



FIRST PEOPLES DISABILITY NETWORK (AUSTRALIA)

Briefing Paper to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Long term detention and interactions with the criminal justice system experienced by people with disability

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About First Peoples Disability Network (Australia)

First Peoples Disability Network (Australia) is a national representative body for First Nations people, family and communities with lived experience of disability.

The Australian Bureau of Statistics estimates that 50 percent of First Nations people have some form of disability or long-term health condition. Despite its high prevalence, disability remains an untold story not solely in justice, but in all other areas that determine social outcomes for First Nations people such as education, employment and housing.

First Nations people with disability and their families are amongst the most seriously disadvantaged and disempowered members of the Australian community. They are nonetheless the experts in the often hidden impact of social policy upon the lives of peoples with disability. As the only national organisation in Australia that is governed by and for First Nations people with disability, we give voice to their needs and concerns from lived experience.

Introduction

First Peoples Disability Network (FPDN) provide this written briefing to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Royal Commission) in advance of the hearing into long term detention and interactions with the criminal justice system experienced by people with disability.

Multiple, high profile and comprehensive inquiries have focused on this issue, and we echo and endorse their recommendations for reform¹. Yet still, there is a lack of the political commitment needed, and momentum for change.

As the national representative body for First Nations people with disability, their families and carers, we strongly urge the Royal Commission to pay specific attention to the disproportionate impact on our community.

Given the complexity of this area, we draw attention in this briefing to some of the structural initiatives that have the potential to lead to better justice outcomes for First Nations people with Disability, and urge the Royal Commission to interrogate through this hearing. Much of this submission is drawn from our recent contribution to the NSW Select Committee inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, and we note that this inquiry has yet to report.

In addition, we include as an attachment the submission by the First Peoples Disability Justice Consortium² to the 2016 Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment³. This submission includes rich research, and recommendations in relation to the experiences of Aboriginal and Torres Strait Islander people with disability and the criminal justice system.

The criminalisation and incarceration of First People with Disability

¹ Notably: Australian Law Reform Commission 'Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (2018) https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf; Australian Human Rights Commission 'Equal Before the Law - Towards Disability Justice Strategies (2014) <https://humanrights.gov.au/our-work/disability-rights/equal-law-towards-disability-justice-strategies>; The Law Council of Australia, The Justice Project Final Report –Part 1' (2018) <https://www.lawcouncil.asn.au/justice-project/final-report>; and Melbourne Social Equity Institute, 'Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities' (2017) https://socialequity.unimelb.edu.au/_data/assets/pdf_file/0009/2598507/Unfitness-to-Plead.pdf

² The First Peoples Disability Justice Consortium represents an alliance of Aboriginal and Torres Strait Islander community organisations, disability, justice and legal researchers, Universities and Research Institutes.

³ The Submission to the Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment can also be accessed here: <https://fpdn.org.au/criminalising-disability-federal-leadership-required-to-end-the-indefinite-detention-of-people-with-cognitive-and-psychiatric-impairment/>

First Nations people with disability are the most marginalised people in Australian society. As such, the criminalisation and incarceration of First Nations people with disability must be understood within the broader intersecting dynamics of colonialism, racism and ableism. To address the over incarceration of our people, these underlying structural issues, and the trajectory that leads to interactions the criminal justice system, must be acknowledged and understood, and community led solutions identified and implemented through a strategic approach⁴ based on the principles of ‘self-determination; person centred care; holistic and flexible approach; integrated services; and Culture, Disability and Gender-informed practice’.

‘By the time an Aboriginal or Torres Strait Islander person with disability first comes into contact with the criminal justice system, they will most likely have had a life of unmanaged disability. Coupled with discrimination, based on their Aboriginality and disability, they will have faced barriers from the time they are born, of poverty, early exposure to life in institutions through the child protection system, struggles at school, lack of appropriate health care and an inability to secure employment. Coming into contact with the police, courts, juvenile detention and prisons is normalized in their life trajectory...[t]he justice system does little to address these factors and outcomes and in fact often makes them worse. People acquire the label of a prisoner who must be punished, not a person with disability who needs support. When released from prison, the personal, social and systemic circumstances that propelled them into detention or prison will not have changed. Thus, many face a cycle of recurrent detention that goes on indefinitely’.⁵

