



**North Australian Aboriginal Justice Agency
Response to the
Australian Human Rights Commission
Issues Paper: April 2013
*Access to justice in the criminal justice
system for people with disability***

August 2013

The North Australian Aboriginal Justice Agency welcomes the opportunity to respond to the Australian Human Rights Commission Issues Paper: *Access to justice in the criminal justice system for people with disability*.

NAAJA is the largest law practice in the Northern Territory with offices in Darwin, Katherine and Nhulunbuy. Our criminal lawyers appear in the Magistrates Court in Darwin, Katherine and Nhulunbuy, and represent the vast majority of clients in 20 circuit courts in remote communities across these regions. We also appear in the Supreme Court and the Court of Criminal Appeal. Our civil lawyers represent clients in complaints about government services and departments, compensation claims against police and other government departments, victims compensation and discrimination complaints, as well as a range of other areas that are not relevant to this inquiry. They travel to 21 remote communities and appear in a range of courts and tribunals in Darwin, Katherine and Nhulunbuy.

Our clients are overrepresented as victims of crime, in the criminal justice system and in the prison. In the NT, Aboriginal people make up approximately 30% of the population but over 80% of the prison population and the vast majority of young people in juvenile detention are Aboriginal.¹ The last publically available statistics indicate that 98% of the young people locked up in juvenile detention were Aboriginal.² The majority of our clients face barriers when engaged in the western criminal justice system in the Northern Territory, a legal system that does not reflect Indigenous lore or values. Most of our clients encounter cultural and language barriers when they come into contact with the mainstream criminal justice system in the NT.

These barriers are further compounded and exacerbated for our clients with disability who face multiple barriers when they come into contact with the criminal justice system. It is impossible to quantify the extent to which Aboriginal people are overrepresented in the criminal justice system in the Northern Territory. We are not aware of any publically available comprehensive statistics about the incidence of disability, or even mental health and cognitive impairment, in Northern Territory prison or detention centres. Anecdotally we are aware that many clients in the criminal justice system, including clients in custody, have a disability. Our client base includes people with a broad range of physical disabilities, mental illness, cognitive impairment and communication disabilities.

The prevalence of disability in the Indigenous community is significantly higher than the general Australian population. The First People's Disability Network '10-point plan for implementing the NDIS in Aboriginal communities' highlights the findings of a recent report by the *Commonwealth Steering Committee for the Review of Government Service Provision* that 'the proportion of the indigenous population 15 years and over, reporting a disability or long-term health condition was 37 per cent (102900 people).'³ The First People's Disability Network 10-point plan also emphasises that:⁴

¹ See Northern Territory Department of Justice, *Northern Territory Quarterly Crime and Justice Statistics*, Issue 35, March Quarter 2011, 94. Available at: www.nt.gov.au/justice/policycoord/researchstats/index.shtml

² See Northern Territory Department of Justice, *Northern Territory Quarterly Crime and Justice Statistics*, Issue 35, March Quarter 2011, 95. Available at: www.nt.gov.au/justice/policycoord/researchstats/index.shtml

³ See First People's Disability Network Australia, *10-point plan for implementing NDIS in Aboriginal Communities*. Available at: <http://fpdn.org.au/10-point-plan-ndis>

⁴ See First People's Disability Network Australia, *10-point plan for implementing NDIS in Aboriginal Communities*. Available at: <http://fpdn.org.au/10-point-plan-ndis>

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

Recent research conducted in Queensland found that 73% of male and 86% of female Aboriginal and Torres Strait people in custody in high security prisons suffered a mental disorder.⁵ The researchers concluded that ‘the prevalence of mental disorder among Indigenous adults in Queensland custody is very high compared with community estimates’ and ‘there remains an urgent need to develop and resource culturally capable mental health services for Indigenous Australian in custody.’⁶

In this submission we highlight a number of key issues that are particularly important in the context of representing Aboriginal clients in contact with the criminal justice system in the NT. We also outline a number of barriers that impede to extent to which our clients with disability are able to understand and fully participate in the criminal justice system and propose a number of initiatives, including legislative reforms, that would help to reduce or remove these barriers.

Key issues for our clients with disability

Hearing impairment

It is widely acknowledged that hearing loss is disproportionately high among Aboriginal people in Australia. In the NT, few Aboriginal people are given an opportunity to learn Auslan or even signed English. This means that they depend on their ability to lip read, assess other visual cues and their own locally based signed language. This places defendants in a very vulnerable position when they come into contact with the criminal justice system. Clients who are deaf often face a ‘double language barrier’. Many defendants speak English as a third or fourth language and are unable to communicate effectively with sign interpreters in English and it can often be difficult to find Auslan interpreters who are able to communicate with clients in their language. Delays encountered in trying to overcome these communication barriers can result in matters taking a significant time to finalise which is particularly problematic when clients are refused bail and remanded in custody.

