IMPRISONMENT OF INDIGENOUS PEOPLE WITH COGNITIVE IMPAIRMENT: WHAT DO PROFESSIONAL STAKEHOLDERS THINK? WHAT MIGHT HUMAN RIGHTS-COMPLIANT LEGISLATION LOOK LIKE?

by Patrick Keyzer and Darren O'Donovan

Recently the Senate released Terms of Reference for an Inquiry into the Indefinite Detention of People with Cognitive Impairment or Psychiatric Illness in Australia.[1] The Senate Inquiry will provide an opportunity for the stories of Marlon Noble, Rosie Ann Fulton and many other Indigenous (and non-Indigenous) Australians to be heard. Marlon Noble spent 10 years in a Western Australian prison even though he had not been convicted of a crime. Rosie Ann Fulton, whose case drew national media attention in 2014, had been charged with criminal offences, but it was found that due to her fetal alcohol syndrome disorder, she would not understand the criminal proceedings and was unfit to plead. Despite the court making a 'supervision order' in her case, Rosie still spent over two years in prison, due to no secure facility being available for her care and support. These experiences have come to symbolise the plight of those who have languished in prisons for years due to the insufficient number of secure care facilities available for people with cognitive impairment in the community. The work and lobbying of sector advocates such as Damian Griffis from First Peoples Disability Network and Patrick McGee of La Trobe University and the Aboriginal Disability Justice Campaign, and academics such as Professor Eileen Baldry from the University of New South Wales, among others, has cut through, and the Federal Parliament now has an opportunity to address the significant human rights issues raised by the Australian Human Rights Commission in their July 2014 report on this topic.

Some of the ways in which the challenges in this area can be addressed may already be known. In November 2014, the La Trobe University 'Transforming Human Societies' Group supported the 'A Line in the Sand' summit in order to generate possible solutions to the over-representation of Indigenous Australians with cognitive impairment in prison.[2] The conference brought together 60 Indigenous and non-Indigenous disability, legal and human rights advocates from around the country, who were recruited on the basis that they have direct experience working with Indigenous people with cognitive impairment in the criminal justice system.

To generate data from this conference, a focus group technique called nominal group technique ('NGT') was used. In an NGT session, participants are asked to provide responses to a particular issue or question, the responses are pooled, and then a secret ballot is conducted to list and rank responses in order of importance.[3] Group consensus is reached without being hampered by uneven group dynamics or power relationships. NGT enables generation of data that is free from confirmation bias and also enables the development of follow-up questionnaires that have content and construct validity.[4]

Conference participants were first asked to identify the six most significant challenges facing Indigenous Australians with cognitive impairment who come into contact with the criminal justice system. These challenges, in the order in which they were ranked by the stakeholders, are as follows:

1. There is a lack of distinctive, culturally responsive sentencing and service outcomes other than prison for people with cognitive impairment. Specifically, there is a need for:
   a) sustainable, stable, secure, individualised (non-congregate) culturally responsive accommodation;
   b) community support and transitional options that are specifically funded and staffed by independent, culturally responsive caseworkers;
   c) institutions which are proactive, responsive and adopt systemic case and risk management; such management should be anchored in using non-punitive, therapeutic approaches, so that restrictions upon individuals' freedoms and family lives are kept to a minimum; and
   d) such services must also connect with, and leverage support from, families and other relevant social services.
2. There is a need for early assessment, diagnosis, support and intervention (including in the juvenile justice system) that prevents criminalisation and that is capable of identifying and addressing root causes of offending/anti-social behaviour.
3. There is a need for targeted, uniform, human rights-focused law reform that:
   a) acknowledges individual needs;
   b) accommodates both support for people with cognitive impairment and protection of the community;

c) addresses the need for tests of capacity to be nuanced;
d) ensures terms are limited and regularly reviewed;
e) incorporates a complaints mechanism; and
f) ensures access to justice and procedural fairness are provided.

4. There is a need for integrated, long-term political will and public sector leadership to respond to the crisis of over-representation of Indigenous people with cognitive impairment in the criminal justice system by building an appropriate framework of responsive policies, administered by agencies that are accountable.
5. There is a need for identification and recognition of people with cognitive impairment by the justice system (for example, lawyers, police, corrections, guardians) that acknowledges individual differences (for example, gender, language) and diversity of situations, conditions and needs.
6. There is a need to raise public awareness and knowledge in the community, within and across the criminal justice system and service systems (including among corrections, among lawyers) to increase understanding regarding why and how Indigenous people with cognitive impairment come into contact with the criminal justice system.

Researchers in the La Trobe Law School have also developed Draft Minimum Legislative Standards for the Senate Inquiry to consider, and are well advanced in administering a national survey which will produce additional useful data for the Inquiry. The legislation could be supported by using the external affairs power (s 51(xxxix) of the *Constitution*).

