Indefinite detention of people with cognitive and psychiatric impairment

Submission to Senate Standing Committee on Community Affairs

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Who we are

The Australian Lawyers Alliance (‘the Alliance’) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

Introduction

1. The Australian Lawyers Alliance (‘the Alliance’) welcomes the opportunity to have input into the issues raised by the terms of reference of the Senate Standing Committee on Community Affairs Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia. This submission makes comments on 1 a, b, c, e, i and n of the Terms of Reference.

2. A wide variety of definitions of cognitive and psychiatric impairment have been used in the studies consulted. The Alliance has combined various definitions to interpret the phrase ‘cognitive and psychiatric impairment’ to refer to individuals who are considered intellectually disabled, with an IQ of below 70, borderline intellectually disabled, with an IQ of between 70 and 80, or who have an acquired brain injury (ABI), including foetal alcohol syndrome. Mental illnesses may coincide with these impairments but mental illness and cognitive and psychiatric impairment are not synonymous terms.

3. Clear definitions are important, although there is currently a lack of clarity in this area. Brain Injury Australia, for example, includes foetal alcohol syndrome in its definition of ABI, while NSW Health considers it to be a separate condition. The Productivity Commission in its report on Disability Care and

\[\text{\footnotesize\textsuperscript{2}}\]

\[\text{\footnotesize\textsuperscript{3}}\]

\[\text{\footnotesize\textsuperscript{4}}\]
Support appeared to consider the needs of individuals with psychiatric impairment and mental health challenges together, which will not always be appropriate.  

a. The prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia

4. People with cognitive and psychiatric impairment are sometimes detained in health care facilities, although data suggests that a significant proportion of the prison population also have cognitive and psychiatric impairment. Available data is sparse, with prisoner health surveys not routinely collecting data on whether prisoners have cognitive and psychiatric impairment. Estimates of the proportion of individuals in prisons with cognitive impairment or intellectual disabilities ranging from 8 to 20 per cent in New South Wales, to a national figure of 12 per cent of prisoners having an intellectual disability (IQ less than 70) and a further 30 per cent having a borderline intellectual disability (IQ 70-80).  

5. These figures do not capture other forms of cognitive or psychiatric impairment such as ABI. Figures from the Australian Institute of Health and Welfare indicate that up to 50 per cent of male and 38 per cent of female

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prisoners may have ABI, compared to 17 and 9 per cent of men and women respectively in the general population.

6. This lack of clarity about the extent of the incidence of cognitive or psychiatric impairment in prisons presents a serious challenge to ensuring the needs of these prisoners are adequately met during their period of incarceration.

7. The ongoing overrepresentation of Indigenous Australians in prisons is also a matter of concern. In 2011, for example, while Indigenous Australians represented 2 per cent of the general Australian population, in prisons this cohort represents 27 per cent of the population.8

8. In addition to overrepresentation in prisoner populations, individuals with cognitive or psychiatric impairment are sometimes detained indefinitely in health care facilities. Individuals with ABI, for example, can be placed in nursing homes or similar aged care facilities indefinitely.9 Housing young people in these facilities is clearly inappropriate. The Alliance is not aware of any centralised state and territory based or national data indicating how many people with cognitive and psychiatric impairment are detained or housed in nursing homes or similar facilities.

b. The experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely

9. Persons with a cognitive or psychiatric impairment can be among the most vulnerable in society. Their ability to communicate can be compromised, or

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there can be a tendency to question the accuracy any disclosures of abuse or mistreatment.

10. These challenges have led to systematic abuse of some people detained in care facilities indefinitely, as revealed in the recent Senate Standing Committee on Community Affairs inquiry into violence, abuse and neglect of people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disabilities, and culturally and linguistically diverse people with disabilities (Senate Inquiry into disability and institutions).10

11. While that inquiry was broader than those with cognitive and psychiatric impairment, as it included individuals with physical disability, many of the findings were relevant to those with cognitive and psychiatric impairment. The establishment of the present inquiry was one of the recommendations emanating from that Inquiry.11

12. The Senate Inquiry into disabilities and institutions revealed that individuals with cognitive and psychiatric impairment have been subjected to violence, abuse and neglect, including sexual misconduct. Much of this treatment would amount to cruel, inhuman or degrading treatment or even torture under the

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10 Senate Standing Committee on Community Affairs, Report: Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability, 25 November 2015.

