



Submission to the Australian Human Rights Commission

Consultation on access to justice in the
criminal justice system for people with
disability

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Contents

Introduction	2
About CAALAS	3
Context.....	3
Barriers.....	5
Recommendations	15
Conclusion.....	15

Introduction

The Central Australian Aboriginal Legal Aid Service Inc (**CAALAS**) commends the Australian Human Rights Commission for commencing a consultation on the barriers people with disability in Central Australia face in accessing justice, and welcomes the opportunity to provide a submission to the Australian Human Rights Commission. As the largest legal practice in Central Australia, CAALAS is well-placed to comment on the barriers people with disability in Central Australia face in accessing justice in Central Australia. We also offer some constructive ways of addressing these issues.

In our experience, the key barriers relate to under-diagnosis, lack of access to appropriate services, lack of awareness of issues relating to disability amongst professionals working within the criminal justice system, inflexible and inappropriate legislative regimes, and a lack of effective diversion options. Overcoming these barriers will require a shift away from a law and order approach, and a commitment to a therapeutic approach to offending behaviour related to a person's disability.

We have adopted a broad definition of disability for the purposes of this submission. As discussed below, there are difficulties in identifying exact rates and types of disability in our jurisdiction, particularly in the criminal justice context. This is problematic because, as Schetzer, Mullins and Buonamano state in the background paper "Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW":

"Any analysis of access to justice issues must break the generic term 'disability' down into separate groups, since each disability group is likely to face different barriers in accessing justice." ¹

For this reason, we have focused on the types of disabilities which, in our experience delivering legal services in Central Australia, seem to have the biggest impact on access to justice for our clients. These disabilities include "invisible disabilities" such as cognitive impairment, mental health and hearing loss.

¹ Louis Schetzer, Joanna Mullins, Roberto Buonamano, *Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW, Background Paper* (2002), 8. Retrieved from:[http://www.lawfoundation.net.au/ljf/site/articleIDs/012E910236879BAECA257060007D13E0/\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/012E910236879BAECA257060007D13E0/$file/bkgr1.pdf)

These types of disability, particularly when undetected, may impact on access to justice at all stages, including police arrest and questioning, communication with lawyers, bail applications, court proceedings, sentencing, the experience of prison, and parole applications. Hearing loss, for example, may make an individual less likely to respond to a police direction, make it more difficult for them to provide instructions to a lawyer and understand court proceedings, effect the court's assessment of their demeanour, and may result in a degree of social isolation in prison.² These challenges are often compounded by the multiple forms of disadvantage that are faced by Aboriginal people, particularly in the remote communities of Central Australia.

In this submission, we discuss some of the most significant barriers our clients with disability encounter in Central Australia, and make some brief recommendations to address these barriers. A recent paper delivered by CAALAS' research officer on lower level offending by people with a cognitive impairment in the Northern Territory is annexed to this paper and supplements this submission.

Please note that case studies used in this submission have been de-identified, and may constitute compound case studies to protect client confidentiality.

About CAALAS

Founded in 1973 as the first Aboriginal organisation in Alice Springs, CAALAS provides high quality, culturally appropriate legal advice and representation to Aboriginal and Torres Strait Islander people living in Central Australia in the areas of criminal, civil, family and welfare rights law. The organisation also advocates for the rights of Aboriginal people and improved social justice outcomes. Additionally, CAALAS provides community legal education, support for youth interacting with the justice system and assistance to prisoners, detainees and their families to support reintegration into the community.

CAALAS strives to achieve its vision statement of "Justice, dignity and equal rights and treatment before the law for Aboriginal people in Central Australia" through its service provision across approximately 90,000 square kilometres of the NT. CAALAS is led by a Council of elected Aboriginal representatives and is funded solely by the Commonwealth Attorney-General's Department to operate two permanent offices (in Alice Springs and Tennant Creek) and to conduct a range of outreach trips and clinics, and attend bush court circuits.

Context

Available data indicates that Aboriginal people are more likely to have a disability than non-Aboriginal people, and there is some evidence to suggest that the rate of disability is under-diagnosed in Central Australia and in the Northern Territory more generally.

Drawing on a 2006 review of disability services in the Northern Territory carried out by KPMG on behalf of the Northern Territory government in 2006, key figures about disability in the NT include:

² Damien Howard et al., Hearing Loss and the Criminal Justice System Standing Committee, *Aboriginal Law Bulletin* (1993) 15, 26; Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time - Time For Doing: Indigenous youth in the criminal justice system* (2009), 108, 111-113.