Clients are often heavily dependent on family members to assist them to communicate which can limit the instructions that the client is able to give through the family and can be difficult for lawyers to ensure that the instructions coming through the family are in fact the clients

⁵ Heffernan, E.B, Andersen, K.C., Dev, A., and Kinner, S., *Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland Prisons*, Medical Journal Australia 2012; 197(10) 37-41

⁶ Heffernan, E.B, Andersen, K.C., Dev, A., and Kinner, S., *Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland Prisons*, Medical Journal Australia 2012; 197(10)

own instructions. In some circumstances, the close involvement of family in this situation could give rise to possible conflicts of interest.

Where hearing loss is undetected or not addressed in the criminal justice system, a clients ability to engage with and participate in the process at all stages from summons/arrest, investigation and throughout any court mentions or hearings is significantly effected. The importance of understanding the court process and any orders of the court is particularly relevant in cases where bail conditions are imposed, a Domestic Violence Order is put in place or a client is placed supervised order in the community with conditions attached to it. The consequence of breaching any of these conditions often results in further charges being laid and in many cases, imprisonment.

In our experience, amplifiers are not used frequently in court, but when they are, they can have a dramatic effect on a clients ability to understand and participate actively in the criminal court process. We are not aware of hearing loops being used in the court cells, interview rooms, the court or in the prison.

Hearing impairment can also have serious ramifications for clients in custody, being unable to hear prison bells, prison officers directions, communicate effectively with other inmates and advocate on their own behalf. A study of Indigenous prisoners in NT prisons 'found more than 90 per cent of Aboriginal and Torres Strait Islander inmates had a significant hearing loss.'⁷

Please find attached a copy of NAAJA's submission to the *Senate Community Affairs References Committee Inquiry into Hearing Health in Australia* which outlines in more detail the impact of hearing impairment for Aboriginal clients in contact with the criminal justice system and includes a list of recommendations and the following case study (Attachment A):

Case Study: John – disability resulting in delay and an extensive period of time in custody

John was charged with several serious driving offences, including driving under suspension. He is deaf, and does not know sign language. John has significant difficulties explaining himself and will often nod during conversations, which leads to people to believe he is replying 'yes', when, in fact, he does not understand. He has a very limited and idiosyncratic form of sign language. Every now and then he does something that resembles signing.

John was not able to communicate with his lawyer. An AUSLAN interpreter was utilised, but because John could not sign, he was not able to convey instructions of any complexity to his lawyer. John's lawyer sought to arrange a Warlpiri finger talker through the Aboriginal Interpreter Service, but the interpreter concerned was not willing or able to come to court. It was also not known if John would even be able to communicate using Warlpiri finger talking.

The witness statements disclosed to defence included a statement from a police officer describing how she came upon a group of men drinking in a park drinking. She ran a check on John, to discover he had warrants for his arrest, at which time she arrested him. Her statement reads: 'It is my belief that he understood as he looked at me and became quite distressed. I asked (John) verbally if he

⁷ Troy Vanderpoll and Dr Damien Howard, *Investigation into hearing impairment among Indigenous prisoners within the Northern Territory Corrections Services* (2011), 3

understood and he nodded and turned his head away from me while raising his arms in the air.’

John spent a significant period of time on remand at Darwin Correctional Centre. He was given bail at one point, but after failing to attend court as required, his bail was revoked. John subsequently spent a lengthy period of time remanded in custody as a result. It is arguable that John was not able to comply with his bail because he did not understand what his bail conditions were. He could not plead guilty or not guilty because he was not able to communicate with his lawyer and provide instructions. Ultimately, his lawyer successfully applied for a permanent stay, but the matter took two years to finalise.

Significantly, John’s inability to convey information (or to understand what his lawyer was trying to tell him) in relation to his charges has also been highly problematic in relation to bail. For example, when he was explaining to his lawyer with the assistance of the AUSLAN interpreter when he was to reside, both the interpreter and lawyer understood John to be referring to a particular community. It was only when the interpreter was driving John home, with John giving directions on how to get there, that it was discovered that he was actually referring to a different community altogether.

Whilst in custody, John was not provided appropriate services or assistance. He relied heavily on relatives who were also in custody. He was unable to hear bells, officers’ directions and other essential sounds in the prison context. At one point, it was alleged that John was suicidal and he was moved to a psychiatric facility as a result. John denied the allegation but was unable to properly explain himself to resist his transfer.

