



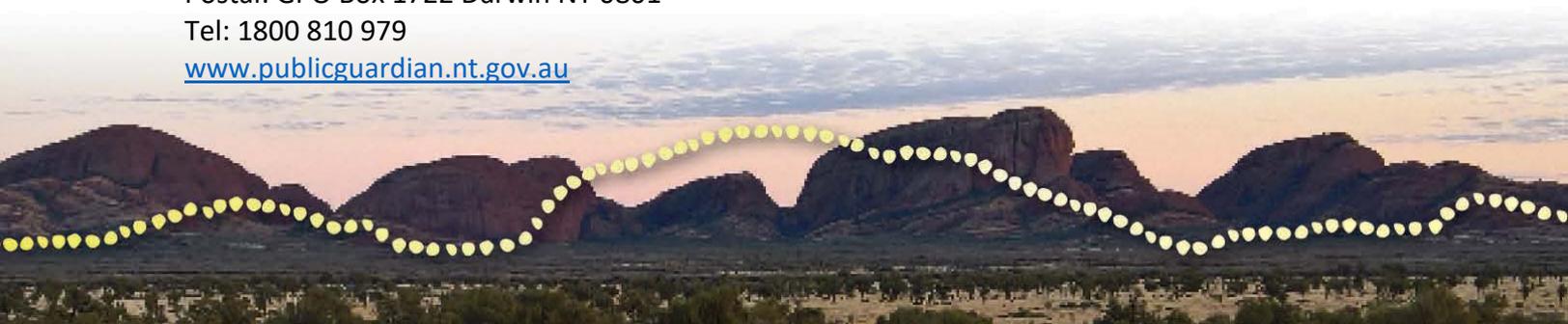
# Northern Territory Office of the Public Guardian Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

## THE CRIMINAL JUSTICE SYSTEM Issues Paper

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## **Introduction**

The Northern Territory Office of the Public Guardian welcomes the opportunity to provide a submission to the Criminal Justice System Issues Paper released by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Inquiries that consider the involvement of people with disability with the criminal justice system and necessary improvements, especially with regard to the unique Northern Territory situation, are strongly supported by the Office of the Public Guardian.

Established under the *Guardianship of Adults Act 2016* (the Act), the Office of the Public Guardian is committed to providing adult guardianship services, information and advocacy that is responsive to the needs of the Northern Territory community and reflects contemporary, best practice guardianship principles within a human rights framework.

The Act provides a legal decision-making framework for adults with impaired decision-making capacity in relation to their personal or financial matters. It includes a broad definition of impaired decision-making capacity that captures adults with a cognitive impairment from any cause including mental illness, dementia, intellectual disability or acquired brain injury.

The Act recognises the overall wellbeing, human rights and fundamental freedoms of persons with impaired decision-making capacity and aligns with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The UNCRPD's purpose is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". Article 5 of the UNCRPD directs equal recognition of all persons and prohibits discrimination on the basis of disability.

## **The Northern Territory context**

The Office of the Public Guardian teams are located in Darwin and Alice Springs and are responsible for providing guardianship services to approximately 570 adults represented by the Public Guardian. Compared to other jurisdictions, the Northern Territory has the lowest number of adults under guardianship orders, however has the highest percentage of the population under guardianship.

While most Territorians live in regional centres, a significant number live in remote and very remote areas. For Aboriginal people, who make up thirty percent of the Northern Territory population,<sup>1</sup> almost seventy seven percent live in remote or very remote areas<sup>2</sup>.

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<sup>1</sup> Department of Treasury and Finance (NT), Population - Northern Territory Economy: Aboriginal Population (2018) <<https://nteconomy.nt.gov.au/population>>.

<sup>2</sup> Department of Treasury and Finance (NT), Population - Northern Territory Economy: Background (2018) <<https://nteconomy.nt.gov.au/population>>.

