The provision of services under the NDIS for people with disabilities who are in contact with the criminal justice system

Submission to the Joint Standing Committee on the NDIS

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Coordinated by Australians for Disability Justice (ADJ)

ADJ is a national campaign that advocates for changes to legislation policy and practice regarding the recurrent and indefinite detention of people with cognitive impairment and mental health disorders. ADJ particularly focuses on the impact of detention on Indigenous Australians.

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Executive summary

The cost of inaction

People with cognitive impairments are highly represented in the criminal and juvenile justice systems. This overrepresentation is directly related to the lack of appropriate disability supports commonly available to this group in their communities. The results are deprived and abused lives for the people with cognitive impairments cycling in and out of trouble and prison and for a significant number indefinite detention with no likelihood of release. These problems are particularly marked for Indigenous Australians.

Not meeting this group's disability support needs also leads to great cost to the community and governments:

- Personal and financial costs to victims of crime
- Compounding disadvantage for offenders and their families
- High and cumulative costs to the justice system and human services – police, legal aid and prosecutors, courts, prison, juvenile justice, community corrections, community health and hospitals, disability services, social housing and centrelink.

The NDIS is an opportunity

The response of State/Territory disability service systems to this group has varied markedly but has generally been inadequate. The justice system has also been very ill-equipped to respond to this group. As for other people with disability and substantial support needs, the NDIS is an historic opportunity to address the needs of this group, meet Australia's human rights obligations and allay the costs outlined above.

People with cognitive impairment and criminal justice histories have complex support needs

Complex and widely varying support needs arise from the interplay and compounding effects of intellectual and/or other cognitive impairment/disability and some or all of:

- histories of trauma,
- mental health problems and psychosocial disability,
- hearing and sight impairments,
- alcohol and other drug problems,
- highly disadvantaged neighbourhoods
- lack of positive family relationships,
- poor experiences of school education,
- negative experience in the out of home care system,
- disadvantage associated with Indigenous or CALD culture,
- negative experiences of service systems,
- great difficulty forming trusting relationships,
- difficulty seeing what a positive lifestyle might entail, and
- reluctance to identify as having a disability.

This interplay leads to great difficulties exercising decision making, choice and control. People will express choices but they will often be ill informed, negative and changeable.

Individuals may be superficially quite independent but in fact have:

- undiagnosed cognitive, psychosocial and sensory impairments and
- substantially reduced functional capacity, particularly in communication, social interaction, learning and self management.

Members of this group will commonly not see or wish to acknowledge these impairments. They are very unlikely to seek out NDIS support of their own initiative and will often initially be suspicious of suggestions to obtain NDIS assistance.

People will often have volatile and fast changing support needs.

Implications for appropriate access to and support by the NDIS:

- Identification, outreach and engagement are vital to supporting people to access the NDIS and other human services.
- Continuity of support relationships is vital to establishing and maintaining a trusting relationship that then allows positive support and development of capacity to make choices.
- Holistic support is vital rather than fragmented support.
- NDIS and provider staff need specific skills in working with this group.
- Quick and flexible responses are vital.

Elements of an appropriate NDIS response to this group

1. **Outreach, engagement and support to access services** including where appropriate to become an NDIS participant. By both the NDIS, advocacy and mainstream services.

2. **Skills in NDIA** - Relevant staff with specific skills in recognising, engaging and working with members of this group

3. **Early support and intervention** in childhood and adolescence.

4. **Timely and often urgent preparation and review of plans**

5. **An informed planning process**
    a. Considerable support for the person to form goals and understanding of needs
    b. Input from experts in the needs of this group
    c. Use of existing assessments and/or obtaining new and culturally relevant assessments of needs.
    d. Consideration of appointment of a nominee or application for a guardian where the person cannot be supported to make decisions in their interests

6. **Participant plans attuned to this group**
    a. Provision for early development and ongoing maintenance of relationships with support providers
    b. Substantial support to assist development of a person's understanding of their needs and development of skills in decision making, choice and control
    c. Support as needed to understand and avoid the risks of offending
    d. Holistic support across the range of a person's needs

e. Capacity to provide immediate support in crisis or last resort situations
f. Maximum flexibility in the plan to respond to fast changing needs
g. NDIS support in accordance with COAG interface principles for persons in custody
h. Support coordination by a person with adequate hours and skills

7. **Development of market capacity** of service provider organisations, support workers, support coordinators, behaviour practitioners and other professionals including
    a. Acknowledging the highly skilled and challenging nature of the work
    b. Providers from Indigenous communities
    c. Ensuring availability of last resort providers
    d. Addressing disincentives, e.g. unreliable income flow because of periods in custody and the time it takes to engage with a client
    e. Ensuring availability and increasing levels of tertiary expertise like that in the Community Justice Program NSW as a source of training, mentoring and expert consultancy
    f. Considering block funding of some services
    g. Specific consideration of this group in implementation of the NDIS Quality and Safeguards Framework

8. **Interplay with mainstream services**
    a. Systemically and locally, strong collaborative relationships between the NDIS and justice, health, housing, Indigenous, CALD, child and family and other relevant services
    b. A framework for information sharing
    c. Proactive case coordination by an NDIS support coordinator
    d. Capacity to work in the context of police and court diversion schemes
    e. Capacity to work in the structure of criminal and forensic orders of courts and tribunals
    f. Development of equitable access to and reasonable accommodation in mainstream services
    g. Development of the overall capacity of mainstream services and, in the meantime, NDIS being realistic about what they can/not provide

9. **Support for research** including collaboration with researchers who have expertise in disability and justice issues.

Time for the NDIA to systematically respond

To date, the NDIA has not responded systematically to the needs of this group. Responses to individuals have been variable but have shown a range of concerning patterns including:

1. Trial sites varying in the quality of their engagement with the justice system and therefore in linking potential participants into the NDIS.
2. A tendency towards a simplistic and inaccurate distinction between challenging behaviour which is accepted to be the responsibility of the NDIS and offending behaviour which is seen as the responsibility of the justice system. Offending behaviour by persons with cognitive disability is likely to be directly related to a disability as is other challenging behaviour.
3. Unrealistic expectations about what mainstream services can do.

4. Only being willing to start planning community supports six months before a set release date. People will often not be able to get a release date until a plan for disability support is in place.
5. NDIS pricing and market policies not recognising the need for continuity of support relationships when a person is in detention.
6. Inadequate funding in plans including for behaviour support.

The roundtable being conducted by the Joint Committee is an opportunity for the NDIA to engage with community representatives towards collaborative action on these issues.

1. Target group

The vast majority of people with disabilities who come into contact with the criminal justice system have some form of cognitive disability, including intellectual disability; mild to borderline intellectual disability; acquired brain injury and foetal alcohol spectrum disorders.[1] The overwhelming majority of these individuals also experience a range of psychosocial disabilities related to mental health impairments.[2] The combination of these issues impacts significantly upon the person's daily functioning, very often resulting in compounding social disadvantage and complex support needs.[3]

In the absence of appropriate service provision, these individuals are criminalised and cycle in and out of the criminal justice system more rapidly and more frequently than those without complex disability support needs.[4] One of the consequences of the extreme social disadvantage experienced by this group is a lack of established diagnoses: for many, formal diagnosis of their disabilities does not occur prior to the age of 18; for a significant number, formal diagnosis occurs for the first time after entry into the criminal justice system.[5] The lack of established diagnoses in this group, the predominance of mild to borderline intellectual disability, and foetal alcohol spectrum disorders, commonly co-occurring with mental health impairments, together with their complex presentations makes this highly disadvantaged group particularly vulnerable to exclusion from the NDIS. For a multiplicity of reasons explained throughout this submission it is crucial that appropriate measures are taken by the NDIA to ensure that *all* people with cognitive disabilities who come into contact with the criminal justice system receive access to appropriate assessment and support. Drawing on extensive academic knowledge and professional expertise, contributors to this submission have considered the elements of an appropriate NDIS response to this group. These are presented in Section 8 below.

CASE STUDY 1

> *Julie is 36 years old and was recently arrested for a charge of malicious damage by fire and intimidation. Julie had only one offence on her criminal record from 7 years ago. Before going into custody she lived independently in the community with her husband who also has Intellectual disability. Not long before she was arrested her husband was incarcerated and Julie lost her*

[1] Baldry E, Dowse L & Clarence M (2012) *People with mental and cognitive disabilities: pathways into prison*. Sydney: University of New South Wales.

[2] Baldry E (2014) 'Disability at the Margins: the limits of the law', *Griffith Law Review* Vol 23 (3):370-388 DOI: 10.1080/10383441.2014.1000218; New South Wales Council on Intellectual Disability (2011) *People with intellectual disability and contact with the justice system, at risk lifestyles or mental disorders*, Submission to Productivity Commission on Disability Care and Support.

[3] Soldatic K, van Toorn G, Dowse L & Muir K (2014) Intellectual disability and complex intersections: Marginalisation under the National Disability Insurance Scheme, *Research and Practice in Intellectual and Developmental Disabilities*, 1(1), 6-16.

[4] Baldry, E., Clarence, M., Dowse, L. & Trollor, J. (2013) 'Reducing vulnerability to harm in adults with cognitive disabilities in the Australian criminal justice system', *Journal of Policy and Practice in Intellectual Disability* 10(3):222-229

[5] Baldry E (2014) 'Disability at the Margins: the limits of the law', *Griffith Law Review* Vol 23 (3):370-388

accommodation, as she was not on the lease. Julie has no other supports in the community other than the one hour a day she received from a support service.

Julie was refused bail by the police and then by the court as there was nowhere to release her to, she was homeless. When Julie's lawyer spoke to her to get instructions she acknowledged that her capacity to instruct was borderline but she felt she could take instructions. However, further time in custody diminished her capacity to the point where the lawyer felt that fitness was now an issue and Julie was not capable of instructing her. The lawyer sought a report about her fitness to plea.

Julie lived in an area that had already transitioned to the NDIS in the pilot site, but she was not an NDIS participant. She did not know about the NDIS and said she had never been told about it. Julie is a good example of people who are likely to miss out on NDIS because they are not already connected and NDIS does not have adequate outreach to involve her.

Corrective services in the prison realised that Julie needed an application to be made to NDIA if she was get out of custody. Having made enquiries and in the absence of anyone to assist, staff from the Statewide Disability Services in Corrections helped her complete the paperwork to start the process. A planner from the NDIA had a phone interview with Julie while she was in prison and determined that she was eligible for an $11,000 package. This was totally inadequate to meet the Julie's needs in the community and bail was refused again on her next court date.

Co-ordination of support was included in Julie's NDIS package and to action the package she had to choose and engage a Co-ordinator of supports (COS), who could start the work to link her with services. Julie did not have capacity to do this herself and needed support to do this further delaying the process. A combined effort of Corrective Services staff at the prison and IDRS led to the appointment of a COS.

Once a COS was chosen there were further delays because the COS had to travel to the prison to meet with Julie so that consent forms could be signed. To meet Julie's needs and the expectation of the court supported accommodation had to found and an NDIS plan review had to be arranged as the current plan did not include that level of support. Eventually, accommodation was sourced in a house with 4 residents with 24 hour support.

Another bail application was made but the magistrate thought that even this level of support was insufficient to enable bail. Further the magistrate did not feel this level of support was enough to enable an order under Section 32 (Mental Health (Forensic Provisions) Act 1990) to be successful so bail was again denied and Julie remained in custody. Julie's lawyer arranged for her to see a Clinical Psychologist via Audio Visual Link for a fitness assessment and also to get an opinion if she believes about the 24 level of care that Julie needed.

As a result when the matter returned to the local court court, Julie was found unfit and a permanent stay was granted on her matter.

Julie had spent 3 months in prison before being released. Based on the seriousness of the offence and her limited antecedents, it seems unlikely that Julie would have been remanded in custody had she not been homeless and without support.

The NDIS process could not respond urgently enough to Julie's situation to prevent her going to prison. Once she was there, it was slow to get to the point of her having an alternative that would satisfy the court. Getting the process to work for Julie relied on the good will and assistance of the Corrective Services Staff and advocacy of IDRS to apply pressure to get things done as quickly as possible. Without that assistance it is likely that Julie would still be in priosn.

Major areas of concern in this matter are:

1. *Julie did not know of NDIS until IDRS started working with her at court*
2. *No assistance in the system available to support her to apply for NDIS while in prison other than prison staff*
3. *Poor assessment of client's needs made based on initial planning meeting done over the phone leading to an inadequate package to meet the needs of the client or to satisfy the court that her needs would be met*
4. *NDIS system seemed to rely on the participant arranging her own Coordinator of Support. She was incapable of doing that and being in prison resulted in delays in actioning her plan.*
5. *The court's apparent unrealistic expectations of community supports available and the NDIS system*
7. *Length of time spent in custody due to the lengthy process of becoming a NDIA client, getting a package and services being arranged.*
8. *Reliance on Corrections staff and on IDRS advocacy to keep the process moving. This would not be available in all prisons and people would be stuck.*

2. Clarification of key terms

There are several terms central to this submission that require clarification.