11 Recommendation 8.
UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).\textsuperscript{12}

13. Those detained in prisons generally have less protections than those in medical facilities. The Aboriginal Disability Justice Campaign has detailed some of the experiences of some Indigenous Australians detained in prisons in the Northern Territory and Western Australia, including being subjected to chemical restraints and detained for nearly two years on traffic offences, due to being found unfit to plead.\textsuperscript{13}

14. The Australian Human Rights Commission has also highlighted the risk of violence, abuse and neglect faced by people with disability in institutional settings.\textsuperscript{14} While evidence suggests that women with disability are at particular risk of these forms of abuse, there are no national records on the prevalence and nature of the violence.\textsuperscript{15}

15. The Alliance believes a national survey of violence, abuse and neglect of people with cognitive and psychiatric impairments in institutional settings, disaggregated by types of abuse experienced, sex, cultural or linguistic background, sexuality and gender identity and other factors should be

\textsuperscript{12} UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 1, 16.

\textsuperscript{13} Aboriginal Disability Justice Campaign, Submission to the Senate Inquiry into Abuse Neglect and Exploitation of People with Disabilities: The Use of Restrictive Practices in Correctional Settings in Western Australia and the Northern Territory, Submission No. 159 to the Senate Standing Committee on Community Affairs,

\textsuperscript{14} Australian Human Rights Commission, Information concerning Australia and the Convention on the Rights of Persons with Disabilities: Australian Human Rights Commission submission to the UN Committee on the Rights of Persons with Disabilities (2013), [58].

\textsuperscript{15} Australian Human Rights Commission, Information concerning Australia and the Convention on the Rights of Persons with Disabilities: Australian Human Rights Commission submission to the UN Committee on the Rights of Persons with Disabilities (2013), [60].
conducted urgently so policy makers and legislators can gain a comprehensive picture of the risks faced and how they might best be overcome.

c. The differing needs of individuals with various types of cognitive and psychiatric impairments such as foetal alcohol syndrome, intellectual disability or acquired brain injury and mental health disorders

16. Often mental illness and cognitive impairment are conflated. This is problematic for people with cognitive impairment, because the medical model utilised in the treatment of mental health isn’t necessarily effective in assisting people with cognitive disabilities in the criminal justice system. Cognitive impairment is often masked as people can become very good at hiding their disabilities to ‘fit in’, or because strategies for identification are not well developed. Identification of cognitive impairment is complicated by the fact that sufferers may function very well in some areas of their lives and not at all in others.

17. The Aboriginal Disability Justice Campaign has pointed out challenges faced by Indigenous Australians with foetal alcohol syndrome. Those living in remote areas do not have access to the early intervention or specialist services they need at a young age. The behavioural problems they develop mean they can be excluded from attending school and marginalised in their communities. Concerning behaviours can develop into violence, presenting a risk of harm to others. Their circumstances become increasingly complex, making it more unlikely that they can be integrated into either Indigenous or mainstream support services.16 This background must be accounted for when

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16 Aboriginal Disability Justice Campaign, *Submission to the Senate Inquiry into Abuse Neglect and Exploitation of People with Disabilities: The Use of Restrictive Practices in Correctional Settings in*
Indigenous Australians with foetal alcohol syndrome are detained in correctional or other facilities. It is more appropriate for them to be detained in health care rather than correctional facilities.

18. A person with an IQ below 70, who also has “significant difficulties in adaptive behaviours and daily living skills such as self-care, communication and community participation” is considered to have an intellectual disability. The Centre for Developmental Disability Health Victoria has prepared guidance on working with people with intellectual disability in health care settings. Much of this guidance will also be relevant in correctional facilities. It provides guidance on how to best communicate with people with varying levels of intellectual disability, emphasising the importance of respecting all individuals and endeavouring to communicate with them in a manner that ensures they can be understood.

