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**People with Disabilities in the Corrections System and Youth  
Justice In Australia**

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**Written for the Office of the Public Advocate**

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## Executive Summary

People with disabilities continue to enter the Australian prison system, despite having alternative institutions for them. This report will investigate, and make recommendations on, how Australia is complying with its international law obligations by analysing the treatment of people with disabilities (PWD) in prison custody. It will start with an overview of international law relating to people with disabilities. An analysis will then be conducted on how Australia has responded to these obligations, including the legislation that has been put in place and whether the National Disability Insurance Scheme (NDIS) is accessible to prisoners. A brief look will then be had to adults in corrections, youth justice and Aboriginal and Torres Strait Islanders (A&TSI) and specific needs for each group identified. From this, the following recommendations have been made:

- The Commonwealth and State and Territory governments should screen all entrants into the prison system for all types of disabilities. They should then ensure all prisoners they identify as having disabilities have access to appropriate support and accommodation and access to the NDIS where necessary.
- State correction services should regularly train staff in identifying and supporting prisoners with disabilities, taking into account how to identify and interact with them during crisis moments.
- The use of solitary confinement should be abolished for PWD or used as a last resort and not the default punishment.
- States should increase the availability of community-based disability and mental health resources and provide access to criminal justice diversion programs. In turn, the courts should make better assessments on who really belongs in prison, which can be accomplished by disability screening upon arrest or at the start of a trial.
- The Federal government should monitor the conditions and treatment of PWD in state custody to ensure they are adhering to international standards.
- Early detection of disabilities in young people can reduce offending and re-offending by helping them deal with their disability earlier on and not just when it is identified in prison. Assessments should be undertaken for all youth that come into contact with not just the Youth Justice system other government bodies, including child protection system's and public schools.
- Data collection on PWD in corrections and Youth Justice, including a national census.
- An assessment of prisoners who are eligible to be on the NDIS to target recidivism.
- An advocate within the NDIS for children who do not have parents capable of advocating for their needs.
- NDIS should recognise trauma related mental illness and Foetal Alcohol Spectrum Disorder (FASD) as disabilities.
- Information sharing between government agencies, including the courts, Department for Correctional Services (DCS), Department for Child Protection (DCP), NDIS etc.
- Changes must be made to our domestic legislation that focus on the protection and promotion of rights of people with disabilities in detention. An added amendment to the Disability Discrimination Act 1992 (Cth) is one option or amendments to Correctional Services acts seen in figure 1.
- Support providers in the NDIS need to be more pro-active in liaising with the children to prevent them returning to custody and have specialist skills in how to interact with those who don't have family members advocating for them.

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## Contents

<b>Executive Summary</b>	i
<b>Introduction</b>	1
<b>Australia's International Law Obligations</b>	2
Convention on the Rights of Persons with Disabilities (CRPD)	2
Optional Protocol	2
The Mandela Rules	2
The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT')	3
<b>Australia's Domestic Laws</b>	3
State Legislation	3
National Disability Insurance Scheme (NDIS) access in prison	4
Fitness to Plead	6
<b>Adult Corrections</b>	7
Abuse	7
Confinement	8
Inaccessibility	8
Training, Identification and Stigma	8
<b>Youth Justice</b>	10
<b>Aboriginal and Torres Strait Islanders</b>	11
<b>Conclusion</b>	12
<b>Recommendations</b>	12
<b>Bibliography</b>	13

## Introduction

The Australian Bureau of Statistics (ABS) Survey of Disability, Ageing and Carers defines people with disabilities as someone who has 1 or more limitations, restrictions, or impairments affecting their everyday activities that have lasted, or are likely to last, at least 6 months.<sup>1</sup> A disability includes physical impairments as well as cognitive impairments.<sup>2</sup> In a recent meeting between the Office of the Public Advocate and the Guardian for Children and Young People, the Guardian stated that “correctional facilities are the largest mental health institutions in Australia”. She is not incorrect – what research has been conducted indicates that PWD, particularly those with cognitive impairment, are significantly overrepresented in the Australian criminal justice system,<sup>3</sup> accounting for what is estimated to be 50% of the adult prison population, despite only comprising approximately 18% of the Australian population.<sup>4</sup> Aboriginal and Torres Strait Islander (ATSI) people are especially overrepresented, accounting for 28% of the Australian adult prison population despite representing only 3.3% of the Australian population.<sup>5</sup> A 2017 study found that 25-30% of prisoners have borderline intellectual disabilities and 10% have mild intellectual disabilities.<sup>6</sup> A 2010 Senate Inquiry found that approximately 98% of ATSI inmates have cognitive impairment.<sup>7</sup> While no data could be found on those with physical disabilities, the same study found that 19% of the Australian prison population had chronic health conditions or disabilities limiting their day-to-day activities and participation in education and employment.<sup>8</sup> Despite this, PWD continue to enter prisons that are often unable to properly provide appropriate care and accommodation for those living with a physical or psychosocial disability.<sup>9</sup>

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<sup>1</sup> Australian Institute of Health and Welfare ('AIHW'), The health of Australia's prisoners 2018 (Report, 2019)

<https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe246.pdf.aspx?inline=true> > 77.

