



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Mr Jonathan Smithers  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: [nathan.macdonald@lawcouncil.asn.au](mailto:nathan.macdonald@lawcouncil.asn.au)

Dear Mr Smithers,

### **Productivity Commission Inquiry into Mental Health**

Thank you for the opportunity to suggest issues for inclusion in the Law Council's submission to the Productivity Commission inquiry into the social and economic benefits of improving mental health ("the Inquiry").

The Law Society has consulted with its policy committees in relation to the questions on justice, child safety, and mentally healthy workplaces contained in the Productivity Commission Issues Paper on this topic released in January 2019 ("the Issues Paper"). We would like to provide the following recommendations for inclusion in a Law Council submission.

#### **1. Justice**

*Support for Indigenous Australians with cognitive and mental impairments who come into contact with the criminal justice system*

The Law Society recommends consideration of the attached article "Indigenous Australians, mental and cognitive impairment and the criminal justice system: A complex web" which sets out the key systems and legal issues as they relate to Indigenous Australians with cognitive and mental impairments coming into contact with the criminal justice system. These issues are discussed in more detail in the 2015 University of NSW study *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System*.<sup>1</sup> We recommend consideration of this very comprehensive report and have extracted and attached from that report recommendations and solutions.

We note that these issues have been the subject of a number of other reviews and inquiries, including the NSW Law Reform Commission review of *People with cognitive and mental health impairments in the criminal justice system*<sup>2</sup> and the Australian Law Reform

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<sup>1</sup> Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of NSW, 2015), online: <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:37093/binb10f2bda-8816-4112-aeeb-6cd6d8efe6f7?view=true>

<sup>2</sup> NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system*, Report No 135 (2012)

Commission Report on *Equality, Capacity and Disability in Commonwealth Laws*.<sup>3</sup> We suggest also that to inform its current inquiry, the Productivity Commission consider the discussion in the ALRC's 2018 *Pathways to Justice* Report in respect of fitness to stand trial regimes (at [10.60] to [10.84]).

We further recommend consideration of the 2018 policy paper prepared by Gilbert + Tobin on ending discrimination against people with Foetal Alcohol Spectrum Disorder ("FASD")<sup>4</sup> in NSW law and policy. People with FASD are likely to fall outside of definitions of cognitive impairment and mental illness, and are thereby unable to access education and social security supports, as well as exemptions and other considerations afforded by the criminal justice system.

We also note the 2013 study by Legal Aid NSW profiling the 50 highest users of legal aid services in the State between July 2005 and June 2010. The findings of the study indicated that all of these individuals had complex needs. Of the 50 users, 46% had received a mental health diagnosis, and nearly a third had primary carers with a disability (most commonly a psychiatric disability). The study concluded that:

The findings provide evidence to inform the development of a new, intensive legal aid service that provides targeted, specialist services to a small group of complex needs clients at the same time as brokering a package of police, mental health, education, housing and human services to support this group of clients who are amongst the most disadvantaged people in the community.<sup>5</sup>

#### *Effective service delivery to Indigenous peoples*

The Law Society supports a cross-disciplinary, person-centred, holistic, flexible and early intervention based approach to the delivery of services, including legal services, to people with mental health needs in the justice system. In respect of Indigenous people, those services must be culturally and disability safe and appropriate in order to be effective. The services must also not stigmatise individuals, and be trauma-informed (in particular, be intergenerational trauma-informed). Those involved with service delivery must be properly trained to do so to Indigenous people. Critically, Indigenous-led knowledge and solutions must be properly resourced, as should Indigenous community mental health services.

We note the work of the Justice Health & Forensic Mental Health Network in NSW ("JHFMHN"), which provides health care in a complex environment to people in the adult correctional environment, to those in courts and police cells, to juvenile detainees and to those within the NSW forensic mental health system and in the community. There are equivalent agencies to JHFMHN in other jurisdictions in Australia, including Forensicare in Victoria and the State Forensic Mental Health Service in Western Australia. With reference to the NSW experience, our members note that JHFMHN consultants attend most major courts in NSW, and that engagement levels are high as individuals are ready to engage at a time of crisis. In our view, JHFMHN – and comparable services in other jurisdictions – should be resourced to be expanded, particularly to regional, rural and remote areas. In the

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<sup>3</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

<sup>4</sup> Gilbert + Tobin, *When your disability doesn't fit: Ending discrimination against people with FASD in New South Wales law and policy*, September 2018. Available at: [https://assets.brandfolder.com/pei5v3-e3x0sw-8llyzj/original/FASD%20Fetal%20Alcohol%20Spectrum%20Disorder%20Advocacy%20Paper%20\(NSW\)\\_IssueC\\_310818.pdf?qa=2.192820514.921581416.1535959644-2012191321.1529559734](https://assets.brandfolder.com/pei5v3-e3x0sw-8llyzj/original/FASD%20Fetal%20Alcohol%20Spectrum%20Disorder%20Advocacy%20Paper%20(NSW)_IssueC_310818.pdf?qa=2.192820514.921581416.1535959644-2012191321.1529559734)

<sup>5</sup> Legal Aid NSW, *High service users at Legal Aid NSW*, June 2013, 4, online: [https://www.legalaid.nsw.gov.au/data/assets/pdf\\_file/0004/16537/Legal-Aid-NSW-Study-on-high-service-users-June-2013.pdf](https://www.legalaid.nsw.gov.au/data/assets/pdf_file/0004/16537/Legal-Aid-NSW-Study-on-high-service-users-June-2013.pdf)

absence of face to face engagement, consideration should at least be given to the use of technology, such as AVL or video suites in regional, rural and remote locations.