The Northern Territory's situation is unique and poses challenges for service delivery to a small population spread across vast distances. The sparse population, harsh climate and rough terrain mean justice and other supports and services in many parts of the Territory are limited. The Northern Territory's transient population impacts the retention of the skilled workforce as individuals have many alternate options elsewhere in Australia. The high cost of living in the Northern Territory is an additional challenge for those in low socio-economic circumstances.

The Northern Territory population is comprised of many culturally and linguistically diverse groups. Approximately 78 per cent of people involved with the Office of the Public Guardian identify as Aboriginal<sup>3</sup>. Many speak English as a second or third language. The Office of the Public Guardian has observed a disconnect from country and culture for Aboriginal people with disability, as many experience significant difficulties in receiving appropriate support services in remote and very remote communities and are required to move to regional centres.

A function of the Public Guardian is to advocate for adults with impaired decision-making capacity by promoting understanding and awareness of relevant issues, including in relation to the criminal justice system. The Office of the Public Guardian is committed to ongoing advocacy for all people with disability, but particularly people with cognitive disability, to prevent involvement with the criminal justice system and to avoid indefinite detention in institutions such as prisons.

The Office of the Public Guardian shares the nationwide concern of the over representation of people with cognitive disability who are charged with or accused of criminal offences and the disproportionate representation of people with a cognitive disability who are victims of abusive or violent criminal conduct. It is agreed that the issues, problems and barriers outlined in the Criminal Justice System Issues Paper exist for people with cognitive disability and those matters will not be repeated in this submission except to the extent that further insight into the Northern Territory context and experience may be provided.

### ***Experiences of people with disability in the criminal justice system***

#### Where the person with cognitive disability is charged with or accused of criminal offences

A person with cognitive disability involved in the criminal justice system is vulnerable simply by virtue of their disability. For many people with cognitive disability there may also be other relevant factors such as poverty, history of trauma, discrimination, poor housing and poor English language literacy.

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<sup>3</sup> The term Aboriginal is used throughout this document to refer to all people of Aboriginal and Torres Strait Islander descent who are living in the Northern Territory. The use of this term reflects the wishes of Aboriginal people in the Northern Territory. Department of the Attorney-General and Justice (2019). *Draft Northern Territory Aboriginal Justice Agreement 2019-2025*.

These factors increase the likelihood that a person with cognitive disability might be detained in custodial arrangements for longer periods or indefinitely because of a lack of suitable accommodation and support options in the community to meet the needs of the person.

In 2018–19, 24 adults under the guardianship of the Public Guardian in the Northern Territory were involved with the criminal justice system. Of these 24 represented adults, 21 were male, 6 were prisoners and 18 were subject to Part IIA of the *Criminal Code Act 1983*. Part IIA of the *Criminal Code Act 1983* provides that alleged offenders with a cognitive impairment are deemed not guilty or unfit to stand trial. People who are found unfit to stand trial may have significant, multiple and complex needs arising from combinations of cognitive impairment, mental health issues, acquired brain injury, serious health issues, drug and alcohol problems, behavioural issues and frequent interaction with the criminal justice system. As at 30 June 2019, 4 represented adults remain in prison and 15 of the represented adults who are subject to Part IIA of the *Criminal Code Act 1983* are supported in the community.

The Public Guardian acknowledges the over-representation of Aboriginal people in the criminal justice system and further notes the high incidence of cognitive impairment or mental illness among this group. Of the 24 represented adults involved in the criminal justice system, all identified as Aboriginal. The disproportionate representation of Aboriginal people in the justice system is reflected in data on prisoners: at 30 June 2018, Aboriginal people accounted for 84 per cent of the adult prison population in the Northern Territory.<sup>4</sup>

Many of the causal factors relevant to the increased interaction of Aboriginal people with the criminal justice system are equally relevant to people with cognitive disability, including poverty, history of trauma, discrimination, inadequate or inappropriate accommodation and poor literacy skills. The high incidence of Aboriginal people involved in the criminal justice system with a cognitive disability is particularly concerning and warranting of systemic action to ensure access to justice for this group of Australians.

