Submission to the Australian Human Rights Commission:

Access to justice in the criminal justice system for people with disability

August, 2013

NATSILS

NATIONAL ABORIGINAL & TORRES STRAIT ISLANDER LEGAL SERVICES

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1. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services in Australia. The NATSILS have almost 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The NATSILS are the experts on justice issues affecting and concerning Aboriginal and Torres Strait Islander peoples. The NATSILS represent the following Aboriginal and Torres Strait Islander Legal Services (ATSILS):

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

2. Introduction

NATSILS welcomes the opportunity to respond to the Australian Human Rights Commission Issues Paper: *Access to justice in the criminal justice system for people with disability.* We would like to endorse the submissions of our member organisations, the North Australian Aboriginal Justice Agency (NAAJA) and the Central Australian Aboriginal Legal Aid Service (CAALAS). We recommend that this submission be read in conjunction with those from NAAJA and CAALAS as while the following provides an overview of the issues nationally, the submissions from our member organisations provide a more detailed local focus and include some very illuminating case studies.

3. Incidence of disability in Aboriginal and Torres Strait Islander communities

The prevalence of disability amongst Aboriginal and Torres Strait Islander peoples is significantly higher than the general Australian population. The First People's Disability Network '10-point plan for implementing the NDIS in Aboriginal communities' highlights the findings of a recent report by the *Commonwealth Steering Committee for the Review of Government Service Provision* that 'the proportion of the indigenous population 15 years

and over, reporting a disability or long-term health condition was 37 per cent (102900 people).'[1] The First People's Disability Network 10-point plan also emphasises that: [2]

> The high prevalence of disability, approximately twice that of the non-indigenous population occurs in Aboriginal and Torres Strait Islander communities for a range of social reasons, including poor health care, poor nutrition, exposure to violence and psychological trauma (eg arising from removal from family and community) and substance abuse, as well as the breakdown of traditional community structures in some areas. Aboriginal people with disability are significantly over-represented on a population group basis among homeless people in the criminal and juvenile justice systems, and in the care and protection system (both as parents and children).

The higher incidence of disability amongst Aboriginal and Torres Strait Islander peoples combined with the disproportionate over-representation of Aboriginal and Torres Strait Islander peoples in criminal justice system suggests that there is a significant number of Aboriginal and Torres Strait Islander peoples with disability who are in contact with the criminal justice system.

The main types of disability experienced by ATSILS clients include, mental illness, cognitive impairment, hearing loss, Foetal Alcohol Spectrum Disorder (FASD), and the impact of trauma and neglect on children's brains.

It is difficult to provide exact data as to the incidence of each of these types of disability amongst Aboriginal and Torres Strait Islander peoples in contact with the criminal justice system. However, some evidence is available to us:

- Recent research conducted in Queensland found that 73% of male and 86% of female Aboriginal and Torres Strait people in custody in high security prisons suffered a mental disorder.[3] The researchers concluded that 'the prevalence of mental disorder among Indigenous adults in Queensland custody is very high compared with community estimates' and 'there remains an urgent need to develop and resource culturally capable mental health services for Indigenous Australians in custody.'[4]

- Aboriginal and Torres Strait Islander peoples suffer ear disease and hearing loss at ten times the rate of other Australians and arguably at the highest rate of any people in the world.[5]

- A study of Aboriginal and Torres Strait Islander prisoners in NT prisons 'found more than 90 per cent of Aboriginal and Torres Strait Islander inmates had a significant hearing loss.'[6]

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[1] See First People's Disability Network Australia, *10-point plan for implementing NDIS in Aboriginal Communities.* Available at: http://fpdn.org.au/10-point-plan-ndis

[2] See First People's Disability Network Australia, *10-point plan for implementing NDIS in Aboriginal Communities.* Available at: http://fpdn.org.au/10-point-plan-ndis

[3] Heffernan, E.B, Andersen, K.C., Dev, A., and Kinner, S., *Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland Prisons,* Medical Journal Australia 2012; 197(10) 37-41

[4] Heffernan, E.B, Andersen, K.C., Dev, A., and Kinner, S., *Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland Prisons,* Medical Journal Australia 2012; 197(10)

[5] Senate Community Affairs References Committee, Parliament of Australia, *Hear Us: Inquiry into Hearing Health in Australia* (2010) xv.