<sup>2</sup> For the sake of this paper, cognitive impairment of disability will refer to all disabilities that impact on cognitive functioning including, but not limited to, forensic disability, mental impairment, psychosocial disability and intellectual disability.

<sup>3</sup> AIHW (n 1).

<sup>4</sup> “‘I Needed Help, Instead I Was Punished’: Abuse and Neglect of Prisoners with Disabilities in Australia”, Human Rights Watch, (Web Page, 6 February 2018) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>.

<sup>5</sup> Australian Bureau of Statistics, Prisoners in Australia (5 December 2019) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#aboriginaland-torres-strait-islander-prisoner-characteristics>>.

<sup>6</sup> AIHW (n 1).

<sup>7</sup> Law Council of Australia, The Justice Project (Final Report, August 2018) 15

<sup>8</sup> AIHW (n 1).

<sup>9</sup> The Australian OPCAT Network, Submission to The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and The UN Working Group on Arbitrary Detention, The Implementation of OPCAT in Australia (January 2020) 103.

## Australia's International Law Obligations

Australia has ratified a number of international law instruments that indicate clear rights and relating to people with disabilities who engage with the criminal justice system.

### Convention on the Rights of Persons with Disabilities (CRPD)

The primary treaty is the CRPD and its accompanying Optional Protocol. The CRPD requires Australia to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all people with disability'.<sup>10</sup> The convention obliges parties to take positive action, including law reform, to reflect the principles and protect the rights contained in the convention. Articles that relate to PWD in the criminal justice system include the right to equal recognition before the law, the right to access justice, the right to freedom from torture or cruel, inhumane or degrading treatment or punishment and the right to freedom from exploitation, violence and abuse.

### Optional Protocols

Article 12 calls for equal recognition of PWD before the:

*"State parties shall take appropriate measures to provide access by persons with disabilities to the support they may in exercising their legal capacity"*

Article 13 considers access to justice for PWD:

*"In order to help to ensure effective access to justice for persons with disabilities, State Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff"*

### The Mandela Rules.

The standard minimum rules for treatment of prisoners, or the 'Nelson Mandela Rules', implement a base-level requirement for treatment of prisoners. PWD were accounted for in more than one rule:

*"Rule 5: Prison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis"*

*"Rule 39: Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability"*

*"Rule 45: The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures"*

*"Rule 109: 1. Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities"*

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<sup>10</sup> Australian Human Rights Commission, Submission to the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability, (20 March 2020) p 7

*as soon as possible. 2. If necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialized facilities under the supervision of qualified health-care professionals”*

### **The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)**

Australia have also signed and ratified OPCAT. The object of the treaty is to prevent the mistreatment of people in detention.<sup>11</sup> In 2019, a Royal Commission was launched into Violence, Abuse, Neglect and Exploitation of People with Disability in response to community concern that Australia was failing to meet its obligations under this treaty. An example of a possible breach was a situation involving four Aboriginal men with disabilities, indefinitely detained in prisons.<sup>12</sup> Detention in specialist forensic units may equally result in practices that constitute ill-treatment or torture.

It is clear that Australia is bound by international law to protect and promote the rights of PWD in the criminal justice system. What is unclear is whether our domestic laws, in practice, satisfy such requirements.

### **Australian Domestic Law**

Australia have not implemented one Act in response to their International Law obligations. Instead, domestic law consists of individual state legislation, governing their corrections systems, which could address such obligations.

#### **State Legislation**

<b>South Australia</b>	<i>Correctional Services Act 1982 (SA).</i>
<b>New South Wales</b>	<i>Crimes (Administration of Sentences) Act 1999 (NSW)</i>
<b>Victoria</b>	<i>Corrections Act 1986 (VIC)</i>
<b>Northern Territory</b>	<i>Correctional Services Act 2014 (NT)</i>
<b>Western Australia</b>	<i>Prisons Act 1981 (WA)</i>
<b>Australian Capital Territory</b>	<i>Corrections Management Act 2007 (ACT)</i>
<b>Queensland</b>	<i>Correctional Services Act 2006 (QLD)</i>

*Table 1: primary state legislation regarding adult corrections*

The above legislation are the primary statutes that oversee corrections facilities in Australia. Despite being the paramount legislations, the SA, NT, WA and Victorian Acts do not mention PWD at any point. The NSW Act does make mention of PWD, but only to grant a prisoner a local leave permit which enables the inmate to visit a member of their immediate family who are suffering serious illness or disability.