The view of the Office of the Public Guardian is that there is an overall systems abuse of people with cognitive disability in the criminal justice system. It is a system with limited capacity to accommodate a person's disability in the assessment of their ability to participate in and/or respond to the criminal justice system in any capacity – as an accused person, victim or witness.

The vulnerability of persons with cognitive disability is amplified in custodial settings where they are removed from their support networks, including family and carers, daily routine and culture and are more vulnerable to abuse by other prisoners and to system failures unable to address their individual needs. This abuse and systems failure can often manifest in the person with cognitive disability displaying certain behaviours and subsequently being isolated from other prisoners, who may also be sources of informal supports, in an attempt to either protect them and/or others from harm. This further isolation without consideration of the underlying cause of the behavior can lead to further unmet needs for the person with cognitive disability.

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<sup>4</sup> Australian Bureau of Statistics 2018,4517.0 – Prisoners in Australia, 2018, viewed 15 July 2019, <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Northern%20Territory~27>

Appropriate levels of support to address the health and emotional needs of the person with cognitive disability in prison are inadequate or unavailable as custodial settings are fundamentally inappropriate to address the needs of people with cognitive disability or people with complex needs.

The Office of the Public Guardian is aware of the following examples of unmet needs in custodial settings:

- A person with cognitive disability becoming incontinent whilst in prison. The prison was not equipped to address the personal needs of the person and therefore there were no products or support offered to assist the person with their incontinence. If the person was unable to make it to the toilet they were required to 'clean up their own mess' and subsequently experienced taunting and teasing by other prisoners.
- Other prisoners are used to support the person with disability for communication support and advocating specific needs but it does not usually extend to hygiene and health care needs.
- A person with hearing loss who was in custody for in excess of 6 months without any communication tools being offered to address their communication needs. This sits within the context of a massive prevalence of hearing loss among Aboriginal prisoners in the Northern Territory.

The Public Guardian notes that imprisonment resulting from relatively minor infringements such as fine default has the consequence of targeting people with cognitive disability who may lack the requisite decision-making ability to pay multiple and/or significant fines without appropriate supports. Additionally, offensive language provisions may also target those with cognitive impairment who have poor impulse control, behavioural management issues and immature language skills. Imprisonment for this group without intervention or support is unlikely to address the underlying causes for the offending behavior and leads to continued interaction with the criminal justice system.

Accommodation to support people with cognitive disability or people with complex needs who are involved in the criminal justice system, including but not limited to, under Part IIAA *Criminal Code Act 1987* is a significant issue in the Northern Territory. Although it is widely acknowledged that prisons are not appropriate for this cohort of people there is often no immediate alternative accommodation to address their needs and they are accommodated in settings inappropriate to their needs, including prison, hospitals and mental health facilities for periods that significantly impact their health and emotional needs.

Information sharing with and between first line responders including police and ambulance officers and across agencies is often limited where the person with cognitive disability may have had no previous contact with the criminal justice system or has had frequent contact but their disability needs have not been considered due to their lack of immediate visibility or presentation. The Office of the Public Guardian has experienced a person with cognitive impairment under guardianship being charged with an alleged offence and remanded before it became known of the status of their guardianship order. This was at significant distress to the person with cognitive disability.

Police officers often acknowledge the complexity of needs of people with cognitive disability in their interactions but a lack of expertise and requisite skills as to how to address these needs can result in a response detrimental to the overall wellbeing of the person. The Office of the Public Guardian has witnessed repeated offending behavior of a person with cognitive disability without any consequence through the criminal justice system, and meant the person's behavior continued to the detriment of the person and others.

#### Where the person with cognitive disability is a victim or a witness

It is the experience of the Office of the Public Guardian that often by the time a person with cognitive disability is making an official complaint to police the person has had to recount their complaint on multiple occasions and to multiple different people. This compounds the trauma of the alleged event and is often due to service providers undertaking their own investigations before supporting the person to attend at a police station.

