support to this population. A persistent theme throughout the interviews in this report was that prison is usually not an appropriate or effective site for behaviour intervention for this population. It was also noted by participants in this research that the numbers of people who need to be securely detained are very low. The use of extremely restrictive regimes for this population also requires ongoing critical attention.

The justification of imprisonment is generally reliant on four key ideas.

- That prison has the potential to rehabilitate
- That prison has the potential to deter (both the offender and the general community)
- That prison protects the community
- That prison operates to punish

These justifications however become complicated when looking at the use of imprisonment for people with cognitive impairment. It is suggested in this report that aside from the protection of the community, imprisonment does not effectively serve any other purpose when imprisoning Indigenous people with cognitive impairment. While the protection of the community is important, and ADJC recognises that there are some people who do need to be held in extremely secure environments, it is argued that these numbers are relatively small, and would be even smaller were there adequate services in the community.

Participants in this research argued that when vulnerable people are placed in prisons, regardless of the rehabilitative ambitions of the institution, regardless of the intended support of the staff on the ground, regardless of the jurisdiction under which the care for the person is officially placed, the experience of being locked up is a punishing one – this is particularly so where maximum security prisons are used. For many people with cognitive impairment the connection between this experience and their offending behaviour is impossible to make.\(^43\) For others, even if this connection is able to be made, the capacity to address offending behaviour in the restrictive environment of a prison is impossible. One of the features of many forms of cognitive impairment is an inability to generalise the ‘learning’ from one situation to another. This means that even if there were meaningful courses available for people inside prison (and in many jurisdictions these are extremely limited or non-existent), unless there is substantial transitional and post-release support available, any skills learnt inside are not translatable to life in the community.

The extent to which prison has become the institution for dealing with the most vulnerable people in our community requires serious consideration. We have a situation where the ineffectual nature of imprisonment in terms of rehabilitation for this population is broadly recognised amongst the communities and the government organisations charged with their incarceration and care. Yet in spite

\(^{43}\) Office of the Public Advocate, QLD, *Issues for people with a cognitive disability in the criminal justice system*, May 2005
of this, people with cognitive impairment continue to be imprisoned at a higher rate than those without impairment, and tend to stay in prison for longer than people without.\textsuperscript{44} This is because of both the issue of indefinite detention in a number of states and territories, and also because of an absence of supported accommodation and treatment in other jurisdictions thus limiting people’s abilities to obtain parole.

Quite aside from the deprivation of liberty, prison is a stressful, complex environment with a plethora of both implicit and explicit rules. It was noted in the course of interviews for this project that people with cognitive impairment can face enormous difficulty in understanding these rules, and as a consequence are often vulnerable during their time in custody. If the disability is masked and/or unrecognised and prisoners with cognitive impairment are housed in the mainstream, this struggle is particularly pronounced. Implicit rules governing eye contact, personal space, disclosure of personal information, understanding of various hierarchies amongst prisoners, and the code governing the relationship between prisoners and officers, when not understood and followed can result in extreme antagonism from other prisoners, and in some cases violence. Similarly, not understanding – or being slow to understand – the explicit prison rules, can result in breaches of prison discipline, and as a consequence reduced privileges and capacity to move through the system.

For many Indigenous people with cognitive impairment, the task of ‘addressing offending behaviour’ in prison is made even more difficult because of the impact of being removed from land, country and family. When solid community supports exist (and this is certainly not the case in many instances) the wrenching experience of separation from land can compromise further someone’s capacity to learn new skills and behaviours while inside.

There are also specific issues for Indigenous people with cognitive impairment who spend time on remand. In some jurisdictions (for example Queensland), people spend long periods of time remanded in custody while waiting for the outcome of their assessments with regard to whether or not they are fit to plead. In other jurisdictions (such as NSW) a number of sentencing decisions over the last decade have resulted in remand prisoners constituting at times over a quarter of the entire prisoner population.\textsuperscript{45} Spending time on remand is problematic for a number of reasons. There are very limited opportunities to engage in any programs. The time spent in custody tends to be extremely disruptive. Remand centres are notoriously stressful maximum security environments, and for the many people who don’t go on to spend time in prison, they experience all of the punishing aspects of imprisonment (extreme stress and monumental disruption) without ever having been found guilty of an offence.


\textsuperscript{45} NSW Corrective Services (2012) Facts and Figures, Corporate Research, Evaluation and Statistics, NSW (p2)
**Emmett’s Story**

Emmett is an Indigenous man who was convicted of a sexual offence, prior to it being determined that he was un-fit to plead as a consequence of cognitive impairment. What is of note in Emmett’s case is the that his disability was not recognised for many years. His cyclical and serious offending was treated for years in mainstream courts and prisons before it was identified that his capacity to understand his actions and their consequences – the basis for granting unfitness to plead – was compromised.

The fact that the origin of Emmett’s disability had not been identified when he was a child delayed the process for formal diagnosis. In all states and territories access to disability services is dependent upon certain criteria being met. A common criteria is that the cognitive impairment has to have occurred prior to the age of eighteen. The fact that very little was known about Emmett’s childhood and adolescence slowed the identification down. By the time that it was noticed that his literacy and his intellectual capacity were limited, he had already experienced multiple episodes of imprisonment. Although his inability to look after his personal hygiene was also noted by various people within the criminal justice system, this did not prompt any formal testing.

Emmett’s first encounter with the criminal justice system was in 1984 as a juvenile at which point he was already abusing alcohol. It wasn’t until ten years later in 1994 that it was identified that he might have an intellectual disability (but all this identification appeared to mean at that time was that he was ineligible for a sex offender program). Nothing further was done with regard to testing. In 1997 Emmett was sentenced to prison until 2003 (for a serious sexual offence). During this time he had a brain scan but no formal evaluation. It was not until 2005 that he was formally evaluated by a consultant psychiatrist who diagnosed dementia (and a history of head injury amongst other things). In 2006 his psychiatrist also diagnosed a range of behavioural problems but it wasn’t until 2011 (following the end of another prison sentence, and a movement by the DPP to continue his imprisonment past his release date) that Emmett was properly assessed by a clinical psychologist as having an intellectual disability. This was later confirmed by a psychiatrist, and following further brain scans, it was suggested that the earlier diagnosis of dementia was incorrect and that in fact he was born with an intellectual disability.
Key Issues for Indigenous People with Cognitive Impairment in Police Stations

There is now a substantial body of research exploring both the interaction between Indigenous people and police, and the interaction between people with cognitive impairment and police.46 Both Indigenous people, and people with cognitive impairment frequently have difficulties in their interactions with police, both as victims and offenders. Previous research, and conversations with stakeholders in the current project noted that difficulties arise in the following areas:

- The relationship between Indigenous people and police in Australia clearly has a fraught history. Many Indigenous communities report that experiences with the police have in the past been characterised by explicit and implicit racism, violence, injustice and mistrust.

- Non-identification (of the disability). Although in some jurisdictions (Victoria and NSW) programs exist to support people with disabilities in police stations – in most places it is still the case that the disability is not identified, or in many cases is masked by other more obvious issues. For Indigenous people, who also have substance abuse issues, who may have English as a second (or third or fourth) language, who may have hearing difficulties, the fact of a cognitive impairment is very unlikely to be recognised. Reticence – or difficulty in participating in an interview – is much more likely to be attributed to either cultural issues, or the impact of drugs and/or alcohol.

- People with a cognitive impairment frequently agree with scenarios that are ‘put’ to them by police (partly because they may not understand what is being asked, and partly because of a desire to either please, or at least not upset, people in positions of authority). There is also often a desire to agree with the police version of events because it is assumed that this might speed up the process.

- People with cognitive impairment – particularly various forms of brain injury – frequently have much better expressive communication than they do receptive communication. This can mean that they may well appear to understand what is going on, their actual comprehension is very limited. Again, this can operate to further mask the disability.

- Police interviews are often conducted at a very fast speed, and the stressful nature of police stations means that people with cognitive impairment frequently have an compromised ability to understand what is going on.

People with cognitive impairment have very limited understanding of what their rights are in police interviews. Even in Victoria where the Independent Third Person Support program has been running successfully for years, this appears to have had only limited impact on people exercising their rights.

The inadequacy of police training on this issue, particularly the capacity of police to identify if someone has an intellectual disability has been noted in numerous articles, with some pointing out that the absence of access to justice at various points in the criminal justice system for this population constitutes serious discrimination.  

Matthew’s Story

Matthew is an Indigenous man. He has been diagnosed with a borderline intellectual disability with an overall IQ of 70 and substance use disorder. He is registered as attending school and not until year 8 was he enrolled in a special class, however in effect it appears that his school attendance is very poor and he effectively ceases to engage with school around fourth class. Both Matthew’s parents come from highly disadvantaged backgrounds and use alcohol to excess. He is surrounded from birth with drugs and alcohol. For example a number of times before the age of 12 police note that Matthew was with one or other of his parents, who were intoxicated, at a pub. Although his mother has public housing it appears that Matthew is living between the streets and various relatives from very early in his life and has ‘no fixed address’ noted often by police and Community Services. Unsurprisingly he does not finish school.

Before eight years of age, Matthew has already come to the attention of authorities a number of times. Police note cruelty to animals, threatening phone calls and assault and when disciplined he “appeared to have no remorse”. As he is under 10 no formal action is taken but Community Services (CS) is involved and he goes in and out of state care eventually coming under permanent out of home care (OOHC). At age nine, his foster care arrangements break down due to his behaviour. He is diagnosed with ‘behaviour defiance syndrome’. Between the ages of 7 and 11 years Matthew has over 70 contacts with police as a person of interest, often for minor thefts of money and retail items (often food) and some for more serious matters such as intimidating and harassing people, assaulting his carers and damaging property. At age ten police note that he is showing violent behaviour beyond his age and that he ‘has an enormous capacity for violence’.

He has two short Juvenile Justice custodies at age 10 for ‘non-aggravated assault’, ‘property damage’, ‘breach of bail’, ‘not residing at a place approved by/as directed by Department of Juvenile Justice’. He goes in and out of JJ custody over 10 times, often for lengthy periods, for increasingly serious offences. He also commits offences whilst in custody and is noted to self-harm and to threaten suicide. When out of custody police note him as being homeless and begging. Matthew’s bail conditions usually require him to have a responsible adult and sometimes stipulate that this is his aunt, father or grandfather. However it is clear throughout his life that there is in reality no adult who is willing or able to take such responsibility.

In his teenage years Matthew continues his pattern of frequent offending and custody. He is often recorded as intoxicated, does not attend school, and begs for food. Police note their frustration with the lack of response from CS. While aged 13, Matthew has 99 contacts with police for a range of offences mainly street offences, and for being at risk. The police record Matthew as being at risk on eleven separate occasions. Matthew is charged on 22 occasions and has four admissions to custody and stays a total of 85 days. The

next year Matthew has 123 contacts with police, and is charged on 28 occasions, with more serious offending. He has five admissions to custody for a total of 228 days.

Over the next three years Matthew has a total of 98 contacts with police resulting in 78 charges. His offences are wide ranging but now include predominantly break and enter and theft charges. Matthew is now identified as carrying a weapon. He receives legal aid assistance over these years. During his 17th year he resides in the community for only a six week period, spending the remainder of the year in custody. He threatens self-harm on multiple occasions, makes repeated escape attempts and is placed in ‘disciplinary segregation’.

Matthew’s first period of police custody as an adult is at 18, immediately after release from detention. He is soon charged with ‘breach of bail’, ‘common assault’, ‘behave in offensive manner in/near public place/school’ and ‘maliciously destroy property’. These result in the revocation of his parole order. Matthew receives pharmaceutical drugs for drug dependence (speed, cannabis and heroin) whilst in prison. He is referred to ADHC by staff of the Department of Corrective Services State-wide Disability Services Unit (he had never received services from ADHC) but was not accepted as a client.

As with other Indigenous people with a cognitive impairment, Matthew has very early and usually short and crisis driven interventions that do not address his substantive and long term issues as a child with cognitive disability, experiencing child abuse and neglect, very early alcohol and drug use and living in highly unsafe and disadvantageous circumstances. At no point does it appear that there is any concerted effort to bring Indigenous community services, school education, disability services and community services together to assess Matthew’s needs and situation and provide a positive approach. The only point at which it seems his behaviour improves is when he sent away from his hometown to familial care in another town. This approach seems to have positive outcomes so it is possible that he could have been better cared for in the longer term, but it is not persisted with or supported vigorously so it breaks down. The lack of options in rural NSW may be playing a part in Matthew’s precipitate entry into serial detention and incarceration, as there appear to be no other options. Matthew, like Natalie, never lives in an ordinary community space as a small child, youth or adult but is in marginal community/criminal justice spaces controlled by the criminal justice system. All but the police (and they cannot do that) wash their hands of him by the time he is 14. His cognitive disability is never addressed.
Key Issues for Indigenous People with Cognitive Impairment in Court Settings

People with cognitive impairment in court settings need to be able to understand and participate in proceedings in order for the process to be effective. They also need access to expert legal representation. There is now a reasonable body of research examining the difficulties both Indigenous people, and people with cognitive impairment have in court settings. It is noted in much of this research, and was also noted by participants in the current project that courts tend to be experienced as formal and intimidating environments by Indigenous people with cognitive impairment. This serves to increase stress levels (and therefore diminish skills in terms of comprehension) for this population. For people with cognitive impairment the discomfort experienced can be so acute, that the experience operates to disconnect the person from the justice process entirely. In addition, lengthy delays between being charged with an offence, and having the offence heard poses particular problems for people with cognitive impairment who may struggle to synthesise the experience of court with offending behaviour. In addition, the lengthy waiting times in courts on the day that the matter is to be heard can often mean by the time the case is before the magistrate, the person with the cognitive impairment is already exhausted (and again, compromised in terms of their capacity to understand what is happening) by the time they are called. The technical and legal jargon, the process of cross-examination, the formal attire of judges and magistrates, the rules governing standing and sitting down, and the design of the court room itself – can all operate to alienate Indigenous people with cognitive impairment.

There has been a significant shift in Australia over the last decade towards therapeutic jurisprudence, particularly the introduction of a range of ‘problem solving’ courts, as well as alternatives to the court process. These processes have the potential to resolve some of the problematic features of traditional court processes for this population. The various court alternatives that might be suitable for Indigenous people with cognitive impairment, are noted in the break-down of services by jurisdiction further in this report.

The Conflation between Mental Illness and Intellectual Disability

Most of the legislation that applies to people with cognitive impairment was designed for people with mental illness, and who, as a consequence of their mental illness are either considered unfit to plead, or have the capacity to be found not-guilty as a consequence of diminished responsibility. The significant difference – and what is problematic across a number of jurisdictions, is that much mental health legislation is founded on the idea of treatable illness. Assessments, reviews, and in some cases the possibility of release are all dependent on the potential for an improvement in the condition that rendered somebody unfit. The problem for people with cognitive impairment is that while there are

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49 Submission to the Victorian Parliamentary Law Reform Committee, Australian Community Support Organisation (ACSO) Access to and Interaction with the Justice System by People with an Intellectual Disability, their families and carers (2011)
certainly shifts in capabilities and changes in behaviour as a consequence of support, stress and environment, cognitive impairment is never treatable in the same way as much mental illness is. Cognitive impairment does not ‘improve’ over time. While there are some shared legislative issues (in terms of determining criminal responsibility and fitness to plead) there are very different requirements in terms of ‘treatment’, assessment and service needs. The confusion in the legislation is in many ways replicated in the service systems, which in turn are further confused by the many people requiring support who have both cognitive impairment and mental health issues.

The Dilemma for Legal Professionals
Legal representatives in those jurisdictions where the possibility of indefinite detention exists face an ethical dilemma. When judicial systems are likely to discriminate against clients with a known cognitive impairment, practitioners, in instances where fitness to plead is ambiguous, must decide between this being legally determined with the risk of indefinite detention, or to enter a plea.

It was also noted by participants in interviews for this report, that there is often an absence of specialist knowledge to assist the Courts when it comes to the disposition of cases following a finding of unfitness to be tried or a not guilty by reason of mental impairment. Rarely do practitioners have the specialised knowledge of modern disability practice which the Court can call upon in determining the order to be made. In many instances the Court is wholly reliant on advice and risk assessments provided by government, which may lack independence and expertise. Legislative provision is needed allowing the Court greater discretion in seeking independent advice and to recognise and hear parties wishing to make ‘best interest’ representations on behalf of a person to be made subject of an order.

Tribunals- The confusion between administrative and judicial functions
In some jurisdictions, participants in this research raised grave concerns about the manner in which the tribunals in their jurisdiction operated. Although there are differences between the jurisdictions, frequent critique included:

- Mental Health Review Tribunals while often set up as informal decision making bodies, are charged with making serious decisions.
- They are officially administrative in their function, but in many jurisdictions perform a quasi-judicial role.
- Access to documents, access to legal representation, and access to a fair hearing are in some jurisdictions compromised.
- In Western Australia, the Mentally Impaired Accused Review Board does not have any formal appeal process.
Key Issues for Indigenous People with Cognitive Impairment in the Community

There are, across Australia an absence of pathways out of criminal justice settings. Participants in this project argued that there is also an absence in terms of the flexibility of the provision of support. Prior to involvement in the criminal justice system there is a lack of significant protection mechanisms for individuals and the communities. In order to obtain support, it is often the case that the cycle of offending must become more severe. There is an ongoing need for people to be able to move from secure to less secure environments in the community, and for the support that is on offer in these environments to be provided in a flexible manner. Historically, community based options have been very poorly resourced. This has recently shifted in NSW, which now runs the only systematic post-release support and diversionary project for people with intellectual disability who are involved in the criminal justice system. This system has a variety of support options, and serves as a useful template as to the kinds of pathways following release that other states might also consider emulating.