### *Diversion of young people with cognitive and mental health concerns*

The prevalence of cognitive and mental health impairments among young people who come in contact with the juvenile justice system is high. The Law Society has previously submitted that strategies which seek to deal with this group of vulnerable young people must prioritise a therapeutic approach.<sup>6</sup>

A study published by JHFMHN and Juvenile Justice NSW in December 2017, found that 83.3% of young people in custody in NSW met the threshold for a psychological disorder.<sup>7</sup> However, despite the high rates of mental health illness for juveniles in the criminal justice system, rates of diversion in the Children's Court of NSW for young offenders with mental health problems are low.<sup>8</sup> In 2012, the NSW Law Reform Commission found that diversion legislation for people with cognitive and mental health impairments was not effectively utilised due to a perceived lack of accountability for defendants who are diverted and a lack of programs and services to which courts can turn to support a diversion order.<sup>9</sup> The Law Society suggests that these findings are likely to be similarly applicable to juvenile offenders.

### *Court diversion under ss 32 and 33 of the Mental Health (Criminal Procedure) Act 1990 (NSW)*

The Law Society supports greater use of the *Mental Health (Criminal Procedure) Act 1990 (NSW)* ("MHCPA") for young offenders with mental health problems. The advantages for juvenile offenders diverted under the MHCPA is that they have an opportunity to be diagnosed, to have a treatment plan formulated and given appropriate referrals to care and treatment providers. Sections 32 and 33 of the MHCPA are the key provisions utilised to divert young offenders with a mental illness or condition away from the criminal justice system. The provisions provide the courts with greater flexibility to deal with juvenile offenders (for example, they may dismiss the charges and discharge a young person on the condition they obtain a mental health assessment or treatment).

However, the Law Society submits that there are practical difficulties with implementing these legislative provisions. We are of the view that obtaining a mental health diagnosis, followed by a well-resourced therapeutic and treatment program, are the keys to the effective use of diversion legislation for young offenders with mental health issues. We understand that the Adolescent Court and Community Team ("ACCT") (run by JHFMHN) is physically based in some Children's Courts, and facilitates audio-visual linking or teleconferencing to the other Children's Courts. However not every local court which sits as a Children's Court has access to this service.<sup>10</sup>

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<sup>6</sup> Law Society of NSW, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System* (22 February 2011). Available at:

[https://www.lawrefom.justice.nsw.gov.au/Documents/Completed-projects/2010-onwards/Mental-health/Submissions/cref120\\_mh36lawsocietyofnsw.pdf](https://www.lawrefom.justice.nsw.gov.au/Documents/Completed-projects/2010-onwards/Mental-health/Submissions/cref120_mh36lawsocietyofnsw.pdf)

<sup>7</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, '2015 Young People in Custody Health Survey: Full Report' Sydney, New South Wales, Australia: Justice Health and Forensic Mental Health Network. Available at:

<http://www.justicehealth.nsw.gov.au/publications/2015YPICHSRReportwebreadyversion.PDF>, 65.

<sup>8</sup> R Sheehan and A Borowski, 'Australia's Children's Courts Today and Tomorrow. Children's Well-Being: Indicators and Research' vol 7. Springer, Dordrecht, 165 - 185.

<sup>9</sup> NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System – Diversion* (2012), Report 135.

<sup>10</sup> The ACCT clinicians provide a specialised mental health court diversion and consultation liaison service.

The Law Society notes that a key role of the ACCT in NSW is to conduct mental health assessments on young people appearing before the Children's Court, with the aim of identifying those with mental health problems and diverting them to appropriate care and treatment. We therefore submit that while there is a need for sustainable funding for services such as NSW's ACCT to be located at Children's Courts, this must also be attached to increased funding for adequate services to which mental health referrals can be made, including specialist forensic psychiatric hospitals for children.

The Law Society notes that in 2017 the NSW Government launched an adult pilot diversion program to help adult defendants with a cognitive impairment charged with low-level offences access services that address the underlying causes of their offending behaviour.<sup>11</sup> The Cognitive Impairment Diversion program is a joint initiative between the Department of Justice and NSW Health and also provides assistance for defendants to link with the National Disability Insurance Scheme ("NDIS") and other services. The Law Society would strongly support the introduction of such programs for juveniles, to help identify juveniles with cognitive and mental health impairments, prevent further contact with the criminal justice system, and assist in accessing funding under the NDIS.

#### *Exclusion of prisoners from mental health care services under Medicare and the NDIS*

The mental health services available to inmates in Australia are insufficient given the scale of the need arising from demographic and environmental factors. A 2015 study conducted by JHFMHN found nearly 63% of the adult population in correctional centres in NSW had received a mental health diagnosis, most commonly depression and anxiety. In 2010, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health reported that in NSW 43% of prisoners met the diagnostic criteria for at least one mental illness, compared with 15% of adults in the general population. Psychosis was reported as 10 times more prevalent in prisons than in the community.<sup>12</sup>

Despite the high rates of mental illness among prisoners in Australia, people in the criminal justice system are excluded from mental health support under Medicare and the NDIS due to the operation of s 19(2) of the *Health Insurance Act 1973* (Cth) and the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth). A 2015 report by the NSW Inspector of Custodial Services found that the waiting time for people in a correctional centre to see a mental health nurse and psychiatrist was 27 days and 42 days respectively.<sup>13</sup> The Law Society submits that the lack of suitable mental health services available within the justice system in Australia is relevant to the Productivity Commission Inquiry, given the role that mental wellbeing plays in a prisoner's transition back into the community post-release, and the likelihood of recidivism.<sup>14</sup>

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<sup>11</sup> Department of Justice, *Court project to help people with a cognitive impairment* (4 December 2017). Available at: <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/court-project-to-help-people-with-a-cognitive-impairment.aspx>

<sup>12</sup> UN 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* (3 June 2010), 14<sup>th</sup> session, agenda item 3, A/HRC/14/20/Add.4, 70.