Foetal Alcohol Spectrum Disorder

While the prevalence of FASD has yet to be confirmed, the recent Commonwealth Inquiry into FASD outlines the following research findings:⁸

- The Foundation for Alcohol Research and Education (FARE) and the Departments of Health and Ageing and Families Housing, Community Services and Indigenous Affairs (FAHCSIA) report that recent research estimates the prevalence of FAS to be between 0.06 and 0.68 per 1 000 live births. Other experts consider this to be a significant underestimation. The occurrence of FAS is a smaller subset of the occurrence of FASD.
- FARE reports that among Indigenous Australians, the incidence of FAS is estimated to be 2.76 and 4.7 per 1 000 births.
- A study in far north Queensland estimated a FASD prevalence of 1.5 per cent in the Aboriginal child population, with one Cape York community having a prevalence of 3.6 per cent.
- A comprehensive and detailed incidence study of FASD in Fitzroy Crossing will soon be released; a recent media report suggested that half of the babies born in Fitzroy Crossing are born with disabilities from FASD.

The Inquiry addresses FASD in the context of the criminal justice system in Chapter 5 of its report and makes a number of recommendations regarding FASD which relate to the

⁸ House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders* (2012), 2.94

criminal justice system. Recommendations 17, 18 and 19 of this Inquiry are particularly relevant.⁹

FASD is particularly relevant in relation to our young clients appearing before the Children's Court, many of whom present with a number of complex social, psychological and health issues. We anticipate that FASD is often under identified issue among our clients. A recent National Assessment of Australia's Children's Courts which canvassed the views of judicial officers and key stakeholders across each state and territory in Australia confirms that young people appearing in Children's Courts across Australia increasingly have high and complex needs. The research findings are discussed by Alan Borowski in his paper, the *Findings of the National Assessment of Australia's Children's Courts*. Relevantly, this paper provides that that:¹⁰

Study participants across Australia reported that, relative to a decade ago, the court now served a much more challenging clientele. While the children, young people and families who appear in court remain highly socio-economically disadvantaged and marginalized, what is "new" is the complexity of their problems and needs and, in Victoria and NSW, the increase in clients from a refugee background. Alcohol and drug abuse, domestic violence, mental health problems and, indeed, prior involvement with the child protection system, are now common among the clientele of the child protection jurisdiction. Young offenders manifest similar problems and have increasingly engaged in serious (i.e., violent) criminal activity.

These findings are consistent with our experience acting for Aboriginal young people in the Youth Justice Court in the NT. These high and complex needs can often impact on a young persons ability to participate fully in the court process as well as understand and comply with orders of the court and Community Corrections. As we note later in this submission, there is no court based assessment and referral service in the NT, our lawyers have very large case loads and there are limited services available in the community for young people with intellectual disability, including FASD.

Please refer to the Aboriginal Peak Organisations of the NT (APONT) submission (Attachment B) which addresses FASD, including diagnosis and management in the context of the criminal justice system, in more detail. The submission makes a number of relevant recommendations and contains a number of case studies, including the case study outlined below.

Case Study B: Anna – Foetal Alcohol Spectrum Disorder: under detected and untreated

A 15 year old Aboriginal girl in the care of the NT Office of Children and Families (OCF) has a history of exhibiting difficult behaviour. As a result of her behaviour, she has been excluded from schooling for approximately five years. Over a period of 14 months, the girl has become involved in offending, primarily property damage, which has brought her before the courts on several occasions. Due to the girl's behaviour and concerns about her well being, OCF was ordered to provide a report to the Court

⁹ House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders* (2012), 5.133, 5.138, 5.139

¹⁰ Allan Borowski, 'Whither Australia's Children's Courts? Findings of the National Assessment of Australia's Children's Courts (2013) *Australian and New Zealand Journal of Criminology* (due to be published August 2013) 20

about the girl's family support and access, accommodation, education and developmental issues. While the report stated that it has been identified that the girl is operating intellectually as a seven year old, no formal FASD diagnosis was referred to and there was no proposed FASD management plan.

Impact of trauma and neglect on children's brains

There is a growing body of research in the area of 'Trauma Theory' which draws a link between exposure to trauma and chronic stress in childhood and brain development and future health outcomes. The NT Children's Commissioner outlines this research and its import in terms of the NT experience in the paper '*Vulnerability, risk and justice for children and young people in the Northern Territory*'.¹¹ Significantly, the paper states that:¹²

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

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

The extent to which this material is taken into account in sentencing in the NT is questionable. Where possible, much of this information is put before the court by defence counsel as 'material in mitigation' when a plea of guilty is entered. However, resources are often not available to commission psychological reports until a young person is charged with a particularly serious offence which appears before the Supreme Court, or a young person is expected to face a significant period of time in custody.

