Indefinite detention of people with cognitive and psychiatric impairment in Australia

FRIDAY, 29 APRIL 2016

MELBOURNE

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Terms of Reference for the Inquiry:

To inquire into and report on:

1. The indefinite detention of people with cognitive and psychiatric impairment in Australia, with particular reference to:
   a. the prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia;
   b. the experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely;
   c. the differing needs of individuals with various types of cognitive and psychiatric impairments such as foetal alcohol syndrome, intellectual disability or acquired brain injury and mental health disorders;
   d. the impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead;
   e. compliance with Australia's human rights obligations;
   f. the capacity of various Commonwealth, state and territory systems, including assessment and early intervention, appropriate accommodation, treatment evaluation, training and personnel and specialist support and programs;
   g. the interface between disability services, support systems, the courts and corrections systems, in relation to the management of cognitive and psychiatric impairment;
   h. access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants;
   i. the role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system;
   j. the availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment;
   k. accessibility and efficacy of treatment for people who are a risk of harm to others;
   l. the use and regulation of restrictive practices and their impact on individuals with cognitive and psychiatric impairment;
   m. the impact of the introduction and application of the National Disability Insurance Scheme, including the ability of individuals with cognitive and psychiatric impairment to receive support under the National Disability Insurance Scheme while in detention; and
   n. the prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses.

2. That for the purposes of this inquiry:
   a. indefinite detention includes all forms of secure accommodation of a person without a specific date of release; and
   b. this includes, but is not limited to, detention orders by a court, tribunal or under a disability or mental health act and detention orders that may be time limited but capable of extension by a court, tribunal or under a disability or mental health act prior to the end of the order.
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Mr McKinlay: I am the adult guardian for a number of persons in the Northern Territory, and a spokesperson for the Aboriginal Disability Justice Campaign.

CHAIR: We are doing a panel discussion because we find it is quite useful for people to interact and get some agreement and discussion about what people might think are the key issues. We were doing it a bit yesterday in our aged-care hearing, and it works really well—well, we think it does anyway. So we are hoping this is going to work really well.

I would like to ask each of you—or whoever you have decided will make a short introduction—just to kick things off, and then we would like to spend some time talking about key issues and then talking about some of the ways forward if that is okay with people. Mr McKinlay, I will start with you. I will throw to you first to make a brief introductory comment, and then we will go around the room.

Mr McKinlay: Thanks for the opportunity to contribute to the inquiry. I speak on behalf of the Aboriginal Disability Justice Campaign. This is a group set up by a couple of guardians in the Northern Territory, Patrick McGee and me, when faced with the difficulty in advocating for this high-end need in the Northern Territory—namely, persons under adult guardianship with cognitive impairment who are ending up in the criminal justice system, in a situation of indefinite imprisonment following 'unfitness to be tried' findings.

As individuals, our prime focus remains the clients we represent, but in the broader picture we are trying to expose this need nationally and look for solutions. In the Northern Territory, as I mentioned, this need has largely been ignored and allowed to default to the criminal justice system and custodial solutions. This has caused serious
harm and stress to those affected, as well as the collateral damage that had to occur to facilitate these prison solutions.

Initially, our concern was not the actual cognitive impairment underlying this need, beyond it being found by the guardianship courts to be an intellectual disability—that is, the inability to make informed decisions or reasonable judgements relative to daily living. Later on, we began to discover that the predominant cause of this need was FASD, and we also discovered that there is a lack of bigger picture detail around this need—in particular, the number of persons who are under custodial supervision nationally. We have no real figures on that—the best indicators are that it is somewhere between 60 and 100—nor is it known how many people affected by FASD are in the general prison population. Some estimates go up as high as 25 per cent, but that is still not known with any accuracy.

The ADJC's concern is still those Indigenous persons under custodial supervision, and that remains our key focus. This type of supervision results from 'unfitness to plead' findings—in many cases for fairly minor offending. The courts, in the absence of any proper services, have little alternative but to order prison-based supervision. This, in part, is facilitated by the shortcomings in 'fitness to be tried' legislation nationally and having no limiting periods for custodial supervision. This creates a disincentive to provide alternative services and leads to continuation of the status quo. The lack of awareness of modern disability and behavioural support methodology is another big issue. It is available and capable of meeting the majority of this need—all except the extreme end. Another issue that we deal with is the silence of this need within the Indigenous population, especially in the Northern Territory, which attempts to silence any advocacy around this need.

In terms of solutions, we see the need for a national perspective as to the actual prevalence of this need across the country and the need for the states and the Commonwealth to sort out what their response will be, especially around NDIS involvement. I have submitted a case study of Rosie Ann Fulton, focusing down to that. It is a fairly sad picture in the Northern Territory. The few reforms that have been achieved over the last 16 years are now collapsing in favour of prison solutions once again, and those we have managed to get out of prison, who number only three or four, are now potentially heading back to prison and potentially lifelong imprisonment.

So that is basically what the ADJC is about. Thank you very much for the opportunity.

CHAIR: Thank you.

Dr Chesterman: I am with the Office of the Public Advocate here in Victoria. The Victorian Office of the Public Advocate is a statutory office established under the Guardianship and Administration Act, independent of government and government services. It works to promote and protect the rights, interests and dignity of people with disabilities in Victoria. We provide a number of services to work towards these goals, including the provision of last resort adult guardianship, advocacy and investigation services to people with cognitive impairments or mental ill health. We also provide support to over 900 volunteers who operate in various capacities within the disability and justice service systems, including community visitors, independent third persons and corrections independent support officers. OPA also has monitoring roles in relation to restrictive intervention and compulsory treatment provisions contained in Victoria's Disability Act.

OPA's submission contains 15 recommendations concerning people with disability who are involved in the criminal justice system. They point to the need for greater data collection and screening, the need for greater evaluation of current service provision, and the need for improved service provision and advocacy support. The central purpose of OPA's submission is to highlight the legislative framework for compulsory treatment provided under Victoria's Disability Act. While, as our submission points out, there are ways in which Victoria's approach could be improved, we think it provides a possible model for other jurisdictions to consider. This framework enables treatment to be provided in compulsory settings to a small number of people with disability who are deemed to constitute a risk to the safety of other members of the community. OPA understands that the compulsory treatment framework in Victoria's Disability Act, with its associated safeguards, would constitute a possible improvement on regimes in place in other jurisdictions in Australia—notably Western Australia and the Northern Territory—which result in non-therapeutic detention of people with disability, including Aboriginal and Torres Strait Islander people.

We have been asked to nominate two highest priority issues. In our view, the first of the two highest priority issues is the lack of treatment-based detention regimes in other jurisdictions for people with disability—I will be talking about those in addition to regimes which exist under mental health legislation. On that topic, people with intellectual disability in some other jurisdictions, for instance, who come before the criminal justice system are not afforded the same protections as in Victoria. In Victoria our Disability Act sets out a legal framework for the detention and compulsory treatment of people with intellectual disability who are found to pose a significant risk of serious harm to others. The legislation requires that the person with an intellectual disability obtain treatment
and so derive a benefit from being placed on an order. The framework, in our view, can be improved in a number of ways. I will not go into those right now; I will just summarise them by saying we think that the regime should be extended to people with acquired brain injuries as well and that there should be a cap on the length of time people can be placed on orders in Victoria. But, those improvements notwithstanding, we think this regime does provide something of a possible model for other jurisdictions to follow. I point out here our recommendation No. 5, which fleshes out that point.

The second of our two highest priority issues is the way and the extent to which the National Disability Insurance Scheme will support people with disability who are involved in, or who are at risk of being involved in, the criminal justice system. We know from existing guidelines and principles that NDIS support will be available, but the level and nature of support both inside and outside custodial settings, including immediately post release, remains unclear. Clarification in our view is urgently required as appropriate support at the right time offers the best way of preventing people with disability from becoming involved in the criminal justice system.

The Office of the Public Advocate hopes the National Disability Insurance Scheme will support people who are at risk of interaction with the criminal justice system at the various points of exposure. This would include early intervention and diversion approaches, ongoing access to services and support, the interaction with the civil and criminal detention regimes and beyond through transition planning and provision of post-release accommodation support. On this topic I point the committee to our recommendation No. 12, which again fleshes that key point out. Thank you for the opportunity to be present today and I look forward to engaging in further conversation.

CHAIR: We will let you get your breath back and I will come back to you.

Dr Jessop: Thank you for the opportunity to be here. It is a pleasure to represent Jesuit Social Services today. To give you a feel for what we do, Jesuit Social Services work to build a just society by advocating for social change and promoting the health and wellbeing of disadvantaged people, families and communities. For nearly 40 years we have accompanied people involved in the criminal justice system. As per our submission, our focus is mainly around Victoria and the Northern Territory.

In Victoria, we work with people in the justice system through our Brosnan services supporting people exiting prison and youth justice facilities. Among other things, this includes Next Steps and Perry House residential programs. In Perry House we particularly work with people with an intellectual disability. We do some work around youth group conferencing, with a particular focus on younger people. We also, in partnership with the Centre for Innovative Justice, implement the Enabling Justice Project, which you may have heard about. This is really focused on the over-representation of people with an ABI in the criminal justice system, and we are supporting an advocacy group that are identifying and making recommendations around how the system can better support them and their needs.

In the Northern Territory we support the eastern and central Arrernte people in a number of ways to better their situation and have more control over their lives—that is, community development, capacity building amongst leaders and those sorts of things—and to empower our communities. As part of this work, we support the Making Justice Work campaign to promote evidence based approaches to community safety in order to respond more effectively to crime in the community. Based on our observations and experience, we believe under current Australian schemes the criminal justice system does not easily adapt and respond to the complex and varied needs of people with cognitive and psychiatric impairment. As I am sure you are all aware of by now, there is a serious lack of specialised screening and assessment tools throughout Australia, a lack of access to appropriate therapeutic support services, inflexible legislative schemes and a lack of rehabilitative and diversion options. People with cognitive and psychiatric impairments are at high risk of re-entering the justice system without receiving the crucial support they need, including interventions to reduce re-offending.

In particular, we are greatly concerned that this issue has a disproportionate impact on Aboriginal and Torres Strait Islander people given they are already over-represented in the criminal justice system and among people with disabilities. In this context, Jesuit Social Services calls for an end to the arbitrary and indefinite detention of people with cognitive impairments. We believe detention of people with cognitive and psychiatric impairments should only be used as a last resort, and when it does happen it must be suited to the person's circumstances and needs and include specialised therapeutic programs.

Wherever possible people with cognitive impairments should be supported as part of a health response, not a punitive compliance based response. This gets to one of the main recommendations we have around legislative schemes, particularly in the Northern Territory. We think that changes should include things such as repealing mandatory sentencing laws, amendments to bail laws and amending relevant legislation to remove the indefinite detention of people who are deemed unfit to plead.
We also strongly recommend the introduction of appropriately resourced, accessible and specialised assessment and screening tools at all key points of the justice system. Coupled with this is the need for specialised therapeutic support options both within the community and in prison, including in remote and regional Australia. That would be one of the main recommendations that we have around transitioning people from prison into the community and making sure there is appropriate housing and support for them when they exit. We believe diagnosis and therapeutic support at the earliest opportunity would reduce the likelihood of further contact with the criminal justice system as well as ensuring compliance with Australian human rights obligations. We look forward to sharing more as this conversation unfolds.

CHAIR: Welcome, Ms Fritze and Mr Povey. We have already started. We are still in the introductory comments. I will double-check you have been given information on parliamentary privilege and the protection of witnesses and evidence?

Mr Povey: Certainly.

Ms Fritze: Yes.

CHAIR: I would like to invite you to take a couple of minutes to highlight the key things that you think we should be focusing on.

Mr Povey: Fantastic. Thank you for the opportunity to provide evidence to the hearing today. We represent Victoria Legal Aid, which is a key provider of legal services and advocacy for people with cognitive and psychiatric impairment. We do this via two ways: the Mental Health and Disability Law Program and Independent Mental Health Advocacy. Independent Mental Health Advocacy is a non-legal program focused on people experiencing compulsory treatment under the Mental Health Act. It focuses on assessment, treatment and recovery. Eleanore and I are both part of the Mental Health and Disability Law Program, which provides legal information, advice and representation to people in relation to a range of key pieces of legislation, including legislation that can leave people indefinitely detained—so that is the Crimes (Mental Impairment and Unfitness to be Tried) Act, the Mental Health Act and the Disability Act.

In thinking about our position today and what we wanted to say to people, we think there are a couple of key things to talk about. We are not necessarily going to dive into why indefinite detention is hugely problematic, but clearly that is the case. It has a massive impact on individual liberty and autonomy. Also, the absence of a really consistent and clear framework quite often in relation to people who are indefinitely detained can create an environment for abuse.

Our submission today really focuses on a couple of things: entry into the system and pathways out. Over both of those key points we say that there should be a really clear and consistent framework about what happens. There should be legislative authority in relation to detention, and we say that is not the case. A really clear example of that is when people are detained ostensibly under the authority of the Guardianship and Administration Act, but there is no clear power to detain people under that piece of legislation. In looking at people going into indefinite detention, we focus on the crimes mental impairment act and the way in which we say there is insufficient consideration given to other less restrictive alternatives. We agree with the prior introductory comments that entry into indefinite detention should be as a last resort and absolutely we should be looking at all less restrictive options before making that very serious decision.

As outlined in the opening statement, we also look at pathways out. This is an interesting area. My colleague Eleanore, who is a senior lawyer and has a huge amount of experience working with people in the system, including at Thomas Embling Hospital, can tell you that there are a range of individual, local system and broader systemic issues that make it very difficult to extricate people from indefinite detention once they are in. That does not mean that we should not do it. Absolutely it means we should plan, design, fund and implement appropriate systems to make sure that people are not languishing in indefinite detention. It means that there is really a strong emphasis on preventing people entering but also an equal emphasis on making sure that we can get people out of indefinite detention. Thank you.

CHAIR: Thank you, everybody, for those opening statements. What we would like to do for the next part of this session is talk about some of the key issues we have just been talking about. I am wondering whether we should start where Mr Povey just left off in terms of the issues around entry into the system in the first place. Are people happy if we go there for a little while? Since we are at that space already, Mr Povey, do you want to add a little bit to that comment? Then we can look at the key things there that we as a committee should be recommending could be put in place. Mr McKinlay, don't forget to let us know when you want to make a comment.

Mr McKinlay: Will do. Thank you.
Mr Povey: Thank you for the opportunity to kick this off. What I might do is ask my colleague Eleanore to jump in once I have outlined our general position because Eleanore is able to talk about some of the case studies involved and the sorts of experiences that people are going through. What we are talking about in this particular situation is people on custodial orders. When a custodial order is made under the Crimes Mental Impairment Act, we say that judges and decision makers at that point are looking at: is it custodial or non-custodial under the Crimes Mental Impairment Act? They are not looking at alternatives under possibly the Mental Health Act or the Disability Act—legitimate alternatives that weigh issues of risk and that are less restrictive, that do not result in people being indefinitely detained in a forensic secure hospital.

Also what we talk about is people on non-custodial orders—that is, people for whom, at the point of disposition, there is a decision that they are on the lower end of offending, that the criminal act for which they are put on a non-custodial order is at the lower end. What happens, because of personal factors—dual disability, substance dependence, those sorts of things—is that sometimes people on non-custodial orders in that situation struggle to comply with the rules and are at risk of being varied to custodial orders. What that means is: this is the prevention point—if you are on a non-custodial order, you get varied to this highly restrictive pathway in a secure forensic hospital, it means that clawing your way out can be quite difficult. However, the reasons why people end up being varied also mean that they are unlikely to make their way back out.

Senator Lines: I am from Western Australia and we are on par with the Northern Territory. That starting point is not the starting point in Western Australia, so it might be worth actually saying what the starting point is for someone who has broken the law ought to be. That may well be the Victorian example, but that is not the starting point in Western Australia. So you have kind of jumped off in this direction; whereas in Western Australia we are down here. Is that an appropriate starting point, I guess, is the question I am asking?

Mr Povey: The starting point, the principle, that we are trying get at is—

Senator Lines: So someone has broken the law. They have got an impairment. At that point, what is the best option for people?

Mr Povey: Eleanore, if you want to jump in, please feel free. It is the principle that we are talking about at this stage. It is the fact that when you are making a decision: is it custodial; do you vary someone to a custodial order; and is that the only alternative? Who asks the question, making sure that there is a legislative setting that says, 'We don't just dive into custodial and, when we vary people, we are really clear about why we are doing it.' The risk is, when we are varying because of personality or behavioural issues, that those very issues are going to prevent people from extricating themselves. So I take your point, and that is one of the challenges about this particular consultation, because we have all got these local variations. However, as a principle, a last resort, let's be really clear about when we make that decision, because it is going to be hard, particularly because of the resource implications, to get people out.

Ms Fritze: Going back a step, Senator, to your question: if somebody is charged with a criminal act, it might become clear at a certain point in the prosecution that their disability or personal circumstances were a key driver in that behaviour. It might either become clear through a jury or court finding that they were not responsible for that conduct or it might just be apparent to the police and prosecutors handling the case that that may well be a likely finding. Legal aid and no doubt others would call for diversion out of the criminal justice system where disability and those other circumstances are the drivers of that behaviour and look to civil mechanisms—non-criminal and non-stigmatising mechanisms—to provide the supports necessary to that person to, hopefully, ameliorate their behaviour and support them to live safely in the community.

Senator Lines: Does that require a change in the sentencing laws then: if someone presents to the court with an obvious mental impairment, the magistrate or the judge has a range of options?

Ms Fritze: Yes. I think that is the case, and in Victoria we have certainly got some formal and informal diversionary mechanisms. Whether they are formally embedded in legislation or through established practices that are well resourced is perhaps less the question. The pointiest end of it is that, once it has been clearly established by a court, if the prosecution has progressed to the point where someone has been found unfit to be tried or not guilty because of mental impairment, at the point when punitive purposes behind criminal justice laws cease to have a role then the court should be looking to exit the person from the criminal justice system, or quasi-criminal justice system, by linking them back into existing community supports that apply on a more mainstream basis through the Mental Health Act and the disability act mechanisms, which can support them without needing those supports to be mandated through criminal justice legislation.

Dr Chesterman: We totally agree. In order to do that there need to be two things. Firstly, the legislative option needs to be open at the point of determining whether a non-custodial order would be appropriate and there
also has to be a confidence that services exist with appropriate monitoring mechanisms that can support the person.

CHAIR: Let's come back to the services, because that is another key area. It seems that what we are talking about is a national framework or a national process where this is consistent across all states and territories.

Senator LINES: What effect does mandatory sentencing have, then? We have mandatory sentencing in WA and we have now got three strikes burglary mandatory sentencing.

Dr Chesterman: It removes that option.

Senator LINES: You would have to remove that option?

CHAIR: It seems fairly clear from a lot of the evidence we are getting that that is a major problem. We agree we are against that and that that needs to be addressed. So let's to a certain extent take that off the table, because I think we could spend a lot of time talking about how that plays a part, when we all know it is playing a crucial part in what is driving some of this. We would have a national approach which is really clear about where people should not be going through the criminal justice system.

Mr Clements: Arguably, that is where we would suggest that what you need are appropriate support services in place, and they do not currently exist. They do not currently exist on a national basis. Certainly one of the major stumbling blocks that you come across at times is access to safe, stable, affordable housing.

CHAIR: That is also something that has come up. This is only our second hearing, but if you really look at the evidence we have got, and at the submissions, that is really key. Can I park that for a second and come back. That is a key issue, and we cannot just say, 'Yes, we need it.' There are actually some key things that need to be done to get us there. Let's come back to housing and a stable environment. Where do we go from there? What are the key services?

Mr Clements: As part of the support services, we do need to look at what the offending behaviour looks like and we need to acknowledge that there is something that we need to do. We would probably argue that there is an opportunity to think about restorative practice and restorative processes that support the individual to better understand the impact of the offending on families and on community, and that can work parallel to targeted, purposeful, tailored case management support. It is very difficult to park the housing. I am concerned, Senator, where you are coming from there.

CHAIR: I will come back to it again.

Mr Clements: But alongside that is purposeful support that incorporates and understands the offending behaviours, and perhaps a restorative approach is one area that you could look at in that space.

Senator LINES: Who is the 'we' in looking at the offending behaviour? It almost sounds like it is a consultation. That is quite different to a court of law.

Mr Clements: If you think about a diversionary approach, something that we have been trialling for the last 12 months in the children's courts is the capacity and opportunity to divert a young person into a purposeful exercise around case management and support. The people who fit into that assessment are obviously the lawyer, the public prosecutor and the magistrate who signs off on the diversion plan. That diversion plan is obviously going to depend on the offending, but that is an example where you can then adopt a therapeutic approach to the needs of the individual rather than a punitive approach.

Senator LINES: What gets people in the courtroom to that consultative approach rather than a prosecutor and a defender, with one trying to uphold the law and presumably sentence and one trying to get the best outcome for their client? How do you change that environment to one that is more consultative? Is that what you are suggesting? Where does that work begin?

Mr Clements: Victoria has a really good example, in the context of a neighbourhood justice centre that adopts an approach of therapeutic jurisprudence. Fundamentally, that is an approach that differs from a punitive approach and provides the opportunity for relevant parties and those stakeholders in the court system to consider something that is more appropriate to the needs of the individual. I think Koori courts are another opportunity. I think drug courts—

Senator MOORE: But are those courts at lower levels of offence in terms of what the actual charges are? My understanding, certainly from Queensland in the past, and it is in a state of flux now in terms of looking at things, is that it operates for what would be called lower and middle level crimes, so a lot of property crime and those kinds of things. But once you get into the area of significant violence and the harm, I have not seen any of those alternatives actually triggered in those cases. It is the level of crime. The kind of thing that we have seen in some of the evidence—we are talking about serious crime, where people have been harmed. And that is where the
community response comes in as well. Have you got evidence of where, at a more serious level, we have looked at alternative mechanisms? I know you want to talk, Ms Fritze; I am sorry!

**CHAIR:** And, Ian, I have not forgotten you; I will come back to you.

**Ms Fritze:** In relation to the Assessment and Referral Court List, which was just mentioned by John, that is obviously a Victorian example. I was the first duty lawyer attached to that list, so I have some experience of how that worked when that was set up a few years ago. That is a program that is established under statute in Victoria; it does have some basis. There are some offence types that are excluded, but it did, broadly speaking, allow pretty much any matter that could go through the Magistrates Court to participate in that court. The jurisdiction of the Magistrates Court—I am not sure about other states, but certainly in Victoria—has been expanding over time and does include some offences where injuries of a significant level have occurred to people. The first person I represented in that list had caused a very serious brain injury, unfortunately, to a person through his behaviour. He was able to participate successfully in that list. The victim and her family ended up attending court at the end of the process and seemed to be quite satisfied with the outcome once they understood the intent behind the 12 months he had spent participating in that therapeutic, individualised program—the supports he had received—and she thought that was a good outcome.