- Of the 39,500 people in the Northern Territory with a disability, 40% were Aboriginal or Torres Strait Islander, despite making up only 29% of the Northern Territory's population;
- 15,800 of the approximately 59,000 Aboriginal or Torres Strait Islander people in the Northern Territory had a disability,³ which equates to a rate of 26.8% across the Aboriginal and Torres Strait Islander population;⁴
- Of the 15,800 Aboriginal and Torres Strait Islander people with a disability, 5000 people had a profound disability;
- A large number of people with a disability live remote areas. Of the 14,900 people with a disability living remotely (this does not include Alice Springs urban area), 4,500 had a profound/severe disability;⁵
- KMPG projections indicate that the number of people with a disability will increase significantly over the next 20 years in the Northern Territory.⁶

We note there are some significant gaps in the data, which itself poses a barrier to effective identification and redress of the issues faced in Central Australia. For example, KPMG used data from the 2003 Australian Bureau of Statistics Survey of Disability, Ageing and Carers and data from the NT Department of Health and Services and Charles Darwin University.⁷

While data such as that released by the KMPG report provides some indication of the extent of the issue in Central Australia, the exact number of people with a disability in Central Australia is unknown.⁸ As the Productivity Commission stated in its 2011 *Disability Care and Support Inquiry Report*, the primary source of data it relied on to assess the rates of disability in the Aboriginal population is the National Aboriginal and Torres Strait Islander Social Survey, “[h]owever, there is reason to suggest that these surveys underestimate the extent of disability amongst Indigenous Australians.”⁹

Indeed, in consultations carried out by the Productivity Commissioner with service-providers in the Northern Territory, a common theme was concern regarding the perceived high-level of “hidden disability”; many considered that the real rate of disability in remote communities far exceeded the official statistics.¹⁰ This may be because of issues such as higher rates of non-response, different

³ KPMG, Review of Disability Services in the Northern Territory: Final Report, (2006), 4.

⁴ Ibid.

⁵ Ibid, 6-7.

⁶ Ibid, 5.

⁷ Ibid, 3-5.

⁸ For more detailed discussion of this issue, see the paper prepared by our research officer annexed to this submissions: Madeleine Rowley, ‘The Invisible Client: People with cognitive impairments in the Northern Territory’s Court of Summary Jurisdiction’ (paper delivered at the 14th CLANT Conference, Bali, 25 June 2013).

⁹ Productivity Commission, Disability Care and Support: Productivity Commission Inquiry Report, no. 53, 31 July 2011, 532, <http://www.pc.gov.au/projects/inquiry/disability-support/report>.

¹⁰ Ibid, 555; Madeleine Rowley ‘The Invisible Client: People with cognitive impairments in the Northern Territory’s Court of Summary Jurisdiction’ (paper delivered at the 14th CLANT Conference, Bali, 25 June 2013), 3; cf Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008), 13, where the Australian Human Rights Commission notes the concern held by some that Aboriginal youth may be over-diagnosed with cognitive impairment, at least in an educational setting, because of inappropriate assessment tools.

concepts of disability in some Aboriginal communities, language barriers and culturally inappropriate survey or assessment design.¹¹

Accordingly, we do not have reliable and comprehensive data on the number of Aboriginal people with disability, or people with disability more generally, in the criminal justice system in the Northern Territory. What is well-documented is that Aboriginal people are vastly overrepresented in the criminal justice system. Recent Australian Bureau of Statistics data shows that the imprisonment rate of Aboriginal and Torres Strait Islander people was 13 times higher than the rate for non-Aboriginal people in the Northern Territory in 2012.¹² In our experience, some Aboriginal people with a disability may be at a particular risk of entering the criminal justice system. This risk is often exacerbated in cases of cognitive impairment and/or undiagnosed disability, and tends to be compounded by the presence of additional vulnerabilities such as co-morbid alcohol or drug abuse, unstable or insecure housing, or speaking English as a second, third or fourth language. Despite the high overrepresentation of Aboriginal people in our criminal justice system, and the knowledge that some Aboriginal people with disability are vulnerable to contact with the criminal justice system, we do not yet have a system which effectively supports at risk people with disability.

CAALAS is particularly concerned about the lack of support services that are available to help Aboriginal people with a disability in Central Australia avoid contact with the criminal justice system, or to appropriately navigate that system. Many people with a suspected cognitive impairment, for example, do not have access to routine screening and diagnosis, and therefore do not receive the early intervention and ongoing support and protection that would best meet the needs of both the individual and community. The appropriate response to offending behaviour related to a person's disability is a health and community response, wherever possible. Unfortunately, the default response has been an ineffective and costly law and order response.