In the NT, young people on court orders are supervised by Community Corrections. They are managed in monitored in the same way as adults rather than case managed to address the underlying causes of their offending. Counselling and rehabilitation programs are not available in detention as a matter of course. In our experience, some young people in the care of OCF, or with particularly high needs have had treatment services provided to them in detention, but access to therapeutic treatment in detention is the exception rather than the norm. In our experience, young people with complex needs, including disabilities, routinely come back before the courts, receive little case management support in the community and receive custodial sentences from the court at a young age. Their complex needs are often

¹¹ Dr Howard Bath, '*Vulnerability, risk and justice for children and young people in the Northern Territory*', (Presentation delivered at the Fourteenth Annual Biennial conference of the Criminal Lawyers Association NT, Bali, June 27, 2013). Available at: <http://www.clant.org.au/index.php/the-bali-conference/2013>

¹² Dr Howard Bath, '*Vulnerability, risk and justice for children and young people in the Northern Territory*', (Presentation delivered at the Fourteenth Annual Biennial conference of the Criminal Lawyers Association NT, Bali, June 27, 2013) 5. Available at: <http://www.clant.org.au/index.php/the-bali-conference/2013>

not properly identified at court and even where they are, there are very limited services available to support young people in the community to address them, particularly in remote communities. Once in custody, they often don't receive appropriate treatment so they return to the community without the underlying causes of their offending being addressed. Sadly, in our experience, young people with complex needs stemming from severe trauma and result in conditions such as post traumatic stress disorder and conduct disorder continue to cycle through the system, continually returning to custody, often through to adulthood and adult custody.

Case Study C: Paul – trauma, disability and the revolving door

At the age of 13, Paul was sentenced by the Youth Justice Court. There were a large number of charges before the court and he received a sentence of 14 months detention to be suspended after serving 10 months. Prior to receiving this sentence, Paul had been subject to a number of good behaviour bonds and was in breach of a number of these court orders.

The matter was unsuccessfully appealed. In the process of preparing for the appeal, the Office of Children and Families agreed pay for a psychological assessment to be conducted. The psychologist considered that his experience of childhood trauma, domestic violence, alcohol abuse, substance abuse and neglect meant that he was unable to reach essential developmental milestones. The psychologist concluded that he was experiencing Post Traumatic Stress Disorder symptoms, displayed behaviour consistent the criteria for Moderate Conduct Disorder, with Adolescent Onset and Dysthymia, a low grade depression.

This information was not before the court at the time of sentencing. He did not receive any counselling or treatment in custody, despite the psychological report recommending intensive ongoing psychological support. He was recently released on a suspended sentence, only to return to the criminal justice system, and juvenile detention, having reoffended and breached the conditions of his suspended sentence shortly after he was released from detention.

Barriers for people with disability in the criminal justice system in the NT

- **A limited and underutilised legislative scheme to divert people with mental illness or disturbance from the Court of Summary Jurisdiction**

In the NT, diversion into voluntary treatment requires a client to plead guilty or be found guilty of an offence and requires the consent of the prosecution. In our experience, diversion into treatment pursuant to s78 of the *Mental Health Related Services Act* (NT) rarely, if ever, occurs.

Section 77 of the MHRS Act enables a court which is exercising summary jurisdiction to 'dismiss' a charge if satisfied that 'at the time of carrying out the conduct constituting the alleged offence: (a) the person was suffering from a mental illness or mental disturbance; and (b) as a consequence of the mental illness or disturbance, the person (i) did not know the nature and quality of the conduct; or (ii) did not know the conduct was wrong; or (iii) was not able to control his or her actions'.

There are a number of significant limitations to this section and its ability to prevent people with mental illness, intellectual disability or cognitive impairment from becoming part of the criminal justice system.

The Court requests a certificate from the Chief Health Officer stating 'whether at the time of carrying out the conduct constituting the alleged offence, the person was suffering from a mental illness or mental disturbance and if the person was suffering from a mental illness or mental disturbance.'¹³ The process of requesting a certificate usually takes approximately two months. In our experience, this process is convoluted and can result in clients with mental illness being placed on remand for long periods of time when their case is ultimately dismissed as a result of their illness. It is also an expensive process if defence seek to challenge a report or need to supplement the report provided by the Chief Health Officer.

The section applies only to people with a mental illness or disturbance and does not apply to people with intellectual disability or cognitive impairment. This is a significant gap in the legislation.

In practice, we also find that magistrates are reticent to deal with matters by dismissal under s 77 as it requires them to decide between whether a person receives a penalty or whether to dismiss the charge without any penalty and with no binding conditions in relation to treatment. In our experience, only a relatively small amount of matters are dismissed pursuant to this section.

In some cases, the prosecution have chosen not to consent to hearing the matter summarily, resulting in matters being referred to the Supreme Court to be determined pursuant to Part IIA of the *Criminal Code*. In these cases, the matter takes significantly longer to be finalised and the client is exposed to the possibility of indefinite detention.

- **The real risk of indefinite detention for clients found unfit to plead in the Northern Territory**

Where matters involving issues of fitness to be tried and 'mental impairment' are not dealt with summarily, they are determined in the Supreme Court pursuant to Part IIA of the *Criminal Code*. If a person is found unfit to plead or not guilty by reason of mental impairment they can be subject to a custodial or a non-custodial supervision order.