**CHAIR:** Mr McKinlay, I will come to you now.

**Mr McKinlay:** I just want to add some illustrations from the Northern Territory experience to the current conversation. In the Northern Territory there is very little in the way of early intervention diversion. Although the knowledge of those possibilities exist, the Northern Territory largely started from the high end, from the forensic situation, and is trying to work back from that. They attempted to develop a secure care facility. They built one in Alice Springs, and that was meant to be a pre-forensic intervention or provide for pre-forensic intervention of the related legislation to allow for mandatory treatment orders as well as allowing a pathway out of prison for those under custodial supervision orders.

The difficulty arose when it came to running the facility. The cost of it became apparent and frightening to government, because it meant the initiative being forced back into the health department domain from corrections and required lot of training and infrastructure skill sets that the Territory simply could not afford or attract up into the region. Consequently, the facility has largely collapsed; it is not running anywhere like the way it was intended.

That brings me back to my earlier comments, that, first of all, there is not the data to be able to present to government to argue for the infrastructure development. There is that idea that not the fronting will always be the main argument. So unless it is somehow captured in a national framework under national legislation or if related COAG and funding were included into the picture, I think that will continue to be a stalling factor in the Northern Territory. That is just an illustration.

**CHAIR:** Thanks. I have data on my list to come back to.

**Dr Chesterman:** Could we give an example of significant serious offending behaviour and an alternative pathway that does exist in Victoria? I will get Tess to give us a precis of one of our case studies.

**Ms McCarthy:** Yes. DM is a man with an intellectual disability and now resides in a group home under an STO.

**Dr Chesterman:** Supervised treatment.

**Ms McCarthy:** He has a history of engaging in unprotected sexual activity without disclosing the status of his sexual health, but he is also vulnerable to sexual exploitation. He was made subject to compulsory treatment by a supervised treatment order to ensure the management of the risk he posed to others and of his treatment. He was unable to institute protective arrangements for himself, but the supervised treatment regime provided him with supervision, monitoring and restrictions upon his access to and movement within the community. He benefited from the treatment by services and supports defined within his treatment plan. His health has significantly improved and is carefully monitored. His access to community is via a structured and well-managed program with differing levels of step-down supervision relative to assessed risk. He actively engages in many community events and pursues his interests as a consequence of this. He regularly sees a counsellor for review of his relapse prevention strategies and is supported to access safe and licensed sex providers.

**Dr Jessop:** To build on the point about restorative justice: one of the things I will point out is our recommendation 13, which talks about the effectiveness of presentence diversion and preplea. There is a legislative mechanism that we have been arguing for in Victoria with others that we should have: a legislative preplea diversion. The Victorian government’s royal commission into family violence suggested that we establish a statutory youth diversion scheme.
One mechanism is that, when people are at that early point, there is the option for people to go through that scheme and to make it a consistent approach. For example, the youth diversion pilot program, which Jesuit Social Services is running, happens in certain locations but not others. We think that, if that mechanism were there in Victoria and other jurisdictions, that would help consistent practice and give people the chance to get back on track at that earlier stage.

CHAIR: Is that something everyone would agree with?

Senator MOORE: Your model Ms McCarthy just read out is about personalised, resourced treatment over a long period of time. We did not hear from you, Ms McCarthy—I read it all—about the period of time over which this particular process was going to operate.

Mr Walkinshaw: The behaviour of the fellow the case study was based on was longstanding. He had engaged in unprotected sexual activity around beats and things like that. He had developed an HIV infection and had been subject to a public health order. The health order itself was not sufficient to support him to maintain safe sexual practice to ensure that others were not exposed to risk; it was really the framework of the coordinated supports that were set out within his treatment plan through the disability act that really brought that network of support together for him.

Senator MOORE: So they went out of legal and into disability.

Mr Walkinshaw: Yes, through a civil supervised treatment order. That then brought quite a sophisticated plan of support to him. It was detailed, set out and had aspects of clinical oversight through the senior practitioner here in Victoria. It gave clear support goals, identified areas where he was most at risk and placed limits on his freedom of movement in some respects but also provided him with support and opportunity to safely engage in activities that he has real interest in. He has done very well. His perceptions of his circumstance are measured by quality-of-life tools, and he scores really highly on those. He is involved in arts programs. He is involved in theatre. He says he has a really good life now compared to the difficulties he experienced before.

Senator LINES: So the supports there need to be ongoing so that they are lifetime support.

Mr Walkinshaw: Yes. There are different levels of support and supervision he has relative to different activities. Risk is assessed in various contexts. In some areas he has closer support and closer levels of supervision, and in others less so. I would like to think that we are seeing a movement in the longer term to lower levels of supervision and restriction that are imposed on him, together with a slow capacity for him to develop better self-management.

Dr Chesterman: It raises an interesting kind of case study question about what the National Disability Insurance Scheme will contribute to his ongoing supports. I was just going to say that the supervised treatment order regime which covers this gentleman is a civil detention regime in part 8 of our Disability Act. It is specific for people with intellectual disability which should be extended to people with acquired brain injuries as well.

Senator LINES: I was reading one of the submissions and it really struck me that, particularly for Aboriginal and Torres Strait Islander people, the first time they come into contact with the justice system is also often in most cases the first time their disability is identified. Is that true across the board? Does that also apply to non-Aboriginal and Torres Strait Islander people?

Dr Chesterman: There are screening processes in place, but they do not pick up everyone. We had an ombudsman's report in Victoria looking at our prison population. All we could point to was the number of people with acquired brain injuries was 42 per cent of male prisoners and 33 per cent of female prisoners, as against two per cent in the general population. Of people with registered intellectual disabilities, I think it was three per cent in the prison population and one per cent in the general population—but that is only registered intellectual disabilities; the figure is higher than that.

Ms Fritze: As a lawyer at Legal Aid for the last 10 years, I was initially in criminal defence work and I certainly encountered many clients who were diagnosed for the first time with a disability as a result of the lawyer or criminal justice system interaction.

CHAIR: What I was thinking of doing, because there are a lot of issues here, is take us through some of the key issues. Feel free to jump in. Data comes up a lot and screening and diagnosis come up a lot. There is the whole issue around early intervention before people even have any contact with the justice system. I realise that is an issue, but perhaps we can put that off to the side for a bit. There is the issue around data and getting an understanding of what the size of the potential population is and the number of people that are already in the system, because we still have not got a handle on that. We talked about mandatory detention—we got that out of the way—and a national framework and what that needs to look like. We would obviously need to get some key areas about what a national framework should look like. And then we need to come back to housing, the services
and the cost. We are talking about lifelong supports here. We can intensify the levels of supports when needed—I understand that—but really, if we are doing this properly, we are not going to be in a situation where we are going to say to a person, 'Off you go; you're fine.'

Mr Povey: I am just wondering whether to that list you would add the legislative safeguards and oversight. To some extent they are incorporated, but we would absolutely agree with the Disability Act and supervised treatment order regime being a best practice model that should be considered. This idea about safeguards and processes including statutory authority to detain is a really important bit. The way in which decisions to detain are made by independent courts and tribunals needs to be demonstrably justified on evidence and can only be made when there is no less restrictive means. The way in which orders authorising detention can be subject to review, repeal and periodic review. Finally, it is really important that people—particularly if we are talking about cognitive and psychiatric impairments—have access to information, advice and representation. There is a bit of vagary about the data, but we know that lots of people are missing out on access to information, let alone tailored advice and representation.

Senator LINES: I think the other thing that is worth putting out there is the moral hazard, if you like. For the person who has not committed a crime their behaviours perhaps go unnoticed, but then once they impact the criminal justice system, seemingly we can mandate some behaviour modification processes. I am just wondering about the moral hazard there about us mandating that at the moment someone comes into the criminal justice system, which we would not be able to do when they are outside of the criminal justice system. I am a little bit uncomfortable about that. I accept the reality of it, but to me there is a moral hazard there.

Ms Fritze: One of the benefits—and certainly we have suggested it in our submission—is a stronger emphasis on civil support, supervision and detention mechanisms rather than the criminal justice system, because they can take effect before anyone has committed an offence or been charged with an offence. For instance, the supervised treatment order regime can be triggered where someone poses a significant risk of serious harm to others based on their past history of behaviour. That does not have to have been charged behaviour or behaviour that has attracted the attention of police or the courts but, if there is that demonstrable need, that can trigger that intervention.

Senator MOORE: I just want to add two things. It is the family involvement that is critical in some of this and, also, on the other end, the lack of family involvement where you have public guardians, like Mr McKinlay, when the person has no family support. The other thing is how we bring the community along, because these issues sometimes stimulate some very negative responses in the community. If we are going to have any movement, we need to actually bring the community with us. I would be really interested to see how people feel about how we do that. I just want to add that to the list, Rachel.

Dr Chesterman: That is a significant challenge that we have experienced here with the regime in Victoria.

Senator MOORE: As soon as you start talking about those things, the tough on justice arguments come out. It is how we handle that.

Mr Clements: Sometimes with the nature of the offending, they certainly come out even more so.

Senator MOORE: Absolutely.

Mr Clements: But I guess what we would argue is that increasingly there is economic modelling that indicates the financial benefits associated with an approach that actually does not involve incarceration. And, yes, there have been a number of approaches and studies. In the work of Eileen Baldry and Leanne Dowse at the University of New South Wales, there is now some very reasonable evidence to suggest that there are better approaches.

Senator PERIS: A lot of the stuff is very useful, but there are high incarceration rates in the Northern Territory and more mandatory laws that we are continually introducing up there. I know that yesterday the Northern Territory government said that they were canning the support that they had previously given to people who had been arrested in communities and put out on bail, and now they are not assisting them to get back to community. That is just going to cause more disruption. Dr Jessop, I know you were talking about the lack of transition. We are just continually going to be setting people up to fail. We are going to be here in 10 years time talking about the same things, if we do not take action now. For a young Aboriginal child who goes into detention up in the Northern Territory, we are talking about putting restraints on these young kids in detention now. We are talking about all the things that we want to prevent, but government is continually introducing laws that are just going to get worse.

For a young 11-year-old or 12-year-old Aboriginal kid who has not been committed but is kept in detention, where does he go from there? If home life is not so great, he goes into foster care. He runs away from foster care, and then he is back into the system. That is where I am really interested. Perhaps we will get a new government
up in the Northern Territory in the next couple of months. What is the way forward? I know Senator Lines shares
the same concerns. The number of laws that directly target Aboriginal people, the incarceration rates and the
deaths in custody are not getting any better. I just want to throw that out here, because we are talking about very
valid things. But, unless we make some serious changes, we will be back here next year, the year after and in 10
years time with the same issues.

I know Mr McKinlay is from the Northern Territory. Where does a 12-year-old boy go once he is in prison? They
say you have got a sentence for life. That is where I feel disheartened when I am here talking about these
things all the time.

Mr McKinlay: That is true, and if I could just follow on from Senator Peris. One of the major difficulties, in
looking at the big picture scenery, is the diversity across the different jurisdictions. You have, I guess, the older
jurisdictions like Victoria and New South Wales who have more services and are more advanced, although none
are perfect, then you have the trialling jurisdictions like the Northern Territory and WA and perhaps even
Queensland who are playing catch-up. The main problem is lack of awareness. That is what I was emphasising
earlier. Often the belief is that they are handling the problem with their criminal justice responses as occurring
now.

There is even the belief in the Northern Territory around this new Darwin prison, called a megaprison with its
forensic facilities, that it is going to be the answer for present and future needs. That is where the conversation
seems to be stalled in the Northern Territory. When we discuss this difference at different forums and different
inquiries, we have suggested that there could be some level of state mentoring from those who have some systems
and alternatives in place to compare with the states and territories that have virtually nothing.

For it to get some standardisation, I cannot see any alternative other than developing a national strategy and the
Commonwealth taking the lead with all the implications that that is going to carry in terms of NDIS involvement,
related legislation and funding. But that is probably taking too big a part at the present time. That is where I think
the Northern Territory is stalled at the moment.

CHAIR: Dr Chesterman.

Dr Chesterman: In identifying a framework, I guess the combined message we are all suggesting is that a
lower level or criteria of intervention is appropriate for behaviour, which may not yet even be criminal, and we
are talking about people with disability here such as intellectual disability, mental ill health or other cognitive
impairment. The other side to that must be treatment so that any restrictions placed on movement and behaviour
of a person who has not yet committed a crime is justified on the basis of their receiving treatment to assist them
not to offend in the future. In terms of a framework I guess that is what we are talking about. In Victoria we have
that civil detention regime of supervised treatment orders. We would certainly say that is worth considering as a
possible framework for other jurisdictions and even a national conceptualisation of this.

CHAIR: Mr Clements, I thought you indicated that you wanted to say something.

Mr Clements: I was just going to say something in response to Senator Peris's comment. We released a piece
of research last year around postcodes of disadvantage, so we actually know that there are certain postcodes that
have a high representation of people who enter the criminal justice system. They enter at an early age and I guess
there are certain flags, if you like, or alerts, that would enable us to actually start working in those places early.
Most notably, if you are aged between the age of 10 and 14, if you are Aboriginal and if you are picked up by the
police for whatever reason, these are all red flags where we need to start doing something.

We were very happy to find out just recently that we were re-funded for a program that we deliver in
partnership with the Victorian Aboriginal Child Care Agency and the Victorian Aboriginal Legal Services that
actually works with that cohort. The moment that a Koori young person is locked up, they are flagged through the
system. We put that program together in partnership with those agencies because nothing was happening with
those young people. Instead of nothing happening, other than a legal response, we felt very strongly that you
needed to put to a therapeutic response in place. They could bring their trauma informed practice and perspective to
that work, we bring a case management perspective and the Aboriginal Legal Services bring a legal perspective
that enables us to address a range of factors associated with the offending.

Fundamentally key to this program is that, while the young person is the trigger, we work with the family and
we work with community. Many of our systems and services are triggered to work with the individual. One thing
we know about working with the Aboriginal community is that you need to adopt an approach that actually works
with everybody who is involved. Unfortunately the funding mechanisms do not always allow you to do that.

Senator Lines: Has anyone looked at the economic benefits? One of the issues that might propel the
Western Australian government to change is that incarceration now is costing almost one-third of the state budget

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because we lock up so many people. Is there good economic modelling which says that restorative justice or supervised treatment orders are more economically beneficial?

Dr Chesterman: Interestingly, we were just talking about this outside before and the need to have this kind of data to give us a comparison of lifetime of service support versus incarceration. I believe in the United States, there is some data, that is because of the very high imprisonment rates, but I am not aware of that in Victoria.

Mr McKinlay: Amongst the limited data available in Australia is the work done by Professor Baldry that was mentioned a bit earlier that does comparisons between using earlier interventions versus long-term prison solutions. That is quite a significant piece of research. I do not think anybody would argue that the cost of long-term prison based or custodial support is going to be cheaper than remedial early intervention allowing people to transition down into medium-to low-level care. Unfortunately, that is not seen in the short-term electoral cycles where prisons, especially in the Northern Territory, provide immediate and perceivably less costly solutions. To try and get that information out and get the long-term perspective is going to be a challenge.

Senator MOORE: I have read some of the research that Mr Clements and Mr McKinlay have referred us to. It seems that in terms of construction and staffing of detention centres, prisons or whatever—people change the title, depending on what you want—that is a more immediate response than putting into place the kind of groundbreaking research with what we have got and then make recommendations about any...that is because of the very high imprisonment rates, but I am not aware of that in Victoria.

Dr Chesterman: There is a kind of disconnect between the youth justice systems and the adult justice systems. As we know, the legislative and policy environments in both instances are very different. Sometimes what actually happens for young people is we might see the early onset of ABI, where we are often dealing with lower-level cognitive functioning. Sometimes, particularly in that 17 to early-20s age group, there is a kind of disconnect, which is best exemplified in data systems where none of that data transitions, so court data, police data, youth justice data, adult justice data—and I am talking specifically in the Victorian context here—and none of these systems speak to each other. I do not know of anything happening in that space but, if there was, often the difficulty is that that would not then translate to young adults in the adult justice system and look at the repercussions down the track.

Dr Jessop: One thing I would quickly add to that is building on mainstream services as well: how would you pick it up at neonatal screening, child protection, schools—that step before? It is really critical that at that point we can start to pick these things up.

CHAIR: So high-risk communities.
Mr Clements: One final point: in the context of prisons, it is worth remembering, as we all know, prisons are extremely dangerous and violent institutions where, when you go into a prison, this is not something that you want to flag, because you are highly at risk of standover, manipulation, abuse—further abuse—in those systems. Within the prison system, they are not particularly skilled always at managing or responding to the needs of this cohort. I am speaking more broadly here than necessarily those with a diagnosis but for those, where often you would suspect something—and, in our work here, we work with serious violent offenders and sex offenders—the information does not transition through. So there are some pragmatic challenges associated with communication and sharing information but, fundamentally, in our work with the ABI user group, they will all say: 'When you're in prison, you keep your head down and you don't flag any of this.' When you go and see somebody and actually say, 'I need some support or my meds,' it is not something that you advertise.

CHAIR: Once you are in the system—

Mr Clements: Once you are in prison—

CHAIR: You are stuck.

Mr Clements: that is it, yes.

Dr Chesterman: I am going to throw in three quick comments in relation to the conversation we have been having. One is in relation to foetal alcohol syndrome. One of the things we would say is that some research—it would be a pretty small amount of research that would be needed—ought to be done to say whether the supervised treatment order regime that Victoria has would be appropriate for people with foetal alcohol syndrome. The question there is: whether the treatment that can be provided would be sufficient to warrant the restrictions that would be placed on a person. That would be very targeted clinical research that could be conducted. We would certainly recommend that occur.

The second point in relation to Senator Moore's comment on the NDIS is that this inquiry is really happening at a very opportune moment, given the rollout of the NDIS. We have high-level principles that the Council of Australian Governments have agreed upon but which do not flesh out the applicability of NDIS supports that will be available to people in and near the criminal justice system. Some work from this inquiry could be quite beneficial to flesh out what supports will be available.

The third point, just very quickly, is to make a point that we, at the Office of the Public Advocate, host a large volunteer program—the Independent Third Persons Program—where our volunteers sit in on police interviews with people with apparent cognitive impairments. In terms of early identification, that is one of the earliest points in the criminal justice system at which a person with a disability is identified to have a disability. Much more could be made of the information that we generate through that program, which involved last year almost 3,000 police interviews with over 250 volunteers.

CHAIR: On that, have you looked at the new South Australian process?

Dr Chesterman: I am aware of it—which uses volunteers. I know there is a bit of debate about that.

CHAIR: Yes. I would be interested in any comments anybody has got of having a look from the outside into what South Australia is doing.

Dr Chesterman: I think we are likely to get some different views amongst the panel on this but we would certainly say that our program is expanding not because of the greater incidence of people with disability but greater awareness by the police of the need to involve independent third persons in police interviews.

CHAIR: Have you got any comments?

Mr McKinlay: On early diagnosis around the FASD identification question, I know that New Zealand have made some first-stage steps in this regard—and I think a Dr McGuiness is probably involved there. Canada is probably two decades ahead of Australia on this pathway, and there is a lot of interesting modelling and systems over there. Whether or not they are transposable or transferable to an Australian context, I do not know.

CHAIR: The committee is certainly aware of some of the work in Canada and New Zealand. I think we need to chase up some more information on that. Ms Fritze, did you have something to comment on?

Ms Fritze: Not in relation to any South Australian developments—I am not across them—but in relation to the independent third person program here. I am certainly aware that while the police's ability to identify people with disabilities might be increasing, there are many instances where we see people progress through police interviews and prosecution without that disability being picked up and where the independent third person might not be able to adequately protect the rights of the person in that interview process. We have seen a recent example in the County Court where a number of police interviews were ruled to be inadmissible as unfair interviews, even though an independent third person had been present.
CHAIR: So even with the third person present.

Senator MOORE: That was ruled at the court level?

Ms Fritze: It was ruled at the court level. It was found that the person had not understood their right to silence and the implications of participating in that interview, notwithstanding the independent third person's presence in a number of different interviews.

Senator MOORE: The system actually works.

Mr Walkinshaw: It can have those gaps, but it does potentially, for a number of people, provide an early pick-up for people having contact with the criminal justice system. It could be better done, but it does provide an opportunity for referral and for a look at other ways to support people in relation to their behaviour. The underbelly starts to begin: often we will see people with disabilities present on numerous occasions to the police before they are charged. So the behaviour has a patterning and a building to it and earlier intervention to support, other than through chemical restraints, perhaps, but through positive behavioural supports, provides a window of opportunity that could be a good investment.

Mr McKinlay: One of the difficulties in identifying people within the criminal justice system with cognitive impairment is opinion and legal practice around 'fitness to be tried'. Most lawyers in most jurisdictions will avoid raising fitness to be tried defences, because it often ends up with their clients being under indefinite detention. This distorts the picture to some extent, because these individuals just continually recidivate in and out of the justice system and are not picked up. That is another conversation, and a legal conversation, as to perhaps redefining and getting a better understanding around fitness to be tried, allowing that defence to be raised where it is legitimate and allowing that as a pathway or potential pathway out of the criminal justice system for some people.

CHAIR: Yes. The issue around being unfit to plea and being pressured to plea, because it gets it dealt with, came up in Queensland. But then down the track, when it becomes more obvious that somebody has a cognitive impairment, they look back at the history and go, 'You didn't plead then, so you must be okay,' and you just continue on through the system. Does that happen around Australia?

Mr McKinlay: This is a problem, especially in the Northern Territory, as well as the lack of independence of professional advice available to the court as to fitness to be tried. They generally rely on expertise provided by the health department. I am not suggesting that there is total bias, but there is definitely a lack of independence. To be able to get the courts or get a proper understanding of fitness to be tried—the test is very low at the moment. If they can tell a lawyer, 'Yes, I did it'—'Did you know it was wrong?' 'Yes, I knew it was wrong'—then that largely constitutes fitness to plead. But there are a lot of other elements to it, which are not considered: a person's right to put the Crown to the test and proving guilt and all those elements do not come into it in any degree at the moment.

Dr Chesterman: I point the committee to a Victorian Law Reform Commission report of 2014 on our crimes mental impairment legislation, which did make a number of recommendations, including the idea of broadening out and defining the term 'mental impairment', making it apply to a broader category of people and also requiring treatment to be provided under supervision regimes. It would be quite instructive as a better model.