LIFE-STAGE ASPECT	Peri-Natal	Early childhood	Schooling years	Young people	Justice	Health	Ageing
Aboriginal and Torres Strait Islander	Low awareness of disability Environmental factors, increased likelihood of low birth-weight	Low awareness of disability Exposure to trauma increased likelihood of OOHC – off country, unstable home setting	Low awareness of disability “Bad black kid syndrome” – punitive schooling over supported disability	Less likely to secure employment Increased likelihood of police contact	Denial of rights – over incarceration	Subconscious bias – institutional racism	Reduced life expectancy Disability happens earlier in life and with more co-morbidities.
Disability	Low birth weight and environmental factors in developmental disability	Disability assessments aren’t carried out to the extent that they need to be	Undiagnosed and unsupported disability	Less likely to secure employment Communication impairments, reduced capacity to negotiate conflict	Denial of rights – indefinite detention and fitness to plea for people with cognitive and psychiatric disability	Subconscious bias – diagnostic over shadowing	Inadequate public infrastructure especially in remote communities.

Avery S. (2016) ‘The life trajectory for an Aboriginal and Aboriginal or Torres Strait Persons with disability’.

It is estimated that 45% of Aboriginal and Torres Strait Islander people have disability or a long-term health condition, with First Nations people more than twice as likely to have disability than the rest of the Australian population⁶. A high proportion of First Nations people who interact with the criminal justice system will have had unrecognised and unsupported disability for much of their life.

⁴ This strategic approach was laid out in First Peoples Disability Justice Consortium submission to the 2016 Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment (as an attachment to this submission)

⁵ Ibid P.5

⁶ 2014–15 National Aboriginal and Torres Strait Islander Social Survey (NATSISS)

Whilst there is no nationally consistent disaggregated data on the number of people with disability in the criminal justice system, Human Rights Watch report that almost 50 per cent of prisoners in Australia have cognitive or psychosocial disability⁷. There is no comprehensive data to report the number of First Nations people with disability that have died in custody⁸.

Denial of legal capacity and diversionary procedures

The detention of First Nations people with disability in Australia occurs within a legislative framework that routinely denies individual legal capacity, under financial management, mental health and guardianship provisions. This is despite numerous calls from domestic and international bodies for reform⁹. For example, the *NSW Mental Health (Criminal Procedure) Act* can divert people accused of a crime away from legal proceedings where they can be found ‘unfit’ to stand trial or not guilty by reason of ‘mental impairment’. These diversionary provisions deny people procedural fairness of the court, and can often lead to people with First Nations people with disability being detained indefinitely in forensic services without conviction, often for periods longer than the maximum custodial sentence for the offence, and where the use of restrictive practices are widespread¹⁰.

In fact, court diversion can ‘use a person’s disability to effectively circumvent the right to equality before the law¹¹’. Many First Nations people with disability are subject to violence, abuse and neglect within the criminal justice system, however diversionary processes, where a person is moved from the court system to specialised services for ‘treatment and support’, provides for an environment where restrictive practices are routinely used, and just continues ‘disability oppression and the process of control and punishment of people with disability who are not sentenced and might not even be convicted of any criminal offence¹²’. For First Nations people with Disability this further severs ties with their community, including connections and support critical for a pathway out of detention. We refer the Royal Commission to the work of Dr Linda Steele in this area¹³.

The trap of the criminal justice system for First People with disability

The impact of dual discrimination for First People with disability is often misunderstood and absent from both Aboriginal justice and disability justice dialogue, and too often lost within siloed Government policy and funding. This leads to poorly designed initiatives, that are either disability

⁷ Human Rights Watch ‘I needed help, instead I was punished’ Abuse and Neglect of Prisoners with Disabilities in Australia (2018) <https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>

⁸ The Royal Commission into Violence, abuse, Neglect and Exploitation of People with Disability has published a factsheet that notes ‘The Australian Institute of Criminology monitors the extent of deaths in prison as part of the National Deaths in Custody program, but not by disability status’. The Guardian Deaths Inside website flags mental health issues and cognitive disability where identified <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>