¹³ *Mental Health and Related Services Act (NT) s 77(2)*

Where the court imposes a custodial supervision order, this results in the accused person being committed to prison. While a person can be committed to custody another 'appropriate place' that the court considers appropriate,¹⁴ in practice no such appropriate places have been made available.

In our experience, the main barrier to justice that people face when dealt with under Part IIA of the *Criminal Code* arises not from major flaws in the legal system, but from the lack of alternatives that would allow a person to be appropriately supervised in a non-custodial setting.

There is a chronic need for great supported accommodation for people with high needs resulting from mental illness, intellectual disability or cognitive impairment. Having such places available would allow for people before the courts to remain on bail rather than be remanded in custody and would allow people to be placed on non-custodial supervision orders rather than being held in prison indefinitely.

The limited places that are available have been developed in an ad hoc way and have not always met the needs of the individuals placed in them. This places the person subject to the order, and those caring for them, at risk of harm that could be avoided.

For a more detailed discussion of the NT provisions relating to mental impairment and fitness to be tried, please refer to the attached paper, *A Kangaroo Loose in the Top Paddock: Criminal Justice, Mental Impairment and Fitness for Trial in the Northern Territory*¹⁵ (Attachment C).

Case study D: Peter - indefinite detention causing harm

'Peter' is a man in his 40's from a remote Aboriginal community. Peter has been diagnosed with treatment resistant schizophrenia as well as intellectual impairment due to an acquired brain injury (believed to be from petrol sniffing).

Peter was arrested on 23 August 2009 for causing serious harm to his uncle. The offence involved Peter stabbing his uncle in the chest with a kitchen knife after an argument over food. It was the view of the psychiatrist who reported to the Supreme Court on his case that Peter was unable to control his actions by reason of his mental impairment.

Lack of community placement options

Peter was initially released on bail to live with family in his home community. In August 2009 he was placed in emergency respite care away from his community because the family could not safely provide adequate support and care. This respite arrangement continued until February 2011 when Peter was remanded in custody by the Supreme Court.

¹⁴ Section 43ZA(1)(a)

¹⁵ Jonathon Hunyor, *A Kangaroo Loose in the Top Paddock: Criminal Justice, Mental Impairment and Fitness for Trial in the Northern Territory* (Presentation delivered the Uluru Criminal Law Conference, Uluru, 31 August 2012)

At this stage it was agreed by prosecution and defence that Peter was unfit to be tried. Although it was initially the view of Peter's treating psychiatrist that Peter was suitable for non-custodial supervision, Peter's violent behaviour towards those caring for him led the Department of Health to conclude that they could not safely care for him in the community.

Custodial supervision

Peter's matter progressed through the Supreme Court and in November 2011, a custodial supervision order was imposed. Because there is no alternative facility in the Northern Territory, this required Peter to be held in the Darwin prison.

Supervision orders under the Criminal Code are for an indefinite period. However, in imposing a supervision order, a Court is required to set a 'term', before the end of which a major review is to be conducted. The term is set by reference to the sentence of imprisonment that would have been imposed had the person been found guilty. In Peter's case, a nominal term of 2 years and 6 months, backdated to February 2011, was imposed. This means that had Peter been convicted of the offence and sentenced to prison, he would be released in August 2013.

Various periodic reviews of Peter's supervision order have been conducted by the Court the matter is soon to undergo a major review. That review will not be complete by August 2013.

Peter will therefore remain in prison beyond the sentence he would have served if he did not have a disability and was found guilty in the ordinary way. At this stage, his imprisonment is indefinite.

Conditions of custody

The conditions of Peter's imprisonment remain of great concern to those involved in his case. Peter is held in a part of the remand section reserved for prisoners 'at risk'. The general conditions of remand have previously been found by the NT Supreme Court to breach basic human rights standards. Peter's conditions are much more restrictive than those faced by 'mainstream' prisoners on remand because of his isolation in a single cell with access only to a small walled yard.

In 2011 and into 2012, efforts were being made to transition Peter into a house in the community with a view to a move onto a non-custodial supervision order. Peter was having day release for a few hours in the middle of the day (with overnight stays planned) in a house that had been rented by the Department of Health in the rural area of Darwin. These efforts were ceased in April 2012 because of concerns about Peter's behaviour.

In 2013 there was some prospect of this position changing with the opening of 'Secure Care Facilities' in Darwin and Alice Springs. Peter was able to have day release from the prison to the Darwin Secure Care Facility, but this ceased in July following an announcement by the government that the facility in Darwin will be used for other purposes. There is some prospect that the Alice Springs facility may be available in this case, but that would require first a move to the Alice Springs Prison from which transition would be conducted and this move is opposed by Peter's guardian as being 'disastrous' for him given the disruption to his routine and the distance from his country and countrymen in prison.

It is understood that day release is now taking place for a few hours each weekday to another property in Darwin's rural area. It is not known whether this might be an appropriate place to which Peter might transition to a non-custodial supervision order in the medium-long term.

