



First Peoples
Disability Network
Australia

Promoting Inclusion Issues Paper

Royal Commission into Violence, Abuse, Neglect
and Exploitation of People with Disability

WE ARE FIRST PEOPLES DISABILITY NETWORK (FPDN)

First Peoples Disability Network Australia is a national organisation of and for Australia's First Peoples with disability, their families and communities. Its purpose is to promote respect for human rights, secure social justice, and empower First Peoples with disability to participate in Australian society on an equal basis with others. We are the custodians of the narratives of First Peoples with disability, their families and communities and we recognise this important responsibility.

Because ours is an oral history, we continue this by recognising the value of our peoples' narratives and collecting this as data, which informs our work and the work of others.

“ We have a vision of a just and inclusive society, in which the First Peoples with disability of the Australian nation are respected and valued for their culture, history and contribution to contemporary life, and in which the human rights of First Peoples with disability are recognised, respected, protected and fulfilled.

OUR CORE VALUES



Recognition and respect for human rights, and in particular for the human rights of First Peoples and First Peoples with disability



Equality of outcomes for First Peoples with disability with other members of Australian society through equal opportunity, non-discrimination and affirmative action



Empowerment of First Peoples with disability and their families to direct their own lives and to secure the resources that they need to participate on an equal basis with others in Australian life



Access to justice for First Peoples with disability



Inclusion of First Peoples with disability in all aspects of Australian life



Respect for the Elders of First Peoples nations across Australia and for their efforts over time to secure justice for their peoples and communities. In particular, we honour those Elders who have worked to secure justice for First Peoples with disability and their families



Respect for the culture and history of Australian First Peoples and recognition of the ongoing importance of that culture in our contemporary lives



Recognition and respect for the lived experience of First Peoples with disability and their families as the central driver of our work



Recognition of the richness and diversity of Australian First Peoples communities across Australia

OUR CORE PRINCIPALS

We work within a social model of disability, which recognises that disability is produced by barriers to equality and participation for people with impairments that must be dismantled.

We work with First Peoples with disability, their families and communities across Australia, to ensure that our work reflects their diversity and priorities.

We work with all First Peoples communities to create and maintain a safe and secure place for the exchange of ideas, the building of alliances, and the formulation of priorities, between and across community divides.

We are passionate, determined, and committed to our work.

We lead change, not react to it.

We are innovative, creative, and solution-focused.

We are accountable in all aspects of our work to First Peoples with disability and their families, our communities, and to the community generally.

PROMOTING INCLUSION ISSUES PAPER

Introduction

Scott Avery, in his landmark research *Culture is Inclusion*, found that First Peoples with disability are included in our communities across social, cultural and community events, and that this is the sole exception to the exclusion they experience in all other aspects of life.

Avery believes that this is “a contemporary expression of a culture of inclusion that has survived in spite of other disruptive influences upon community functioning”¹.

Aboriginal and Torres Strait Islander people experience significant disadvantage and exclusion in all aspects of Australian life, as shown through the Closing the Gap reports, with the latest showing improvement in early childhood education and Year 12 retention, but huge inequalities still remaining in all other areas². The 2020 report, released in March 2020, found that “while on almost every measure, there has been progress, achieving equality in life expectancy and closing the gap in life expectancy within a generation is not on track to be met by 2031”³.

The health and social inequities that are experienced by Aboriginal and Torres Strait Islander people, particularly those with disability, is a travesty for a nation with Australia’s resources. Policy for structural reform which enables Aboriginal and Torres Strait Islander people to enjoy the same quality of life that is readily enjoyed by other Australians requires sustained commitment, to urgently implement what is an immediate priority, and to strategically work through the more entrenched and complex issues.

FPDN has worked to advocate for additional proposals within the Closing the Gap strategies that will start to address these inequalities. The proposals are in two parts. The first two proposals are aimed at incorporating the health and wellbeing of Aboriginal and Torres Strait Islander people with disability within Closing the Gap strategies. Data and research shows that the impact of disability has a material limiting effect on the attainment of health and social outcomes for the Aboriginal and Torres Strait population yet disability is still not adequately accommodated in Closing the Gap strategies. This is a critical oversight. These proposals are informed by FPDN’s community-driven research expertise and our cultural obligations to the First Peoples disability community.