<sup>13</sup> NSW Inspector of Custodial Services, *Full House: The growth of the inmate population in NSW* (2015), NSW Government, 53.

<sup>14</sup> N Hancock, J Smith-Merry and K McKenzie, 'Facilitating people living with severe and persistent mental illness to transition from prison to community: a qualitative exploration of staff experiences' (2018), *International Journal of Mental Health Systems*, 12:45.

## 2. Child Safety

As the Issues Paper for the Inquiry notes, mental ill-health is widespread among children and young people who are in contact with the child protection system. The Law Society submits that children and young people and who have suffered trauma which requires intervention of child protection systems need the utmost care. As part of this approach, it is vital that those working in the child protection system undergo appropriate induction and ongoing training that sensitises them to the trauma of the children in the system, and how to respond. This is particularly important for foster carers, as well as case workers, teachers, and health care professionals. It is also essential that governments increase resourcing for secure and therapeutic residential programs for children and young people with highly challenging behaviours, such as Sherwood House, which is operated by the NSW Department of Family and Community Services.

The Law Society further submits that it is important for those caring and working with children in the child protection system to know a child's family medical and mental health history, to the extent that the information will assist them in promoting the child's safety, welfare or well-being. Information exchange provisions, such as s 248 and Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should be utilised to ensure that child protection agencies are able to provide and receive information that promotes the safety, welfare or well-being of the children and young people they have responsibility for, while protecting the confidentiality of the information.

## 3. Mentally Healthy Workplaces

The Productivity Commission Issues Paper on the Social and Economic Benefits of Improving Mental Health notes that "there is currently a large cost associated with mental-ill health in the workforce". The Issues Paper cites a number of estimates of the financial cost of mental illness in the workforce in Australia, ranging from \$2.6 billion to \$9.9 billion per annum. The legal profession is far from immune from the impacts of mental ill-health at work. The *Courting the Blues Report*, published in 2009, found that nearly 31% of solicitors in Australia showed high or very high levels of psychological distress on a clinical measure, compared to 13% of the general population aged 17 and over.<sup>15</sup> A 2011 study by Sharon Medlow, Norm Kelk and Ian Hickie similarly found that "solicitors and barristers exhibited significantly higher levels of psychological distress than did members of the general population". The authors also found that among the 924 solicitors and 756 barristers who participated in the study "there was strong agreement that discrimination was likely to arise against people with depression in their workplaces".<sup>16</sup>

Professional associations such as the Law Society of NSW have an important role to play both in supporting organisations to develop 'mentally healthy' workplaces, and in combating stigma and discrimination against mental illness. In 2016 the Law Society, in collaboration with NSW Young Lawyers and the Australian National University, published *Being Well in the Law: A Guide for Lawyers*. This resource, developed in collaboration with experts from the Australian National University and the University of Sydney, is described as a "toolkit for lawyers", and draws on multidisciplinary knowledge including mindfulness and meditation.<sup>17</sup> The Law Society's website also features a portal detailing initiatives available for lawyers

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<sup>15</sup> N Kelk et al., *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers* (Brain & Mind Research Institute, 2009) 12.

<sup>16</sup> S Medlow, N Kelk and I Hickie, 'Depression and the Law: Experiences of Australian Barristers and Solicitors' (2011), *Sydney Law Review*, 33(4). Available at: <http://classic.austlii.edu.au/au/journals/SydLawRw/2011/31.html>

<sup>17</sup> The Law Society of New South Wales, NSW Young Lawyers and Australian National University, *Being Well in the Law: A Guide for Lawyers* (2016). Available at: <https://www.lawsociety.com.au/resources/mental-health-and-wellbeing>

experiencing difficulty with mental wellbeing, including Lifeline for Lawyers, LawCare, and an independent panel of specialists available for confidential wellbeing consultation service.<sup>18</sup>

If you have any queries about the items above, or would like further information, please contact Mark Johnstone, Director, Policy and Practice, on (02) 9926 0256 or [mark.johnstone@lawsociety.com.au](mailto:mark.johnstone@lawsociety.com.au).

Yours sincerely,



Elizabeth Espinosa  
**President**

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<sup>18</sup> The Law Society of NSW, 'Seeking Mental Wellbeing Help and Support'. Available at: <https://www.lawsociety.com.au/advocacy-and-resources/mental-health-and-wellbeing/seeking-support>

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# INDIGENOUS AUSTRALIANS, MENTAL AND COGNITIVE IMPAIRMENT AND THE CRIMINAL JUSTICE SYSTEM:

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## A COMPLEX WEB

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by Peta MacGillivray and Eileen Baldry

### INTRODUCTION

The over-representation of Aboriginal and Torres Strait Islander people with mental and cognitive impairment in the Australian criminal justice systems ('CJS'), particularly in prisons, is of grave concern. Social justice, human rights and anti-discrimination challenges emerge from the systematic enmeshment of this group in criminal justice systems in all Australian jurisdictions.