Forensic disability There is no national consensus about the meaning of the term forensic disability. In each jurisdiction it refers to different population groups and systems of intervention. The contributors to this submission thus agree that it is more appropriate to refer to 'people with cognitive and mental health impairments who are in contact with the criminal and juvenile justice systems'. [6]

Cognitive Impairment refers to 'an ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, dysfunction, development delay, or deterioration of the brain or mind'. It may arise from, but is not limited to: 'intellectual disability, borderline intellectual functioning, dementias, acquired brain injury, drug or alcohol related brain damage, autism spectrum disorders'.[7] This definition includes fetal alcohol spectrum disorder which must be recognized as a form of cognitive impairment.

Mental impairment Contributors to this submission agree with the NSW Law Reform Commission (NSW LRC) that mental and cognitive disability are distinct impairments and thus need to be defined separately.[8] Throughout this submission, mental health impairment is used to refer to 'a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behavior, so as to affect functioning in daily life to a material extent'. It may arise from, but is not limited to: 'anxiety disorders, affective disorders, psychoses, and severe personality disorders. Substance induced mental disorders should include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances'.[9]

Psychosocial disability Consistent with the definition adopted by the Mental Health Council of Australia, throughout this submission the term psychosocial disability is used to describe 'the experience of people with impairments and participation restrictions related to mental health conditions. These impairments can include a loss of ability to function, think clearly, experience full physical health, and manage the social and emotional aspects of their lives. [It] relates to the social consequences of disability – the effects on someone's ability to participate fully in life as a

[6] This approach reflects the broadest definition of 'forensic disability' adopted in South Australia were a 'forensic disability client' is a person with a disability for whom a court order is in place, or a person who has contact with the criminal justice system arising from that person being charged with an offence or the police initiate another similar legal process (that is a summons, court attendance notice or youth court matter).

[7] New South Wales Law Reform Commission (NSW LRC) (2012) *People with Cognitive and Mental Health Impairments in the Criminal Justice System*: Diversion, Report No. 135, NSW LRC: 5.123.

[8] New South Wales Law Reform Commission (NSW LRC) (2012) *People with Cognitive and Mental Health Impairments in the Criminal Justice System*: Diversion, Report No. 135, NSW LRC.

[9] New South Wales Law Reform Commission (NSW LRC) (2012) *People with Cognitive and Mental Health Impairments in the Criminal Justice System*: Diversion, Report No. 135, NSW LRC: 5.134.

result of mental ill-health. Those affected are prevented from engaging in opportunities such as education, training, cultural activities, and achieving their goals'.[10]

Conflation of Mental and Cognitive Impairments While there is an increasingly recognised distinction between psychosocial disability and intellectual disability, it is important to stress that they are not mutually exclusive categories – many people with intellectual or cognitive disabilities also identify or are identified as having psychosocial disabilities.[11] However it is equally important to stress that there are well-documented concerns regarding the conflation of cognitive impairment and mental health disorders in the criminal justice system.[12] Often, people with cognitive impairment have been dealt with under mental health legislation. This regularly results in cognitive impairment being thought of as an illness, similar to mental illness, and therefore to be treated in the same way. However it well established that people with cognitive impairment require specific processes and diversionary pathways; responding as if their cognitive impairment is the same as mental illness is neither effective nor appropriate.[13]

Social model of disability Throughout this submission disability is conceptualized and the effects of impairment are understood from the perspective of a social model of disability.[14] As stated in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), 'disability is an evolving concept ... that ... results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.[15] This is in stark contrast with a medical model of disability. Focused as it is on internal, individual pathology, the medical model of disability has been shown to contribute to the marginalisation of people with cognitive and mental health impairments who are in contact with the criminal justice system.[16]

[10] Mental Health Council of Australia (2014) Getting the NDIS right for people with psychosocial disability, 12 June 2014 <https://mhaustralia.org/general/getting-ndis-right-people-psychosocial-disability>.

[11] Ellison L, Munro VE, Hohl K & Wallang P (2015) Challenging criminal justice? Psychosocial disability and rape victimization, *Criminology and Criminal Justice, 15(2),* 225-244.

[12] New South Wales Law Reform Commission (NSW LRC) (2012) *People with Cognitive and Mental Health Impairments in the Criminal Justice System*: Diversion, Report No. 135, NSW LRC; New South Wales Law Reform Commission (NSW LRC) (2013) *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No. 138, NSW LRC; Sotiri M, McGee P & Baldry E (2012) *No End in Sight: The imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment,* Sydney: University of New South Wales; McCausland R & Baldry E (In Press) 'I feel like I failed him by ringing the police': Criminalising disability in Australia, *Punishment and Society*.

[13] Baldry E (2014) Disability at the margins: limits of the law, *Griffith Law Review*, 23(3), 370-388; McCausland, R & Baldry, E. 2017 I feel like I failed him by ringing the police: Criminalising Disability in Australia, Punishment and Society http://journals.sagepub.com/doi/abs/10.1177/1462474517696126.

[14] Oliver M (2013) The social model of disability: thirty years on, *Disability & Society* 28(7), 1024-1026.

[15] United Nations Convention on the Rights of Persons with Disabilities 2008, preamble, [e].

[16] Steel L, Dowse L & Trofimovs J (2016) Who is diverted: moving beyond diagnosis towards a social and political analysis of diversion, *Sydney Law Review* 38(2), 179-206.

3. Summary of key work

Two decades of successive government reports[17] and empirical research[18] have significantly increased current understanding about the characteristics, life trajectories and complex *disability-related* support needs of people with cognitive disability who are in contact with the criminal justice system. From this work there is ample evidence and knowledge required to address systematically the complex needs of this vulnerable group. However for a multiplicity of reasons explained in this submission, the systematic provision of evidence-based, holistic and specialised support for people with cognitive disability who are in contact with the criminal justice system remain as of yet, aspirational at best.[19] The NDIS provides the first opportunity in Australian history to end the well-documented human rights violations, punitive and destructive cycles experienced by people with cognitive disability in the criminal justice system.

Criminalising disability: understanding the causes of over-representation

It is well established that a continuing lack of appropriate service provision in the community[20] has directly contributed to the criminalising of and disproportionate representation of people with cognitive disability in prison.[21] Empirical research has shown that the overwhelming majority of people with cognitive disability come from backgrounds of entrenched disadvantage, many have experienced social isolation, stigma, homelessness, unemployment and victimisation prior to

[17] See for example: Australian Human Rights Commission (2014) *Equal before the law: Toward disability justice strategies*, February 2014, AHRC; Law and Justice Foundation of New South Wales (2009) *Cognitive Impairment, Legal need and Access to Justice*, Paper No. 10, Sydney: Law and Justice Foundation of NSW; New South Wales Law Reform Commission (NSW LRC) (1996) *People with an Intellectual Disability and the Criminal Justice System,* Report No. 80, NSW LRC; New South Wales Law Reform Commission (NSW LRC) (2012) *People with Cognitive and Mental Health Impairments in the Criminal Justice System*: Diversion, Report No. 135, NSW LRC; New South Wales Law Reform Commission (NSW LRC) (2013) *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No. 138, NSW LRC; South Australian Department for Families and Communities (2011) *Forensic Disability: The Tip of Another Iceberg*, Government of SA; Senate Community Affairs Reference Committee (2016) *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, Report 29, Canberra: Commonwealth of Australia; Victorian Law Reform Commission (2014) *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997,* Melbourne: Vic LRC.

[18] See for example: Baldry E, Dowse L & Clarence M (2012) *People with mental and cognitive disabilities: pathways into prison*. Sydney: University of New South Wales; Baldry, E, Dowse L, McCausland R & Clarence M (2012) *Lifecourse institutional costs of homelessness for vulnerable groups*. Sydney: University of New South Wales; Baldry E, McCausland R, Dowse L & McEntyre E (2015) *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System*, Sydney: University of New South Wales; McCausland R, Baldry E, Johnson S & Cohen A (2013) *People with mental health disorders and cognitive impairment in the criminal justice system: Cost-benefit analysis of early support and diversion*, Sydney: University of New South Wales; Young JT, van Dooren K, Claudio F, Cumming C, Lennox N. Transition from prison for people with intellectual disability: A qualitative study of service professionals. *Trends & issues in crime and criminal justice*,no. 528, 1-12.

[19] Baldry E (2014) Disability at the margins: limits of the law, *Griffith Law Review*, 23(3), 370-388; Baldry E, Dowse L & Clarence M (2012) *People with mental and cognitive disabilities: pathways into prison*. Sydney: UNSW.

[20] Cunneen C, Baldry E, Brown D, Brown M, Schwartz M & Steel A (2013) *Penal Culture and Hyperincarceration: The Revival of the Prison.* Surrey: Ashgate.

[21] McCausland, R & Baldry, E. 2017 I feel like I failed him by ringing the police: Criminalising Disability in Australia, Punishment and Society http://journals.sagepub.com/doi/abs/10.1177/1462474517696126; Indig D, Vecchiato C, Haysom L, Beilby R, Carter J, Champion U, Gaskin C, Heller E, Kumar S, Mamone N, Muir P, van den Dolder P & Whitton G (2011) *2009 NSW Young People in Custody Health Survey: Full Report*, Sydney: Justice Health and Juvenile Justice; NSW Justice Health & Forensic Mental Health Network & Juvenile Justice (2016) *2015 Young People in Custody Health Survey: Key findings for all young people*. Justice Health & Juvenile Justice, Sydney.

contact with the criminal justice system.[22] There is therefore no doubt that the over-representation of people with cognitive disability in prison does not arise from a pervasive inclination for crime; rather it arises from the cumulative disadvantage that the experience of cognitive disability presents when combined with extreme disadvantage and service system failure.[23]

Punishing disability: the problem with incarcerating people with disability

Over the past two decades there has been a highly problematic tendency for policy makers, legislators and legal professionals to perceive the criminal justice system as having a therapeutic role in relation to people with cognitive and mental health impairments. However it is widely acknowledged that, premised as they are on punishment and risk management, criminal justice systems are not well-equipped to respond to the unmet disability-related complex needs of the high proportion of persons in their care who have cognitive and mental health impairments.[24] Incarceration is a risk factor for elevating certain kinds of behavioural problems.[25] For people with cognitive disability, the experience of imprisonment increases the likelihood of homelessness on release, risky substance use,[26] and also increases the risk of multiple forms of future criminal justice system involvement.[27] Additionally, prisoners with cognitive disability are at increased risk of manipulation and/or victimisation while in custody and require ongoing disability-informed support to mitigate this risk.[28]

Given the substantially increased and more complex needs experienced by prisoners with cognitive disability, the 'principle of equivalence' (rule 24.1 of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners or the 'Mandela rules') needs to be understood in terms of equivalent outcomes, not equivalent services[29]. Without integrated support from disability-specific funded services, the criminal justice system does not have the capacity or

[22] Baldry E, Clarence M, Dowse L, Trollor J (2012) Reducing Vulnerability to Harm in Adults With Cognitive Disabilities in the Australian Criminal Justice System, *Journal of Policy and Practice in Intellectual Disabilities*,10, 222-9; Young JT, Cumming C, van Dooren K, Lennox NG, Alati R, Spittal MJ (2017) Intellectual disability and patient activation after release from prison: a prospective cohort study, Journal of Intellectual Disabilities Research, http://dx.doi.org/10.1111/jir.12349

[23] Cockram J (2005) People With an Intellectual Disability in the Prisons, *Psychiatry, Psychology and Law*, 12:163-73.

[24] McCausland, R & Baldry, E (2017) I feel like I failed him by ringing the police: Criminalising Disability in Australia, *Punishment and Society* http://journals.sagepub.com/doi/abs/10.1177/1462474517696126

[25] Simpson J (2014) *Participants or just policed? Guide to the role of the National Disability Insurance Scheme with people with intellectual disability who have contact with the criminal justice system, Sydney*: NSW Council for Intellectual Disability.

26 Bhandari A, van Dooren K, Eastgate G, Lennox N, Kinner SA (2015) Comparison of social circumstances, substance use and substance-related harm in soon-to-be-released prisoners with and without intellectual disability, *Journal of Intellectual Disabilities Research*, 59, 571-9; Baldry E (2014) 'Complex needs and the justice system' in Chris Chamberlain, Johnson, G & Robinson C. *Homelessness in Australia: an introduction*. UNSW Press, Sydney, Ch 10 pp 196-212.

[27] Baldry E, McDonnell, D, Maplestone P, Peeters M (2006) Ex-Prisoners, Homelessness and the State in Australia, *The Australian and New Zealand Journal of Criminology*, 39(1): 20-33.