⁹ See the Committee on the Rights of Persons with Disabilities (2019) *Concluding observations on the combined second and third reports of Australia*, CRPD/C/AUS/CO/2-3, September 2019, 8, adopted by the Committee at its twenty-second session (26 August – 20 September 2019) ; see also Australian Law Reform Commission’s *Equality, Capacity and Disability in Commonwealth Laws* <https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/>

¹⁰ Rather the detention becomes an arbitrary period or determined by reference to the individual’s perceived treatment and support needs. See Steele, L (2020) *Disability, Criminal Justice and Law – Reconsidering Court Diversion*, published by Routledge

¹¹ Ibid

¹² Ibid

¹³ Steele, L. *Disability, Criminal Justice and Law*, published by Routledge (May 2020) For summary and reflection of the book refer to the online recording of the book launch <https://www.uts.edu.au/partners-and-community/initiatives/social-justice-uts/news/recording-diverting-justice>

or culturally inaccessible – most likely both. For example, the National Disability Strategy 2010-2020¹⁴ did not prioritise justice, and were notably absent in initiatives to respond to First Nations people with disability over-representation in the criminal justice system. The 16 new Close the Gap targets do not mention disability, despite its centrality to progress across all areas, including education, health and justice¹⁵.

A lack of early identification of disability and therefore provision of appropriate support for Aboriginal young people, begins a trajectory towards interaction with the criminal justice system. Baldry et al identified ‘a severe and widespread lack of appropriate early diagnosis and positive, culturally responsive support for Indigenous children and young people with cognitive impairment. This is connected to schools and police viewing certain kinds of behaviour through a prism of institutional racism rather than disability, as well as Indigenous community reluctance to have children assessed using particular criteria that are perceived as stigmatising and leading to negative intervention in Aboriginal families¹⁶.

In many cases, particularly in rural and remote areas where community services and outreach support is absent, police are the first, and only responders to concerns relating First Nations people with disability, including individuals with intellectual and psychosocial disability. Police are poorly equipped to recognise, and respond appropriately, resulting in jails becoming a default solution to an issue that required a disability or mental health service response. Whilst being held, a lack of skilled assessment of disability requirements results often results in an individual’s disability support needs not being met.

The age of criminal responsibility in the majority of Australian jurisdictions is 10. Despite consistent calls for this to be raised to 14, and that children under the age of 16 should not be imprisoned¹⁷, the ACT is the only jurisdiction that has committed to changing legislation to this effect. It is estimated that 59% of young people in detention nationwide are Aboriginal, and that 2/3 of those young people in juvenile detention have disability¹⁸. Data from NSW demonstrates that prevalence of complex disability and multi-faceted disadvantage is higher amongst First Nations young people compared to other young people in juvenile detention¹⁹. First Nations children are excluded from school at 3 times the rate of non-Indigenous children²⁰, in large part due to unrecognised and unsupported disability. These young people are criminalised due to the interaction of their Aboriginality and disability – failed by every stage of the service system.

The National Disability Insurance Scheme (NDIS), with its client, market driven model is poorly equipped to respond to the needs of First Nations people, and remains inaccessible and inappropriate to many of our community, including from a young age (for example, there are

¹⁴The National Disability Strategy 2010-2020 can be accessed here: https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf. The new strategy is currently being developed.

¹⁵ See RN Breakfast interview with Damian Griffis, CEO FPDN <https://fpdn.org.au/disability-not-included-in-the-16-new-closing-the-gap-targets/>

¹⁶ Eileen Baldry, Ruth McCausland, Leanne Dowse & Elizabeth McEntyre, A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal system (October 2015) www.indigenousjustice.gov.au

¹⁷ Most recently unanimously raised as an issues at Australia’s Universal Periodic Review ABC <https://www.abc.net.au/news/2021-01-21/un-australia-raise-the-age-of-criminal-responsibility/13078380#:~:text=The%20minimum%20age%20of%20criminal,years%20as%20the%20minimum%20age.>

¹⁸ 2015 Young People in Custody Health Survey Justice Health & Forensic Mental Health Network and Juvenile Justice NSW <https://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF>

¹⁹ Avery, S. (2018) ‘Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability’

²⁰ See Department of Prime Minister and Cabinet, Closing the Gap Education report <https://www.pmc.gov.au/sites/default/files/reports/closing-the-gap-2018/education.html>

considerable barriers to accessing NDIA funding for Foetal Alcohol Spectrum Disorder²¹). The NDIA does not have an established structure to consult with First Nations people with disability about the functioning of the scheme, with major issues with initial access and utilisation of plans.