The Queensland Act however does take into account the unique needs of PWD. Immediately under the Purpose of the Act, any special needs because of a disability of an offender is taken into account.<sup>13</sup> Section 150 addresses prison amenities and says that when establishing a new prison in Queensland, appropriate provisions must be made for ‘the accommodation and access requirements of older prisoners and prisoners with disabilities’.<sup>14</sup>

<sup>11</sup>Optional Protocol to the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment of Punishment” *United Nations Human Rights Office of the High Commissioner* (Web Page, 18 December 2002) <https://www.ohchr.org/en/professionalinterest/pages/opcat.aspx>

<sup>12</sup> KA, KB, KC and KD v Commonwealth [2014] AusHRC 80

<sup>13</sup> *Correctional Services Act 2006(QLD)*S 3(b)(ii)

<sup>14</sup> *Ibid* S 150(e)

The Australian Capital Territory (ACT) legislation also acknowledges the needs of PWD in prison. Their legislation provides for case management plans of each prisoner under section 78, which must take into account any physical or mental disability and strategies for extra assistance to minimise disadvantage suffered because of a disability, particularly in relation to suitability for work and release from detention.<sup>15</sup> Section 66 requires anyone who cannot communicate effectively because of a disability to have an interpreter inform them of their entitlements in prison.<sup>16</sup>

<b>South Australia</b>	<i>Youth Justice Administration Act 2015 (SA)</i>
<b>Victoria</b>	<i>Children, Youth and Families Act 2015 (Vic)</i>
<b>Western Australia</b>	<i>Young Offenders Act 1994 (WA)</i>
<b>New South Wales</b>	<i>Young Offenders Act 1997 No 54 (NSW)</i>
<b>Queensland</b>	<i>Youth Justice Act 1992 (QLD)</i>
<b>Northern Territory</b>	<i>Youth Justice Act 2005 (NT)</i>
<b>Australian Capital Territory</b>	<i>Children and Young People Act 2008 (ACT)</i>

Table 2: primary state legislation regarding youth justice

Youth Justice has a more pragmatic approach and the majority of the legislation take disabilities into account in many aspects. However, the *Young Offenders Act 1994 (WA)* does not make mention of PWD and despite the *Youth Justice Act 2005 (NT)* providing a section on forensic procedures, children with disabilities are not taken into account. At no point does this ACT consider those with disabilities in custody.

Section 48AA of the *Youth Justice Act 1992 (QLD)* requires a child's disability, and their need for services and supports in relation to the disability, to be considered when making particular decisions about release and bail.<sup>17</sup> Further, under section 297D disability services is a listed service provider that may be provided to the children.<sup>18</sup>

The objects of the *Youth Justice Administration Act 2015 (SA)* include facilities and programs developed for the care, rehabilitation, detention, training, therapeutic treatment or other treatment of youths, which should be individually designed, among other things to take account of the youths disability or any special needs,<sup>19</sup> A Training Centre Visitor is a statutory position introduced under section 14, who inspects facilities and advocates for the youth in them. In exercising their functions, they must pay particular attention to the needs and circumstances of residents who have a physical, or cognitive disability.<sup>20</sup> Youths are also assessed upon admission to a training centre and in carrying out such an assessment regard must be given to the cultural identity, developmental and cognitive capacity, ability or disability, and any special needs, of the youth.<sup>21</sup> The same regard must be had when assessing whether a youth can participate in community programs and service activities.<sup>22</sup>

In the NSW, when a child in youth justice is given a caution and that child has a communication or cognitive disability, an appropriately skilled person may be present.<sup>23</sup> Part

<sup>15</sup> Corrections Management Act 2007 (ACT) 78(3)(f)

<sup>16</sup> Ibid s 66(3)

<sup>17</sup> *Youth Justice Act 1992 (QLD)*, s 48AA(b)(vii).

<sup>18</sup> Ibid s 297D(b).

<sup>19</sup> *Youth Justice Administration Act 2015 (SA)*, s 3(e)(ii)(A).

<sup>20</sup> Ibid s 14(2)(b)(iii).

<sup>21</sup> Ibid s 14(2)(b)(ii)

<sup>22</sup> Ibid s 43(3)(c)(ii)

<sup>23</sup> *Young Offenders Act 1997 No 54 (NSW)*, s 34(c)(iii).