Siloed Service Systems

The majority of people in this situation tend to have complex needs. Their disability or impairment exists alongside other forms of disadvantage and they have a multitude of distinct support needs. It is often the case that the disability is masked as a consequence of these other factors. For instance, when disability co-exists alongside mental illness, drug and alcohol addictions, homelessness and a history of trauma, it can be very difficult to unpack the various causes of offending behaviour, and it can be very difficult for services to know how they should be responding. The majority of Indigenous people with cognitive impairment who end up imprisoned have some combination of disadvantage. However many of our service systems have very specific criteria with regard to participation. There are significant difficulties for this population when attempting to access services which are geared towards dealing only with one form of disadvantage. For instance, it is often the case that one person requires support with cognitive impairment, mental illness and drug and alcohol misuse – yet services that are set up to work with all three issues are extremely rare – and in many parts of Australia non-existent. Similarly, services that are able to address any combination of these issues in a way that is Indigenous specific, or even culturally aware are incredibly uncommon.

The problem of service systems being ‘siloed’ and as a consequence, unable to work with people holistically constitutes a major theme in this report. In some jurisdictions there is recognition of the limitations of the siloed service approach at senior governmental levels. NSW, Victoria, Queensland and the Northern Territory all have inter-departmental working groups that are attempting to respond to the complexity of need of this population. This style of collaboration and cooperation is to be applauded. The, at times divergent philosophical approaches of disability and justice agencies has the potential to stymie reform, especially if the security, risk management and community protection focus of most justice agencies, is unable to be reconciled with the person centred, support needs focus of disability services. A level of pro-activity is required in order that the two legitimately different focuses of key government departments are able to find ways to co-exist.

The Absence of Targeted Community Based Services

A key human rights issue for people with cognitive impairment is access to services in the community. People with cognitive impairments in some jurisdictions do not have access to the range of services as people without cognitive impairment, and in many cases this lack of access has a direct result of indefinite detention. While there appears to be a movement in those jurisdictions with currently little support for this population, towards the resourcing and building of secure units to
house people with cognitive impairment (outside of the prison environment) this does not appear to be
matched with a commitment to house and support this population in the community.

There are some jurisdictions where the range of options in terms of supported housing on release from
prison is very positive. The Community Justice Program in NSW offers a range of flexible
accommodation options from extremely secure and fairly restrictive settings, to accommodation
which is largely independent but with some drop-in-support built in. However in jurisdictions like
NSW and Victoria, participants from those states who participated in this project noted that even
where significant service systems exist, there are many gaps within these service systems for
Indigenous people with cognitive impairment. For instance, there are difficulties in accessing already
stretched Indigenous services, and even Indigenous specific disability services frequently aren’t
structured to work with people with offending behaviour or drug and alcohol use.

The Need for Early Intervention
There is a need for early identification, early intervention, and then ongoing quality support. It is not
the view of this report that it is ‘too late’ by the time someone is embroiled in the criminal justice
system, but the service responses become complicated post criminal justice system involvement, not
just because of entrenched and habitual offending behaviour, but because of the different ideologies
and ambitions of the government departments charged with responding to this group.

There is also the need for intervention prior to contact with the criminal justice system. While this
report is primarily focused on service responses for people who have already had contact with police,
there is clearly the need for increased attention to service intervention prior to this point. One of the
key themes to emerge from interviews and surveys with both criminal justice agencies and disability
services is that contact with criminal justice agencies is usually preceded by compromised educational
experience, disconnection with community, and inadequate service system responses to need.

The Role for Indigenous Communities
The concept of disability is a western one. Many Indigenous organisations consulted in the process of
writing this report pointed out that Indigenous people often do not use, or recognise the term
‘disability.’ Within communities, there is frequently recognition that someone is ‘different’, but this
difference tends to be accommodated. Various impairments are viewed as simply one part of the
person, but are often not considered central or core to one’s identity. 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 of the Indigenous community is not romanticised. There is no doubt that the
absence of labelling, and the absence of stigma caused by labelling is something that the broader
community can- and should learn from Indigenous communities. In many ways, this approach
reflects the person centred ambitions of much government disability policy. However the associated
absence of support that an absence of identification produces continues to be a serious cause for
concern- especially in criminal justice settings.

In addition to a historical mistrust between Indigenous communities and white government agencies,
it was also noted by Indigenous stakeholders, that in some communities, the presence of disability is
viewed as simply one more disadvantage in a whole raft of disadvantages, and it is for this reason that
it tends not to warrant any 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 severely fractured communities – disabilities were often
considered to be fairly low on the scale of priorities.
The complexity of building community based interventions in communities that are themselves struggling, fractured, impoverished, and under-resourced emerged as a key theme in this report. ADJC takes the position that Indigenous communities cannot be expected to provide the complex support necessary to people who perpetrate violence. The expectation that Indigenous communities should be able to ‘manage’ members of their community is at times not just unrealistic, but sometimes dangerous. It is unfair to expect Indigenous communities to offer a level of support that is not demanded of the rest of the community.

**Difficulty Obtaining Information about Community Based Services**

One of the limitations of this report, is that we were unable to obtain concrete information about the numbers of people participating in community based services, or the outcomes for these people. Although, this report lists existing services (based on interviews with participants, and research via a range of government websites and reports, see appendix 3), the scope, and reality of what these services actually look like (with some notable exceptions in NSW, Victoria and QLD) remains relatively unexplored. This is in part due to the time restrictions in putting this report together, but also in part due to an absence of easily available data and information regarding program participation. This is problematic because although it is clear there are now a handful of disability specific criminal justice or complex needs programs operating, it is still unclear how many people are actually able to access these, or for those who are accessing them, what sort of impact these programs are having on their lives.
The Specific Needs of Indigenous People with Acquired Brain Injury

People with an ABI have lived a life where they have not been cognitively impaired. They have memories of this life, memories of being independent, and memories of their identity prior to their injury. This group frequently aspires to a level of independence that is difficult to achieve, and are often unwilling to admit the limitations that their brain injury has imposed on them. Many people are shameful and/or fearful of revealing their injury. However they are frequently ‘used’ by others in the commission of crime, and regularly end up taking responsibility for others when caught.

There are significantly different pathways through the criminal justice system for people with brain injury when compared to intellectual disability. In spite of the fact that both impairments have a similar impact in terms of the barriers to accessing support, there are significantly fewer options for people who have an ABI. This is the case even in those jurisdictions which have been remarkably progressive in understanding the special needs of people with an intellectual disability. For instance in Victoria, where specialist services have existed for people with intellectual disability who are caught up in the criminal justice system since 1987, people with acquired brain injury are still excluded (or not prioritised in terms of services).

Acquired Brain Injury (ABI) is any kind of damage to the brain that occurs after birth. Traumatic Brain Injury is the term that tends to be used for brain injuries that occur through accidents, falls, or assaults. Other kinds of acquired brain injury are acquired through things like; strokes, loss of oxygen to the brain, degenerative neurological diseases, and (significantly in the context of this project) drug and alcohol abuse.

It is estimated that about 1 in 45 Australians have an ABI that causes some kind of limitations or restrictions because of disability, and about 20,000 people have a traumatic brain injury each year. People with brain injury are also significantly over-represented in prisons across Australia. In one Australian study, 200 prisoners were randomly sampled, 82% reported having experienced a traumatic brain injury.\(^{50}\) In the most recent NSW Justice Health survey, it was found that 53% of people had experienced a head injury resulting in loss of consciousness, and possible permanent brain injury.\(^{51}\) Victorian research has found that 42% of men and 33% of women were found to have acquired brain injury (following a formal neurological assessment).\(^{52}\)

There are enormous variations in the effects of the injury- and these depend on both the location of the injury, and its severity. Although sometimes it is clear that somebody has a brain injury – much of the time, (like intellectual disability) it is masked. That is, the person who has suffered the brain injury becomes very good at covering up the cognitive changes that have occurred as a consequence their injury. Brain injury effects not just cognition and intellect, but can also impact on sensory and emotional experience, social interaction, physical well being and behaviour and personality.


\(^{51}\) Indig et al (2009) 2009 \textit{NSW Inmate Health Survey}, Justice Health, NSW (p63)

\(^{52}\) Stringer, K & Paradin (2011) Victorian coalition of ABI service providers, Submission to Victorian Law Reform Committee \textit{Inquiry into Access and Interaction with the Justice System by people with an intellectual disability and their families and carers}, Victoria (p7)
People with ABI might:

- Be easily confused and overwhelmed
- Have difficulty taking in new information
- Have memory problems
- Have difficulty planning ahead
- Have difficulty judging situations
- Have difficulty problem solving
- Have difficulty controlling emotions (especially anger)
- Experience a decline in inhibitions
- Experience a decline in social skills and capacity (become more vulnerable to social isolation, abuse and exploitation)\(^5^3\)

As is the case with people with intellectual disability there can be great variability in terms of levels of functionality. Somebody with an ABI might be able to function very well in some areas and not at all well in others – so again, they can give the impression that they are coping better than what they actually are. The way that they cope is also affected (as is the case with all of us) by what is happening in the environment around them. For instance some of the common triggers that might impact on how well someone with an ABI is coping include:

- The extent to which they are over-stimulated (the environment is too noisy, too much activity)
- The extent to which they are under-stimulated (bored)
- Their level of fatigue and tiredness
- Any physical discomfort they might be experiencing
- Any changes in staff or routine
- Levels of frustration because they are not been adequately understood
- Levels of frustration in regard to feelings of independence and autonomy\(^5^4\)

As is the case with people who have intellectual disability, often people’s capacity to explain why they are not coping, or how they are not coping is limited. Because of this it is often the case that ‘not coping’ manifests itself in behaviours that are misinterpreted as being non-compliant or disruptive.


\(^5^4\) Merton, R (2009) BIA Homelessness forum, NSW
Alistair’s Story

Alistair is an Indigenous man who grew up on Elcho Island. At the age of two Alistair fell into a sewer tank and luckily was rescued by his mother. Alistair had been under the water just long enough for the blood supply to his brain to be interrupted which caused hypoxic brain damage. Following this accident, Alistair’s mother began to notice that Alistair was falling behind in his childhood milestones and was struggling with managing day-to-day activities. By the age of eight Alistair’s learning difficulties became more pronounced. At the age of eight Alistair also began to abuse volatile substances which further damaged his brain compounding the damage already caused to a fragile developing brain. This situation interfered with Alistair’s school attendance and he fell further and further behind. It was during his early school years that his delayed development was diagnosed formally. Referrals to appropriate health and welfare agencies were made but these were unable to provide the level of assistance that Alistair and his family needed.

Alistair grew up in a large family with four brothers and sisters. Unfortunately for the family Alistair’s father passed away soon after they arrived in Darwin late 90’s and Alistair’s mother provided care for five children including Alistair who was requiring special care. The family moved to Darwin where disability support was more readily available.

Despite contact with health and disability agencies Alistair’s episodes of anxiety and depression were increasing during his early teens he was placed under the care of mental health workers. Concerns were raised about Alistair’s risk of harming himself and becoming threatening others in the context of his deteriorating mental health and his living with his mother and extended family.

Despite Alistair being known to both mental health and disability services during this period there was little change in his or his family’s circumstances. During 2005 – 2006, Alistair’s mental health did not improve but did not get any worse. Alistair received minimal community psychiatric services associated with managing his medication but was not in any contact with formal psychosocial programs and was not receiving support to access the community nor was he attending any education programs or enrolled in vocational programs. The impact of Alistair’s situation on his family, particularly his mother, was emotionally and psychologically distressing. Alistair and his family were isolated within an environment of psychiatric disability.

In 2007, when Alistair was 18, he was arrested for stealing cigarette butts from the ground inside a neighbour’s property. Alistair was sentenced to nine months in a maximum security prison and a two year good behaviour bond. During his hearing and whilst he was in prison there was no assessment of his mental impairment despite the fact that he received mental health services whilst in prison. Upon his release from maximum security prison, Alistair returned to live with his mother.

In 2010, Alistair’s mother applied for a guardianship order under the belief that this would enable Alistair to receive more targeted support and an advocate who could assist Alistair and his family to access services and improve Alistair’s quality of life. A guardian was appointed who had decision making power for Alistair’s money and lifestyle. Soon after the appointment of the guardian a disagreement emerged between the Office of the Public Guardian and Alistair’s mother. Alistair’s mother did not feel he had enough access to money and was regularly without any money for day to day expenses. The guardian held a different view. Alistair continued to live with his mother in her house during this time.
In October 2011, Alistair stole $50 off a lady who had withdrawn the money at an ATM. Police chased him and arrested him and he was remanded in a maximum security jail for seven months until his hearing. A request was made in November for a mental impairment assessment and the first report was provided in March 2012. Further psychiatric assessments occurred in May / June 2012 which declared him mentally impaired. Alistair was found unfit to plead by a jury soon after. Whilst on remand in prison Alistair received psychiatric support and his mental health improved although his general mood was poor because of the length of time he had been detained.

Alistair was detained from the 8th of October 2011 until the 22nd of May 2012 on remand in a maximum security prison waiting for his hearing. At his hearing he was bailed to his mother’s care and accommodation for three weeks whilst he waited for sentencing. In June 2012, Alistair received a two year suspended sentence with the sentence backdated to November 2011. The condition attached to this sentence was that Alistair reside in a supported accommodation option – a plan developed in consultation with his mother, his lawyer from the Northern Australian Aboriginal Justice Agency and mental health and disability services.

Alistair remains under guardianship and his mother has been unable to visit him for reasons that are not clear to her. Alistair’s mother asked this question, “Are there people who get access to supported accommodation who don’t have to go to jail?”
The Specific Needs of Indigenous people with Borderline Intellectual Disability

In most states and territories if someone is diagnosed with an intellectual disability, this means that they have an IQ of 70 or below, and have deficits in two or more areas of adaptive behaviour (this refers to every-day skills like personal hygiene and care and communication). People with borderline intellectual disability tend to have an IQ of between 70 and 75. They are often not eligible for disability services, even though they have many of the same disadvantages and struggles of other people with disabilities.

Although there are problems with generalising about people with intellectual disability, and there is great variation with regard to some of these characteristics (and often variation within the one person at different periods of time), the following list of common issues is presented in order to provide a level of insight into some of the common issues many people with both borderline and mild intellectual disability may face:

- Difficulties with some aspects of daily living (this could be financial, public transport, negotiating services or bureaucracies, meal planning etc)
- Some difficulties with learning new information
- Difficulties with understanding complicated instructions
- Difficulties understanding ‘abstract’ concepts
- Difficulties absorbing and processing information fast enough (at a rate that might be considered ‘normal’)
- Difficulties maintaining attention
- Difficulties retaining information (things easily forgotten)
- Difficulties recalling information
- Difficulty with ordering and understanding time
- Difficulty with causal relationships
- Difficulty with comprehension (especially of large volumes of information, or information that is presented in a complex, fast or otherwise inaccessible format)
- Difficulty with educational settings (People with intellectual disability have often had difficult, limited, or traumatic educational experiences)
- Difficulties with planning ahead
- Difficulties with impulse control
- Difficulties with being assertive (sometimes this can mean being easily led, and often eager to please, or to not get in trouble)

Many people with borderline intellectual disabilities are not identified in mainstream organisations. This is often because people with borderline ID have learnt to cope relatively independently and are often very good at appearing to understand even when they don’t. That is, their expressive communication is frequently much more sophisticated than their receptive communication. They have learnt to look like they are understanding what has been said, and they may also talk in an articulate manner – but they may have a very limited comprehension of any information that is being shared.

There is a strong case for people with borderline intellectual disability to be included in discussions of the issue of Indigenous people with cognitive impairment in the criminal justice system. The continued distinction in terms of service provision between people with intellectual disability and

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people with borderline disability needs to be dissolved. This population should be looked at in terms of their support needs, and not excluded on the basis of exceeding a designated cut off on an IQ test.

Natalie’s Story

Natalie is a young woman with a borderline intellectual disability (total IQ 73), a history of substance abuse and who has had various mental health diagnoses including: dissociation personality disorder, emotionally unstable personality disorder, histrionic personality disorder, and a psychotic disorder due to the harmful use of cannabinoids. Police records refer to Natalie as having ADHD. She also suffers from asthma and has experienced high-risk pregnancies with her three children who were all born by the time Natalie had reached her early twenties. She attended a special class but left school early without any qualifications. Natalie now receives a disability support pension.

Natalie comes into contact with police multiple times as a young person in relation to a number of offences but also as a ‘young person at risk’, predominately as a result of her inability to stay at her parents’ home due to the aggravated nature of her relationship with a family member. Natalie spends large periods of time in Out of Home Care, crisis accommodation and in youth shelters over the course of her teenage years. On numerous occasions as a young person police note that she has no fixed permanent address. Natalie’s instigation of confrontations with family members and her tendency to aggressive behaviour are identified as contributing to the large number of temporary accommodation placements she experiences.

Coinciding with her exit early from the school system, Natalie’s frequent contact with police as both a victim and as an offender commences. She first comes to police notice as a victim of domestic violence and assault but also in relation to offences including harassment; truancy; disobeying court orders; shop lifting; and as a missing person. Natalie makes full admissions to offences when confronted by police, and is cautioned on a number of occasions. Her behaviour appears to the police to be seriously disturbed and they attempt at least 4 times over the next few years to have her admitted to a psychiatric unit under the Mental Health Act but each time the psychiatric assessments indicates she does not have a mental health disorder and she is refused admission. She has 22 police contacts before her first JF custody at 15 years of age.