- A recent Commonwealth Inquiry into FASD[7] found that the incidence of FAS amongst Aboriginal and Torres Strait Islander peoples is estimated to be between 2.76 and 4.7 per 1 000 births compared to between 0.06 and 0.68 for the rest of the Australian population. Other experts consider this to be a significant underestimation. A comprehensive and detailed incidence study of FASD in Fitzroy Crossing will soon be released; a recent media report suggested that half of the babies born in Fitzroy Crossing are born with disabilities from FASD.

- There is a growing body of research in the area of 'Trauma Theory' which draws a link between exposure to trauma and chronic stress in childhood and brain development and future health outcomes. The NT Children's Commissioner states that:[8]

  > There is an emerging consensus that the compelling research findings on the developmental impact of childhood trauma represent a similar revolution of understanding – a paradigm shift. We are learning that many adult diseases, mental health issues, behavioural disorders such as substance abuse, and even criminality, have their roots in the toxic effects of childhood trauma and chronically stressful environments.

  Sadly, the experience of overwhelming trauma is not uncommon for many of ATSILS young clients. Many young clients grow up in families attempting to deal with the impacts of intergenerational trauma which can manifest in the form of alcohol abuse, domestic violence and in some circumstances, neglect. These factors in turn can result in high rates of developmental vulnerability among the youngest members of the family.

It is important to note that it is well recognised that there is likely to be a significant amount of Aboriginal and Torres Strait Islander peoples whose disability goes undiagnosed or undetected so the figures are in fact likely to be higher than current evidence suggests. For example, CAALAS reported in its submission that:

> 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. 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.[9]

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[6] Troy Vanderpoll and Dr Damien Howard, *Investigation into hearing impairment among Indigenous prisoners within the Northern Territory Corrections Services* (2011), 3

[7] House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders* (2012), 2.94

[8] Dr Howard Bath,'*Vulnerability, risk and justice for children and young people in the Northern Territory*', (Presentation delivered at the Fourteenth Annual Biennial conference of the Criminal Lawyers Association NT, Bali, June 27, 2013) 5. Available at: http://www.clant.org.au/index.php/the-bali-conference/2013

[9] CAALAS, Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability (2013) 6.

4. Barriers to access to justice

4.1 Criminalisation of care

Australia's criminal justice system is inappropriately being used to deal with wider societal problems in relation to health, housing and poverty. This is what has become know as the 'criminalisation of care'. Nowhere is this clearer than in the mental health and cognitive disability sectors. The criminal justice system is increasingly and inappropriately being used to "deal with" people with mental illness and cognitive disability because of a lack of resources within public health and welfare systems. There is also a specific lack of culturally appropriate diagnostic and support services to meet the unique needs of Aboriginal and Torres Strait Islander clients. Not only are there insufficient resources to adequately meet the need but in the case of FASD, where there is, as yet, no accepted clinical assessment tool and FASD is not classified as a registered disability entitling a person to support services, there is also a lack of access to services that do exist. Hence, without access to such services, people's cognitive impairment and mental health issues go unaddressed and direct intersections with the criminal justice system are exacerbated. For example,

> A 16 year old Aboriginal boy from the Goldfields was charged with serious violent offences against another boy, in a similar fashion to offences he witnessed his father commit against his mother at a young age that resulted in her death. The boy did not receive counselling at the time of the domestic incident but has now been diagnosed with schizophrenia and had been living a shambolic life in the care of his maternal grandmother. He was illiterate and innumerate. He did not have assistance to regularly take medication for his schizophrenia or diabetes and had no access to psychological services. The Community Adolescent and Mental Health Services in the Goldfields were responsible for managing his mental health needs but did not provide services to the Central Desert where he resided nor was there a psychiatric service in this region. Prior to the offending, he was twice admitted to the Mental Health ward at Kalgoorlie Hospital in 2009 demonstrating a deteriorating mental state. The boy was sentenced to 15 months detention.

