

## Indefinite Detention of People with Disability

There remain significant issues with legislative, policy and practice frameworks, which result in the indefinite detention of people with disability, disproportionately experienced by Indigenous people with disability, people with intellectual disability and people with psychosocial disability.

All Australian jurisdictions have in place legislation that addresses a defendant within the criminal justice system and their 'fitness' to stand trial. These justice diversion provisions are applied when people with disability, particularly those with cognitive or psychosocial disability are deemed 'unfit' to stand trial. An unfitness test may arise as an issue before or during the trial process.<sup>1</sup>

Justice diversion provisions have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime. In numerous cases, people are being detained for a longer period than if they had been convicted.<sup>2</sup> This situation is exacerbated by a lack of community based housing, therapeutic and disability support options available for people with disability who are deemed 'unfit' to stand trial.

In reviewing Commonwealth laws and programs and legal capacity for people with disability in 2014, the Australian Law Reform Commission recommended reform of the 'unfitness' test, the provision of appropriate supports, limits and reviews on detention.<sup>3</sup> The Australian Government is yet to respond to the Law Reform Commission's 2014 report '*Equality, Capacity and Disability in Commonwealth Laws*'.

The practice of indefinite detention is disproportionately experienced by Indigenous people with disability.<sup>4</sup> A lack of transparency in data makes it difficult to quantify the number of people indefinitely detained, however evidence provided to a Senate Inquiry on indefinite detention estimates, that there are at least 100 people detained across Australia without conviction in prisons, psychiatric units and forensic detention services under mental impairment legislation. These people are predominately Indigenous, have cognitive and/or psychosocial impairment, cultural communication barriers and/or hearing loss.<sup>5</sup> This issue intersects with the high rates of incarceration of Indigenous Australians, who whilst making up 2.5% of the Australian population, comprise at least 50% or one-half of the people detained without conviction.<sup>6</sup>

In detention, people with disability are vulnerable to punitive treatment and practices, such as chemical and physical restraints, and solitary confinement. For example, in the situation of four Indigenous men with disability indefinitely detained in prisons, the Australian Human Rights Commission found that detention conditions amounted to cruel, inhuman or degrading treatment and that Australia was in breach of its international obligations.<sup>7</sup>

Children with disability are being held and restrained in adult detention centres and are experiencing gross violations of their human rights. In June 2019, an Indigenous boy with an intellectual impairment was kept "completely naked" for days inside an adult, maximum-security police watch house after being deemed a suicide risk. After being stripped he was left naked in a cell with only a blanket to cover himself with. An investigation by a current affairs program found that some children, including those with disability, were being held in adult watch houses for weeks on end, with one placed in isolation for 23 days.<sup>8</sup>

In 2016, the Australian Senate tabled its *Inquiry Report into the Indefinite Detention of People with Cognitive and Psychiatric Impairment* in Australia.<sup>9</sup> The Inquiry Report sets out a series of recommendations for comprehensive law, policy and program reform to address indefinite detention of people with cognitive and psychiatric impairment.<sup>10</sup> More than three years on from the tabling of the Senate Report, the Australian Government is yet to respond to the Report.

At the 2016 UPR<sup>11</sup> Australia made a voluntary commitment<sup>12</sup> to improve the way the criminal justice system treats people with cognitive disability who are unfit to plead or found not guilty by reason of mental impairment. In 2016 Australian Governments<sup>13</sup> tabled the *Draft National Statement of Principles Relating to Persons Unfit*

to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment. However, three years later, these Principles are yet to be consulted on, endorsed or implemented.

It is also unclear if this voluntary commitment aims to address the concluding observation made to Australia in 2013 by the Committee on the Rights of Persons with Disabilities regarding the indefinite detention of unconvicted persons with disability, particularly Indigenous people with disability.<sup>14</sup>

In its 2017 review of the fifth periodic report of Australia,<sup>15</sup> the Committee on Economic, Social and Cultural Rights expressed its concern that persons with disability who are deemed unfit to stand trial may be subject to indefinite detention without being convicted of a crime, and recommended that the Australia "Introduce the necessary legislative and policy changes to end indefinite detention of people with disabilities without conviction".<sup>16</sup>

Australia has not acted on the recommendations from the CRPD Committee and the Committee on Economic, Social and Cultural Rights, and people with disability in Australia continue to experience indefinite detention in prisons, psychiatric units and forensic detention services.

## Recommendations

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That Australia:

- As a matter of urgency, end the unwarranted use of prisons for the management of unconvicted people with disability.
- Consult with people with disability on the *Draft National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment*, and on other measures to address indefinite detention of unconvicted people with disability.
- Implement the recommendations from the 2016 Senate *Inquiry Report into the Indefinite Detention of People with Cognitive and Psychiatric Impairment* in Australia.
- Ensure that legislative, administrative and policy frameworks that deprive people with disability of their liberty and impact on their security are fully consistent with the CRPD.
- Implement the recommendations from the *National Inquiry into the Incarceration Rate of Indigenous Peoples*.

## Endnotes

<sup>1</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124, (2014).

<sup>2</sup> Australian Human Rights Commission, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, Submission to the Senate Community Affairs References Committee, March 2016, p.4.

<sup>3</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014).

<sup>4</sup> First Peoples Disability Justice Consortium, *Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment*, April 2016, First Peoples Disability Network.

<sup>5</sup> Commonwealth of Australia (2016) Senate Standing Committee on Community Affairs, Report: *Indefinite detention of people with cognitive and psychiatric impairment in Australia*.

<sup>6</sup> 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 NSW. See also Eileen Baldry, Ruth McCausland, Leanne Dowse, Elizabeth McEntyre, *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*, UNSW, October 2015.

<sup>7</sup> *KA, KB, KC and KD v Commonwealth* (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General's Department) [2014] AusHRC 80

<sup>8</sup> Willacy, M. & Blucher, A. (18 Jun 2019) *Boy kept 'completely naked' in Brisbane watch house for days*. ABC Investigations.

- <sup>9</sup> Commonwealth of Australia (2016) Senate Standing Committee on Community Affairs, Report: Indefinite detention of people with cognitive and psychiatric impairment in Australia.
- <sup>10</sup> Commonwealth of Australia (2016) Senate Standing Committee on Community Affairs, Report: Indefinite detention of people with cognitive and psychiatric impairment in Australia.
- <sup>11</sup> See: Australia's Universal Periodic Review; Attorney-General's Department.
- <sup>12</sup> See: Human Rights Law Centre, Australia's 2nd Universal Periodic Review: Voluntary Commitments. See also: Law Council of Australia, Australia's International Human Rights Obligations.
- <sup>13</sup> The former Law, Crime and Community Safety Council (LCCSC) consisted of ministers with responsibilities for law and justice, police and emergency management. As a result of a Council of Australian Governments (COAG) review conducted in 2016-17, COAG decided to replace the LCCSC with a separate Councils for Attorneys-General, and a separate Council for Police and Emergency Management.
- <sup>14</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013), UN Doc CRPD/C/AUS/CO/1, paras 31-32.
- <sup>15</sup> Committee on Economic, Social and Cultural Rights (16 February 2016) Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights; Fifth periodic reports of States parties due in 2014, Australia. UN Doc No. E/C.12/AUS/5
- <sup>16</sup> Committee on Economic, Social and Cultural Rights, (11 July 2017) Concluding observations on the fifth periodic report of Australia; UN Doc No. E/C.12/AUS/CO/5