No end in sight

Despite having access to day release for a few hours of each weekday, Peter remains confined to a single cell for a lengthy period (up to 16 hours) each evening. Removing him from a correctional environment is critically important.

A number of psychiatric reports have highlighted serious concerns about the impact of sensory deprivation on Peter and the harm this may be causing to him. The independent psychiatric report prepared in the matter concluded that Peter should not be treated in a correctional environment but rather in a health care environment. Despite this, Peter remains in prison in conditions that are harsh and oppressive.

- **A parole system which excludes the rules of natural justice, including procedural fairness, and operates largely in 'secret'**

The parole process in the NT is not transparent. There are no public reasons given and the decisions of the Board are not subject to review. While we have developed a relationship with the NT Parole Board and now make written submissions to the Parole Board each month, matters are heard behind close doors and we are only given a very brief outline of the Parole Board's decisions. On one occasion we have applied to the Board and been granted leave to appear in person before the Board. In the vast majority of cases, matters are heard behind closed doors. In other states and territories in Australia, the parole process is far more transparent and prisoners can request a hearing.

It is very difficult to achieve parole in the NT. In 2011, 102 (30%) of parole applications were granted, 111 (32%) of applications were refused, 75 (11) were undetermined and in 56 cases (16%) prisoners declined to apply for parole. Aboriginal prisoners can face a number of barriers to achieving parole. In many cases, our clients have difficulty understanding the concept of parole, communicating effectively with their probation and parole officer and putting forward a workable post-release plan.

Where clients have committed a violent or sexual offence, the Parole Board usually requires prisoners to complete a treatment program to address the offending, such as a Violent Offenders Treatment Program or a Sexual Offenders Treatment Program. Clients with disability can face barriers when their suitability for these programs is being assessed. For example, interpreters are not used to deliver programs, either group or one-on-one treatment, in the prison. We are concerned that this may result in some clients being found unsuitable to participate in programs. Also, a prisoners ability to understand and actively participate in groups can have an impact on how long they take to complete the program and on the conclusions that are reached about their rehabilitation and remorse which are often crucial considerations for the Parole Board.

As we outline in the case study below, clients with disabilities are often put in the ‘too hard basket’ and in many cases serve their full term because Community Corrections do not actively engage with the client to develop appropriate post-release plans.

The most persistent barrier for our clients trying to achieve parole is identifying suitable accommodation. Clients with disability, particularly with high and complex needs, can find it very difficult to find appropriate accommodation. Clients presenting with conditions such as severe schizophrenia face almost insurmountable barriers to achieving parole, particularly in cases where they cannot return to their community, or relevant mental health services aren’t available in their community.

Further, Aboriginal clients can find it difficult to comply with conditions of parole if they are released to parole. Clients with disability, particularly undetected disability such as cognitive impairment may have particular difficulties complying with conditions of parole, such as reporting to Corrections at a certain time on a certain day and complying with curfew conditions.

In 2011, 89% of parole breaches resulting in imprisonment were due to conditional breaches rather than reoffending. In our experience, the Parole Board takes a very strict approach and Community Corrections have a policy to report all breaches, even minor breaches, to the Board.

Case Study – Edward: barriers to achieving parole

Edward was sentenced towards the end of 2007. He was seen and prescribed an antipsychotic medication by a psychiatric registrar in 2007 but was not case managed by Forensic Mental Health in custody until 2011. He has been eligible for parole since 2010. The client instructed NAAJA that he wanted to apply for parole since 2010, although Community Corrections maintain that he continually instructed that he did not wish to apply for parole. NAAJA Prison Support drew this to the attention of the NAAJA Advocacy Solicitor who has been advocating on the clients behalf for over six months. We wrote a submission to the parole board confirming that he did wish to apply for parole and have worked to develop a post release plan for Edward and coordinate joint case-management conferences between Forensic Mental Health, Corrections and NAAJA to address any concerns raised by Corrections. There was no interagency consultation or collaboration until a NAAJA lawyer arranged for the relevant agencies to come together. The client is now in a strong position to apply for parole.

It was not until Edward had an advocate to steer and support him through the parole process and engage with relevant health and support services on his behalf that he was able to apply for parole, let alone develop a realistic post-release plan with relevant supports and accommodation in place, that the Parole Board have considered an application for parole and given the application meaningful consideration.

- **A lack of counselling and mental health services in most remote communities in the NT and significant gaps in services available in urban centres**

- **A prison which is currently over capacity that offers a limited range of prison programs and does not currently have a designated forensic unit**

Case study – Frank: inadequate care and conditions in custody and no appropriate services in the community

Frank suffers from severe schizophrenia. He is currently housed in maximum security in the Darwin Correctional Centre. While Frank is case managed by Forensic Mental Health, he is managed on a day to day basis by Correctional Staff who do not have any relevant training in dealing with people with serious mental health conditions. At present, there is no forensic unit in the Darwin prison, so Frank has to be accommodated in the mainstream prison in a single cell in the maximum security section. While the Aboriginal community that he comes from does have a health clinic, it does not have any permanent mental health or psychiatric nurses based in the community. It will be extremely difficult for this client to achieve parole prior to his full term. He has no alternative accommodation options, other than to return to his home community. In the past, Frank has been released from custody at the expiry of his full term, stops taking his medication and reoffends in the same way within a matter of days.