Senator MOORE: Did government respond?

Ms Fritze: We are still waiting.

CHAIR: If I had a dollar for every time I have read that!

Unidentified speaker: Yes, we agree that there is work being done.

Ms Fritze: We have been consulted on it since the report, so we understand that it is progressing.

Senator MOORE: Dr Chesterman, your point about the NDIS is really interesting. I would like to know if you have had any discussions with the NDIA around these issues because in the trials it is not a point that has come up. I am wondering whether there has been something that we do not know about in terms of what is going on behind the scenes.

Dr Chesterman: I have had many conversations with the NDIA but not about this topic. I know that in New South Wales the Council for Intellectual Disability is probably the best organisation to provide an answer and they have released a paper on this topic.

CHAIR: I spoke to Jim about it last week.

Senator MOORE: Do they work with the NDIA on it?

CHAIR: Yes. They have a reference group for the NDIA working specifically on people with intellectual disability and it has come up.
Senator MOORE: As a subset of that?

CHAIR: Yes, but my understanding is that there is quite a long way to go.

Senator MOORE: The justice stuff was not mentioned when the legislation was brought in—and I understand that because you cannot cover everything—but I do not think that it has been at the forefront of the NDIA processes so it is important to get in there.

Dr Chesterman: I can point the committee to the Council of Australian Governments document from November last year which is headed, Principles to determine the responsibilities of the NDIS and other service systems, with which you would be familiar. It does have a section on people in custodial and outside of custodial settings and the broad level principles suggest NDIS support should and will be available. Seeing how that actually plays out is an important question.

Senator MOORE: Support should be available, full stop. It does not does not go into—

Senator LINES: Western Australia and the Northern Territory are, as Mr McKinlay described, the outlier states. WA and the Northern Territory are a million miles away from the Victorian response. Was it ever the case in Victoria that you had the harsh regimes that we had seen in Western Australia and the NT and, if so, what forced the change? Even if we got a national framework under a different government, state governments could stay outside of that, and West Australia has a history of not participating in national frameworks and the NDIS is a case in point. What gets states to change? The economics in WA are a big issue, but did Victoria ever have a harsh regime similar to WA and the NT and what changed it?

Dr Chesterman: Certainly a ground-breaking moment in Victoria was the enactment of the Disability Act 2006, which comes very close in time to the enactment of the Charter of Human Rights and Responsibilities Act 2006 as well, but I would have to defer to people more experienced, I think that is the euphemism, with the period prior to the disability legislation. It was certainly a harsher regime. I am not sure whether it was as harsh as the WA and the Northern Territory regimes.

Mr Walkinshaw: We saw the CMIA, Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, replace the Governor's pleasure arrangements prior to that. Certainly people with mental illness have fared better under the current regime and we are waiting, as was mentioned earlier, to see the recommendations from the Law Reform Commission translate to further enhancements to that arrangement. Other than that there is the Serious Sex Offenders (Detention And Supervision) Act 2009 which was reviewed by the Harper review that was released two days ago. We are not really across that but it seems to be recommending a reconfiguration of that regime to broaden its scope to include violence beyond sexual violence.

Interestingly, a quick glance shows that 30 per cent of people detained within that regime are people with intellectual disabilities, which is really quite astounding given that we are working off what was previously an identified three per cent within the prison population and one per cent within the community. We do not really know the demographics and the details of that 30 per cent. Are they at the more serious end of offending or are they at the more mild, moderate to low end of offending? Certainly some of the people that have been through the state's disability act regime have offended while on the disability program through the civil arrangements and have graduated to serious sexual offending but not quite to the order of recent high profile offenders that led to the Harper review.

Mr McKinlay: One of the side actions, I guess, of the ADJC—which is not our core project of course; we want to work in a cooperative and supportive way—is that we have been lodging complaints with the Australian Human Rights Commission and with the United Nations regarding breaches of various conventions that are occurring. The Commonwealth is the respondent to those actions because it is the signatory to the conventions. We hope that might provide some incentive to the Commonwealth to start thinking more in national terms and frameworks, and perhaps in supportive legislation and so forth. But, as I said, this is only a very small initiative in the bigger scheme of things.

CHAIR: I want to go back to the issue of accommodation and housing. Mr Clements, do you want to kick that off?

Mr Clements: Yes. We see that as a fundamental, pressing issue. We know that it is not unique to Victoria; it is something that is national. We need to have better transition step-down models—housing support—for everybody who is transitioning from prison into the community. But there are particularly vulnerable cohorts around that—notably Aboriginal, women and people with a disability and cognitive impairment.

I do not think there is an easy solution, but I think we need to acknowledge that the rates at which these vulnerable cohorts are recycling back into the prisons and the numbers of them that transition into homelessness or are at risk of homelessness means that it is fundamentally an area that we need to address.
CHAIR: Does anybody else want to add to that?

Mr Povey: It is the same point that we were making, I suppose, at the front end. There is a bit of that, 'How do you stop people entering into the system?' You need support services and you need housing at that point, but you also need housing—and appropriate housing—to get people out. So at both ends you need these particular types of options.

Our submission provides examples of people who have been on involuntary treatment orders under the Mental Health Act. A lot of the discussion today, we note, has been in relation to people in a forensic context. But certainly, our submission makes references to people in informal detention—aged-care facilities, disability services and other residential-type arrangements. People who are not able to go but who are not covered by any explicit legal framework is something that I think should be on people's radar.

Our submission provides examples of people who have been subject to involuntary orders under the Mental Health Act for upwards of 10 to 15 years. For people who have had a forensic context in the past you find that the secure extended care units and other facilities are saying, 'We're not going to take you, because you have got this kind of offending background.' It is just a blockage. People cannot access the system because people are not going to take them on. And then you have these mixed ideas about cognitive impairment and psychiatric impairment—'No, you've got both of those issues.' Or, 'You've got one or the other. We're not going to take you.' So to a significant extent there is this supply issue, and the fact that if everyone is full to the gills they are not going to be able to take anyone else—particularly people who they see as more problematic.

Dr Chesterman: Just fleshing out the point that Chris made earlier about people in mental health facilities for a lack of other accommodation settings: we did a study—it was referred to in our submission—our long-stay project, where we established a range of criteria to determine whether a person was a long-stay patient in a mental health facility. In the original research, which we have updated since, 99 people were identified as long-stay mental health patients, of whom 75 were in the facilities because there was no alternative accommodation for them.

Senator PERIS: Mr McKinlay, with regard to the incarceration of Aboriginal kids in youth detention, what percentage of those kids have cognitive disorders, in your view?

Mr McKinlay: I have no idea. I suspect that there is a percentage of them that do. We sort of only come in on the picture at adult age, and that is 18. But just going from the current studies, I would suggest that a significant percentage of them would have some level of impairment.

Senator PERIS: You have assessment tools and rehabilitation tools. I think I read in one of the submissions that people with psychiatric impairment can be rehabilitated, is that the same for cognitively impaired people? Have you done any studies on reoffending, of people who have gone into the system with that disorder and not reoffended later on through rehab?

Mr McKinlay: At both ends of the spectrum, it is probably easier and the solution is more obvious than when you go into the mental health domain. Although, as has been said, there is dual diagnosis in some cases. In most cases, in the cognitive impairment domain, that is a welfare issue that requires welfare focused services. Normally, they will have to be lifelong in providing some level of disability support. The solutions and the methodology to achieve those solutions exist. It is just a question of getting them implemented at the right time, preferably pre-emptively before they reach the forensic level. The answers are there: it is totally doable; it is just a question of getting it done.

Dr Chesterman: Bryan is one of the Victorian experts on this topic.

Mr Walkinshaw: He is right. We will generally see that people with mental ill-health have better prospects for recovery than those with intellectual disability or cognitive impairment. But, by the same token, Ian is right: the last 20 years have been quite significant with the development of the technology of positive behavioural support. We have moved away from the notion of seeing disability as static—it is much more individualised. We are seeing opportunities for people to grow, develop, learn, change their behaviour and learn new behaviours and replacement behaviours. With that technology, it is there. It needs to be applied. In the past it never was; it was just an institutionalised model that left people without such opportunity. We are seeing it emerge. It can be slow and often we will be talking about lifelong needs for supports for many people, but there is a sector within there that will flower, given the opportunities, and move and develop a good lives model.

Mr McKinlay: I totally agree.

Senator MOORE: Regardless of the crime?

Mr McKinlay: Yes.
Senator MOORE: I think we have to keep making that point, because that is where the community stuff comes in.

Mr Walkinshaw: Yes. What motivates people with disabilities to commit crimes is a very complex equation. It is so individualised. We often see people who themselves have had—not that it excuses their behaviour but it gives some context—quite traumatic and disruptive developmental backgrounds where they have been victims. The notion of habilitation often needs more traction than the notion of rehabilitation in that context.

Dr Jessop: I will quickly flag two things. There are some generic models that we know work—for example, in Victoria, the Judy Lazarus Transition Centre. They help to stage release where they help people with employability, living skills and those sorts of things. Whilst not specific to people with intellectual disability, or cognitive impairment et cetera, those sorts of models could be expanded. For example, recidivism rates for people going through Judy Lazarus are 10 per cent compared to 44 per cent. That is a really tangible thing. Even with, for example, Jesuit Social Services ReConnect program working with high-risk offenders, whilst not specific to people with cognitive impairment, we see some positive outcomes. But we think the service offering really should be broadened for those kinds of models which we know work pretty well. That is certainly a gap in the system.

CHAIR: Mr McKinlay, did I just hear you trying to say something?

Mr McKinlay: I was going to add to the previous comment about models for disability services dealing with cognitive impairment. The mainstream thinking these days around the positive behaviour approach is that, in the majority of instances, the behaviours that people are seeking to develop are relatively normal goals and aspirations that most of us want out of life. It is just that for various reasons, and many complex reasons, they have developed negative means of trying to secure these outcomes. Positive behaviour methodology seeks to provide the pathways to achieve normal aspirations and goals whilst closing off the negative methods of achieving it. That is just an aside I wanted to put in.

CHAIR: What I would like to do is invite each of your groups to make any final comments. We have got a stack load of notes here. It seems to me that what we are looking at, and we have not talked about it a lot, is we are doing some front-end stuff so that people do not end up having connections with the system in the first place. There is a whole lot of early intervention supports and diagnosis supports there. There is a legal framework around how we should be handling this at a national level, taking into account the Constitution—some of the states are not has progressed as others, shall we say. We have also got issues around transitioning—that is, when people have connection with that justice system. There are a lot of recommendations around transitioning people out as well, including more services and supports and doing an economic study to get some more evidence. And there are issues with the NDIS.

Senator MOORE: And there are issues with community messaging. Does that put things into where we should be going?

Mr Clements: I have just one very small point in relation to community messaging. Clearly we believe in education, which is why we invest in research and policy and appropriate messaging. But one of the major issues I think the community forgets is that the majority of people come out of prison and move into the community. Often the sentencing averaging here is 18 months or somewhere around that, in many instances less. So if we want to create safer communities, and we all share that commitment, then it is a better investment in those individuals who are most vulnerable and who place sometimes communities at risk. We acknowledge that, which is why we deliver a small housing service like Perry House that works with people with intellectual disability who enter the criminal justice system, many of them for very serious offending and sex offending. But there are models around where you can support people to make that transition into community through a stepdown model. The example you spoke to earlier on is a very good example of people who can successfully live in community. The challenge is it does require an investment of resources and therein lies the problem.

Dr Jessop: We have not really talked about workforce much but I think when we talk about having supportive therapeutic environments, having a workforce that is able to deliver that is very important. From police through to courts through to prisons, it is important we have not just a compliance punitive response but actually understand people's needs. I think that is a critical component as well.

CHAIR: Do I take it that is your final comments?

Dr Jessop: We will leave it at that.

Ms Fritze: To pick up on your earlier point around lawyers not raising defences of mental impairment or highlighting when someone might be unfit to give instructions, the reason I think that so often occurs is because the lawyers themselves are not aware of alternative mechanisms for supporting people in the community outside of the criminal justice system and fear that their client will end up indefinitely detained if they pursue those
mechanisms. That really highlights the need for the justice system to be empowered to divert people at that point, following a finding of unfitness, following a successful defense of mental impairment, back into the community through mainstream civil support, supervision and detention regimes rather than defaulting, as they currently do, to a criminal justice system supervision order. The Victorian Law Reform Commission report that was referred to earlier from 2014 recommended that the courts must first consider those alternative civil mechanisms and be satisfied they would not be sufficient before considering then whether to detain them or supervise them under the criminal justice system regime. Really, that strong focus is on avoiding entry into the system.

Mr Povey: I wanted to comment on the question from Senator Lines before about what causes a change. I think it is such a great question and something to think about in relation to what we want the system to look like. If you think about what has happened in Victoria, I think it is important to acknowledge, as it has been acknowledged, it is not perfect. There has been a legislative agenda, a framework over a series of years if you think about the Disability Act, the charter, the Crimes Mental Impairment Act and the updated Mental Health Act.

The updated Mental Health Act is an interesting example because it does talk quite strongly about human rights, about recovery and about supported decision making. All of these sorts of things are not the answer absolutely but this idea about changing culture, about moving away from punitive responses, lead the way. I think that is an important thing to think about. I talked about safeguards and processes. Because of the fact that we keep coming back to dealing with people with cognitive and psychiatric impairments, there is this idea that we need to have very clear processes and rights in relation to decisions and orders but people also need to be supported through those processes. They need information, advice and advocacy.

Dr Chesterman: I agree with those points. Every so often people with disability are imprisoned or indefinitely detained in the context of protecting the community and managing risk. We make the point as we have throughout that good models do exist, which also secure benefits to the person and these models also provide benefits to the general community.

Ms McCarthy: I would like to point to the importance of the Convention on the Rights of Persons with Disabilities in this context. It is the most comprehensive international human rights statement on the rights of people with disability and it is really significant for people with disability who are in contact with or who are at risk of contact with the criminal justice system. I think keeping that in mind in the development of recommendations and a human rights approach to this issue really provides an opportunity to influence. As you know, Australia is a signatory to that convention so I think we should keep it within that.

Senator MOORE: We like signing things.

Mr McKinlay: I think the need and the type of need has been well articulated by those here today. All I would say is we need to have more data to get a better picture of the extent and the future extent of this need. We have to have a national approach, and I think that needs to be led by the Commonwealth.

Senator MOORE: Leading on from that, is there an opportunity for organisations like yours to actually get together and talk about this stuff? Throughout this inquiry there have been a number of people and organisations who share absolute commitment to making the system better. Is there something in the system that allows it to happen?

Dr Chesterman: As it happens, it probably occurs all too infrequently, as I was reflecting after we were talking before. We came in and started to talk about these issues and realised there is lots of mutual interest and that we can learn from each other. I guess the one thing we take away is the need to do that more frequently.

Mr Clements: I think it would be good to think about what formal mechanisms we need. We all work together in different ways but it is a bit of an ad hoc approach.

Senator MOORE: And allowing for the time and resources that takes for everyone with their workload. It struck me that there is such a commonality of interest among so many people and yet we do not actually see it.

CHAIR: I was very interested to see the witnesses we had here today that the first peoples disability networks had brought together with their consortium. They have got together some very interesting and useful information. We are starting to see groups bring the various groups together, some of the research together and with some of the legal people as well. Let's keep it going. Thank you very much for your time today; it was much appreciated.
AVERY, Mr Scott, Director, Policy and Research, First Peoples Disability Network, Australia
WARNER, Ms Karly, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services
MUIR, Mr Wayne, Chairperson, National Aboriginal and Torres Strait Islander Legal Services

Evidence from Mr Avery was taken via teleconference—

[11:03]

CHAIR: Welcome. Have you been given information on parliamentary privilege and the protection of witnesses in evidence?

Mr Avery: Yes.

CHAIR: I invite all of you to make an opening statement, depending on who wants to speak from NATSILS, and then we will ask you some questions.

Mr Avery: I will start. I would just like to start by thanking the committee for the invitation to appear today, particularly in accommodating my appearance by teleconference. I would like to acknowledge the traditional owners of the land here and where you are meeting today.

I am the policy and research director at the First Peoples Disability Network. We are a non-government disabled people's organisation established by and for Aboriginal and Torres Strait Islander people, their families and communities.

Along with two other community organisations and six research institutes and universities we have put together a consortium submission, bringing together the best research and evidence that is available on the problem as it affects Aboriginal and Torres Strait Islander people. Our submission includes contributions from the First Peoples Disability Network, the National Aboriginal and Torres Strait Islander Legal Services, National Family Violence Prevention Legal Services and researchers from La Trobe University, UNSW, the Telethon Kids Institute, Macquarie University, UTS and the University of Wollongong, and the submission has been supported formally by the Change the Record campaign. As the submission by the First Peoples Disability Justice Consortium is quite comprehensive and comprises in-depth contributions by experts, some of whom are not present here today, it would not be possible to attempt to cover all the issues in the time allocated, so I will speak more about the approach that we adopted and what drove the submission being put together.

The consortium recognised from the outset that the circumstances affecting Aboriginal and Torres Strait Islander people are unique, and that the intersection with cognitive and psychiatric disability within the justice system warrants a specific focus. When you combine Aboriginality with disability, you have the perfect storm of system dysfunction. This is because Aboriginal and Torres Strait Islander people with disability encounter a structural bias which works against them at all key points of their lives, up to, during and after their coming into contact with the justice system.

This structural bias works against them on multiple levels. An Aboriginal person who has disability may experience bias on two levels—an Aboriginal woman who might be exposed to domestic violence and has disability has bias on multiple levels. The impact of this systemic bias accumulates over the course of their lives.

We have captured how these factors interact across life trajectories in a table on page 19 of the submission, which is our summary of it. As it stands, an Aboriginal and Torres Strait Islander person with disability is more likely to matriculate into prison than into tertiary education.

So the notion of indefinite detention is not limited to individual episodes of uncontained confinement without trial. Whilst these cases personify some of the most horrific of human rights violations, they just represent the tip of an iceberg. Instead, the notion of indefinite detention should be seen over what happens across the entirety of a person's life. The reality for many people who are Aboriginal or Torres Strait Islanders with disability is that once they come into contact with the justice system they face a life of recurrent detention which goes on indefinitely.

The community and the research sector have organised themselves in the production of this submission, to demonstrate that it is possible to come up with a coherent, multidisciplinary strategy to change the conditions that create indefinite detention, and one which is supported by the evidence. We need a new direction, and it is vital that the government of Australia have a role. The 16 recommendations in the submission were arrived at using a life courses approach, so we looked at what can be done at critical points in a person's life to alter the trajectory away from imprisonment and towards a positive future. We have taken care to focus on those social barriers that make a difference, as well as the development of nationally consistent legislative practices, which we would see as a natural leadership role for the Commonwealth.
If these issues seem complex then please for a moment just consider how the justice system appears to an Aboriginal or Torres Strait Islander person with disability, isolated and without support. Whilst the consortium members come together, bringing with them a particular expertise on the problem, we are ultimately all Australians who want to live in a country that is both diverse and fair in action and in sentiment. In submitting our recommendations, we are motivated by a moral and ethical imperative to act upon a national tragedy that continues to unfold. Essentially, what we seek is for the Commonwealth government to prioritise a dedicated, comprehensive approach to the issues of indefinite detention for Aboriginal and Torres Strait Islander people with disability, who are the most marginalised of the most marginalised of our citizens. Thank you for that. I am happy to take questions after the NATSILS make their statement.

CHAIR: Thank you. Ms Warner, are you making a statement?

Ms Warner: Yes, I am. I would like to begin by acknowledging the traditional owners of the land which we are meeting on today, the Wurundjeri people of the Kulin nation, and all peoples of the Kulin nation. I pay my respects to their elders past and present. Thank you to the Senate Community Affairs References Committee for inviting NATSILS, the National Aboriginal and Torres Strait Islander Services, to give evidence to this inquiry. I am the acting executive officer of NATSILS, which is the peak national body for the Aboriginal and Torres Strait Islander legal services in Australia.

Firstly, I would like to acknowledge the contribution of the First Peoples Disability Network in preparing their excellent consortium submission. I would also like to acknowledge that Shane Duffy, the CEO of the Aboriginal and Torres Strait Islander Legal Service (Queensland), gave evidence to this inquiry at an earlier public hearing on 23 March of this year.

Let me begin by telling you just a little bit about NATSILS. NATSILS brings together over 40 years of experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner throughcare to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The ATSILS, or Aboriginal and Torres Strait Islander legal services—I will interchange those terms—are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. This role gives us a unique insight into the justice issues that are affecting Aboriginal and Torres Strait Islander peoples. NATSILS represents the Aboriginal and Torres Strait Islander Legal Service (Queensland), the Aboriginal Legal Rights Movement in South Australia, the Aboriginal Legal Service (NSW/ACT), the Aboriginal Legal Service of Western Australia, the Central Australian Aboriginal Legal Aid Service, the North Australian Aboriginal Justice Agency, the Tasmanian Aboriginal Community Legal Service and the Victorian Aboriginal Legal Service Co-operative Limited.

I am sure you are all aware that Aboriginal and Torres Strait Islander people are imprisoned at a rate 13 times higher than the rate for non-Aboriginal people. This trend is getting worse. From 2004 to 2015, there was a 95 per cent increase in the rate of Aboriginal and Torres Strait Islander imprisonment, compared to an increase of 27 per cent in the overall imprisonment rate during the same period.

We do not know exactly how many people with cognitive and psychiatric impairments are in contact with the criminal justice system. However, it is well documented that Aboriginal and Torres Strait Islander people are more likely to have cognitive and psychiatric impairments, including acquired brain injuries, cognitive impairment and foetal alcohol spectrum disorder—or FASD—as well as child trauma and many others. Some of those studies that we referred to in the NATSILS submission outlined that 73 per cent of male and 86 per cent of female Aboriginal and Torres Strait Islander people in custody in high-security prisons suffered a mental disorder. We also outlined that the majority of young people in custody were found to have a psychological disorder, and possible intellectual disability was also common, with 20 per cent of Aboriginal and Torres Strait Islander young people in custody assessed as having a possible intellectual disability, compared with seven per cent of the non-Indigenous cohort. Aboriginal and Torres Strait Islander people are over-represented in the numbers of people held indefinitely. In Western Australia 11 of the 33 people held under the Mentally Impaired Accused Review Board and in the Northern Territory all nine of the people on supervision orders are Aboriginal or Torres Strait Islander.