In one year in her mid teens, Natalie has contact with police on 36 occasions, the first as a result of being the victim of physical assault by a member of her family. At the time she also informs police that she regularly experiences assault by another family member. Natalie is in care for the next six months. She is banned from school for using abusive language, is abusive to staff at a hospital and is picked up on various minor assaults and malicious damage. During these events police record the fact that Natalie does not have stable housing and that ‘not enough was being done especially when reviewing DOCS notes’ and ‘feels no attention to the ADHD and intellectual disability matter was or has ever been made’. Despite repeated attempts at finding her accommodation police record that Natalie’s history of aggressive behaviour results in her being refused admission to or being thrown out of many youth refuges /temporary accommodation so she is often homeless.

The following year, Natalie has contact with police on 28 separate occasions, most relating to verbal and physical altercations and breach of AVO or bail conditions. She receives legal aid advice but nevertheless has seven episodes in JF custody and whilst in custody she threatens self-harm and suicide. This is Natalie’s first recorded hospital admission for ‘intentional self harm’. Guardianship Tribunal orders are made that Natalie be taken to and returned to ADHC premises, with police assistance as required. Over the next two years Natalie resides in AHDC premises but has multiple contacts with police due to her assaults on staff, property damage, theft and justice offences where she is found to be breaching bail conditions.

Her first police contact as an adult is on the day of her 18th birthday when she abuses staff and damages property at a government office. Most contact in this period is related to domestic arguments and assaults between Natalie and her de-facto. AVOs are on occasions taken out but not pursued as police note that ‘both parties have a mental illness and are known drug users’. She is also regularly charged with theft, assault
and malicious damage and her first custody episode occurs when she is remanded for one day and the placed on a community based supervision order for 6 months, which she completes. There are several further domestic violence related incidents in this year and in July Natalie is pregnant and noted by police to be agitated and uncontrollable and living on the streets. Her first child is notified to CS at 8 weeks old due to Natalie having no fixed permanent address.

Natalie serves four adult custody episodes when she is 20 years old for stealing and breaching bail conditions. She also moves in to a new de-facto relationship and police are alerted to frequent violent events. Natalie receives legal aid in regard to custody of her baby and CS custody of the child is formalised. When she is 21 she has a string of police events related to property damage and domestic violence incidents and breaching of AVOs relating to her previous relationship however she completes a community order. As a result of breaching bail conditions she services 6 months of periodic detention with four more police contacts. She is granted priority housing but she loses her tenancy and is provided with another that is terminated a year later. She has 3 short DCS custodies the following year and has a number of self harm and attempted suicides during these incarcerations.
The Specific Needs for Indigenous People with Foetal Alcohol Spectrum Disorder

Foetal Alcohol Spectrum Disorder is an umbrella term which relates to a range of different disorders which occur as a consequence of foetal exposure to alcohol. These include;
- Foetal Alcohol Syndrome (FAS),
- Partial Foetal Alcohol Syndrome (pFAS),
- Alcohol Related Neurodevelopmental Disorders (ARND) and
- Alcohol Related Birth Defects (ARBD).

A strong theme in the interviews for this report was that there is an absence of recognition of the role played by foetal alcohol spectrum disorder in contributing to cognitive impairments in Indigenous communities. This lack of recognition is evident in the lack of services focused on early intervention and diagnosis and the absence of schools with the funding necessary to cater for children with special needs. The absence of resourcing of early intervention services is of particular concern (and was noted by participants in this report to be a key issue in WA, NT and SA). Others noted that the under-diagnosis of foetal alcohol syndrome is problematic in terms of understanding offending behaviour amongst some populations. Impaired decision making, including difficulty in determining the causes and consequences of actions are features of Foetal Alcohol Spectrum Disorder, and are significant in that they also predispose people to offending behaviour.56

Exposure to alcohol during pregnancy has the potential to permanently change the structure and function of the developing brain. As is the case with ABI and Intellectual Disability there are many variations in the impact of FASD. It is commonly assumed that people with FASD look different from other people (small, and specific facial characteristics) – this is true of only a very small minority of those affected by FASD. As always, it is difficult to generalise, but there are some defining characteristics which are useful as a way in to understanding the kinds of things that people who are affected might be struggling with. Many of these are similar to the issues for people with ABI and Intellectual Disability also.

These features include:

- Difficulties with memory
- Difficulties with attention span
- Difficulties with retaining information
- Difficulties with thinking things through and reasoning
- Difficulties with understanding the consequences of their actions (cause and effect)
- Difficulties learning from experience
- Difficulties with controlling behaviour
- Difficulties getting along with others
- Difficulties with money/finances
- Difficulties maintaining employment57

56 Martin, W (2011) Mental Health and the Judicial System, A paper presented as part of the ARAFMI break-through series, August 2011, WA (pp11-15)
This research has been primarily focused on adult imprisonment. However there is clearly a need to examine the pathways for young Indigenous people with cognitive impairment. The research that does exist in this area, suggests that young people with cognitive impairment are significantly over-represented in Juvenile Justice Centres. The NSW Law Reform Commission has recently noted that there is the need for a different kind of response for young people with cognitive impairment who come before the justice system - as the issues for young people are distinct. Their recent consultation paper notes the distinct developmental issues for young people, the different opportunities for rehabilitation that are possible because of the ongoing development and also the particular rights of young people who require a certain level of protection.

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**Jack’s Story**

Jack has had a life-course common to many Indigenous young people. Born into a family with intergenerational alcohol problems, Jack’s mother abandoned him in a community hospital when he was a few months old from where he was adopted by an Indigenous grandmother. Jack’s new mother died when he was about 9 years old: his biological father committed suicide around the same time. During childhood Jack’s learning difficulties were compounded by familial instability as well as substance abuse. By his early teens Jack had a number of contacts with the juvenile justice system including periods of detention.

At the age of fourteen Jack was diagnosed with a foetal alcohol spectrum disorder (FASD). At this time FASD was not recognised as a cognitive impairment and so he was not eligible for specialist disability support. Jack continued re-offending engaging in persistent low level criminal behaviour; mostly stealing. Over time the seriousness of these crimes increased; the most serious being his involvement in ram raiding a liquor store. During this period Jack was addicted to drugs and alcohol. Jack is currently serving a sentence in a mainstream prison. Jack seems unable to manage his parole orders when he was released early and so he is now serving a full term for the original charge.

Jack does not manage well in a mainstream prison. His cognitive impairment, often misconstrued as defiance or bad behaviour means that he regularly suffers punishments and removal of liberties. One particular vulnerability, often acknowledge as resulting from his cognitive impairment is his impulse control. Consequently, Jack can sometimes respond angrily to orders given by the corrections staff. The last incident was serious enough, and on the back of numerous other incidents, for Jack to be placed in ‘lockdown’ for several months with severely limited freedom of movement. During this period his privileges were withdrawn and he would often spend large parts of the day and night in his cell without television or the interaction with others.

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**The Specific Needs for Young People with Cognitive Impairment**

This research has been primarily focused on adult imprisonment. However there is clearly a need to examine the pathways for young Indigenous people with cognitive impairment. The research that does exist in this area, suggests that young people with cognitive impairment are significantly over-represented in Juvenile Justice Centres. The NSW Law Reform Commission has recently noted that there is the need for a different kind of response for young people with cognitive impairment who come before the justice system - as the issues for young people are distinct. Their recent consultation paper notes the distinct developmental issues for young people, the different opportunities for rehabilitation that are possible because of the ongoing development and also the particular rights of young people who require a certain level of protection.

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Key Issues and Overview by Jurisdiction

Australian Capital Territory
Community Care Orders can be made by the ACT Civil and Administrative Review Tribunal for people who are identified as having a cognitive impairment and as a consequence are unfit to plead. These orders can be made for a period of up to 6 months. At the end of the six month period the order can be reviewed and the person assessed again.

Key Legal and Service Issues
- The referral and assessment process (to determine if somebody has an impairment) is lengthy (often months). People are often held on remand while waiting for an assessment.
- Cognitive impairment is frequently not identified in police stations, courts and prisons. There is no proper screening of disability on reception to prison in the ACT (although there are some questions included in the Alexander Maconochie Health Survey)
- There is a limited understanding of what the impact of an impairment can be on the part of both lawyers and the judiciary
- There is a significant absence of ongoing and continuous support (People have to tell the same story over and over again to different organisations and workers) particularly for people with foetal alcohol spectrum disorder and the absence of through-care is especially problematic.
- Prison programs are usually not able to accessed by prisoners with a cognitive impairment
- Cultural rights are not acknowledged in Correctional Centres and most programs do not incorporate the kinds of culturally aware programs Indigenous people with cognitive impairment would be likely to benefit from
- Indigenous are people more likely to remanded in custody than non-Indigenous (one worker suggested they are 181 times more likely)
- Offenders might be excluded from alternative sentencing options such as the Circle Court because of a lack of understanding of cognitive impairment
- There is only limited flexibility in the way that some legislation is enacted (particularly with regard to young Indigenous people.

Relevant Legislation
The Mental Health (Treatment and Care) Act 1994 provides for the treatment, care, control, rehabilitation and protection of individuals who come into contact within the criminal justice system who are either mentally ill, have some other form of mental ‘disorder’ (such as a cognitive impairment) or are comorbid. In addition, Psychiatric Treatment Orders can be made by the ACT Civil and Administrative Tribunal for up six months of involuntary treatment, care and support of

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individuals with a mental illness. If the Tribunal finds that an individual who has a mental illness is likely to seriously harm themselves and/or others the Tribunal will grant an order if they are satisfied that the psychiatric treatment is likely to improve an individual’s psychiatric condition.  

For people with cognitive impairment, Community Care Orders (CCO) can be made by ACAT for a period of up to six months. These orders can be made by the courts, police, or other forensic services. At the end of the six month period they are assessed again, and a further six month order can be imposed if it is considered the person is still a risk to themselves or others.

**Relevant Services and Programs**

- The Intensive Treatment and Support Program operates as part of Disability Services in the ACT and is intended to develop service plans for people with disabilities and complex needs.

- The Forensic Community Outreach Service offers assessments and provides services for individuals with a mental illness during the post custody period with a focus on those who pose a significant risk to the community. This service may also clinically manage offenders who have a dual diagnosis, but does not work with people who have cognitive impairment but no mental health needs.

- Mental Health Forensic Services are a specialist service of Mental Health ACT and works with people who are over 13 and either in contact, or at risk of coming into contact with the criminal justice system. The focus of this service is on people with mental health issues. However because of it’s role as an assessor and advisor (for instance through the court assessment and liaison team), it has the capacity to refer to other services if it is found that someone has a disability (but not it is able to identify and refer people who are thought to have disability (but no mental illness). It also has the capacity to advise the courts that somebody has a disability (this might happen following a request from on-the-spot advice from the courts).

- The Alexander Maconochie Centre (AMC) team provides specialist mental health services to people held in custody (remand or sentenced) at the Alexander Maconochie Centre. Again, however, although this centre might screen and identify disability, it is not a specialist disability service. If someone has a disability and a mental illness they will be able to access a range of supports, but if it is just a disability, the centre staff will attempt to make an appropriate referral.

- The Bimberi Youth Justice Centre (BYJC) team provides specialist mental health services to children and young people held in custody at the Bimberi Youth Justice Centre. Again the focus of this service is on mental illness rather than cognitive impairment. Staff are able to refer to disability services if it is suspected someone has an intellectual disability (but not a mental illness).

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New South Wales

In NSW under Section 11 of The Mental Health (Forensic Provisions) Act a judge determines if an accused person is fit to stand trial. If they are not able to stand trial then the mental health review tribunal oversees the process. If they are not likely to become fit to plead in the next 12 months (and this is the case for most people with a disability) then a special hearing is held. At this hearing, the judge imposes a limiting term. This limiting term mimics the term they would have got if they had been found guilty and sentenced in a mainstream court. Throughout this term there are regular reviews by the mental health tribunal and there are also allowances for conditional release (for instance to the CJP). It should however be noted from the outset that the vast majority of people with cognitive impairment imprisoned in NSW are not ‘forensic’ patients. There are approximately 20 people with cognitive impairment who are forensic patients in NSW, 285 (non-forensic) prisoners who are identified as having an intellectual disability, and many more people with impairments who are imprisoned who have not ever had their disability or impairment formally identified.64

Key Legal and Service Issues in NSW

- The Community Justice Project (CJP) in ADHC has over the last five years made a significant difference in the lives of people with a disability who are cycling in and out of prison. The post-release and parole options for this population are significant. The Community Justice Project offers a range of support options, which are flexible and allow for movement between services. There are houses that are intensively staffed and restricted, and houses where people are able to live independently but with drop in support.

- The CJP is however still largely a post-release service. While it does divert some people from the courts (and there is no doubt that its existence has resulted in some people not getting custodial sentences) the bulk of its work occurs after people have already spent time in custody.

- Although the CJP has made some important inroads in the provision of services in this area, there are still significant barriers to accessing services for Indigenous people with cognitive impairment. For instance, many Indigenous people want some flexibility with regard to movement between geographic regions, yet many ADHC services, and certainly most parole services don’t allow for this level of flexibility.

- The level of disadvantage for the large population of Indigenous people on the coast in NSW is substantial. Because these communities aren’t rural or remote, they tend to be overlooked, even though the numbers of people in these communities are large.

- Indigenous services are stretched, and struggle to cope to meet the demand from these communities. In places like Nowra for instance, participants in this research noted that around 70% of prisoners in the prison are Indigenous, and in Probation and Parole, around 65% are Indigenous. However there is one Aboriginal liaison officer one day a week at probation and parole to work specifically with this population, and two Aboriginal mentors at Nowra prison. The capacity of Indigenous communities to work effectively with Indigenous people requiring support in NSW is compromised by the intensity of demand. In this context, people with cognitive impairment are less likely to be able to navigate barriers to service provision than people without. If their disability is not identified this situation is compounded.

64 Baldry, E, Dowse, L & Clarence, M (2012) People with mental and cognitive disabilities, Pathways into Prison, Background Paper for Outlaws to Inclusion Conference, from ARC Linkage Project, Feb 2012, UNSW
- The holistic approach of circle sentencing in some parts of NSW has worked very well for this population group.

- There are no beds for people with cognitive impairment at the Long Bay forensic hospital. It is exclusively for people with mental illness. Some advocates argue that this is an oversight and that there should be a comparable facility for people with cognitive impairment.

- In NSW, when people are found unfit to plead they are given limiting terms. The limiting terms that are set often are as long as what the maximum sentence would be if somebody was to have their case heard in court. It is argued by some that this is longer than what would actually be given because mitigating circumstances are not taken into account, and there is no potential for parole.

- NSW Corrections has been screening for disability in the prisons for close to eleven years. It currently uses the WASI tool and collects reasonably comprehensive data on people who are identified as having a disability. Currently in NSW there are 285 people in custody who have a disability. 112 of those are Indigenous.

- People who are identified in prison as having an intellectual disability are usually hooked into ADHC and the Community Justice Project. This means that post-release planning for this group is able to occur as a partnership between Corrective Services and ADHC.

- ADHC eligibility rules are problematic, particularly the stipulation that to be eligible for support the acquisition of the disability has to have been identified prior to the age of 18, and that the IQ has to be under 70. Emerging research demonstrates that there are significant numbers of people in prison who have IQ’s in the range of 70-80, but have never received any services.

- Recidivism is much higher within the population of people of people with cognitive impairment. In the general offender population recidivism rates are around 44-46%. Conversations with NSW experts in this research revealed that for people with cognitive impairment this rate is around 69.2% and 71% of these are Indigenous.

- The way in which success is measured (in terms of recidivism) requires ongoing examination. For instance, the CJP tends to measure its success in terms of whether or not someone is staying out of prison for longer than what they have previously.

- There are about 20 patients with intellectual disability who forensic patients – but this is relatively small compared to the non-forensic population.

- In the most recent NSW inmate health survey, one in seven participants (14%) scored an extremely low IQ score (below 70) indicating an intellectual disability (using the full scale weschler test). Indigenous people were significantly more likely to score a low, or low/average IQ. Adaptive functioning tests were performed on those who scored below 70, but weren’t included in this report.

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The Disability Services Act 1993 provides for the funding and provision of disability services and sets out the standards which must be applied in the design, administration and delivery of services. This legislation supports the equal rights of people with disabilities and provides a basis for ensuring that their specific needs are met. The legislation states that services must be provided in such a manner that addresses individual needs, the right to privacy, dignity, confidentiality, and that each individual is able to achieve their maximum potential as members of the community.

The Mental Health (Forensic Provisions) Act 1990

Under section 32 of the Mental Health (Forensic Provisions) Act 1990 magistrates (in summary proceedings) can divert individuals with an intellectual disability out of the criminal justice system and into the human service sector (for example into the care of a responsible person) allowing these individuals to get the assistance they need in order to live a positive life within the community. Part 3 of the Mental Health (Forensic Provisions) Act 1990 contains all the provisions relevant to summary proceedings before a Magistrate relating to persons with intellectual disability, other developmental disabilities and mental disorders. Sections 32 and 33 of the Act enable magistrates to arrange for the care and treatment of persons suffering from mental health problems. Section 32 applies to an accused person who suffers from a mental deficiency but is not mentally ill within the terms of the Mental Health Act 2007. Section 33 applies to an accused person who is mentally ill within the terms of the Mental Health Act. A section 32 order is available in relation to charges being dealt with summarily. The effect of the order is to dismiss the charges either unconditionally or subject to conditions. Conditions usually relate to complying with a support or treatment plan, which is an outline of various steps to be taken to engage with services and support to address any issues associated with the alleged offending conduct and the person’s disability.