[28] Freeman J (2012) The relationship between lower intelligence, crime and custodial outcomes: a brief literary review of a vulnerable group. *Vulnerable Groups & Inclusion*, *http://dx.doi.org/10.3402/vgi.v3i0.14834.*

[29]Lines R (2006) From equivalence of standards to equivalence of objectives: The entitlement of prisoners to health care standards higher than those outside prisons, *International Journal of Prisoner Health,* 2:269-80.

expertise to deliver equivalent outcomes for this group while in custody.[30] Furthermore, reliance on diagnostic categories is problematic, as this does not indicate level of complexity of needs;[31] people in the criminal justice system with mild to borderline intellectual disability and complex support needs are at equivalent risk of poor health and justice outcomes to those with more profound intellectual disability.[32] Currently, no national benchmarks for healthcare and disability support exist for this highly vulnerable group in custodial settings; therefore most service provision is provided on an ad-hoc basis and is not subject to rigorous evaluation.

The exclusion of prisoners with cognitive disability from the NDIS will very likely represent a substantial barrier to communication between community and correctional service providers upon entry to prison, as has been documented previously for prescribing and the exclusion from the PBS.[33] A lack of a systematic approach to the identification of cognitive disability prior to or during incarceration[34] suggests that increased integration between correctional systems and the NDIS in implementing evidence-based screening such as the Hayes Ability Screening Index[35] to target the clinical identification of people with cognitive disability is critical in reducing harm and providing substantive health and social benefits.[36] As noted above, it is well established that for the vast majority of people with cognitive disability, their pathway into the criminal justice system is a result of multiple and repeated failures in social service provision. The trajectory of people's lives will only change through identification and recognition of the support they require.

CASE STUDY 2

> *Mr Malcolm Morton has been detained in the Alice Springs Correctional Centre (ASCC) since 2009 for the killing of his uncle in 2007. Mr Morton is an Arrente man with a severe intellectual disability and foetal alcohol syndrome disorder. He is reliant on others for support and this support needs to be twenty four hours a day. He is currently transitioning to the Secure Care facility managed under the Northern Territory Department of Health. This transition process has taken three years.*

[30] Freeman J (2012) The relationship between lower intelligence, crime and custodial outcomes: a brief literary review of a vulnerable group, *Vulnerable Groups & Inclusion*, *http://dx.doi.org/10.3402/vgi.v3i0.14834;* Young JT, van Dooren K, Claudio F, Cumming C, Lennox N (2016) Transition from prison for people with intellectual disability: A qualitative study of service professionals, *Trends & issues in crime and criminal justice*, no. 528, 1-12.

[31] Howlett MS, Trollor JN (2013) *Clinical Services Planning for Adults with an Intellectual Disability (ID) and Co-occurring Mental Disorders,* Sydney: University of New South Wales.

[32] Young JT, van Dooren K, Lennox NG, Butler TG, Kinner SA (2015) Inter-rater reliability of the Hayes Ability Screening Index in a sample of Australian prisoners, Journal of Intellectual Disabilities Research,59, 1055-60; Baldry, E & Dowse L (2013) 'Compounding mental and cognitive disability and disadvantage: police as care managers' in Duncan Chappell (ed) Policing and the Mentally Ill: International Perspectives CRC Press, Taylor and Francis Group, Boca Raton USA, pp 219-234.

[33] Abbott P, Magin P, Lujic S, Hu W (2016) Supporting continuity of care between prison and the community for women in prison: a medical record review. *Australian Health Review,* doi: 10.1071/AH16007.

[34] Victoria Ombudsman (2015) *Investigation into the rehabilitation and reintegration of prisoners in Victoria:* September, Melbourne: Victoria Ombudsman

[35] Hayes S. Hayes Ability Screening Index (HASI) Manual (2000), Faculty of Medicine, University of Sydney; Young JT, van Dooren K, Lennox NG, Butler TG, Kinner SA (2015), Inter-rater reliability of the Hayes Ability Screening Index in a sample of Australian prisoners, Journal of Intellectual Disabilities Research, 59:1055-60.

[36] Hayes S. Hayes Ability Screening Index (HASI) Manual (2000), Faculty of Medicine, University of Sydney.

Whilst detained at the ASCC Mr Moreton has engaged in self harming beaviours such as banging his head on the cell walls. The ASCC's policy on people detained who engage in self harming behaviour is to intervene and prevent them from self-harming. In Mr Morton's case this intervention involved him being forcibly removed from his cell by correctional staff, belted into a restraint chair and injected with a tranquiliser until he was sedated. Mr Morton could be in the restraint chair from anywhere between 30 minutes to 2 hours. Between 2012 – 2017 the ASCC utilised this intervention seventeen times. This was despite the guardian refusing to consent to the intervention and the Office of Disability refusing to support the intervention in their Behaviour Support Plan.

The ASCC last used this intervention in September of 2015.

Preventing re-offending: the crucial role of through-care and appropriate support in the community

The disadvantage experienced by people with cognitive disability pervades after release from custody; research has shown that ex-prisoners with intellectual disability return to custody at twice the rate compared to their counterparts without intellectual disability.[37] Upon release, the vast majority of these individuals are forced to navigate multiple complicated service systems in order to address their complex and compounding physical, mental, substance use and social service needs.[38] Best practice in post-release support has for the last two decades, consistently stressed the importance of through-care as a central feature in pre-release planning.[39] That is, pre-release planning should occur while the person is in prison, usually with the same worker who will be involved with supporting the person on release from prison. Programs that use this model report much higher levels of engagement, sustained engagement, and post-release success, than those programs without it. The first three months is the highest-risk period for re-offending, homelessness and death. For someone with a cognitive disability and minimal or no supports, the risks are far higher. Recognising and addressing the risks that result from having a cognitive disability are crucial in reducing the unnecessary return to prison.

Given the well-established critical importance of through-care, contributors to this submission are deeply concerned by the NDIAs current practice of engaging in planning for community based supports only once a prisoner has a known release date, and is within 6 months of that date. Consistent with broader trends in short custodial sentences, a significant number of incarcerated people with cognitive disabilities are in custody for short periods of time.[40] In December 2016, the average length of stay for those on remand was less than 7 weeks, while the average length of

[37] Holland S, Persson P(2011) Intellectual disability in the Victorian prison system: characteristics of prisoners with an intellectual disability released from prison in 2003–2006, *Psychology, Crime & Law*, 17, 25-41.

[38] Männynsalo L, Putkonen H, Lindberg N, Kotilainen I (2009) Forensic psychiatric perspective on criminality associated with intellectual disability: a nationwide register-based study, *Journal of Intellectual Disabilities Research,* 53, 279-88; Dias S, Ware RS, Kinner SA, Lennox NG (2013) Physical health outcomes in prisoners with intellectual disability: a cross-sectional study, *Journal of Intellectual Disabilites Research*, 57, 1191-6.

[39] Baldry, E (2007) Recidivism and the role of social factors post-release, *Precedent,* Issue 81, p. 5; Borzycki M & Baldry E (2003) Promoting integration: The provision of post-release services, *Trends & Issues in Crime and Criminal Justice, no*. 262, Canberra: Australian Institute of Criminology.

[40] Baldry E (2014) 'Disability at the Margins: the limits of the law', *Griffith Law Review* Vol 23 (3):370-388

stay for sentenced prisoners was 7 months.[41] Therefore for the majority of prisoners there is simply not a six-month period for a planning cycle to be completed. Also, for people on remand or eligible for parole or detained under mental impairment legislation, there will be no release date until disability support is arranged. It is clear that if the NDIS fails to address these concerns, the significant economic and human costs to governments, communities, families and individuals associated with this group's entrenchment in the criminal justice system (for example, the costs associated with victimisation, police, courts, and prison) will continue to escalate.[42]

In sum, it is indisputable that incarcerated people with cognitive and mental health impairments are not afforded the care, protection and right to 'the full and equal enjoyment of all [their] human rights and fundamental freedoms' and 'respect for their inherent dignity' as enshrined in the Convention on the Rights of Persons with Disabilities[43] which was ratified by Australia in July 2008[44]. As successive government inquires, reports and empirical research has affirmed, what is fundamentally required to end the human rights violations of people with cognitive disability who are involved with the criminal justice system is a genuine commitment to providing appropriate holistic support in the community. This support is crucial to meeting the unmet disability-related complex support needs of this highly vulnerable group.

4. Pathways into and out of detention

Many people with cognitive impairments have multiple encounters with the criminal justice system before they are detained in prison.[45] These encounters are commonly missed opportunities to identify the impairment and arrange disability support that can break the cycle of offending.

There are two main pathways people with complex disability support needs enter detention.
Significant issues of concern for this group are: overrepresentation in all aspects of the justice system leading to recurrent (serial) detention and indefinite detention; limited access to therapeutic outcomes; and vulnerability to violence and arbitrariness whilst detained. Indigenous Australians are disproportionately affected by these matters.[46]

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[41] Bureau of Crime Statistics and Research (2016) *Custody Statistics Quarterly Update*, Sydney: BOSCAR.
[42] McCausland R, Baldry E, Johnson S & Cohen A (2013) *People with mental health disorders and cognitive impairment in the criminal justice system: Cost-benefit analysis of early support and diversion*, Sydney: PricewaterhouseCoopers & UNSW.
[43] United Nations (2008) *Convention on the Rights of Persons with Disabilities*, Article 1.
[44] Australian Law Reform Commission (2014), *Equality, Capacity and Disability in Commonwealth Laws*. ALRC Report 124. Canberra Australian Government.
[45] Baldry E (2014) 'Disability at the Margins: the limits of the law', *Griffith Law Review* Vol 23 (3), 370-388
46 Gooding P, Mercer S, Baldry E and Arstein-Kerslake A (2016) 'Unfitness to Stand Trial: The Indefinite Detention of Persons with Cognitive Disabilities in Australia and the United Nations Convention on the Rights of Persons with Disabilities' Court of Conscience 10, 6-19; Baldry, E., McCausland, R., Dowse, R., & McEntyre, E. (2015) *A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal system.* pp1-169. ISBN: 978-0-9873593-9-1; UNSW, DOI: 10.13140/RG.2.1.3457.2240

Pathway One Into detention: Conviction and Sentencing Leading to Recurrent Detention

The vast majority of persons with complex disability support needs who are arrested are charged with lesser crimes, brought before the local magistrates court, and either are remanded for short periods or receive short sentences. Once released they often offend again quite quickly and so are captured in a cycle of imprisonment. Their disabilities are often not recognised or taken into account. This can occur due to: lack of understanding by gatekeepers in the criminal justice system; unavailability of expertise to identify and respond to impairment or mental health disorder; masking of the impairment or disorder; lawyers advising not to identify as a person with impairment due to the fear of indefinite detention.[47]

In detention this group is vulnerable to the cumulative negative experiences that arise out of also having other disabilities and health problems in a punitive environment. This group fares worse in terms of their physical, mental and emotional health and well-being than people with capacity [48] and in many jurisdictions they do not receive disability specific support.

Persons with complex disability support needs who cycle in an out of prison in this way invariably return to the same circumstances that led them to come into contact with the criminal justice system in the first place.[49] Indigenous Australians with cognitive impairments and mental health disorders are particularly vulnerable to this form of recurrent detention.[50]

Pathway Two: Mental Impairment and Unfitness to Plead Leading to Indefinite Detention

The second pathway into and out of detention is via state and territory Mental Impairment legislative processes.

The Mental Impairment / Unfit to Plead pathway is an alternative pathway through the criminal justice system and is designed specifically for people who are assessed as mentally impaired and as a result are found unfit to plead. The original purpose of this legislative process was to ensure that people who did not understand the meaning of right or wrong could still participate in the justice process and ultimately be afforded access to treatment of significant benefit. Different state and territories have different legislative versions of the Mental Impairment process.[51] Western Australia has a particularly punitive approach to this: once a person is found unfit to plead the justice processes ceases and the person is indefinitely detained under the Criminal Law (Mentally Impaired Accused) Act 1996.

In this pathway, once the person with the impairment or anyone else in the court process raises

47 O'Carroll B (2013) Intellectual disabilities and the determination of fitness to plead in the magistrates' courts. *Criminal Law Journal* 37: pp. 51-67.

48 Sotiri M, McGee P & Baldry E (2012) *No End in Sight: The Imprisonment and Indefinite Detention of Indigenous People with a Cognitive Impairment*. Report for the Aboriginal Disability Justice Campaign. September.

49 Baldry, E. (2010) 'Women in transition: prison to …' Current Issues in Criminal Justice 22(2):253-268

50 Baldry, E., McCausland, R., Dowse, R., & McEntyre, E. (2015) A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal system. pp1-169. ISBN: 978-0-9873593-9-1; UNSW, DOI: 10.13140/RG.2.1.3457.2240

51 O'Carroll B (2013) Intellectual disabilities and the determination of fitness to plead in the magistrates' courts. *Criminal Law Journal* 37: pp. 51-67.

their mental impairment, the court can order a mental impairment assessment. If the assessment finds that the person has a mental impairment consideration is given to their capacity to plead.
If they are found unfit to plead then the normal justice process is suspended and no conviction is recorded. Persons who are found mentally impaired and unfit to plead cannot therefore be considered offenders and are not convicted of a crime.