Barriers

Failure to identify the disability

In the Central Australian context, our experience highlights the absence of much needed early detection and support services. As the Australian Human Rights Commission notes, it is likely that many people with disability are not identified as having a disability and therefore are "unable to access early intervention and a range of other supports and services when necessary". It also means people with a disability are not able to identify that they have a disability or state the supports they

¹¹ Ibid,532-533; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Indigenous young people with cognitive disabilities and Australian juvenile justice systems (2005), 26; Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 'Mental illness and cognitive disability in Aboriginal and Torres Strait Islander prisoners – a human rights approach' (Paper presented at 22nd Annual THeMHS Conference – National Mental Health Services Conference 2012: Recovering Citizenship, Cairns, 23 August 2012), <http://www.humanrights.gov.au/news/speeches/mental-illness-and-cognitive-disability-aboriginal-and-torres-strait-islander>; see also Kylie M Dingwall, Jennifer Pinkerton, Melissa A Lindeman, "'People like numbers': a descriptive study of cognitive assessment methods in clinical practice for Aboriginal Australians in the Northern Territory' (2013) 13 *BMC Psychiatry* 42; see Madeleine Rowley, above n 8, 2-4.

¹² Australian Bureau of Statistics, 2012 *Prisoners in Australia, Indigenous prisoner characteristics: Table 2* (2013).

need if asked".¹³ Furthermore, if a disability is not identified, the crude criminal justice response to offending behaviour cannot be modified to meet the needs of the offender and minimise the risk of continued involvement in the system.

Some people with disabilities only start receiving the support they need at crisis point, such as when they first enter the criminal justice system. It is relatively rare for our criminal lawyers to meet a client with a formal diagnosis of a cognitive impairment, despite our concern that the number of people with a cognitive impairment involved in the criminal justice system is very high.¹⁴ Sometimes a psychiatric or cognitive assessment organised by a lawyer for the purpose of criminal proceedings will be the first time an assessment has been carried out for a client. In our view, there is a clear need for more comprehensive assessment and early intervention services in Central Australia to ensure that people receive the assistance they need before, during and after involvement in the criminal justice system.¹⁵ There is also a need for culturally appropriate assessment tools to facilitate this.¹⁶

Once an individual has entered the criminal justice system, a disability may remain undetected due to a lack of awareness and understanding within the justice sector. Our lawyers, and other stakeholders in the criminal justice system, may miss the signs of a disability, particularly "invisible disabilities" like cognitive impairment or hearing loss. A recent report of a study conducted in Western Australia, for example, found that many practitioners in the criminal justice sector knew little about foetal alcohol spectrum disorders (**FASD**).¹⁷ Because of growing concern regarding the possible rate of FASD in the criminal justice population, and the population more generally, the report recommended increased training on FASD for practitioners in the sector.¹⁸ This is discussed further below.

There are insufficient services to help police, lawyers, magistrates, judges and prison officers when the need for services and supports are identified and requested by them

Another key factor may be the difficulty practitioners and other stakeholders in the criminal justice system face in accessing culturally appropriate and sufficiently comprehensive assessment services for an accused person or offender in timely manner.

This is a barrier identified by the Australian Human Rights Commission, and it is an issue stakeholders in the Northern Territory criminal justice system often confront. It can be quite difficult for lawyers, magistrates, judges and corrections to obtain a timely and comprehensive cognitive or

¹³ Australian Human Rights Commission, *People with Disability – Access to the Justice System*, (2013); see also Mindy Sotiri, Patrick McGee and Eileen Baldry, No End in Sight: The imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment (Aboriginal Disability Justice Campaign, September 2012) 49, http://elizabethrussell.com.au/rffada.org/images/stories/documents/No_End_in_Sight_Report_from_the_Aboriginal_Disability_Justice_Campaign_on_the_Inprisonment_and_Indefinite_Detention_of_Indigenous_Australians_with_a_Cognitive_Impairment-1.pdf.

¹⁴ See Madeleine Rowley, above n 8, 1,3; see also Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, above n 11, 26.

¹⁵ See above n 11 and 12.

¹⁶ Ibid.

¹⁷ Raewyn Mutch et al, 'Fetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice within the Western Australian justice system: Final Report' (Foundation for Alcohol Research and Education and Telethon Institute for Child Health Research, The University of Western Australia, April 2013).

¹⁸ Ibid.

psychiatric assessment or an assessment of a client's other health needs to inform the criminal justice system's response to an individual's offending behaviour. A matter may be significantly delayed if an assessment is sought or a particular service is requested, which at times presents a dilemma to legal representatives seeking to have matters dealt with expeditiously to reduce the likelihood of a client breaching bail conditions or spending unnecessary time in custody on remand.