¹ Avery, S. (2018) ‘Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability’ <https://fpdn.org.au/product/cultureisinclusion/>

² Closing The Gap report 2020, <https://ctgreport.niaa.gov.au/overview>

³ As above

These proposals are:

- **PROPOSAL 1:** Establish a stand-alone target for the equitable access to the National Disability Insurance Scheme by Aboriginal and Torres Strait Islander people]
- **PROPOSAL 2:** Disaggregate reporting within each other target area by disability status and other known factors that inhibit achieving health and wellbeing outcomes for the Aboriginal and Torres Strait Islander population as a whole.
- **PROPOSAL 3:** Establish stand-alone targets to reduce the over-representation of Aboriginal and Torres Strait Islander people in prison and their exposure to violence.
- **PROPOSAL 4:** Reserve a place for emerging knowledge areas such as trauma, mental health and culture in wellbeing.
- **PROPOSAL 5:** Set up Aboriginal and Torres Strait Islander led reference groups under each of the target areas to incorporate community knowledge and expertise into a systemic analysis and response to each performance target.
- **PROPOSAL 6:** ‘Keep it real’ with fact-based discourse.

Including Aboriginal and Torres Strait Islander people with disability as part of the National Agreement on Closing the Gap will work to address the exclusion we face.

But at the same time, policies for people with disability need to also align with the outcomes and targets in the Closing the Gap agreement. The National Disability Strategy, for example, must include the intersectional nature of the exclusion that First Peoples with Disability experience, and ensure that the outcomes in the Strategy sit alongside the Closing the Gap agreement.

Alongside this work, we need the Disability Royal Commission to particularly look at the impact that the National Disability Insurance Scheme and the justice system have on the exclusion of First Peoples with disability.

Each of these systems takes a top-down approach which does not correlate to Aboriginal and Torres Strait Islander community business. These systems are based in settler colonialism ideas and structures, and implemented without any consideration for how they would work for our community.

Huhana Hickey agrees, saying that “while discussions of persons with disabilities commonly depend on the notion of universalism and individual rights, regardless of any cultural-specific identity, the concerns of Indigenous persons with disabilities are related to discussions of group rights and cultural relativism that are intertwined with collective identities”⁴.

⁴Human Rights and Disability Advocacy, ed by Maya Sabatellos and Marianne Schulze, 2014: Indigenous People with Disabilities: The Missing Link, Huhana Hickey, p158

There is a considerable amount of work to be done to translate any program so that it has strong cultural content for Aboriginal and Torres Strait Islander people, particularly our people with disability. In addition, these programs do not translate on the ground without the work of cultural navigators, that would be available to make sure that First Peoples with disability have access to basic disability supports.

There also needs to be a concerted effort to teach and train across all sectors information about the social model of disability and people with disability being in control of their destiny. All too often, First Peoples with disability are not included when thinking about the design or implementation of any kind of program or service, let alone as people with rights, decision making power, or agency.

NATIONAL DISABILITY INSURANCE SCHEME

First Peoples with disability face ongoing exclusion from everyday life, due to the barriers they face in accessing essential disability supports through the National Disability Insurance Scheme (NDIS).

These issues have been known for many years, and yet are still ongoing as the NDIS has fully rolled out across Australia. FPDN launched a 10-point-plan⁵ for the implementation of the NDIS in Aboriginal and Torres Strait Islander Communities, with bipartisan support, in 2013 and updated it in 2018, with a broader, more comprehensive plan to fix the NDIS. However, the expertise and community connection of FPDN has not been adopted.

These priorities are:

1. Invest to create an Aboriginal Community Controlled Disability Service Sector for the provision of disability supports by Aboriginal and Torres Strait Islander people with disability for their communities
2. Address the barriers facing Aboriginal and Torres Strait Islander people in accessing the National Disability Insurance Scheme (NDIS)
3. Prioritise timely intervention to ensure supports and services are provided, and available over the long-term, and at the right time in people's lives
4. Recognise and value the existing knowledge, skills and expertise within Aboriginal and Torres Strait Islander communities. We are leaders in the inclusion of people with disability
5. Resource a community-directed research strategy which specifically focuses on Aboriginal and Torres Strait Islander disability
6. Endorse and support peer-to-peer leadership to ensure that Aboriginal and Torres Strait Islander people with disability lead the engagement with community themselves
7. Develop and implement an access to justice strategy for First People with disability, particularly those with cognitive impairment, sensory and intellectual disability
8. Develop and implement programs for inclusive education and employment for First People with disability in line with national strategies for their full social participation
9. Create links between the National Disability Strategy and Closing the Gap Framework for coordinated policy and programs at the Commonwealth, State and local levels in partnership with Aboriginal and Torres Strait Islander people with disability and their organisations
10. Develop an Aboriginal and Torres Strait Islander Disability Performance Framework for the independent monitoring of the social and economic outcomes of Aboriginal and Torres Strait Islander people with disability