Our submission raises—and I would like to emphasise this today—that, while the indefinite detention of people with cognitive and psychiatric impairments is a real and serious concern, people held indefinitely represent a small fraction of those with impairments in the criminal justice system. The experience of our member organisations is that clients with cognitive and psychiatric impairments often continuously cycle in and out of correctional facilities. We know that people with cognitive and psychiatric impairments who come into contact with the criminal justice system have overwhelmingly negative experiences. The legal processes and custodial settings are not designed to accommodate people with complex needs.
The key issue is that many Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments are pushed into the criminal justice system early in life in the absence of alternative pathways. Pathways into the criminal justice system for Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments are currently entrenched by the absence of coherent frameworks for holistic disability education, human services and justice support. There is a lack of supports—supports that are designed to break the cycle of imprisonment—as well as a lack of culturally specific services that are well funded to prevent Aboriginal and Torres Strait Islander people falling into contact with the criminal justice system in the first instance. We believe that this inquiry will facilitate an introduction to the breadth of circumstances affecting Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments. The circumstances affecting Aboriginal and Torres Strait Islander people are unique and we need to address those issues specifically, using dedicated resources.

In addition to the community and research sectors working together, we need a reciprocal action from the government to ensure a multidisciplinary approach to our seriously held concerns about the number of Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments cycling in and out of the justice system. Our submission made reference to a number of recommendations that were aimed at addressing and designed to break the cycle of imprisonment for our most vulnerable clients. Those recommendations include:

- Review of legislation for mentally impaired accused in the states and territories to ensure they are compliant with Australia’s human rights obligations and the minimum standards that NATSILS … identified …
- Improved access to screening and assessment services, particularly in remote communities. This should include access to psychiatric reports in a timely fashion;
- Increased funding for a range of community-based support services, including health, welfare and supported accommodation;
- Training for lawyers, police officers, court and judicial officers—and for support staff within Aboriginal and Torres Strait Islander legal services—
  in identifying and appropriately [caring for] people with cognitive and psychiatric impairments;
- Targeted funding to ensure that once identified, [alleged] offenders with a cognitive and psychiatric impairment have access to diversionary therapeutic options that meet their specific needs;
- Reform of bail laws to ensure decision-makers take account of the impact of bail and bail conditions on a person with special needs, such as cognitive or psychiatric impairments;
- The repeal of mandatory sentencing legislation—
  across the country—
- Significant increase in funding for support services and programmes within prisons that meet the needs of people with cognitive and psychiatric impairments;
- Further funding for interpreter services to ensure that Aboriginal and Torres Strait Islander people, including those with cognitive and psychiatric impairments, are able to understand legal processes;
- Immediate reversal of planned funding cuts to the [Aboriginal and Torres Strait Islander legal services] and the provision of further funding to the [Aboriginal and Torres Strait Islander legal services]—
  and to other legal services such as the Aboriginal Family Violence Prevention and Legal Service—
  to ensure that Aboriginal and Torres Strait Islander peoples with disabilities are able to access culturally competent legal services.

As I have already indicated, with the lack of culturally appropriate referral pathways and diversionary options, Aboriginal and Torres Strait Islander legal services are often the first services to identify and respond to Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments. It is critical that the Aboriginal and Torres Strait Islander legal services are funded to be able to respond to the needs of our most vulnerable clients and the most marginalised people. As specialist non-government Aboriginal community controlled organisations, the ATSILS are in a unique position to develop programs for Aboriginal and Torres Strait Islander people that successfully divert people away from the justice system. While the ATSILS have been at the forefront of the provision of diversionary programs, ongoing funding uncertainty and short-term funding periods have hampered their ability to translate innovative program concepts into long-term benefits for our communities.

Instead, Aboriginal and Torres Strait Islander legal services are facing funding cuts of $4.5 million due to come into effect in 2017. We know that when government cuts funding to services the first people to experience the reduction are those vulnerable clients with the most complex needs. The Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairments are among our most vulnerable and marginalised clients. Cuts
to the Aboriginal and Torres Strait Islander legal services necessarily constrain the ability of Aboriginal and Torres Strait Islander legal services to provide meaningful and just assistance to our children, parents and elders who are all suffering with cognitive and psychiatric impairments.

**CHAIR:** Thank you. Mr Muir, did you want to add anything?

**Mr Muir:** It is in the other submissions, and I know I heard the previous presenters talk about the lack of adequate data and appropriate data. If we want to talk about evidence-based public policy, we need to get the evidence base right. As Karly said in her opening statement, we do not know exactly how many people who are within the system or come into contact with the system have cognitive or psychiatric impairment, but we do know that 16 per cent of entrants into the criminal justice system report being under medication for mental health conditions, and we know from the Australian Institute of Health and Welfare report that 14 per cent are reporting very high levels of distress.

What we also do not talk about in this country very much is the impact that cognitive and psychiatric impairment has and how it might permeate into a form of post-traumatic stress disorder or critical post-traumatic stress disorder, and there has been substantial work done in that space in Canada with regard to First Nations peoples. We need to do a bit more work in that space in this country. We need to take those things into consideration in the criminal justice system as well as our human rights obligations.

**Senator LINES:** Mr Avery, are you able to update us on the Western Australian Telethon Kids Institute's study of FASD with juvenile offenders?

**Mr Avery:** They have a whole stream of research which is going on at the moment, but there are two that I will reference, and these are ones that were in the submission. The first is that they are undertaking some work on a diagnostic tool for foetal alcohol spectrum disorder. These are clinical guidelines to help clinicians detect and correctly diagnose foetal alcohol spectrum disorder in a medical sense. Those guidelines are very close to finalisation—I think they are almost in final draft form and are due for release within the month. So that is where that is at. That diagnostic tool is aimed at clinicians and it is very much at the tertiary end. It does involve child paediatricians, psychologists and occupational therapists; it is a bit of a health resource approach to diagnosing a child with foetal alcohol spectrum disorder in getting that formal diagnosis.

What we see is that that work needs to happen because it is really geared at the health professionals. We would like to see the next generation of FASD research around diagnostic tools develop more resources which are more broadly available in the justice system, the education system and the early childhood system to help detect the risk of FASD. This is one of those hidden disabilities in that, because there is a fair degree of stigma attached to this both from the child and from the mother, people do not often come forward to seek help. We want to be able to have resources that increase awareness of the issue and the impact it might have at the earliest possible point in the child's development. That is where we see the next generation of research.

The second program I would like to mention is the Banksia Hill project. This looks to integrate disability professionals within the juvenile justice system. For example, the NDIS guidelines might say that as soon as someone leaves prison the NDIS will pick them up. We think that that is too late because once they hit the prison door they are on their way and they have missed that. So the Banksia Hill project really looks to integrate disability professionals and justice professionals together whilst they are in there and work more towards a strength based approach. So when the person who has foetal alcohol spectrum disorder is in prison they get the proper diagnosis but they also get their own personal plan on what they can do and what their parent or guardian can do to help them access support once they leave. It could be in further training or education. It helps them identify their strengths so that by the time they leave they have a strength based plan for their life.

We see that is a really good model. It is just starting out. Most of the offenders in that juvenile detention centre are Aboriginal. I do not know the exact number—it is about 60 or 70 per cent. That gives you an idea of the prevalence. They are working with that. That is the model that we would see if we can get more of them. When we talk about integrating the NDIS we should look at those kinds of programs and strategies to reduce the recidivism—this churning cycle that we have spoken of.

**Senator LINES:** This is probably a question for both you, Mr Avery, and Ms Warner. I note that the Banksia Hill project has been slightly controversial in Western Australia because of our shocking laws in relation to mental impairment where, if you have a mental impairment, either you are deemed fit to stand trial and you can be held indefinitely or you are released unconditionally. I know people are anxious about this diagnosis that could potentially put juveniles at risk. Are you aware of any work the Western Australian government has done on changing the way that WA deals with people who have a mental impairment?
Mr Avery: In I think about December 2014 there was a Western Australian government inquiry to review the legislation—the Criminal Law (Mentally Impaired Accused) Act. First Peoples Disability Network put a submission into that. We are not aware what the outcome of that inquiry was. It was a WA inquiry. We are not experts in the legislation but what we saw was a failure in the checks and balances in that legislation. Someone who is unfit to plea for reason of cognitive or psychiatric impairment basically go into the system almost lost.

There is an inquiry that the UK human rights commission did. They have done a complete project on this. We contacted them. They said that there are two things that you need to do concurrently. You need to assess the fitness to plea and you also the hearing of facts. What was happening in WA is people were exposing themselves to this legislation and there was actually no hearing of facts so there was no sort of check and balance in the legislation and that open-ended legislation meant in one case that a person ended up in prison for in excess of a decade, which we just find horrific. So we are aware of that inquiry, but at least as at a few months ago they had not released the outcome of that inquiry.

Ms Warner: Similarly to Mr Avery, I am not aware of the outcome of that inquiry either. I echo some of Mr Avery's comments. In Western Australia, as you rightly point out, Senator, under the Criminal Law (Mentally Impaired Accused) Act 1996 a court dealing with a person who has been found to be unfit to stand trial has one of two options: indefinite custody or unconditional release. The lack of judicial discretion is a major obstacle to the courts making appropriate orders, as appropriate resolutions will seldom be reached by either of the extreme options of unconditional release or indefinite detention. As Mr Avery points out, it is a serious issue in Western Australia that these orders can be made against an accused under that act even though evidence against them has been substantially lacking. The assessment of the strength of the evidence against the accused is only undertaken by reference to the written brief of evidence. No witnesses are called to give evidence, nor can they be cross-examined.

One of the things that I think NATSILS has pointed out in the submission is that the criminal justice system is increasingly being used as a caretaker, as a default care provider. It is completely inappropriate, in all honesty, that people with cognitive and psychiatric impairments are 'dealt with' by the criminal justice system because there is a lack of resources within the public health and welfare systems. Without access to services and early intervention, people with cognitive and psychiatric impairments will not have their complex needs met, which increases the likelihood of intersection with the criminal justice system. The criminal justice system is not an appropriate vehicle for addressing people's needs stemming from a disability or mental illness.

We have a case study, if you will entertain me reading it out. This example comes from Western Australia, where in 2009 a 16-year-old girl with no criminal record was kept in custody for weeks after she was charged with disorderly conduct after her family had taken her to a hospital for a mental health assessment. The girl had a breakdown in hospital. The police were called and offered to restrain her while she was assessed, but the hospital refused to assess her. As a result, she was taken into custody over the weekend—this was on a Saturday.

At court, her family gave evidence that they did not have the capacity to assist her and they asked for her to be taken to a mental health facility so that she could receive care. As there were no services available to bail the girl to, she remained in custody. Sadly, when the Aboriginal Legal Service of Western Australia attended the police station, they were informed that the girl was naked in her cell. ALSWA queried why she was not being assessed and treated at the hospital and were informed that there was nothing else to demonstrate that she had a mental health problem.

The girl was taken to Perth the next morning. She was admitted to the Bentley Adolescent Unit, a mental health ward, prior to the court appearance the following Friday and there was a report confirming her unfitness to plead. Thankfully the prosecution, on invitation from the magistrate, withdrew the charges, effectively explaining that they were only 'holder charges', intended to get the girl some treatment.

CHAIR: She had to go to jail to get treatment.

Ms Warner: That is right.

Senator LINES: I am told that, particularly in Western Australia—but I am sure it is the same in the Northern Territory—often clients are told to plead guilty so that they get an end date on their sentence.

Ms Warner: That is exactly right. One of the requests that we make in our recommendations for the framework legislation is that, in addition to procedural fairness, judicial discretion and threshold hearings to test the evidence, we need finite terms for custody orders and release orders. It is a major issue in some of the states and territories that there are not. As you point out, one of those is Western Australia. In Victoria there are finite terms for court secured treatment orders, where an accused has been found guilty through ordinary trial
procedures. However, for an accused found unfit to stand trial or found not guilty by reason of mental impairment, there are no finite terms for the supervision orders which they may be subject to.

Senator LINES: Are you—or you, Mr Avery—aware of the case of the Warneke murder in Broome, I think it was, where there has been a whole police inquiry which found the police well and truly at fault? It suggested that the person who is sitting in jail, found guilty of the murder of a young man, is actually a victim of FASD.

Ms Warner: I am aware of that matter—

Mr Avery: I am aware of this case, and there are similar cases both in Australia and in New Zealand. Again, these are not coming to light through any systemic approach around the review of who is in prison and held indefinitely. Basically, they appear through the energy and activity of human rights advocates and the media.

That is what concerns us—we would not know how many of these people who are in our prisons at the present time should not be there. It is due to the lack of data on a person's disability status and what their rights are, which is captured when they enter prison, and the systemic approach. We just note that Australia has not ratified the Optional Protocol to the Convention against Torture, which would provide some mechanism for independent scrutiny of what actually happens in prisons. We find that it is almost ad hoc when these cases do come to light, in the absence of some sort of systemic approach to looking at the checks and balances and the rights of people who are currently caught up in prison.

CHAIR: Ms Warner, you were going to add something?

Ms Warner: Just following on from what Mr Avery has told the committee, we recommend that determinations about release of mentally impaired accused from custody or community release orders should be made by the relevant board, with an annual right of review before the Supreme Court.

For example, in Victoria there are some rights of review under the current legislation. It allows a new application for the variation of an order within three years or a lesser period at the court's discretion. But we would argue that three years is far too long.

CHAIR: Can I pick up on the comment that you have just made, Mr Avery, about people not being picked up? I presume the point you are making is that where people have not been diagnosed with FASD then they are not flagged in the system as having a cognitive impairment or a disability and so they are not counted? Is that—

Mr Avery: Correct. This happens for the person very early in life. Generally, there is a very low awareness of disability amongst Aboriginal and Torres Strait Islander people. There are a lot of cultural reasons for that. In essence, disability becomes normalised in many Aboriginal and Torres Strait Islander communities.

Again, if you just look at the early parts of life—and this refers to the table on page 9 of our submission—if you are a child who is born into poverty and there are inadequate public health facilities and those kinds of things—ineffective medical support—often you can be born with a disability which is not picked up. That carries through into early childhood, and what happens is that they just get labelled. They do not pick up what the disability actually is. They do not get the medical diagnosis.

The medical diagnosis has an administrative function in our services in that it is good—it gets the support. But that labelling is not natural for Aboriginal and Torres Strait Islander communities. There are lots of cultural reasons behind that. So you could find someone who is picked up on a minor misdemeanour. They might go to their legal aid lawyer—a NATSILS lawyer—and the lawyer might say, 'There is something not quite right here.' The person would not have personal awareness of their own disability. They might be called 'just a bit slow' or something like that, but do not have that medical diagnosis. The lawyer would then say, 'We'll just plead you out on a minor misdemeanour.'

What would then happen is, because nothing is done about getting them the proper support or getting a proper assessment, they might commit another misdemeanour and then they come back again. By the third time, particularly if there is mandatory detention, they are suddenly in the system. At no point is there a systemic approach to eliminate disability as a factor in what is happening here. The people who have a disability are not always going to be the ones who put their hand up, because the awareness of this is so low amongst Aboriginal and Torres Strait Islander communities.

Mr Muir: I can expand on Scott's points. When people come into contact with the justice system, it is equally true that the justice system itself is not geared to identify and does not seem to have the expertise to identify some of the early signs with regard to cognitive and psychiatric impairment. The police, for example, cannot necessarily identify it. There is a secondary problem with that in terms of the adequacy of data, because we know the data is not perfect with regard to identifying Aboriginal and Torres Strait Islander people coming in. Again, I go back to my opening comment about the adequacy and accuracy of data to inform evidence based practice.
If I link back to some of the FASD stuff—it is not perfect, but in the Australian Early Development Index with regard to cognitive development of young people there is some specific evidence which starts to present itself through that mechanism. Something like that might have the capacity to send the early warning signs for further work to be done. Equally, there needs to be more work done, frankly, in the maternal–child health state place. That would pick up some of the sorts of things that Scott was talking about in terms of those very early indicators. When it comes to joining up and looking at the different elements, sometimes we get siloed and we do not realise there is a piece of work being done over there, for example in education, that is interlinking.

CHAIR: This is why I find the consortium submission very, very helpful, because that is pulling it together.

Mr Muir: That was the intent: to try and draw together the different elements.

Mr Avery: If I can make another comment: that was the point of our submission. The solution is not going to come exclusively through the disability system or the justice system; this needs a multidisciplinary approach. What we need to do is integrate them, and have those two systems working much more closely together.

Ms Warner: Just echoing both Mr Muir's and Mr Avery's points that they have made, it is quite common for many of our clients to not have a formal diagnosis. This means that they have not had the support and treatment for their disabilities throughout their lives, which is often a contributing factor to the offending behaviour. However, I think it is important to point out—and we have identified this in our submission—that there are a number of reasons why Aboriginal and Torres Strait Islander people may not want a formal diagnosis. I will only touch on a few of those today. Scott may also be able to add some more points. They may not seek treatment or diagnosis for the reason that they may not want any contact with the child protection system. As we know, Aboriginal and Torres Strait Islander people are 10 times more likely to be in out-of-home care.

Our solicitors on the front line have experienced lots of difficulty in accessing psychiatric, psychological and neuropsychological reports for our clients. This is a key issue, because an accused can be placed on remand for months, even up to a year at a time, while they wait for these reports to be prepared. Those reports, of course, may ultimately be prejudicial to a person in a criminal law matter. It is important that any legislative reform is able to address some of these concerns. Further, there are often no or limited services to support the individual, and this is particularly the case in rural and remote areas.

CHAIR: Can you say that last point again? The support services are not there, and they are particularly not there in rural and remote areas?

Ms Warner: That is correct.

Mr Muir: In the homelessness space—and we know there are a good number of people with cognitive and psychiatric challenges in the homelessness space—a little town in Alberta called Medicine Hat had a high homelessness problem and a number of people with cognitive and psychological issues. They decided that they were going to do something radically different for that part of the country. They have actually invested in a joined up, holistic support and accommodation program. They now have no homelessness in that town—zero. The issues with regard to cognitive and psychological challenges are being dealt with. The downturn in contact with the criminal justice system has been significant. It is a smaller town, it is in a rural setting, but it is a worthy case study to have a look at. They are very proud of it, and they are more than happy to share their experiences in that space.

I say that because we know, for example—you go down to Flinders Street Station here in Melbourne, or Spencer Street or one of the metropolitan stations in the evening, and God forbid somebody with a cognitive or psychological issue is having an episode at the train station, because they will come into contact with our protective service officers and, next thing they know, they will be incarcerated. It is about our justice systems being better trained to deal in this space, both the front-line staff and our judicial officers. FASD in this state is still not adequately recognised and used during judicial hearings and by our judicial officers. I suspect if that is the case here in Victoria, then it is probably the case in other jurisdictions. There is a piece of work to be done.

CHAIR: I would say you could guarantee that they are not.

Senator MOORE: I want to ask about the whole issue of when someone gets any form of screening. Your submissions have indicated that interaction with the health system when people are out of prison is very limited and varied and all over the place, and there are reasons for that. One of the things we have found is interaction with the health system once you are in prison is also varied, and it goes down to the interaction between state and federal government and Medicare and all those things. But I am interested in your opinions about the quality of screening that is done once somebody is in the system, which, for many people, could actually be the first time they have interacted with a whole range of health areas. What is your knowledge, based on what you know from the clients you deal with, about how effective is the health process in the prisons to identify some of the issues
that you have talked about? People have been lost all the way through: they have been lost in the judicial system as they have gone through sentencing and charging, and now they are in jail. We have often thought here that that is an opportunity for someone who is there—it could be a real opportunity in many ways for people to get support. What do you think the systems are like?

**Mr Avery:** Thank you for the question. My understanding is that the states are responsible for the relative justice health system and the processes and procedures vary from state to state—quite markedly, I understand, so I probably need to speak in generalisations. If you can imagine disability is like a spectrum, then in terms of where some of the work has been done, there are some forensic psychiatry units and those kinds of places—for example, in Queensland—that have frameworks for the assessment of psychiatric conditions on entry to prison. In terms of the work that is around and the evidence and frameworks, that is relatively more advanced than something like cognitive impairment. There are no formal frameworks for the systematic assessment of cognitive disability within prisons that I am aware of. Certainly, around FASD, the national clinical guidelines are yet to be released, so that would not be applicable at all. Then you have acquired brain injury. Some of them might have got into a fight and acquired a brain injury that way. The frameworks there are non-existent.

I can only talk about what the framework is. But as for what the individual practices are, I would say that our prisons are full of people who would not know that they have a disability. It is peculiar for Aboriginal and Torres Strait Islander people, but I think that is a concept more broadly. It is not just cognitive and psychiatric; I think you would find it with people with undiagnosed hearing impairments as well. It is just not getting picked up in society. Generally, I would be very sceptical that assessments are happening to anywhere near the degree that they would need to happen in the prison system.

**Senator MOORE:** Ms Warner, do you have any comments?

**Ms Warner:** It is quite a complex area, as you outlined in your question. When the solicitors of the Aboriginal Legal Services are in court, they can raise custody management issues with the magistrate or the judge, and those custody management issues might be along the lines of, 'It appears that our client is suffering from auditory hallucinations,' which we would argue are probably representative of something quite traumatic for that person. To then be able to get an assessment for your client whilst they are in custody becomes a bit of a battleground of who is going to pay for that assessment. If that assessment does take place while they are in custody it is sometimes, and often, the case that the Aboriginal Legal Services do not actually know that the assessment has taken place.

This is also double edged because, depending on what is contained within that assessment report, it could be prejudicial to your client when you are trying to give them legal advice about what it is that they might want to consider. I would also add that despite custody management issues being noted, that is all the judiciary can actually do. For whether those custody management issues are actually followed up, they will often say to you, 'This is beyond my control.' At the Victorian Aboriginal Legal Service, we had a client who was suffering from what appeared to be auditory hallucinations. They would describe what we would say was suggestive of some severe mental health concerns. But unfortunately, the magistrate said to us, 'Yes, I could send them to the Melbourne assessment prison,' but that does not mean that they go there.

**Senator MOORE:** Even from the bench, they cannot direct them that? That is interesting.

**Mr Muir:** The Commonwealth and states fund various post-release prisoner and pre-release prisoner through-care programs. None of them adequately address cognitive and psychiatric impairment in terms of the work that needs to be done, or in the pre-planning and post-release supports. They will say that there are elements there, but they are simply not adequate. What I often find when I talk to clinicians away from funding agencies and funding agreements, is that they will tell you that the resources available are not adequate and that the time frames for therapeutic approaches, treatment and outcomes are not adequate. They have constructed a program that meets the funding amount, as opposed to what is good clinical practice. I think that is an issue.