The client has limited capacity to demonstrate his rehabilitation in custody and where his needs are so significant that he cannot access the regular treatment services in custody, namely group or one-on-one counselling. There are no services to manage his mental health condition in his community, and as a result his risk of reoffending is high. The Parole Board is likely to have significant concerns about community safety and his risk of reoffending if his schizophrenia cannot be appropriately managed in the community. As a result, it will be extremely difficult for Frank to achieve parole. It is hoped that when the new Darwin Correctional Centre prison is opened he will have more appropriate accommodation and treatment in custody.

- **The lack of any court based assessment and referral service**

Unlike other jurisdictions such as New South Wales, the NT does not have any court based assessment and referral service. The Court can order a pre-sentence report addressing the 'medical and psychiatric history' pursuant to s70(1)(c) of the *Youth Justice Act* or s106(1)(c) of the *Sentencing Act*. However, these reports are prepared by Community Corrections staff who do not usually have qualifications in psychology or psychiatry and can take a number of weeks to be prepared. There is no service at court which is able to assist lawyers to assess a client's mental health or other needs. In reality, this role invariably falls to a client's lawyer who usually will not have training or qualifications to identify and diagnose mental health conditions or disability.

- **A youth detention centre without any regular treatment services and intermittent health and mental health services available to young people**

There are no health services unit or treatment services unit permanently based in youth detention centres in the NT. Nurses visit the detention centre weekly, and where necessary, young people are taken to see a doctor or to the hospital under escort by Correctional Services staff. As noted above, we are aware of some young

people being provided with treatment services, based on known risks or needs but, there are no regular offender treatment programs, counselling or psychological services available to young people in detention in the NT.

- **Underfunded Aboriginal Legal Services resulting in large case loads for our lawyers and impacting on the scope of our capacity to order reports in relevant cases**

There is a significant workload disparity between NAAJA and the Northern Territory Legal Aid Commission. In 2010/11 the average NAAJA caseload represented approximately 147% of the average NTLAC caseload. In reality, this disparity is likely to be far greater than suggested by these figures due to the way in which duty and ongoing casework matters are counted by in each organisation.

The nature of our work is made more complex by virtue of the fact that we often have to use an interpreter to communicate with our clients and the process of taking instructions and giving advice takes more time. Overcoming cultural barriers and explaining legal terms, concepts and processes can also require a significant amount of time. Servicing clients in remote Aboriginal communities is also far more involved than running a legal practice in an urban centre. Travelling to court, keeping in contact with clients, compiling material in mitigation, proofing witnesses and coordinating post-release plans can require a large amount of time and coordination. These factors, coupled with the reality that the prevalence of disability is higher among Aboriginal people than the non-Aboriginal population, can result in very large and complex case loads for NAAJA lawyers.

Funding limitations can also impact on decisions made about whether to order psychological reports or client assessments which can in turn impact on the extent to which disabilities are identified and addressed in the course of a criminal matter.

- **An absence of data and statistics to inform government policy and resource allocation**

As noted in the introduction, we are not aware of any publically available data about the prevalence of disability amongst people in contact with the criminal justice system in the NT. This information would assist in the development of government policies to provide adequate and targeted services for people with disability in contact with the criminal justice system.

Possible solutions

What could be done to remove barriers and help people with disability in the criminal justice system?

1. Pre-court diversion

The NSW Law Reform Commission (NSWLRC) recommended in its report on *People with cognitive and mental health impairments in the criminal justice system* the development of 'a statutory scheme providing police with a clear power to discontinue proceedings in appropriate cases in favour of referral to services.'¹⁶ The NSWLRC considered that diversion should be available before and after a matter comes before the court and should not require admissions. The introduction of a statutory scheme such as this, if implemented by police in the NT, could limit the number of people with disability, particularly those with cognitive and mental health impairments, who are brought before the court and involved in the formal criminal justice system.