The national rollout of the NDIS is now complete and these priorities are informed by the experiences of our people through a period of significant change in the disability sector.

A key aspect is the requirement that appropriate services are available and accessible for First Peoples with disability over the long term. These priorities are intended to form the foundation for a comprehensive national plan collaboratively created to ensure that the services and supports provided to First Nations people are disability accessible, culturally appropriate and will work in our communities.

⁵ FPDN Ten Priorities to Address Inequity In Aboriginal and Torres Strait Islander Communities for the National Disability Strategy and National Disability Insurance Scheme <https://fpdn.org.au/wp-content/uploads/2018/10/FPDN-ten-priorities-2018.pdf>

The plan should be based on the ten priorities identified by FPDN and be developed by using three pillars:

1. Build the capacity of communities and individuals to understand their rights and entitlements
2. Invest to create a First People's Community Controlled service sector
3. Develop and support a First Nations workforce⁶

As of 30 June 2019, there were 16,417 Indigenous participants in the NDIS, making up 5.7% of all active participants in the NDIS⁷. Given the likely estimate above of over 60,000 Aboriginal and Torres Strait Islander people with disability, this shows that the NDIS is clearly not accessible to most First peoples with disability, and that there needs to be much more action to ensure communities have access to the disability support they need.

Table 1: Estimates on the prevalence of disability amongst the Aboriginal and Torres Strait Islander population⁸

Percent of Aboriginal and Torres Strait Islander population reporting some disability (rate)	45%
Percent of Aboriginal and Torres Strait Islander with severe and profound disability (rate)	7.7%
Comparator: Other Australians - No people with severe and profound disability	4.6%
Age adjusted ratio	2.1 times higher amongst Aboriginal and Torres Strait Islander people
Number of Aboriginal and Torres Strait Islander people aged 15 and over with severe and profound disability	34,300
Estimated number of Aboriginal and Torres Strait Islander people with severe and profound disability (using 2018 Aboriginal and Torres Strait Islander population estimate)	60,100

COMMUNITY VOICES

FPDN works directly with community, visiting Aboriginal and Torres Strait Islander people with disability all across Australia, as well as hearing from people with disability on the phone, email and social media. We hear directly about how our community has been faring, and their ideas for change.

Advocates report that there is widespread concern that the NDIS is not working for First Peoples with disability.

⁶ FPDN Ten Priorities to Address Inequity In Aboriginal and Torres Strait Islander Communities for the National Disability Strategy and National Disability Insurance Scheme <https://fpdn.org.au/wp-content/uploads/2018/10/FPDN-ten-priorities-2018.pdf>

⁷ NDIS Aboriginal and Torres Strait Islander participants report <https://data.ndis.gov.au/reports-and-analyses/participant-groups/aboriginal-and-torres-strait-islander-report>

⁸ National Aboriginal and Torres Strait Islander Social Survey (ABS, 2017)

A range of issues are compounding existing exclusion from disability supports. These include:

- Difficulty accessing NDIS supports, and with using plans once accepted.
- Complexity of NDIS creating barriers.
- Lack of cultural safety with NDIS staff and offices, as well as Local Area Coordinators, particularly in regional and remote areas - “nothing good to say about how they engage with our mob”.
- LACs making incorrect assumptions about informal supports and cutting formal supports.
- Families meeting informal support needs, and being unaware of availability of formal supports through the NDIS.
- Plans being reduced after reviews, including for aids and equipment. People have to have a “proper fight for basic stuff”.
- [REDACTED]
- NDIS and LAC staff not having knowledge of disability, [REDACTED]
- Concern about the impact of independent assessments on access to the NDIS.