The Joint Standing Committee on The National Disability Insurance Scheme 2017 report into 'The Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition', raised fundamental issues with the interaction between the NDIS and jurisdictional criminal justice system²². The NDIS is not a crisis service, and does not have in place the market to respond to complexity.

Australia has one of the fastest growing prison populations, presenting significant challenges within the justice system (from arrest, to imprisonment) in responding proactively to the disability support needs of First Nations people with disability. There is no clear human rights based framework for integration, and delineated responsibility between the NDIA and jurisdictional justice systems. The majority of jurisdictions lack Disability Justice Strategies. A lack of overarching strategy leads to gaps including early identification of, and early assessment of disability support requirements, and sharing information (for example, where specialist reports and assessments may be undertaken for court hearings, but not make their way to the NDIA as a referral). There is the need for much earlier reintegration planning and disability support assessments, involving appropriately skilled First Nations NDIA staff. Through incarceration we strip away the autonomy of individuals (including their personal decision making) and their links with community. This needs to be considered and supported with a view to the skills and connections First Nations people with disability need in place for release.

Lack of data

As is evidenced by the lack of data around First Nations people with disability in the justice system, there remains no well validated tool for data collection. This lack of data, and disjointed policy framework results in gaps and a lack of system responsiveness to meet the required needs of First Nations people with disability. In addition, adequate and accurate data-gathering can help 'identify trends across detention facilities, improve oversight and ensure that investigations are effective and perpetrators are held accountable'. Data plays a critical role in 'facilitating the determination of root causes and the design of strategies to prevent and reduce the occurrence of violence and ill-treatment in places of imprisonment'²³.

Oversight mechanisms

The 2019 UN Commissioner for Human Rights report 'Human Rights in the administration of Justice' emphasised that;

²¹ The Senate Standing Committee on Community Affairs inquiry into 'Preventative Approaches to prevention, diagnosis, and support for Foetal Alcohol Spectrum Disorder is due to report December 2020. See the Australian Human Rights Commission submission to the inquiry (sub 17) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/FetalAlcoholSpectrumDi/Submissions

²² The Joint Standing Committee on The National Disability Insurance Scheme 2017 report into 'The Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition report can be accessed here: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MentalHealth/Report

²³ Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General 'Human rights in the administration of justice' Human Rights Council Forty-second session 9–27 September 2019 (A/HRC/42/20)

‘issue of violence, death and serious injury was identified by the Secretary-General as one of the most important challenges pertaining to the protection of persons deprived of their liberty.²⁴ By depriving persons of their liberty, States assume the responsibility to protect the life and bodily integrity of such persons. States are thus obligated to prevent the ill-treatment of, and violence against, such persons and to ensure that the conditions of a dignified life are met’.

The Australian OPCAT Network noted recently that many of Australia’s prisons; ‘are significantly overcrowded; they also face serious challenges in managing the increasingly complex needs of people being sentenced to imprisonment. They are often unable to properly provide appropriate care and accommodation for particular cohorts of people, including those with complex health issues, those living with physical and/or mental health disability (particularly psychosocial disability), people experiencing complex grief and trauma issues, Indigenous peoples, LGBT people, women, young people, children and other vulnerable groups’²⁵.

The use of restrictive practices is widespread in all detention facilities, in response to a lack of appropriately tailored disability support, including physical restraint and seclusion/isolation. We are aware of increases in these practices since the COVID pandemic began²⁶. These practices cause significant breaches of human rights, and can constitute torture, cruel inhuman or degrading treatment or punishment.²⁷ In its most recent Concluding Observations to Australia (September 2019) the UN Committee on the Rights of Persons with Disabilities calls for the: ‘... establishment of a nationally consistent legislative and administrative framework for the protection of all persons with disabilities, including children, from psychotropic medication, physical restraint and seclusion under the guise of ‘behaviour modification’ and the elimination of restrictive practices, including domestic discipline/corporal punishment, in all settings²⁸.’