In response, there has been recent investigation of the multi-faceted and complex intersections that this group experience in interactions with police, courts, juvenile detention and prisons and the relationship with human service systems (for example housing, health, disability services). In 2012 and 2013 the New South Wales ('NSW') Law Reform Commission ('LRC') tabled reports from its reference *People with cognitive and mental health impairments in the criminal justice system*<sup>1</sup> documenting the significant challenges for people with a disability in contact with the criminal justice system, and recommended significant change to legislation and approaches.

Additionally, since 2011 the *Indigenous Australians with Mental Health Disorders and Cognitive Disability Project* ('IAMHDCD' Project)<sup>2</sup> based at the University of New South Wales has been investigating the life course pathways of Aboriginal and Torres Strait Islander people with mental and cognitive disability in contact with the criminal justice and human service systems. The project is using qualitative research, as well as analysis of a linked dataset of 2731 people, 680 of who are Aboriginal and/or Torres Strait Islander.<sup>3</sup> As part of the project, the views on these pathways and on how system, policy and program dynamics impact Indigenous people and their communities have been sought from the full range of stakeholders that are accountable and responsible for this client group in NSW and the Northern Territory ('NT'). Most importantly, the views of Indigenous people with cognitive and mental impairments with experience in the criminal justice system, as well as family, carers and community members have been collected.

This article will provide an overview of the system and legal issues in NSW that have been identified through the IAMHDCD Project, with reference to the NSW Law Reform Commission Report ('LRCR') on diversion.<sup>4</sup> Initially, an explanation of the experiences that Indigenous people with cognitive and mental impairments have in criminal justice and human service systems will be provided using a case study.<sup>5</sup> This illustrates the critical and fundamental problem of the way the key legal issues that emerge for this group, with police and courts, are a product of cumulative challenges in service system design and function. Finally, key findings in regard to the criminal justice system's syndrome-like interaction with human and community services will be offered, including a summary of the challenges to the successful diversion of Indigenous people with cognitive and mental impairments out of the criminal justice system.

### A PICTURE OF COMPLEX NEEDS AND THE CRIMINAL JUSTICE SYSTEM

This section will provide an account of the breadth and depth of needs that Indigenous people with cognitive impairments have, and the relationship to offending and contact with the criminal justice system. This is informed by the work undertaken as part of the IAMHDCD Project and the NSW LRCR, which includes currently available data. The over-representation of Aboriginal and Torres Strait Islander people in Australia's criminal justice systems has been acknowledged, and is reported on frequently.<sup>6</sup> In NSW, the most recent available data shows that in 2012, 22.9 per cent of adults incarcerated in NSW were Aboriginal or Torres Strait Islander people.<sup>7</sup> However, obtaining accurate data on the prevalence of mental and cognitive impairment in Indigenous communities is difficult, with additional challenges to those that regularly emerge in collecting population data. Lack of access to professionals for competent diagnosis is one difficulty that has emerged, as well as misdiagnosis of certain disorders, and underdiagnosis of others due to cultural bias in testing affecting accuracy.<sup>8</sup> Despite these limitations, Sotiri and Simpson suggest that the incidence of cognitive disability might be twice as prevalent in some Indigenous communities due

to the impact of factors such as economic disadvantage, dispossession and associated inter-generational trauma, foetal alcohol spectrum disorder, and brain damage or brain injury as a result of alcohol consumption, inhalant use, accidents and violence.<sup>9</sup> Furthermore the *NSW Aboriginal Health Plan 2013-2023* cites the social determinants of Aboriginal health—including historical factors, education, employment, housing, environmental factors, social and cultural capital and racism—as being important for addressing health inequality.<sup>10</sup> But these are experienced in addition to the challenges that Indigenous people with impairment face daily. They must negotiate a labyrinth of requirements, events and disadvantages—a complex web which is currently being examined in detail by the IAMHDCD Project. Pathways of individual peoples' life-long trajectories through diverse social, community and criminal justice institutions (often in the context of control rather than support) are presented through close analysis of unique individual quantitative and qualitative administrative data, which illustrates the perverse and damaging outcomes for individuals, families, and communities. Case studies developed using the Mental Health Disorders and Cognitive Disability ('MHDCD') dataset demonstrates the poor integration of system and agency responses, resulting in inadequate service and support across the life course of individuals. The example below illustrates some of the service and system challenges:

Ms K is a 24 year old Aboriginal woman who has been diagnosed as having an intellectual disability. Ms K experiences a range of social difficulties including maintaining appropriate housing, drug use and poor nutrition. She is poor and struggles with everyday functioning. She is enmeshed in the criminal justice system. Ms K has a history of childhood neglect and suspected abuse. Ms K absconded from a diversionary accommodation program, thereby breaking the conditions of a Section 11 bond. Ms K was taken back into custody and a magistrate decided Ms K should not return to the program. Her solicitor was not able to apply for bail until an alternative accommodation option could be found for Ms K in the community. The NSW Department of Ageing, Disability and Home Care ('ADHC') was unable to locate an accommodation option for several months, but eventually, Ms K was released from custody into a supported accommodation service called Comprehensive Lifestyle Accommodation and Support Program ('CLASP') funded by ADHC.<sup>11</sup>

