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SUBMISSION TO THE ROYAL COMMISSION INTO THE PROTECTION AND DETENTION OF CHILDREN IN THE NORTHERN TERRITORY

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About us

This submission was prepared by researchers of the project, **'Unfitness to Plead and Indefinite Detention of Persons with Cognitive Impairments: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community'** (hereafter, 'Unfitness Project'). The project is hosted by Melbourne Social Equity Institute and Hallmark Disability Research Initiative at the University of Melbourne, and is being conducted in collaboration with the University of New South Wales, the North Australian Aboriginal Justice Agency, the Intellectual Disability Rights Service, and the Victorian Aboriginal Legal Service. This project is jointly funded by Commonwealth, state and territory governments under the National Disability Special Account, administered by the Department of Social Services on behalf of the Commonwealth, state and territory Research and Data Working Group

The Melbourne Social Equity Institute at the University of Melbourne supports interdisciplinary research on social equity issues across the full spectrum of social life including health, law, education, housing, work and transport. The Institute brings together researchers from across the University of Melbourne to identify unjust or unfair practices that lead to social inequity and work towards finding ways to ameliorate disadvantage. It facilitates researchers working with government and community organisations and helps with the dissemination and translation of research for public benefit.

The Hallmark Disability Research Initiative at the University of Melbourne co-ordinates interdisciplinary projects with the involvement of community partners and those with lived experience of disability. Its brief is to develop high-quality applied research, policy and education programs. The aims of the DRI are to:

- enable the development of disability research in collaboration with the wider community;
- bring together people with disabilities and their representative organisations with academic researchers; and,
- foster a rich understanding of how to match research to the needs and desires of the community.

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Introduction

The authors welcome the opportunity to submit material to the Royal Commission into the Protection and Detention of Children in the Northern Territory. Pursuant to the reference made in the Letters Patent of this inquiry, this submission is concerned with inconsistencies in the treatment of children with disabilities in the relevant facilities with federal anti-discrimination law and international human rights law.¹

Accordingly, this submission examines two aspects of anti-discrimination and human rights obligations relevant to the detention and protection in the Northern Territory of children and young persons with disabilities. It considers the United Nations ('*UN*') Convention on the Rights of Persons with Disabilities ('*CRPD*'), and, with respect of domestic laws, it considers the *Disability Discrimination Act 1992 (Cth)* ('*DDA*'). The two specific issues the submission considers are (1) the need for data collection on the prevalence of disability among children and youth in detention in the Northern Territory, and (2) the need for disability-based support measures in the criminal justice system to ensure access to justice for all children and young people on an equal basis with others. **As a corollary recommendation, the *Youth Justice Act 2005 (NT)* or the *Criminal Code Act 1983 (NT)* should be amended to incorporate these requirements, and all other relevant human rights obligations.**

For the purposes of this submission, the term 'cognitive disability' will be used to refer to those with 'intellectual, cognitive and psychiatric disabilities'.² However, the recommendations in this submission are also relevant to people with communication and sensory disabilities, such as those who are blind or vision impaired, or those who are deaf or hearing impaired.

Recommendation 1 – Identifying the Problem: Introduce Data Collection on Disability among Children and Young Persons in Detention

There is currently a distinct lack of data on the prevalence of disability among children and young people in detention in the Northern Territory.³ However, there is evidence suggesting disability rates are extremely high among children and young persons in detention in the Northern Territory, particularly among Indigenous children and young people. For example, a NSW study found that intellectual disabilities was particularly high amongst Aboriginal young offenders and that 88% of young people in custody reported symptoms that were consistent with psychiatric disability.⁴ There is also some evidence to suggest that Indigenous youth with cognitive disability are more likely to encounter the criminal justice system at a younger age than their non-Indigenous peers with

¹ Commonwealth, *Royal Commission into the Protection and Detention of Children in the Northern Territory*, Letters Patent, 28 July 2016, para (c)(iv).

² A non-exhaustive definition of disability contained in the *UNCRPD* indicates that persons with disability include 'those who have long-term physical, *mental, intellectual* or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.' *UNCRPD* art 1 (emphasis added). Although the term 'cognitive disability' does not appear in the *UNCRPD*, it is here used to capture disability arising from 'mental and intellectual' impairment. This term is increasingly used elsewhere in the disability and human rights field. See, eg, Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System*, University of New South Wales (October 2015) 31.