BOUNDARY ISSUES

As the NDIS is now at full rollout, there remain considerable boundary issues between the NDIA and state and territory jurisdictions, particularly about funding for essential supports. Areas such as health, housing and justice are all crucially under-resourced for people with disability generally, and particularly for Aboriginal and Torres Strait Islander people with disability.

Advocates report that interface issues with education and justice systems are particularly acute, as well as wider barriers caused by a lack of accessibility in the built environment.

Aboriginal and Torres Strait Islander people with disability who are leaving prison have no disability support, with access to the NDIS not facilitated in any way. This contributes to people going back to prison, and not having the support they need as people with disability, that may stop them ending up in the prison system.

Housing, or the lack of accessible and affordable housing, is also a huge issue making effective NDIS supports difficult. People with disability, who can also be carers of other people with disability, may also have other relatives and family staying with them temporarily.

The NDIS can assume these people can act as informal supports, and remove formal supports in response, despite the person with disability not receiving any informal support. Advocates report that the NDIS has expected an adult child with disability, of a parent with disability, to do garden maintenance, and has cut those supports from a plan, as an example of a common practice.

Short term housing, such as hostels, are also not accessible for people with disability, with advocates reporting that people with disability are excluded from this kind of accommodation and can become homeless as a result.

Access in the built environment, or the lack of that, particularly in regional and remote areas, is also a barrier to fully realising the supports in people with disability's NDIS plans. While some of this rightly sits with the National Disability Strategy, there can be no inclusion if a person with disability can't get around their community. Advocates report people with disability who use wheelchairs dealing with a lack of curb cuts, footpaths, and a range of inaccessible structures when trying to access services - there are "wheelchairs trying to get through the desert".

BARRIERS TO ACCESS

Research has also found that Aboriginal and Torres Strait Islander people with disability were more likely than people without disability to be removed from their families, as well as be more likely to experience violence and threats. These are key issues that may act as barriers to accessing the NDIS ⁹.

Community engagement by FPDN has shown a number of ongoing barriers to accessing the NDIS. Our advocates report that there is an ongoing lack of adequate accessible information about the NDIS, including all direct communication with First Peoples with disability. Information isn't available in appropriate languages or formats.

Community members tell us that the National Disability Insurance Agency (NDIA) also fails to engage with Aboriginal and Torres Strait Islander people with disability. For example, the NDIA goes into community, but only engages with service providers instead of community Elders. Information is not made available in community languages, and there is an ongoing delay in rolling out the Community Connector program.

FPDN advocates often find, when talking about the NDIS, that key aspects have not been adequately explored with First Peoples with disability, leading to many misconceptions about the Scheme, such as that access to the NDIS would mean a reduction in income support, what the disability supports funding through the NDIS can be used for, how to apply, and who can access the Scheme.

The recent moves to introduce independent assessments will further damage the capacity of the NDIS to provide adequate, appropriate and culturally safe services to First Peoples with disability. FPDN joins with other disability peaks to call for a stop to these reforms ¹⁰.

A key barrier to accessing the NDIS is the threat of child removal, and the engagement with the child protection system.

⁹ Understanding disability through the lens of Aboriginal and Torres Strait Islander people –challenges and opportunities 2019,

https://www.lowitja.org.au/content/Document/PDF/NDIS_Evaluation_M_Kelاهر_v2.pdf

¹⁰ Disability sector statement on the Australian Government's planned reforms to the National Disability Insurance Scheme (NDIS)

<https://everyaustraliancounts.com.au/ndis-sector-statement/>

The child protection system constructs a hostile environment for First Nations families that perceives a risk to children built on assumptions about parental capacity and appropriate support structures. From FPDN's experience in community, we know that these paternalistic assumptions can lead to parents with disability, and/or parents of children with disability doubting their right and ability to parent and being encouraged to surrender their children, rather than support being put in place to ensure families can stay together, in their communities, where possible. The NDIS has expectations about parental responsibility and the balance with funded support¹¹. Some families, struggling with poverty, insecure and inaccessible housing and the care of other siblings, are left feeling they have no choice but to relinquish care.

For families who may require communication, or decision making support, or who face barriers of literacy and language, understanding and navigating the system is impossible. Disability advocates can assist families by working with them to understand the processes involved, seeking disability support and assistance, and linking them with other social services and legal assistance. This legal assistance can be essential to negotiate court proceedings. The absence of this support may result in negative guardianship judgements that sever families forever and leave parents with no ongoing say in their children's lives. A critical shortage of First Nations disability advocates in local communities means that families are often left with no help.