The supports necessary to enable a person with cognitive disability to report an offence to police are limited and very often do not meet the individual support needs of the person or rely on external supports to the criminal justice system. The Office of the Public Guardian has witnessed a person with cognitive disability being unsupported in making a complaint of physical assault against a support worker and therefore not making the complaint but then subsequently being charged with an offence, that may have amounted to self-defense, in relation to the same incident.

It is the experience of the Office of the Public Guardian that assessments are made by interviewing officers as to the likelihood of successful prosecution of the offence and the person with cognitive disability being counselled as to whether they wish to proceed with the complaint. This has been particularly witnessed in relation to females with cognitive disability making complaints of sexual assaults.

#### ***Causes of violence, abuse, neglect and exploitation of people with disability in the criminal justice system***

The criminal justice system is by its nature extensively regulated and constrained by legislation. It is unaccommodating on many occasions to the circumstances and needs of people with cognitive disability or people with complex needs. This leads to an overall systems abuse of people with disability in the criminal justice system.

The vulnerability of people with cognitive disability is intensified within the criminal justice system and there is a disproportionate power imbalance between the individual who may have difficulty communicating and understanding their rights and responsibilities and a highly regulated system.

There is often inadequate communication with the person through the poor use of communication tools, including accredited interpreters so that the person fails to have an understanding of the relevant issues, their rights and responsibilities. This is frequently experienced from the commencement of the person's involvement with the criminal justice system through to its conclusion. In the Northern Territory, this is exacerbated for Aboriginal people with cognitive

disability and culturally and linguistically diverse people with disability for whom English is a second or third language.

It is the experience of the Office of the Public Guardian that there is insufficient multiagency approach to people with cognitive disability or people with complex needs involved in the criminal justice system. This lack of multiagency approach leads to poor information sharing between relevant agencies and a silo approach to responding to the person resulting in the needs of the person not being addressed and their continued involvement with the criminal justice system as either an offender or victim.

***Strategies to help people with disability avoid the criminal justice system***

Strategies to help people with disability avoid the criminal justice system must address the social determinants that impact a person's likelihood to be involved in the criminal justice system including poor health, disability, poverty, discrimination and poor English literacy skills. Additionally there must be increased individualized supports to support the person with disability to live within the community.

The Office of the Public Guardian strongly advocates for increased education across the whole criminal justice system, including police, court and prison systems, to increase the expertise and skills of individuals working with people with disability. Existing education and strategies must be strengthened so the whole criminal justice system supports the rights of people with disability to equal access to justice.

The Office of the Public Guardian acknowledges the significant work of the Northern Territory Aboriginal Justice Unit in developing the draft Northern Territory Aboriginal Justice Agreement (the Agreement). The Agreement contains strategies, actions and outcomes aimed to:

- reduce reoffending and imprisonment rates of Aboriginal Territorians
- engage and support Aboriginal leadership
- improve justice responses and services to Aboriginal Territorians.

The Office of the Public Guardian supports the Agreement and the strategies, actions and outcomes contained in it. The achievement of the Agreement aims will ultimately also help Aboriginal people with disability to avoid the criminal justice system.

Stable, supported accommodation is a key factor in people with cognitive disability both avoiding the criminal justice system and being involved in it for the minimum time. The Northern Territory Government together with service providers must continue to address the thin market of service providers specializing in supporting people with complex needs in the Northern Territory. Appropriate housing stock must also be secured to offer choice and flexibility in accommodation as an alternative to custodial settings.

For remote and very remote communities incentives and supports must be offered to service providers to develop supported accommodation models to support Aboriginal people with cognitive disability to live on country while still having their health and support needs met.

A multiagency approach to respond to people with cognitive disability who are at risk of or who are repeatedly in contact with the criminal justice system should be established with clear lines of communication and co-ordination. The history of the person including trauma history, together

with needs and risks factors should inform involved agencies in the development of coordinated plans of intervention and support.