³ See Thalia Anthony, 'Data gaps mean Indigenous incarceration rates may be even worse than we thought' *The Conversation* 27 July 2016 <<https://theconversation.com/data-gaps-mean-indigenous-incarceration-rates-may-be-even-worse-than-we-thought-63044>>.

⁴ Kelly Richards, *Trends in Juvenile Detention in Australia*, Australian Institute of Criminology (May 2011) <www.aic.gov.au>.

cognitive disability.⁵ Additionally, reports indicate that Indigenous people are also more likely to experience cognitive and psychiatric disabilities compared to non-Indigenous people, potentially at a twofold rate.⁶ Commissioner Mick Gooda has previously noted that the ‘high rates of unresolved intergenerational trauma [in Aboriginal and Torres Strait Islander communities] has led to disability, alcohol-related disability, brain injury and mental health issues’.⁷ Yet there remains a lack of data to identify the extent of the problem.

Without data to accurately assess disability prevalence among children and young persons with disabilities in detention on the Northern Territory, it is not possible to formulate and implement policies to secure their equal rights. This gap presents a barrier to reducing incarceration rates, developing cost-effective support and accessibility measures in the community, and ensuring sites of detention include relevant disability support for young offenders.

The Australian government is required to collect appropriate statistics and data related to disability support needs according to article 31 of the *CRPD*,⁸ from which the following recommendation is adapted.

Recommendation 1

The NT Government should undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to secure the equal rights of children and young people with disabilities in the criminal justice system. This collection should encompass:

- discovering rates and types of disability among children and young persons with disability in detention and in the criminal justice system more generally;
- recording of and reporting on the availability disability accessibility measures provided at all levels of the criminal justice system, including in police procedures, pre-trial and trial proceedings, and detention and post-release measures; and
- recording of and reporting on the availability of culturally appropriate accessibility and support mechanisms, particularly for Indigenous people with disabilities.

⁵ Baldry et al, above n 2, 31–5; M Sotiri and J Simpson, ‘Indigenous People and Cognitive Disability: An Introduction to Issues in Police Stations’ (2006) 17(3) *Current Issues in Criminal Justice* 431, 434; M Sotiri, P McGee and E Baldry, ‘No End in Sight: The Imprisonment, and Indefinite Detention of Indigenous Australians with a Cognitive Impairment’ (Report prepared for The National Justice Chief Executive Officers Working Group, Aboriginal Disability Justice Campaign, September 2012) 22.

⁶ Sotiri and Simpson, above n 5, 433. Reportedly high rates of foetal alcohol spectrum disorders (FASD) in some Indigenous communities, which can cause cognitive disability, also presents significant challenges in relation to disability and equal recognition before the law. Select Committee on Action to Prevent Foetal Alcohol Spectrum Disorder, Parliament of the Northern Territory, *The Preventable Disability* (2015) [2.1]-[2.22]. Harris and Bucens report that the prevalence rate of foetal alcohol syndrome – which is the perhaps the most well-known of the conditions falling under the foetal alcohol spectrum disorders - was 1.87 to 4.7 per 1000 births among Indigenous Australians in the Top End of the Northern Territory, compared with 0.68 to 1.7 per 1000 total births for non-Indigenous people. KR Harris and IK Bucens, ‘Prevalence of Fetal Alcohol Syndrome in the Top End of the Northern Territory’ (2003) 39 *Journal of Paediatrics and Child Health* 528, 530. **Parliamentary Privilege**

⁷ Amnesty International Australia, ‘A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia’ (Report No ASA 12/1641/2015, Amnesty International, May 2015) 3 <www.amnesty.org.au>.

⁸ *CRPD* art 33.