The NDIS is not working for our communities. First Nations people with disability remain largely absent from the scheme, and from our perspective, there is no evidence that the NDIS is positively working with other social services to support families to avoid child protection issues arising, or putting in place supports which prioritise children remaining in their family where child protection concerns occur. Proposed functions, such as the Independent Functional Assessments¹² present a significant risk of increasing family separation and child removals.

There is a lack of funding for specific therapeutic support programs for children in care. Successful programs, such as the Circle Program in Victoria has been found to deliver positive outcomes for children and carers, but places are limited, and the program evaluation found that a lack of Cultural Support Plans for First Nations children with disability undermined the benefit of the program for those participants¹³.

Where guardianship arrangements are made which exclude parents and carers from decisions relating to their child with disability, including through NDIS nominee provision¹⁴, children are not receiving culturally appropriate and responsive support, including considerations of communication support in their first language¹⁵.

¹¹ Children and Young People with Disability Australia October 2019 Improving the NDIS for children and young people with disability Submission to the consultation on Establishing a Participant Service Guarantee and removing legislative red tape review

<https://engage.dss.gov.au/wp-content/uploads/2019/11/Children-and-Young-People-with-Disability-Australia.pdf>

¹² See First Peoples Disability Network submission to the Joint Standing Committee on the National Disability Insurance Scheme – General Issues around the implementation and performance of the NDIS, awaiting publication

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/General_NDIS

¹³ Frederico, M., Long M., McNamara, P., McPherson, L., Rose, R., and Gilbert, K. (2012) The Circle Program: an Evaluation of a therapeutic approach to Foster Care. Centre for Excellence in Child and Family Welfare, Melbourne, Australia Recommendation 8 p.12 <http://128.199.174.185/wp-content/uploads/2012/10/The%20Circle%20Program%20-%20An%20evaluation%20of%20a%20therapeutic%20approach%20to%20foster%20care.pdf>

¹⁴ See the National Disability Insurance Scheme Child Representative Operational Guideline – Determining who has parental responsibility for a child <https://www.ndis.gov.au/about-us/operational-guidelines/child-representatives-operational-guideline/child-representatives-operational-guideline-determining-who-has-parental-responsibility-child>

¹⁵ This is despite the acknowledgement of the importance of language in the NDIS Aboriginal and Torres Strait Islander Strategy, p.14, 4.5

<https://www.ndis.gov.au/about-us/strategies/aboriginal-and-torres-strait-islander-strategy>

LIMITS OF NDIS MODEL

Research by Western Sydney University Senior Lecturer Scott Avery found that the model of the NDIS, with the focus on individual supports and agency, may not be appropriate for or applicable to communities that lack basic public infrastructure, such as remote communities¹⁶. Avery says that:

“Whilst it might not be within the remit of a National Disability Insurance Scheme to fix the public infrastructure problems that exist in remote communities, inclusion strategies that are dependent upon a personal agency model will fall short of their optimal effectiveness if the structural limitations cannot be accommodated within public policy that aims to be inclusive of disability¹⁷.”

The NDIS client, market driven model is poorly equipped to respond to the needs of First Peoples with disability, and remains inaccessible and inappropriate to many of our community, including from a young age (for example, there are considerable barriers to accessing NDIS funding for Foetal Alcohol Spectrum Disorder¹⁸). The NDIA does not have an established structure to consult with First Peoples with disability about the functioning of the scheme, with major issues with initial access and utilisation of plans.

The Joint Standing Committee on The National Disability Insurance Scheme 2017 report into ‘The Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition’, raised fundamental issues with the interaction between the NDIS and jurisdictional criminal justice system¹⁹. The NDIS is not a crisis service, and does not have in place the market to respond to complexity.

Australia has one of the fastest growing prison populations, presenting significant challenges within the justice system (from arrest, to imprisonment) in responding proactively to the disability support needs of First Nations people with disability. There is no clear human rights based framework for integration, and delineated responsibility between the NDIA and jurisdictional justice systems. The majority of jurisdictions lack Disability Justice Strategies. A lack of overarching strategy leads to gaps including early identification of, and early assessment of disability support requirements, and sharing information (for example, where specialist reports and assessments may be undertaken for court hearings, but not make their way to the NDIA as a referral). There is the need for much earlier reintegration planning and disability support assessments, involving appropriately skilled First Nations NDIA staff. Through incarceration we strip away the autonomy of individuals (including their personal decision making) and their links with community. This needs to be considered and supported with a view to the skills and connections First Nations people with disability need in place for release.