**Mr Avery:** I just want to make a comment about the general rights of people, using this intersectional approach that we talked about and referring to the current coronial inquiry that is happening in Western Australia at the moment for Ms Dhu. What we have is there is a young Aboriginal women with known exposure to drug and alcohol issues, a psychiatric condition, exposed to domestic violence and had had their liberty taken away. It is currently going through a coronial inquiry. What is known is that she presented to hospital two times and had her right to health disregarded. The third time she actually died on presentation.

Again, reiterating the most marginalised people of the marginalised group, you would think that one white framework would have picked that up when you have so many risk factors. It is actually making it harder for...
those people. They are getting increasingly isolated. They are not taken seriously by the health system or the justice system. We are seeing that, when Aboriginal people with disability, and when you add risk factors, come into contact with the health system or the justice system their rights are diminished. That is the fundamental point, I want to make there.

Ms Warner: In terms of the throughcare programs that Mr Muir mentioned throughout the country, there are only two of the Aboriginal and Torres Strait Islander legal services that are actually funded to deliver those programs. The throughcare and the post-release programs that could be offered to Aboriginal and Torres Strait Islander people are important to try and support reintegration into the community and support those most vulnerable, particularly those with cognitive and psychiatric impairments.

I also wish to point out that clients of the Aboriginal and Torres Strait Islander legal services who are on non-custodial sentences are also at risk of not being screened adequately. On non-custodial orders, our clients have appointments up to their eyeballs that they need to attend, whether that is part of parole or part of a correctional order. There are a number of things that actually begin to dominate their lives and of course, all the while, Aboriginal and Torres Strait Islander people are expected to then go out and get a job, and also make sure that their children attend school so as not to be at risk of interference from the child protection system. They might be suffering homelessness and so, in the hierarchy of needs, getting a formal diagnosis for a cognitive or psychiatric impairment might well be down on their list in survival.

Senator MOORE: Would it be on the list, Ms Warner, in terms of non-custodial processes? In your experience, is the issue around getting medical help or a medical assessment—is that often on the list? I have seen a couple but I have not seen medical on the ones—and I have seen so few in comparison to what you would have done.

Ms Warner: On the list, from a correctional—

Senator MOORE: Non-custodial.

Ms Warner: Sorry, I mean on the list from a client's perspective. If I am suffering homelessness and I am not sure where I am going to sleep tonight, I am not going to bother to attend that appointment—

Senator MOORE: Okay, that is their personal list, but I was thinking more of a non-custodial process where there are a number of set things that the client has to do to maintain their process. It often includes not just going to the legal stuff; it includes other things in terms of a rounding experience. I was just wondering whether this health aspect is one that would be a component of a non-custodial statement—I do not know.

Ms Warner: At times, it is, and you come across—for example, if some of the solicitors might make a submission that a neuropsychological assessment is required from their perspective—who will pay?

Senator MOORE: Where will you get it? They are rare.

Ms Warner: That is right.

Senator MOORE: In Rockhampton, where will you get an assessment?

Ms Warner: That is exactly right. For example, in Mildura, you are going to wait for that neuropsychological assessment from someone who flies up once a month type thing. It should be noted that there are some differences between corrections across the country, and you will find some correction officers quite willing to order that a neuropsychological assessment be completed and paid for by corrections, by the state; however, that is not consistent.

Mr Muir: There is not a systemic approach to that so that the individual, without any support structures around them, actually has the capacity to understand that they need to be over there at 2.30 on Tuesday, otherwise they might be breached. If I have got cognitive and psychological impairment, I might not even know that I need to be there at 2.30. So it is also critical to ensure that, where those people are in those circumstances, the necessary support structures are built around them so that they are not breached.

Senator MOORE: The Jesuit services they talked about were looking at doing that. My second question is around the interaction with the NDIS system. We heard evidence from the previous set of witnesses that that was one area where there was some hope, from their perspective, that there would be some interaction with people who do meet NDIS guidelines. We know that many people will not, but there is that process. Is that something that Mr Avery or Ms Warner have looked at in the wider sense as to whether there could be some process there?

Mr Avery: That certainly is one area that we have focused on in our recommendations. We think that this will be a dedicated project. Where it is at the moment is that the NDIS protocol essentially has the capacity to pick up
support once a person leaves prison. What we would look at is an aspect where there could be some joining of the systems, where ideally a person first coming into contact with the system has a triage on to the NDIS to see if they can get on the plan before they go to prison, rather than automatically default, and that connects with the diversion strategy. Also there should be greater integration so that all of the NDIS assessments and planning happen before the person is released. At present the operating protocols of the NDIS stipulate that it happens after their release. We would like to see all of that work done before. It is certainly on their agenda. We continually raise it—FPDN has raised it directly with the NDIS. We do see that there is a project that could quickly materialise around that entry point and exit point of prison on to the NDIS.

Ms Warner: I will perhaps leave the comments largely to Mr Avery, though I note that Mr Avery and I have had discussions about the limited resources that exist in the Aboriginal and Torres Strait Islander legal services to be able to make such referrals for a solicitor who is going to have 10 clients at court on that day. To try to be giving the best possible service to all of those clients they would need more resources to be able to make those appropriate referrals to the NDIS.

Mr Avery: Our expectation is that it is disability professionals who are doing that. The legal fraternity could refer to the disability expert, who could then integrate that. We would not expect that the legal system would be the right body to do that. We would actually need to create a system where there are disability experts doing that. We recognise, again, that that disability expertise is not all around the country; there are some parts of the country where that disability expertise would need to be built.

CHAIR: Thank you very much for your time, both for your submissions and for appearing today—and particularly you, Mr Avery, who have taken time out of your busy schedule overseas. We really appreciate the time. Thank you very much for your contribution today; it is much appreciated.

Mr Muir: I am sure you are already aware of this but in 2011 there was also a parliamentary inquiry in Victoria into this same issue, so there would be a range of resources available.

CHAIR: Thank you.
Evidence from Dr Arstein-Kerslake was taken via teleconference—

CHAIR: Welcome. Could I please check that both of you have been given information on parliamentary privilege and the protection of witnesses and evidence?

Prof. Keyzer: Yes.

Dr Arstein-Kerslake: Yes, I have been given that.

CHAIR: We have both of your submissions. Thank you very much. I would like to invite both of you to make an opening statement, and then we will ask you some questions.

Dr Arstein-Kerslake: Thank you very much for inviting me and my research team to speak at the hearing today. I will just briefly tell you who we are and why we are undertaking this research. It is a collaboration between the Melbourne Social Equity Institute and the Hallmark Disability Research Initiative at the University of Melbourne. The Social Equity Institute and the Disability Research Initiative work across all nine faculties of the university to stimulate interdisciplinary research, and in the case of the Disability Research Initiative it is specifically disability research. Our project on unfitness to plead is an interdisciplinary project across the faculty of population and global health, the faculty of law and the University of New South Wales, where we have a partner investigator, Professor Eileen Baldry.

We were interested in engaging in this issue particularly because of the international attention that has been given to the right to equal recognition before the law. Australia is a leader in many ways in that right. I believe that John Chesterman spoke earlier today. The legal capacity law in Australia is really paving the way for other countries in terms of having human rights compliant legislation. In that regard we thought it was time to look at the unfitness to plead laws from the perspective of equal recognition before the law, and we began to bring those forward as well. I will give a brief description of our research project and then briefly go over our core recommendations from the submission.

Our research project has, as I mentioned before, chief investigators Professor Eileen Baldry of the University of New South Wales, as well as me, Professor Bernadette McSherry and Professor Kerry Arabena from the University of Melbourne. The grant is from the Commonwealth disability research grant funding and it is administered by the New South Wales Research and Data Working Group. Our project takes a two-pronged approach to the problem, if you will, of unfitness to plead laws in Australia. The first is an academic approach, where we are putting together a series of journal articles on a number of different topics and in different disciplines in order to develop concrete legislative reform recommendations but also recommendations for practice reform. Those articles will be focused on social determinants of unfitness to plead determinations, human rights analysis, comparative perspective of other jurisdictions and Australian specific domestic recommendations for reform. Our first article focused on the human rights analysis and that will be out soon.

The second prong of our project is really a practical perspective and we are using an action research methodology. We are hiring three supporters in community legal centres in three different states. One is the North Australian Aboriginal Justice Agency, one is the Intellectual Disability Rights Service in New South Wales and one is the Victorian Aboriginal Legal Service. Those three supporters will be working for six months and will be providing support for people with cognitive disabilities that are charged with a crime. That will be their specific goal for those six months.

Throughout those six months our postdoctoral researcher will be tracking their progress, successes and failures. He will be doing that through a series of interviews. The aim is to develop concrete good practices in supporting people with cognitive disabilities that are charged with a crime. The reason for doing this is, firstly, to provide a good service that can be replicated, to build on the services that already exist and also to help develop alternatives to findings of unfitness to plead to hopefully in some cases avoid a finding of unfitness to plead from the beginning.

That is a brief overview of our project, which began in October 2015 and will go to October 2017. I will briefly run through a couple of the core recommendations coming out of our submission to this inquiry. These recommendations are based on the information that our researchers have already gathered in this project and in
past projects that they have worked on in this area, and also are grounded in our human rights analysis around the right to equal recognition before the law for people with cognitive disabilities.

In needing to recognise that right and in aiming to figure out how to do that, our first recommendation is that the law on unfitness to plead shift away from assessing competence to stand trial towards facilitating participation of people with disability and cognitive disability specifically in criminal proceedings on an equal basis with others. I think that recommendation sums up the core of what our research project is trying to do but also where we would recommend the law goes.

Our other core recommendations include increasing the accessibility measures for court proceedings—so making sure that the court room and the trial process are meaningfully accessible and meets the needs of a variety of different disabilities and a variety of different cognitive disabilities as well as being culturally sensitive to the needs of the individuals that are charged with the crime. Our third recommendation is that good practice should be identified for providing formal support to accused persons at risk of being unable to participate in criminal proceedings. Again, this is what our project is aiming to do and we hope to have a concrete report on what exactly those good practices are and what they could be in the future.

Our fourth recommendation is that unfitness-to-plea laws that allow for indefinite and nominal terms should be reformed to prevent the indefinite detention of persons with cognitive disabilities. The fifth recommendation is a new threshold to identify when an accused person cannot participate in criminal proceedings to the extent of being able to express wishes, instruct counsel and/or challenge claims made against him or her should be developed—so a new way to identify when a fair trial is in jeopardy because an individual cannot meaningfully participate. We are hoping that by the end of our research project we will have even more recommendations on that but in our submission we do have some more detailed recommendations in that area.

The last recommendation is that where criminal sanctions are imposed as a result of such alternative processes, they should be done on an equal basis with others—so where it is found that a right to a fair trial would be jeopardised if it were to go forward and a special of hearing or a greater interaction with the criminal justice system than they would have in a regular trial proceed without any additional support.

I think that sums up a broad overview of what our submission required and what our project required. That is the end of my opening statement.

Prof. Keyzer: I am here on behalf of La Trobe University today. The Living with Disability Research Centre as led by Christine Bigby is the largest group of disability researchers in any university in Australia. I am also here on behalf of the centre for legislation at La Trobe Law School to make some recommendations about model legislation. The material that I would like to take you through in my opening statement today is available in long form as one of the final chapters of the consortium submission that First People Disabilities Network made that you would be aware of. La Trobe Law School partnered with the First Peoples Disability Network to create that report. What I am about to say is developed in a more elaborate form in that publication. Just so you know, my own research in this area started in 1995 with some work funded by what was then called the Disability Services Subcommittee of the Commonwealth Department of Human Services and Health examining legal service options for parents with intellectual disability and also ageing carers of people with intellectual disability. That work is now 22 years old. Most recently I worked with the Endeavour Foundation to produce a 155-page report on the then new NDIS a few years ago called Discover, which was published in 10,000 copies and in fact I think one of your comrades from the lower house of the federal parliament, Jenny Macklin, held it up at the NDIS launch conference in 2013. We are now going into our second edition of that book, so that is the research backdrop.

In late 2014 we funded and convened a forum of over 60 Indigenous and non-Indigenous stakeholders from right around the country to come to Melbourne to develop solutions to the sorts of issues that all of the witnesses have been talking to you about over the last few days. These people included police, prison wardens, social workers, advocates, lawyers, guardians and all of the people who have direct and extensive experience working with Indigenous people with cognitive impairment in the criminal justice system generally. It was perhaps a wider lens than just indefinite detention and the criminal justice system generally, but it was certainly people with very substantial experience. We asked them a question: what are the most significant challenges facing Indigenous Australians with cognitive impairment who come into contact with the criminal justice system?

We used a data generation technique called nominal group technique, which I elaborate on in the submission. Basically, it is designed to ensure that all of the participants get an equal say, and that no one group of people—the lawyers, the guardians, the social workers, the prison wardens or what have you—have a disproportionate influence on the outcome. It is a genuine, rich slice of data that is going to tell us what diverse stakeholders think...
about the issue and what they think the solutions should be. Like Dr Arstein-Kerslake, we are actively involved in research in this area but we came at the solutions that we would recommend from a slightly different approach than the researchers at Melbourne took.

Essentially, there were six challenges. Those six challenges, briefly, are: firstly, there is a need for sustainable, stable, secure, individualised, culturally responsive accommodation, community supports and transitional options for people with cognitive impairment.

**Senator MOORE:** Is that just one?

**Prof. Keyzer:** That is just one—sustainable, stable, secure, individualised, culturally responsive accommodation. There are a lot of adjectives in that sentence, but it is important that all of those subtleties be recognised—

**Senator MOORE:** They are critical.

**Prof. Keyzer:** Secondly, there is a need for early assessment, diagnosis, support and intervention that prevents criminalisation and that is capable of identifying and addressing root causes of offending or antisocial behaviour. Thirdly, there is a need for targeted, uniform, human rights focused law reform that acknowledges individual needs. Fourthly, there is a need for integrated, long-term political will and public sector leadership to respond to the crisis of overrepresentation of Indigenous people with cognitive impairment in the criminal justice system. Fifthly, there is a need for identification and recognition of people with cognitive impairment by the justice system—lawyers, police, corrections, guardians, all of the players—that acknowledge individual differences: gender, language and diversity of situations, conditions and needs. Sixthly, there is a need to raise public awareness and knowledge in the community, within and across the criminal justice system and service systems, to better understand why and how Indigenous people with cognitive impairment come into contact with the criminal justice system.

Those are the six policy components developed by the 60 stakeholders with their thousands of years of combined experience, from right across Australia, diverse professional groups all recruited to that forum, because they had direct experience and substantial experience working with Indigenous people who come into contact with the criminal justice system—that is, Indigenous people with cognitive impairment. Those six policy components are elaborated on in our paper, so I will not go into those in any more detail.

The second thing that I want to say in the opening statement is that the centre for legislation at La Trobe University then took that policy work and developed a mental impairment and cognitive disability treatment and support bill—so draft legislation, which can be constitutionally supported by the external affairs power to the extent that it implements the United Nations Convention on the Rights of Persons with Disabilities and can be funded by tied grants through section 96 of the Constitution. This work was done by Dr Darren O'Donovan and me. I will not go through this draft legislation in detail, but I will isolate the seven key components.

First, that a particular minister in each state and territory should have a legally enforceable obligation to provide appropriate services to people with cognitive impairment.

Second, that each state and territory should provide adequate resources for the provision of expert reports, where this is required, in order to independently assess the cognitive impairment of the relevant person and their needs.

Third, that the relevant state or territory minister should have an obligation to develop and implement a service plan which must provide detailed particulars of what measures will be taken and the time frames for action, to ensure that the person has reasonable access to a secure care facility or other supported accommodation and care and treatment.

Fourth, that an Australian court must not make a custodial supervision order committing an accused person found unfit to plead to custody in prison or remand, unless it is satisfied that there is no reasonable or practicable less restrictive alternative.

Fifth, that an Australian court that makes a custodial supervision order committing an accused person found unfit to plead to custody in prison or remand must set a return date for a review of the order within three months to ascertain progress in developing and implementing a service plan.

Sixth, that the guardian or legal representative of the relevant person should have standing to seek review of the continued detention of the person on the basis that the relevant minister has failed to meet their obligations.

Seventh, that both community and residential patients shall have the right to apply for a leave of absence from their place of residence or other restrictive conditions in appropriate circumstances. We outline those in the submission.
The six policy struts and the seven dimensions of the legislation we outlined in our submission, together with the submissions made by First Peoples Disabilities Network and also the advocacy work of the Aboriginal Disability Justice Campaign. Together, those submissions aim to plug bureaucratic gaps in services that have abjectly failed Indigenous Australians, such as Marlon Noble, Rosie Anne Fulton and many, many others. It is vital that legislative reform in this area ensures that there is engagement with the individual's specific circumstances and capabilities and that that replaces the bureaucratic drift that happens and the defaults that are caused by institutionalised failings and time and resources pressure.

The policy and legislative reforms that are proposed in this submission are motivated by a desire to avoid the false isolation of courtroom proceedings from the individuals' other contacts with government services. In our opinion, the issue of intellectual disability or cognitive impairment in the criminal justice system cannot be detached from broader challenges around the recognition of self-determination or indeed the need for the National Disability Insurance Scheme to allow Indigenous people to design flexible, culturally appropriate, community-based services. More than that, we regard the policy and legislative reform proposals that have been made by the Aboriginal Disability Justice Campaign and the First Peoples Disabilities Network as representing an important step towards practical reconciliation.

**Senator Lines:** I have asked this of other participants too: how do we change the approach of state governments? I am a Western Australian senator. Western Australia is an absolute outlier. We have a number of very poor examples of Aboriginal and Torres Strait Islander people impacting with the justice system, both those with a mental impairment and those without. Law and order and locking people up is very much something that the current state government push. How do we get that change to something that is more humane?

The other point I have made is that locking people up is now about a third of the state budget cost, because there is massive overcrowding in our prisons. It is costing a lot of money. We have seen a slight change, but, at the same time as we have seen some movement in the juvenile justice area, we have now just implemented new laws which will put people into prison after three burglary attempts—a mandatory sentencing regime. On the one hand, there is a slight movement on juvenile justice but, on the other, there is still this hard, politically appealing, law-and-order, lock-people-away approach. So I guess I am a bit despairing of how we get change in Western Australia given the political context that there is very little support for people who find themselves in the criminal justice system.

**Dr Arstein-Kerslake:** A problem of political will is always a challenge when you are trying to make a significant reform, especially to the criminal law. People in the room probably have more expertise on that. I think it would be really interesting to explore what the right political angle is to making this change—and I am sure that there is one. One of the easy ones, which you have already mentioned, is the amount of money it costs to have this system exist as it does now. I am American—if that is not obvious—and it is definitely a lesson we need to take from the American criminal justice system, which has been absolutely overloaded from having similar problems and having gone further down the path. I think it is prudent at this point not to head down the same path that many of the American criminal justice systems have headed down, which has ended up in further marginalisation of people with cognitive disabilities in particular and at a very high cost to taxpayers.

On the more concrete legislative changes, I would be happy to provide you with a document we recently put together looking specifically at the Western Australian law.

**Senator Lines:** That would be great. By way of example, we now have double bunking in Bandyup Women's Prison, which of course puts hanging points back in prison. That is obviously an unintended consequence but it is a very real consequence of our tough bail laws, mandatory sentencing and so on and so forth.

**Prof. Keyzer:** Obviously our submission proposes a national approach to legislation. However, being from Western Australia—

**Senator Lines:** That Western Australia can opt out of, as it has done with the NDIS.

**Prof. Keyzer:** As you know, there are probably some good reasons for that, in the NDIS space, given that the approach Western Australia took in that space was designed to have individual planning already.

**Senator Lines:** I am not sure that my way is universally applauded!

**Chair:** Frankly, I think the jury is still out!

**Prof. Keyzer:** I do not want to be cast as part of the fan club.

**Senator Lines:** Please tell me they want a national standard!
**Prof. Keyzer:** It is worth mentioning that it was the Western Australia Inspector of Prisons who produced that report about 18 months ago that identified the number of people with cognitive impairment who he believed were in indefinite detention. That is a plus. While we recommend a national approach, we do think a cooperative approach is just as good, if it can be negotiated. Obviously the Howard government's gun control buyback was a cooperative approach, and it worked. That was in the news just yesterday. We do not care if it is national or cooperative, as long as it happens. I think justice targets are something worth mentioning. I think the proposal to have justice targets is a very worthwhile development. In particular, because of the relationship between the Commonwealth, states and the territories in relation to funding, section 96 tied grants provide a vehicle for the implementation of justice targets, which I personally think is very desirable indeed.

**CHAIR:** But the minister does not, I think.

**Prof. Keyzer:** Perhaps not, no. I will echo Dr Arstein-Kerslake's observation about the US system. You would all be aware that about three or four years ago the United States Supreme Court, in a case called Plata and Brown, decided that it was unconstitutional to have prisons at 130 per cent of capacity in California. The Supreme Court decided, constitutionally, that California had to empty their prisons. Of course, that has had a dramatically positive effect on their budgets but, unfortunately, there is no constitutional mechanism here. We really are relying on you—the national legislators—to lead in this area. The Senate resolution made in 2014 about Rosie Anne Fulton was a wonderful step forward, and this inquiry is also a fabulous development. So we are just very hopeful that, whether it be national or cooperative, there be progress. Of course, you have got plenty of evidence to work with.

The final point I will make, which also echoes the observations of a number of other people who have given testimony into this inquiry, is the value of money that comes from justice reinvestment. Together with justice targets, justice reinvestment really is something that we have to do. Professor Baldry's work in this particular area has been amazingly powerful. She tells the stories of people who, if the investment had been made at an early enough point, then you would avoid having decades of connections with the police, criminal justice system and so on and so forth. Yes, an investment is required in the short term and in the medium term. Doesn't it make sense to make that investment now to deal with the bureaucratic problems? If you invest now, it pays substantial dividends tomorrow in terms of saved government services expenditures.

**Senator MOORE:** Thank you for your submissions. They are very detailed. My question is how do we work with the wider community to bring them on board with the work that you do. Both your projects look in great detail at the injustice that has been suffered as a result of these processes that we have entrenched. A lot of the processors have been stimulated by fear in community that has been politically generated—and I think Senator Lines referred to that in her state. However, it is how we get the wider community to become sensitive to the issues that you are working on and taking it away from a kind of elitist approach that a number of people work very hard on and get it into the wider space. I am interested, Dr Arstein-Kerslake or Professor Keyzer, whether any of the projects you are working on look at that. And how do you then market what you have done so it gets community uptake because, without that, politicians will always take the more conservative role—and that has been proven?