The NSW LRC relied upon case studies like Ms K's, which were developed using state-agency administrative data, to demonstrate how the presence of a cognitive impairment in addition to various poor social determinants of health factors can reinforce and exacerbate offending.<sup>12</sup>

In the case of Ms K this included drug use, mental illness and homelessness, which compounded her difficult life experiences due to her cognitive impairment. Importantly, for individuals such as Ms K, police action such as arrest and being held in police custody or prison may be ineffective in addressing the offending behavior of people with cognitive or mental health impairments, and rather implicate them further into cycles of offending.<sup>13</sup> Furthermore, the NSW LRC identified that broader social or structural factors (social determinants) are relevant in explaining the complex relationship between cognitive and mental health impairment and offending.<sup>14</sup> For instance, in regard to intellectual disability, 'the factors most likely to bring people with intellectual disability into contact with the criminal justice system are related to a number of deficits in life skills due to the lifestyle and the environment in which they grew up, rather than having an intellectual disability itself'.<sup>15</sup> Also of importance is the group of Indigenous people who are embroiled in the criminal justice system with more than one type of impairment or disability along with significant social disadvantages, often referred to as having 'complex needs'.<sup>16</sup> Indigenous people, who have complex problems, find it particularly difficult to find appropriate service provisions are more likely to be imprisoned or involved in the criminal justice system.<sup>17</sup>

Importantly, the experience of how complex needs impact on the lives Indigenous people with impairments can be explained as not just the presence of a number of conditions, but rather it is argued that the combination and co-occurrence of these problems create an additional level of complexity that requires attention in its own right.<sup>18</sup>

### EMERGING ISSUES WITH POLICE AND COURTS

The complex and multi-faceted needs of Indigenous people with mental and cognitive impairments creates particular legal issues which often manifest in high levels of contact with police, courts and prisons. While all of the criminal justice institutions in NSW have experience with complex needs, they vary in their degrees of success in addressing the issues. However, with a dearth of data relating to this group, the resolve to plan and coordinate effective and appropriate responses has been minimal. Yet the absence of reliable data is only one aspect of the challenge, as the inadequacies of integrated, collaborative and culturally appropriate human service systems provide significant barriers.

#### POLICE

Data from the MHDCD dataset, as part of the IAMHDCD Project, suggests that cognitive impairment in combination



with other conditions, especially drug and alcohol use, make it more likely that a person will have contact with police at a younger age than a person with no impairment or only a single impairment.<sup>19</sup> Also, Indigenous youth with co-occurring impairments will come into contact with police approximately two years earlier than their non-Indigenous counterparts at 14 years of age.<sup>20</sup> Aboriginal people in regional and rural NSW report that the police are often the first respondents to a crisis involving Aboriginal people with MHDCD, followed by ambulance services. Often the presence of a cognitive impairment will not be recognised or acknowledged by police; being 'hidden' or misidentified as another kind of impairment, such as being affected by drugs and/or alcohol, or a drug-induced mental health episode. Other issues identified in the community were that Aboriginal people with cognitive and mental health impairments have long histories of offending, and that this is used as a justification for police 'hyper-surveillance' of them in the community. This is seen to bring these individuals into contact with the police more often for non-offending reasons, despite the fact that they are often victims as well, and that this contact does not result in positive outcomes.

#### COURTS

There are various studies that have found people with cognitive and mental health impairments are over-represented in the NSW Local Court jurisdiction for criminal matters.<sup>21</sup> Diversion is considered the most appropriate response when considering how co-occurring impairments influence offending behavior, particularly in the absence of social and care supports. Currently, diverting this group out of the criminal courts is attempted through Section 32 and Section 33 of the *Mental Health (Forensics Provisions) Act 1990* (NSW). If the magistrate considers it appropriate, Section 33 can be applied to people who are seriously mentally ill at the time of their court appearance, otherwise Section 32 is used as the main diversionary mechanism.<sup>22</sup>

However, evidence from the MHDCD dataset indicates that very few people who meet the disability criteria for Section 32 are granted it, with only 142 out of 2731 people being given a Section 32. Aboriginal people are far less likely than non-Aboriginal people to receive a Section 32.<sup>23</sup> The observations and impressions of Aboriginal people, gathered for the IAMHDCD Project, recognise this extreme under use. They believe this is due to the extremely high volumes of matters that magistrates, Aboriginal legal services solicitors and NSW legal aid lawyers deal with in local courts. The IAMHDCD project has identified two significant reasons why high numbers

of Indigenous people who appear in local courts either have their impairments unrecognised by the court, or if they are identified, are left unassisted.

The first is the impact of the drive for efficiency in summary courts, as well as the application of the crime-control model in court processes. The second is in regards to the capacity of solicitors to represent their clients under the high-volume conditions, and lack of viable options in the community.