Community Justice Program (CJP)

The Community Justice program is a post release program which provides support services for individuals with an intellectual disability exiting the criminal justice system that have a high risk of re-offending. Individuals exiting prison undergo a comprehensive assessment to determine the level of support required by the person. Support includes (but is not limited to) specific consultations or interventions, case work, clinical and accommodation services (for example intensive group home support to drop-in models). The program aims to reduce the incidence and impact of offending behaviour by individuals with an intellectual disability.


Integrated Services Program (ISP)\textsuperscript{70}

The Integrated Services Program is a multi-agency service approach administered by Ageing, Disability and Home Care (ADHC) in partnership with NSW Health and Housing NSW. The program coordinates cross-agency responses for approximately 24 adults a year who have been identified as having complex needs and challenging behaviour (identified across existing programs). Individuals accepted into the program have multiple disabilities, which may include intellectual disability, mental illness, drug and alcohol abuse or an acquired brain injury. The program provides for the provision of a range of additional time-limited services to individuals and their support network. These services include comprehensive assessment, behaviour support, supervision, case coordination and accommodation. The program aims to improve an individuals' pattern of health and behaviour, increase opportunities for them to participate more fully in community life and establish an ongoing and high quality support network.

Statewide Behaviour Intervention Service (SBIS)\textsuperscript{71}

The Statewide Behaviour Intervention Service provides clinical consultation to government and non-government agencies working with individuals who have an intellectual disability and high levels of offending behaviour. This service is available to local clinical staff or management in relation to individuals who are in accommodation and day program services or who live with family members. Work is undertaken collaboratively with these local partners to meet needs at the time as well as to build their knowledge and practical skills so as to meet similar needs in the future.

Seniors Officer’s Group on Intellectual Disability and the Criminal Justice system

The Senior Officers Group (SOG) was created in order to ensure that better outcomes for individuals with an intellectual disability in or at risk of contact with the criminal justice system are addressed. This group includes representatives from the Attorney General’s Department; Department of Ageing, Disability and Home Care; Department of Corrective Services; Department of Education and Training; Housing NSW; NSW Health; Department of Juvenile Justice; Justice Health, Police Force; and Corrective Services NSW. This Inter-agency approach guides individuals and the collaborative work of these agencies with the aim of improving general community well-being and the quality of life of individuals with an intellectual disability or low cognitive functioning. In order to achieve this, the scope of the Senior Officers Group is concerned with all stages where individuals with intellectual disability may come into or at risk of coming into contact with the criminal justice system.

The Justice Services Policy (JSP)\textsuperscript{72}

The Justice Services Policy has been developed to provide a framework for disability service providers that will use workforce capacity and guide responsive and appropriate service provision to service users who are children, young people or adults with an intellectual disability in, or at risk of, contact with the criminal justice system whether they are victims, witnesses or alleged offenders.

\textsuperscript{70} Ibid
\textsuperscript{71} Ibid
\textsuperscript{72} NSW Department of Ageing, Disability and Home Care, Justice Services Policy, viewed 17 November 2011, http://www.adhc.nsw.gov.au/_data/assets/file/0005/228380/Justice_Services_Policy_June_2009_Final.pdf
Northern Territory

Key Legal and Service Issues

**Indefinite detention in the Northern Territory (an overview of the process).**

In the NT the prosecution, defence or the Court can seek to have somebody’s fitness to plead determined. Somebody can be found unfit to plead – or not guilty on the grounds of mental impairment- by either a jury, or by agreement between parties. When unfitness to plead has been determined there is another hearing to determine whether or not the offence was committed by the person.Once that has been determined there are three options.

1. That the person is released unconditionally
2. That the person is given a non-custodial supervision order
3. That the person is given a custodial supervision order.

If it is determined that a custodial supervision order is needed then the Court calls upon the CEO of Health to certify that an appropriate place offering care and treatment is available. If no appropriate place is offered then the Court is left with no option but to order prison-based custody.

The Court must receive reports from the CEO of Health within each 12 months period, and may determine that a Periodic Review of the order is needed. However the Major Review is the only mandated review, a period determined by the length the prison sentence that would have been imposed had the person been found guilty of the offence.

In all instances the Court is reliant on the advice of the Health CEO. If at the Major Review the persons remains a risk to self and others and if no appropriate place is offered, the Court has little option but to continue the prison-based supervision.

In the majority of cases a person under a custodial supervision order will be kept in prison custody for a period exceeding any sentence that would have been imposed on a finding of guilt, and this custody will be indefinite. This custody occurs in the maximum security sections of the prisons, with minimal treatment of significant benefit offered. It is often the case that behaviour deteriorates as a consequence of indefinite detention, resulting in a situation where the longer the person spends in custody, the less likely they become to be considered able to be managed in the community. This increases the likelihood of people spending long periods, even all of life, in custody.

In the Northern Territory there are 9 Indigenous men currently under guardianship who are detained under part IIA of the NT Criminal Code. Although no concrete data was available as to the number of Indigenous people with cognitive impairment imprisoned in the Northern Territory who are not indefinitely detained, some participants in interviews estimated that in Alice Springs Correctional Centres as many as 100 of the Indigenous prisoners there would have some form of cognitive impairment.

**Community Options**

- There is broad consensus across the territory that prison should be a last resort for Indigenous people with cognitive impairment. However given the limited options available in the community, its use has been difficult to avoid when working with people who pose significant risks to the their communities.
There is some important work however that does occur in the community. The disability unit in the Department of Health works closely with many individuals who have cognitive impairment and in some instances offers intensive case management to people who are at risk, while they are still in their communities. The remote area health services are often responsible for identifying people in remote communities who may have cognitive impairment, and it is often the case that disability services have been in contact with individuals prior to their involvement in court. Many workers clearly work extremely hard to offer individualised, and intensive case management. This includes many efforts to involve family and community in any judicial or criminal justice processes. In many ways the relatively small size of the population in the Northern Territory, and the dedication of many of the workers employed there, lends itself to the kind of person centred approach many other jurisdictions aspire to. However a combination of factors – including the incredible challenges involved in working across such a large geographic region, the complexity of the need of the individuals as well as the communities they are living in, and an absence of funded community based alternatives to imprisonment– can compromise the efficacy of this approach.

- When people have the support of family and community, the work carried out by both government and non-government organisations is much more likely to be successful. When the support isn’t there (and sometimes this is a consequence of the challenging behaviour of the individual, and sometimes a consequence of a fractured community) it is much more complex to provide holistic and person centred approaches. However it is also pointed out by many that it is not fair to assume that Indigenous Communities (which are already very imposed on) are expected to alone find solutions to this issue.

- A number of participants in this research noted the important work that does occur in the community, and pointed to community-based programs in both Darwin and Alice Springs as examples of what is possible outside of the prison framework. However there are challenges – in all areas of community service provision in terms of meeting the needs of this population – and viable accommodation options for people who require a level of support that is not available from the informal support networks of their communities.

- There is an ongoing issue with both recruiting and retaining staff for this work. It is often the case that experts from outside the Northern Territory are recruited for short periods to provide specialist support to particular individuals. However the problems in retaining staff – which is in part due to the stress and challenge of the work itself – has continuing implications for the capacity of individuals and communities to build solid and trusting relationships.

**The spirit and intention of the legislation- and the pragmatics**

- A strong theme in the Northern Territory interviews was that legislation itself in the Northern Territory is reasonable, but its application is problematic. Specifically it is the absence of community facilities, programs and services that dilutes the intended function of the legislation. As a result, courts making Part IIA supervision orders often have no practical alternative but to impose prison based custodial orders. The consequence is that some cognitively impaired people are imprisoned for very lengthy periods when they should probably be supervised in the community.

- The idea behind the legislation in the Northern Territory is that there is a need for an alternative pathway for people with cognitive impairment. However the reality for many people is that this different pathway is actually much more punitive than the mainstream system. It is clear in the
Northern Territory that people who are not criminally responsible, end up spending more time in custody than people who are.\textsuperscript{73}

- There is also an apprehension on the part of lawyers to use part IIA of the legislation because they are fearful their client will be indefinitely detained, and also because the legal process itself is so drawn out. Some participants suggested that lawyers try and hedge around issue; that is they try and ignore it or avoid it so courts often don’t actually know what the full story is.

**Different pathways for people in prison on supervision orders**

- When people with a cognitive impairment are imprisoned on a supervision order, there are clearly differences in the way they are treated (compared to mainstream prisoners). There is for instance a specialist unit in the Alice Springs Centre which caters for people identified by prison management as having a cognitive impairment, as well as for people on a supervision order. There are differences in prison routine for people on orders (including more time out of cells, access to their cells during the day) and there are disability support workers who are able to visit people in prison and provide programs and advice to staff also. However, regardless of these differences there is no escaping the fact that all of this occurs within a maximum security prison.

- Despite the best intentions of prison administrators and staff on the ground, people in prison rarely receive the kind of treatment and support that would be of significant benefit, particularly if the ambition of this treatment is ultimately community re-integration and the reduction of offending behaviour.

**The complexity of need in the Northern Territory**

- The complexity of need in remote Indigenous communities in the Northern Territory looms large in every discussion as to how to best meet the needs of people with cognitive impairment in these regions. When communities and families are fractured, their capacity to support someone with cognitive impairment and offending behaviour is limited. For those within the community who are capable of offering support, frequently they are stretched in terms of what they are able to offer, because the need is so great. Communities are dealing with high rates of violence, family and community break down, unemployment, abuse, suicide, drug and alcohol addiction, an absence of education, chronic health conditions arising from in many cases extreme poverty, high rates of imprisonment, the psychological impact of disempowerment, the ongoing legacy of invasion, as well as brain injury, foetal alcohol spectrum disorder and intellectual disability. It is very rare that an Indigenous person fronting the criminal justice system just has an intellectual disability. The needs are multiple, and the interaction between these needs is complex.

- The geographic spread in the Northern Territory compounds the challenges of working with this population. There are challenges in terms of time and distance for workers, as well as challenges for families wishing to visit those incarcerated or facing court in the major centres. In addition, post-release transition work can be complicated by the remoteness of communities from major centres.

**Recent Initiatives**

There have been a number of recent initiatives in the Northern Territory with regard to people with cognitive impairment in the criminal justice system.

- There are two new secure facilities being built in the Northern Territory intended for people with cognitive impairment. There will be 8 (adult) beds in Darwin, and 8 (adult) beds in Alice Springs. These facilities will be for people with cognitive impairment (not necessarily just for people on supervision orders). People can be referred through the courts, or via their disability and support workers. There is intended to be flexibility with regard to the support levels within the units. Some people will be participating in community activities during the day but will sleep there, while others will have a much more restricted regime.

- A new disability forensic facility is also to be built in Darwin by 2015. Although this will be operated by health, it will be situated next to a prison with the perimeter staffed by Corrections. This will have between 24 and 30 beds.

- Although the intention of the secure facilities is that they will be transitional, there are concerns amongst some advocates that the limited options available to people in the community will limit the capacity of people to transition effectively. Similarly, there are concerns in the community about the extent to which the future forensic facility will operate to net-widen. That is, there are fears that it will be used for a different population to those who are already on custodial orders and who might otherwise have a less-intensive and restrictive supervision order. There are also concerns with regard to the extent to which these units and secure facilities will be fundamentally different from imprisonment (or the experience of imprisonment for people with cognitive impairment).

- Other new relevant Initiatives in the Northern Territory include:
  - Resources for an ‘exceptional needs and complex case management’ initiative
  - The introduction of the Northern Territory Alcohol Reforms and
  - The establishment of a cross-government and cross-department working group to develop strategies to prevent and respond to foetal alcohol spectrum disorder

**Relevant Legislation**

Relevant legislation in the Northern Territory includes:

- The Mental Health and Related Services Act
- Northern Territory Criminal Code

**The Mental Health and Related Services Act**

The Mental Health and Related Services Act governs the delivery of mental health services in the Northern Territory. The Act provides for the treatment of individuals with mental illness in hospitals and the community. It aims to protect the rights of individuals with mental illness/mental disorder while ensuring that they have access to appropriate care.

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The Northern Territory Criminal Code

The Northern Territory Criminal Code Act was amended in June 2002 to include Part IIA Mental impairment and unfitness to be tried provisions. This change allowed the Courts greater flexibility in dealing with accused individuals suffering from mental impairment.

The court however must not make a custodial supervision order committing the accused person to custody unless it has received a certificate from the chief executive officer of the Department of Health and Community Services stating that facilities or services are available in that place for the custody, care or treatment of the person. Therefore the chief executive officer Department of Health and Families, can by certifying there is no alternate place of custody with the facilities or services needed, and by asserting that there will be proper services in prison, have little alternative but to place the accused person on a prison-based order. Essentially it is the advice of the CEO Health, and the failure to provide alternatives ensures the accused person ends up in prison. When such orders are reviewed similar advice can result in this form of custody continuing indefinitely. Changes to the Northern Territory Criminal Code now allow individuals with complex needs and offending behaviours or who are assessed as a risk to the community to be incarcerated and held indefinitely in maximum-security jails.

Relevant Services

Note: The Northern Territory has a number of programs that are specific to Indigenous people with mental illness who are involved with the criminal justice system (for example, Aboriginal Mental Health Worker program) but far fewer that are targeted to people with cognitive impairment. There are however a number of initiatives currently in development. These almost all fall under the jurisdiction of the Aged and Disability Program in the Department of Health.

Positive Behaviour Support Unit (PBSU)

The Positive Behaviour Support Unit provides assistance to empower individuals with challenging behaviour to communicate more effectively and to enhance the capacity of families, communities and service providers to care and support individuals with challenging behaviour, specifically in relation to triggers for challenging behaviour, de-escalation strategies and facilitating positive interactions with others. PBSU assesses the needs of referred clients to develop strategies to stabilise client behaviours. This involves developing, implementing and reviewing, individualised and therapeutic behaviour management programs and risk management plans.

The Exceptional Needs and Complex Case Management Model is currently in development in the Northern Territory. This will be over-seen by health and will involve a community based case management response to people with complex needs.

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In Queensland, when it is determined that someone is not fit to plead under section 27, the case is referred to the mental health court. The role of the mental health court is to decide whether or not the person facing court was of unsound mind at the time of the alleged offence, and also whether or not the person is fit to plead. For somebody with an intellectual disability or cognitive impairment, this means determining if their cognitive impairment prevents them from standing trial. It is often the case that the court will decide that the person was in fact of sound mind at the time of offence, but is not fit to stand trial. (The guidelines governing these decisions are contained in section 267-271 of the mental health act)

If it is the case the person is found unfit to plead or stand trial then the person can’t be found guilty and they are acquitted. The next question for the court is whether or not the court needs to make a forensic order. This decision is made on assessments of both the safety of the person and the safety of the community. Particular attention is paid to the question of whether or not it is necessary for the person to be detained for treatment.

The difficulty for people with cognitive impairment is that this process is targeted towards people with mental illness. The mental health court consists of two psychiatrists and a supreme court judge. If it is determined by the court that the person needs to be detained in a safe place, this (in Queensland) means detention in a psychiatric hospital and then a forensic order is made. The rationale behind this is that people will then be treated (medically), and will ultimately recover and be released into the community. The Mental Health Review Tribunal (made up of lawyers, community members and psychiatrists) reviews these orders every six months. If the person is considered after six months to still be a risk to themselves or the community, then the order is continued. If it is considered every six months when the order is reviewed that the person continues to pose a risk to themselves or the community, indefinite detention is possible. It was estimated in the course of this project that over 100 people with cognitive impairments are indefinitely detained in psychiatric hospitals.

There are multiple problems involved in the indefinite detention of people with cognitive impairment in psychiatric hospitals. The central issue is that people with cognitive impairment (and no mental illness) do not have a treatable or intermittent illness. Psychiatrists often don’t have a great deal of skill or expertise in working with people with cognitive disability, and people’s well-being and skill levels tend to deteriorate when they are held in restrictive environments without the level of community engagement and support necessary to work on any issues underlying offending behaviour. It is also the case that people get further damaged by the experience of imprisonment in psychiatric hospitals. It was pointed out by participants in the interviews for Queensland that this group experiences a high level of solitary confinement and other forms exclusion from the mainstream population – often because their behaviour is confusing and challenging for professionals who are not expert in working with this population.

The issue of seclusion is particularly important in terms of the impact that this has on Indigenous people with cognitive impairment. The practice of confining patients on their own was considered by
participants in this project to be particularly psychologically damaging for this population. Despite this, seclusion as a strategy is used regularly with patients who are considered difficult.

- In 2011 forensic disability orders were introduced through the Forensic Disability Act. This act provides for people with intellectual disability in the system to be detained in a forensic disability unit. The forensic disability unit is a new building situated next to an existing psychiatric unit and cost around 34 million to make. However it currently only has 8 beds. There are currently 8 people in there on forensic orders. It is estimated that there are still well over 100 people in psychiatric hospitals on forensic orders who have intellectual disability. The forensic disability service was built as a way of diverting people with intellectual disability out of the mental health system. But it is inadequate in terms of the numbers it has the capacity to deal with.

**Detainment as a consequence of delays in assessment**

- In Queensland, as well as the problem of indefinite detention in psychiatric hospitals, there is a specific problem with the potentially indefinite detention of people while awaiting reports assessing their mental health. When it has become clear that somebody is not fit to stand trial, the Director of Mental Health provides notice to the administrator advising that the person the person is unfit (in the legislation this is found in Chapter 7, Part 2). The administrator has 21 days from the date of the notice to provide a report commenting on the patient’s mental condition, and its impact on the alleged offence. The Mental Health Act 2000 (Qld) under s.238 requires a medical practitioner to assess a person’s capacity at the time of the offence. The report is then given to the Director of Mental Health who decides whether it is to be referred to the DPP or the Mental Health Court. Non-indictable offences cannot be referred to Mental Health Court. The DPP then has the options of continuing, discontinuing, or referring to the Mental Health Court. Criminal proceedings are suspended until a s 238 report has been completed.