There needs to be further in-depth discussion on how the interaction of these systemic barriers creates a unique inaccessibility to the NDIS for the people who are most in need of support. Data showing the prevalence of disability among the Aboriginal and Torres Strait Islander population (45% - number can be deleted?) coupled with the research on the social, health and wellbeing inequality they experience, provides sufficient evidence to justify a policy focus on disability within Closing the Gap, supported by mandatory reporting against a target for equitable access to the NDIS. Failing to acknowledge the health and wellbeing of Aboriginal and Torres Strait Islander people with disability will only result in the known gap in inequality to access widening²⁰.

¹⁶ <https://fpdn.org.au/product/cultureisinclusion/>

¹⁷ Avery, S. (2018) ‘Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability’

<https://fpdn.org.au/product/cultureisinclusion/>

¹⁸ The Senate Standing Committee on Community Affairs inquiry into ‘Preventative Approaches to prevention, diagnosis, and support for Foetal Alcohol Spectrum Disorder is due to report December 2020. See the Australian Human Rights Commission submission to the inquiry (sub 17)

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/FetalAlcoholSpectrumDi/Submissions

¹⁹ The Joint Standing Committee on The National Disability Insurance Scheme 2017 report into ‘The Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition report can be accessed here:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MentalHealth/Report

²⁰ FPDN Submission into ‘Closing the Gap Refresh’ 2018

The criminalisation and incarceration of First Peoples with disability must be understood within the broader intersecting dynamics of colonialism, racism and ableism. To address the over incarceration of our people, these underlying structural issues, and the trajectory that leads to interactions the criminal justice system, must be acknowledged and understood, and community led solutions identified and implemented through a strategic approach²¹ based on the principles of 'self-determination; person centred care; holistic and flexible approach; integrated services; and Culture, Disability and Gender-informed practice'.

'By the time an Aboriginal or Torres Strait Islander person with disability first comes into contact with the criminal justice system, they will most likely have had a life of unmanaged disability. Coupled with discrimination, based on their Aboriginality and disability, they will have faced barriers from the time they are born, of poverty, early exposure to life in institutions through the child protection system, struggles at school, lack of appropriate health care and an inability to secure employment. Coming into contact with the police, courts, juvenile detention and prisons is normalized in their life trajectory...[]the justice system does little to address these factors and outcomes and in fact often makes them worse. People acquire the label of a prisoner who must be punished, not a person with disability who needs support. When released from prison, the personal, social and systemic circumstances that propelled them into detention or prison will not have changed. Thus, many face a cycle of recurrent detention that goes on indefinitely'²².

LIFE-STAGE ASPECT	Peri-Natal	Early childhood	Schooling years	Young people	Justice	Health	Ageing
Aboriginal and Torres Strait Islander	Low awareness of disability Environmental factors, increased likelihood of low birth-weight	Low awareness of disability Exposure to trauma increased likelihood of OOHC – off country, unstable home setting	Low awareness of disability "Bad black kid syndrome" – punitive schooling over supported disability	Less likely to secure employment Increased likelihood of police contact	Denial of rights – over incarceration	Subconscious bias – institutional racism	Reduced life expectancy Disability happens earlier in life and with more co-morbidities.
Disability	Low birth weight and environmental factors in developmental disability	Disability assessments aren't carried out to the extent that they need to be	Undiagnosed and unsupported disability	Less likely to secure employment. Communication impairments, reduced capacity to negotiate conflict	Denial of rights – indefinite detention and fitness to plea for people with cognitive and psychiatric disability	Subconscious bias – diagnostic over shadowing	Inadequate public infrastructure especially in remote communities.

Avery S. (2016) 'The life trajectory for an Aboriginal and Aboriginal or Torres Strait Persons with disability'.

It is estimated that 45% of Aboriginal and Torres Strait Islander people have disability or a long-term health condition, with First Nations people more than twice as likely to have disability than the rest of the Australian population²³.

