



Criminal Lawyers Association of the Northern Territory (CLANT)

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SUBMISSION TO THE SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE INQUIRY INTO THE INDEFINITE DETENTION OF PEOPLE WITH COGNITIVE AND PSYCHIATRIC IMPAIRMENT IN AUSTRALIA

The Criminal Lawyers Association of the Northern Territory (CLANT)

Since its foundation in 1986, CLANT has robustly contributed to public policy debate in relation to the administration of criminal justice. CLANT's Objects and Purposes relevantly include:

- to promote and advance the administration of the criminal justice system and development and improvement of criminal law throughout the Northern Territory
- to actively contribute in public debates in issues relating to the criminal justice system
- to represent the views of members to bodies and persons engaged in the administration of criminal justice and a review in development of criminal law, procedure and civil liberties

This submission was prepared by CLANT Vice-President Felicity Gerry QC, a member of the Management Committee of The Advocates Gateway in the UK which introduced the use of intermediaries to facilitate effective participation through communication in justice systems. Ms Gerry is also currently involved in an EU funded project to deliver training to lawyers in all 28 EU Member States on the rights of children with mental disabilities.

The Northern Territory

The issues raised in this inquiry are at the interface between health services and justice systems, both of which have to respond to the particular populations in a given region. The collection of demographic data is difficult in the NT. Many people do not have formal personal identification or street addresses and localities can have more than one name. In addition,

health and justice sectors in the NT experience a high turnover of staff, with some staff having very little exposure to Indigenous people or Indigenous culture. Hospitals attempting to collect personal data have found that the level of engagement can be improved when there is an Aboriginal health worker, interpreter or a known and trusted hospital staff member present¹. With these qualifications, the preliminary estimated statistical resident population at 30 September 2015 for the Northern Territory was 244,500. There are slightly more men than women. The median age is 30. Roughly 30% of the total NT population are Aboriginal and Torres Strait Islander, the highest proportion of all the States and Territories. All States and Territories recorded positive population growth in the year ended 30 September 2015². The Northern Territory recorded the slowest growth rate at 0.3%. Life expectancy in the NT is the lowest in Australia, particularly for Indigenous people³. The suicide rate is the highest⁴.

It must be noted that whereas many communities are remote and rural, both health and justice services are concentrated in urban centres. The sheer size of the NT and the distribution of communities is a significant challenge often resolved by moving those with health and welfare issues to urban centres which can exacerbate those same issues by the removal and distance from family and community. Mobile health and justice services to remote areas remain limited. There are some remote courts but there are even basic problems with transport including returning offenders to community on release.

The long term effects of colonialism (including brutal dispossession, forced removal and institutionalisation of children, and mass killings within living memory⁵), failures to follow properly researched recommendations⁶ to address disadvantage, poverty, alcohol and abuse, particularly in relation to Indigenous people, has led to high crime rates, high detention rates

¹ Demographic Data Quality Assessment for Northern Territory Public Hospitals 2011
<<http://digitallibrary.health.nt.gov.au/prodjspu/bitstream/10137/513/1/Public%20hospital%20demographic%20data%20assessment%20.pdf>>

² Regional Statistics, Northern Territory, Mar 2011
<<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1362.7Feature%20Article1Mar%202011?opendocument>>

³ The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, Oct 2010 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter218Oct+2010>>

⁴ Statistics on suicide in Australia
<<http://www.livingisforeveryone.com.au/uploads/docs/LIFE-Fact%20sheet%203.pdf>>

⁵ Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families
<https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>

⁶ Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"
<http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf> and Deaths in Custody: 10 Years on from the Royal Commission <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi203.pdf>

and a culture of cruelty⁷. People with complex cognitive and psychiatric needs and offending behaviours, or who are assessed as a risk to the community, are incarcerated and held indefinitely in maximum-security prisons in the NT largely because there is no or no sufficient alternative provision and no services to effect crime prevention through health and welfare⁸. This indefinite detention of the cognitively and psychiatrically impaired is just one part of the appalling state of affairs that has arisen in the NT which, as a result of several factors that cannot all be addressed in this submission, have and are causing trans-generational trauma⁹.