ATSILS (and the non-legal agency partners they work with) have reported increased incidences of Apprehended Violence Orders being used to control behavioural issues by schools, care workers and parents, rather than referring people displaying difficult behaviours to more appropriate health and welfare support services because such are unavailable. Hence, behavioural issues associated with disabilities or impairments are diverted to the criminal justice system rather than being appropriately dealt with (and resourced) as health, care and welfare issues. The criminal justice system should not be seen as an appropriate means to address a person's cognitive or mental health disability needs.

4.2 Awareness amongst criminal justice system professionals

A disability can affect all stages of a person's contact with the criminal justice system including arrest and questioning, communication with lawyers, court proceedings, sentencing as well as the time a person spends in prison. Justice system professionals are not experts in diagnosing disabilities. However, if justice system professionals do not receive some level of training in identifying when a person may have a disability critical failures can occur. If justice system professionals at each of the stages mentioned above fail to detect a person's disability or are unaware of the most appropriate way to respond it greatly diminishes the chances that a person with disability will be afforded equal access to justice. For example, as CAALAS observed:

> 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.[10]

Perhaps one of the most shocking examples of how an undetected disability can tragically affect a person's access to justice can be found amongst the evidence provided to the Senate Community Affairs References Committee in its Inquiry into Hearing Health in Australia:

> One audiologist talked to me about dealing with a client who had recently been convicted of first-degree murder and had been through the whole criminal justice process. That had happened and then she was able to diagnose him as clinically deaf. He had been through the whole process saying, 'Good' and 'Yes'—those were his two words—and that process had not picked him up. Given the very high rates of hearing loss, you have to wonder about people's [sic] participation in the criminal justice system as being fair and just if in cases like that people simply are not hearing or understanding what is going on.[11]

It is important to note that even when a person's disability is identified, due to under-resourcing within health and welfare systems, police, lawyers, magistrates, judges and prison officers can still find it difficult to access the necessary diagnostic and support services to assist them and the person in need.

4.3 Inflexible and inappropriate legal regimes

4.3.1 Bail

It is ATSILS experience that approaches to bail are becoming harsher and that young people in particular, who are released on bail are being subjected to increasingly onerous conditions including curfews, requirement to be in the company of parents and place restrictions. People with cognitive, mental health and hearing impairments are more likely to have difficulty understanding bail conditions, and consequently more likely to breach conditions inadvertently. One consequence of bail breaches is that the person will end up in remand. Another is that young people with a lengthy history of bail compliance issues will be less likely to be granted bail in the adult criminal justice system. The link between juvenile justice issues and long term engagement with the adult criminal justice system is well-known.

Furthermore, the onerous conditions being imposed by police sometimes have little to do with the legislative purpose and criteria to be considered in bail applications. This points to a dysfunction in the management of what is clearly a health and welfare issue. Again, the idea that a person's disability needs will be "treated" by their engagement with the criminal justice system is not acceptable.

4.3.2 Diversion

Another concern for the NATSILS is the failure of police to deal with mental illnesses and/or cognitive/intellectual disabilities of a person who has come into contact with the

[10] 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.
[11] Evidence to Senate Community Affairs References Committee, Parliament of Australia, Alice Springs, 18 February 2010, 1 [Tristan Ray]

criminal justice system, for relatively minor offending, without resorting to judicial proceedings and detention. Remand is increasingly being used by police in order to manage people with mental health concerns and cognitive disabilities. This can either be because the mental illness or intellectual/cognitive disability goes unidentified or there is a chronic lack of support and treatment facilities. This is not what the criminal justice system should be used for. The current lack of awareness and recognition of the potential prevalence of Foetal Alcohol Spectrum Disorder (FASD) is a major factor to consider here.