19. Individuals with acquired brain injuries (ABIs) may be significantly overrepresented in prison populations. Some ABIs may cause an increase in aggressive, violent or criminal behaviour. Despite this fact, however, there are inadequate services available to treat these injuries. Investing in treatment

[Western Australia and the Northern Territory, Submission No. 159 to the Senate Standing Committee on Community Affairs.]


can have long term positive impacts, as the individual can become better acquainted with their condition and techniques to manage it, reducing the likelihood of reoffending.\textsuperscript{20} This inadequacy is likely to mean that individuals are being detained for longer and more often than is necessary.\textsuperscript{21}

20. The Alliance believes it is appropriate for all persons with cognitive and psychiatric impairment to have an advocate or guardian that they work with in managing their detention. These advocates / guardians should have adequate training in working with individuals with the impairment in question, and should be able to assist them in ensuring detention does not exacerbate their symptoms and indeed contributes to amelioration of their conditions where possible.

21. It is also important that adequate treatment is available for cognitive and psychiatric impairment for detained individuals. We suggest that all Australian governments work collaboratively to develop a best practice model on how to best treat individuals with cognitive or psychiatric impairment in correctional, health care or other facilities. This model should include health care needs and how to respond to disclosures of abuse, mistreatment or neglect. It should also ensure that adequate mechanisms for these disclosures to be made in an environment of respect and trust are in place in all places in which individuals with cognitive and psychiatric impairment are detained.


e. Compliance with Australia’s human rights obligations

22. Australia’s international human rights obligations provide significant detail in relation to the rights of individuals being detained. The Convention on the Rights of Persons with Disabilities (CRPD), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment (CAT) all contain obligations that have direct bearing on the detention of persons with cognitive and psychiatric impairment. The UN Convention on the Elimination of Racial Discrimination (CERD) is also relevant to Indigenous Australians and people from culturally and linguistically diverse backgrounds.

23. Three articles of the CRPD are of particular relevance. Article 13 requires that individuals with disabilities have access to justice on an equal basis with others. Article 14 specifies that persons with disability enjoy the right to liberty and security of the person on an equal basis with others. Article 15 guarantees that persons with disability shall be free from torture and other cruel, inhuman or degrading treatment or punishment.

24. On its review of Australia’s implementation of its obligations under this Convention, the Committee on the Rights of Persons with Disabilities made recommendations to Australia with respect to each of these articles. Australia should “ensure that all persons with disabilities who have been accused of crimes and are currently detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation”.22

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22 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia (2013) CRPD/C/AUS/CO/1, [30].
25. In relation to article 14, the Committee recommended that Australia, as a matter of urgency:

a. End the unwarranted use of prisons for the management of unconvicted persons with disabilities, focusing on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention;

b. Establish mandatory guidelines and practice to ensure that persons with disabilities in the criminal justice system are provided with appropriate support and accommodation;

c. Review its laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, and repeal provisions that authorize involuntary internment linked to an apparent or diagnosed disability.¹²³

26. Regarding article 15, the Committee recommended the establishment of an independent national prevention mechanism to monitor places of detention, to ensure that “persons with disabilities, including psychosocial disabilities, are not subjected to intrusive medical interventions”.¹²⁴ Such mechanisms are envisaged in article 33 of the Convention, as well as under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

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¹²³ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia (2013) CRPD/C/AUS/CO/1, [32].

¹²⁴ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia (2013) CRPD/C/AUS/CO/1, [36].
27. Australia has not yet ratified the OPCAT, although it is a signatory. The Alliance believes that the Commonwealth should ratify this Protocol and establish an independent national prevention mechanism as a matter of urgency. All other recommendations of the Committee on the Rights of Persons with Disabilities should also be implemented.

28. A number of individual communications have been filed with the Committee on the Rights of Persons with Disabilities have been filed regarding the detention of individuals with disabilities in Australia. The Alliance is monitoring the outcome of these complaints.

29. The ICCPR contains an obligation to refrain from arbitrarily depriving individuals of liberty: article 9. For those who are deprived of their liberty legitimately, an obligation to treat them with humanity and respect exists: article 10. The UN Working Group on Arbitrary Detention has made it clear that detention of an individual with a disability against their will due to denial of their capacity constitutes arbitrary detention. According to the Human Rights Committee, which monitors the implementation of the ICCPR:

The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law. The procedures should ensure respect for the views of the individual and ensure that any

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25 See the list of pending cases before the Committee on the Rights of Persons with Disabilities at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Tablependingcases.aspx.

representative genuinely represents and defends the wishes and interests of the individual.\textsuperscript{27}

30. As mentioned above in response to b., the conditions that some individuals with cognitive and psychiatric impairment may also violate provisions of the CAT prohibiting torture and cruel, inhuman or degrading treatment or punishment.