The treatment of the cognitively impaired is just one aspect of the failure to comply with Australia's human rights obligations in the NT. Together with an agenda which has seen the building of an ever larger and increasingly inaccessible prison estate and the setting up of expensive mandatory treatment facilities, the NT highlights Australia's failure to provide safe systems for any justice to operate¹⁰. It is a miserable lottery with a thin line of professionals and civil society (including our membership) doing their best within huge limitations. This submission addresses some, but not all, of the issues in the context of our criminal lawyers' expertise on three bases:

- (i) Australia's human rights obligations
- (ii) Access to suitable health services for those with cognitive and psychiatric impairment in the Northern Territory.
- (iii) Effective participation in the criminal justice system by those with cognitive and psychiatric impairment accused of criminal offences in the Northern Territory.

⁷ There are numerous resources openly accessible on these issues from a health and justice perspective: See for example the Australian Indigenous Health Bulletin or Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney General as required by section 46C (1) (a) *Human Rights and Equal Opportunity Commission Act 1986* (Cth). In particular see the work of Menzies School of Health Research based in the NT.

⁸ See CAALAS Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability
<https://www.humanrights.gov.au/sites/default/files/Sub40%20Central%20Australian%20Aboriginal%20Legal%20Aid%20Service%20Inc_0.pdf>

⁹ An Overview of Psychiatric Ethics

<<http://www.heti.nsw.gov.au/Global/HETI-Resources/psychiatry/An%20Overview%20of%20Psychiatric%20Ethics.pdf>>

¹⁰ Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia

<https://www.humanrights.gov.au/sites/default/files/content/disability_rights/notforservice/documents/NFS_Finaldoc.pdf>

Australia's Human Rights Obligations

The United Nations estimates that there are 650 million people worldwide who have disabilities, and 80 per cent of them live in developing countries. Among these people, significant proportions have mental health disabilities or intellectual disabilities. Some people with intellectual disabilities also have mental health problems. It is an issue which affects many families and which has been addressed in international law through many human rights mechanisms to which Australia is a signatory.

The newest treaty is the 2006 Convention on the Rights of Person with Disabilities (CRPD), which entered into force upon its twentieth ratification in May 2008¹¹. The Convention purports to represent a paradigm shift, reflecting progressive attitudes and approaches to persons with disabilities. It moves away from the medical model of disability which views people with disabilities as objects (of treatment, management, protection, charity and sometimes pity and fear), and towards the social model of disability which regards people with disabilities as subjects of the full range of human rights on an equal basis with others, and where people's capacity to make decisions is presumed. Two substantive areas demonstrate the 'paradigm shift'. The first is legal capacity and the second is the right to live in the community¹².

At the international level, the CRPD sets up a new UN treaty body, the Committee on the Rights of Persons with Disabilities. The Committee evaluates reports submitted by States party to the Convention (and shadow, or alternative reports submitted by non-governmental organisations). The Committee also has a quasi-judicial role in considering individual complaints submitted by people who allege that they have suffered a violation of one or more of the CRPD provisions in a State which has ratified the CRPD and its Optional Protocol.

Australia has ratified the CRPD and its Optional Protocol with the following declaration:

“Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards; Australia recognizes that every person with disability has a right to respect for his or her

¹¹ Convention on the Rights of Persons with Disabilities
<<http://www.un.org/disabilities/convention/conventionfull.shtml>>

¹² The ITHACA Toolkit
<https://www.thl.fi/documents/189940/1878598/2.4_Ithaca_Toolkit_English.pdf/bbd4594f-a221-48be-822a-9c5fac843454>

physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards; Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria."

Whilst we recognise that indefinite detention may be the appropriate arrangement for some people with cognitive and psychiatric impairment, particularly when they have exhibited dangerous offending behaviour, the current lack of facilities, treatment and communication deficiencies in the NT mean that arrangements are insufficiently flexible to comply with Australia's declaration and its obligations under CRPD and the Torture Convention.

In our submission, by maintaining indefinite detention as a default setting (rather than a last resort) without a guarantee of periodic reviews, for people with cognitive and psychiatric impairment who have been charged with serious offences, Australia is in breach of its obligations under the CRPD and must report its failures under the Optional Protocol. It is also at risk of individual complaints.