- Although these reports are supposed to be completed in 21 days, and this is in fact a legal requirement, there are no repercussions for doctors or mental health services who fail to meet this requirement, and there is widespread acceptance in both the courts and the community that this process takes a long time. Many people are remanded in custody during this process. The 2009-10 annual report for the Director of Mental Health recorded an average time of 115 days for reports to be complete. Participants in this research noted that this process can take much longer. People are often remanded in custody awaiting the reports longer than they would have been in prison had they pleaded guilty.

- It is too often the case that lawyers who recognise that their Indigenous client might have an intellectual disability often can’t get support in having it assessed. They often don’t have the resources to fund a psychologist. What happens instead is that people can wait for an assessment but during this period of waiting they are often remanded in custody. Cases can be adjourned for many months at a time and it is not uncommon for people to spend longer in prison waiting for an assessment than they would have if they had pleaded guilty.

**Problems with the process of the MHRT**

- Participants in the interviews for this report also noted that there are some problems with regard to the process of the Mental Health Review Tribunal for people with cognitive impairment. It was suggested that it is often the case that the patient does not have access to information, documents, or legal representation when important decisions are made. It was noted that there are problems in receiving reports prior to the meeting of the tribunal (they are intended to be provided seven days
before the hearing but this often did not happen) and this is problematic in terms of attempting to prepare for the hearing. It was also noted that people with cognitive impairment find it very difficult to respond adequately to the issues raised by the mental health review tribunal if they don’t have substantial time and support.

- The Mental Health Review tribunal is intended to be set up as an informal and therapeutic process – a process in which legal representation is unnecessary. However some argue that representation, at least in some cases, is necessary to ensure a fair hearing. Participants in this research argued that this is particularly the case in hearings regarding forensic orders. The Attorney General in these cases is represented by a lawyer and the onus is on the patient to prove he/she is not an “unacceptable risk” and potentially subject to long term incarceration.

- It was noted by participants however that there have recently been some substantial improvements in the way the tribunal operates. There was a sense that they had become more open about receiving submissions and allowing questions to be asked of the doctor, and taking the time to ensure the client has a fair and full hearing.

Other legal and service issues in QLD

- There is still a real lack of options for Indigenous people on minor charges. People with intellectual disability or cognitive impairment charged with summary offences must be dealt with in the Magistrates Courts. There is no option for them to be diverted, because only indictable offences can be diverted to the mental health court

- There are significant differences between the services for people with mental illness (where there exists long standing and sophisticated in-reach services) and people with cognitive impairment. There was broad consensus in the Queensland interviews that there is overall a comparative absence of services that are specifically targeted towards people with cognitive impairment.

- However it is clear that there have recently been some significant shifts with regard to service provision and legislation targeted towards this population. The Forensic Disability Act (as mentioned above) was introduced last year, and the Forensic Disability Service, while minimal in terms of it’s reach, reflects a willingness to begin examining seriously the support needs of this population. Corrective Services has also started to make some significant attempts to make a special needs unit for people who are vulnerable in prison and the specialist unit at Arthur Gorrie prison continues to provide specialist support for people with cognitive impairment. Queensland has also two specialist courts that are able to deal with this population, and a number of support structures in place for working with this group in the community (see below for listings of relevant services)

Relevant Legislation

Relevant legislation in Queensland includes:

- Mental Health Act 2000
- The Forensic Disability Act 2011

Mental Health Act 2000 and the Forensic Disability Act 2011

The Mental Health Act 2000 provides involuntary assessment and treatment, and the protection, of individuals who have mental illnesses. The Mental Health Court under this Act decides whether an individual is unfit to stand trial or was of unsound mind at the time of the offence. When this is the
case, the court may order the individual to be detained in an authorised mental health facility or the forensic disability service under the Forensic Disability Act 2011.

The Forensic Disability Act 2011, provides involuntary detention, care, support and protection for individuals with an intellectual or cognitive disability on a forensic order. The Act offers an alternative and more suitable forensic care option for this target group, where involuntary treatment for a mental illness is not required. In addition, this Act also provides the legislative framework for the Forensic Disability Service whereby involuntary detention, care and support for up to ten individuals with an intellectual or cognitive disability on a forensic order may be made by the Mental Health Court.

Relevant Services

Special Circumstances Court
The Special Circumstances Court Diversion Program (SCCDP) is an initiative of the Brisbane Magistrate Court and is funded by the Department of Justice and Attorney-General.\(^{78}\) The program is directed at offenders who are in contact with the criminal justice system at the early stage. It specifically targets two main groups of offenders, that is ‘those who have impaired decision-making capacity as a result of: mental illness, intellectual disability, cognitive impairment, brain and neurological disorders, and those who are homeless, or at risk of being homeless.’\(^{79}\)

The aim of this program is to manage the diversion of this target group to appropriate bail and sentencing options, and ensure the necessary support services relating to accommodation, health and other needs are in place in order that they might then address the nature of their offending behaviour. Offenders are assessed by court liaison officers and if eligible or as a result then referred, supported and supervised where the factors contributing to their offending behaviour are addressed.

Mental Health Court
This is a supreme court and only people with indictable offences will go there. It can hear cases of people who have an intellectual disability, request reports and assessments from Disability and Community Care Services and can make forensic disability orders which stipulate the nature of community treatment and support and can also detain people to the Forensic Disability Service.

Post custody support - Bridging the Gap (pilot program)
The Department of Community Safety within Queensland is presently piloting a provision of through-care Support Services for prisoners with impaired cognitive functioning, otherwise known as the Bridging the Gap (Pilot program) Project. This pilot program aims to provide support to both men and women (on a case by case basis) suffering from moderate to severe impaired cognitive functioning who are being released from correctional centres back into the wider community. Support ranges from (but is not limited to): rehabilitation during both pre and post release; restoration of social support networks; access to disability support services; and addressed criminogenic program needs.

Department of Communities – Disability and Community Care Services


\(^{79}\) Ibid
Queensland Disability and Community Care Services provide a range of services to individuals with cognitive impairment, who exhibit challenging behaviours that could put them in, or at risk of, contact with the criminal justice system. These services include (but are not limited to):

**Intensive Behaviour Support Teams**
Intensive Behaviour Support Teams work with adults whose behaviour has been found challenging by their support network, that is their family, carers and service providers. Team members work with the individual and his/her support network in order to achieve a better quality of life for the individual and try to prevent loss of community support or exclusion from community life. A positive behaviour support framework (in the form of a person centred approach) is used in order to emphasise the development of positive intervention strategies.

**The Centre of Excellence for Behaviour Support**
The Centre of Excellence for Behaviour Support is funded as part of the Queensland Government’s responsibility in improving the quality of life of those individuals with intellectual or cognitive disability and challenging behaviour, and to diminish the use of restrictive practices in the lives of this target group. The Centre’s focus lies in undertaking world leading, policy development and training aimed at improving service for these individuals.

**Specialist Response Services**
Specialist Response Services (SRS) delivers specialized therapeutic intervention and support to improve outcome for individuals with an intellectual or cognitive disability who display challenging behaviour. Specialist Response Services work with Queensland’s disability services to support adults to develop and maintain positive behaviours and skills that will aid in improving their quality of life and greater involvement in the community.

**The Forensic Disability Service**
The Forensic Disability Service (FDS) provides appropriate accommodation for individuals with an intellectual or cognitive disability who are on a forensic disability order. The service offers a secure environment for individuals to receive therapy and learn specifically tailored skills (depending on each individual case) to reduce offending behaviour, increase their quality of life and reintegrate into the wider community.

**Positive Behaviour Environments**
The Queensland Government’s Positive Futures program is constructing a range of environments to meet the needs of adults who require a specialist response. The environments are aimed at providing opportunities for individuals to learn new skills and positive behaviours. Service providers use a number of individualised approaches to support adults in these environments, for example active support, person centred approaches and positive behaviour support.

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83 Ibid
84 Ibid
85 Ibid
In addition, this initiative supports a capital works program that is creating more positive built environments for adults with an intellectual or cognitive disability who display challenging behaviours. A range of accommodation options are being implemented in order to provide a positive living space for this special needs group, improve their quality of life and help them reintegrate back into the wider community.

86 Ibid
South Australia

Key Legal and Service Issues

Legislative Options

- In South Australia, a number of legislative options exist for people with cognitive impairment. Part 8A of the Criminal Law Consolidation Act allows for a process where fitness to plead or mental incapacity is determined. If a person is found to be incompetent (usually on the basis of a report by a forensic psychologist) – a limiting term is set which can be served in custody, in a secure forensic facility, or on licence in the community. This term is comparable to the amount of time that would be served if the crime had been committed. It is also possible for a person with cognitive impairment to be sentenced under the Sentencing Act (and again this might be served in custody or in the community). For people who have committed minor or summary offences additional options exist through the Magistrates Diversion Program where they are able to voluntarily participate in treatment while their matter is adjourned. It is also possible for people to be detained under the Guardianship and Administration Act, Section 32.

The Absence of Community Support

- There was a strong theme in the interviews in South Australia, that the legislation as it exists is actually very reasonable and offers a number of options, but it is the absence of services in the community that is problematic. This is in part due to the extremely remote nature of some of the communities, and also the difficulties that some services have engaging well with Indigenous communities. It was argued that prison is used too often as a sentencing option for people with cognitive impairment. It was also felt that if the courts were able to refer people to the community more they would do this, but the absence of community support and services prevents this from occurring. It was also suggested that for those people with challenging behaviour, disability services did not always have the resources to work with this population. Similarly, it was felt that when people had offended against members of their community, and as a consequence family and community were fearful, this poses additional challenges for services attempting to promote community integration.

- There is an overall absence of services for Indigenous people with disabilities in South Australia, including people with cognitive impairment. In the communities there are not services to support what court parole conditions or orders are asking for. It is very hard to sustain workers out in the communities and keep practicable programmes and services running. This also means that the enforcement of orders or parole conditions is very difficult particularly those with supervision requirements. There is one community based supervision facility (in Port Augusta) which provides a high level of supervision, but aside from that, there is no intensive community based support. Where services do exist there are difficulties in attracting the community to engage, and attracting skilled and qualified staff to do the work.

- There is currently some important work being carried out by the Exceptional Needs Unit (see below for an over-view of this unit) in terms of supporting Indigenous people who are unfit to plead to live in the community. However there remain significant difficulties in terms of contracting services and individuals to provide this work. It was argued throughout the interviews to this report that services for Indigenous communities work best when they operate in the communities and are not operating on a fly in and fly out basis.
It is however currently often the case that Indigenous people aren’t allowed to return back to their communities due to risk of safety (to other community members) and because there aren’t the services there to support them. Part of the work the exceptional needs unit is undertaking is to attempt to work with families and communities to accept people back into communities, and to reconnect individuals with their country and land.

There are some specific programs for this population. For instance there is a carer respite program where Indigenous people with CI/ABI are taken from the families and bought to cities (Alice) and placed in a safe environment to allow the carers some respite. However there are limitations on the extent of the injury that the person is able to have as these services are not able to manage people who are high risk.

Remote and Metropolitan Divides

It was also noted in the interviews that there are significant differences in terms of service pathways between people who live in the metropolitan areas and people who live in remote communities. Although tele-medicine and tele-psychiatry are used in order to conduct assessments, this is often not all that useful for Indigenous people who also require an interpreter. For people who are awaiting an assessment in custody, this then means that there needs to be adjournments to facilitate those arrangements. This results in longer times on remand.

Cultural (Mis)understanding

Other complicating factors with regard to assessment (aside from English as a second – or third or fourth – language), include the absence of medical records and histories for people in remote communities, and cultural ambivalence with regard to ‘diagnosis.’ In many South Australian communities, people with a disability are generally accepted as who they are. Although there are services that do provide case management, there are many Indigenous people who would prefer not to work with white organisations, and tend to rely on the support that the community is offering.

It was also noted by participants in the interviews that the forensic or enforcement orders often reflect a lack of cultural understanding of Indigenous lives. For instance, orders may say that you will be in breach if you leave South Australia. But because boundaries are invisible and it is not uncommon for Indigenous people to go hunting this can lead to a breach because somebody spends time in the Northern Territory. Compounding this issue, is that if you have someone with a cognitive impairment out on the land with certain orders, they frequently won’t understand that they have breached their orders by going hunting – and so there exists a kind of cultural disconnect, where they are not able to link their behaviour with any punitive response that occurs as a consequence of the breach.

Participants in this research noted that improving service provision is difficult partly because it is difficult engaging with Indigenous communities. There is a need to engage communities to build their own services, but before this occurs there is the need for extensive community development, work and education. It was noted that there are cultural issues regarding family and community ties. People often don’t want to stop their family members from drinking/drugs or use external agencies to assist them with this – even if this is worrying them or causing them harm.
Additional issues specific to SA

- The issue of petrol sniffing in South Australia continues to be of particular concern with regard to Indigenous communities and the impact this has in terms of cognitive impairment. It was noted by participants in this research that there has been a failure to implement the coroner’s recommendation from 2002 and 2005 petrol sniffing inquests. Institutions were set up at Amatyere (APY Lands) that were intended to operate as rehabilitation facilities targeting petrol sniffers but they are not being staffed properly or used. Recommendations regarding the need for secure facilities have also not been implemented.

- The Aboriginal Legal Rights Movement (ALRM) has argued that the needs of people with cognitive impairment needs to be examined. This population are able to be detained under Section 32 of the Guardianship and Administration Act – but it is noted that this is somewhat problematic because of the non-intermittent nature of disability (compared to mental illness) ALRM also points to the dire lack of adequate facilities for the detention of people who have cognitive impairment. It is suggested that the Minister of Families and Communities (who oversees the work of Disabilities) should be mentioned in the legislation and share the responsibility for the care of this population. Although there is allowance in Section 32 for people who are at risk of self harm or endangering others to detained, the absence of secure facilities makes this impossible. The absence of services also makes the setting of limiting term orders, detention orders, and release on licence very difficult.

- ALRM has also pointed out that there are particular problems with regard to expiation notices. The key issues here relate to the difficulty Indigenous people with cognitive impairment have in having expiation notices heard in the mental impairment diversion courts, and the financial impact of the expiation notices on people who are financially and socially vulnerable. It has been suggested that if a person is unfit to plead or mentally incompetent they should not receive expiation notices, or if they are marginally fit to plead, then the consequences should be reduced to reflect this marginality. The existing legislation does not have any flexibility to allow for this population.

- There are very few program options available in prison for people with cognitive impairment. The adaptation of a sex-offending program for people with cognitive impairment was developed last year and is currently operational. However there are many programs within the prisons that people with cognitive impairment are not able to access.

Relevant Legislation

Relevant legislation in South Australia includes:

- The Criminal Law Consolidation Act, Mental Impairment Provisions 1995
- The Guardianship and Administration Act 1993
- The Criminal Law Consolidation Act 1935
- The Mental Health Act (2009)
- The Sentencing Act (1988)


Under the Criminal Law Consolidation Act, Mental Impairment Provisions (1995), individuals with cognitive impairment in, or at risk of, contact with the criminal justice system come under the

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87 ALRM (2011) Submission to the Review of Division 4 Part 8 of the Criminal Law Consolidation Act 1935

88 ALRM (2011) Submission to the Legal Services Commission 'Expiation of Offences Act' correspondence
jurisdiction of the Minister for Health. For illustrative purposes, this means that the Department for Health is responsible for the custody, treatment and rehabilitation of this target group.

**Guardianship and Administration Act (1993)**

Individuals with an intellectual disability may be released ‘on licence’ to Community and Home Support SA – Disability Services and may be under formal guardianship orders\(^8^9\) enacted through the Guardianship and Administration Act (1993) Section 32; which includes individuals who are deemed “not fit to plead”. Under section 32 the Board can direct an individual to live or stay in a particular place, or where the guardian or enduring guardian says they should live or stay in order to ensure the proper medical treatment, day to day care and well-being of a person with a mental incapacity.\(^9^0\)

**The Criminal Law Consolidation Act (1935)**

The Criminal Law Consolidation Act 1935 outlines provisions regarding detention or supervision on licence of individuals found to be ‘mentally impaired’. Mental impairment under this Act includes mental illness, intellectual disability, and disability resulting from senility. Section 296C for example addresses ‘mental competence’ whereas section 296H addresses ‘mental unfitness to stand trial’.

**Relevant Services**

**Post custody support – The Aboriginal Prisoners and Offenders Support Service (APOSS)**

The Aboriginal Prisoners and Offenders Support Service provide support services for Aboriginal and Torres Strait Islander people with exceptional needs exiting the criminal justice system. The support services include providing information and referral, prison visiting, counselling, advocacy, peer support and post release assistance to Indigenous prisoners, offenders, young people and their families.\(^9^1\)

**The Exceptional Needs Unit**

The Exceptional Needs Unit is a South Australian state-wide program that provides assessment and advice for people with complex needs, including people with disabilities, mental health conditions and chronic health problems, or a combination of these. People who receive support from the unit may:

- be experiencing difficulty living independently or safely in the community
- have significant behavioural problems
- be in contact with multiple agencies
- fall through gaps in the support system
- be homeless
- require an integrated response from a number of workers or agencies.