An unintended but highly significant consequence of the Mental Impairment / Unfit to plead pathway for people with complex disability support needs, is indefinite detention.[52] Indefinite detention occurs when a person is detained past the cessation of the Custodial / Non-Custodial Supervision Order. Persons in this group who remain unconvicted are detained indefinitely as a result of: a review of the level of risk the person continues to pose finding they continue to pose a risk; and/or there being nowhere safe to which the person can go when released.

In this context, significant differences occur for people with mental health disorders compared to people with cognitive impairments in regards to their experience of justice and access to treatment of significant benefit.

People with mental health disorders who are detained under the sentencing and conviction pathway or the Mental Impairment / Unfit to Plead pathway have access to psychiatric supports both within the correctional setting but also within forensic settings and hospital settings. Transfers to forensic psychiatric units and appropriate acute psychiatric units in hospitals are available. There are external oversights, safety and monitoring processes including review by a state based Mental Health Review Tribunal which intersect with the Custodial Supervision Orders. Such oversight mechanisms recommend treatment options, manage evidence of risk and determine length of detention.

In most jurisdictions, people with cognitive impairments do not have the same access to treatment of significant benefit whilst detained under Mental Impairment legislative regimes as people with a mental health disorder. Persons with a cognitive impairment in these circumstances are very vulnerable to indefinite detention because their impairment is not responsive to medication or other therapeutic interventions in the way many mental disorders are.[53]

CASE STUDY 3

Will is a 48-year-old man with Jacob's syndrome and an intellectual disability.

Four years ago, police charged him with a serious sexual offence against a youth aged 14. Will was tried in the South Australian District Court and was found unfit to plead by reason of mental incompetence. Although he admitted

[52] Anna Arstein-Kerslake, Piers Gooding, Louis Andrews and Bernadette McSherry, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (forthcoming)
[53] Anna Arstein-Kerslake, Piers Gooding, Louis Andrews and Bernadette McSherry, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (forthcoming); Gooding P, Mercer S, Baldry E and Arstein-Kerslake A 2016 'Unfitness to Stand Trial: The Indefinite Detention of Persons with Cognitive Disabilities in Australia and the United Nations Convention on the Rights of Persons with Disabilities' Court of Conscience 10:6-19

to the offence (his mother told him to tell the truth!), under the South Australian Criminal Law Consolidation Act (Sect 269C), a person is mentally incompetent to commit an offence if, at the time of the conduct alleged to [have given] rise to the offence, the person [was] suffering from a mental impairment and, in consequence of the mental impairment—

(a) [did] not know the nature and quality of the conduct; or
(b) [did] not know that the conduct is wrong; or
(c) [was] unable to control the conduct.

There being no alternative that afforded the level of protection to the community required by the court, Will was given a limiting term (of equal duration to the head sentence for the offence) of 20 years in the state's forensic unit James Nash House. Interestingly, had he had capacity and had made these early admissions, it is very likely that he would have received a non-parole period in jail significantly less than the head sentence.

Since his time in James Nash House, a multi-agency group has met under the leadership of the Management Assessment Panel to try to find a community solution that would be a better for Will and still provide community safety. If such an option cannot be found, Will faces the prospect of spending 20 years in custody.

There has been debate about whether the considerable funds required to implement any alternative could come from state disability funding and more importantly whether they could be provided under the National Disability Insurance Scheme.

One view is that Will's support needs are minimal as he has lived successfully in the community largely with only case management support for over forty years and that the "considerable" funding is largely about his supervision and hence not a responsibility of the state disability service now nor the NDIA in the future.

A counter argument is that the court has determined that his disability is such that he is not guilty of a crime. Given this status, the support he needs is reasonable and necessary to live in the community, obtain employment and have the opportunities that the NDIS will afford people with disabilities generally.

The support Will needs is supervision, as is the case for many others with cognitive disabilities, and is the direct result of his disability. If such support cannot be provided, he will be thrice disadvantaged.

- *He is currently facing essentially an 20 year sentence whereas his "competent" counterpart would perhaps be looking at a 5 year non-parole period with a resourced plan for his return to the community.*

- *He is in an environment where he is gaining few skills and where his weight and diabetes will severely impair his health and shorten his life*
- *He will never have the opportunities for employment and the other benefits that our community offers*

5. Indigenous Australians

The NPY Women's Council in a Report to the NDIS titled, 'Assisting Indigenous Australians in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands to Benefit from the National Disability Insurance Scheme (NDIS) 2014' stated "People in remote Central Australia live in poverty in an extreme environment. Communities are isolated and the climate is harsh. Violence is common, exacerbated by substance abuse and a culture of blame and punishment. People are driven by basic needs for food, shelter and safety, and compete for limited resources. Cultural obligations often determine priorities for the distribution of resources such as food, clothing and money. This includes carer payments are often given to the culturally most important person rather than the person who is doing the caring work. There are high numbers of 'failure to thrive' children in the APY Lands."[54]

Services, not sentences

Indigenous Australians are significantly over-represented amongst those in prison with complex disability support needs. They are also significantly more likely to be very poor, come from highly disadvantaged places, have low levels of education, be unemployed, have experienced violence and abuse and have earlier and more police and criminal justice events as both victims and offenders.[55]

In 2012, Australians for Disability Justice (formerly the Aboriginal Disability Justice Campaign) believed that there were between 100 – 150 people, 50 of them Indigenous Australians, with cognitive impairments detained under Mental Impairment / Unfit to Plead legislative regime across the country.[56] As no jurisdiction other than WA reports these figures these are guestimates.

Some suggested reasons for this over-representation are:

- People don't understand what cognitive disability is
- High levels of stress in some Aboriginal communities
- Many Aboriginal people in the criminal justice system have 'complex support needs'

[54] Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (2014) *Assisting Indigenous Australians in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands to Benefit from the National Disability Insurance Scheme* (NDIS)

[55] Changetherecord.org; Baldry, McEntyre and McCausland (2015) "Why Aboriginal People with Disabilities Crowd Australia's Prison's" *The Conversation* November

[56] Sotiri M, McGee P & Baldry E (2012) *No End in Sight: The Imprisonment and Indefinite Detention of Indigenous People with a Cognitive Impairment*. Report for the Aboriginal Disability Justice Campaign. September.

- A lack of appropriate support for Aboriginal people with mental and cognitive disability[57]

Suggested strategies to reduce Indigenous Australians with complex disability support needs' negative experience in the criminal justice system[58]:

- Development of cultural inclusive safety principles that are formed by Indigenous Australians with cognitive impairments and mental health disorders, their families and communities.
- Translation, interpreting and plain language services to enable Indigenous Australians with cognitive disability to access information.
- Involvement of community Elders in creating pathways back into community for Indigenous Australians who have complex disability support needs and have been in prison.

CASE STUDY 4

Ms Roseanne Fulton is an Indigenous woman from Alice Springs who was detained in the Eastern Goldfields Correctional Centre after being found mentally impaired and unfit to plead. Ms Fulton has Foetal Alcohol Syndrome Disorder. Ms Fulton was detained indefinitely for twenty two months in that correctional centre for traffic offences.

Ms Fulton was returned to Alice Springs after the Aboriginal Disability Justice Campaign advocated for this action. Since returning to Alice Springs in June 2014 Ms Fulton has spent 63% of her times in the maximum security setting of the Alice Springs Correctional Centre. Some of that time has been spent in solitary confinement. The set of offences that Ms Fulton has been charged with relate to her consumption of alcohol breaching the conditions of her parole order; threats and low level assaults towards security staff who were deployed at her home and towards police who arrested and charged her.

Upon returning to the Northern Territory Ms Fulton was assessed by a psychiatrist and found to be fit to plead. Thus all her offences have carried a conviction and she has now been detained for more time than she has been free. The Department of Health believe that Ms Fulton has a mild cognitive impairment resulting from alcohol abuse and have refused her access to the Secure Care facility. Ms Fulton is now often homeless and lacks the specialist support that people with Foetal Alcohol Syndrome Disorder require.

[57] Baldry, McEntyre and McCausland (2015) "Why Aboriginal People with Disabilities Crowd Australia's Prison's" *The Conversation* November.

[58] Jody Barney (2015) "Getting It Right" report for the Barwon Regional NDIS trial site.

6. Key national issues

The need for holistic support

People with complex disability support needs who are in contact with the criminal justice system require support packages that work holistically. Fundamental to their support needs are their cognitive and other disability needs, which if not supported appropriately are compounded with the other numerous disadvantages they experience. [59] This population is frequently *excluded* from mainstream services as a consequence of both their disabilities and their offending behaviours making it vital to provide holistic disability support to prevent offending and re-offending.

Choice and control: The need to reconsider 'capacity'

The founding principles of choice and control central to the NDIS premises a particular conception of the disability experience, which at its foundation excludes the majority of people with cognitive disabilities who are in contact with the criminal justice system. By assuming all individuals with disability have the capacity to make positive life choices, the scheme's founding principles present significant concerns for this group.

The combined extensive practice experience of many of the contributors to this submission clearly indicates that for the vast majority of criminalised people with complex cognitive disability support needs, the extent of their disadvantage and marginalisation means that they have never experienced control over their own lives. Moreover, their *capacity* to make positive life choices is significantly impaired.[60]

A significant number of this group is engaged in behaviours that place them at serious risk to themselves and others, including non-compliance with medication, extensive drug and alcohol misuse, impulsivity, aggression, and criminal activity. The very nature of their disabilities means that the vast majority of these individuals do not recognise the negative outcomes of these behaviours. All contributors to this submission who provide services to this group concur that to *self identify* a need for support for these issues is highly unlikely, at least without considerable development of the person's capacity to understand their needs.

Risks to the community

The NSW NDIS Quality and Safeguarding Transitional Working Arrangements and Provider Registration document is focused primarily on two key types of risk: the risk that people with a disability could receive poor quality supports; and the risk that people with a disability could be harmed in some way. These are clearly important parameters. However, evidence clearly demonstrates that in the context of working with people with cognitive disability and criminalised behaviours, it is paramount that attention is also paid to a third area of risk - that is the risk to

[59] New South Wales Law Reform Commission (2012) *People with cognitive and mental health impairments in the criminal justice system: Diversion, Report no. 135*, Ch. 5, Sydney: NSW LRC; Villamanta Disability Rights Legal Service Inc. (2012) *People who have an Intellectual Disability and the Criminal Justice System: A guide and educational tool for people working in the criminal justice system*, Villamanta Disability Rights Legal Service Inc.

[60] Clift K (2014) Access to the National Disability Insurance Scheme for people with intellectual disabilities who are involved in the criminal justice system, *Research and Practice in Intellectual and Developmental Disabilities*, 1(1), 24-33.

community safety.[61] Critically, that risk to the community directly creates risks for the person with disability – the risk of charges and imprisonment will all the negative consequences that brings for the person.

Marketisation of services: the need for block funding

The marketisation of services under the NDIS appears to be resulting in appropriate service provision for the target group being financially unsustainable. In particular, the provision of 24-hour support for clients with high complex support needs is unlikely to be possible using the individualised funding model of the NDIS.

People with complex needs frequently cycle in and out of custody, and services supporting populations with cognitive disability need to be able to support them through this process and become the stabilising service provider (such as the CJP has been in NSW). If funding is to be withdrawn for individuals when they exit the service and enter a custodial environment, as evidenced above this is usually for short periods of time, the sustainability of 24-hour services is compromised. As evidence in this paper highlights, people who require assistance most - truly complex and high risk clients cycling in and out of prison - will not be housed as the potential costs to services are too great.

There needs to be urgent consideration of the need for investment in block funding for those services qualified to address the range of complex issues relating to offending behaviour for this group.

The impact of incarceration & the critical importance of through-care

People with cognitive disability leaving prison's disability is overshadowed by their criminal history. Access to traditional disability services is severely limited. Fear, stigma by services and complexity of need are barriers. Few mainstream services have adapted service provision for this group. To suggest that this population can use self-determination to access services in the community like many other individuals is a fallacy.

People in the criminal justice system have long histories of being monitored and managed by government organisations and systems. Histories of abuse and trauma further exacerbate a person's ability to form relationships of trust. There is significant research identifying that up to 60% of positive behaviour change that occurs for an individual is a result of a trusting therapeutic relationship. The NDIS funding model relies heavily on the utilisation of a casualised workforce; a formula that is not conducive, and in fact works in opposition to maintaining long-term client worker relationships. In order to work effectively with complex disability support needs populations, it is crucial to employ *skilled professional workers* and for clients to have long term support relations with the same trusted person.

Best practice in mainstream post-release support has for the last two decades consistently stressed the importance of through-care as a central feature in pre-release planning.[62] Through-

[61] Churchill A, Sotiri M & Rowe S (2017) Access to the NDIS for people with cognitive disability and complex needs who are in contact with the criminal justice system: Key challenges, Sydney: Community Restorative Centre.

care is critical in preventing reoffending, as well as improving community integration and ultimately enhancing community safety. The current disconnect between the NDIS and the correctional settings that house large populations of people with cognitive disability and complex needs must be addressed, urgently. Governments have acknowledged that the NDIS interface with justice is complex.