As will be discussed below, even where a possible disability is identified, an assessment is obtained and appropriate services are identified, in some cases stakeholders are constrained by inflexible legislation, and cannot utilise appropriate diversion options.

Lack of culturally appropriate and accessible services and programs, particularly in relation to people with a cognitive impairment and/or mental health impairment

The lack of culturally appropriate and accessible services and programs for Aboriginal people in Central Australia, particularly those with a cognitive impairment and/or mental health impairment, means that many people at risk of entering the criminal justice do enter the system, and many people involved in the criminal justice system, are unable to get out of it.

As discussed above, we believe there is an urgent need to increase access to assessment and early intervention services. There is also a clear need for a range of other community-based support services, including 24 hour supported accommodation, specialised services for people with a disability who display challenging behaviour, and support for families and carers.¹⁹

Another key issue is the importance of using interpreters in service provision. In Central Australia, where a large number of Aboriginal people do not speak English as their primary language, it is critical that interpreters are used during the court process and in the delivery of ancillary services.²⁰ While awareness of the need for interpreters has improved, pressures on service providers result in the continuing underutilisation of interpreters in Central Australia.

Lack of access to services and support in remote communities

The Productivity Commission observed that “[d]isability support services are practically non-existent in many remote communities – often limited to basic HACC services (such as meal preparation) and occasional visits by allied health professionals.”²¹ Similarly, the 2006 KPMG review of disability services in the Northern Territory found that remote communities “are substantially under serviced relative to population, funding share and prevalence of disability” by government disability services²² and that “the non government sector virtually has no presence in remote communities in relation to the delivery of specialist disability services”.²³ The KMPG review of disability services in the Northern Territory also stated:

“Disability support services are practically non-existent in many remote communities – often limited to basic HACC services (such as meal preparation) and occasional visits by allied health professionals. However, as with non-Indigenous Australians living in remote areas,

¹⁹ Productivity Commission, above n 9, 555.

²⁰ Ibid, 544.

²¹ Ibid, 555.

²² KPMG, above n 2, 15.

²³ Ibid, 18.

matching the range and quality of services provided in major cities is not realistic or appropriate.”²⁴

In the criminal justice context, the practical effect of this is that people with some types of disability are at a significant disadvantage. Our experience in relation to people with cognitive or mental health impairment from remote communities is that the reason they are involved in the criminal justice system is often because they have not received support at the earliest available opportunity to address and manage challenging behaviour related to their disability. As we discuss below, they are less likely to obtain bail, a non-custodial order or parole if they are unable to access stable accommodation and support networks and services to help them manage their behaviour, and may struggle to comply with bail and court order conditions if they are released back to the community because of the dearth of support services.

Case Study one: A 16 year old Aboriginal boy is on remand because he repeatedly breached bail. He is from a remote community, but has lived in Alice Springs on and off throughout his childhood. An assessment obtained through his school detected a cognitive impairment. His offending and non-compliance with bail conditions is largely a consequence of his cognitive impairment: he is impulsive and struggles to control his behaviour. He also had trouble understanding his bail conditions.

His family were unable to provide the intensive support and care the youth needed to stay out of trouble and comply with his bail conditions. They are caring for another family member with high needs, and struggled to also deal with the youth’s challenging behaviour. The court considered it necessary to revoke his bail and remand him in the detention centre.

Case Study two: A man with a serious mental illness was serving a three year sentence with an 18 month non-parole period for a violent offence. He had received treatment while in prison and his condition had stabilised, although he continued to display some symptoms of illness. He was unable to access work or rehabilitative programs in prison due to his condition. His family lived in a remote community and indicated that they did not feel confident supporting him to comply with his medication regime or parole conditions. He applied for parole 10 times over 18 months and was refused on each occasion. Ultimately he served his full term.

We recognise that there are significant costs and challenges associated with delivering disability services in remote communities. Both the Productivity Commissioner and KPMG discuss these challenges quite comprehensively in their reports on disability service provision. However, some effort must be made to expand existing services and improve accessibility to services, both in remote communities and in regional centres such as Alice Springs and Tennant Creek. It is also vital to enhance the reach and effectiveness of other services, such as education, housing, drug and alcohol and related health services, to improve justice outcomes for people with disabilities from remote communities by addressing the multiple forms of disadvantage many of our clients with a disability experience.

²⁴ Productivity Commission, above n 9,555.

Barriers to obtaining appropriate bail, parole and non-custodial court order

As the Australian Human Rights Commission comments in its issues paper, “bail and parole conditions and court orders may not be conveyed to people with disability in a way that they can understand, making it more likely that they will fail to comply with these conditions and orders”. While our solicitors and caseworkers are conscious of the need to clearly explain conditional orders to clients in a way that they will understand, police and the courts do not always do this.