5 of the *Young Offenders Act 1997 No 54* (NSW) sets up Youth Justice Conferences and section 34 establishes principles and purposes of such conferencing and in particular states that the needs of any children with disabilities, especially those with communication and cognitive difficulties, must be taken into account.<sup>24</sup> An appropriately skilled person is required to attend such conferences.<sup>25</sup>

The objects of the *Children and Young People Act 2008* (ACT) include ensuring that services provided by, or for, government for the wellbeing, care and protection of children and young people, respect the individual race, ethnicity, religion, disability, sexuality and culture of children and young people.<sup>26</sup>

The *Children, Youth and Families Act 2015* (Vic) takes children with disability into account throughout all court processes, including sentencing. However, it does not mention the rights of children with disabilities in custody. Interestingly, this Act incorporates Family Law matters and Youth Justice matters. It should be noted that separating these two issues could result in a better outcome for children with disabilities in Youth Justice.

### **National Disability Insurance Scheme ('NDIS') access in prison**

The *National Disability Insurance Scheme Act 2013* is the legislation that established and oversees the NDIS. The *National Disability Insurance Scheme (Supports for Participants) Rules 2013* sets out rules regarding the assessment and determination of the reasonable and necessary supports that will be funded for participants under the NDIS.<sup>27</sup> Section 7.24(b) states that, in relation to a person in custody, the NDIS will be responsible for:

- (i) *reasonable and necessary supports other than those mentioned in paragraph 7.25(a), to the extent appropriate in the circumstances of the person's custody; and*
- (ii) *transition supports.*

Section 7.25 states that the NDIS will not be responsible for:

- (a) *the day-to-day care and support needs of a person in custody, including supervision, personal care and general supports; or*
- (b) *ensuring that criminal justice system services are accessible for people with disability including appropriate communication and engagement mechanisms, adjustments to the physical environment, accessible legal assistance services and appropriate fee waivers; or*
- (c) *general programs for the wider population, including programs to prevent offending and minimise risks of offending and re-offending and the diversion of young people and adults from the criminal justice system; or*
- (d) *the management of community corrections, including corrections-related supervision for offenders on community based orders; or*
- (e) *the operation of secure mental health facilities that are primarily clinical in nature.*

These exclusions mean that in reality, the NDIS provides very little for PWD in custody. Notably, the day-to-day care of recipients is not offered to PWD in custody, as it is to those in the community. The duty of such responsibilities therefore falls onto the corrections system. The Mandela Rules require health care in prisons to be equivalent to that in the

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<sup>24</sup> Ibid s 34((c)(iii)

<sup>25</sup> Ibid s 47(2)(c)

<sup>26</sup> *Children and Young People Act 2008* (ACT) s 7(e)(iv)

<sup>27</sup> *National Disability Insurance Scheme (Supports for Participants) Rules 2013*



community.<sup>28</sup> However, research shows that there is still a gap between what care the NDIS and DCS provide, primarily for those who have unidentified or undiagnosed disabilities. Noting section 7.25(b), does not require the NDIS to ensure the criminal justice department services are accessible for people in custody. Further, the exclusions dramatically reduces eligible participant's plan/package in custody until they are eligible for transitional supports. This is problematic because (a) majority of responsibility is placed on the justice system who do not have adequate disability-specific capacity to provide the level of care provided in the community (a requirement of our human rights obligations) and (b) evidence indicates that a large proportion of PWD in custody experience care disruptions in custody and they remain unsupported after release. This is problematic as people with disabilities who experience inadequate or interrupted care and support are at increased risk of poor health outcomes and further incarceration.<sup>29</sup>

However, the NDIS are specifically responsible for funding people in custody with requirements due to the impact of the person's impairment on their functional capacity in addition to reasonable adjustment, including:

- aids and equipment;
- allied health and other therapy directly related to a person's disability, including for people with disability who have complex challenging behaviours;
- disability specific capacity and skills building supports which relate to a person's ability to live in the community post release;
- supports to enable people to successfully re-enter the community; and
- training for staff in custodial settings where this relates to an individual participant's needs.<sup>30</sup>

In practice, it appears that the NDIS tend to cover physical disability supports (wheelchairs, walking aids etc.) for those in prison. This is problematic as a substantial portion of prisoners with disability have a cognitive impairment, not a physical one. It's interesting to note that the NDIS should cover training for custodial staff. The lack of training and expertise in the system to provide day to day care equivalent to what is reasonably expected in the community means that it is impossible for the Australian justice system to meet our International Obligations.