Cost benefit of ensuring holistic disability services for this group

Research of the costs incurred by government agencies for highly disadvantaged persons with cognitive disability who are not supported early and who end up being managed by the criminal justice system is sobering and enlightening. Real costs for every human, social and justice agency intervention or event with a range of persons with complex disability support needs who had been in prison were calculated and a cost benefit analysis done to arrive at savings that could have been made had appropriate disability support services been provided. Costs over the lifecourse (ages ranged from 20 to 40) of those in these case studies ranged from $1m to $5.8m (in 2016 $). Cost benefits of holistic (24hr when needed) disability support ranged from 1.4 to 2.4 saving for every dollar spent in support.[63]

CASE STUDY 5

> *Troy, a 36-year-old man who identifies as Aboriginal, was referred to the Community Restorative Centre (CRC) when he was due to be released from custody. Following two serious car accidents in his teenage years, Troy was diagnosed with Traumatic Brain Injury. He has a mild intellectual disability that significantly impacts on his ability to access appropriate supports and to reduce his risk of re-offending. Troy also has schizophrenia and substance abuse issues that inhibit his ability to maintain a safe and effective medication regime. In addition Troy has diabetes, epilepsy, vision problems and dental health issues.*
>
> *As a child Troy was exposed to family violence, unstable housing and disrupted education. Both of his parents were addicted to heroin and as a result Troy was frequently exposed to drug use. Troy was present during many police raids on his family home and remembers these times as terrifying.*

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62 Borzycki, M. & Baldry E (2003) 'Post-release policy, issues and services in Australia: Themes emerging from a roundtable discussion' *Trends and Issues in crime and criminal justice* No. 262 Australian Institute of Criminology, Canberra.

63 McCausland, R, Baldry, E. & PwC 2013 People with mental health disorders and cognitive impairment in the criminal justice system Cost-benefit analysis of early support and diversion Report for AHRC, pp1-12 http://www.humanrights.gov.au/publications/justice-reinvestment-people-disability-could-save-millions; Baldry, E., Dowse, L., McCausland, R. and Clarence, M. 2012 Lifecourse institutional costs of homelessness for vulnerable groups Report for FaHCSIA funded by FaHCSIA Homelessness study grant pp1-122 ISBN 978-0-9873593-1-5 http://www.mhdcd.unsw.edu.au/mhdcd-projects-studies.html

Troy has limited insight into his support needs. His cognitive impairment impacts on his ability to understand the consequences of his actions and to relate actions to outcomes. Troy displays impulsivity and lives 'in the moment'. As a result he requires ongoing and intensive case management and support to follow through with medical processes, including mental health, maintain medication regimes, access to community services and supports and to maintain accommodation.

Troy's cognitive impairment makes him highly vulnerable to exploitation by others. CRC have been successful in an application for financial guardianship to ensure that Troy is able to maintain financial commitments, and to have funds available to meet his basic support needs. Without staff support, Troy will still spend his grocery monies on drugs and alcohol, leaving himself short of sufficient food to maintain the most basic level of dietary requirement.

Troy requires a high level of advocacy and support. However Troy's challenging behaviours have resulted in many services declining referrals to provide necessary supports to him. At the present time, CRC continues to support Troy in the community to ensure that his health and well-being is maintained.

7. Problems with the Justice Interface principles

Particular problems with COAG Applied Interface Principles – Justice

Under these principles "Other parties" are responsible for:

1. Cognitive and psychiatric assessments for court sentencing or diversion.
2. Accessible legal assistance
3. "Offence specific interventions…. which are not clearly a direct consequence of the person's disability".
4. "Intensive case coordination … where a significant component of the case coordination is related to the justice system".
5. Early identification and primary intervention programs.

But justice services commonly do not perform these or other stated responsibilities.

In this field, we argue that the interface principles are not consistent with the test in the NDIS Act on which they rest, namely whether supports are

> most appropriately funded through the NDIA and not through other mainstream services as part of their universal service obligation or in accordance with reasonable adjustment required under discrimination law (Section 34).

The justice interface principles do note "that the NDIS interface with justice is complex" and that lessons learned from the NDIS trials will assist Governments to refine them.

8. Making the NDIS work for people with cognitive impairment who are in contact with the criminal justice system

Summary: People with cognitive impairment and criminal justice histories have complex support needs

Complex and widely varying support needs arise from the interplay and compounding effects of intellectual and/or other cognitive impairment/disability and some or all of:

- histories of trauma,
- mental health problems and psychosocial disability,
- hearing and sight impairments,
- alcohol and other drug problems,
- lack of positive family relationships,
- negative out of home care experiences,
- poor school education experiences,
- difficult transition to youth,
- disadvantage associated with Indigenous or CALD culture,
- negative experiences of service systems,
- great difficulty forming trusting relationships,
- difficulty seeing what a positive lifestyle might entail, and
- reluctance to identify as having a disability. [64]

This interplay leads to great difficulties exercising decision making, choice and control. People will express choices but they will often be ill informed, negative and changeable.

Individuals may be superficially quite independent but in fact have:

- undiagnosed cognitive, psychosocial and sensory impairments and
- substantially reduced functional capacity, particularly in communication, social interaction, learning and self management.

Members of this group will commonly not see or wish to acknowledge these impairments. They are very unlikely to seek out NDIS support of their own initiative and will often initially be suspicious of suggestions to obtain NDIS assistance.

People will often have volatile and fast changing support needs.

Implications for appropriate access to and support by the NDIS:

- Identification, outreach and engagement are vital to supporting people to access the NDIS and other human services.
- Continuity of support relationships is vital to establishing and maintaining a trusting relationship that then allows positive support and development of capacity to make choices.

[64] Baldry, E & Dowse L (2013) 'Compounding mental and cognitive disability and disadvantage: police as care managers' in Duncan Chappell (ed) Policing and the Mentally Ill: International Perspectives CRC Press, Taylor and Francis Group, Boca Raton USA, pp 219-234.

- Holistic rather than fragmented support is vital.
- NDIS and provider staff need specific skills in working with this group.
- Quick and flexible responses are vital.

Elements of an appropriate NDIS response to this group

10. **Outreach, engagement and support to access services** including where appropriate to become a NDIS participant. By
    a. Local area coordinators
    b. Funded ILC services
    c. Advocacy services
    d. Justice agencies
    e. Other mainstream agencies and services
    f. Informal networks of support

    This includes processes to identify potential members of this group and support them to obtain evidence of impairments and functional deficits.

11. **Skills in NDIA** - LACs, planners and other relevant staff with specific skills in:
    a. Recognising, engaging and working with members of this group
    b. Understanding the interplay of factors that give rise to participant eligibility on the basis of disability or early intervention

12. **Early intervention** in childhood and adolescence via strong collaboration with education, Indigenous, child and family and juvenile justice services and community groups.

13. **Timely and often urgent preparation and review of plans** including
    a. When a person is at risk (which includes other people being at risk and therefore the person is at risk of further trouble with the law)
    b. When on remand or at risk of a sentence of imprisonment for want of disability support
    c. When to be released from custody including when this occurs suddenly and unexpectedly
    d. When in custody and an equitable opportunity for early release is dependent on having disability supports
    e. Reviews of plans where circumstances change – many of this group have volatile and fast changing support needs
    f. Administrative review of inadequate plans

14. An informed planning process
    a. Considerable support for the person to form goals and understanding of needs
    b. Input from experts in the needs of this group and people with professional knowledge of the person, eg Community Justice Program NSW
    c. Use of existing assessments and/or obtaining new and culturally relevant assessments of needs. Expert multidisciplinary assessment will be needed in many cases.
    d. Consideration of appointment of a nominee or application for a guardian where the person cannot be supported to make decisions in their interests

15. Participant plans attuned to this group

a. Provision for early development and ongoing maintenance of relationships with support providers
    i. In the community
    ii. For people in custody, 3 months before first possible release or linked as soon as possible by Corrective Services to support provider in the case of very short term detainees, and maintenance of relationship if the person is returned to custody
b. Substantial support to assist development of a person's understanding of their needs and development of skills in decision making, choice and control
c. Support as needed to understand and avoid the risks of offending. For some people, this can extend to 24 hour support
d. Holistic support across the range of a person's needs including
    i. Support to respond to each of a person's impairments and the interplay of those impairments
    ii. Substantial behaviour support and other therapies, including trauma informed practice
    iii. Communication supports
    iv. Development of basic life skills, eg healthy hygiene
    v. Support to access health and other mainstream services, communicate with them and act on their advice
    vi. Being realistic about what mainstream services will provide
    vii. Support in legal processes and to understand and comply with legal orders
    viii. Avoiding a false distinction between disability and offender needs
    ix. Accommodation
    x. Cultural and religious, including cultural safety
    xi. Access to independent advocacy including expert advocacy eg Intellectual Disability Rights Service NSW
e. Capacity to provide immediate support in crisis or last resort situations
f. Maximum flexibility in the plan to respond to fast changing needs
g. NDIS support in accordance with COAG interface principles for persons in custody (prison, juvenile detention and secure disability facilities where people are placed under a sentence or other custodial order)
    i. Aids and equipment
    ii. Therapy directly related to disability including for complex challenging behaviour
    iii. Disability specific capacity and skills building
    iv. Support to enable a person to successfully re-enter the community
    v. Training custodial staff in individual participant needs
    vi. BUT not supervision, personal care and fixed aids and equipment
h. Support coordination by a person with adequate hours and skills to bring together all of these elements

16. **Development of market capacity** of service provider organisations, support workers, support coordinators, behaviour practitioners and other professionals including
    a. Acknowledging the highly skilled and challenging nature of the work and so the need for ongoing staff development and close supervision
    b. Providers from Indigenous communities

c. Ensuring availability of last resort providers where there is no willing and able provider or a provider exits a person
d. Addressing disincentives, e.g. unreliable income flow because of periods in custody and the time it takes to engage with a client, costs flowing from property damage by clients
e. Ensuring availability of tertiary expertise like that in the Community Justice Program NSW as a source of training, mentoring and expert consultancy
f. Considering block funding of some services
g. Specific consideration of this group in implementation of the NDIS Quality and Safeguards Framework including:
    i. Development of specific additional standards for providers who work with this group
    ii. Third party quality assurance of providers
    iii. Practice leadership by the Senior Practitioner

17. Interplay with mainstream services

a. Systemically and locally, strong collaborative relationships between the NDIS and justice (police, legal aid, courts, juvenile justice, corrections etc), health (physical, alcohol and other drugs, mental), housing, Indigenous, CALD, child and family and other relevant services
b. A framework for information sharing
c. Proactive case coordination by an NDIS support coordinator
d. Capacity to work in the context of diversion schemes operating in State/Territory courts including diversion on condition of complying with orders requiring acceptance of support services.
e. Capacity to work in the structure of criminal and forensic orders of courts and tribunals including that reductions in security arrangements and release will often depend on a plan being in place for disability support
f. Development of equitable access to and reasonable accommodation in mainstream services
g. Development of the overall capacity of mainstream services and, in the meantime, NDIS being realistic about what they can/not provide

18. **Support for research** including collaboration with researchers who have expertise in disability and justice issues.

In view of the large number of people with cognitive disability in contact with the justice system and the multiplicity of issues spelt out above, the NDIA could valuably engage a senior expert from the sector to develop principles, policy and practice (as the agency has for mental health).

Appendix A: Localised State and Territory Issues

New South Wales

Disability support services in NSW for offenders with intellectual disability

Until about 2000, offenders with intellectual disability seldom had access to disability support. Government disability services prioritised people with more "severe" disability than those who usually get in trouble with the law.

Then, the NSW disability department, now Ageing, Disability and Home Care (ADHC) in the Department of Family and Community Services, took three major steps to acknowledge the considerable disability support needs of people with intellectual disability and justice system involvement.

First, the department made this group a high priority for access to support services. This led to increased access to things like case management, behaviour support and accommodation support, albeit within the context of a very stretched service system.

Second, with a major budget enhancement, the department established the Community Justice Program whose focus is supported accommodation, behaviour support and case management for people with intellectual disability and complex needs related to their serious history of offending.

The CJP now is available to up to 400 people with a wide range of support arrangements including individual support packages and drop-in support through to intensive residential placements (group homes with intensive support and supervision and in some cases restrictions on freedom of movement).

A high proportion of the clients of the CJP are Aboriginal people.

Most but not all clients of the CJP are in supported accommodation run by non-government organisations but with a high level of case coordination and behaviour support from the specialist CJP team in ADHC.

Third, the Department funded the Intellectual Disability Rights Service to establish the Criminal Justice Support Network. Through a large network of volunteers trained and coordinated by a small number of staff, the CJSN provides support in police interviews and the criminal courts to people with intellectual disability who would otherwise find it extremely difficult to understand the legal processes and their rights, for example the right to silence in a police interview.

CJP clients are transitioning into the NDIS and there are major issues about whether the NDIS will meet their needs in the same holistic way as has the CJP.