\textbf{i. The role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system}

31. There are between four and 10 separate programs or legislative systems in place in each state and territory that impact on people with cognitive and psychiatric impairment, or seek to divert them from engagement with the criminal justice system: at least 51 programs or provisions across the country. The Alliance is not in a position to assess the accessibility and efficacy of these programs.

32. A number of these programs are broadly focussed on mental health and/or disabilities and may impact on individuals with cognitive and psychiatric impairment either as a factor of comorbidity or because cognitive and psychiatric impairment is considered a mental health or disability issue. Others focus only on one type of cognitive and psychiatric impairment, such as intellectual disability. Often state-based health services will also have a role to play in diagnosing and treating cognitive and psychiatric impairment.

33. This plethora of services suggests that authorities recognise the magnitude of the problem faced by individuals with cognitive and psychiatric impairment.

\textsuperscript{27} Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, [19] (references omitted).
being detained. The pressing need, however, is for a nationally consistent approach based on the best practice learnings of many of these programs. It would be appropriate for the Commonwealth government to play a coordination role in establishing this best practice approach. The Alliance believes that the Council of Australian Governments (COAG) should place this issue on its agenda.

n. The prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses

34. The Aboriginal Disability Justice Campaign published a report in 2012 detailing the experience of Indigenous Australians with cognitive impairment being imprisoned and detained indefinitely.\(^{28}\) That report highlighted a number of challenges. The majority of Indigenous Australians with cognitive impairment who are imprisoned have combinations of disadvantage. Many services, however, have specific entry criteria. This group face significant difficulties accessing services that address only one form of disadvantage.

35. According to that report, Indigenous Australians with cognitive impairment spend longer in custody than people without cognitive impairment, have fewer opportunities in terms of program pathways when incarcerated, are less likely to be granted parole, and have substantially fewer options in terms of access to programs treatments. They cycle in and out of detention, causing disconnection from their local communities and support services.

36. This report provides valuable insight into the experience of Indigenous Australians with cognitive and psychiatric impairment. The Alliance supports the recommendations made in the report, and emphasises the importance of considering the unique challenges faced by Indigenous Australians with cognitive or psychiatric impairment coming into contact with the criminal justice system or other forms of detention.

**Recommendations:**

The Australian Lawyers Alliance makes the following recommendations:

- A national survey of violence, abuse and neglect of people with cognitive and psychiatric impairments in institutional settings, disaggregated by types of abuse experienced, sex, cultural or linguistic background, sexuality and gender identity and other factors, to gain a comprehensive picture of the risks faced and how they might best be overcome, should be conducted;

- All persons with cognitive and psychiatric impairment who are detained should have access to an advocate or guardian that they work with in managing their detention. These advocates / guardians should have adequate training in working with individuals with the impairment in question, and should be able to assist them in ensuring detention does not exacerbate their symptoms and indeed contributes to amelioration of their conditions where possible;

- Australia’s international human rights obligations, including the right to liberty and security of person, the right to be free from discrimination on the basis of disability or race and the right to be free from torture and other cruel, inhuman or degrading treatment or punishment must underpin treatment of cognitive or psychiatrically impaired individuals.

- Adequate treatment should be available for cognitive and psychiatric impairment for detained individuals. All Australian governments should come together to develop a best practice model on how to best treat individuals with
cognitive or psychiatric impairment in correctional, health care or other facilities. This model should include health care needs and how to respond to disclosures of abuse, mistreatment or neglect. It should also ensure that adequate mechanisms for these disclosures to be made in an environment of respect and trust are in place in all places in which individuals with cognitive and psychiatric impairment are detained;

- Australia should establish a national prevention mechanism to inspect all places where cognitive and psychiatrically impaired people are detained;
- Australia should ratify the OPCAT as a matter of priority;
- The Commonwealth government should play a coordinating role in all state and territory governments coming together to develop best practice models for working with and detaining individuals with cognitive and psychiatric impairment. Community organisations working with these individuals and health care professionals should be intrinsically involved in developing this best practice model. The Alliance believes that COAG should place this issue on its agenda.