In addition, in our submission, there are ongoing breaches through the lack of access to justice for those people with cognitive and psychiatric impairment. In the absence of implemented human rights mechanisms, the vulnerability of people with cognitive and psychiatric impairment to human rights abuses in Australia is high. This is particularly so in the NT.

We note that the Senate Committee's November 2015 report on violence, abuse and neglect against people with disability recommended that the Australian Government work with State and Territory governments on the implementation of initiatives to improve access to justice for people with disability (Rec 6) and to implement requirements for supported decision-making

and to address the indefinite detention of people with cognitive impairment or psychiatric disabilities (Rec 8)¹³.

We remind the Senate Committee of the recent reports on these issues from the Australian Law Reform Commission¹⁴, the Australian Human Rights Commission¹⁵ and the Productivity Commission and the communiqué of the Law, Crime and Community Safety Council's meeting on 5 November 2015 which recorded that Ministers agreed to 'establish a working group to collate existing data across jurisdictions and develop resources for national use on the treatment of people with cognitive disability or mental impairment unfit to plead or found not guilty by reason of mental impairment'¹⁶.

We also note that the UN Convention against Torture (1984) establishes substantive protection against torture, inhuman, cruel or degrading treatment or punishment. It is supplemented by the Optional Protocol to the Convention against Torture (commonly known as OPCAT) which does not establish any substantive rights, but establishes an international monitoring body of places of detention known as the UN Sub-Committee for the Prevention of Torture (SPT), and obliges States to establish or designate national preventive mechanism(s) which should monitor the rights of people in places of detention, including prisons and police stations, as well as mental health institutions and social care institutions¹⁷.

In our submission, there is an urgent need for appropriate human rights monitoring and evaluation to address these issues in the NT. This should NOT follow the format of previous Commonwealth interventions. For the purposes of monitoring human rights abuses in the context of cognitive and psychiatric impairment, we recommend, in particular, the use of the Human Rights and Care Assessment (ITHACA) Toolkit which provides a complete guide to monitor human rights for people with mental health problems and people with intellectual disabilities, including the right to health, in mental health and social care institutions¹⁸.

¹³Senate Community Affairs Committee Secretariat Report 'Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability' and see submission to this inquiry by the Australian Law Reform Commission.

¹⁴ Ibid n13 and see The ALRC's report *Equality, Capacity and Disability in Commonwealth Laws* (ALRC 124, 2014) ('ALRC Report')

¹⁵ Ibid n13 and n14.

¹⁶ Ibid

¹⁷ See various reports of Committee Against Torture and Ibid n 12

¹⁸ Ibid n 12 <https://www.thl.fi/documents/189940/1878598/2.4_Ithaca_Toolkit_English.pdf/bbd4594f-a221-48be-822a-9c5fac843454>

Services

We are not health services experts but take the opportunity to highlight some of the health issues that arise in a criminal justice context: in the context of the number of people with cognitive and psychiatric impairment in the NT, there is no proper data at all. Nobody knows exactly how many people, let alone Aboriginal people, with a cognitive impairment are dealt within the Northern Territory's courts or the penal estate each year. For example, Foetal Alcohol Syndrome Disorder (FASD) is the leading cause of non-genetic disability in Australia.¹⁹ At present, there is no formal assessment system for a person, either upon reaching school age or after first contact with the justice system, to undergo assessment for FASD or any other physical or mental disability or cognitive or psychiatric impairment. It is unknown how many youth or adults are held within the NT penal estate living with foetal alcohol related disabilities and therefore the chances of suitable health responses are reduced.

The Red Cross Vulnerability Report for Australia for 2016²⁰ highlights that a disproportionate number of highly disadvantaged people end up in prison. It is estimated prisoners are up to three times more likely to have mental illness and up to 15 times more likely to have a psychotic disorder. Another study has found 42% of male prisoners and 33% of female prisoners have an acquired brain injury. Crime is higher in more disadvantaged postcodes, where there is entrenched poverty, segregation and residential instability. So people go into prison disadvantaged and they come out of prison even more disadvantaged. And this also hits innocent families and communities. When a child loses a parent to the prison system this becomes an intergenerational problem²¹.

