**ISSUE: Indefinite detention of persons with disability within the criminal justice system**

(See Article 14 on page 11 of DPO Australia Submission to the CRPD)

**Background**

All Australian jurisdictions have in place legislation that addresses a defendant within the criminal justice system and their ‘fitness’ to stand trial. These justice diversion provisions are applied when people with disability, particularly those with cognitive or psychosocial disability are deemed ‘unfit’ to stand trial. An unfitness test may arise as an issue before or during the trial process.[[1]](#endnote-1)

Justice diversion provisions have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime. In numerous cases, people are being detained for a longer period than if they had been convicted.[[2]](#endnote-2) This situation is exacerbated by a lack of community based housing, therapeutic and disability support options available for people with disability who are deemed ‘unfit’ to stand trial.

This practice of indefinite detention is disproportionately experienced by Aboriginal and Torres Strait Islander people with disability.[[3]](#endnote-3) A lack of transparency in data makes it difficult to quantify the number of people indefinitely detained, however evidence provided to a Senate Inquiry on indefinite detention estimated, that there are at least 100 people detained across Australia without conviction under mental impairment legislation.[[4]](#endnote-4) This issue intersects with the high rates of incarceration of Aboriginal and Torres Strait Islander people, who whilst making up 2.5% of the Australian population, comprise at least 50% or one-half of the people detained without conviction.[[5]](#endnote-5)

In detention, people with disability are vulnerable to punitive treatment and practices, such as chemical and physical restraints, and solitary confinement. For example, in the situation of four Aboriginal men with disability indefinitely detained in prisons, the Australian Human Rights Commission found that detention conditions amounted to cruel, inhuman or degrading treatment and that Australia was in breach of its international obligations.[[6]](#endnote-6)

In reviewing Commonwealth laws and programs and legal capacity for people with disability, the Australian Law Reform Commission recommended reform of the ‘unfitness’ test, the provision of appropriate supports, limits and reviews on detention. [[7]](#endnote-7) The Australian Government has yet to respond to this report.

The Australian Government has also not responded to the Senate Committee’s recommendations from its inquiry into indefinite detention of people with disability. These recommendations outline comprehensive law, policy and program reform to address this situation.[[8]](#endnote-8)

During its second Universal Periodic Review (UPR), the Australian Government made a voluntary commitment to improve the way the criminal justice system treats people with disability.[[9]](#endnote-9) While this is welcome, there has been little public information on what tangible outcomes have been achieved from the cross-jurisdictional working group established to implement this commitment.[[10]](#endnote-10)

It is also unclear if this commitment aims to address the concluding observation made to Australia by the Committee on the Rights of Persons with Disabilities regarding the indefinite detention of un-convicted persons with disability, particularly Aboriginal and Torres Strait Islander persons with disability.[[11]](#endnote-11)

**Proposed Questions**

**Please update the Committee on measures taken to end the unwarranted use of prisons for the management of unconvicted persons with disability, with a focus on Aboriginal and Torres Strait Islander persons with disability, with reference to its voluntary commitment provided during its latest Universal Periodic Review.**

Please update the Committee on findings, and progress towards implementing all recommendations from the *‘Senate Inquiry into Indefinite detention of people with cognitive and psychiatric impairment in Australia’*.

Please update the Committee on measures to implement the recommendations to reform of the ‘unfitness’ test, the provision of appropriate supports, limits and reviews on detention made by the Australian Law Reform Commission.

**Endnotes**

1. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*,ALRC Report 124, (2014). [↑](#endnote-ref-1)
2. Australian Human Rights Commission, *indefinite detention of people with cognitive and psychiatric impairment in Australia,* Submission to the Senate Community Affairs References Committee, March 2016, p.4, available at; <https://www.humanrights.gov.au/sites/default/files/AHRC_Submission_on_indefinite_detention2016.pdf> (accessed 31 July 2017) [↑](#endnote-ref-2)
3. First Peoples Disability Justice Consortium, *Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment*, April 2016, First Peoples Disability Network. <http://fpdn.org.au/wp-content/uploads/2016/10/FPDN-Senate-Inquiry-Indefinite-Detention-Submission_Final.pdf> [↑](#endnote-ref-3)
4. Sotiri, M, McGee, P, & Baldry, E (2012) *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*. Sydney: University of NSW. [↑](#endnote-ref-4)
5. Sotiri, M, McGee, P, & Baldry, E (2012) *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*. Sydney: University of NSW. See also Eileen Baldry, Ruth McCausland, Leanne Dowse, Elizabeth McEntyre, *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system,* UNSW, October 2015, 104, available at <https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a_predictable_and_preventable_path_2nov15.pdf> (accessed 31 July 2017). [↑](#endnote-ref-5)
6. KA, KB, KC and KD v Commonwealth (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General’s Department) [2014] AusHRC 80 [↑](#endnote-ref-6)
7. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014). [↑](#endnote-ref-7)
8. Community Affairs References Committee, ‘Indefinite Detention of people with cognitive and psychiatric impairment in Australia’, Commonwealth of Australia, 2016, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report> [↑](#endnote-ref-8)
9. ‘Universal Periodic Review - Australia’s opening statement’, delivered to the UPR Working Group for Australian’s second UPR, 9 November 2015, <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx> [↑](#endnote-ref-9)
10. Committee on Economic, Social and Cultural Rights, ‘List of issues in relation to the fifth periodic report of Australia, Addendum, Replies of Australia to the list of issues, 61st sess, UN Doc E/C.12/AUS/Q/5/Add.1, 29 May-23 June2017, paras 133 - 134. [↑](#endnote-ref-10)
11. Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013), UN Doc CRPD/C/AUS/CO/1, paras 31-32. [↑](#endnote-ref-11)