The funding for the CJSN is in peril with the transfer of the whole NSW disability budget to the Commonwealth.

Will specialist skills be available in the NDIS environment?

The major gains that have been made in support services for offenders with intellectual disability in NSW have been strongly related to the development of specialist teams of case managers and behaviour support practitioners and related therapists.

These teams have not only provided case management and behaviour support but they have also been key to the training and ongoing support of non-government services who provide supported accommodation to clients with more complex needs.

It is very doubtful whether the market will by itself provide these specialised skills. By block funding or some other clear method, the NDIA needs to ensure that these specialised skills remain available in NSW and are provided in States and Territories that do not currently have them.

Mixed results in the Hunter NDIS trial site

A small number of offenders with intellectual disability have received disability support for the first time through funded packages in the Hunter trial site and with good results for their enhanced lives and reduced trouble with the law.

Best practice in linking people into the NDIS is exemplified by the work of the Criminal Justice Support Network of IDRS which has gone outside its funded role to support some of its regular clients to see the potential benefit of accessing the NDIS, go through the NDIS processes and achieve positive participant plans. (See Kenn Clift (2014) "Access to the National Disability Insurance Scheme for People with Intellectual Disabilities Who are Involved in the Criminal Justice System", *Research and Practice in Intellectual and Developmental Disabilities*, 1:1, 24-33, http://dx.doi.org/10.1080/23297018.2014.910863)

On the other hand, there have also been problems.

Juvenile justice NSW reported that in 2 ½ years it had only successfully supported three of its Hunter clients to become participants in the NDIS and none of these had achieved a participant plan. These figures starkly contrast with The 2006 NSW *Young people on community orders health survey* at www.justicehealth.nsw.gov.au/publications/ypco-report.pdf

In that rigorous study,15% of young people had IQs below 70 and an additional 27% IQs below 80. On a measure of academic achievement, 30% had scores below 70 and a further 30% below 80. Further, 40% of the overall sample reported severe symptoms of a clinical mental health disorder including 25% a depressive or anxiety related disorder.

Similar results were found for young people in custody.
www.justicehealth.nsw.gov.au/publications/ypco-report.pdf

Clearly, there was a major problem between the NDIA and Juvenile Justice in gaining equitable access to the scheme for juvenile justice clients. There were similar problems between NDIA Hunter and other justice agencies including Corrective Services and Legal Aid.

At the same time, some clients of the ADHC Community Justice Program have transitioned into the NDIS in the Hunter and there have been major problems with continuity of the support that was

being provided through the CJP. For example, there has been a fundamental deficit in the number of hours of behaviour support that the NDIS has been willing to fund. The NDIS has only tended to initially fund 15 hours of behaviour support a year which would be vastly less than what would have been provided by the CJP.

Victoria

As of September 2016, with a population of 6,314 prisoners, Victoria accounts for 17% of the total prisoners in Australia.[65] Recent prevalence estimates suggest that between 442 and 631 prisoners in Victoria likely have an intellectual disability.[66] In addition, a 2013 Victorian parliamentary inquiry reported that people with an 'intellectual impairment' were 'anywhere between 40 and 300 per cent more likely' to be jailed than people without an intellectual impairment.[67] Regarding those with acquired brain injury, the Victorian Department of Justice reported that 42 per cent of male prisoners and 33 per cent of female prisoners had an acquired brain injury, compared to just 2.2 per cent of the general population.[68] Outside of prison, it is highly likely that these individuals would be eligible for the NDIS.

It is generally agreed that Victorian prisoners with disabilities, like those around the country, experience disadvantage. While many issues are the same around Australia, some specific disadvantage arises in Victoria. For example, people with intellectual disability are more likely to meet eligibility requirements for disability-based support in corrections, than persons with cognitive disabilities (ie. those who typically acquire a brain injury after the age of 18). Without clear information as to the specific cause, in practice this distinction relies on an age of onset criterion of prior to 18 years of age.[69] Despite many of the support-requirements being similar or the same for these two groups, the specific definition of intellectual disability under Section 3 of the *Disability Act 2006,* tends to preclude eligibility for anyone who is deemed to have acquired a cognitive impairment after the age of 18. However, research has highlighted that a substantial proportion of individuals with cognitive/intellectual disability are not diagnosed prior to contact with the criminal justice system.[70] Accordingly, due to low pre-incarceration rates of clinical assessment, disability-specific services, a lack of close informant report and often multiple mental health comorbidities, reliable ascertainment of the age of onset of clinically significant

[65] ABS. Corrective Services, Australia, September Quarter 2016. Canberra: Australian Bureau of Statistics; 2016.

[66] Dias S, Ware RS, Kinner SA, Lennox NG. Co-occurring mental disorder and intellectual disability in a large sample of Australian prisoners. Aust N Z J Psychiatry. 2013, 47:938-44; Hellenbach M, Karatzias T, Brown M. Intellectual Disabilities Among Prisoners: Prevalence and Mental and Physical Health Comorbidities. J Appl Res Intell Disab. 2016;Epub ahead of print.

[67] Law Reform Committee, Parliament of Victoria, above 14.

[68] Corrections Victoria, 'Acquired Brain Injury in the Victorian Prison System' (Corrections Research Paper No 4, Department of Justice, 4 April 2011) 22; see also Peter W Schofield et al, 'Traumatic Brain Injury among Australian Prisoners: Rates, Recurrence and Sequelae' (2006) 20 *Brain Injury* 499.

[69] American Psychiatric Association. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Arlington, VA: American Psychiatric Association; 2013.

[70] Snow K, Young J, Preen D, Lennox N, Kinner S. Incidence and correlates of hepatitis C virus infection in a large cohort of prisoners who have injected drugs. BMC Public Health. 2014,14:830; Young JT, Cumming C, van Dooren K, Lennox NG, Alati R, Spittal MJ, et al. Intellectual disability and patient activation after release from prison: a prospective cohort study. J Intellect Disabil Res. 2017:n/a-n/a.

cognitive/intellectual impairment is exceedingly difficult in criminal justice system settings. Compounding this issue, a recent report by the Victoria Ombudsman highlighted that there is "no consistent process to identify, assess or support this group of vulnerable prisoners" in the Victorian prison system.[71] While people with intellectual disability can go to Disability Forensic Assessment and Treatment Services (DFATS), and offenders and accused with mental health issues can go to the Thomas Embling forensic hospital, the only place for people with acquired brain injury is prison (again, unless the person is deemed to have acquired their brain injury before the age of 18, in which case they are eligible for support through DFATS). These arbitrary distinctions are precisely the issues that can be addressed by the eligibility requirements of the NDIS. However, without a systematic and NDIS-integrated approach to the identification of intellectual/cognitive disability in the Victorian criminal justice system, a substantial proportion of vulnerable individuals will be precluded from assessment of their eligibility.

Benefits: Despite the disadvantage facing Victorians with disabilities in the criminal justice system, there are a number of agencies, organisations and programs, which are seeking to improve the situation. Many of the individuals, organisations and government agencies involved in the provision of these supports would be well-placed to negotiate the application of support under the NDIS to people with disabilities in the criminal justice system. These include:

- Villamanta
- OPA, which includes programs such as Independent Third Persons.
- Disability Discrimination Legal Service
- Australian Community Support Organisation (ACSO)
- Jesuit Social Services
- VALID
- The Justice User Group, RMIT.
- The disability division at VLA
- The Victorian Aboriginal Legal Service, which recently trialled a 6-month program in which a disability support worker was co-located at the service, and assisted accused persons with disabilities.
- A number of University researchers – Jesse, Dr Kate van Dooren, Piers, Bernadette, the Monash access to justice scholars, RMIT, Patrick Keyzer, etc.

- The Assessment and Referral Court List (the List) is a specialist court list operates in the Magistrates' Court of Victoria to meet the needs of accused persons who have a mental illness and/or a cognitive impairment[72].
- The Court Integrated Services Program (CISP) began in November 2006. The program provides accused persons who have a disability or not, with access to services and support

[71] Victoria Ombudsman (2015) *Investigation into the rehabilitation and reintegration of prisoners in Victoria: September 2015*, Melbourne: Victoria Ombudsman, p. 7

[72] https://www.magistratescourt.vic.gov.au/court-support-services/assessment-and-referral-court-list-arc

to reduce rates of re-offending and promote safer communities. The program currently operates at the Latrobe Valley, Melbourne, Mildura and Sunshine Magistrates' Courts.[73]

- The use of intermediaries as communication assistant specialists' research project Miranda Bain Funds in Court.

Queensland

Apart from needs that are peculiar to Aboriginal and Torres Strait Islander people, the broad support needs of Queenslanders with cognitive impairments, and particularly those at risk of the criminal justice system, are not different to those of people with cognitive impairments in other Australian jurisdictions.

The Queensland legal infrastructure, however, is in flux as we transition to the *Mental Health Act 2016* (Qld) ('MHA'). The MHA offers new possibilities for NDIS support, and above all, for first contact between defendants and the NDIS.

Queensland-specific but not unique matters for the Committee to consider, and where there is enormous potential for NDIA collaborations that will reduce people's involvement with the criminal justice system, are:

- Aboriginal and Torres Strait Islander people: a disproportionate number of Aboriginal and Torres Strait Islander people with cognitive impairments, many in remote communities. Amongst Queensland Aboriginal and Torres Strait Islander prisoners the proportion with disabilities is astronomical: 73 percent of men and 86 percent of women in Queensland jails have some form of mental impairment.[74]

- The *Mental Health Act 2016* (Qld) - is a brand new legislative structure[75] allowing *inter alia* Magistrate referral of defendants to named support services, including the NDIA.[76] Until the end of February 2017, Queensland Magistrates had no special powers in relation to defendants with cognitive impairments who were charged with simple offences, even though they comprised, and still do, a substantial minority of defendants, and of criminal matters. These arrangements have driven people with intellectual impairments further into the criminal justice and forensic systems, incarceration, debt, homelessness, housing stress and welfare dependency.

Now, from March 2017, Magistrates-

[73] https://www.magistratescourt.vic.gov.au/court-support-services/court-integrated-services-program-cisp
[74] This is the 12 month prevalence: *ibid.*
[75] The *Mental Health Act 2016* (Qld).
[76] Referral pursuant to the *Mental Health Act 2016* (Qld) section 174, when the matter has been dismissed because, on the balance of probabilities, the person is not fit for trial.

a) will have the power to dismiss complaints (criminal charges) if satisfied on the balance of probabilities that the defendant was of unsound mind or is unfit for trial[77]
b) may refer defendants who are unfit for trial to a 'appropriate agency', including the National Disability Insurance Scheme[78] or the Transition Agency established under the *National Disability Insurance Scheme Act 2013* (Cwlth) or the department in which the *Disability Services Act* (Qld) is administered,[79]and if 'a)' above applies, and the person has or may have a mental illness
c) may make an examination order for clinical determination of need for treatment.[80]

- The Queensland Mental Health Court makes forensic dispositions in relation to people who are unfit for trial or who are of unsound mind, with no limiting terms, and usually without a determination of guilt beyond a reasonable doubt.

- Restrictive practices[81] were regulated by law when the Carter Report revealed appalling abuses at the Challinor Centre and Basil Stafford. The legislative regime was designed to phase these practices out, but services use them still as a blunt instrument to manage behaviour, and almost always for the convenience of everyone but the person subject to them. With appropriate support restrictive practices can be eliminated.

- The Forensic Disability Service is at Wacol, near Brisbane, for the indefinite detention of people with cognitive impairments, who are sometimes a great distance (up to ~ 2200 kms) from home. No-one has yet transitioned from the Forensic Disability Service, despite its disposition as a transitional facility.

Northern Territory

The Northern Territory faces a number of significant challenges in responding to people with cognitive impairments and mental health disorders. Significant issues associated with the large numbers of people that live remotely many of whom are Indigenous Australians ensure that providing a range of specific services that are culturally relevant and therapeutic in nature mean that the number of people living under forensic orders is higher than in other jurisdictions.