At CAALAS, we often have to overcome two significant hurdles for clients with offending behaviour related to a cognitive impairment and/or mental health impairment before we get to the point where we need to explain bail, parole or court order conditions. The first hurdle is obtaining bail, a non-custodial court order or parole, which can be difficult in circumstances where a client is viewed as a risk to the community, and cannot access appropriate support services to address his or her behaviour. The second hurdle is convincing the court to only impose appropriate conditions. Often the conditions imposed on bail, a non-custodial court order or parole are complex, onerous and cannot realistically be followed by some people with cognitive impairment and/or mental health issues, who often also experience other forms of social disadvantage.

In relation to bail, as we recently submitted to the Northern Territory’s Government recent review of the *Bail Act* and have touched on above, experience and research indicates that:

- people with mental health impairments or cognitive disabilities may have a history of offending related to their disability, therefore making it more difficult to obtain bail;²⁵
- people with mental health impairments or cognitive disabilities are less likely to live in secure accommodation and are accordingly at a greater risk of being refused bail;²⁶
- it can be difficult for a person with a cognitive disability or mental health impairment to understand and comply with increasingly onerous bail conditions, particularly where bail conditions are imposed without the provision of additional support;²⁷
- bail conditions imposed on people with a mental health impairment or cognitive disability are often inappropriate or unsuitable; and
- where a person is remanded, either because bail is refused or because bail is revoked, the period in custody may have a more adverse effect of a person with a mental illness or a cognitive disability because ‘prisons are unable adequately to meet their needs and to ensure that their welfare is not harmed by incarceration’.²⁸

Accordingly, CAALAS submitted to the Northern Territory Government’s *Bail Act* review that all bail decision makers should take account of the particular impact the imposition of bail and bail conditions would have on a person with a mental health impairment or cognitive disability.

²⁵ See generally Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008). This was also noted as a significant issue in the NSW Law Reform Commission, *Bail*, Report 133, 179.

²⁶ NSW Law Reform Commission, above n 25, 179.

²⁷ Ibid.

²⁸ Ibid, 178-179.

Case study three:²⁹ CAALAS represents a male under an adult guardianship order. The client has an acquired brain injury which impairs his cognitive functioning.

The client was initially bailed by police. The client was unable to understand the bail conditions and therefore was unable to comply with the conditions. He was remanded in custody for breach of bail pending review of his bail by the court. The client was ultimately released on bail again on essentially the same conditions. This time he was able to comply with the bail because a CAALAS solicitor explained the conditions to him in a manner he could understand.

The same client was later refused bail on another matter. The client was remanded to the police watch house because of overcrowding at the time in the Alice Springs Correctional Centre. Because of his cognitive issues, he did not cope well with detention in the watch house and was not provided with the services and supports he required. His CAALAS solicitor made submissions to this effect. However, bail was refused because the court wasn't satisfied that his experience at the watch house was more difficult for him than for anyone else.

This case highlights that legislative change is also key to diverting people with disability from the criminal justice system, in appropriate cases. Regimes such as the *Bail Act* must be amended to introduce greater flexibility to minimise the disadvantage faced by people with special needs in the criminal justice system, particularly those with cognitive or mental health impairment.

Mandatory sentencing

A related issue is that of mandatory sentencing. The new mandatory sentencing scheme in the Northern Territory significantly limits the court's discretion in sentencing, and thus limits the court's ability to take into account a person's disability in determining an appropriate sentence. The new mandatory sentencing scheme applies to a broad range of violent offences, and requires the court to impose an actual sentence of imprisonment if an offender is convicted of certain offences. The mandatory minimum length of imprisonment depends on the offence committed and whether the offender has previously been convicted of certain offences. In "exceptional circumstances" the court can order that part of the mandatory minimum sentence of imprisonment be suspended or served in home detention, but a person will still be required to serve at least some time in prison.

This may be completely inappropriate for a person with a disability. For example, in a paper addressing the indefinite detention of Aboriginal people found unfit to plead, the Aboriginal Disability Justice Campaign strongly argues a sentence of imprisonment imposed on a person with a cognitive impairment may be inappropriate and ineffective because the person may not fully understand the connection between the offending behaviour and the prison experience,³⁰ and in some cases a person with a cognitive impairment may "do it harder" in prison because of difficulty understanding the rules of prison and the experience more generally.³¹ These issues are particularly concerning in relation to a period of imprisonment imposed under minimum mandatory sentencing

²⁹ Case study used in CAALAS' submission to the Northern Territory Government's 2013 Review of the *Bail Act*.