A high proportion of First Nations people who interact with the criminal justice system will have had unrecognised and unsupported disability for much of their life.

²¹ This strategic approach was laid out in First Peoples Disability Justice Consortium submission to the 2016 Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment (as an attachment to this submission)

²² Ibid P.5

²³ 2014–15 National Aboriginal and Torres Strait Islander Social Survey (NATSISS)

Whilst there is no nationally consistent disaggregated data on the number of people with disability in the criminal justice system, Human Rights Watch report that almost 50% of prisoners in Australia have cognitive or psychosocial disability²⁴. There is no comprehensive data to report the number of First Nations people with disability that have died in custody²⁵.

The small amount of data that is available shows that:

- Indigenous young people, particularly those with disability are overrepresented in the youth justice system, including in detention-based supervision (24 times higher than the rate for non-Indigenous young people), and in community based supervision (17 times higher than the rate for non-Indigenous young people).
- Indigenous people with disability are 14 times more likely to be imprisoned than the rest of the population.
- 50% of the total prison population report a history of psychosocial disability, almost one-third report a disability, and 25%–30% of prisoners have an intellectual disability.
- Indigenous women are the fastest growing prison population in Australia. A significant proportion have cognitive impairment as well as an undiagnosed psychosocial disability.

DENIAL OF LEGAL CAPACITY AND DIVERSIONARY PROCEDURES

The detention of First Nations people with disability in Australia occurs within a legislative framework that routinely denies individual legal capacity, under financial management, mental health and guardianship provisions. This is despite numerous calls from domestic and international bodies for reform²⁶. For example, the NSW Mental Health (Criminal Procedure) Act can divert people accused of a crime away from legal proceedings where they can be found 'unfit' to stand trial or not guilty by reason of 'mental impairment'. These diversionary provisions deny people procedural fairness of the court, and can often lead to people with First Nations people with disability being detained indefinitely in forensic services without conviction, often for periods longer than the maximum custodial sentence for the offence, and where the use of restrictive practices are widespread²⁷.

In fact, court diversion can 'use a person's disability to effectively circumvent the right to equality before the law'²⁸. Many First Nations people with disability are subject to violence, abuse and neglect within the criminal justice system, however diversionary processes,

²⁴ Human Rights Watch 'I needed help, instead I was punished' Abuse and Neglect of Prisoners with Disabilities in Australia (2018)

<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>

²⁵ The Royal Commission into Violence, abuse, Neglect and Exploitation of People with Disability has published a factsheet that notes 'The Australian Institute of Criminology monitors the extent of deaths in prison as part of the National Deaths in Custody program, but not by disability status'. The Guardian Deaths Inside website flags mental health issues and cognitive disability where identified

<https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>

²⁶ See the Committee on the Rights of Persons with Disabilities (2019) Concluding observations on the combined second and third reports of Australia, CRPD/C/AUS/CO/2-3, September 2019, 8, adopted by the Committee at its twenty-second session (26 August – 20 September 2019) ; see also Australian Law Reform Commission's Equality, Capacity and Disability in Commonwealth Laws

<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/>

²⁷ Rather the detention becomes an arbitrary period or determined by reference to the individual's perceived treatment and support needs. See Steele. L (2020) Disability, Criminal Justice and Law – Reconsidering Court Diversion, published by Routledge

²⁸ Ibid

where a person is moved from the court system to specialised services for ‘treatment and support’, provides for an environment where restrictive practices are routinely used, and just continues ‘disability oppression and the process of control and punishment of people with disability who are not sentenced and might not even be convicted of any criminal offence’²⁹. For First Nations people with Disability this further severs ties with their community, including connections and support critical for a pathway out of detention. We refer the Royal Commission to the work of Dr Linda Steele in this area³⁰.

The trap of the criminal justice system for First People with disability

The impact of dual discrimination for First People with disability is often misunderstood and absent from both Aboriginal justice and disability justice dialogue, and too often lost within siloed Government policy and funding. This leads to poorly designed initiatives, that are either disability or culturally inaccessible – most likely both. For example, the National Disability Strategy 2010-2020³¹ did not prioritise justice, and were notably absent in initiatives to respond to First Nations people with disability over-representation in the criminal justice system. The 16 new Close the Gap targets do not mention disability, despite its centrality to progress across all areas, including education, health and justice³².