For example:

> A 16 year old Aboriginal girl with no criminal record was kept in custody for an unreasonable period in order to address her mental health needs. The girl was charged with two disorderly conduct offences that allegedly occurred on a Saturday in August 2009 in Geraldton. The allegations related to behaviour she exhibited at the hospital when taken by her family for a mental health assessment. According to the Statement of Material Facts, when police arrived they offered to restrain her while she was assessed but the hospital refused to assess her. She was taken into custody at about 6.00pm and appeared in court on the following Monday. The girl was very agitated and exhibited worrying behaviour in Court. She was granted bail but her family who were present indicated they would not take responsibility for her until her mental health was assessed. The girl was remanded in custody for the purpose of being observed and assessed and she was held in the police lockup in Geraldton.
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> Upon arriving at the police lockup, ALSWA was informed the girl was naked in her cell. ALSWA queried why she was not being assessed and treated at the hospital and was informed by police that there was nothing else to demonstrate she had a mental health problem. A female officer persuaded the girl to put on clothes and ALSWA spoke to her. The girl was behaving erratically. She had shredded a polystyrene cup and scattered it like confetti over the mattress. She alternated between appearing willing to speak to ALSWA and being aggressive. She made a number of seemingly random statements and claimed that her name was something else. Her biggest preoccupation throughout the day was that someone had "killed" her babies.
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> The girl was taken to Perth on Tuesday morning. She was admitted to the Bentley Adolescent Mental Health ward prior to her Court appearance on Friday and there was a report confirming her unfitness to plead. The prosecution, on invitation by the Magistrate, withdrew the charges effectively explaining that they were only "holder charges" intended to get the girl some treatment.

The NATSILS recommend that in situations like these, a person's health concerns should be addressed as a priority over contact with the criminal justice system. While some inconsistency exists around the country, overall there is great opportunity to improve the diversionary options that are available to lower courts.

The trend in the United States and other overseas jurisdictions is toward a therapeutic jurisprudence approach (for example, Mental Health Courts) where the causes of the offending behaviour are identified and addressed through treatment and support services, while the person is monitored by the court. However, in this approach there is significant reliance upon external services to support clients and hence, for this to be implemented in the Australian context a significant injection of resources into health and welfare services would be required.

Mechanisms should be in place to divert and support people with mental illness and intellectual/cognitive disability throughout all stages of the criminal justice system. For diversion to be available:

- More funds need to be injected into community mental health services, housing, general health care and support services;

- Education, training and appropriate screening tools for Police to identify and divert the mentally ill and/or intellectually/cognitively disabled. A precursor to the Police being able to divert people is that services are available to assist people; and

- Court staff and legal representatives need to be able to identify mentally ill and/or intellectually/cognitively disabled people and court processes must be devised where people can be diverted and referred to, and supported by, relevant services.

4.3.3 Risk of inappropriate and indefinite detention

The NATSILS hold serious concerns in relation to people declared unfit to plead or mentally/cognitively impaired at the time of offending. Around Australia these people can either be placed on remand until a psychiatrist's report is completed or placed on supervision orders. The concern is that despite legislative requirements for psychiatrist's reports to be completed within 21 days, as is the case in Queensland, this is not often enforced in practice and it is not unusual for people to spend up to 3 months on remand and in some cases, up to 12 months on remand waiting for these reports. The ATSILS have witnessed numerous cases in which a person spends a longer period on remand than the sentence they receive upon conviction, or would have received if convicted.

In relation to supervision orders, in many cases in the Northern Territory supervision orders involve custodial supervision. Custodial supervision involves supervision by way of detention at a correctional facility or at another 'appropriate place' which is deemed so by the court. In practice however, no such alternatives have been established and hence, incarceration in the same correctional centres as all other prisoners is most commonly the result. Supervision orders in the Northern Territory have no expiry date. The only way for an order to cease is if the Court accepts expert evidence that the person subject to the order is no longer at serious risk of harm to the community or themselves. The result is that once people are put on supervision orders, there is a real risk of being held indefinitely. CAALAS and NAAJA both have clients who have been detained on supervision orders for years beyond the likely length of sentence they would have received if they were fit or not mentally impaired at the time of offending.

In Western Australia, where a similar regime exists, a man has been detained under fitness to plead legislation for ten years despite the fact that the maximum sentence he would have received if convicted would have only been two years.