### **Fitness to Plead**

At common law, the test of unfitness to stand trial is stated as 'whether an accused has sufficient mental or intellectual capacity to understand the proceedings and to make an adequate defence'.<sup>31</sup> There is a presumption that the accused has the mental competence to commit the offence charged. This presumption can be rebutted if found that the accused has a mental impairment which finds them unfit to plead or stand trial under section 269D *Criminal Law Consolidation Act 1935* (SA). Where this issue arises, the consequences of finding the accused is mental incompetent may include the defendant's detention and treatment in a psychiatric facility.<sup>32</sup> The Justice Project have found that people found unfit to stand trial can sometimes face 'protracted, sometimes indefinite, periods of detention at higher levels of security than is necessary',<sup>33</sup> which they claim may violate the OPCAT. Therefore, some defendants choose not to raise this defence. This is

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<sup>28</sup> Jesse Young and Stuart Kinner, Prisoners are excluded from the NDIS-here's why it matters (2017) [https://theconversation.com/prisoners-are-excluded-from-the-ndis-heres-why-it-matters-73912#comment\\_1238593](https://theconversation.com/prisoners-are-excluded-from-the-ndis-heres-why-it-matters-73912#comment_1238593)

<sup>29</sup>Ibid

<sup>30</sup>"Principles to Determine the Responsibilities of the NDIS and Other Service Systems" Council of Australian Governments.(Web page, 27 November 2015) <https://www.coag.gov.au/sites/default/files/communique/NDIS-Principles-to-Determine-Responsibilities-NDIS-and-Other-Service.pdf>

<sup>31</sup> *R v Pritchard*(1836) 7C&P 303.

<sup>32</sup> 'Mental incompetence and mental unfitness to stand trial', *Legal Services Commission of South Australia* (Web Page,10 September 2018)<https://lsc.sa.gov.au/dsh/ch14s06.php>

<sup>33</sup> Justice Project (n6) 21

one reason why people with psychosocial disabilities enter our prison system when they may be better suited to a mental health facility. The Victorian Ombudsman investigated a specific case of a woman who was held in custody while waiting to stand trial that she later was found unfit to stand. Treatment of this woman included keeping her in solitary confinement and the mental health unit, both of which were inappropriate accommodations. The Ombudsman found that her treatment was in breach of Australia's international law obligations.<sup>34</sup> This is not the only case where Victoria has housed PWD in custody who haven't been found guilty of an offence and should be housed in a secure therapeutic facility.<sup>35</sup>

Reform of section 269D should be a priority when ensuring compliance with the CRPD, including a limit on the period of detention that can be imposed if a finding of unfitness is made. Further, alternatives to non-custodial accommodation should be reviewed.

### Adult Corrections

An Australian study by the Human Rights Watch ('HRW') found that the corrections system is failing PWD. They visited 14 prisons over 2 years in WA and QLD and found they were not getting the support they needed due to these reasons:

- Many prison staff do not know how to support PWD;
- In addition, there is little support offered to PWD regardless;
- Many disabilities are not identified upon entry to prison;
- PWD may not identify their disability for fear of being treated badly or are unaware of their disability.<sup>36</sup>

According to the HRW, Australia is failing to fulfil its international obligations by restricting and violating the rights of prisoners with disabilities.<sup>37</sup> It all stems from failure to conduct proper assessment upon entry to prison, to identify any disability. Without such information, prisons fail to provide appropriate and adequate services and accommodations for PWD<sup>38</sup>, despite their obligation to provide such services that the NDIS cannot provide for. HRW identified concerns around abuse, the use of solitary confinement and inaccessibility to amenities. They identified a lack of appropriate staff training and identification of disabilities as the primary reason for concerns.

### Abuse

PWD often find it harder than others to adjust to the stresses of incarceration, leading them to be at a higher risk of violence and abuse.<sup>39</sup> They may struggle to understand prison rules and follow instructions, which in turn appears as insubordination and rule violation, resulting in punishment and abuse from staff and prisoners who view PWD as easy targets.<sup>40</sup> HRW documents 41 known cases of physical violence, perpetrated by prisoners and staff and 32 cases of sexual violence.<sup>41</sup> This number underrepresents just how many cases actually occur as sexual violence is difficult to document due to the fear of retaliation or being labelled a traitor.<sup>42</sup> Cases of harassment often go unreported due to fear of reprisal and lack of faith they

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<sup>34</sup> Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (Report, October 2018) 36

<sup>35</sup> The Australian OPCAT Network (n8) 106

<sup>36</sup> Human Rights Watch (n3)

<sup>37</sup> Abuse and Neglect of Prisoners with Disabilities in Australia HRW

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Ibid

will be believed.<sup>43</sup> Facing this kind of abuse (sexual, physical and verbal) particularly from staff ‘perpetuates this cycle of violence and creates distrust between staff and prisoners’.<sup>44</sup>

### **Confinement**

In addition, conditions or confinement (e.g. sharing/overcrowding of cells) can present further physical and psychological challenges with PWD.<sup>45</sup> And solitary confinement presents even bigger problems. Prisoners with cognitive and psychosocial disabilities can spend weeks locked in solitary confinement for 22 hours or more a day, some even spending years in solitary in Maximum Security Units.<sup>46</sup> HRW reported a man with a psychosocial disability had spent more than 19 years in the maximum security unit. Prison staff acknowledge the overrepresentation of PWD in solitary due to the fact that they are not appropriately trained on distinguishing between disobedience and misinterpreting a disability. Nor do they receive adequate training on techniques to interact with PWD, particularly in crisis moments.<sup>47</sup> Thus, their responses often result in punishment rather than support and detention becomes the default response.