**Dr Arstein-Kerslake:** I can comment on that. Our project has only been underway since October, so it is a relatively new project. We have already gotten quite a bit of media attention, some of which we sought out and other attention that came to us. We have already had an article published in *The Conversation*, which is an online platform for a combination of journalistic and academic information, remaining in that elitist category, if you will. We are also working with the communications team at the University of Melbourne who have a new online platform where they are aiming to reach a wider audience. It is called Pursuit, and we are working with them to make sure that the information—at least that we produce in our project—is disseminated to an audience that is not just the immediate stakeholders; that it is a mass audience. Does that answer your question?

**Senator MOORE:** Yes. It think it actually takes it to that step beyond where research papers normally go. So thank you for that.

**Prof. Keyzer:** In our submission, raising public awareness and knowledge in the community is one of the components, as you have seen. I think it is probably the evidence that Ian McKinlay gave that would be the most powerful. Professor Eileen Baldry's fundamental point has been that we need people to understand that Indigenous people with cognitive impairment who come into contact with the criminal justice system today were children who had horrible lives in the not too distant past. We need to be characterising people correctly as people at risk and as victims of the system, rather than as perpetrators of crimes that are somehow divorced from their historical and social contexts.
I guess when it comes to publicising that issue, we know that there was the Four Corners program on Rosie Anne a few years ago. There have been advocates who have been very substantially involved in propelling this work over a number of years, but, frankly, often without the funding that even allows them to rub a couple of zacks together. I think Dr Arstein-Kerslake's research, our research and the research of a number of other scholars have value. But you are absolutely right to ask the question: how can we get it out there to the public to understand that this is the issue? Frankly, we would really rely on government to provide us with leadership there. And perhaps justice—

Senator MOORE: Government is not always the best at getting their own messages out there—

Prof. Keyzer: No, indeed. We can only hope. But perhaps justice targets, the publicity around justice targets—

Senator MOORE: That has community support.

Prof. Keyzer: and the rationale for justice targets. I would encourage you and urge you to read Brown v Plata, the United States Supreme Court decision. It talks about setting justice targets for California. It was the very first decision of the Supreme Court of the United States, in its multi-hundred year history, where it actually included a photograph in the report. The photograph is of a metal box about the size of a big fridge where they used to manacle and lock people with mental health issues in the prisons. They did not have the resources to actually detain those people and keep them from harming themselves and others in those prisons because they were so overcrowded.

I hear the point that you made earlier, Senator Lines, but, unfortunately, if we do not get serious about the rise in the number of people going into prisons in Australia, we are only heading in that direction. We will end up with precisely the same problem that they had to deal with in the Supreme Court of the United States—people being locked up in metal boxes.

CHAIR: Without the same mechanisms to address it.

Prof. Keyzer: We do not have the Constitution that allows public interest test litigants to bring the sorts of actions that are going to drive the institutional responses. We cannot get those in this country unless we work through the federal parliament.

CHAIR: I hear Senator Lines' concerns because I share them. Being from Western Australia, we are recalcitrant in a whole lot of areas in terms of cooperating federally. I suppose I am putting my opinion here, but I want to ask you for yours. Just because we do not have a state on board, and potentially others, should that deter us from seeking a national approach?

Prof. Keyzer: Definitely not. Anna, do you mind if I answer first?

Dr Arstein-Kerslake: Yes, go ahead.

Prof. Keyzer: Definitely not. The argument that this is a matter for the states and territories is—

CHAIR: You are channelling Senator Brandis at the moment.

Prof. Keyzer: Well, you have made that comment. It is a nonsense argument in Australia. We have had a fiscal mismatch of resourcing and revenue for a long time. With the constitutional debates about the ambit of the external affairs power and the corporations power, both sides of politics have used both of those powers to advance national agendas in a number of areas. There simply is not a Samuel Griffith Society argument you can run in that area, that the states should have a degree of autonomy. That is, I think, quite a childish argument. Human rights are by definition a national concern, and they ought to be. Australia is the international body that signs up to these treaties. When Australia accepts its obligations, as it did under the United Nations Convention on the Rights of People with Disabilities and the ICCPR, Australia signs these treaties and there should be no federal reservations there. If there are federal reservations in any of these treaties, internationally those federal reservations are not regarded as operating as an obstacle on the federal parliament. These treaties are a basis upon which the federal government can pursue its responsibilities for the implementation of human rights in Australia, and if there were ever a circumstance where effective human rights legislation was absolutely necessary, it is in this area where you are dealing with people who have multiple vulnerabilities.

Frankly I think the stories of Marlon Noble and Rosie Anne Fulton speak for themselves. It is well past time that the federal government stepped up to the plate. We were really pleased with the Senate resolution in 2014, and what we would like to see is a measure of political will. It is obviously a difficult problem and it is a complicated problem. From reading the submissions and hearing the evidence you would no doubt know that, but it is not insurmountable. Twenty years ago the idea of an NDIS was that we would never get there. We have an NDIS now, and it had bipartisan support. It cannot be that hard for us to take the next step and to have a national
approach to this issue. It is not that hard. The evidence is there, the research is there and what we need now is the political will. Given that we are talking about a situation where an investment now is going to save so much money down the track, it beggars belief that we have not attended to this sooner than we have. But we are delighted at the interest and engagement of this inquiry.

CHAIR: Dr Arstein-Kerslake, do you have anything to add?

Dr Arstein-Kerslake: I would agree with Patrick, and his last statement in particular. In terms of the issue between it being a national or a state issue, I would again reiterate what Patrick mentioned, that it really is a national human rights issue. That being said, a coordinated state effort to reform law and practice, if that is the most effective way to go forward, should be done. To follow on from what Patrick said and the comments of other senators, as researchers, and as a wider research team, not just our project but all the researchers that are working on this issue, we are in a good place to provide the concrete information that the government needs to make this change happen. We are doing that the best we can from our perspective but we are also happy to have a continued conversation of specific needs of specific states and specific senators in terms of what concrete recommendations or concrete areas of change or research need to be addressed.

I think that is really the role that academics and researchers can play in social change movements in general, and I think in this particular area of addressing this problem of indefinite detention and also the overrepresentation of people with cognitive disabilities in the criminal justice system we are particularly well placed to be providing concrete recommendations at this point with the wealth of information that we have gathered over the many years that Patrick and I have both discussed and with the number of researchers we have actively working in this area right now. We are just happy to continue engaging in this area.

CHAIR: Thank you both for your submissions and your time today. We appreciate your evidence and the amazing points you have made. It will be very useful for us.

Proceedings suspended from 12:50 to 13:45
CROUCHER, Prof. Rosalind Frances, President, Australian Law Reform Commission

Evidence was taken via teleconference—

CHAIR: We welcome our next witness, from the Australian Law Reform Commission. Can I check that you have been given information on parliamentary privilege and the protection of witnesses and evidence?

Prof. Croucher: I have.

CHAIR: We have your submission, thank you very much. You were one of the first—you are number four. Yours came in very early on. I would like to invite you to make an opening statement and then we will ask you heaps of questions.

Prof. Croucher: I am very pleased to assist the committee in relation to this important inquiry. It was a matter that the Australian Law Reform Commission touched upon in our important report on equality, capacity and disability in Commonwealth laws, which we completed in 2014. The question of indefinite detention of people with cognitive and psychiatric impairment did come up as part of our very wide brief. We considered certain aspects of that and I am very happy to share with the committee any observations arising from the report or from the submission that we gave that might assist the committee in its work.

CHAIR: You would like to leave your statement at that?

Prof. Croucher: Yes, I do not think I need to add to it. The written statement draws attention to things. If you would like, I could elaborate a little further; otherwise I will just respond to your specific questions.

Senator LINES: What are some of the solutions to this? How do we make sure that people get a fair go before our justice system if they have a mental impairment? Obviously, legislative reform is something—but how do we bring all the states on board through some kind of national agreement? What are the salient points there?

Prof. Croucher: That is a very good and a very wide a question.

Senator LINES: I know!

Prof. Croucher: I will do what I can to answer it! The thing that is most achievable, and the quickest, is to pick up the observations in our recommendation 7-2, which is that state and territory laws that govern the consequences of a determination that a person is ineligible to stand trial should include two things. One of those is limits on the period of detention and the other is regular periodic review. In a way, they are the things that should be in flashing lights about limitations that can be placed in legislation.

There is a lot of other material around it in terms of all the things that feed into that initial question of, as it is described, 'unfitness' to stand trial. We would prefer that the emphasis is placed on how you will help a person or support a person to be able to undertake a trial, where that is appropriate. Our whole emphasis in the ALRC's report is on supporting a person, because often the outcome of just saying, 'Oh, this person is unfit to stand trial,' is that they can be exposed to indefinite detention in circumstances which would exceed those even where they had stood trial and been found guilty—that their penalties in fact could exceed what might have happened to them if they had undertaken the normal course of the criminal justice system.

There is quite a considerable consideration around that whole issue of testing, supporting and so on. But I think the simplest target—at least in the first place—for getting the states and territories on board is a commitment that the period of detention has to be limited so that it can be, for instance, no longer than what would normally apply if the person were found guilty, and also that any detention orders are regularly reviewed. That seems to be the minimum and the most quickly achievable to get all the jurisdictions in Australia on board.

Senator LINES: I am a Western Australian senator so, obviously, these issues are very much in my mind.

Prof. Croucher: There are a couple of specific cases that I am sure are very acutely in your mind.

Senator LINES: There is a recent one—I am not sure if you are aware of it—in relation to the sentencing of a young man found guilty of the murder of another young man up in Broome, which has actually come to light because the absolutely appalling way the police gathered evidence. But I think that is under review. There is a view that the young boy has FASD. What sorts of elements would you look at in a periodic review?

Prof. Croucher: Did we make any specific comments about that? Just bear with me—I am not sure whether we commented specifically about that, but let me just refresh my mind. It is probably simplest if I give you some pinpoints.

On page 208 of our report, we refer to jurisdictions that do not provide statutory limits. The report is as at 2014, and I may not have picked up if there has been any change in the meantime, because I have been doing other things. But at the time we were writing, Western Australia did not place limits on the period of custody orders for persons detained after being found not mentally fit to stand trial. That is obviously what is in your
mind. The Northern Territory provides supervision orders for persons found not fit to stand trial for an indefinite term. And in Victoria, custodial supervision orders are for an indefinite period—although the relevant act requires the court to set a nominal term for the purposes of review.

Those are some illustrations; the example in Western Australia is the 'at the governor's pleasure' kind of model. That led us, in paragraph 7.86, to suggest that regular periodic review of detention orders is essential. We made reference to the Victorian Law Reform Commission making a recommendation about regular automatic review at intervals no longer than every two years. As to what might constitute that review, which is really the gist of your question: rather than my suggesting that, it may be that the Victorian Law Reform Commission report provides some more flesh on the bones of that idea. For us, the essence was to identify what the foundational elements should be, and then the specifics could be elaborated thereafter.

Senator LINES: On that second point you made, in relation to periodic review: you would see that operating where we have such terms such as 'governor's pleasure', as we do in Western Australia?

Prof. Croucher: Indeed. Essentially, there first has to be a limit. You cannot just have a period of detention that has no limit, and regular reviews of those orders need to be made.

Senator LINES: You just jogged my mind on something that I talked about to the Victorian group this morning. They have these compulsory supervised treatment orders, and I was wondering about the morality of that in the sense of forcing people to undergo treatment. Do you or your organisation have a view about that?

Prof. Croucher: I not quite sure what treatment you are referring to.

Senator LINES: They are saying that, if a person comes before the court and they make a non-custodial order, the person can be required to undergo treatments to manage whatever behavioural element it is that has led them to commit a criminal offence. Those would remain in place; they do not have a time limit on them. I did ask them about the moral hazard around that, but they did not really answer the question.

Prof. Croucher: I cannot really comment specifically in response to that question other than to refer to the general approach that we concluded in our report, which was that any arrangements or interventions in relation to people who need decision-making support should be least restrictive of the person's human rights. The treatment of people with cognitive impairment may attract a whole legislative framework addressing situations concerning them, but that kind of least restrictive mantra would certainly be something that we would suggest could well carry through into the kinds of situations to which you are referring.

Senator LINES: Presumably, you would want to see that have some sort of periodic review as well?

Prof. Croucher: If we are talking generally about treatment of people with cognitive impairment, that was not a specific issue that we considered in the report but, probably by analogy, it would attract the same kind of overall approach.

Senator LINES: I find it interesting that we are very moral about euthanasia laws, and how they might be used and misused, but when it comes to cognitive impairment those same issues are not raised. I am not an expert in this area but certainly they were not raised by any of our witnesses today. I find it strange that on the one hand we can have a strong set of what are really moral views around euthanasia, but not about compulsory treatment orders.

Prof. Croucher: Yes. The approach that we took throughout the report was to use the human rights framework embodied in the Convention on the Rights of Persons with Disabilities, which certainly would run counter to any kind of compulsion or indefinite treatment or detention that did not give full recognition to the person's autonomy and rights as an individual.

Senator LINES: I imagine there are a lot of grey areas here; nothing is that cut and dried when we are dealing with human beings.

Prof. Croucher: Yes, indeed; and, as most answers in law are, the answer is often 'it depends', with so many things in the space that comes after that opening phrase.

Senator LINES: That is true. Thanks very much, Professor Croucher.

Prof. Croucher: My pleasure.

Senator PERIS: Professor Croucher, can you elaborate more on the restrictive practices that you have in your submission?

Prof. Croucher: It was part of our overall approach. Our report came within the context that there was already the endorsement of a national framework for reducing and eliminating the use of restrictive practices in the disability services sector—a national framework which was established in March 2014, just over two years ago.
What we suggested was that, in the light of the decision-making principles that we set out in our report, if you used that as the backdrop for looking at restrictive practices now, you would want to ensure that any discussion about restrictive practices involved the person upon whom those restrictions were to be imposed and to also support them in the consideration of those restrictive practices. In our safeguards guidelines the only circumstances where we contemplated that a human rights framework might override what the person says is when they are likely to be of danger to themselves or possibly to others. It was a very minimal approach, a very anti-restrictive practices other than through the participation of the individual themselves.

CHAIR: We have been talking this morning about a whole range of things, including justice targets and overarching national legislation. We had a fairly substantive discussion about that with our previous witnesses. How do you see justice targets playing a role?

Prof. Croucher: What do you mean by justice targets?

CHAIR: We have been talking about justice targets in the context of closing the gap and the close-the-gap targets as a way of driving reform.

Prof. Croucher: I am still not quite sure what you mean that I could usefully contribute to that answer. In terms of indefinite detention of people?

CHAIR: This morning we were having a discussion about indefinite detention—obviously, because it is the inquiry—but also about incarceration rates.

Prof. Croucher: I cannot really comment about the issue of incarceration rates generally. I can only really refer to the extent to which we covered those matters in our report, and that concerned people with disability. I think the troubling aspect of detention of people with cognitive impairment, for us, was that the consequences of the trigger for indefinite detention—namely, that they were considered unfit to stand trial—was done in a way that was not fully explored. The individual's ability to make that decision, to understand the nature of the trial, to get what was going on—unless the person is supported through that very question, the threshold can suddenly trigger them into this dreadful limbo of indefinite detention. Where that affects Indigenous people with cognitive impairment, you have this double whammy of injustice. Our focus was on making the fitness test a much better decision making process even around trial issues. Then, if the person is still considered not able to undertake the trial in a way that serves the interests of justice and the individual, the detention that is imposed is one that is fair within the overall human rights standards, which is one where it is not indefinite and is regularly reviewed.

CHAIR: Which is also the conversation you were having with Senator Lines.

Prof. Croucher: Absolutely.

Senator MOORE: I knew I would spark something in my brain. It was the regular follow-up, regular review issue. I am interested because I take that as a core principle, but what is the definition of 'regular'?

Prof. Croucher: I think the Victorian commission suggested every two years. We did not embark upon pulling apart all of those ideas. Given that that was only one of a whole range of other matters we considered, we thought it was important to pick off what would be the essential elements of an appropriately safeguarded detention approach. 'Regular' probably depends on its context, but Victoria, which looked specifically at this issue, suggested every two years, so something of that nature is probably appropriate.

Senator MOORE: Yes. I am just fearful that 'regular' could mean 10 years.

Prof. Croucher: Indeed. These matters obviously have to be calibrated to the circumstances. When a person is in detention, I think that time frame is quite a narrowly construed one.

Senator MOORE: Thank you.

CHAIR: Could I branch off a little bit from there? When we were in Queensland, the evidence we received talked about people who did not have the support. They had a lawyer, and the combination of lawyers and others said it was easier if they plead, because you will get through the process et cetera. They have been through a number of trials and occasions where they had had interaction with the law and finally got somebody who then said they were unfit to plead. Then the courts looked back and said, 'You actually haven't brought this up before, so what suddenly makes you unfit to plead now?' How widespread is that? Have you come across that situation?

Prof. Croucher: By anecdote, some observations were made that there is often pressure. This is just by anecdote and general remarks in submissions, but there may be a pressure to plead guilty because at least then the matter is dealt with. By pleading guilty, the criminal justice system then goes to penalty rather than the potential of being relegated to the limbo land of indefinite detention as a consequence of being found unfit to plead. That may be a pragmatic response to the underlying problem. The underlying problem is this limbo land of indefinite detention approach. 'Regular' probably depends on its context, but Victoria, which looked specifically at this issue, suggested every two years, so something of that nature is probably appropriate.

CHAIR: I think the Victorian commission suggested every two years. We did not embark upon pulling apart all of those ideas. Given that that was only one of a whole range of other matters we considered, we thought it was important to pick off what would be the essential elements of an appropriately safeguarded detention approach. 'Regular' probably depends on its context, but Victoria, which looked specifically at this issue, suggested every two years, so something of that nature is probably appropriate.

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Prof. Croucher: Indeed. These matters obviously have to be calibrated to the circumstances. When a person is in detention, I think that time frame is quite a narrowly construed one.

Senator MOORE: Thank you.
detention where you have been found unfit to plead. So there are two angles to it. One is that the limbo land should not exist; if a person is detained because of mental impairment, suggesting that they are unable to go through the trial process, there have to be real human rights limits around the nature of that detention. But the underlying issue too is that perhaps the person could go through a trial process if they were supported in the understanding, whether it is by way of communication in a court environment or support to understand each aspect of the trial process. Our analysis went to two aspects of improving justice for people with cognitive impairment in the justice system.

**CHAIR:** Okay.

**Senator PERIS:** I am sure senators Lines and Siewert back me up on this. The amount of mandatory laws that have come into play in the last three or four years, in particular in the Northern Territory, where we have the mandatory rehab and paperless arrests, predominantly target Aboriginal people. At the same time, with mandatory rehab we are looking at criminalising people with a health problem. Then you look at people with disabilities or psychiatrics, and it is very hard to get out once they are in the system. What is your view on this? I know the United Nations has been calling to scrap mandatory laws because mandatory law history shows it does not break the cycle. I am interested in hearing your views on it.

**Prof. Croucher:** I think they are very important questions, but, because they are not matters that we considered in our specific inquiry, I do not really feel I can comment. But I am obviously, as you are, distressed by certain situations of that kind.

**Senator PERIS:** Okay.

**CHAIR:** Those are all our questions. Thank you very much.

**Prof. Croucher:** My pleasure. It is always a pleasure to speak with you.

Proceedings suspended from 14:14 to 14:26
In our submission, we draw attention to the fact that the mental health service system does not work well with them because they do not have mental illnesses that fit into the treatment model. When they are admitted to wards because of their impairments from a cognitive and communication point of view, they often will not fit into the treatment within Victoria. We see a lot of people with these kinds of problems. Part of the problem, o the community, the gravity of the an Governments which govern the infrastructure to do it. group o to contain that kind of behaviour in a community setting. Then the justice system struggles because they have a are behaving in a manner that is putting the staff at risk and the general community at risk, and it is very difficult they cannot cook, they can help them with that kind of stuff. But it is very difficult to support therapeutic programs. The disability model is very much set up to support people. So if someone cannot budget or because of their impairments from a cognitive and communication poi

There are principles that have been agreed by the Council of Australian Governments which govern the interaction between the justice system and the NDIS. The document acknowledges that this is a very complex area and that it will need to be tested and adjusted in light of experience that the NDIS has developed. But we think that the NDIS does provide the potential to work more constructively through this very difficult terrain.

The approach we have recommended in our submission is essentially a five-step approach for anyone who is the situation of being unfit to plea because of cognitive impairment or mental illness. That should involve appointing a nominee or a representative for that person undertaking a joint assessment. That would involve the justice system and the disability system in assessing the impact of risk, risk to the community, the gravity of the offence, the likelihood of offending and the efficacy of disability supports, and out of that putting together a disability service plan.

That plan should provide support and should be aimed, ultimately, at re-integrating that person into the community. It should involve the significant others in that person's life—family. It should take account of the impact of culture. It should detail any restrictive practices that may be applied for that person, with a view that these restrictive practices be monitored and hopefully reduced over time.

The fourth step should be to identify and fund skilled service providers, recognising that this is a particular skill in supporting people in this situation. The final one: ensuring that there is independent oversight and regular independent review of a person's circumstances.

There are two other points I would just emphasise now. While there are some specialist facilities that have been built to house people in this situation as an alternative to prison—and the Bennett Brook centre in Western Australia is an example of that—there does need to be a greater range of accommodation for this group to recognise that this is really quite a diverse group; not a large group at a diverse group. Finally, there is a good case for investing further in research to understand and monitor this particular group of people with cognitive impairment and mental illness, and to investigate the impact of diversionary programs and the most efficacious responses. Thank you.

Dr Bennett: Thank you for the opportunity. Maybe I will quickly start off with a description of my job. I am a psychiatrist and I work across the mental health service system and the disability service system as well is within the justice system within Victoria. We see a lot of people with these kinds of problems. Part of the problem, firstly, is that people with intellectual disability in particular have very high rates of comorbid mental disorder. I think there is often an assumption that it is the disability that is leading to the problem when it is often the comorbid mental disorder that is often unrecognised. Because of that, the service system is not well designed to meet the needs of this population.

In our submission, we draw attention to the fact that the mental health service system does not work well with them because they do not have mental illnesses that fit into the treatment model. When they are admitted to wards because of their impairments from a cognitive and communication point of view, they often will not fit into the therapeutic programs. The disability model is very much set up to support people. So if someone cannot budget or they cannot cook, they can help them with that kind of stuff. But it is very difficult to support someone when they are behaving in a manner that is putting the staff at risk and the general community at risk, and it is very difficult to contain that kind of behaviour in a community setting. Then the justice system struggles because they have a group of very complex people whom they are required to look after and, again, they do not have the skills and the infrastructure to do it.
My thought is that—and is probably matches with what Dr Baker has just been saying—there needs to be a range of more specialised facilities that can not only manage the specialist health needs but also look towards helping this group of people access the community in a meaningful kind of way. I agree with the principles that no-one should be detained on the basis of lack of capacity or mental illness. But it is usually their behaviour that leads them to be detained rather than the actual presence of mental illness or disability.