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PROPOSED DRAFT LEGISLATION: MENTAL IMPAIRMENT AND COGNITIVE DISABILITY (TREATMENT AND SUPPORT) BILL

The goal of this draft legislation is to provide a set of consistent, national minimum principles to avoid the gaps and bureaucratic drift which have marked previous state legislation and practice in the area. The experiences of the last decade underline the need for clear lines of responsibility as well as the need to avoid disconnecting the issue of capacity at criminal trial from the resulting and interconnected obligations of the government to take reasonable steps to help the individual access appropriate services.

The core principles of the Bill are as follows.

1. **Obligation to provide reasonable access to appropriate services**

An identified Minister in every state or territory ('the Minister')[5] shall be responsible[6] for ensuring provision of reasonable access[7] to a secure care facility or other supported accommodation[8] and care and treatment for a person accused of an offence who is found unfit to plead ('the relevant person') by any court of that state or territory by reason of cognitive disability or mental impairment.[9] For the avoidance of doubt, this provision confers jurisdiction on every court of a state or territory, including all inferior and superior courts, to determine for these purposes that a person is unfit to plead by reason of cognitive disability or mental impairment.

2. **Assessment of needs**

Each state and territory will provide adequate resources for the provision of expert reports, where this is required, in order to assess the cognitive disability and/or mental impairment of the relevant person and their needs ('the assessment'). An application for an assessment can be made by the court or by the legal representative of the accused person. A fresh assessment may be undertaken where the previous assessment was made more than 12 months previously.

3. **Obligation to develop and implement a service plan**

The Minister has an obligation to develop and implement a service plan that must provide detailed particulars of what measures will be taken and the time frame for action,[10] in addition to any steps they have already taken,[11] to ensure that the person has reasonable access to a secure care facility or other supported accommodation and care and treatment.[12] Taking assessments into account, the service plan must detail how the relevant person will have reasonable access to less and least restrictive environments over a reasonable period of time. A court officer of that court shall cause the relevant Minister for Health of the state or territory in which an accused person has been charged to be notified of the making of the order and its return date, so that the service plan can be prepared and furnished to the court.

Programs and services for residents in secure facilities or those subject to community supervision are to be designed and administered so as to be sensitive and responsive to the individual's circumstances and needs. They shall in particular take into account their age, gender, spiritual beliefs, cultural or linguistic background and family relationships.

The service plan developed by the Minister shall also address the goals of:

a) promoting the individual's development; and
b) providing for the individual's management, care, support and protection; and
c) supporting the individual's reintegration into the community.

4. **Circumstances when custodial order can be made**

An Australian court must not make a custodial supervision order committing an accused person found unfit to plead to custody in a prison or remand facility unless it is satisfied that there is no reasonable or practicable less restrictive alternative in the circumstances. The relevant court shall ensure:

a) that its decision should take into account not only the advice of a Minister and/or relevant health authorities, but also independent evaluations by persons qualified in risk assessment of the facilities or services the individual requires; and
b) that it considers any less restrictive options available before making a supervision order and not declare someone liable for a custodial order unless satisfied on the evidence that the person would be likely to seriously endanger the community if not declared liable to supervision.[13]

5. **Return date within three months, and annually**

An Australian court that makes a custodial supervision order committing an accused person found unfit to plead to custody in a prison or remand centre must set a return date for a review of the order within three months to ascertain progress in developing and implementing a service plan. The court must also set return dates for annual reviews for the same purpose.

In recognition of the unique and abiding nature of mental impairment, which is distinct from mental illness, there shall be a rebuttable statutory presumption that at review a person shall transition to a less restrictive order. This presumption is applied to ensure that the focus of the review process shall not be merely upon the management of risk, but upon the obligation to ensure that treatment and support remain appropriate and are the least restrictive possible in all the circumstances.

All reports prepared for the review hearing shall be provided to all parties at least 21 days prior to any review hearing.

6. **Review on application**

The guardian or legal representative of a relevant person committed to prison or remand by a court may, unless a similar application has been made within the previous three months, make an application to that court, or may seek leave to have a special hearing, seeking review of the relevant person's continued detention on the basis that the Minister for Health of the state or territory in which the accused person has been charged has failed to meet their obligation to ensure that an accused person has reasonable access to a secure care facility or other supported accommodation and care and treatment. The Minister may be ordered to pay the reasonable costs of such applications.

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7. **Applications for leave**

Both community and residential patients shall have the right to apply for a leave of absence from place of residence or other restrictive conditions of their orders. A leave application may be made where it promotes greater participation in the community and life skills. Decisions on leave applications are subject to the guiding principle that the least restrictive approach to the individual's liberty shall be adopted. Applications for leave shall therefore be approved, absent the prospect of serious endangerment to the community, where the leave period enables the individual in question:

a) to access medical services not otherwise available;
b) to attend court;
c) to attend significant family events and otherwise further significant family and other social and cultural relationships; and/or
d) to prepare for reintegration into the community or to transition to a lower level of order.