Within the Exceptional Needs Project, accommodation options include a six bed supported accommodation service for 6 women with intellectual disability, and a 24 hour supported accommodation service for Indigenous men with brain injury in conjunction with mental illness, and/or drug and alcohol problems. This group are usually not able to return to their communities

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\(^{9^0}\) Ibid

because of their offences and risk levels. The Exceptional needs unit also offers a homelessness support service.

**Magistrates Diversion Service**
The Magistrates Court Diversion Program offers a diversionary option to people with cognitive impairment who have been charged with minor indictable or summary offences. The program is voluntary. People who come before the court commit to six months of voluntary treatment, during which the matter is adjourned. This treatment occurs in the community, and the program assists with referral and linkage to appropriate services. After six months the court then assesses their progress before determining an outcome.

**James Nash House**
James Nash house is a specialist mental health unit. Although it has a focus on people with mental illness, it is at times also used for people with cognitive impairment, however there is consensus that this is not the most appropriate place for this population. There is no specialist forensic disability unit in South Australia. The South Australian Government has recently announced that a new 40 bed forensic unit will be opening\(^2\) although it is not clear if this will cater for people with cognitive impairment also.

In Tasmania, if someone with a cognitive impairment faces court and are found fit to plead, they progress through the regular court and sentencing progress. If however it is determined that the person is not fit to plead, they may be heard under the Criminal Justice Mental Impairment Act, which stipulates that the court may impose supervision or restriction orders. These orders may be carried out in the community or in prison.

There are no targeted services in Tasmania for people with cognitive impairment who are in contact with the criminal justice system. There are some targeted forensic mental health services which at times work with people with disabilities also, or with people with dual diagnoses, but there are currently no pathways for this population. Although the Wilfred Lopes centre provides forensic beds to people who have been found not guilty by reason of insanity, or those who are unfit to plead and on forensic orders, this is focused on people with mental health issues, rather than people with cognitive impairment.

While disability services have the capacity to offer a reasonably intensive case-management service, there is no funded supported community accommodation for this population. This has a significant impact on the capacity of the court to impose community based orders. It also causes significant delays with regard to people leaving prison (for instance in the cases where parole is not granted because there are no suitable accommodation options).

There was some difficulty in the interviews establishing the size of both the incarcerated Indigenous population, and the size of the population of Indigenous people incarcerated who have cognitive impairment. It was suggested by some participants that there was research to suggest that there were close to 1400 Indigenous people with severe disability in Tasmania, but no reference or data sources were able to be provided for this estimation.

**Relevant Legislation**

- Sentencing Act 1997
- Corrections Act 1997
- Youth Justice Act 1997 (and its new amendment bill)
- The Disability Service Act 1992
- Criminal Justice ([Mental Impairment]) Act 1999

**The Criminal Justice (Mental Impairment) Act 1999**

The Criminal Justice (Mental Impairment) Act 1999 provides for procedures for dealing with individuals with a mental illness who are unfit to stand trial or who are not guilty of offences owing to insanity. Under this Act, those who are found unfit to stand trial are placed on a supervision order within the community who are subject to the supervision of the Chief Forensic Psychiatrist on conditions as to treatment, residence, directions relating to alcohol or illicit drug consumption or other directions made by the Chief Forensic Psychiatrist. Section 37 of the Criminal Justice (Mental Impairment) Act 1999 requires the Tribunal to review all individuals subject to a supervision order 12 months after the order was made and at least once every 12 months after that.

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94 Ibid
The Youth Justice Act 1997
Section 105 of the Youth Justice Act 1997 allows courts to adjourn a matter to determine mental health or disability of a young person who appears before the court.

Relevant Services
Alternatives to custody – Wilfred Lopes Centre
The Wilfred Lopes Centre is a 35 bed secure mental health unit operated by the Department of Health and Human Services. Individuals who are seriously mentally ill (including those with cognitive impairment) and commit crime are offered mental health treatment in a secure health setting (an alternative to prison) ideally, so that their condition is well managed before they are discharged. The Wilfred Lopes Centre can accommodate those who are found not guilty by reason of insanity, or unfit to plead and placed on a forensic bed, found Not Guilty by Reason of Insanity or Unfit to Plead and placed on a Forensic Order.

Post custody support – The Intensive Support Service (ISS)
The Intensive Support Service model provides time-limited, transitional support for individuals with a disability who have complex and exceptional needs. The service focuses on the development, implementation and review of Individual Support Plans for this target group and provides case management around these plans. Occasionally, the Intensive Support Service is used to support individuals subject to supervision orders, where additional supervision and support is required on an ongoing basis to meet individual needs.

Brain Injury Association of Tasmania (BIAT)
The Brain Injury Association of Tasmania addresses the needs of individuals with an acquired brain injury, their families and carers. It works at a national level to ensure that all individuals living with acquired brain injury have access to the support and resources they need to enhance their wellbeing in the community.

Diversion from the criminal justice system – The Mental Health Diversion List (MHDL)
The Mental Health Diversion List aims to address the mental health needs and related offending of individuals. The Court deals with this target group by providing separate lists or sittings for them with Magistrates and teams that focus on treatment and support. By focusing on treatment and support the court aims to provide an opportunity for eligible individuals to voluntarily address their mental health and/or disability needs associated with their offending behaviour. Individuals with cognitive impairment may only utilize this option if they have a mental disorder.

Victoria

Key Legal and Service Issues

- Victoria has been working specifically with people who have cognitive impairment who are involved in criminal justice settings for over two decades. As a consequence there are a number of systems and processes in place that demonstrate the commitment to meeting the needs of this population. Victoria has a well-established support program in police interviews, a number of court-based alternatives to mainstream court processes, specific forensic disability programs, and specialist units inside the prisons for people with cognitive impairment. Victoria also has a well established process of screening and identification, and as a consequence has developed a solid system of data collection also.

- Although there is legislation in Victoria that in theory allows for people with cognitive impairment to be detained indefinitely, it was suggested throughout the course of the interviews for this project that this didn’t happen in practice, because the existing services and pathways provided multiple options ahead of indefinite detention. It was also pointed out by some participants that the Indigenous population in Victoria is relatively small and that this impacted on the ability of the state to provide solid services. There are however still gaps in service provision. For instance post-release services, and services for people with cognitive impairment aside from intellectual disability still require considerable attention.

Services in the Prisons

- Corrections and Disability services work closely to ensure that clients of disability services are identified and their needs taken into account when they are imprisoned. There are a number of disability specific services in the prisons and those people who are registered as having an intellectual disability (currently between 120 and 130) have particular pathways through the prison system that are comparable to the pathways available to mainstream prisoners.

- Within the prison there are specific adapted programs that are run for people with disabilities. These programs are targeted towards offence type but tend to have a focus on a more experiential style of learning and activity.
- These programs include:
  - Sex offender programs
  - Violent offending programs
  - Anger management programs
  - Communication programs
  - Living Skills programs

- It is not necessary for people to have a formal disability diagnosis to participate in the adapted programs. Participation is on the basis of functional ability. So for those people who have failed formal diagnosis, they are still able to access the services in prison. It is often the case that people have had a go at mainstream groups in the prison, and they haven’t worked so they are then given the opportunity to try one of the adapted versions. People on remand (who can’t access offence related programs) are still offered living skills programs.

- All prisoners with an intellectual disability who are at risk are streamed via the Marlborough Unit in Port Phillip Prison. This includes a joint treatment program operated in partnership with Corrections Victoria and Statewide Forensic Services.
Within the prisons there is also a significant training program. This includes training community correctional staff, parole staff and custodial staff.

There is still no formal screening program for people with borderline disability in Victorian prisons. Attempts have been made to find a screening tool, but there is not yet something that has been adopted. It has been found that people with borderline intellectual disability go in and out of prison regularly and commit multiple but petty offences. It was estimated by many participants in this research that the needs of this population were significant, and that this group in fact represented perhaps the largest group of people with impairment in the Victorian justice system.

Although the drug and alcohol support needs for this population are high, there is still not a targeted specific drug and alcohol program that is adequately adapted for people with cognitive impairment.

Although all of the programs on offer in Victoria are available for Indigenous people, there are no specific or targeted programs. There have been some recent attempts in Victoria to build capacity via a ‘cultural wrap around’ approach for people on community corrections orders.

The Victorian Aboriginal Legal Service (VALS) submitted a report to the recent Victorian Parliamentary Inquiry into the needs of people with intellectual disability with regard to their interactions with the criminal justice system in Victoria. They noted that Corrections Victoria has conducted research which has found that of the 7,805 prisoners who were released with intellectual disability over a two year period, 102 of these were registered with disability services. It was found that those with an intellectual disability were significantly different in terms of their most serious offence type (their most serious offences tended to be property crimes – so less serious than the non-disabled population) – but they also tended to be released from higher security institutions (even if their security classification was lower) compared to the non-disabled population. The issue for prisoners with cognitive impairment on parole was also noted and VALS suggest that there may be forms of discrimination with regard to obtaining parole because of the lack of options for people in the community and the submission recommends that this issue be further investigated.99

Community and Post Release Support

There are still significant barriers to the accessing of appropriate accommodation on release from prison for people with disabilities. This is partially due to an absence of suitable supported accommodation options, partially due to some resistance on the part of people coming out of prison to engage with disability services, and partially to do with the difficulties that generic welfare organisations have in working with this population. As a consequence many people with cognitive impairment end up living in unsupported hostel or boarding house style accommodation on release from prison. The instability of this situation clearly increases their risk of re-offending and re-imprisonment. Although there are some specialist disability supports available targeted towards people at risk of re-offending, there is not a systematic approach to post-release support in this population.

The Victorian Department of Forensic Assessment and Treatment Service runs a residential treatment program (which has 13 beds- this has recently been reduced from 19) and there is also a step down community house. This service works with people who are a serious risk of serious threat or violence

and has been operating in some form for over 20 years.

- Victoria has two special bail hostel accommodation options for people with intellectual disability and acquired brain injury in the Melbourne metropolitan area where people can be bailed to in the event that there is nothing else.

**Courts in Victoria**

- It was noted by participants in the interviews that the time between the commission of an offence and having that offence heard in court is considerable in Victoria. In addition, the criminal justice system for people with an ID is longer and more complex than it is for people without a disability. This is problematic in terms of the extent to which people with an ID are able to connect the experience of court with their crime and an immediate consequence.

  Victorian Legal Aid notes there are some problems in terms of the way the legislation is implemented in Victoria, particularly with regard to the use of mental impairment defence in the magistrates court. They suggest that it is frequently the case that police (who don’t want matters to be dismissed or the person discharged) ensure that slightly varied charges are laid to ensure it is an indictable offence, and the process of accountability and outcome is potentially much more serious. Victorian Legal Aid also notes the way that services often don’t appear able to deal with multiple and complex needs – including various forms of dual diagnosis, and frequently referrals when they occur are not ‘warm’ and therefore largely ineffective with this population.

- People are placed on a range of supervision orders in Victoria including: Non-Custodial Supervision Orders as well as indefinite supervision orders under Part V of the CMI Act. Victorian Legal Aid notes however, that ‘these orders are generally far lengthier and more restrictive than any sentence which would have been imposed on the person had they pleaded guilty to the charges. For instance, the order may require them to be held in secure care for many years and have to return to the court for periodic reviews of their order.’

- There are a range of problem solving courts in Victoria. These include: The Koori Court, The Koori Liaison Officer Program, The Assessment and Referral Court List, Court Integrated Services Program, Victims of Crime Assistance Scheme, Neighbourhood Justice Centres.

**Services in Police Stations**

- Victoria offers services to people with cognitive impairment in police stations via the Independent Third Person Support Program. This service involves support people sitting in on police interviews and assisting with understanding by facilitating strategies to support comprehension in these settings. This service, run through the Office of the Public Advocate, participated in 2,200 interviews last year and clearly has a broad reach. However it was noted by participants in the interviews for this project that there was not the level of uptake in the Indigenous community that might be expected (given the

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100 Victoria Legal Aid (2011) *Access to and interaction with the Justice System for People with an intellectual disability and their families and carers*, Submission to the Victorian Parliamentary Law Reform Committee, 2011 (pp15-21)

101 Victoria Legal Aid (2011) *Access to and interaction with the Justice System for People with an intellectual disability and their families and carers*, Submission to the Victorian Parliamentary Law Reform Committee, 2011 (p4)

102 Victoria Legal Aid (2011) *Access to and interaction with the Justice System for People with an intellectual disability and their families and carers*, Submission to the Victorian Parliamentary Law Reform Committee, 2011 (p21)

103 Victorian Aboriginal Legal Service Co-op Ltd (VALS) *Access to Justice for People with a Cognitive Impairment*, Submission to the Victorian Parliamentary Law Reform Committee, 2011 (pp21-35)
over-representation of Indigenous people in police interviews) and also that there were limitations of
the project in terms of the extent to which the support people were able to play a case-management
role. Others have argued that the reason that Indigenous people are not utilising the third person
program is that there is a lack of identification (in terms of disability) amongst Indigenous populations
and an absence of awareness of the program amongst Indigenous populations and referring
organisations. Others have noted that even when people do use the independent third person
program, they still often don’t exercise their legal rights.

- The Independent third person program also involves the use of support people in prison hearings.
  However this is currently limited to supporting people with intellectual disability – and not those with
  brain injury.

  **Culturally Specific Services**

- There is an absence of culturally specific programs for Indigenous people with cognitive impairment.
  Where these do exist (for instance the Aboriginal Healing Centres (one in Echuca and one in
  Mildura), participants noted that these were incredibly powerful in their ability to work with people in
  a way that resonated culturally.

- Participants in this research noted the ramifications of the lack of immediate and targeted support in
terms of future outcomes. For instance, it is often the case that a small incident – which requires an
immediate and targeted culturally relative response – does not receive that response and so can morph
over time into more serious and more intractable behaviour that then requires a more serious response.
Much of the time this response is in fact incarceration.

- It was also noted by participants in this research that there is minimal continuity between the child
  protection system and the disability system. Many of the young Indigenous people with an ABI who
  end up involved in the criminal justice system are well known in the child protection system (either as
  a consequence of the removal of the child from the family, or the experience of multiple trauma) but
  there is no systemic process for linking those at risk with relevant services prior to their involvement
  in the criminal justice system.

- It is also of note that almost all of the support for Indigenous young people is offered during business
  hours. This includes much of the post-release options. For the majority of young people, the 9-5
  model does not adequately meet their needs.

  **The gaps for people with ABI**

- Although the Disability Services Act and the associated legislation allows for people with ABI to
  enter service systems, the service system in Victoria has historically been focused on intellectual
disability, and there are still fewer systems in place with regard to identifying and then working with
people with Acquired Brain Injury. The services provided to people with brain injury in Victoria are
almost exclusively run by the non-government sector. However there is now an ABI clinician
employed by the disability unit in Corrections who works across a number of domains in Corrections
including the provision of assessments. It was noted in the course of the interviews that many of the
people in prison with an ABI have at some point been connected to the Transport Accident

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105 Victoria Legal Aid (2011) *Access to and interaction with the Justice System for People with an intellectual disability and their families and carers*, Submission to the Victorian Parliamentary Law Reform Committee, 2011 (pp10-11)
Commission (which means that their brain injury occurred as a consequence of an accident). However the TAC does not provide support to people while in custody.

- It was noted in the course of the interviews, that if it is suspected that someone at the point of court has an ABI, the only place that might be able to do an assessment is ABIAS, and this involves waiting around 8 weeks for a neuro-psych assessment, and then often up to 12 months for any form of case-management. There is however a sense that some of the new courts are dealing with this issue, but it was still argued that even when the issue is recognised, there are very few concrete services for people with ABI when they are in prison.

- The Victorian Coalition of ABI Service Providers submitted a report to the recent Victorian Parliamentary Law Reform Commission where they over-viewed research recently undertaken. The submission reported on findings from interviews with people with ABI who had either themselves been involved in the criminal justice system – or were interested in advocating on behalf of this group. For the people interviewed, those who had been involved in the criminal justice system reported a lack of trust in the system, a number of them had experienced police harassment, and others were too nervous to participate as they felt that their participation might in some way work against them. None of the participants were aware of their rights, and were not aware of the supports available to them (for instance through the public advocate/ independent third person program). All participants reported finding the processes difficult to understand, and having experienced various forms of discrimination on the basis of their disability (including having wheelchairs and prosthetic limbs confiscated).\(^\text{106}\)

- This report also noted that in Victoria, 42% of men in prison, and 33% of women were found to have acquired brain injury (following a formal neurological assessment).\(^\text{107}\) AIHW data indicates that about 1.9% of the general population have a disability related to ABI. The report also argues that this client group often have extremely complex needs and tend to experience discrimination in terms of legal and corrections processes – including being locked up for long periods of time, not having parole granted because of limited access to adequate accommodation, and an inability to access ‘group based’ programs with no alternatives made available.

**Justice Plans**

- The Sentencing Act 1991 enables courts to order a justice plan to be developed by Disability Services. Justice plans require the courts, disability services and the local community correctional services to work in partnership in putting together a service plan, which is then implemented and monitored.
- Disability Client Services provide justice plans for people with intellectual disability who are coming before the courts. At this stage these plans are not available for people with Acquired Brain Injury. The question of who gets a justice plans and who is referred to the Disability Forensic and Treatment Service (DFATS) is related to the issue of the safety of the person and the risk of harm to others.