³⁰ Mindy Sotiri, Patrick McGee and Eileen Baldry, above n 13; see also Jonathon Hunyor and Michelle Swift, 'A Judge short of a Full Bench: mental health in the NT criminal justice system' (paper presented at the Criminal Lawyers Association of the Northern Territory Thirteenth Biennel Conference, Bali, 30 June 2011); Madeleine Rowley, above n 8, 7, 15; Heather Douglas, 'Sentencing and Fetal Alcohol Spectrum Disorder (FASD)' (2010), 15-17.

³¹ Ibid.

laws, given that the sentence of imprisonment will usually be relatively short. As a result, prisoners in Central Australia are unlikely to receive the supports or accommodations they need in prison, and will be separated from the supports and accommodations they may receive in the community.³²

Mandatory sentencing laws have been shown to disproportionately impact on Aboriginal people, particularly those experiencing multiple forms of disadvantage. The NT's new mandatory sentencing regime is expected to increase the public burden of imprisonment and the overrepresentation of Aboriginal people in prison, and will negatively affect people with a disability. By removing judicial discretion, the court is constrained from taking account of factors, including those related to disability that would otherwise be relevant to a decision on sentencing. For example, for relevant offences, the court can no longer take account of a symptom of disability (such as poor impulse control) as a contributing factor in offending; nor can the court consider the particular impact of imprisonment on a person with a disability. A case study highlighting this issue is set out in the paper annexed to this submission.³³

Lack of appropriate court diversion schemes for people with a cognitive or mental health impairment

In the Northern Territory, people found unfit to plead and stand trial or not guilty because of mental impairment have often been placed under custodial supervision orders committing them to prison for a potentially indefinite period of time. It is hoped that this issue will be ameliorated with the opening of the new secure care facilities, but there is still concern that some people will be caught in the criminal justice system for too long. A related concern is the lack of appropriate diversion and therapeutic options available to a lower court in the Northern Territory dealing with a person with a cognitive impairment.

Part IIA of the Criminal Code – mental impairment and fitness

The legislative regime for dealing with questions of fitness is found under Part IIA of the Criminal Code (NT). Part IIA provide that where a person is found unfit to stand trial and is unlikely to become fit within the following twelve months, the matter must go to a special hearing within three months. The purpose of the special hearing is for a jury to determine whether the person is not guilty of the offence, not guilty because of mental impairment, or committed the offence charged. Where a jury at a special hearing finds that the accused person is not guilty of the offence due to mental impairment, or that the person committed the offence, the Court must either declare the accused person liable to supervision under Division 5 of the Act or release the accused person unconditionally. It only applies to matters brought before the Supreme Court, which is problematic where questions of fitness are raised in matters involving minor offences, which would normally be dealt with more quickly in a lower court.

A supervision order may involve custodial supervision, in a prison or another place the Court considers appropriate or non-custodial supervision. Recently, the Disability Services Act and the Criminal Code have been amended to provide that an “appropriate place” for the purposes of a

³² See the case study provided in CAALAS' research officer's paper: Madeleine Rowley, 'The Invisible Client: People with cognitive impairments in the Northern Territory's Court of Summary Jurisdiction' (paper delivered at the 14th CLANT Conference, Bali, 25 June 2013), 15.

³³ Ibid, 6-7, 14.

custodial supervision order includes secure care facilities, which have recently been opened in the Northern Territory. A supervision order is for an indefinite term,³⁴ although a “term” is set on the order and a major review occurs near the end of the “term”. On review, the Court may order the continuation of the supervision order. The Criminal Code also provides for periodic reviews.³⁵

The Criminal Code states that “the court must not make a custodial supervision order committing the accused person to custody in a prison unless it is satisfied that there is no practicable alternative given the circumstances of the person”.³⁶ Unfortunately, it has been CAALAS’ experience, at least prior to the opening of the secure care facilities that many clients who were found unfit were subject to custodial supervision orders committing them to prison, in the absence of appropriate alternative facilities. In the case of *R v Doolan; R v Leo* [2012] NTSC 46, for example, the court reviewed the custodial supervision orders imposed under Part IIA on two individuals, Mr Leo and Mr Dooley, both of whom suffered from significant mental impairments. Both had been committed to prison because no alternative options were available. The secure care facilities were near completion, but not yet ready. His Honour commented at [62]:

“As noted by Martin (BR) CJ both persons have spent more time in custody, and at times in a high security unit of the prison, than their crimes would ordinarily merit. Each at times becomes significantly frustrated and desperate. It is of significant concern that during some periods Mr Leo may have deteriorated, thus making it more difficult for him to pass through the planned stages to alternative arrangements. Mr Murdock, who closely monitors each of the supervised persons, emphasizes the prison environment is not appropriate. Plans need to be implemented to see that the goal of alternative appropriate arrangements, consistent also with the requirements of the Criminal Code can be achieved as soon as possible, respecting the need for incremental change.”