In assessing applications for leave, the relevant decision-maker shall recognise and respect the distinct culture, history and way of life of Aboriginal and Torres Strait Islander peoples, and shall ensure leave decisions properly respect the need to practice cultural traditions, relationships and customs.

8. **Non-compliance with community supervision orders**

In circumstances where an individual fails to comply with the terms of their community supervision order, a court shall also have the right to delay proceedings in relation to non-compliance, where this is reasonable in order to afford the individual in question an opportunity to resume compliance.

RECOGNISING AND CLOSING THE GAPS IN THE CRIMINAL JUSTICE SYSTEM

This proposed legislation aims to combat the bureaucratic gaps through which Indigenous Australians such as Marlon Noble and Rosie Ann Fulton have passed. Yet beyond the details of legal wording, any statutory intervention also has to trigger a broader conversation about how social class interacts with the criminal justice system. As Baldry et al argue, prevailing approaches see Indigenous young people often being characterised as being 'a risk' rather than being 'at risk'.[14] Legislative reform in this area must ensure that engagement with the individual's specific circumstances and capabilities replaces the bureaucratic drift and defaults caused by institutionalised failings and time and resource pressures. The changes proposed above are motivated by a desire to avoid the false isolation of courtroom proceedings from the individuals' other contacts with government services—from unstable, inappropriate accommodation placements, a history of poor educational experience or health supports. The issue of intellectual disability and the criminal justice system cannot be detached from broader challenges around the recognition of self-determination or the need for the National Disability Insurance Scheme to allow Indigenous peoples to design flexible, culturally appropriate, community-based services. Committing Australian governments to designing pathways back home for those Indigenous people whose complex support needs have not historically been met can thus be an important step to practical, not merely symbolic, recognition.

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1 Senate Standing Committee on Community Affairs, Inquiry into Indefinite Detention of People with a Cognitive and Psychiatric Impairment in Australia, terms of reference available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Indefinite_Detention>.

2 For a discussion of the proceedings, see <https://law.blogs.latrobe.edu.au/2015/12/10/imprisonment-of-indigenous-people-with-cognitive-impairment-what-do-professional-stakeholders-think/>.

3 AL Delbecq, AH Van de Ven and DH Gustafson, 'A Group Process Model for Problem Identification and Program Planning' (1971) 7 *Journal of Applied Behavioural Science* 466.

4 IR Coyle, SD Sleeman and N Adams, 'Safety Climate' (1995) 26(4) *Journal of Safety Research* 247. A questionnaire based on the present research is currently being administered, with results expected early 2016.

5 The intention of this provision is that a particular Minister should take responsibility for the matter, so that people with cognitive impairment are not disadvantaged by government department unwillingness to take responsibility for their care and treatment. This approach also ensures uniformity of record-keeping and centralised coordination. A state or territory may select a different Minister (such as a Minister for Disability Services) so long as there is an identified Minister.

6 The obligation stems from human rights principles reflected in international treaties to which Australia is a party.

7 State and territory statutes refer to 'practicable' accommodation. This low threshold has meant that if there is no accommodation available, people are detained in prison. A requirement of reasonable access imports the administrative law requirement of reasonableness, which requires decision-makers to make logical, proportionate and appropriate decisions in this context.

8 Secure care facilities should not be the only option. Supported accommodation should be available for people who have been found unfit to plead. Requirements of care and treatment also ensure that supported accommodation is genuinely supportive.

9 The reference to 'any court' is intended to ensure that *all* inferior courts *and* superior courts are covered, including the local court, which determines many matters involving people with cognitive impairment: see, for example, *R v AAM; Ex parte A-G (Qld)* [2010] QCA 305. See also J O'Leary, S O'Toole and BD Watt, 'Exploring juvenile fitness for trial in Queensland', *Psychiatry, Psychology and Law,* 2012, 1–14.

10 This provision is intended to fulfil the need for authentic, detailed service planning for people with cognitive impairment.

11 The intention of this provision is to underscore the need for service planning to be undertaken before a person reaches court, where this is possible. That is, if a person is known to the service system, planning should have been demonstrated by this point.

12 The focus of the review is on the performance of the government in providing support to the person.

13 For consideration of the concept of endangerment, see *NOM v DPP* [2012] VSCA 198.

14 Eileen Baldry, Ruth McCausland, Leanne Dowse, Elizabeth McEntyre, *A Predictable and Preventable Path: Indigenous Australians with Mental Health Disorders and Cognitive Disabilities Report* (October 2015), available at <https://www.mhdcd.unsw.edu.au/a-predictable-and-preventable-path-iamhdcd-report.html>.