HRW spoke with a psychiatrist who stated that they “haven’t seen anyone with an intellectual disability who hasn’t gotten worse in prison. They are often punished [by staff] when struggling to communicate or seek help”.<sup>48</sup>

### **Inaccessibility**

Many prisons were not physically designed for disability access. They documented numerous cases of PWD having difficulty accessing basic amenities such as toilets, showers, bathrooms or kitchens because of a lack of physical infrastructure.<sup>49</sup> 9 out of 14 prisons did not provide disability access to bathrooms, which required them to urinate or defecate in ‘humiliating conditions’.<sup>50</sup> In one prison, there was only 1 accessible toilet and shower in the 1,000 bed facility – prisoners would have to seek permission to leave their unit and wheel themselves 125 metres to the accessible toilet and wait in line when they get there. Further, when prisoners are locked in their cells, they have no access to usable toilets.<sup>51</sup>

Despite the implementation of state Disability Access and Inclusion Plans (DAIP), there seem to be no specific provisions that provide for physical access in prisons. Each state justice department have implemented their own DAIP. However, such plans focus solely on prisoner access to programs and services rather than physical access to amenities.

### **Training, Identification and Stigma**

The Justice Project have found that prisoners with a disability are more vulnerable to violence, abuse and mistreatment in custody.<sup>52</sup> Many offenders with disability have long gone undiagnosed or untreated for their impairments. There is a need for early intervention and identification initiatives for people with disabilities to support targeted prevention of incarceration. The Justice Project recommend initiatives that include ‘better identification of disability, greater access to mental health services and rehabilitation programs, and accessible community legal education and information’.<sup>53</sup> Undiagnosed disability is often related to systemic criminalisation of disability – when criminal justice agencies treat

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<sup>43</sup> Ibid

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> The Justice Project (n6) 20

<sup>53</sup> Ibid

behaviours which may be related to a person's disability as dangerous and offensive'.<sup>54</sup> This results in PWD being more likely to get caught up in the criminal justice system than those without.<sup>55</sup>

Further, offenders with a disability have higher rates of recidivism and are more susceptible to repeat or extended incarceration. This correlates with a lack of appropriate supports in and out of prison, to ensure offenders understand court orders and parole or bail conditions. Without such support, offenders with certain impairments (particularly ATSI offenders who may also have an added language barrier) have difficulty understanding and complying with instructions and orders.<sup>56</sup> This in turn can appear as disobedience, which perpetuates misconceptions about disability and stigma, resulting from inadequate disability training.<sup>57</sup> It also leads to a failure of prison staff to identify PWD and appropriately respond to their needs. Therefore, greater disability training is needed for justice system personnel, in particular correctional officers.

Another issue relates to information sharing guidelines between government departments. For example, while the courts may order a mental health assessment, DCS have no access to these reports because of data sharing protocols. If such information was shared between departments, identification would become easier. Therefore, majority of disabilities are identified through prisoners self-reporting. However, this rarely occurs as they may not know they have a disability or don't report it for fear of discrimination. In addition, the personnel admitting inmates do not possess the knowledge or training to make such assessments, unlike in Youth Justice where residents are assessed for disabilities upon admission to a training centre.<sup>58</sup> An obvious implementation would be to have staff trained in some way to identify disabilities, or to have specific clinical psychologists on hand. Unfortunately, due to the high volume of prison entrants (70-80 a week compared to 14 total in Youth Justice) this does not seem to be feasible at present.

The majority of prisoners with cognitive disabilities are likely to remain unidentified and therefore unsupported in prison and when they return to the community.<sup>59</sup> They often lack the capacity to look after their own health and therefore likely qualify for the NDIS. However, if their disability goes unidentified, they will not have access to the NDIS and support to find appropriate health services. They are then at risk of recidivism and returning to custody as ex-prisoners with poorer health are more likely to return to custody.<sup>60</sup> The HRW found that between 2010 and 2020, 60% of people dying in prisons in WA had a disability, including mental health conditions.<sup>61</sup> 58% died because of 'a lack of support, suicide, or targets of violence' with half of them ATSI prisoners.<sup>62</sup> Elain Pearson, the Australian director of Human Rights Watch says 'PWD often fall prey to violence or resort to self-harm because proper support is lacking'. Even in cases in which the prisoner's disability or mental health history was well known and documented by the prison, staff failed to provide adequate and timely support that could have prevented the prisoner from taking their own life or from an attack by fellow prisoners.<sup>63</sup>

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<sup>54</sup> The Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability, Criminal Justice System (Issues Paper, 14 January 2020) 6 <https://disability.royalcommission.gov.au/system/files/2020-07>

<sup>55</sup> Ruth McCausland and Eileen Baldry, "I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) 19(3) Punishment & Society 290, 290-2.