Recommendation 2 – Introducing Disability-based Support and Accessibility in the Criminal Justice System

Just as ramps are required for wheelchair-users to access banks and other public spaces, so too, persons with disabilities in the criminal justice system require support to access justice on an equal basis with others. Support measures could include sign language interpreters and plain language materials. For those in detention, support might include screenings to identify offenders with an acquired brain injury and provide them with appropriate support programs, or pre and/or post-release support to people with cognitive or communication disabilities, including employment assistance for people leaving detention.⁹

International human rights law requires governments to provide accessibility and support measures for people with disabilities in detention. The *CRPD* requires that all appropriate steps be taken to ensure ‘accessibility’ and ‘reasonable accommodation’ for persons with disabilities, including ‘procedural and age-appropriate accommodations’ in the justice system.¹⁰ The definition of ‘discrimination on the basis of disability’ in the *CRPD* encompasses direct and indirect discrimination, and can include a failure to provide appropriate supports and ‘reasonable accommodation’ to a persons with a disability.¹¹ ‘Reasonable accommodation’ is defined as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.¹²

Federal anti-discrimination law prohibits both direct and indirect discrimination on the basis of disability,¹³ and includes ‘failure to make reasonable adjustments’ where such failure ‘has, or is likely to have, the effect of disadvantaging persons with the disability’.¹⁴ ‘Reasonable adjustment’ is defined as ‘an adjustment to be made by a person... unless making the adjustment would impose an unjustifiable hardship on the person’.¹⁵

A number of disability support programs for persons in detention exist, which should be provided to children and young persons with disabilities in detention as a matter of course. The Australian Human Rights Commission has listed examples of good support measures found in the criminal justice system across Australia.¹⁶

As part of our own project on unfitness to plead laws, the research team developed a support program wherein a support person works with an accused person with disability.¹⁷ Persons in

⁹ For a full list of accessibility and support programs in the criminal justice system, see Australian Human Rights Commission, ‘Programs and services that assist people with disability in the criminal justice system’ <<https://www.humanrights.gov.au/our-work/disability-rights/current-projects/programs-and-services-assist-people-disability-criminal>>.

¹⁰ *CRPD* arts 2, 5, 9 and 13.

¹¹ *CRPD* arts 2 and 5.

¹² *CRPD* art 2.

¹³ *DDA* ss 5, 6.

¹⁴ *DDA* ss 5(2)(a), 6(2)(c).

¹⁵ *DDA* s 4(1).

¹⁶ See Australian Human Rights Commission, ‘Programs and services that assist people with disability in the criminal justice system’ <<https://www.humanrights.gov.au/our-work/disability-rights/current-projects/programs-and-services-assist-people-disability-criminal>>.

¹⁷ See, Piers Gooding et al, ‘Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings in Australia – Avoiding the Pitfalls of Unfitness to Stand Trial Laws’ (forthcoming) *Law in Context*. (Available on request). See also Louis Andrews et al, ‘New project to tackle the detention of Aboriginal and Torres Strait Islander people with disabilities’ *Croakey*, 6 January 2016 <<https://t.co/p8yvBS1P2v>>

detention awaiting trial can receive support under the program. While the program is designed for adults with cognitive disabilities, the assistance could be provided to children and young persons with disabilities. The findings of the program, which has now been running for 6 months, are yet to be compiled, but interim findings suggest the program could assist persons with cognitive disabilities to avoid detention and gain access to community-based support services. The program is designed particularly to prevent persons with cognitive disabilities being found 'unfit to stand trial', which, under Northern Territory law, can lead to a person being detained indefinitely.¹⁸

Recommendation 2

The NT Government should make available a range of support measures to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations. Such measures should facilitate the effective role of children and youth with disabilities as direct and indirect participants, including as witnesses, in all legal proceedings, and in places of detention.

In order to help to ensure effective access to justice for children and young persons with disabilities, the Northern Territory must promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Available support should:

- encompass supports relevant to the range of different persons with disabilities, including those who are deaf and hearing impaired, blind and vision impaired, persons with cognitive, intellectual and psychosocial disabilities;
- encompass supports relevant to persons from diverse cultural backgrounds, including supports that are culturally relevant to Indigenous persons with disabilities that have been developed in consultation with relevant communities; and
- be developed in consultation with disabled peoples organisations and Indigenous-led organisations.

¹⁸ Piers Gooding, et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' *Melbourne University Law Review* (forthcoming) (available upon request).