**Mr Pappos:** Thank you to the committee, again, for the invitation. Firstly, I will start by providing a very brief overview of ACSO and how we fit into this area. ACSO has been around for approximately 30 years. During that time, we have worked predominantly with people presenting with a whole range of complex needs, including those with a cognitive impairment and a mental illness. Today, we operate 10 specialist residential services that work with people who engage in high-risk behaviours in the community, including serious-offending behaviours.

Where we interface with compulsory treatment regimes and forms of high levels of supervision is around the Disability Act and the CMIA, the Crimes (Mental Impairment And Unfitness To Be Tried) Act. At present, we have a number of people who are subject to compulsory treatment orders under the Disability Act in Victoria. When we make decisions to apply for those types of orders, we never take it lightly. It is a key consideration.

It is important to articulate that we do not practice detention. We have participants who might be subject to high levels of supervision in the community because of their assessed risk to others. What is important there is that we balance our obligations to their human rights with the risks that they are assessed as posing to either themselves or others in the community. The tension for us, I suppose, is we are the applicant of these orders in Victoria—because that is what it requires, that the authorised program office under the Disability Act is required to apply for an order—but we are also the service provider. For us, that is a constant tension. Certainly, we do not consider these orders should apply in all instances. In fact, we only think that it should be in exceptional circumstances and, where possible, every effort should be undertaken to see reductions in any form of supervision applying. In other words, we do not want to see people subject to indefinite orders in the community.

In terms of the CMIA, where we interface is around those who are currently in mental health facilities, including Thomas Hamblin, or the long-term residential treatment program in Victoria, where we see people who are about to transition from custodial supervision orders back into the community. Insofar as that is concerned, we believe that there is a real need to assess risk, plan in a robust way to manage those risks in the community. But we also believe that opportunity should be provided to those who have been in these environments for an extended period of time to transition into the community in a safe way. In saying that, it requires a fair bit of collaboration from a whole range of entities.

With regard to the National Disability Insurance Scheme, we have had some recent interactions with compulsory treatment. There is certainly a desire to collaborate but there needs to be a lot more work. I think one of the challenges we see is that there is not a national framework that informs the way in which people with cognitive impairment who may engage in high-risk behaviours should be supported. For example, you have certain states and territories that may have people who are incarcerated, possibly without any real framework or oversight in place, and that would be concerning for us.

Where ACSO are concerned, we are very much involved in the community space and in supporting people who may have complex presentation and engage in this high-risk behaviours, to reduce the level of restriction wherever possible to the point where they are very much included in the community. So if the National Disability Service is interested, we are certainly one of those specialist providers that have a role to play in this space and people with this complex presentation.

**Senator LINES:** I am glad that you talked about the compulsory treatment orders because it is something I have been a bit concerned about today. You said that it is balanced between human rights and obviously what is necessary for the behaviour to be changed or modified, or the person to be safe and safe to others. Is there a test or is it just the clinical knowledge of the people doing the assessing? What are the criteria?

**Mr Pappos:** Firstly, in our experience we are usually looking at these compulsory treatment orders for those who have engaged in offending behaviours and where there is a very clear history of them engaging in serious offending behaviour. There is always a risk assessment that informs that. There is a validated tool that has been developed—the ARMIDILLO-S—that looks at risk in a very holistic manner. Before we even contemplate applying we need to be very clear that we are providing treatment, supports and interventions that are going to be of benefit—

**Senator LINES:** Of benefit to the individual and the community?
Mr Pappos: To the individual and to the community, absolutely, without question. We also want to ensure that we have exhausted other less restrictive options before we even contemplate applying for this sort of order. Certainly we have some very open discussions with the Office of Professional Practice in Victoria where we have individuals who may be subject to criminal orders, for example, also being subject to compulsory treatment orders, so we certainly question the efficacy of that in those instances, but decision making around applying for an order of this nature and developing treatment is always carefully considered. We consider the impact on the individual as well as on the community.

Senator LINES: Various stakeholders from Victoria this morning said that the compulsory treatment period could be infinite because someone might require ongoing treatment. Are there review periods built in?

Mr Pappos: Yes. In all instances there is an annual review period. The Victorian Civil and Administrative Tribunal is responsible for reviewing those orders, as well as revoking orders and making orders of course. We have a very strong service philosophy around not having people subject to indefinite orders—in other words, not reapplying year upon year—unless it is absolutely justified. We have been one of a handful of organisations in Victoria that have presented applications for revocation of these orders where either we feel that there is no longer benefit or we believe that the risk can be managed in a far less restrictive manner.

Senator LINES: Are they appealable? If I got a compulsory treatment order, could I then appeal that?

Mr Pappos: Yes. The participants that we support have the ability to request a review at any point in time and they can do that through their legal advocate. This is information that we openly provide to all the participants when we do apply for these orders so that they are fully aware of their rights and whatever responsibilities they may have as well.

Senator LINES: My other question comes out of one of the submissions today. Often the point was made, particularly in relation to Aboriginal and Torres Strait Islander people—but I am sure it is all people with a cognitive impairment or mental illness—that the first time that it is recognised that they have got the cognitive impairment or mental illness is when they come up against the justice system. If there is no history of this person having a cognitive impairment or mental illness then what triggers the fitness to stand trial test? What would trigger it? Or could this person simply slip through the system?

Dr Bennett: I think a fair number do slip through the system. It is really dependent on the awareness of the people that they come into contact with through the journey through the court system.

Senator LINES: Is there a way that we could do it better?

Dr Bennett: I know screening tools have been employed in a research setting. I do not know if they have been employed in a system wide kind of setting. But that would be one approach—just to adopt a screening approach when people hit the court system.

Senator LINES: The statement was made by one of the groups that have put a submission in that the first time that a person's cognitive impairment or mental illness is discovered is at that impact with the justice system. Is that your experience?

Dr Bennett: Yes, and there are two other problems that you run into. One is that a number of people do not want to be labelled as having cognitive impairments, so they do not want that kind of assessment. The second issue is that it may be evident they have a cognitive impairment but sometimes it is not clear when that occurred; whether it fits into the paradigm of intellectual disability—that is, before the age of 18—or if the cognitive impairment is subsequent to some injury after an ABI or—

Senator LINES: Does it matter when it occurs?

Dr Bennett: It can matter in terms of access to appropriate services.

Senator LINES: Right. Are there any other points on that?

Dr Bennett: Yes—on one of the other things about involuntary treatment. I think when I last looked that there were about six different ways under different forms of legislation where people could receive involuntary treatment in Victoria, and they all have different processes for review and monitoring the quality of treatment that is received. I think it is quite complicated, in terms of which order and which legislation someone is being managed under.

Senator PERIS: How long does the assessment take for that diagnosis for an individual coming into the system?

Dr Bennett: It can be quite short. It depends, really—if you are just assessing for cognitive impairment, that can be quite a short assessment.
Senator PERIS: A short one or a long one?

Dr Bennett: A short one. It might just be a question of doing some phone calls and seeing if there is any previous testing that is available and if the person has already been identified. Or it could be administering a test that might take 30 minutes or an hour. Just to clarify: we worked out that when we are assessing people it takes us about 20 hours on average. But we are not just assessing for the cognitive impairment, we are assessing for the full range of issues and problems the person is presenting with.

CHAIR: Should we not do that for anybody that you might be assessing through this process when they come into contact with the justice system?

Dr Bennett: It depends on the complexity of the problems they are presenting with, what the object of the assessment is and what services might then be available to manage it.

CHAIR: I hear what you are saying, and I understand what you are saying, but surely we should not be assessing somebody in terms of whether we might not be able to give them services and resources to support them, so we will just do a minimal level of assessment. I am not having a go or anything!

Dr Bennett: The interesting thing is that most of the people we come across have been assessed multiple times and have a range of assessments; it is pulling it together in a way that you can then make use of it and apply it in a setting.

Senator LINES: One of the umbrella groups for the Indigenous law services told us this morning that assessments may have been done but that they are not always made available to the parties in the court. So that seems to be a bit of a stumbling block, if an assessment has been done but it is not freely available to both parties. As you said, they might have had multiple assessments but, again, it is about how you pull those together.

Dr Bennett: What we do is a lot of detective work.

Senator LINES: Yes, I am sure. We have heard about the poor data sets and the poor collections we have. That has been a key feature of what we have heard this morning.

Dr Bennett: We are in a bit of an advantageous position in that we are funded by disability and by mental health, so we get access to information from both service systems. But you cannot get access without consent, and if a person is not willing to give consent then you cannot get hold of the information.

Senator LINES: Even if you were looking at a compulsory treatment, do you still need consent?

Mr Pappos: For the order to apply?

Senator LINES: No, to gather background information—previous information.

Mr Pappos: Yes, that is right. But prior to us accepting any person into our service we make sure that standard information is met, and if we are not satisfied we will usually sit down with the referring agency to ensure that there is a proper exchange of information.

Senator LINES: So you have a benchmark?

Mr Pappos: That is right. Going back to your question—

Senator MOORE: If they do not provide it, does that mean that they do not get the service?

Mr Pappos: We need to strongly consider how we support people—

Senator MOORE: I am just wondering what you—

Mr Pappos: We do not prevent access to the service, but we need to then sit down to discuss and outline why, sensibly, we require that standard information and what it is going to be used to inform. For example, if it is around supporting someone with specific needs or diversity in background or risk then we outline very strongly to those referring that that standard of information is required.

Senator MOORE: But my question remains: do they get the service if they keep saying no?

Mr Pappos: We have not had an instance where we have not had that—

Senator MOORE: My question remains.

Mr Pappos: Usually the service is provided, where the information is provided and where we feel competent and capable of providing that service to someone. If there is a list of unknowns with someone, then what we would recommend and what we implement is a process of review within the first three months of that person accessing the service. So there are some rare examples where individuals may not have history that follows them, or there are sporadic instances of service involvement, for instance. That does not mean that we prevent access to that person. It stems from our capacity and capability to provide that service in a meaningful way and to meet that person's needs. That is usually what informs whether we engage with the person and provide that service. So it is
not an overriding factor that the standard of information has not been provided, but it is certainly something that we strongly consider in all instances.

Senator MOORE: I still do not understand the answer, but that is fine. I will read Hansard and see whether it is any clearer for me.

Mr Pappos: I am happy to clarify further if necessary.

Senator LINES: You have made the comment, Dr Bennett, that in Victoria alone there are about six different ways you can end up with compulsory treatment. A number of people have said today that we need a national framework. My state of Western Australia is one of the outlier states, along with the Northern Territory. If we were looking at national standards, how would we deal with these questions, given that people present with a range of issues that cut across a number of different departments and services? What are the kinds of simple recommendations that might go into a national framework?

Dr Bennett: I will have to think on that. I think the basic principles are about things like the capacity of the person and the availability of treatment and services and appropriate reviews. A lot of people with intellectual disability are treated with psychotropic medication, and they are not consenting to it. If they were treated under the Mental Health Act, that would be reviewed by a panel of a layperson, a psychiatrist and a lawyer. Under the Guardianship Act, they are not. It is either a family member or someone appointed by VCAT.

Senator LINES: So some harmonising at least of impacting legislation so that there are the same expectations there?

Dr Bennett: Yes. I guess my concern is—

Senator LINES: Best practice.

Dr Bennett: that someone outside whoever it is who is providing the service looks at it and is in an informed position to say, ‘Yes, this is a reasonable thing to do.’ I think what we see a lot of is people being inappropriately treated because there is not that process of review—or that is one of the factors contributing to it.

Dr Baker: Within the disability world, there is a national framework on the use of what are called restrictive practices and chemical restraints, and that has been agreed by all governments.

Senator LINES: So that is a good start.

Dr Bennett: That is a good start. Certainly it is not the full picture by any means, but it is a good start.

Mr Pappos: If I can just add to that, under the disability act, if a person with an intellectual disability is in receipt of residential services and they have psychotropic medication that is prescribed and it is not for a specific diagnosis, then there is a legislative requirement that that service reports to the Office of Professional Practice why that chemical restraint is used.

Senator LINES: But that is in Victoria.

Mr Pappos: That is in Victoria. So I agree: it is probably not nationally the case. But certainly in Victoria it has been the case since 2007.

Dr Bennett: I agree and I think that has been a start, but the problem is that the Office of the Senior Practitioner has no jurisdiction over the prescriber, so they can comment but then generally the prescription continues. I think the other interesting thing about the idea of chemical restraint is that, for example, in mental health acts the idea of chemical restraint does not exist. It is purely something that exists within a disability kind of framework, although it is not usually a disability you are treating.

Senator LINES: I think I am a bit dumbstruck at this point.

CHAIR: We can come back.

Senator PERIS: With the Northern Territory, obviously there are a lot of mandatory laws up there. For a first time offence of an assault, you are incarcerated for three months; second time round is 12 months. In terms of assessment tools, is that something that you are aware that really exists up in the Northern Territory? What we have heard is that sometimes a disability is the cause of the crime in the first place, and recidivism rates of Aboriginal people are very high. I am just throwing it out there: if you are incarcerated for three months minimum, what kind of rehabilitation or assessment is used in that time?

Dr Bennett: The point of identifying it would be with the aim of providing services. Unless the services were in place, there would be little reason to identify it. I think one of the difficulties is the relationship between the offending behaviour and the disability. I do not know that you can explain the offending behaviour in relation to the disability. I think that that modifies how you might then manage someone, but it is usually other factors that have led to the offending behaviour, and that is usually things like drug and alcohol use or problems with social
environment and poverty—those kinds of things. There is a range of factors that leads to the offending behaviour, and I think that one of the issues that is often co-joined is that the behaviour somehow relates to the disability. I see it usually as: the offending is actually related to other issues, not the disability.

**Senator LINES:** How do you separate all that out? It is getting more complicated.

**Dr Bennett:** I think it depends on how you think about what a disability is, what a mental illness is and what other types of disorders are. So it can get quite complicated. The only reason for doing it is trying to really determine which service system someone should access.

**Senator LINES:** Could you have a situation where, to take your point, the offending behaviour is not always caused by the cognitive impairment or the mental illness? Could you have a situation where someone is not fit to stand trial, but the offending behaviour could actually be treated in some other way so they sort of miss out?

**Dr Bennett:** I am not sure that I understand the—

**Senator LINES:** You are saying that sometimes the offending behaviour is unrelated to the cognitive impairment. Let's assume that you have committed a criminal offence and you go to stand trial but you do not pass the fitness to stand trial test, because of your cognitive impairment. However, you are saying that the offending behaviour is not related to that. If you are in a jurisdiction where some other outcome applied, would that mean that the offending behaviour remained untreated?

**Dr Bennett:** I think in those kinds of situations, it is about sometimes managing the behaviour rather than treating it. I am trying to think of—

**Senator LINES:** I am not a clinician, so excuse my language.

**Dr Bennett:** I am just trying to think of examples. Certainly, if somebody has got a clear-cut mental illness, it can usually be treated. In other situations, it is about things like anger management, looking at what environmental factors might have led to the offending behaviour. It might be: someone is homeless, drug and alcohol using, and they are stealing to get funds.

**Senator LINES:** I think I will tie myself up in knots.

**CHAIR:** I am in that spot now—I am thinking of situations where anger management, for example, could be associated with a cognitive impairment. Let's assume that you have committed a criminal offence and you go to stand trial but you do not pass the fitness to stand trial test, because of your cognitive impairment. However, you are saying that the offending behaviour is not related to that. If you are in a jurisdiction where some other outcome applied, would that mean that the offending behaviour remained untreated?

**Dr Bennett:** I think anger management is used across the range of intellectual functioning; it is not specifically something you use to treat a disability. You are treating the anger, not the disability.

**CHAIR:** I see what you are saying. I am then thinking of the interaction with the justice system and fitness to plea, for example.

**Senator MOORE:** What about FASD? My understanding is that FASD is a condition which affects your ability to see consequence. When someone is angry or has a problem, they react immediately without having any sense of the consequence. It is actually a condition.

**CHAIR:** They cannot manage their emotions.

**Dr Baker:** Yes. The syndrome leads to intellectually disability. It is also associated with anxiety, impulsivity and other behaviours. I would see the impulsivity and the anxiety as being separate from the disability, so you would treat the impulsivity and the anxiety, not the disability.

**CHAIR:** I understand what you are saying. I am then thinking of the interaction with the justice system and fitness to plea, for example.

**Senator MOORE:** Is your fitness to plea, because of your condition or because of the anger—

**Dr Baker:** I think that is the issue. In this context, the impact of the cognitive impairment on mental illness is your inability to take responsibility for the actions, whether they are actions of anger, anxiety or something else. That means that you are put into prison without having a fair trial, effectively, there is some alternative provided to you or you are in limbo.

**Senator PERIS:** Are there really extreme levels of cognitive impairment? If you are diagnosed with it early on as a child, does it get worse? Can it escalate? Where does your level of ability lie?
**Dr Bennett:** I think that it varies. I think people with more severe levels of intellectual disability are usually diagnosed earlier and those with less severe levels may never get diagnosed, but it is generally not seen as a progressive condition in that sense.

**Senator PERIS:** If you are diagnosed with it as a child and you function well—I know children with this, and you can just see their behaviour is different. In some areas of their social awareness, they are well integrated but, in other areas, they are not. Is there no way of curing it or is it just a life plan of being able to—

**Dr Bennett:** I think that is the interesting thing about intellectual disability, because it focuses on the cognitive element of the issue, rather than the social and the emotional aspects, which is where people are often difficult. I do not know what you ideally do. It happens from a very young age. It is about providing the right environments and supports so that people can then develop and learn in a meaningful way. Unfortunately, not everyone responds to that approach, and that approach is not applied to everyone. I guess the people we are seeing are a long way downstream from that—sometimes quite deeply ingrained habits that are very difficult to shift. I am not sure if that answers your question?

**Senator PERIS:** Yes, it did.

**Senator MOORE:** I am just wanting to follow up a little around the NDIS process and how it interrelates. Your submission does talk about the principal document, which I think is very bland in the detail of how it is going to operate. Are you aware of anything that has happened at any of the trials that touch on this issue? I am not.

**Dr Baker:** No, I am not.

**Senator MOORE:** I know Newcastle has a significant prison in its area but I do not know enough about Barwon. I do not think it is an issue we have picked up on until this particular process. The Queensland trial for the NDIS is going to be in Townsville. That area has a really large prison population, so maybe it will work there. But I was just checking; you have been so involved all the way through.

**Dr Baker:** I think it is a good point you make. I suppose, because there is so much else going on, there has not been, as far as I am aware, any focus on this area. And there should be because, as I said, the principles that are articulated acknowledge that this is a particularly complex area. The other problem is in regard to these principles—and they are fairly high level, as you say. At this early stage of the NDIS, the way in which the NDIS has interacted with other service systems has been more often a demarcation dispute or issue—to prevent cost shifting and that sort of argument across service systems—than a let's work together and coordinate supports and services for this person approach.

**Senator MOORE:** This whole area of incarceration has clearly been a messy one in terms of medical services: what Medicare pays for, what states pay for. Well, it has not been messy; they have fought it hard. Once you go inside, Medicare does not exist. It only exists when you come out. I was just wanting to see whether you were aware of anything that had already occurred in the space beyond the principles. So we will follow up on that. The other thing you talked about is appropriate accommodations, and today we have heard a bit about safe places where people can go. I think it was Senator Lines who said that one of the prisons—was it the new prison in WA?—is allegedly going to have a full unit.

**Senator SIEWERT:** No, that is in the NT.

**Senator PERIS:** It will be worth $600 million.

**Senator MOORE:** The new jail is going to have what they consider to be safe place, but within the prison.

**CHAIR:** A forensic place.

**Senator MOORE:** I am just wondering whether that constitutes what you would consider to be a safe place?

**Dr Baker:** I do not know the Northern Territory plans particularly well. I know in Western Australia the Bennett Brook Disability Justice Centre is not—

**CHAIR:** It is not a Bennett Brook type of thing. My understanding is that it is a secure facility.

**Senator MOORE:** Bennett Brook is outside, isn't it.

**Dr Baker:** It is separate from the prison.

**Senator MOORE:** It is a separate place.

**Dr Baker:** Yes, which I think is preferable.

**Senator MOORE:** Yes. I think it is the whole thing about—

**CHAIR:** It is actually a prison.
Senator MOORE: getting more and more corrections focused, as opposed to health focused.

Senator PERIS: In Alice Springs I think they are closing down the psych ward and sending people from there up to the north of the Territory. The concern is that you are placing people with disabilities in with people who are high-risk prisoners.

CHAIR: My understanding is that it is inside the jail and it is a secure forensic facility.

Senator PERIS: Yes.

Senator MOORE: I have not been across the evaluation of Bennett Brook, but your submission says that disability justice centres such as that are a preferable option to the prison system.

Dr Baker: It is one of the preferable options. I think there should be a range, and the review of the Bennett Brook centre was instigated because there had been escapes from the centre. It had a focus on the security of the centre, but its general assessment of the supports and services provided was positive.

Senator MOORE: That is good in itself. From that perspective, this morning we had evidence from a number of organisations, including the Jesuit services who, in Victoria, run some services for people who are moving out of the justice system. They made the case that that was the kind of service that should be funded better and have more options, as they only operate in Victoria and one other state. There are no similar services in Queensland. I think the Jesuit services said they operate in Victoria and the Northern Territory.

Senator PERIS: Yes, that is correct—in Central Australia.

CHAIR: I have a question that goes back to the NDIS. This morning the evidence was very strongly put that we should not just be focusing on people as they come out of the justice system and that we should be seeing what help people need before they go in and also, if possible, through the justice system. In particular, I am thinking about where we still have people in indefinite detention who not been found guilty of a crime. Why would we not be providing NDIS support where a person has not been found guilty? They may be in detention, but they have not been found guilty, because they have been unfit to plead. Why would we not be providing NDIS? There are a whole lot of other issues, but, at the moment, while people are being put into indefinite detention, why should they not be able to access NDIS support?

Dr Baker: I agree. I think, firstly, if they are unfit to plead, in most cases they should be in detention.

CHAIR: I agree but, at the moment, we have a situation where they are.

Dr Baker: If they are in prison—if I think back on the principles, they give a fairly limited role, a very limited role really, to the NDIS while a person is in detention.

CHAIR: I understand that.