"On 21 March 2016, New South Wales had 5.3 persons per 100,000 population (a total of 412; written submission No. 66 of the NSW Government) who were forensic patients. The incidence of forensic patients in the Northern Territory for the same period was 14.8 persons per 100,000 population (a total of 36). These figures are not intended to oversimplify the complexities of this

[77] *Mental Health Act 2016* (Qld) section 172.
[78] Or to Queensland Health
[79] *Mental Health Act 2016* (Qld) section 174.
[80] *Mental Health Act 2016* (Qld) section 177.
[81] *Disability Services Act 2006* (Qld).

area of service delivery but are intended to provide a baseline picture of the burden of forensic patients in the NT compared to a much larger jurisdiction like NSW."[82]

There is a considerable level of concern regarding the inadequacy of the depth and breadth of the response in the Northern Territory to people with disabilities, particularly Indigenous Australians with disabilities, who are involved in the criminal justice system. In 2014 the Australian Human Rights Commission provided Findings in relation to four Indigenous men detained as a result of their mental impairment in the Alice Springs Correctional Centre,

"(b) Cruel, inhuman and degrading treatment
263. The impact on Mr Scotty of custody in a maximum security prison was severe. Chief Justice Martin found that Mr Scotty was unable to live under conditions in a prison where he can associate with other prisoners even subject to usual management and discipline. The result was that he was isolated in a small single cell and the opportunities for him to be permitted outside this cell were restricted to two or three hours per day. Prolonged solitary confinement of a detained or imprisoned person may amount to a breach of article 7 of the ICCPR. Despite these severe conditions, the custodial order was confirmed because there were no adequate resources available for his treatment and support in the community outside of prison."[83]

The Findings from the Australian Human Rights Commission also described the obligations on the Commonwealth to work with the Northern Territory to enhance the quality of life for people with disabilities,

"Taking available administrative measures directed towards the provision of alternative accommodation arrangements would also have been consistent with the positive domestic obligations undertaken by the Commonwealth to the Northern Territory under clause 19 of the Intergovernmental Agreement. These obligations include the commitment to the provision of on-going financial support to the Northern Territory to, among other things, contribute to the achievement of an enhanced quality of life for people with disability. These obligations also include the responsibility under the National Disability Agreement to work together with the Northern Territory to develop and implement reforms to improve outcomes for Indigenous people with a disability."[84]

In May 2015, the then Northern Territory Attorney-General and Minister for Justice requested the Northern Territory Law Reform Committee (NTLRC) to investigate, examine and report on law reform in relation to the interactions between people with mental health issues and the justice system, and ways that this interaction, as well as outcomes for both the individual and society, might be improved.

Report Number 42 discussed the provision of a certificate from the CEO of Health under Section 77 of NT *Mental Health and Related Services Act* in relation to issuing of a Therapeutic Supervision Order'

[82] Department of the Attorney-General and Justice *Northern Territory Government Submission to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* 2016
[83] Australian Human Rights Commission: *Notice s29: Morton, Dooly, Leo and Scotty* 2014
[84] Australian Human Rights Commission: *Notice s29: Morton, Dooly, Leo and Scotty* 2014

"The section 77 process is protracted because it often takes considerable time to receive the certificate, and once the certificate is provided further time elapses before the report on which the certificate is based is provided to the court and the parties. Once the report has been made available the matter is case managed by the court - including the fixing of a hearing date. It can be some time before the application is heard and determined by the court. This drawn out and unduly complicated process is inconsistent with the requirements of the court of summary jurisdiction which are to dispose of matters in a practical and expeditious manner."[85]

The level of concern about the treatment of people with cognitive impairments and mental disorders remains current and can be evidenced by the two 2016 complaints to the United Nations Human Rights Council alleging arbitrary detention and cruel and unusual punishment under the International Covenant on Civil and Political Rights that have been authored and submitted by the Latrobe University Law School.

"In NAAJA's (Northern Australian Aboriginal Justice Agency) view, the main obstacle to better outcomes for people with cognitive and psychiatric impairment in the NT is a lack of resources, reflecting primarily a lack of political will and a failure to give priority to this area of need. The main drivers of indefinite detention in the Northern Territory are the lack of a forensic mental health facility; the shortage of supported accommodation options and appropriate outreach support; and a lack of support for families and people with disability, particularly in remote Aboriginal communities."[86]

The Northern Territory's response to people with cognitive impairments and mental health disorders involved in the criminal justice system has recently been enhanced with the establishment of a separate Mental Health Court operating in Darwin. Previously matters relating to the recurrent and indefinite detention were responded through the Crimes Act Section 43ZC (Mental Impairment) in the Supreme Court.

In both Darwin and Alice Springs people with cognitive impairments and mental health disorders are still detained in maximum security correctional centres through the Department of Corrections. In the new Darwin maximum security correctional centre people with a cognitive impairment and mental health disorder are now referred into the Complex Behaviour Unit. There is the possibility of referral to the new 'step down' cottages on the perimeter of the Darwin Correctional Centre is administered under the Disability Services Act

In the maximum security Alice Springs Correctional Centre people with cognitive impairments and mental health disorders are detained in the John Bens Unit. People with cognitive impairments are also detained at the eight bed Secure Care Facility which is administered under the Disability Services Act

"NAAJA believes that there is an urgent need for increased support for people and their families at an early stage, through diagnosis, management and treatment as appropriate. Such support needs

[85] Northern Territory Law Reform Committee: *Report on the Interaction of People with Mental Health Issues and the Criminal Justice System 2016 Report No. 42* May 2016

[86] Northern Australian Aboriginal Justice Agency *Submission to the Standing Committee on Community Affairs Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairments* 2016

to include help resolving issues with housing and social security; ensuring the appointment of a pro-active adult guardian, making available supported accommodation and other services such as in-home nursing care, access to respite and financial counselling (for example to assist carers to budget)."[87]

In the Northern Territory:

- 36 people who are subject to a Supervision Order under Part llA
- 19 are subject to Custodial Supervision Orders
- 17 subject to Non-Custodial Supervision Orders
- 80% of people detained are Indigenous Australians
- 21 supervised persons under the responsibility of Mental Health Services
- 10 under the responsibility of the Office of Disability
- 4 persons jointly supervised by Mental Health Services and the Office of Disability[88]

Given that 80% of people who are detained under Pat IIA orders are Indigenous Australians with mental health disorders and cognitive impairments the provision of culturally relevant services is fundamental in the Northern Territory

"People's connection to their culture is always more complex than can be explained in words. From discussions we conducted, set against Ninti One's wider knowledge of cultural practice, we discern four key points:

1. People feel better when they can spend time out of town and on their traditional country. There are many reasons, most of which are intensely personal and spiritual in nature.

2. The notion of 'feeling better' has a mental health connotation. In other words, people are less sad, they feel more optimistic and replenished and more able to cope with everyday struggles. In other words, for people who may be vulnerable to mental health conditions such as depression, cultural expression has a therapeutic value.

3. Physical disability is not seen as complete barrier to bush trips because people are accustomed to getting around the place they live and often the locations they want to visit can be close to Tennant Creek or Ali Curung. A bigger constraint is cost and the availability of a vehicle.

4. There was no sense from carers or people with disabilities that stigma or exclusion is part of the problem for people wishing to participate in cultural activities. The pace of life in the Barkly Region is slower than large urban centres and so pressure that comes from other people's schedules is lower."[89]

[87] Northern Australian Aboriginal Justice Agency *Submission to the Standing Committee on Community Affairs Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairments* 2016

[88] Department of the Attorney-General and Justice *Northern Territory Government Submission to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* 2016

[89] Ninti One Limited *Perspectives of Aboriginal People on Disability and Care in the Barkly Region of the Northern Territory* November 2015

Australian Capital Territory

There are no disability led initiatives in the area of criminal justice within the ACT. In the 2014-15 fiscal years the ACT justice system spent $304.26 per prisoner in the Alexander McConachie Centre (AMC) per day in open imprisonment plus periodic detention.[90] Although the cost has been lowered since the 2013-2014 release of expenditure from $396 per prisoner,[91] the ACT is still spending more on prisoners than the rest of Australia.

In the ACT, there are currently very few specialist disability services that equate to that of 'best practice' in responding to people with cognitive disabilities in the justice process. There are certainly none that are by and for people with disabilities – Advocacy for Inclusion is unique in the ACT and one of very few across Australia. As a recent achievement in the disability justice, the ACT Government has cited its commitment to develop an ACT Disability Justice Strategy. It is anticipated that this Strategy could incorporate real actions, against benchmarks, to focus on outcomes which support people with disabilities to achieve equitable access to the justice system and within the NDIS.

Advocacy for Inclusion has initiated engagement within the criminal justice system for people with disabilities on bail or upon release from prison. Since the full roll-out of the NDIS in 2016, the ACT is still facing barriers. It is difficult to suggest that initiatives of best practice are in place. For people released from prison into the mainstream community, the NDIS application and eligibility process can take months to process, resulting in a longer planning process to fully implement and sustain the plan.

What has emerged in our observation the NDIS and the ACT criminal justice system is that there continues to be limited to no development in disability services specifically for people with disabilities revolving through the criminal justice system. Without significant data, we cannot determine whether the high proportion of people with complex needs and disability are not being provided the assistance they require through the NDIS, and if it making a significant difference in reducing involvement in the justice process. Finally, the need for advocacy greatly exceeds the availability of it.

Much work is needed in these critical areas and the NDIS must ensure these opportunities enable marginalised people with disabilities to be active and valued contributors to the ACT community by providing access to specialist solutions to addressing criminal justice as required under the NDIS.

[90] Productivity Commission (2016) Report on Government Services (Corrective Services), table. 8A.7, p.55
[91] Thomas, J (2015), 'How much does it cost to keep people in Australian jails?', SBS News, 2nd February 2015, http://www.sbs.com.au/news/article/2015/02/02/how-much-does-it-cost-keep-people-australian-jails

Western Australia

Current Issues and Supports in Western Australia

Disability & Justice in WA

- An appeal is due to be heard in April against the conviction of Mr Gene Gibson for the manslaughter of a young man, Mr Josh Warneke, in Broome on the grounds of a miscarriage of justice. Mr Gibson is understood to be affected by FASD.
- If it is found that Mr Gibson has in fact been the victim of a miscarriage of justice, and that he does have impairments due to FASD, he will be one of three major miscarriages of justice where people with disability have been wrongly convicted of murder or manslaughter. Mr Darryl Beamish, a man who is deaf and mute was wrongly convicted of murder, Mr Andrew Mallard, a man with a mental illness was also wrongly convicted of murder.
- This is in addition to Marlon Noble, who was found unfit to stand trial and who after 10 years in prison had the charges against him dropped but yet still continues to live under the conditions of a community release order.

Focus on FASD

- There is an increasing level of awareness in Western Australia of the impact of FASD leading to increased risk of contact with the criminal justice system. This is in part due to some high profile cases, as well as the screening project in Banksia Hill (WA's juvenile detention facility) which has recently indicated that about a third of kids screened had FASD in Banksia Hill
- There has been some work via the Telethon Institute to educate professionals in the legal system about FASD.

Fitness to Stand Trial

- Western Australia's *Criminal Law (Mental Impaired Accused) Act* is widely recognised as one of the most regressive laws in Australia with regards to those found unfit to stand trial. Critiques of the legislation include that it allows for the indefinite detention of people who are found unfit to stand trial due to intellectual or cognitive disability or mental illness and that is has significant flaws in terms of procedural fairness that discriminate against people with impairments.
- Reforms to the law which have been requested by disability, mental health and legal advocates over several years include:
    - Allow judiciary to impose a range of options for mentally impaired accused including a community-based order for people found unfit to stand trial;
    - Repeal Schedule 1 to make Custody Orders no longer compulsory for some offences.
    - End indefinite detention - make Custody Orders no longer than the term the person would likely have received, had they been found guilty.
    - Introduce new procedural fairness provisions, providing the rights to appear, appeal and a review; and rights to information and written reasons for a decision in court and MIARB proceedings.

    - Introduce a special hearing to test the evidence against an accused found unfit to stand trial.
    - Ensure decisions about the release of mentally impaired accused, and any conditions to be attached to such release, are made by the Mentally Impaired Accused Review Board but with an annual right of review before the Supreme Court.
- At the time of writing, reforms to this Act are the subject of the current State election campaign with the WA Labor Party committing to substantial reform of the Act within twelve months if elected.
    - There are three reforms that the WA Labor Party have not agreed to – the repeal of Schedule 1 of the Act so Custody Orders are no longer compulsory for some offences; certain procedural fairness provisions including rights to information and written reasons for decisions by either a Court or the mental impaired accused review board; and special hearings to test the evidence against an accused.
- Under the Barnett government the first declared place for people found unfit to stand trial due to intellectual or cognitive disability was opened. The facility has a capacity to house ten people but at the time of writing it is understood that only two people currently reside in the facility.
- There does not appear to be any evidence that the establishment of the Centre has reduced disincentives for counsel to flag questions of impairment given the continuation of indefinite custody orders.

Disability Justice Teams – Clinicians & Coordinators

- The Disability Services Commission currently employ a team of clinicians and coordinators specifically to work with people with disabilities who are eligible for services from the Commission who are in the justice system. These teams provide in reach services to prisons to assist prisons to support eligible people with disabilities in prison including mental impaired accused, facilitate release of people from prison by coordinating disability supports with post-release services. They might also potentially be called in to provide specialist support when an eligible person comes into contact with the justice system.
- It is not clear what the future of this initiative will be in the NDIS environment, however the local service delivery model proposed by the Disability Services Commission for the WA administration of the NDIS at the time of writing appears to include specialist expertise in each of the 12 regional local service delivery teams.

People with Complex Needs

- For the last several years, the WA Disability Services Commission has hosted the innovative People with Complex Needs (PECN) initiative, with the Department of Chid Protection & Family Services hosting a Youth version (YPECN). PECN & YPECN bring a case coordination approach to supporting people with complex needs who are accessing multiple service systems, including disability and corrective services. The model has been successful in facilitating the post-release support of people with intellectual or cognitive impairments. It seeks to coordinate existing resources already available to the cohort given their eligibility for existing services.