Firstly, the expansion of 'technocratic justice' is obvious in regional and remote courts in NSW, as demonstrated by circuit court arrangements in the far-western parts of the state. The high numbers of matters heard back-to-back in a circuit court, together with the high caseload for prosecuting police and defence solicitors, appear to compel all court personnel to process matters quickly. This has routinized the handling of matters, including those involving people with mental and cognitive impairment, with little flexibility. Furthermore, the conformity to a crime control model is most identifiable in the heavy reliance on the offending histories of those appearing. This will be the primary source of information used to deliberate on the sentencing of the individual. This static assessment appears to disproportionately impact Aboriginal people with impairments, as they have much longer offending histories.<sup>24</sup>

Secondly, the factors that influence whether someone's impairment will be recognised include whether that person has been allowed bail, and therefore whether the solicitor has had sufficient time to speak with their client to establish their background and any indication of an impairment. Data from the IAMHDCD dataset suggests that people with impairments have a greater number of remand episodes, especially those people with co-occurring disorders.<sup>25</sup> Feedback from solicitors in the field was that they rarely see their client outside of custody before their court appearance. Receiving enough information from a client in the court environment, while a client is in custody, to establish the presence of a cognitive or mental health impairment is challenging. Nevertheless, if a client's impairment is recognised, then the responsibility for making a diversion application or any non-custodial sentencing option generally falls upon the solicitor representing the client, unless the client has an ADHC case manager, a very rare situation for Aboriginal people. In the cases observed for the IAMHDCD Project this was very difficult given that there is little time or capacity to make these arrangements in or out of court, or guarantee that they are available in the community. For

instance, the objective evidence relied upon for a Section 32 application must be accepted by the deciding magistrate. Evidence such as thorough and up-to-date medical reports and assessments are preferred, and if these are unavailable in regional and remote areas, they are disregarded as realistic options. In their absence Section 32 applications are repeatedly futile.

### DISCONNECTIONS BETWEEN COMMUNITY-BASED SERVICES AND CRIMINAL JUSTICE SYSTEM

The criminal justice system's interaction with human and community services can be described as syndromic when it concerns Aboriginal people with cognitive and mental health impairment. The culmination of structural system deficiencies, institutional racism, policy experiments, and service 'silos'—both budgetary and in service terms—leaves a brittle safety net in child, disability and education service areas. Non-criminal justice services and agencies have the most potential for preventative and support capacity, yet their siloed nature counteracts attempts at holistic and integrated support for adults and children with complex needs.<sup>26</sup> Aboriginal adults and children who have these multiple needs often fall outside of the remit of any one service (which are often voluntary) and yet this group cross into the domain of many services, raising questions about the role and responsibilities of government and non-government agencies.<sup>27</sup>

The key challenge emerging is service implementation and delivery for those with complex needs, as this is difficult for one individual service provider or service type to deliver.<sup>28</sup> Attempts at co-location and an 'all under one roof' approach have not adequately provided full service integration. Aboriginal people with mild or borderline intellectual disabilities, who also have drug and alcohol issues or lengthy offending histories, are the most at risk of being excluded from all service support, propelling them back into offending pathways and homelessness.<sup>29</sup> As a consequence, diversion from prison is difficult as services in the community lack the required information and expertise to appropriately and effectively support Aboriginal people with MHDCD and complex needs. This is particularly the case in rural and regional NSW, in addition to the social and economical pressures experienced daily by some Aboriginal communities. Presently, even minimal service integration for the wider community is a challenging endeavor for government agencies. However, Indigenous community controlled health organisations seem well placed to attempt comprehensive service integration—consistent with already established holistic practices. If implemented more broadly, by government and non-government

organisations, preventing the high rates of incarceration of Aboriginal people with cognitive and mental health impairments could be achieved much sooner.

### CONCLUSION

The IAMHDCD Project aims to provide detailed evidence of the experiences of Indigenous people with complex needs cycling through the community and CJS spaces, particularly the systemic 'funneling' of this group into the CJS from an early age. It is suggested that these trajectories, which leave this group much more disadvantaged, are established through the practice and processes of our social, community and CJS organisations and institutions. However, with new detailed understandings of these trajectories, including the multiple intersections of needs such as disability and rehabilitative interventions, we can identify key points for positive and supportive interventions; as well as system failures for reform and change.

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**Baraltja, 2011**  
Gunybi Ganambarr

*Natural earth pigments on bark*  
133cm x 60 cm





# 10. RECOMMENDATIONS AND SOLUTIONS<sup>17</sup>

## 10.1 OVERARCHING PRINCIPLES

Based on the qualitative and quantitative findings of our study, we recommend that the following five principles and associated strategies should underpin policy review and implementation:

Based on the qualitative and quantitative findings of our study, we recommend that the following five principles and associated strategies should underpin policy review and implementation:

### 10.1.1 Self-Determination

Self-determination is key to improving access to and exercise of human rights and to the wellbeing of Aboriginal and Torres Strait Islander people with mental and cognitive disability, especially for those in the criminal justice system.

#### Strategies:

- Indigenous-led knowledge and solutions and community-based services should be appropriately supported and resourced.
- The particular disadvantage faced by women and people in regional and remote areas should be foregrounded in any policy response to this issue.
- Resources to build the cultural competency and security of non-Indigenous agencies, organisations and communities who work with Aboriginal and Torres Strait Islander people with mental and cognitive impairment who are in contact with the criminal justice system should be provided.

<sup>17</sup> The IAMHDCCD project reiterates and endorses the recommendations of the report by the Aboriginal Disability Justice Campaign, *No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment* (2012) and the report by the Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014). Members of the IAMHDCCD project team contributed to these reports based on our research. Many of the findings and recommendations contained in those reports have regrettably not been acted on, so we emphasise their continuing relevance and urgency.

## 10.1.2 Person-Centred Support

Person-centred support which is culturally and circumstantially appropriate is essential for Aboriginal and Torres Strait Islander people with mental and cognitive disability, placing an individual at the centre of their own care in identifying and making decisions about their needs for their own recovery.