<sup>56</sup> The Justice Project (n6) 20

<sup>57</sup> Ibid

<sup>58</sup> *Youth Justice Act 1997* (SA), s 23(5)(b)(ii).

<sup>59</sup> Young and Kinner (n27)

<sup>60</sup> Ibid

<sup>61</sup> 'Australia: Deaths of Prisoners with Disabilities', Human Rights Watch (Web Page, 15 September 2020) <https://www.hrw.org/news/2020/09/15/australia-deaths-prisoners-disabilities>

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> 'Nine out of ten young people in detention found to have neuro-disability', *Telethon Kids Institute* (Web page, 13 February 2018) <https://www.telethonkids.org.au/news—events-and-news-nav/2018/February/young-people-in-detention-neuro-disability/> Ibid

## Youth Justice

In 2018 the Telethon Kids Institute (TKI) conducted the first of its kind study in Australia that assessed and diagnosed people in youth detention with various cognitive disabilities. The study was conducted over 2 years and included more than 100 young people aged between 10-17, incarcerated in WA's only youth detention centre, Banksia Hill.

TKI found unprecedented levels of severe neurodevelopmental impairment (89% of participants) and 36% were found to have Foetal Alcohol Spectrum Disorder (FASD). Despite most of these participants being in contact with other government agencies before entering detention (e.g. school, Child Protective Services), the majority of the disabilities identified had previously gone undiagnosed, with only 2 children identified as having FASD being previously diagnosed. For most, this was their first comprehensive assessment. Labelled as 'naughty children' in the community, their socially unacceptable behaviour arises from a brain that is not properly functioning, which has not previously been recognised or understood. This presents a clear indication that there are missed opportunities for earlier diagnosis and intervention, which may have prevented or mitigated their interaction with justice services.

This is the highest known prevalence of FASD in a custodial setting worldwide.<sup>64</sup> FASD is an illness particularly prevalent among Indigenous youth, which rarely receives early diagnosis or positive intervention.<sup>65</sup> FASD results in a lack of understanding of consequences, which leads to risky and impulsive behaviour, meaning those who have the disorder are more likely to get in trouble with the law and lack support when interacting with the criminal legal system.<sup>66</sup> Calls have been made for all children to be assessed for FASD, with researchers believing that detection of the disability could prevent youth from re-offending.<sup>67</sup>

Upon completion of the assessments, a report was prepared for each child, with the aim to aid detention staff and other care workers to understand each child's specific difficulties in order to help rehabilitate and support them. TKI's key recommendation is a formal neurodevelopmental assessment for all people entering the Youth Justice system and comprehensive training for detention centre staff.<sup>68</sup> SA Youth Justice have responded to these recommendations by implementing their own Disability Screening Project. They screened 36 children in the Kurlana Tapa Youth Justice Centre between the ages of 12 and 18. Their key findings included:

- 9 out of 10 children had a below average IQ, were at risk of a language disorder and were at a moderate/high risk of re offending;
- More than 50% had severely impaired visual motor integration; and
- 25% were identified as being eligible for the NDIS.

Their recommendations also included screening assessments upon entry to the detention centre and staff training. In addition, they recommend disability informed policies and procedures be implemented.

Because children tend to spend shorter amounts of time in custody, efforts should be focused on community support systems. Many children need an active support person who will be pro-active in getting them the help that they need, including access to the NDIS

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<sup>64</sup> 'Nine out of ten young people in detention found to have neuro-disability', *Telethon Kids Institute* (Web page, 13 February 2018) <https://www.telethonkids.org.au/news—events-and-news-nav/2018/February/young-people-in-detention-neuro-disability/> Ibid

<sup>65</sup> Human Rights Watch (n60)

<sup>66</sup> Marian Faa, 'Link between Foetal Alcohol Spectrum Disorder and youth crime sparks calls for change' ABC News (Web page, 23 November 2020) <https://www.abc.net.au/news/2020-11-23/foetal-alcohol-spectrum-disorder-in-youth-justice-systems-12885632>

<sup>67</sup> Ibid.