The NT imprisonment rate sits at 847 per 100,000 adults, nearly four times that of its nearest Australian rival, Western Australia. In the Territory, 86% of those in prison and 96% of those in juvenile detention are Indigenous. The daily average number of prisoners has more than doubled in the last 20 years. The new \$500 million adult prison in the NT will reach capacity by 2018 and has seen the youth detention facility re-located to the former adult prison which had been condemned. The mandatory sentencing regime and restrictive bail laws, has caused a significant growth in prisoner numbers. Daily averages grew by 31% over just two years. 38% of

¹⁹ Carol Bower, 'The Australian Fetal Alcohol Spectrum Disorders Action Plan 2013 - 2016' (Research Report, Foundation for Alcohol Research and Education (FARE), September 2012) 4.

²⁰ <http://www.redcross.org.au/files/VulnerabilityReport2016.pdf>

²¹ Ibid

those entering an adult prison and 60% of those entering youth detention are unsentenced on reception. This has not led to a decrease in offending or recidivism. For example, recorded assaults have increased and 71% of adult prisoners have served a previous prison term.²²

Remote health services are limited, which has direct and indirect effects on rates of Indigenous incarceration. Transport back to community on release has been removed leaving people homeless on release. Community-based orders are often unavailable in remote areas as there are no programs or staff to supervise them. Overcrowding and poor housing means the suitability requirements of a Home Detention Order cannot be fulfilled. Access to in-prison programs is low overall. Access to culturally appropriate programs is even lower. Suitability and success is rarely evaluated and often ignored at the changing whim of political rhetoric.²³

Alcohol-related harm is rife and child protection notifications have increased. 26% of Indigenous children are in out-of-home care. Youth justice diversionary programs are underfunded and exclude young people without a responsible adult. There are few programs for young people in detention or in the community, particularly in areas such as violent and sexual offending.

In our submission, there is an urgent need to provide resources and services to all communities across the NT to properly identify and treat those people with cognitive and psychiatric impairment in a suitable way and in accordance with Australia's human rights obligations.

In addition, in our submission, there should be a formalised assessment system at health, education and justice system access points to properly identify and treat those people with cognitive and psychiatric impairment in a suitable way and in accordance with Australia's human rights obligations.

²² State of imprisonment: if locking 'em up is the goal, NT's a success <<http://theconversation.com/state-of-imprisonment-if-locking-em-up-is-the-goal-nts-a-success-39185>>

²³ See, for example: The health and welfare of Australia's Aboriginal and Torres Strait Islander people <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737418955>>;

Investigating prison release practice and policy in Queensland and its impact on community safety <http://www.law.uq.edu.au/staffprofiles/publications/Walsh_T_Incorrections_Combined.pdf>;

Indigenous Australians, Incarceration and the Criminal Justice System

<<http://www.alsnswact.org.au/media/BAhbBlsHOgZmSSJhMjAxMS8wOC8xNS8yM18yNF80MI80NTRfSW5kaWdlbm91c19BdXN0cmFsaWFuc19JbmNhemNlcmF0aW9uX2FuZF90aGVfQ0pTX09jdF8yMDEwX1NlbnF0ZS5wZGYGOgZFVA>>

Communication

The failure to properly communicate with people, especially those with multiple and complex needs is inexcusable. In particular, in the NT there is no formalised system for using intermediaries, who are experts in communication, to assist people with communication difficulties at health care or justice access points, nor at court. For example, 95% of the adult prison population in the NT have a hearing impairment which can affect cognitive function, yet there is only one deaf signing interpreter available. The system for using intermediaries for those with cognitive and psychiatric impairment is well developed in the UK through the work of The Advocates Gateway²⁴ and has recently been partly introduced in NSW. It can and should be resourced and implemented across Australia. In some regions it will be rarely used. In the NT, what is required is a focus on complex health, welfare and cultural needs to enable effective participation so, at the very least an appropriately trained intermediary would be of significant assistance.