2. Diversion in the Court of Summary Jurisdiction

Section 78 of the MHRSA Act could be amended to enable clients to be referred into treatment without the consent of prosecution and without being required to enter a plea of guilty. The process of requiring a certificate, obtaining the report and the matter being listed for hearing can take months. Section 77 could be amended to remove the requirement for a certificate. The NSWLRC recommended that the diversion options in the Local Court be expanded to include the following options:¹⁷

- Discharge the defendant unconditionally
- Discharge the defendant on the basis that a diversion plan is in place
- Adjourn the proceedings with a view to later discharge, on condition that the defendant undertake a diversion plan and report to the court in relation to his or her progress in complying with the plan
- Where the defendant meets the eligibility criteria, which include imminent risk of imprisonment, the court may refer the defendant to the Court Referral for Integrated Service Provision (CRISP)

An expanded range of diversionary options is likely to enable more matters to be diverted from the Court of Summary Jurisdiction in a manner appropriate to the circumstances of the client and the matter. The NSWLRC also recommended that a limited range of diversionary options should be made available to relevant matters considered before the District and Supreme Court.¹⁸

¹⁶ NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) [0.31]

¹⁷ NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) [0.39]

¹⁸ NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) [0.64]

3. **Assessment and support services at court**

The NSW Law Reform Commission noted in its report on *People with cognitive and mental health impairments in the criminal justice system* that ‘unless people with cognitive and mental health impairments are first identified, and assessed, the criminal justice system cannot respond appropriately to them’.¹⁹ A court liaison service similar to the Statewide Community and Court Liaison Service in NSW, staffed by a mental health or psychiatric nurses, would have a significant impact on the extent to which cognitive and mental health impairments were identified in the criminal justice system.

As we recommended in the APONT submission to the *Australian House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Foetal Alcohol Spectrum Disorder*, a multidisciplinary assessment service for children and adults in the criminal justice system would enable a wide range of disabilities, including Foetal Alcohol Spectrum Disorder, to be better identified and appropriately addressed in the criminal justice system.

4. **Information and training**

The NSW Law Reform Commission noted in its report on *People with cognitive and mental health impairments in the criminal justice system* observed that ‘assessment and support services depend on referral. The people who identify and refer are police, lawyers, magistrates, court staff and others’.²⁰ Information and training that supports early identification of disabilities and referral would assist lawyers to identify clients with disability.

5. **Problem solving and case management court**

The Court Referral of Eligible Defendants Into Treatment (CREDIT) program is currently being trialled in two court locations in NSW. It is modelled on the Court Integrated Services Program (CISP) in Victoria and aims to give Local Court defendants support to access a wide range of treatment, programs and services to assist them to reduce their chance of reoffending. CREDIT Court offers case management for defendants which may include support to access disability services, mental health assessment, suicide counselling, drug assessment and treatment and accommodation. It is available to defendants in the Local Court whether they are pleading guilty or not guilty. A program such as this is likely to make a significant difference in the NT where defendants with disability invariably face a multitude of barriers when they come into contact with the criminal justice system.

6. **Expanded supports and programs for people with disability in custody**

The following initiatives could address the lack of supports and programs for people with disability in custody:

- A standardised assessment tool to screen clients upon entering detention or prison;

¹⁹ NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) [0.23]

²⁰ NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) [0.24]

- A disability services unit within the Correctional Centre to case manage and support people with disability in prison
- Psychical adjustments such as hearing loops in the cells, common areas, program/education centres, the visiting areas

7. Enhanced funding for legal aid services, particularly Aboriginal Legal Aid Services

This would ensure that appropriate resources can be allocated to clients with disability who come before the criminal justice system. There is currently provision to enable legal aid services to apply for complex case funding for serious matters such as murder trials. In some cases, such as 'John's', even seemingly low level matters proceeding in the court of summary jurisdiction can be extremely complex and time consuming. Access to additional funding in cases such as this could have a significant impact on a clients experience of the criminal justice system.

8. Mental Health counselling and support in remote Aboriginal communities

Appropriate services in the community can limit the extent to which people with disability come into contact with the criminal justice system, and impact on sentencing outcomes and Parole Board decisions whether to release a person to parole.

We made the following recommendations in our submission to the *Senate Community Affairs References Committee Inquiry into Hearing Health in Australia* which are also relevant to this inquiry (Attachment D):

- Mandatory health and hearing checks to be performed on anyone who comes in contact with the justice system and has communication difficulties. This should occur even if individual police or lawyers consider that the communication difficulties are arising from cross-cultural communication and/or other issues.
- Development of a simple screening tool to assist police and legal professionals to detect hearing impairments in Aboriginal people.
- Establishment of a Disability Diversion Court in the Northern Territory, where legislation, policies and guidelines can be developed to systematically and appropriately manage the needs of the hearing impaired in their interactions with the criminal justice system.
- Hearing loops to be installed in all police station and court rooms. Loop receiver devices should be made available in these locations for people without hearing aids.
- Greater availability and use of amplifiers at police stations, legal aid and Aboriginal legal aid offices and court rooms. Amplifiers should always be available for use during police questioning.
- Greater use of amplifiers, the installation of hearing loops and the use of interpreters for programs run in the prison context.
- Greater education amongst police, lawyers and magistrates about the issues of hearing impairments in Aboriginal communities.
- Greater resources devoted to training Aboriginal people to communicate in sign language, and to interpret across this 'double language barrier'.