As NAAJA has pointed out in its submission, the main barrier to justice that people face when dealt with under fitness to plead legislation arises not from major flaws in the legal system, but from the lack of alternatives that would allow a person to be appropriately supervised in a non-custodial setting. Having such places available would allow for people before the courts to remain on bail rather than be remanded in custody and would allow people to be placed on non-custodial supervision orders rather than being held in prison

indefinitely.[12] For specific case studies which further highlight this issue please refer to NAAJA's submission.

4.3.4 Mandatory sentencing

Mandatory sentencing regimes exist in the Northern Territory and Western Australia. Mandatory sentencing 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. A courts ability to consider all factors relevant to the offending during sentencing is a fundamental principle of our justice system. Such approaches to sentencing are completely inappropriate and ineffective for a person with a cognitive disability as the person may not fully understand the connection between the offending behaviour and the prison experience.[13]

There are further concerns in relation to a period of imprisonment imposed under minimum mandatory sentencing laws, given that the sentence of imprisonment will usually be relatively short. As a result, prisoners 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.[14]

4.4 Prison

There is still a significant shortage in resources allocated to diagnosis, treatment and prevention of mental illnesses within prisons. The Special Rapporteur on the Right to Health has observed that current mental health services are insufficient to treat the number of prisoners who suffer from mental illness and that individuals with mental illness are significantly over-represented in prison.[15]

The Government's Draft Baseline Study for the National Human Rights Action Plan noted that

> The Australian Institute of Health and Welfare has found that 37% of prison entrants reported having a mental health disorder at some time.[16] The Report found that 12% of all managed health problems in prisons concerned mental health issues.[17] The Australian Bureau of Statistics has reported that 41% of people who have been in prison had experienced mental illness, which is twice the prevalence of people who had not been in prison.[18]

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[12] NAAJA, Response to the Australian Human Rights Commission Issues Paper: April 2013 Access to justice in the criminal justice system for people with disability (2013) 7-8.

[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)

[14] CAALAS above n 9; 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.

[15] Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* Anand Grover, Un Doc A/HRC/14/20/Add.4 (3 June 2010) at [69].

[16] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2009*, 2009, p x.

[17] Ibid, p 85.

[18] Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing 2007*, 2007.

And that

> In NSW, a 2011 report[19] found that the majority (87%) of young people in custody were found to have a psychological disorder. Possible intellectual disability was also common, with 20% of Aboriginal and Torres Strait Islander young people in custody assessed as having a possible intellectual disability and 7% of the non-Indigenous cohort. A 2008 study[20] examining over 2700 people who have been in prison[21] found that 28% of prisoners experienced a mental health disorder (defined as having any anxiety, affective or psychiatric problem in the past 12 months), 34% had a cognitive impairment and 38% had a borderline cognitive impairment.

In a 2006 inquest, the South Australian Coroner, Ms Sheppard, gave a summary of the inadequacy of mental health services in South Australian prisons quoting Dr Kenneth O'Brien, Director of Forensic Mental Health Services. She stated:

> Dr O'Brien gave a vivid description of the mental health presence in country prisons in South Australia. According to Dr O'Brien, in non-metropolitan prisons, there are no psychologists, social workers who have mental health experience, or dedicated mental health nurses available to handle mentally ill prisoners. Whilst this multidisciplinary mental health team structure exists in the community, it is not available in country prisons. Medical practitioners and nurses are not employees of the DCS and may only offer their services to prisoners who are entitled to refuse if they wish.
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> Dr O'Brien emphasised that the present situation whereby mentally ill prisoners are seen once a month is completely inadequate. He states that there are simply too many prisoners to be seen in a short period of time during those clinics. Despite previously bringing the problem to the attention of government ministers and his superiors, he claims that there has been no improvement over 25 years in the numbers of people he must see in a short period of time. His colleagues in private practise may spend 45 minutes to an hour with every patient they see, whereas Dr O'Brien has an average of about 7–10 minutes with each prisoner he sees in his clinics. According to Dr O'Brien, this is partly the reason why it is so impossible to get psychiatrists to work in prison health service or to attend prisons.
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> Dr O'Brien expressed his views as follows:
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> 'I think it is scandalous that there aren't an adequate number of funded mental health nursing positions in South Australian gaols, and it is scandalous that most gaols do not have a psychologist and there is nothing resembling an adequate mental health service in our prisons.'
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> As to the role played by visiting general practitioners, Dr O'Brien said that his experience of general practitioners in country towns is that they may have little or no interest in mental health. The level of knowledge and competency varies amongst general practitioners providing services to country prisoners.[22]

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[19] D Indig et al, *2009 NSW Young People in Custody Health Survey: Full Report,* Justice Health and Juvenile Justice, 2011.