### Strategies

- Disability services in each jurisdiction, along with the NDIS should ensure there is a complex support needs strategy supporting Aboriginal and Torres Strait Islander people with disability in contact with criminal justice agencies.
- Specialised accommodation and treatment options for Aboriginal and Torres Strait Islander people with mental and cognitive disability in the criminal justice system should be made available in the community to prevent incarceration and in custodial settings to improve wellbeing.
- Aboriginal and Torres Strait Islander people with mental and cognitive disability who are at risk of harm to themselves or others and who have been in the custody of police or corrections should not be returned to their community without specialist support.

## 10.1.3 Holistic and Flexible Approach

A defined and operationalised holistic and flexible approach in services for Aboriginal and Torres Strait Islander people with mental and cognitive disability and complex support needs is needed from first contact with service systems.

### Strategies

- Early recognition via maternal and infant health services, early childhood and school education, community health services and police should lead to positive and preventive support allowing Aboriginal and Torres Strait Islander children and young people with disability to develop and flourish.
- A range of 'step-down' accommodation options for people with cognitive impairment in the criminal justice system should be available. The NSW Community Justice Program (CJP) provides a useful template.
- Community based sentencing options should be appropriately resourced, integrated and inclusive so they have the capacity and approach needed to support Indigenous people with mental and cognitive disability.



## 10.1.4 Integrated Services

Integrated services are better equipped to provide effective referral, information sharing and case management to support Aboriginal and Torres Strait Islander people with mental and cognitive disability in the criminal justice system.

### Strategies

- Justice, Corrections and Human Services departments and relevant non-government services should take a collaborative approach to designing program pathways for people with multiple needs who require support across all the human and justice sectors
- All prisoners with cognitive impairment must be referred to the public advocate of that jurisdiction.

## 10.1.5 Culture, Disability and Gender-informed practice

It is vital that Aboriginal and Torres Strait Islander people's understandings of 'disability' and 'impairment' inform all approaches to the development and implementation of policy and practice for Indigenous people with mental and cognitive disability in the criminal justice system, with particular consideration of issues facing Aboriginal and Torres Strait Islander women.

### Strategies

- Better education and information are needed for police, teachers, education support workers, lawyers, magistrates, health, corrections, disability and community service providers regarding understanding and working with Aboriginal and Torres Strait Islander women and men with cognitive impairment, mental health disorders and complex support needs.
- Information and resources are needed for Indigenous communities, families and carers, provided in a culturally informed and accessible way.
- The distinct and specific needs of Aboriginal and Torres Strait Islander women should be foregrounded in such education and information.

## 10.2 SERVICE RESPONSES

With these five principles in mind we recommend the following:

### CRIMINAL JUSTICE

#### 10.2.1 Legislation/Sentencing

- Mental illness and cognitive impairment should not be conflated in legislation. There is the need for specific processes and diversionary pathways for people with cognitive impairment.
- Mandatory sentencing has specific and significant negative impacts on Aboriginal and Torres Strait Islander people with a cognitive impairment and its application to this group should be repealed.
- The principle of imprisonment as the last resort should apply to everyone and particular care must be taken to apply this principle to Aboriginal and Torres Strait Islander people with cognitive impairment and people considered unfit to plead under mental health legislation.
- All relevant mental health and forensic legislation should comply with the Convention on the Rights of Persons with Disabilities and the Rights of Indigenous Peoples.
- Indigenous people who are detained under mental health legislation are neither prisoners nor offenders. Legislation, policy and practice should reflect this.

#### 10.2.2 Police

- Ongoing education and training should be provided for police to assist in recognising, understanding and appropriately responding to children, young people and adults with multiple and complex support needs, and cognitive impairment in particular.
- Community-police collaboration should be prioritised to build positive approaches to support children, young people and adult with mental and cognitive disability and complex support needs and to keep them out of the criminal justice system.
- Police Local Area Commands should be accountable for demonstrating community liaison and collaboration with Elders and other Aboriginal community members, including through the Local Area Command Police Aboriginal Consultative Committee (PACC).



### 10.2.3 Legal Aid/Aboriginal Legal Service

- More resourcing should be provided for Legal Aid and Aboriginal Legal Services to allow relationship building with a client to establish their background and any indication of mental or cognitive disability.
- Support for Legal Aid and Aboriginal Legal Services to arrange for assessment and diagnosis where indicated.

### 10.2.4 Court

- Education and training should be provided for lawyers, court support workers and magistrates in recognising, understanding and appropriately responding to in children, young people and adults with complex support needs, cognitive impairment in particular. Particular attention is needed in relation to Fetal Alcohol Syndrome Disorder (FASD).
- A special court list for cognitive impairment and mental health disorders should be introduced in jurisdictions where it does not exist.
- More resourcing should be provided for local courts, especially circuit court in regional areas, and for lawyers to reduce caseloads and allow time for appropriate hearings for Aboriginal and Torres Strait Islander people with mental and cognitive disability.

### 10.2.5 Diversionary programs

- Jurisdictions that have legislative but no actual options for community-based accommodation and support for Aboriginal and Torres Strait Islander people with cognitive impairment should redress this lack as a matter of urgency.
- Specialised disability case managers should be funded to work with solicitors to assist in making applications (such as Sec 32 in NSW) for diversionary programs or non-custodial sentencing options for Aboriginal and Torres Strait Islander people with mental and cognitive disability.
- Diversionary programs that can address underlying causes of offending for Aboriginal and Torres Strait Islander people with mental and cognitive disability, including AOD dependency should be developed.
- Expansion of diversionary options appropriate for Aboriginal and Torres Strait Islander people with mental and cognitive disability, in particular specialist women's programs and greater options for people living in regional and remote areas are urgently required.