<sup>68</sup> Telethon Kids Institute (n 63)

## Aboriginal and Torres Strait Islanders

ATSI prisoners with disabilities are further marginalized through persistent institutional racism and discrimination. HRW reported numerous ATSI prisoners were uncomfortable seeking services because they faced racist stereotypes.

Because of the prevalence of alcohol dependence in ATSI people<sup>69</sup>, cognitive impairments often go unrecognised or unacknowledged by prison staff who assume an incident is drug or alcohol related rather than a mental health episode. People fail to take into account that an ATSI person may be slurring their words due to a disability and not alcohol consumption. This comes down to institutional racism, which is still alive and well.

Many Indigenous people first learn of their cognitive impairment in prison.<sup>70</sup> Those who have complex cognitive disabilities that go undetected likely end up imprisoned rather than receiving appropriate treatment. Indigenous people's needs are different to the average civilian as their experiences are complex. A simple impairment to one is combined with a number of other conditions, a combination and co-occurrence of problems, creating an additional level of complexity, requiring unique consideration,<sup>71</sup> which often goes undelivered in the prison system.

Upon re-entry to the world after imprisonment, many Indigenous offenders do not have the support they need to continue their rehabilitation, resulting in re-offending. Current policies use criminal justice services as management tools for Indigenous people with complex support needs.<sup>72</sup> It is abhorrently apparent that this is bad practice and focus should lean toward prevention rather than management after a crime is committed.

A 2015 analysis of prisoners with diagnosed cognitive impairment found that Indigenous people are more likely to have experienced earlier and more frequent interaction with the criminal justice system than non-Indigenous participants.<sup>73</sup>

<sup>69</sup>Indigenous prisoners were more likely to be dependent on alcohol than non-Indigenous offenders and Indigenous men were more likely to be intoxicated at the time of their offending; Deloitte Access Economics 'Aneconomic analysis for ATSI offenders: prison vs residential treatment' (Research Paper No 24, National Library of Australia, Parliament of Australia, 2013) vii.

<sup>70</sup>Eileen Baldry et al, "It's just a big vicious cycle that swallows them up": Indigenous people with mental and cognitive disabilities in the criminal justice system' (2016) 8(22) Indigenous Law Bulletin 10, 12.

<sup>71</sup>Peta MacGillivray and Eileen Baldry, 'Indigenous Australians, Mental and Cognitive Impairment and the Criminal Justice System: A Complex Web' (2013) 8(9) Indigenous Law Bulletin 22, 23.

<sup>72</sup>Ibid.

<sup>73</sup> Ibid 10.

## Conclusion

Many prisoners in the Australian criminal justice system have unrecognised or undiagnosed disabilities, particularly cognitive impairments. Leaving these conditions undiagnosed means these prisoners are more likely to re-offend as they don't have access to the entitlements and support they require. PWD will continue entering our corrections system until systems are put in place to identify such disabilities.

Australia is not living up to its international law obligations and critical changes must occur in various stages of the criminal justice system. The following recommendations have been made in order to better identify PWD in custodial settings and support their unique needs:

## Recommendations

- The Commonwealth and State and Territory governments should screen all entrants into the prison system for all types of disabilities. They should then ensure all prisoners they identify as having disabilities have access to appropriate support and accommodation and access to the NDIS where necessary.
- State correction services should regularly train staff in identifying and supporting prisoners with disabilities, taking into account how to identify and interact with them during crisis moments.
- The use of solitary confinement should be abolished for PWD or used as a last resort and not the default punishment.
- States should increase the availability of community-based disability and mental health resources and provide access to criminal justice diversion programs. In turn, the courts should make better assessments on who really belongs in prison, which can be accomplished by disability screening upon arrest or at the start of a trial.
- The Federal government should monitor the conditions and treatment of PWD in state custody to ensure they are adhering to international standards.
- Early detection of disabilities in young people can reduce offending and re-offending by helping them deal with their disability earlier on and not just when it is identified in prison. Assessments should be undertaken for all youth that come into contact with not just the Youth Justice system other government bodies, including DCP and public schools.
- Data collection on PWD in corrections and Youth Justice, including a national census.
- An assessment of prisoners who are eligible to be on the NDIS to target recidivism.
- An advocate within the NDIS for children who do not have parents capable of advocating for their needs.
- NDIS should recognise trauma related mental illness and FASD as disabilities. • Information sharing between government agencies, including the courts, DCS, DCP, NDIS etc.
- Changes must be made to our domestic legislation that focus on the protection and promotion of rights of people with disabilities in detention. An added amendment to the Disability Discrimination Act 1992 (Cth) is one option or amendments to Correctional Services acts seen in figure 1.
- Support providers in the NDIS need to be more pro-active in liaising with the children to prevent them returning to custody and have specialist skills in how to interact with those who don't have family members advocating for them.

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