Following Australia’s 2017 ratification of the UN Optional Protocol to the Convention Against Torture (OPCAT), the Commonwealth Ombudsman is leading the establishment of National Preventative Mechanism comprising of existing or new bodies to provide oversight and monitor places of detention. Recent media has indicated that states, including NSW, are concerned about the cost, and other implications of implementing OPCAT²⁹.

It is critical that federal-state negotiations are moved forward, safeguarded through Federal and jurisdictional NPM legislation which guarantees full compliance with OPCAT and the NPM Guidelines, and establish independent, accessible mechanisms for complaint and redress³⁰. This legislation should establish structures at all levels of government to engage proactively with civil society, and establish operational processes for interaction and joint initiatives across existing

²⁴ Ibid

²⁵ Australian OPCAT Network (2020) report ‘The Implementation of OPCAT in Australia’ can be accessed here: https://www.kaldorcentre.unsw.edu.au/sites/default/files/Implementation_of_OPCAT_in_Australia.pdf

²⁶ This was identified in the most recent evidence given to the Disability Royal Commission in the public hearings on COVID19, accessed here <https://disability.royalcommission.gov.au/public-hearings/public-hearing-5>

²⁷ Nowak M. *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (2008) A/63/175. New York: United Nations General Assembly

²⁸ Committee on the Rights of Persons with Disabilities (2019) *Concluding observations on the combined second and third reports of Australia*, CRPD/C/AUS/CO/2-3, September 2019, 8, adopted by the Committee at its twenty-second session (26 August – 20 September 2019)

²⁹ See recent media report in The Australian <https://www.theaustralian.com.au/nation/politics/states-fight-malcolm-turnbulls-un-torture-deal/news-story/9592ce939acbb6fcca80bf7e0dc0842>

³⁰ The Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General 21 August 2019 (A/HRC/42/20) noted ‘In order to be effective, complaints mechanisms must be independent, effective, confidential and accessible to victims of torture, including persons deprived of their liberty. They must have the capacity to deal freely with any complaint, provide effective follow-up for the purpose of remedial action and ensure that those who file complaints do not face reprisals. Persons deprived of their liberty must be aware of and have confidence in these mechanisms’ https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Documents/A_HRC_42_20.docx

oversight bodies, including the NDIS Quality and Safeguards Commission³¹. The independent monitoring and oversight function of the NPM must ensure unfettered access for independent investigators into all places of detention³², in terms of criminal justice that includes prisons and juvenile detention facilities, but also monitoring of police holding cells, transport and detention facilities, and all forensic and community based detention facilities.

Community led solutions

There is evidence of successful interventions, and Indigenous community led justice reinvestment programs that are shifting the trajectory for First Nations people, including those with disability. For example, the Maranguka Justice Reinvestment project³³ which has led to a significant reduction in crime and reoffending in the Bourke area. Further, investment in initiatives such as First Nations community led Health Justice Partnerships, which embed legal health in health care settings, can support First Nations people with disability to address social issues that may be a contributing factor to interactions with police, for example, insecure housing and homelessness, issues with credit and debt and domestic and family violence³⁴.

³¹ Australian OPCAT Network (2020) report 'The Implementation of OPCAT in Australia' can be accessed here: https://www.kaldorcentre.unsw.edu.au/sites/default/files/Implementation_of_OPCAT_in_Australia.pdf

³² Ibid

³³ More information on the justice reinvestment programs can be found here: <https://theconversation.com/as-indigenous-incarceration-rates-keep-rising-justice-reinvestment-offers-a-solution-107610>

³⁴ Refer to Health Justice Australia (Centre for Excellence for Health Justice Partnership) Submission 'Integrated services; partnering with community' to the National consultation on Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013-2023 accessed here: <https://healthjustice.org.au/wp-content/uploads/2017/04/HJA-submission-Indigenous-Implementation-Plan-Health-consultation-2017-1.pdf>