**Relevant Legislation**

Relevant legislation in Victoria includes:

- The Sentencing Act 1991

\(^{106}\) Stringer, K & Paradin (2011) Victorian coalition of ABI service providers, Submission to Victorian Law Reform Committee Inquiry into Access and Interaction with the Justice System by people with an intellectual disability and their families and carers (pp7-14)

\(^{107}\) Stringer, K & Paradin (2011) Victorian coalition of ABI service providers, Submission to Victorian Law Reform Committee Inquiry into Access and Interaction with the Justice System by people with an intellectual disability and their families and carers, (p7)
The Sentencing Act 1991 provides special conditions for offenders with an intellectual disability. The Act provides the option of compulsory treatment in a residential treatment facility, that is, the use of a Residential Treatment Order (RTO) as a sentencing option for those who have committed a serious offence and are suitable for admission to the facility. For illustrative purposes, section 80 (2)(b) of the Sentencing Act makes provisions for a court to place an individual with an intellectual disability on a residential treatment order to be undertaken within a residential treatment facility. The Court may sentence an individual to a Residential Treatment Order for a maximum of five years.

The Victorian Disability Act 2006
The Victorian Disability Act 2006 provides a legal framework for protecting the rights of individuals with a disability who are detained for the purposes of treatment because they pose a significant risk of harm to themselves and others. Part 8 of the Act allows for civil detention through supervised Treatment Orders (STOs) made by the Victorian Civil and Administrative Tribunal (VCAT). It also permits court mandated detention and treatment such as residential treatment orders, parole orders, custodial supervision orders and extended supervision orders.

The Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
The Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 provides for both custodial and non-custodial supervision orders to be made upon an individual who is found to have committed an offence, but the court decides that the individual is not guilty due to mental impairment (including cognitive impairment) or is unfit to stand trial. A non-custodial supervision order allows the individual to live in the community while receiving treatment and rehabilitation services for their mental disorder.

Relevant Services
The Assessment and Referral Court List is a specialist court list developed by the Department of Justice and the Magistrates’ Court of Victoria to meet the needs of accused persons who have a mental illness and/or a cognitive impairment. The List is located at Melbourne Magistrates’ Court and works collaboratively with the Court Integrated Services Program (CISP), which provides case management to participants. Case management may include referral for psychological assessment or referral to welfare, health, mental health, disability, and/or housing services and/or drug and alcohol treatment. The aims of the list are to:

110 Ibid
• To reduce the risk of harm to the community by addressing the underlying factors that contribute to offending behaviour;
• To improve the health and wellbeing of accused persons with a mental impairment by facilitating access to appropriate treatment and other support services;
• To increase public confidence in the criminal justice system by improving court processes and increasing options available to courts in responding to accused persons with a mental impairment, cognitive impairment or neurological conditions;
• To reduce the number of offenders with a mental impairment and other conditions received into the prison system.

The Disability Forensic Assessment and Treatment Service (DFATS)
The Disability Forensic Assessment and Treatment Service is a specialist service that provides a residential treatment facility, community based treatment program, dual disability clinic and specialist forensic advice to regions about working with clients with forensic issues.

The Australian Community Support Organisation (ACSO)
The Australian Community Support Organisation (ACSO) provides state-wide support services and assists individuals that are involved in the criminal justice system, particularly those with complex issues and offending behaviour. The organisation also puts into practice a number of residential units within Victoria which support individuals with an intellectual disability. The organisation aims to contribute to individual and community wellbeing by increasing opportunities for this target group to positively engage with their community.

The Disability Interim Justice Accommodation Service (DIJAS)
The Disability Interim Justice Accommodation Service provides accommodation and support to individuals with an intellectual disability who are involved with the criminal justice system.

Forensicare
Forensicare provide mental health services to forensic patients in Victoria. This includes the provision of pre-sentence reports. Forensicare has officers in a number of courts in Victoria who provide mental health liaison and support.

Court Integrated Services Program
This program operates at 3 courts in Victoria and involves a multi-disciplinary approach to assessment, referral and treatment of individuals facing court with complex needs. Case managers over-see the needs of the defendants and make assessments of risk with regard to future offending and treatment needs.

Neighbourhood Justice Centre (NJC)
The Neighbourhood Justice Centre also involves a multi-disciplinary and multi-jurisdictional approach to the court process which uses both therapeutic and restorative justice approaches. The focus of the centre is on addressing the causes of offending behaviour.

The Senior Practitioner
The Office of the Senior Practitioner is responsible for making sure that ‘the rights of people who are subject to restrictive interventions and compulsory treatment are protected, and that appropriate standards are complied with in relation to restrictive interventions and compulsory treatment’.  

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Western Australia

Key Legal and Service Issues

Western Australia has 33 people detained under the Criminal law (Mentally Impaired Accused) Act 1996. 11 of these are Indigenous, 10 are detained in prison and 1 resides in the community.\(^{114}\) Approximately 38\% of this group have a cognitive impairment (some have both mental illness and cognitive impairment).\(^{115}\) The over-representation of this group in WA has already been subject to some scrutiny. Research in 2005 found that over an 11 year period, over 1/3 of people with an intellectual disability who were charged with a criminal offence were given a custodial sentence compared to 13\% of the non-disabled population. 16\% of people with an ID who were arrested for the first time were given a custodial sentence, compared to 7\% of the general population.\(^{116}\) Attempts have also been made to look at the incidence of intellectual disability in Indigenous populations. Research in 2005 looked at contact with disability services (thus excluding the anecdotally large numbers of Indigenous people who do not connect with these services), but even so, found that though Indigenous Australians comprised 3.5\% of the population, they comprised of 7.5\% of people registered as accessing disability services (since 1953).\(^{117}\)

There was consistency in the West Australian responses with regard to what were perceived as some serious limitations in the current legislative and service environment. Of particular note at the time the interviews were being conducted were; the absence of declared places (despite allowances in the legislation for these places); the limited number of beds in the existing forensic facility (only 30); the limitations in terms of eligibility for these places (treatable mental illness only), the absence of community options for the court to impose on people with cognitive impairment; and the fact that people with cognitive impairment spend longer in custody on orders than what they would if they were also given a custodial sentence. The limitations of the Mentally Impaired Accused Review Board was also a strong theme in the WA interviews. Limitations include: the absence of transparency in its processes; the extent of its powers to determine the outcomes for individuals (where they are in custody, when they released, what the conditions of their release are) and the confusion between its role as a judicial and/or administrative body.

However it should be noted, that there is significant change currently underway in Western Australia. During the course of the ADJC campaign, commitments have been made to building declared places (as an alternative to custody for people with cognitive impairment who are placed on orders). In addition, the disability services act is currently under review. However, participants in this report noted that there is a pressing need for a review of The Criminal Law (Mentally Impaired Accused) Act, as it is this legislation that underpins the practice of indefinite detention.

There is a need for partnerships between justice and disability departments. The differing philosophical perspectives of these departments, in conjunction with the absence of pragmatic

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\(^{114}\) Correspondence between ADJC and Mentally Impaired Accuse Review Board 21st August

\(^{115}\) MIARB (2011) Annual Report, Western Australia


alternatives has in some senses stalled development of the pathways for Indigenous people with cognitive impairment in WA.

**Barriers to Justice with the Court Process and the Legislation**

- There is an absence of community options for the court when somebody is found unfit to plead. Courts are either able to place people on a custody order (which often ends up being indefinite detention) or release them into the community, or release them into the community with conditions. However the problem has been that there are so few places in the community for someone to go that conditional release orders are virtually impossible to impose.

- There is in Western Australia some difficulties with distinguishing between mental health and cognitive impairment in the Act. This is particularly evident because the implication in the Act is that its purpose is to ‘stabilise’ people so that they can then stand trial. This clearly is not a possibility for people with cognitive impairment.

- The decision making process is still locked in a criminal justice framework, so that people are treated as an ‘accused’ rather than someone with an intellectual disability.

- There are some offences in the Act that make custody orders mandatory, which means the judge or magistrate has no choice but to impose. This absence of discretion is problematic for people with cognitive impairment as the circumstances surrounding the commission of the offence are not able to be taken into account.

- Although the Act recognises both intellectual disability and mental illness there are not clear pathways for people just with cognitive impairment (which can’t be treated in the short term).

- Some have noted that the legislation itself is badly drafted, particularly that the threshold for unsoundness of mind is too high. In addition, it is noted by others that the Act in WA doesn’t have a statement of purpose, or a description and explanation of its aims.

- There are many people with cognitive impairment who appear unrepresented—especially when charged with summary offences. When this is combined with police who have only a superficial understanding of cognitive impairment, and the impairment is not identified, the potential for people to have their cases heard in a matter which is fair is severely compromised. It was noted by participants in the Western Australian interviews that there was a need for a more sustained effort to avoid criminalisation when people were facing court for the first time.

- It was noted in the interviews that lawyers in Western Australia avoid using the mental health legislation for their clients because they want to avoid the potential indefinite detention that this legislation invokes.

- There is an absence of specialist legal advice. For instance the use of the S27 defence is technically difficult (legal representatives noted that it is onerous in terms of its evidentiary burden). In many cases there is the need for a barrister to prepare the defence in the summary jurisdiction. However for most people this is impossible because of the expense.

- There are only very limited pathways for people with cognitive impairment when they are sent to prison (these are discussed below in relevant services).
**MIARB and the Need for Procedural Fairness**

- Although the MIARB is intended to operate as an administrative body, it was argued by participants in the interviews for this report, that its operation and decision making is judicial in nature. This is problematic primarily because there aren’t ways in which the decisions it makes are able to be appealed. Some have argued that there should be the option for judicial review.

- The key issues identified as being problematic with MIARB are:
  - the length of time people are detained for
  - An absence of procedural fairness
  - Closed hearings
  - Difficulty in providing meaningful advocacy
  - An absence of transparency
  - The fact that decisions are not appealable
  - It is not a legal remedy
  - The majority of people are detained for much longer periods than proscribed for the offences they have committed
  - That prisons should not be used for this group

- If the court puts someone on a custody order, the MIARB then controls all aspect of the order. Section 98 of the WA Guardianship and Administration Act allows for the public advocate to investigate issues of interest of a person under a custody order. The WA PA has interpreted ‘issues of interest’ to include the need for guardianship. Referral to the public advocate is supposed to occur as an automatic part of the process of the person coming under the MIAR Act regime - however this does not occur. This process requires some examination. If it did occur automatically this could impact on both the legal process (the PA could investigate issues of legal representation for instance).

**The absence of community places**

- Although the legislation in WA allows for people with mental illness to be sent to a forensic hospital for treatment (on a custody order), the reality is that they often get sent back to prison because there are only 30 beds available – and once they have stabilised, they tend to be returned to custody. For people with cognitive impairment (and no mental illness), there is very little available in terms of non-custodial options under the Act.

- It was noted in the interviews that Indigenous people with an intellectual disability are often not in contact with disability services prior to the age of 18. Often the first contact with disability services occurs after a crime has been committed and is detained. Individuals and communities have a limited understanding of the opportunities provided through the disability service system, and access to funding is limited, and trust in government services is very difficult to build.

- There are complex issues around the extent to which the absence of uptake of service in some Indigenous communities is related to the manner in which ‘white’ services deliver the services, rather than simply about reticence to engage on the part of Indigenous communities. Services can end up having an attitude of ‘we’ll go where we are wanted’ rather than attempting to reconfigure service provision in such a way that it becomes meaningful and accessible to communities.

- Many people who live in remote areas are not connected with, and do not access any form of support services. Their disabilities are frequently not recognised, and even if they are, it is rare for police to
know if the person they are charging is under any form of guardianship. There is a continuing need to find ways of providing specialist mental health and ID services to remote communities – there is a particular need for early intervention and school based initiatives.

- It was also noted in the course of the interviews that in some cases prison in fact was relied upon to provide services that were not available in the community.

- Disability services have the potential to fall through the gaps in the health, mental health and prison system.

**Recent Changes/Declared Places**

- During the course of the Aboriginal Disability Justice Campaign, the WA government announced that two declared places would be built. 18 million dollars has been allocated to them to allow for the building of “state of the art” secure disability centres which will allow people who are unfit to plead as a consequence of their disability. It is noted that the centres will take about two years before they are complete, and that legislation will be adapted to allow disability services to operate them.  

- Advocates have expressed concerns about the declared places including that declared places run the risk of imitating prisons and forensic hospitals in the way that people are removed from their communities. Options for staged release/re-entry are much more limited when people are from remote regions. Concerns have also been raised about the potential net-widening impact on the Declared Places, with some suggesting that they will operate simply to detain more people indefinitely, rather than operate to support the people currently imprisoned. However, many advocates – despite these misgivings – view the declared places as an important step in the provision of community alternatives.

**Relevant Legislation**

Relevant legislation in Western Australia includes:

- Disability Services Act 1993
- The Criminal Law (Mentally Impaired Accused) Act 1996

**Disability Services Act (1993)**

In accordance to the Disability Services Act (1993), individuals with a disability access services on a voluntary basis, as the Disability Services Commission has no authorisation to provide custodial services.

**The Criminal Law (Mentally Impaired Accused) Act 1996**

The Criminal Law (Mentally Impaired Accused) Act 1996 governs the treatment of mentally impaired individuals charged with criminal offending. Mental impairment under this Act includes intellectual disability, mental illness, brain damage and senility. Individuals that are found to be of unsound mind at the time of the offence or unfit to stand trial under this Act are particularly disadvantaged due to a lack of suitable accommodation and support. With this in mind, there is an evident deficiency in sentencing provisions for individuals who are found unfit to stand trial, that is, an individual can only be released without any conditions or detained under a custody order. Although the legislation

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118 Disability Services Commission (2012) Disability Justice Centres Fact Sheet
provides for detainment in a ‘declared place’ as an alternative to imprisonment or hospital, there are no ‘declared places’, and individuals with an intellectual disability but no curable mental illness sentenced under this Act are detained in prison or juvenile detention centres.

Relevant Services

The Intellectual Disability Diversion Program (IDDP)
The Intellectual Disability Diversion Program is a joint initiative by the Department of Corrective Services and the Disability Services Commission to reduce recidivism, the rate of imprisonment and to improve the way the criminal justice system deals with individuals with an intellectual disability or cognitive impairment. The program addresses the issues that underpin offending behaviour by providing consultancy and advice to this specified target group, their families and agencies, and support individuals working with them.

The People with Exceptionally Complex Needs (PECN) Initiative
The People with Exceptionally Complex Needs (PECN) initiative is a whole-of-government project which aims to provide co-ordinated service delivery to improve the well-being and quality of life of individuals with specific, complex, concurring needs. The initiative targets adults (18 years of age and older) who have two or more of the following:

- A mental illness
- An acquired brain injury
- An intellectual disability
- A significant substance use problem
In addition these individuals must:
- Pose a significant risk of harm to self or others
- Require intensive support and would benefit from receiving co-ordinated services
- Find the existing system is not working as well as it should

There is also a PCEN program operating in WA for young people. These programs were viewed by participants as being extremely successful and constituting a very helpful funding model.

The Frequent Offenders Program
The Frequent Offenders Program is a post-release support program which considers the needs of individuals with intellectual disability and/or cognitive impairment who have constantly been in contact with the criminal justice system. The program provides accommodation and mentoring support.


121 Ibid

Transitional Accommodation Support Service

The Transitional Accommodation Support Service is a program for frequent offenders with an intellectual disability exiting prison who need transitional support as they re-enter the community. The aims of the program include: contacting clients while they are still in prison to assess their needs, and their suitability for the program; assisting and identifying areas in which individuals prefer to live; assisting in securing suitable housing for a period of up to six months; personal support, particularly in the period immediately after release.

123 Ibid
Conclusion

There is significant disquiet amongst individuals, families, communities and service providers, both Indigenous and non-Indigenous, in government and in the community about the indefinite detention of Indigenous people with cognitive impairment.

This report found that while the intent of much ‘mental impairment’ legislation is sound, the absence of appropriate services is deeply problematic. That is, while the majority of stakeholders recognised that the aim of the legislatures is to provide an alternate pathway through the Court system for persons with cognitive impairment charged with an offense, they also noted the devastating limitations of these pathways in practice.

The predominant concern is the fact that provisions which allow prison-based custody as a measure of last resort, is in some jurisdictions, in the absences of appropriate services, the only recourse available to the Court. While there was some conjecture in the interviews that the availability of prison-based supervision may be relieving pressure on Governments to provide proper services in the community, there was a stronger emphasis in the interviews on simply addressing the absence of proper services (regardless of the possible explanations for their lack).

The problem of resorting to prison-based supervision is exacerbated by the indefinite nature of detention in some jurisdictions and its disproportionate impact on Indigenous people. This was also viewed as of significant concern in the context of the issue of access to justice and human rights. A strong theme in this research is that the imprisonment and indefinite detention of Indigenous people with cognitive impairment is potentially a breach of Australia’s obligations under international human rights treaties.

Indigenous people with cognitive impairments are over-represented in our criminal justice system, and Indigenous individuals, families and communities are bearing the brunt of this misdirected policy and practice. They are the people suffering the injustice of indefinite detention. They are the people for whom services are neither accessible nor culturally relevant, and they are the communities left to support their members when no-one else does.

There are however models and programs across Australia that show that not only is there no need for indefinite detention, but that a more holistic and culturally appropriate response to offending behaviour can have a significant impact on Indigenous people with cognitive impairment. There are a range of proven behavioural intervention and disability support models available, offering a just and compassionate approach to those in this category of need. In Australia, these models exist in the form of community based accommodation and treatment programs in NSW; support to Indigenous women on remand by Sisters Inside in Queensland; the ‘Bridging the Gap’ pilot in Queensland; the existence of the Office of the Senior Practitioner in Victoria and NSW; the inclusion in Victoria’s Disability Act of compulsory treatment and Victoria’s Third Person Program - located in the Office of the Public Advocate; 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 and back into the community. These programs are among a number that 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.