Similarly, in a 2011 paper written by our North Australian Aboriginal Justice Agency (NAAJA) colleagues, Jonathon Hunyor and Michelle Swift, ‘A Judge Short of a full bench: mental impairment and fitness to plead in the NT criminal legal system’³⁷, Hunyor and Swift observed that “[t]he practical operation of the regime of supervision orders in the NT is that ‘custody’ means ‘jail’ because at that time, the government had not made another “appropriate place” available. Further, they stated:

“Jail is clearly an inappropriate place for detaining people who are unfit to be tried and/or not guilty by reason of their mental illness. On a purely practical level, it makes treatment and ultimate re-integration much more difficult. It is also difficult to justify incarceration of person whom we deem not subject to criminal penalty in a facility intended to punish.”³⁸

Compounding this issue is that the fact that some people have spent longer in prison under a supervision order than they would have had they been dealt with through the normal criminal justice process, and that therapeutic and support services specific to an individual’s high and

³⁴ *Criminal Code (NT)*, s. 43ZC.

³⁵ *Criminal Code (NT)*, ss. 43ZG, 43ZH, 43ZK

³⁶ *Criminal Code (NT)*, s. 43ZA(2).

³⁷ Jonathon Hunyor and Michelle Swift, above n 30, 13.

³⁸ *Ibid.*

complex needs are often not provided in prison.³⁹ The Aboriginal Disability Justice Campaign has recently published a paper highly critical of the regimes such as that in operation in the Northern Territory which, in practice, result in a harsh, punitive approach to people found unfit to plea, rather than a therapeutic response.

Secure care?

CAALAS hopes that the new secure care facilities, which have opened this year, will result in fewer people with a mental impairment, including a mental health problem and/or a cognitive impairment, being committed to an indefinite term of detention under a supervision order. However, the secure care facilities have limited capacity (half of the 16 beds in the Alice Springs facility will now be used for assessment under the new mandatory alcohol treatment scheme in the NT), and will not be appropriate for all clients subject to a custodial supervision order. For example, in a very recent case CAALAS acted in, *The Queen v Madrill (No 2) [2013] NTSC 42*, the Court made a custodial supervision order committing a person found not guilty because of mental impairment to Alice Springs prison because it was satisfied that, in all of the circumstances, there was “no practicable alternative”, and “[m]oreover, there is no available ‘appropriate place’ to which he might be committed and in respect of which a certificate has been provided by the CEO (Health) pursuant to s 43ZA(4) Criminal Code.” In that case, the secure care facilities were not suitable for the defendant’s particular psychiatric needs.

Where a person is committed to a secure care facility under a supervision order, it is important that the secure care facilities are not used as a mere custodial substitute for prison.⁴⁰ Secure care should only be used as a therapeutic and temporary measure designed to support a person with high-risk behaviours to manage the behaviours and successfully reintegrate back into the community, not as a de facto prison.⁴¹ CAALAS will continue to monitor the operation of the facilities. It is important that people with a mental impairment are removed from the criminal justice system, and supported with a health and community response, as quickly as possible.

It is important to also note that one of the barriers to successful community reintegration of people with a mental impairment committed to custody under a supervision order, and to obtaining a community-based supervision order in the first place, is the lack of culturally appropriate and therapeutic supported accommodation places and community services equipped to support people with highly challenging behaviours.⁴² As discussed above, this is particularly problematic in remote communities.

People with cognitive impairment in the lower courts

One big issue in the Northern Territory is the absence of legislative regime aimed at diverting people with a cognitive impairment prosecuted with relatively low-level offences from the Court of Summary Jurisdiction (the lower criminal court in the Northern Territory).⁴³

³⁹ Jonathon Hunyor and Michelle Swift, above n 30, 17-18.

⁴⁰ Jonathon Hunyor and Michelle Swift, above n 30, 14.

⁴¹ Ibid.

⁴² Ibid, 23.

⁴³ Whilst the Court has some limited diversion powers available to it in relation to people with a mental illness or mental disturbance, there are a number of problems with the scheme, which are outlined in a [paper](#) written

CAALAS strongly believes that, in appropriate cases, where a person with a cognitive impairment is charged with summary offence, the court should have the option of diverting the person from the criminal justice system to facilitate a therapeutic response to the offending behaviour, rather than a law and order response. In our view, the lack of options available to the Court of Summary Jurisdiction when it is dealing with a person with a cognitive impairment, including the lack of assessment and diversion options, means that many people with a cognitive impairment receive inappropriate custodial sentences. CAALAS' research officer recently delivered a paper to the 2013 Criminal Lawyer's Association of the Northern Territory Conference in Bali on this issue. A copy of the paper is annexed to this submission.