A national register of guardianship orders from all Australian states and territories, which could be accessed by personnel within the criminal justice system and the health system, would greatly improve the identification of people with cognitive disability already under a guardianship order.

### ***Supports within the criminal justice system***

The vulnerability of people with cognitive disability is intensified in the criminal justice system where they are removed from their support networks, including family and carers, established routines, culture and home. The criminal justice system must recognize this vulnerability irrespective of whether the person with cognitive disability is an offender, a victim or a witness and must appreciate how this vulnerability may affect the person's behavior, response and interaction with the criminal justice system. At a very basic level it is difficult for a person who cannot hear information (due to hearing impairment) or understand information (due to cultural or language barriers) to comply with any responsibilities imposed on them as a participant in the criminal justice system.

The Office of the Public Guardian advocates for the following support for people with cognitive disability in the criminal justice system:

- Access to interpreters and communication tools that enables a person with cognitive disability to effectively communicate and participate in the system.
- Initial screening at the commencement of the person's involvement in the criminal justice system to identify any support needs of the person.
- Flexibility to accommodate the lower tolerance thresholds for a person with cognitive disability participating in the criminal justice system.
- A trauma informed approach to responding to people with cognitive disability.

The documented impacts of all forms of imprisonment upon Aboriginal people, including community isolation and homelessness are compounded when that person also has a cognitive impairment. Significant and multidisciplinary resourcing is relevant during any periods of imprisonment of an Aboriginal person with cognitive disability, including periods of remand and short or long-term sentences. Interventions, including prison programs, alcohol and drug rehabilitation and behaviour management are essential to identify and address underlying reasons for offending and reoffending and develop supports for the person upon release from custodial sentences.

### ***Barriers to identify, disclose and report instances of violence, abuse, neglect or exploitation in the criminal justice system***

A significant barrier to identify, disclose and report instances of violence, abuse, neglect or exploitation for people with cognitive disability in any setting is communication. People with cognitive disability must have access to communication tools that enable them to effectively communicate with anyone but particularly in settings where they are vulnerable or at risk and the necessity to communicate is paramount to ensure any instances of violence, abuse, neglect or

exploitation are firstly identified and then reported and stopped. The ability of the person with disability to articulate their experience must be considered and addressed.

For Aboriginal people and culturally and linguistically diverse people the communication barrier is exacerbated if they do not have the support of an accredited interpreter in the person's language, the support of a cultural broker and no family or care support to offer insight into their circumstances and history.

Other barriers identified by the Office of the Public Guardian include:

- The separation of the person with cognitive disability from trusted support networks including family and carers who they can share information with, without risk of retribution or consequence.
- The effectiveness of advocacy provided by a person's support networks is often limited within the criminal justice system.
- The close proximity of the perpetrator of the violence, abuse, neglect or exploitation to the person and the fear that any report will lead to increased or further violence, abuse, neglect or exploitation.

The investigation of violence, abuse, neglect or exploitation is reliant on the ability of the person with cognitive disability to articulate their story and to communicate this to relevant persons. It is also reliant on a transparent system that recognizes the difficulties of a system investigating its own policies, procedures and personnel in a non-biased and impartial manner. Perceived conflict of interest can amount to a real conflict in certain circumstances with the result being an inadequate investigation.

***Measures to encourage effective investigation and reporting of violence, abuse, neglect or exploitation in the criminal justice system***

People with cognitive disability and their family and carers should be confident that any report of violence, abuse, neglect or exploitation will lead to a fair and impartial investigation and without any fear of negative consequence for the person with disability. The criminal justice system must be transparent of their policies and procedures for investigating allegations of violence, abuse, neglect or exploitation and must demonstrate a commitment to the rights of people with cognitive disability to equality and access to justice.

People with cognitive disability who are reporting any form of physical or sexual abuse should be automatically referred to the Child Abuse Taskforce whose personnel is skilled in interviewing and working with vulnerable witnesses.