In the NT there is an interpreter service and some police guidelines based on rules formulated by a single judge 40 years ago which provide some limited non-statutory protection based on treating people with “courtesy and respect”²⁵. The importance of language assistance has been recognised through conferences and linguistic research and the creation of the Aboriginal Interpreter Service²⁶ but the implementation is through ad hoc CPD training of stakeholders and a limited certification system for police officers and child protection workers. There is limited quantitative data but it seems, despite (for example) the Australian Federal Police Reconciliation Action Plan²⁷, on the ground, suspects are still interviewed most often in English, without a health assessment or a support person.²⁸ Aboriginal people in particular are not facilitated to answer police questions in any multifaceted way and do not choose to give evidence. It is not clear whether this is based on legal advice or the much more likely disengagement with the system based on historic and cultural marginalisation. There remains an inappropriate culture of ‘judicial shaming’, particularly exhibited in the Magistrates and Youth Courts. The only logical conclusion to reach after four decades of opportunity to treat

²⁴ The Advocates Gateway <<http://www.theadvocatesgateway.org/>>

²⁵ *R v Anunga, R v Walker* (1976) 11 ALR 412

²⁶ AIS <<http://www.ais.nt.gov.au/>>

²⁷ AFP Reconciliation Action Plan <<http://www.reconciliation.org.au/raphub/wp-content/uploads/raps/federal/australian%20federal%20police%20rap%202007.pdf>>

²⁸ See, for example *The Queen v BM* [2015] NTSC 73; *R v GP* [2015] NTSC 53; *The Queen v BL* [2015] NTSC 85

people with courtesy and respect and six decades of post war human rights obligations is that it must be made mandatory to provide suitable health and welfare and communication systems for vulnerable people who come into contact with justice systems.

In our submission, there must be a Federal mandatory statutory Code of Practice on detention, treatment and questioning of vulnerable people, such as those with cognitive and psychiatric impairment which should be applied at all stages of the criminal justice system in accordance with Australia's human rights obligations.

In addition, in our submission, there must be a formalised, mandatory and accredited system for all those personnel working in health and justice sectors with vulnerable people such as those with cognitive and psychiatric impairment.

Unfitness to plead

The rules governing who is capable of participating in a justice system were developed and stand as an antiquated historical device. They need to change to reflect modern scientific and legal jurisprudence that provides for access to justice through effective participation. It is notable that in 2015 the UK Law Commission²⁹ proposed fundamental changes to the system for findings of unfitness to plead. We endorse the recommendations of the Melbourne Social Equity Institute submitted to this inquiry.³⁰ In the NT there is a lack of a harmonised approach between the senior and lower courts and a concern that fitness to plead or communication issues are not being properly addressed due to the fear of indefinite detention.³¹

In our submission, the rules around fitness to plead must change to give primacy to the concept that people with cognitive and psychiatric impairment can have equal access to justice and an opportunity to put forward their case with suitable assistance with communication and appropriate health care treatment in accordance with Australia's human rights obligations.

²⁹ Law Commission, *Unfitness to Plead: Summary*, (January 2016) 9 [1.32].

³⁰ <http://www.socialequity.unimelb.edu.au/wp-content/uploads/2015/11/MSEI-DRI-Submission-to-Senate-Inquiry-on-Indefinite-Detention.pdf>

³¹ This issue is the subject of a forthcoming report of the Northern Territory Law Reform Committee on Interaction between people with Mental Health Issues and the Criminal Justice System

Conclusion

To stop cognitively impaired people from entering and re-entering the justice system, it is important that we identify, assess, divert and support those who come before the Northern Territory's courts. This requires removal of the application of any mandatory provisions, improved resourcing for therapeutic techniques, training for professionals and all stakeholders, reliable assessment tools, services in remote communities and developing a bridge between those services and the criminal justice process.³² It is axiomatic that this should also include the removal of indefinite detention. Only by such a human rights centred approach can we have any hope of achieving community safety in the NT.



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PRESIDENT, CLANT

7 April 2016

³² The invisible client: people with cognitive impairments in the Northern Territory's Court of Summary Jurisdiction
<<https://www.humanrights.gov.au/sites/default/files/Sub40%20Appendix%20Central%20Australian%20Aboriginal%20Legal%20Aid%20Service%20Inc.pdf>>