Lack of access to services and programs in prison and post release

CAALAS runs a Prison Support Program which employs a social worker/co-ordinator and an Aboriginal prison support worker to provide information, education and targeted case management to prisoners on parole or eligible for parole. Our Prison Support Program is aware of prisoners with possible (and in some cases diagnosed) cognitive and mental health impairments who struggle to access appropriate therapeutic supports, such as culturally appropriate and timely assessments of cognition and mental health impairment and meaningful therapeutic and other offender programs tailored to their specific needs and designed to equip them with the skills to live successfully in the community.

Case study four: Our Prison Support Team provided information and advice on the parole process to a man who was coming near to the end of a very long term in prison. Our Prison Support Team queried whether a psychiatric assessment and cognitive functioning assessment had been carried out as the offender's behaviour and responses in initial interviews indicated a possible mental health and/or cognitive impairment. They obtained a copy of the sentencing remarks, which referred to a pre-sentencing report and a psychological assessment report.

The prison was not aware of the existence of the previous assessments. No assessment was carried out by the prison, and the offender had not been referred to any appropriate programs. Through our Prison Support Team's advocacy, the prison is now working with the offender to identify appropriate interventions.

Behavioural issues relating to diagnosed or possible cognitive impairment or mental health problems will, at times, be dealt with by moving the prisoner into maximum security cells. The focus of the response is a security response; programs usually aren't available to manage the behaviour in other ways, and staff may not have specialised training to assist them in responding to behaviour relating to a cognitive impairment or mental health problem.

Another significant issue is the lack of post-release services available to prisoners with disability to facilitate successful reintegration into the community and to prevent reoffending. Our prison support program is not aware of any reintegration programs specifically designed to meet the complex needs of prisoners with a cognitive or mental health impairment. The reintegration

by our North Australian Aboriginal Justice Agency (NAAJA) colleagues, Jonathon Hunyor and Michelle Swift, 'A Judge Short of a full bench: mental impairment and fitness to plead in the NT criminal legal system' (paper delivered at the 2011 CLANT conference, Bali, 30 June 2011) (also cited above n 30).

programs that currently exist are mainstream services that target a small, select group of prisoners, and generally focus on employment opportunities.

Recommendations

CAALAS believes the following are necessary first steps towards improving access to justice in the criminal justice system for Aboriginal people with disability:

- The development of culturally appropriate assessment tools for cognitive impairments;
- Improved access to screening and assessment, particularly in remote communities;
- Greater investment in early intervention through existing and expanded health and other community-based services;
- Increased funding for a range of community-based support services, including supported accommodation;
- Increased education and training for professionals in the criminal justice sector;
- Legislative amendments, including:
 - to allow the court more flexibility in responding to the specific needs of people with disability, including increased diversion options;
 - reform of bail laws to ensure the decision makers take account of the impact of bail and bail conditions on a person with special needs, such as mental health or cognitive impairment; and repeal of mandatory sentencing legislation.

Conclusion

Aboriginal people with a disability face a number of barriers to justice in the criminal justice system in the Northern Territory. Successive Northern Territory Governments have emphasised a “tough on crime” approach that has resulted in overcrowded prisons, rigid bail and mandatory sentencing regimes, and a corrections approach focused on punishment rather than rehabilitation. This context has a direct impact on people with a disability, who may be disproportionately effected by harsh conditions and rigid sentencing regimes.

Specific barriers to justice include high rates of unidentified disability, a lack of culturally appropriate and accessible services, and the compounding effects of remoteness and multiple disadvantage. Factors specific to the criminal justice system include a lack of awareness and training among professionals, inadequate support and assessment services once a potential issue is identified, and an absence of appropriate court diversion schemes, especially for people with a cognitive or mental health impairment. Finally, bail and mandatory sentencing laws hinder the ability of stakeholders to take account of factors related to a disability, and increase the likelihood that a person with a disability will be held in custody.

Aboriginal people with a disability residing in Central Australia are extremely vulnerable when dealing with legal processes. To ensure substantive equality before the law, it is imperative that we do more to support access to justice for people with a disability, and to redress the impact of maladroit law and order approaches to criminal justice. Service provision should be expanded in the community and at all stages of the criminal justice system. Therapeutic responses should be developed that allow for a more appropriate response to people whose offending behaviour is related to a disability. Finally, the impact of legislative schemes such as mandatory sentencing laws should be closely scrutinised with reference to their impact on people with a disability.

APPENDIX