Dr Baker: They can be provided with aids and equipment, there can be some training of staff, there can be some capacity building as they are exiting prison, but that is a pretty limited role. I understand we do not want the failures of other service systems to be loaded onto the NDIS. The NDIS needs to be, I suppose, constrained about what additional responsibilities it takes on, but I think there is a greater role the NDIS could probably play while a person is in prison, particularly in the situation you describe where they should not be in prison, because they have not been able to plead.

CHAIR: Obviously, you are not the person I should be asking about why they established the process that they did in the first place in terms of the NDIS of when you can and cannot access it. We will obviously need to pursue that with the NDIA in the next instance.

Senator PERIS: Mr Baker, in your submission you say that many disability service providers already support people who have had contact with the justice system. Can you give us an example of some of the models you have got at the moment?

Dr Baker: Quite often these are people who are exiting prisons, exiting the justice system, so they are in transition. They are people who have quite high-risk challenging behaviours, so there are specialist support programs that operate in most states. I know of ones in New South Wales and Victoria, and it is quite a skilled task to support that group of people.

Ms Angley: Also our members work quite significantly with some young people exiting out of home care who have had interactions with the justice system on and off, so they do quite a lot of work supporting those young people.

Senator MOORE: And they would be state funded?

Ms Angley: Yes.
CHAIR: Mr Pappos, I want to follow up on where I was going with the NDIS question: are any of your
homes in the Barwon area?

Mr Pappos: Not at present, but we have had interactions with the NDIS with some complex cases. Certainly
discussions around how certain participants who may be found unfit to plea or subject to involuntary treatment
orders—like the compulsory treatment order regime in Victoria—are really in their infancy. I think there is an
awareness that there needs to be further discussion around how those participants are supported under the
framework.

We have been involved in one case to date, which tested a number of different legislative frameworks.
Fortunately, in this case the person has ended up on no order in the community and they are still continuing to
receive support. It was a difficult case to arrive at, I think, for all parties concerned, because of the various
different lenses that were applied from the NDIS, the Department of Human Services in Victoria and a non-
government service provider involved in the case. But I think everyone in the end acted with the best intent to see
this person have reduced restrictions and none of the restrictions imposed on their liberties, which was fortunate
to see.

CHAIR: Did they end up—it depends on where they were, because we have not come to a full rollout yet.

Mr Pappos: They were in the Barwon region. They have ended up in the metropolitan region.

CHAIR: Did they end up being able to access NDIS?

Mr Pappos: They continue to receive NDIS support, which is was great. It was a good outcome.
BARNEY, Ms Jody, Certified Aboriginal Disability Cultural Safety Trainer and Assessor, Deaf Indigenous Community Consultancy

[15:25]

CHAIR: I would now like to welcome Ms Jody Barney to the hearing this afternoon. You have been provided with information on parliamentary privilege and the protection of witnesses and evidence. What I would like to do now is to invite you to make an opening statement and then we will ask you some questions.

Ms Barney: Firstly, I would like to acknowledge country and pay my respects to the traditional owners of the Kulin Nation, the Wiradjuri people, and pay my respects to their elders past and present. I also pay my respects to all other Aboriginal and Torres Strait Islander people here today.

My opening statement really is about having a conversation around my professional and lived experience of Aboriginal and Torres Strait Islander people, who have been unfit to plea and who have also been diagnosed, or not yet diagnosed, with having cognitive or psychiatric disabilities.

Since 2007, in a professional capacity, my business has worked across Australia and, in that time frame, I have engaged with over 170 communities. Twenty years prior to that, my family moved consistently across the country so, in that time, I was able to learn and develop my communication skills not only in oral English but also in Aboriginal signing systems, which is predominantly why I am here today.

What I find with the work that I have been doing since 2007 is that a large proportion of information is unable to be translated from an English context to an Aboriginal signing system. The work I have done in the Northern Territory, Queensland, here in Victoria and South Australia has been slowly translating from spoken English into Auslan and into Aboriginal sign languages to understand the assessment and the capacity of people who are deemed unfit to plea—children in youth detention centres, children in out-of-home care and children in educational settings who are at risk of injustice. I have also worked with prisoners and men and women on remand. During that process of my work I have worked with other professional people. I do not go out there with all guns blazing; I work with a team of psychologists, forensic psychiatrists, other interpreters, sign language interpreters and build capacity around effective communication strategies and visual strategies around finding out how men and women and youth in communities are recognising how they are behaving, how they are making decisions and what their capacity is to do that for the longevity of their life.

Here in Victoria I have worked in the Barwon trial site for 12 months on a project called 'Getting it right'. In that project I engaged with 133 Aboriginal-Torres Strait Islander people, and from that a large proportion either had dual diagnosis or had multiple diagnosis of mental illness, cognitive impairment, acquired brain injury and intellectual disability. In that cohort I had a large number of young men who had been on parole or on community-based orders who were homeless, who were living on the fringe, who were disengaged and unable to really participate in the trial site due to the structure of the NDIS. My role there was to work with the local elders and with community services to find out why there were gaps between the cohort of community members and the NDIA and, in doing that, we were able to have an increase of over 400 per cent in 12 months. In doing that it took more than the 50 hours of funded time—it took quite a substantial amount of commitment and due diligence and cultural responsibility to ensure that conversations were had, not only with the individuals but also with their carers or family and their extended kin, around identifying disability. I am also aware of the capacity of the First Peoples Disability Network and other state bodies around the rollout of the NDIS, and also the ongoing commitment of other agencies such as the NDS, ScopeVic and Yooralla, who are trying very hard to ensure that the cohort of vulnerable people that I am talking about today get access to services.

The largest concern that I have is around communication. Translating or transferring that knowledge from a cultural context into a framework of policy practices or deliverable outcomes is very, very difficult. Time spent in community is often not seen as being beneficial. Some organisations, unfortunately, see it as a time waster; that there are no real outcomes for the time spent on country. As English is my third language, it is often quite difficult for me to try to put my English words together, so excuse me if I find I can be a bit brassy or I find a bit difficult trying to explain the difference of what I am trying to say. I have been involved since the conception of the NDIS here in Victoria. I sat on the Victorian Disability Advisory Council for two terms during the embryo stage, when there was a lot of discussion around how is this going to affect Victorians and, for me, how is this going to affect Aboriginal and Torres Strait Islander people. I am still asking that question.

There is also the importance of the displacement of families—the high number of children in out-of-home care who do not have a diagnosis or who are not diagnosed until they enter the system, and the distressing reality that there is something else that a non-cultural system is trying to impose.

COMMUNITY AFFAIRS REFERENCES COMMITTEE
I spent 14 hours yesterday with a client who could have had his issues resolved in half an hour, if I was allowed to work effectively. Barriers for advocates, or consultants such as me, with systems that are in place to protect workers and to protect community are important; however, if a client is unwell, struggles to communicate in the dominant language of the service provider, shows communication frustration physically instead and is interpreted as being aggressive or antisocial behaviour, it escalates concern for me and for the client. While working with everyone from the Koori justice worker, the Aboriginal health worker, the mental health worker to St Vincent's Hospital and while everybody was in agreement to make sure that this client was well taken care of, he would not have had a clue without me in the room.

The inquiry needs to have a look at what would be a concise and effective communication strategy across the country to ensure that, where there is a person who is unfit to plead, with whatever level of cognitive permanent or intellectual disability, there is a visual strategy all set of tools that can be used in situations to ensure that they have informed consent or informed knowledge of what is going to happen or what has happened, and that training and tools used to determine the capacity of those men, women and youth are done by professionals who are also trained in that area.

I have the greatest respect for psychiatrists, psychologists, teachers, anyone that works with children's, anyone that works with anybody; however, if it is not your first struggle, then you do not know it is a struggle. I am sure you have heard the concerns around racism, oppression and poverty. They are true, they are real and they are here; however, if there is no sense of deliverable hope, respect, dignity and communication about getting the message across, or understanding the message received, then we are going to go around in circles again, and families will continue to be disengaged, disempowered and displaced.

Senator PERIS: Thank you for your evidence today. I am interested in the rehabilitation tools—not only them, but you just mentioned then what tools can be used, like a visual strategy. With a lot of Aboriginal people that are incarcerated, there has been a lot of research done and they have hearing impairments, but also English is their second or third language and they do not understand what they are entering into.

Have these tools been developed, or are we so far behind—can we look to other countries that have already developed these tools? Obviously, you have done a lot of work, and we probably need 100 of you across the country. I would really like to hear more about what we could be using.

Ms Barney: Yes, there needs to be hundreds of me, and I am quite happy to share. Visual communication strategies we have seen in all forms in a printed form, in a 2D form. My passion around deaf and hard of hearing Aboriginal and Torres Strait Islander people is that there is not one signing system. There is not one sign language, as there are for the deaf community, which is Auslan. I do not have interpreters who can sign in Aboriginal sign languages, unless they are spoken Aboriginal interpreters who do not have an understanding of deafness or hard of hearing concerns. So there is a gap around that. A communication strategy will need to look at developing ethical training and protocols in delivering interpreting services to get those conversations going.

Across my 40-plus years of living in Australia, in this country, I have 55 signing systems all stored in my head. I am actually fluent in 17. In my own family there are eight signing systems. I am a Birri-Gubba Urangan woman from South-East Queensland but I also have kinship to the Torres Strait and Cape York through my Kanaka side of family, and the Djabugay people. Through that process I had to communicate effectively as a young child who had no English. Cultural signs are contextually bound. They are also gender bound across the country. For example, n the Territory, if you have spoken language female interpreter working with a deaf Aboriginal man it would not work—it cannot happen. So there are cultural protocols that have to be followed. However, if you have a young Aboriginal woman who is before the court on numerous occasions, knows the spoken language interpreter well and works with an Australian sign language interpreter, however the spoken language interpreter is going through cultural business, she cannot communicate either. These are factors that are coming up in high-prevalence cases.

My work is the last resort. I am the last port of call, because I am deemed too expensive to fly anywhere to work. It takes a long time to sit with a client to find out how they communicate. For example, they may be on Larrakia country but they might come from Kalkarindji or Maningrida. So I need to find exactly what signing systems they are using, where they are in their development and then work with the hearing members of that communication to ensure that they follow a process. Often when we see Aboriginal men and women who are incarcerated with a high prevalence of hearing loss or deafness they are deemed unfit to plea because they have no communication strategy or no communication at all. I have worked on a few famous cases. In three days I had a man's story that he had been working nine years to tell.

So there needs to be checks and balances in place if a person comes through the forensic part of the justice system around assessment or cognitive capacity. Those tools are finding what they can recognise visually and
what it is that they symbolise to be a part of the reason they are there, so that you can track the story of how they got there or why they are there and whether they are doing it as a part of business—that they are taking responsibility for the younger men or older men and they have been put there for that reason—or whether they are taking ownership of a past wrong that they are trying to make right. However, they also may be doing the wrong thing. So it is trying to find out where the story sits in that. If you do not have the effective communication tools and know what you are seeing, you can misinterpret, and that is where Auslan interpreters in the justice system who work in the courts, especially in the Territory, Queensland and in Western Australia, find it very difficult to understand the differences and the subtleties between those cultural exchanges.

There are some Aboriginal sign language books for Walpiri and for various parts of Arnhem Land—my apologies, I cannot pronounce some languages. In all of that, there is a sense of control and order. I am going to tell it as I see it: if you have only a certain amount of funding to employ certain amount of people to do a certain amount of hours—the extended hours that are needed to work with the cohort of people we are talking about—there is no money for that. So people such as myself and the Aboriginal disability justice campaign, who lobby and talk about the importance of these issues, are volunteers. We want to see a more just and equitable society.

There needs to be an onus on the systems to ensure there is a capacity to employ people who have the skills to work with the local community and the elders around engaging them to develop locally used tools, communication strategies that they prefer, that they allow, and a capacity to have a network of individuals in the community who have an understanding of the science. They could be put on a video where they could then show an interpreter 'this means this, that means that' where there is no conflict of interest and there is no breach of protocol. It is a resource network. It needs to have a pool of information that can be a clearing house of Aboriginal signing languages but visual communication as well. In New South Wales, 30 per cent of the youth incarcerated are Aboriginal. Out of that, nearly 82 per cent or 83 per cent have an intellectual disability.

Senator PERIS: What was the percentage?

Ms Barney: The New South Wales Youth Justice Service have informed me that 30 per cent of their clientele are young Aboriginal and Torres Strait Islander people and, out of that percentage, 82 per cent or it may be a bit higher—sorry I might be a bit wrong but in that vicinity—have an intellectual disability. So if we look at the population of Aboriginal and Torres Strait Islander people and then we look at the prevalence of hearing loss in the justice system, it is sometimes up to 90, nearly 100 per cent.

I have worked at Berrimah, I have worked in detention centres and I have worked in justice services. The concerns I have with the Territory is that here in Victoria if you need an interpreter you can get one through the courts. In the Territory, if you want an interpreter, you either have to be a client of the Department of Health or it has to be paid for by the DPP or it has to be paid by NAAJA. So to me there is a conflict of interest of who benefits from having to pay for that interpreter? Often not only as a worker but as an observer, when I am on country, I often get people saying, 'Come to court; come and have a look at this.' I see that pool for that worker to try and meet the needs of the client but not be having a bias towards who is paying them.

If there was a stand-alone pool of money that could look after the needs of Aboriginal and Torres Strait Islander people around communication, whether it is spoken language or visual language, it could be used nationally. Then we would not have this issue of: 'It's the department's responsibility' or 'It's the DPP's responsibility.' Here in Victoria and in other states, you do not have that. If you need an interpreter, you book one through the court. Therefore there is that impartiality.

CHAIR: We did an inquiry into hearing impairment about seven or so years ago. We had a particular focus on Aboriginal hearing impairment. A lot of the evidence was about what people called 'hand talk'. The way that people talked about it was how young kids, particularly, grew up. People did not necessarily identify that they had a hearing impairment but they just started what they said was hand talk. I did not realise there was such a structured system of that throughout—it sounds like from what you are saying—all Aboriginal communities. You talked about people with intellectual disability just then. Does that mean hand talk is not just for people with a hearing impairment? If I understand correctly, people with an intellectual disability might also communicate visually.

Ms Barney: Yes, the reason is that often visual communication is contextually bound to their environment. If I am working with a person who is imprisoned in Darwin and there is a cyclone coming and they see the sign for cyclone, they do not know what that means; they do not know what that is. I explain to them why this weather happens. If they come from the desert, it is about the importance of having context around the sign, but then building and unpacking that sign to explain: what's your sign? When there are multiple signs for fish and water, it needs to be in the context of the court, and around health and decision making.
In the deaf community we also have that concern around identifying evidence: 'What were you wearing—pyjamas, nightdress, nightie?'. Therefore in Aboriginal signing systems, it would be, 'Where did you go? Who was with you? What did you do?'. Therefore it is not a question of why. Culturally, I have met a lot of families who do not ask the question why. It is based on observation. They learn from their environment and from observation, so they do as they see.

**CHAIR:** How many people in Australia would have the knowledge, understanding and skill that you have? Just you?

**Ms Barney:** Yes. To be fair, there is a small network of deaf Aboriginal and Torres Strait Islander people and some, who are oral, like me. I prefer to speak today, because of the importance of the conversation. I also speak with my elders, especially if I am on country, because I do not have effective interpreters—no offence to my interpreter—who are skilled or trained in this area. There are changing circumstances always around being appropriate.

In saying that, we do not have a very large number of Aboriginal and Torres Strait Islander people who are signing deaf who have a tertiary education. I am the only one in the country with a business degree. Two other women I know have teaching degrees. In talking about interpreters, we only have one male Auslan Aboriginal man interpreter; and, for women, there are five.

If we want to support the prevalence of people with cognitive impairment or psychiatric disabilities, who are deaf or hard of hearing in our communities, we need to skill up the workforce. At the same time, we need to empower them so that they can be a part of the workforce, and that comes from developing opportunities for them.

**Senator Lines:** Thanks, it has been really interesting.

**CHAIR:** I want to follow-up the issue around interpreters, because it is hard enough getting interpreters for spoken Aboriginal languages, let alone visual interpreters. First, we have to recognise the issue, then increase resources—resources for training and resources to pay interpreters—and train people. We are not even at step one yet, because there isn't the recognition of the difficulties with visual interpretation—is that the right word?

**Ms Barney:** Interpreting.

**CHAIR:** There is not even the recognised need for it, is there?

**Ms Barney:** That is true. The reason it happens often, and I am sure Patrick can add to this, is that when you are in a situation where you are looking at a higher prevalence need such as capacity—so to assess a capacity you need to have a medical diagnosis; however, you also need to have the right people who are skilled in that area. However, when they look at that, they say, 'He behaved like that, because he has a cognitive impairment,' 'He doesn't know what he's doing because he doesn't have the language' or 'They do that, because they are following suit because they don't know what they're doing.' But no-one has asked: did they hear him? Does he understand what they said? Did he fire up, because he was frustrated? They do not ask those questions. How did you get there? What happened? Tell me. Often in those situations, they are not able to show that. They are not able to vocalise that or—

**CHAIR:** To communicate—

**Ms Barney:** communicate that. You would be aware around foetal alcohol syndrome that it often is a story that comes together as a jigsaw. You often have to unpack the steps of what happened then and then, and sequencing those things takes time.

Often I hear a lot of people say, 'Men, women and youth with FASD are opportunistic.' And, whilst that is true for some, what they are looking for is support and guidance. They need to see how their world is. They mimic what is happening and then they interpret that as: 'I know I can't talk that way. I know I can't walk that way. I know that I don't look that way, so I will take a bit of that and that.' Then they come together and make their own model.

What happens with a lot of decision making around FASD, from my experience around deafness, is that the visual communication strategy is the only thing that is concrete, because they cannot justify what they cannot see. When they see it, they see it in a context that they can interpret, but it is about understanding that interpretation and around giving them the language and the skill set to say, 'Whilst you might have seen that happen, do you see other people doing that?' Or 'When that happens, where should you go, or how should you behave?'

They are often using language that they have limited access to or have little knowledge of. Often in many communities they have spokespersons—they have people speaking for them; there is someone in community who
Senator PERIS: Prison is a violent environment. Some of those who are incarcerated have disabilities—and deafness is quite prevalent amongst Aboriginal people. It is probably an obvious question, but how are Aboriginal people treated in prison when they have a disability? As I said, prison is very violent, but, across your time, have you heard people say that they are treated so much worse because they have a disability?

Ms Barney: My experience working in the justice system, in prisons particularly, is that I have been very fortunate to have access to interpreters to go in with me, but I have also gone in alone. During those times it is around getting the true story—that deaf on deaf; that black on black—and having that yarn. At the same time, I feel the largest barrier that inmates have is miscommunication—that, when they are getting flagged for antisocial behaviour, showing aggression or being confronting or standoverish, it is more around: 'What did you say?' or 'I can't hear you; talk up,' or 'I want to know about family; tell me. Tell me about family.' It is seen differently. As I said before, the contexts are not looked at in the same way.

On my recent trip to a prison, I was asked by the prison staff to view a CCTV of a situation that was happening in a cell between four men, and one was profoundly deaf. He was in the doorway and he was signing and there were the bunks. I was asked to interpret what they said because they did not know what they were planning, they did not know what they were doing, and they wanted to make sure that nothing was going to happen—which I can see from a management perspective as to safety: they needed to try and ensure that there was no conflict and that nothing was brewing in the cells.

Because the man in the doorway was deaf, they thought that he was keeping an eye on the door, that he was stopping the person from getting out and that he was instigating the other men to tell him what to do or to get him to do what he wanted. In fact, what I was able to interpret for them, because I knew the sign language he was using, was that he was telling the other two men to leave him alone; that he was in the doorway so he could stop the other men in the hallway from coming in; that he could tell the man on the bed, 'Come with me,' so he could take him out, because he was the oldest person in the room. The reason he could help this man who was going to be bashed was the fact that he knew him as a young brother.

When the prison staff could see that, they were even more confused. So I offered them training around visual strategy and visual tools. So, if you see them signing this, it means 'family'; if you see them doing this, it means they want a cigarette or they want this; if they are doing this, it means they are making a joke; and if they are doing this it means they want you to be there right now. They are communicating in a way that is a system within a system. However, if you see that you know that they are not escalating into some form of violence—they are communicating in a way to show the hierarchy, but also cultural protocols between inmates.

Especially when you have so many inmates displaced and all put in the one place you are going to have conflict. Actually two of them had hearing aids as well, but the deaf man in question was the instigator and not the peacekeeper. There is always an assumption made. The assumption that people with cognitive or intellectual disability, or who are deaf or who use other forms of communication cannot communicate has to change. It is changing the mindset of the staff and giving them some practical things to look for, to ensure that they are all right. Then they learn the signs and engage with the men; they can and ask, 'How is your family?' That will help the flow of the prison work.

I have been very fortunate to have access to some of the opportunities within the prison systems because they are all trying to do the best they can. But it upsets me culturally that we are still having men and women incarcerated and who are indefinitely detained, or who are at the risk of being indefinitely detained because people like me are too expensive to employ.

CHAIR: I understand.

Ms Barney: But the toolset that I have is not mine. This cultural knowledge is not a marketing tool. It is cultural knowledge that is community’s, and that is the difference from my business training. It is about that shared knowledge. It is my responsibility as an Aboriginal woman who works in this area to impart that knowledge about how to communicate effectively, for people to get the best outcomes that they can and to educate people in the systems to understand that better.

CHAIR: I am aware that we have run over time. It has been absolutely fascinating and you have provided really important information in a whole new area that no-one else has raised. It is so important, and the way you explain it makes total sense. It has put a whole new dimension on this inquiry. It has been really useful.

I am wondering: if we have more questions later, could we write to you and ask you some more questions?

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Ms Barney: Yes, I am fine with that. I have worked with Dr Damien Howard in Darwin for many years, especially around children's inner ear disease. That early intervention step of getting them engaged around learning is really important. We did an inquiry into child protection as well: there is the prevalence of Aboriginal children who are deaf and hard of hearing who are in child protection, and they are at high risk of scapegoating by their families.

CHAIR: I am very interested in this. I have done quite a bit of work over the years on health and, particularly, kids' hearing health and Aboriginal hearing health. I would be very interested in any further information that you have of the inquiry that you were talking about in out-of-home care. We have also had an inquiry into out-of-home care, because of the high rate of Aboriginal children go into out-of-home care. It is crossing over a whole lot of areas of deep interest to us. If you could send us the link to that inquiry, that would be very helpful.

Ms Barney: I am happy to do so.

CHAIR: Thank you very much. I adjourn the hearing.

Committee adjourned at 16:10