## 10.2.6 Corrections

- Screening tools, such as those available for mental health, for cognitive disability including for FASD should be applied for all people on remand as well as those being received on sentence, such as those available for mental health.
- People identified as having a cognitive disability should be diverted from remand to a community support service.
- Programmatic support should be available for people with cognitive disability who do end up in remand, even for very short periods.
- No person should be sent to prison for the purposes of having a psychiatric assessment. Such assessments should be available in the community for consideration by magistrates before sentencing.
- No person with a mental or cognitive disability should be imprisoned in order to access a service.
- No individual with a cognitive impairment should be detained indefinitely in prison. Jurisdictions that currently allow for indefinite detention should legislate for the use of limiting terms for people with a cognitive impairment and abide by the principle of least restrictive support.
- Aboriginal and Torres Strait Islander people with cognitive impairment detained under mental health legislation must be provided support and intervention that is of significant benefit to that person.
- Detention of Aboriginal and Torres Strait Islander people with cognitive impairment under mental health legislation must be accompanied by a justice plan that identifies pathways from high security to low security detention and to community and from the most restrictive to the least restrictive arrangement.
- In-prison programs to address offending behaviour, including alcohol and other drug rehabilitation, should be designed to be inclusive of people with a cognitive impairment and complex support needs.
- Each jurisdiction should ensure there is a culturally appropriate disability support program in prison.
- For all prisoners with disability, remand or sentenced, the NDIA and each corrections agency should come to an agreement regarding assessment, support and referral into the NDIS upon release from prison.
- In each jurisdiction, corrections agencies should build a working relationship with the NDIA (through Local Area Coordinators) and NGOs that work with people with disability to best support people with disability leaving prison.
- Where a person with mental and cognitive disability is imprisoned, a pathway referral out of prison into disability support and case management in the community must be ensured.

## 10.2.7 Post-release

- Resources and funding should be provided to Indigenous organisations to ensure the building of skills and capacity to work with people with a cognitive impairment and complex support needs returning to community after completing criminal justice orders or sentences.
- Specialist long-term accommodation, wrap-around services and case management support should be provided post-release for Aboriginal and Torres Strait Islander people with mental and cognitive disability across the country.



## HUMAN SERVICES

### 10.2.8 Community Services

- Early diagnosis and positive culturally appropriate support for Aboriginal and Torres Strait Islander children and young people with cognitive impairment and complex support needs should be resourced and supported.
- Culturally appropriate support and respite are needed for families and carers of Aboriginal and Torres Strait Islander children with cognitive impairment and complex support needs.
- Aboriginal and Torres Strait Islander children with disability who are in out of home care must be provided with appropriate community and school based support to promote well being and positive life pathways.

### 10.2.9 Schools

- Education and information is required to enable school personnel to better recognise and respond to children with a cognitive impairment and complex support needs.
- Schools where there are enrolments of Aboriginal and Torres Strait Islander children with cognitive impairments should be linked with agencies to provide specialist behaviour interventions where those behaviours are assessed as of concern.
- Culturally appropriate information and support for families of Aboriginal and Torres Strait Islander children with cognitive impairment should be made available through schools in all jurisdictions.

### 10.2.10 Disability

- Improved identification, assessment and referral processes and pathways for Aboriginal and Torres Strait Islander young people with cognitive impairment are required urgently.
- Concerted effort is needed to enable appropriate and early diagnosis and treatment for Aboriginal and Torres Strait Islander children and young people with FASD, particularly through adequate resourcing of professionals and through community education programs.
- Alternative appropriate models of care should be provided to Aboriginal and Torres Strait Islander people with FASD to avoid imprisonment of those unable or unfit to plead.
- Respite options should be provided to families and other members of Aboriginal and Torres Strait Islander communities supporting people with mental and cognitive disability.
- Specialist Indigenous violence intervention programs should be linked with disability supports in Indigenous communities.
- Particular attention must be paid to the planning and support options for Aboriginal and Torres Strait Islander people with mental and cognitive disability and complex support needs through the NDIS.

### 10.2.11 Mental and other health concerns

- Improved referral pathways and greater case coordination between corrections and community-based health providers in regard to medication and therapeutic services and support for Aboriginal and Torres Strait Islander people with mental health disorders and complex support needs.
- Maintenance and provision of up to date medical reports and assessments are vital for consideration in court matters when sentencing Aboriginal and Torres Strait Islander people with mental health disorders and complex support needs
- Culturally appropriate, community-based holistic specialised mental health services able to address the whole range of complex support needs should be available in all areas and communities with significant numbers of Aboriginal and Torres Strait Islander people.
- Indigenous community health care clinics should be resourced to assess and respond to Aboriginal and Torres Strait Islander children and adults, in particular to children with FASD.

### 10.2.12 Housing

- A range of culturally appropriate supported housing, depending on need, should be available in their communities for Aboriginal and Torres Strait Islander people with mental and cognitive disability and complex needs.
- Step down supported housing should be available for Aboriginal and Torres Strait Islander people with mental health disorders and cognitive disability leaving prisons.