[20] E Baldry et al, *A critical perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System*, 2008.

[21] Reference to people who have been in prison is used because the data for this study is drawn from two data collections (2001 NSW Prisoner Health Survey and the NSW State-wide Disability Services of Corrective Services client database) and those involved may have subsequently been released.

[22] See www.courts.sa.gov.au/coroner/findings/2006/walker.

Given the over-representation of Aboriginal and Torres Strait Islander peoples in prison and the high rates of mental health concerns amongst prisoners, access to culturally appropriate mental health services within prisons are critical. While significant injections of funding have been made in recent years into the reform of the mental health sector, it is unclear as yet how this will impact upon the services provided within prisons. Ensuring that people in prison have access to mental health diagnosis, treatment and support services is of direct benefit to the general public as it greatly contributes to reducing the likelihood of recidivism.

4.5 Release and post-release

A shortage of diagnostic, treatment and support services within prisons also affects the ability of individuals to successfully apply for parole. Without being able to access the necessary services, those with non-parole periods have little or no chance of being granted parole and frequently simply serve their full time without receiving any rehabilitative treatment. In addition, in some jurisdictions cognitive impairment is a barrier to accessing prison treatment programs targeted at offending behaviour. In the Northern Territory, a relatively high proportion of Aboriginal and Torres Strait Islander prisoners, often those affected by FASD or a history of volatile substance abuse, are unable to access the major violent offender and sex offender treatment programs.

Post-release, the under-resourcing of health and welfare services comes back in to play again as without access to these the circumstances that lead to a person's original offending are likely to reappear and the chances of recidivism are increased.

5. Recommendations

1. The development of culturally appropriate assessment tools for mental illness and cognitive impairment, including the development of a FASD diagnostic tool;
2. Amendment to relevant legislation to recognise FASD as a registered disability;
3. Improved access to screening and assessment services, particularly in remote communities;
4. Increased funding for a range of community-based support services, including health, welfare and supported accommodation;
5. Increased education and training for professionals in the criminal justice system in identifying disability and how to respond appropriately;
6. Mandatory health and hearing checks to be performed on anyone who comes in contact with the justice system and has communication difficulties. This should occur even if individual police or lawyers consider that the communication difficulties are arising from cross-cultural communication and/or other issues.
7. Implementing stronger measures that require police and courts, wherever possible, to deal with people with mental illness or cognitive disabilities who are in conflict with the law without resorting to judicial proceedings and detention;

8. The introduction of mental illness and cognitive disability assessments being readily available through permanent staff located at adult and children's courts to make on the spot assessments;

9. The introduction of increased diversion options for courts;

10. 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;

11. The repeal of mandatory sentencing legislation;

12. Establishment of forensic care facilities in every jurisdiction so that those found unfit to plead or mentally impaired at the time of offending are not placed within prisons; and

13. Significant increase in funding for culturally competent health and support services within prisons.

6. Conclusion

The criminal justice system should not be seen as a replacement for community based support and care services or as an effective mechanism for addressing people's needs in relation to mental health and cognitive disabilities. The criminalisation of care needs to stop and genuine health/welfare responses need to be implemented and adequately resourced to ensure that people with disability receive equal access to justice.

Given the higher rate of mental illness and cognitive disability amongst Aboriginal and Torres Strait Islander peoples, in conjunction with the disproportionate rates at which Aboriginal and Torres Strait Islander peoples come into contact with the criminal justice system, a specific focus on the needs of Aboriginal and Torres Strait Islander peoples is warranted. Central to addressing the existing barriers faced by Aboriginal and Torres Strait Islander peoples with disability will be the development of unique and culturally competent responses that reflect the precise needs of Aboriginal and Torres Strait Islander peoples.