- PECN and YPECN are very limited in terms of the number of people they support at a time. Given flow through issues, there are not many new opportunities available for new participants. Both models are also highly restricted in who they can support, given that they require people to be eligible to receive supports and services in order to be supported. This means that many people on the margins would not be eligible – including those with more moderate levels of impairment who either refuse to apply for disability support or who have been found not to have sufficient 'functional impairment' to qualify for support.
- It is not clear what the future of this initiative will be in the NDIS environment, however the local service delivery model proposed by the Disability Services Commission for the WA administration of the NDIS at the time of writing appears to include specialist expertise in complex needs in each of the 12 regional local service delivery teams.

Development of Sector Capacity to Support People with Complex Needs and Very Challenging Behaviour

- In recognition of limits in access to develop innovative and financially sustainable service delivery models for supporting young people with complex needs and/or very challenging behaviours.

Outstanding reports/research

- In recent years the Disability Services Commission has commissioned two pieces of work to specifically look at issues relating to supporting people with intellectual and cognitive disabilities in the justice system. Developmental Disability WA is not aware of any specific action having been taken as a result of that work.
- One was a feasibility study into replicating services to assist people with impairments in police interviews and during court appearances, such as that provided by the Intellectual Disability Rights Services in NSW.
- The other was work to examine the disability services sector capacity to respond to people with intellectual disabilities in the justice system which resulted in the development of a justice pathways model. It is understood that this work examined capacity and might have produced some resources, but it is not clear that any specific capacity building initiatives were undertaken as a result of the work.
- Developmental Disability WA has been funded for 18 months to test diversionary approaches for young people with cognitive disabilities in the justice system.

South Australia

Currently in SA, people found unfit to plead under *Section 269 of the Criminal Law Consolidation Act 1935* are the responsibility for the Minister for Mental Health and Substance Abuse, not the Minister for Disability.

James Nash House/Forensic Services A forensic client is an individual who may present before the criminal justice system with mental, emotional, personality and/or intellectual disorders and senility, or may have other characteristics relevant to a legal decision.

Section 269A of the Criminal Law Consolidation Act 1935 (CLCA) defines mental impairment as including: a mental illness; an intellectual disability; or a disability of impairment of the mind resulting from senility. If a person who has been charged with committing a criminal offence and appears before the courts, section 269C of the CLCA may apply if, at the time of the offence they: were suffering a mental impairment and therefore did not know the nature and quality of the conduct; did not know the conduct was wrong; or were unable to control the conduct. All people classified under this section come under the responsibility of the Minister for Mental Health and Substance Abuse, under section 269V of the Act.

People with mental illness are significantly over represented in the criminal justice system. Estimates suggest that people seriously affected by mental illness are three or four times more prevalent in prison populations than in the general community and that the majority of prisoners, at some time in their life, have had some form of mental health issue. Often, this is because they come to the attention of the police in the absence of adequate medical and therapeutic care.

In South Australia forensic care is provided at James Nash House at Oakden where there are thirty beds and an additional ten bed ward situated at Glenside Campus, Grove Closed.

Approximately twenty five per cent of all forensic beds, or placements, are taken up by individuals with a disability.' James Nash House is an acute inpatient facility catering for a limited number of forensic patients. It has been operating since the mid 1980s. It currently operates across two sites, one at Glenside and the other on the site of the former Hillcrest Hospital.

At the time of the establishment of James Nash House, the Strathmont Centre was fully operational and provided secure care for people with disabilities, mental health issues and forensic clients who were detained there. James Nash House was neither designed, nor staffed, to cater for the management of persons with an Intellectual Disability or Acquired Brain Injury (ID/ABI).

Since 1995 the introduction of the new mental impairment provisions of the CLCA meant that offenders deemed mentally unfit to stand trial would receive a Limiting Term commensurate with the severity of the offence. This has resulted in a significant growth in the number of offenders seeking and receiving a finding of Mentally Unfit to Stand Trial from none in 1995 to somewhere in the vicinity of 75-100 at present.

Until recently, we understand there has been no increased resources provided in the health budget or provided by the Disability sector to manage this complex group of consumers who by the nature of their condition, do not make rapid recoveries and require prolonged periods of support, supervision and rehabilitation in order to be fit for release back into the community.

When working with the disability sector, the term Co-Morbidity is perceived as the term used by Disability Services where there is a wish to attribute a person's challenging behaviours to a mental condition or some other issue that obviates their responsibility to provide services to the person.

We have received feedback that Disability SA now appears to operate on a policy of working only with consumers who volunteer to do so (i.e. the consumer consents to Disability SA involvement), a concept that seems counter-intuitive when working with a population who have varying degrees of capacity to consent.'

The Hillcrest site was originally designed and built by the Department for Correctional Services (DCS) in order to treat people with a mental illness who had been deemed by the courts as unfit to be convicted for crimes they had been charged with, by way of incompetence to plead, in order for their own protection or the protection of the community.

There are approximately three hundred forensic clients in South Australia who have an ABI according to information provided in the submission from the CVS. The majority of people live in the community, under specific licence conditions somewhat similar to conditions of parole, whilst some are detained in James Nash House and others are incarcerated in the general prison system.

Dr Maria Tomasic is currently a Senior Psychiatrist in the Centre for Disability Health, located at the Modbury Hospital and funded by DCSI. Dr Tomasic obtained a Churchill Fellowship, in 2012-2013, to undertake a study of service models for adults with intellectual and developmental disabilities and mental illness, including those in the forensic system. She is the Immediate Past President of RANZCP and it was in this capacity that she gave evidence to provide an overview of comorbidity in South Australia.

Behaviours of concern need specific management, and you could argue that this fits appropriately within mental health services, and yet this is often a reason for exclusion from mental health services. Diagnosis is more difficult, as is management, and because of the lack of training psychiatrists and other mental health professionals in Australia in the area, people often feel inadequately trained to assess and manage this population.

Individuals with intellectual disability often have multiple and complex social, physical and mental health issues, so all of those things need to be dealt with if we are going to improve the quality of life of individuals. Yet, they have significant difficulty accessing mental health care, and various studies in Australia have shown that 90 per cent of those people with mental illness are undiagnosed and untreated. People with intellectual disability also suffer higher rates and earlier onset of dementia. People are now living longer than they did in the past, and so we are seeing more cases of dementia presenting, and we can expect this to increase in the future; yet, again, there is little expertise in this area.

Poor adaptive functioning limits people with intellectual disabilities seeking health care, communicating with health professionals and acting on advice; therefore, it is up to their carers, family or family carers to assist in this area, yet these people also have a lack of knowledge about the mental healthcare needs of these people. It is a particularly vulnerable population that are stigmatised and socially marginalise, and they also suffer high rates of abuse, abandonment and

repeated losses, which all contribute to some of the rates of depression, anxiety disorders and PTSD.

People with intellectual disability are also overrepresented in the criminal justice system, with imprisonment rates making up probably — the studies vary — between 8 and 12 per cent of the prison population, which is a sad statement of where society is compared to the rate of 1.25 to 1.5 per cent of the general population. This is both in the juvenile justice and adult systems.

The rate for intellectual disability in the Aboriginal and Torres Strait Islander population is higher than the general community, and that is related to probably a number of health factors. This sub-population is even more likely to also suffer mental health problems and more likely to be incarcerated, and yet they have even more difficulty accessing appropriate and culturally safe mental health services.

80 per cent of people with autism have an intellectual disability and often have even more complex and specific needs which are not met in the current system.
In terms of the needs, there is acknowledgement that people with intellectual disability and mental illness require appropriate access to mental health services, just like every other member of society.

From the *Tip of Another Iceberg Report: Exceptional Needs Unit 2011*
In late 2010, the Exceptional Needs Unit (ENU) developed and conducted a survey to determine the extent and better understand the characteristics of people receiving services through Disability Services (DS), Community and Home Support SA identified as being engaged with the criminal justice system.

There are a significant number of people with multiple morbidities, including psychiatric disability, intellectual disability, acquired brain injury and other conditions relating to chronic substance abuse which do not fall within the responsibility of a single agency, who are identified as presenting a risk to themselves and the community and as being in need of a forensic response.

A large proportion of these individuals have a significant history of engagement with the juvenile or criminal justice system and are deemed at high risk of repeat offending. This group of people have limited opportunity to reside in the community without being a risk to themselves or others and are often at an increased risk of reoffending due to the social challenges they face in their day to day living circumstances.
For many reasons, they often require a service response that is too complex to be met or sustained within existing service frameworks. When engaged with the service system, these individuals characteristically draw on significant cross government resources including a range of emergency services and non-government agencies.

Frequently, the service response to these individuals is crisis-driven, unplanned, un-coordinated and unable to achieve long lasting sustainable changes. The responses often deliver limited, short-term outcomes for the individual, their families or the wider community. Crisis management,

invariably stressful and inevitably expensive, has not uncommonly been marked by a perceived lack of interdepartmental co-operation and an insistence on bureaucratic “gatekeeping”.

People with disability and with a history of engagement with the justice system create significant difficulties when release on parole or bail is being considered by the Parole Board and Courts which are faced with making determinations based around extremely limited options.

For those people who present as high risk to themselves or the community, there remains a single option within this state; incarceration in the prison system. There are no suitable services in SA in which to contain or manage people with disability who also have a requirement for ongoing forensic involvement. This situation is further compounded by a lack of emergency or other suitable accommodation options and a serious shortage of experienced, well trained professional practitioners and support workers.
Among this population, those before the courts found unfit to plead or provide legal direction and who are unable to be released due to the lack of suitable accommodation and support services able to contain or manage them in the community, create a particular problem for the Courts. Aboriginal people from remote areas of the State including the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands are reported to be over-represented within this group

Appendix B: Relevant International Human Rights Obligations

When considering the provision of services under the NDIS for people with cognitive disabilities, Australia must take into account their international human rights obligations. On 30 March 2007, Australia signed the UN Convention on the Rights of Persons with Disabilities (UN CRPD) and ratified it on 17 July 2008. While the CRPD has not been formally adopted in Australian domestic law, Australia has developed the National Disability Strategy to outline how implementation, across a range of areas will occur. Australia acceded to the Optional Protocol of the UN CRPD on 21 August 2009, which came into force on 20 September 2009. The Optional Protocol allows the Committee on the Rights of Persons with Disabilities to receive complaints from individual or groups who believe that their country has breached the UN CRPD, after all domestic remedies have been exhausted.

In the context of service provision under the NDIS for people with cognitive disabilities there are two ways in which Australia's international obligations come into play; where an individual suffers adverse circumstance as a result of not receiving the required supports and an individual's right to live independently and be included in the community.

The right to live independently and be included in the community is provided in article 19 of the UN CRPD:

> States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
>
> (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
>
> (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

This is a critical human right that must be preserved when considering the provision of the NDIS to people with cognitive disabilities. The NDIS will be the gateway to supporting people with disabilities to live independently and participate in the community. Through offering key services for personal care and community support, people in receipt of the NDIS will be able to have full enjoyment and full inclusion and participation in the community. Article 19(b) clearly states that a person have a right to access a range of in-home residential and other community support

services. This is obviously inclusive of the receipt of the NDIS. Denial of these people to participate in the Scheme will deny them the right to live independently and be included in the community.

The international human rights concerns do not stop at the failure to permit people with cognitive disabilities to access the NDIS; the second issue caused by that failure is the circumstances that they are then left with. People who do not receive proper supports to live independently or be included in the community may face greater risk of abuse in the community or high rates of participation in the criminal justice system, particularly prisons. People with disabilities have a right to be free from exploitation, violence and abuse (article 16). Enshrined within the NDIS will be key quality and safeguarding measures which will be critical to the preservation of article 16. People with cognitive disabilities must have access to this.

We also know that people with cognitive disabilities who do not receive proper supports to live independently or be included in the community are over-represented in prisons, often incarcerated on the basis of their disability because 'there is nowhere else for them to go'. Treatments of people with disabilities in prisons have been documented to include isolation, physical and chemical restraint and violence. Such treatment is a breach of article 15 of the UN CRPD which guarantees a person is free from torture or cruel, inhuman or degrading treatment or punishment. Article 15(2) requires Australia to take all effective administrative measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. Measures including ensuring that people with psychosocial disabilities are properly supported to be released from prison or not to be placed there in the first place through access to NDIS services would be better aligned with article 15(2).

Australia must uphold the international human rights obligation owed to people with cognitive disabilities by ensuring they can access the NDIS. Doing so is imperative to preserving their right to live independently and be supported in the community (article 19), but is also critical in ensuring the treatment of people with cognitive disabilities does not violate their fundamental human rights by detaining them on the basis of their disability, exposing them to torture or cruel, inhuman or degrading treatment or punishment (article 15) or leaving them without critical safeguards to ensure that they have a life free from exploitation, violence and abuse (article 16).