There is a need for significant structural change in the way states and territories respond to Indigenous people with a cognitive impairment who engage in offending behaviour – it is urgent. Whilst state-based legislation governs this response there is a critical place for Commonwealth leadership. The Commonwealth needs to lead a national conversation on why mental impairment legislation leads to indefinite detention and why it is having a disproportionate impact on Indigenous people. 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 ineffective (at responding to offending behaviour), and an ethically unacceptable environment for Indigenous people with cognitive impairment. People with cognitive disabilities are frequently unable to connect the punitive experience of imprisonment to their offending behaviour. They are unable to address offending behaviour while in prison and then transpose- or generalise that learning to a community setting. Even if they were able to apply skills learnt in prison to the community, they are frequently cut off from any potential benefits of programs in prison because they are not adequately targeted.

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 to prevent enmeshment with the criminal justice system and provide people with genuine pathways out of the criminal justice system.
Appendix 1: List of Participating Organisations

**ACT**
- Aboriginal Justice Centre
- Australian Federal Police (Aboriginal Liaison)
- Circle Court
- Gugan Golwan

**NSW**
- Council for Intellectual Disability
- First People’s Disability Network
- NSW Corrective Services
- Mental Health Review Tribunal
- Judy Harper (CID, Red Cross)
- Astrid Birgden Consultant Forensic Psychologist Fellow, Deakin University
- Eileen Baldry (UNSW)

**Northern Territory**
- Northern Australian Aboriginal Justice Agency
- Office of Adult Guardianship
- Greg Borchers (Magistrate)
- Legal Aid Commission
- Ian Mckinley (advocate and lawyer- organisation?)
- Central Australian Aboriginal Legal Aid Service
- Department of Justice
- Department of Health

**Queensland**
- Queensland Advocacy Incorporated
- Queensland Forensic Mental Health Services
- Jim Gibney (Independent)

**South Australia**
- Aboriginal Legal Rights Movement
- South Australian Public Advocate
- Ngampa Health Service
- Disability Advocacy and Complaint Service
- Australian and New Zealand College of Psychiatrists
- Exceptional Needs Unit
- North Disability and Domiciliary Care Services
- James Nash House Secure Forensic Mental Health Service
**Tasmania**
- Advocacy Tasmania
- Department of Health and Human Services
- Community Forensic Mental Health Service
- Jennifer White (Lawyer)
- Legal Aid

**Victoria**
- NEAMI
- Department of Forensic Assessment and Treatment Service
- Victorian Public Advocate
- Department of Corrections
- Disability Client Services

**Western Australia**
- State Forensic Mental Health Service
- Office of the Public Advocate
- Mental Health Legal Centre
- Frankland State Forensic Mental Health Unit
- WA Department of Justice
- WA Aboriginal Legal Services
- WA Corrective Services
- Disability Services Commission
- Alison Xamon (Greens Independent)
- Chris Kerr (Geraldton community member, long time employee of disability service
## Appendix 2: Legislative Overview

<table>
<thead>
<tr>
<th>Region</th>
<th>Legislation</th>
<th>Disability Specific Legislative Options and Orders</th>
<th>Time Frame and Review Process/Overseeing Body</th>
<th>Potential for Indefinite Detention</th>
<th>Numbers of people with Cognitive Impairment on Orders and imprisoned</th>
<th>Known Numbers of Indigenous People with Cognitive Impairment on Orders or in prison</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>The Mental Health (Treatment and Care) Act 1994</td>
<td>Community Care Orders</td>
<td>Community Care Orders can be made by the ACT Civil and Administrative Review Tribunal for people who are identified as having a cognitive impairment and as a consequence are unfit to plead. These orders can be made for a period of up to 6 months.</td>
<td>At the end of the six month period the order can be reviewed and the person assessed again (<em>potential for indefinite detention — but not a theme in the interviews</em>)</td>
<td>Estimate of 6 people with cognitive impairment on Community Care Orders</td>
<td>Unclear how many of this group are Indigenous</td>
</tr>
</tbody>
</table>
| NSW    | Mental Health (Forensic Provisions Act) 1990                                | Section 32                                        | Special hearings are used for people who are found unfit to plead. During these hearings limiting terms are imposed (which reflect the maximum term they would have received if sentenced). The Mental Health Review Tribunal must review each case at least every 6 months and can make an order for their conditional release if they are satisfied the person is no longer a risk to themselves and the community. | No. People are unconditionally discharged and released at the end of their limiting term. People with intellectual disability are not able to be compelled into involuntary treatment. | Approximately 20 forensic patients who have intellectual disability. 285 People with Cognitive Impairment in Custody | 112 Indigenous people in custody with identified cognitive impairment  
Not clear how many of the forensic patients are Indigenous                         |
| NT | Northern Territory Criminal Code 22  
The Mental Health and Related Services Act 21 | Part IIA Custodial Supervision Orders and Non Custodial Supervision Orders | Fitness to plead can be determined under part IIA and supervision orders may be imposed if it is determined that the person is unfit to plead. Because of the lack of community options, this usually means a custodial supervision order. | Yes. The court determines when a review of the order should take place (this is usually at around the time of the end of an equivalent sentence), and if the review determines that the person should not be released, they are then detained indefinitely. Reports are required to be submitted to courts annually but the legislation does not require ongoing reviews. | Estimates that there are 9 people who are detained indefinitely (most in prison, but some are on supervision orders in the community) | All people who are on supervision orders are Indigenous |
| QLD | Mental Health Act 2000  
The Forensic Disability Act 2011 | Section 27 (involves referral to mental health court) and Forensic Orders | A forensic order can be made by the court (if it is found that the person is unfit to plead and acquitted) but it is considered the person poses a threat to the safety of the community or themselves. Detainment is to be in a safe place. In QLD this means a psychiatric hospital. | Yes. The Mental Health Review Tribunal reviews the cases every six months, but if the person is still considered to be an 'unacceptable risk' they continue to be detained. | Estimates of 100 people with cognitive disability on forensic orders detained indefinitely in QLD psychiatric hospitals. | Not clear how many of this population are Indigenous |
| SA | Criminal Law Consolidation Act 1935 | Part 8A Section 269 | The Criminal Law Consolidation Act 1935 outlines provisions regarding detention or supervision on licence of individuals found to be 'mentally impaired'. Mental impairment under this Act includes mental illness, intellectual disability, and disability resulting from senility. People can be detained for a limiting term (Section 269).

Individuals with an intellectual disability may be released “on licence” to Community and Home Support SA – Disability Services and may be under formal guardianship orders enacted through the Guardianship and Administration Act (1993) Section 32; which includes individuals who are deemed “not fit to plead”. Under section 32 the Board can direct an individual to live or stay in a particular place, or where the guardian or enduring guardian says they should live or stay in order to ensure the proper medical treatment, day to day care and well-being of a person with a mental incapacity. | No. A limiting term is set after which a person is released. Problematic in that if the limiting term is over-set there is no way to reduce the term. | 170 people on Section 269 (but most of these are in the community) | Over 70 Anangu prisoners in Port Augusta but haven’t been screened for cognitive impairment |
| VIC | The Sentencing Act 1991
The Victorian Disability Act 2006
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 | Residential Treatment Orders (under the Sentencing Act) can be made for a maximum of 5 years. There is a specific Intensive Residential Treatment Program set up to support people on these orders. Custodial and non-Custodial Supervision Orders (under the Crimes (Mental Impairment and Unfitness to be Tried) Act). These are overseen by the Forensic Leave Panel Supervised treatment orders under the Disability Act are overseen by the Victorian Civil and Administrative Tribunal and allow for civil detention of people with intellectual disability who are considered to pose a significant risk of harm to themselves or others. Justice Plans involve the development of a program plan by Disability Services | This does not appear to be an issue in Victoria - yet it appears that that supervision orders under part V of the Crimes (Mental Impairment and Unfitness to be Tried) Act would allow for indefinite detention of people with cognitive impairment. Between 120 and 130 people in prison registered as having a disability. No information regarding anybody on indefinite detention | Unclear of how many of this population are Indigenous |
| WA | Disability Services Act 1993  
The Criminal Law (Mentally Impaired Accused) Act 1996 | Custody Order | The court is able to make a custody order if someone is found unfit to plead (the only alternative to this is unconditional release). While the legislation allows for detainment in a declared place there have never been any declared places in WA for the courts to use. The Mentally Impaired Accused Review Board is responsible for overseeing the order and making any decisions with regard to release. | Yes. There are no limiting terms set. Although there is a mechanism for release back into the community under the legislation on a community release order. | 33 people in prison under MIARB. 15 in prison. | 11 out of the 33 people under MIARB are Indigenous |
|---|---|---|---|---|---|
| TAS | Sentencing Act 1997;  
Corrections Act 1997;  
Youth Justice act 1997, (and its new amendment bill)  
Supervision Orders  
Dangerous Criminal Orders | Restriction Orders and Supervision Orders can be made can be made if someone is found unfit to plead or not guilty on the grounds of insanity. These are over-seen by the Forensic Mental Health Tribunal. People with cognitive impairment on restriction orders are often held in the Wilfred Lopez Centre. | Yes. Restriction orders are for a minimum of two years. After two years it is possible to apply to the supreme court for the order to be lifted. If this is rejected, applications can occur every two years. | Unknown | Unknown |
Appendix 3: Service Overview

NB: One of the limitations of this report, is that we were unable to obtain concrete information about the numbers of people participating in community based services, or the outcomes for these people. Although, this report lists existing services (based on interviews with participants, and research via a range of government websites and reports), the scope, and reality of what these services actually look like (with some notable exceptions in NSW, Victoria and QLD) remains relatively unexplored. This is in part due to the time restrictions in putting this report together, but also in part due to an absence of easily available data and information regarding program participation. This is problematic because although it is clear there are now a handful of disability specific criminal justice or complex needs programs operating, it is still unclear how many people are actually able to access these, or for those who are accessing them, what sort of impact these programs are having on their lives.

<table>
<thead>
<tr>
<th></th>
<th>ACT</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>VIC</th>
<th>WA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disability Support in Police Stations</td>
<td>No</td>
<td>The Criminal Justice Support Network provides volunteer support people in police stations</td>
<td>No</td>
<td>No (for offenders) Some support available through the vulnerable witness program for victims</td>
<td>No</td>
<td>No</td>
<td>The Independent third person program</td>
<td>No</td>
</tr>
<tr>
<td>Relevant Specialist Courts and diversionary schemes available</td>
<td>No</td>
<td>Circle Sentencing Parolee Support Initiative</td>
<td>No</td>
<td>Special Circumstances Court Mental Health Court</td>
<td>Magistrates Court Diversion Program</td>
<td>No</td>
<td>Assessment and Referral Court List Court Integrated Services Program Neighbourhood Justice Centres Criminal Justice Diversion Program Koori Court</td>
<td>No</td>
</tr>
<tr>
<td>Disability Specific Prison Programs</td>
<td>No</td>
<td>The State-wide Disability Service at Corrective Services NSW offers support to people with disability in prison</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes. Corrections Victoria adapts multiple programs to meet the needs of prisoners with disabilities.</td>
<td>Some programs adapted from the Victorian Model</td>
</tr>
<tr>
<td>Service Type</td>
<td>Service Description</td>
<td>Yes/No</td>
<td>Yes/No</td>
<td>Yes/No</td>
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<tr>
<td>Disability Units in Prison</td>
<td>3 Specialist Disability Units Exist at the MSPC at Long Bay, and 1 specialist unit operates at Goulburn Two secure units are currently in development. One new forensic facility is also under construction.</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>multiple pathways starting with The Marlborough Unit and progressing through to minimum security disability specific accommodation</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Targeted Post Release Disability Services</td>
<td>The Community Justice Project offers specialist post-release support and accommodation to people exiting NSW Correctional Centres Bridging the Gap (Post-release pilot project)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>The Intensive Support Service</td>
<td>The Intensive Support Service</td>
<td></td>
</tr>
<tr>
<td>Targeted Complex Needs Disability Services</td>
<td>Intensive Treatment and Support Program The Integrated Services Program State-wide Behaviour Intervention Service Exceptional needs and complex case management Initiative, Specialist Support and Forensic Disability Program. Positive Behaviour Support Unit</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>The Exceptional Needs Unit</td>
<td>The Intensive Support Service</td>
<td></td>
</tr>
<tr>
<td>Indigenous Specific criminal justice based Disability Programs</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Indigenous Prisoners and Offenders Support Service</td>
<td>No</td>
<td>No</td>
<td>The Intensive Support Service</td>
</tr>
</tbody>
</table>

The frequent offenders program
Transitional Accommodation Support Service

The disability forensic assessment and treatment service
Intensive residential treatment program (forensic orders)

Intellectual Disability Diversion Program
Appendix 4: History of the Aboriginal Disability Justice Campaign.

The Aboriginal Disability Justice Campaign had its origins in longstanding concerns held by guardians (both paid and voluntary guardians) in the Northern Territory, particularly in the central desert region of Alice Springs. These concerns focussed on Indigenous people with cognitive impairments being detained indefinitely in the Alice Springs Correctional Centre (a maximum security prison located twenty five kilometres outside of Alice Springs) as a result of being assessed as mentally impaired and then being found unfit to plead.

Despite consistent efforts by the guardians, Indigenous families and communities, and many other human services professionals in the justice and disability fields to effect a change to this practice, change did not seem to be forthcoming. The reasons for this were complex; involving Indigenous cultural issues, the history of service development in remote Indigenous communities, the geography of the Northern Territory, legal frameworks and the inevitable under resourcing of specialist accommodation and treatment services.

Looking to develop a momentum for change the guardians from the Northern Territory met with academics from the University of New South Wales who were researching the issue of people with cognitive impairments in the criminal justice system. At this meeting it was concluded that an advocacy campaign raising awareness of what was happening was desperately needed, particularly focussing on the indefinite detention of Indigenous people with cognitive impairment.

In the course of 2010, organisation across the Northern Territory and other states were recruited to campaign including the Northern Australian Aboriginal Justice Agency; Central Australian Aboriginal Legal Aid Service; Darwin Community Legal Centre; People with Disabilities Australia; First People's Disability Network; Maurice Blackburn Legal Firm of Melbourne; Ashurst Law Firm of Sydney (formerly known as Blake Dawson Legal Firm of Sydney); Brain Injury Australia; Synapse of Queensland; National Council of Intellectual Disability; New South Wales Council for Intellectual Disabilities; the Alice Springs office of the Northern Territory Public Guardian; Queensland Advocacy Inc, Northern Territory Legal Aid, Northern Territory Chapter of Australian Lawyers for Human Rights, Criminal Lawyers Association of the Northern Territory, Western Australian Mental Health Law Resource Centre and the Northern Territory Council of Social Services.

In August 2012 the ADJC secured a meeting with the then Commonwealth Attorney-General the Honourable Robert McClelland to raise the issue of indefinite detention of Indigenous people with a cognitive impairment. As a result of this meeting it was agreed that the ADJC would author a report looking at the particular impact of mental impairment legislation on Indigenous people with a cognitive impairment.

1. The Aboriginal Disability Campaign went on to develop a position statement relating to the goals of the campaign which included:

2. Cross-departmental responsibility is needed to manage this issue

3. Accommodation and support programs both as an alternative to prison and post release

4. That any detention in prison be a last resort and the least restrictive option suited to the person’s circumstances.
5. Skilled intervention and support to address offending behaviour being a central element of all services, whether in the community or in prison.

6. Mandatory review of orders for detention of unconvicted individuals at least annually, with a court or tribunal carrying out the review and the individual legally represented and independently assessed.

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

The ADJC is now a national campaign connected to state and territory Indigenous Justice / Disability and Human Rights agencies and networks.

The ADJC is currently working with legal teams to file papers in the Supreme Court of the Northern Territory challenging the constitutionality of the Northern Territory government to detain prisoners people with a cognitive impairment who have not been convicted of a crime.

As well the ADJC is working with the Australian Centre for Disability Law to lodge complaints with the Australian Human Rights Commission. These complaints are currently in the investigation phase of the complaints process. A final complaint has now been accepted by the United Nations under the Optional Protocol of the International Convention on the Rights of Persons with Disabilities.
Appendix 5: Key Issues Informing the Work of the Campaign

- People with cognitive impairment who have not been convicted of a crime because they are assessed as mentally impaired, are being detained indefinitely in prisons.
- There is no legal or ethical basis for the use of indefinite detention of Indigenous people with a cognitive impairment who engage in offending behaviour.
- Indigenous people are disproportionately affected by indefinite detention.
- In some jurisdictions, people without mental illness are being held indefinitely in psychiatric hospitals.
- Indigenous people and Indigenous families are being hurt as a consequence of indefinite detention, and in some cases they are dying.
- Too often, the cycle of offending, imprisonment and re-offending has to increase in severity in order to obtain any kind of disability support.
- As a consequence of the absence of support, problems that might have required simple, low level early intervention become intractable and frequently involve serious offending behaviour.
- There is limited service delivery to deal with complex offending behaviours outside major metropolitan areas.
- These systemic arrangements described above result in serious legal and human rights concerns. Not only is this particularly vulnerable group of individuals being excluded from services and support but others are damaged and harmed.
- The current response to people with a cognitive impairment engaging in offending behaviour does not balance the need for community protection with their right to justice.
- Indigenous communities are expected to manage and support individuals with a cognitive impairment who are a serious risk of harm to others. This is unfair and discriminatory.
- Indigenous families who have been supporting individuals with challenging behaviour within their communities, often entirely unsupported, should be acknowledged.
- Culturally relevant responses in criminal justice policies and practices should be incorporated when responding to Indigenous people with a cognitive impairment with offending behaviour.
- Programs and responses, in both government and non-government organisations that have a positive impact on Indigenous people with a cognitive impairment who engage in offending behaviour exist.