A lack of early identification of disability and therefore provision of appropriate support for Aboriginal young people, begins a trajectory towards interaction with the criminal justice system. Baldry et al identified ‘a severe and widespread lack of appropriate early diagnosis and positive, culturally responsive support for Indigenous children and young people with cognitive impairment. This is connected to schools and police viewing certain kinds of behaviour through a prism of institutional racism rather than disability, as well as Indigenous community reluctance to have children assessed using particular criteria that are perceived as stigmatising and leading to negative intervention in Aboriginal families’³³.

In many cases, particularly in rural and remote areas where community services and outreach support is absent, police are the first, and only responders to concerns relating to First Nations people with disability, including individuals with intellectual and psychosocial disability. Police are poorly equipped to recognise, and respond appropriately, resulting in jails becoming a default solution to an issue that require a disability or mental health service response. Whilst being held, a lack of skilled assessment of disability requirements often results in an individual’s disability support needs not being met.

²⁹ Ibid

³⁰ Steele, L. Disability, Criminal Justice and Law, published by Routledge (May 2020) For summary and reflection of the book refer to the online recording of the book launch <https://www.uts.edu.au/partners-and-community/initiatives/social-justice-uts/news/recording-diverting-justice>

³¹ The National Disability Strategy 2010-2020 can be accessed here: https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf. The new strategy is currently being developed.

³² See RN Breakfast interview with Damian Griffis, CEO FPDN <https://fpdn.org.au/disability-not-included-in-the-16-new-closing-the-gap-targets/>

³³ Eileen Baldry, Ruth McCausland, Leanne Dowse & Elizabeth McEntyre, A Predictable and Preventable Path: Aboriginal people with mental and cognitive disability in the criminal system (October 2015) <https://www.indigenousjustice.gov.au/resources/a-predictable-and-preventable-path-aboriginal-people-with-mental-and-cognitive-disabilities-in-the-criminal-justice-system/>

The age of criminal responsibility in the majority of Australian jurisdictions is 10. Despite consistent calls for this to be raised to 14, and that children under the age of 16 should not be imprisoned³⁴, the ACT is the only jurisdiction that has committed to changing legislation to this effect. It is estimated that 59% of young people in detention nationwide are Aboriginal, and that 2/3 of those young people in juvenile detention have disability³⁵. Data from NSW demonstrates that prevalence of complex disability and multi-faceted disadvantage is higher amongst First Nations young people compared to other young people in juvenile detention³⁶. First Nations children are excluded from school at 3 times the rate of non-Indigenous children³⁷, in large part due to unrecognised and unsupported disability. These young people are criminalised due to the interaction of their Aboriginality and disability – failed by every stage of the service system.

INDEFINITE DETENTION

First Nations people with disability are at heightened risk of encountering indefinite detention due to the complex interaction of personal and social factors affecting both their Indigenous and disability status.

By the time that a First Nations person has come into contact with the justice system, they are likely to have had a lifetime of unmanaged disability.

A strategic approach is needed to address the factors impacting on First Nations people with cognitive impairment including:

- to improve access to their rights upon coming in contact with the justice system;
- to address the social risk factors to alter their life trajectory and reduce the
- likelihood of their coming in contact with the justice system in the first instance.

There is also a significant lack of data about the number of First Nations people with disability who are currently in indefinite detention, or a plan to ensure that this data is collected in the future.

³⁴ Most recently unanimously raised as an issues at Australia's Universal Periodic Review ABC <https://www.abc.net.au/news/2021-01-21/un-australia-raise-the-age-of-criminal-responsibility/13078380#:~:text=The%20minimum%20age%20of%20criminal,years%20as%20the%20minimum%20age>.

³⁵ 2015 Young People in Custody Health Survey Justice Health & Forensic Mental Health Network and Juvenile Justice NSW <https://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF>

³⁶ Avery, S. (2018) 'Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability'

³⁷ See Department of Prime Minister and Cabinet, Closing the Gap Education report

<https://www.pmc.gov.au/sites/default/files/reports/closing-the-gap-2018/education.html>



CONTACT INFORMATION

First Peoples Disability Network (Australia)
PO Box A2265 Sydney South NSW 1235

Contact: El Gibbs, Senior Policy and Media Coordinator
Phone: 02 9267 4195
Email: elg@fpdn.org.au
www.fpdn.org.au