Opening Address Chair – Ronald Sackville AO QC

Public Hearing 11 - The experiences of people with cognitive disability in the criminal justice system

Introduction

Good morning everyone. I extend a warm welcome to everyone who is or will be following this, the eleventh Public hearing of the Royal Commission into violence, abuse, neglect and exploitation of people with disability.

This is our first hearing for 2021, after a year that has been difficult for so many people in this country, not least people with disability. I am sure my colleagues join me in expressing the fervent wish that 2021, despite its inauspicious start on the COVID-19 front, will prove to be more tranquil, stable, healthy and productive than its predecessor.

This hearing will explore the experiences of violence, abuse, neglect and exploitation of people with disability, but especially people with cognitive disability, in their interactions with Australia's criminal justice systems. We shall be particularly, although not exclusively, examining the circumstances of people with cognitive disability who have complex needs and have been detained for indefinite periods. That can be because they have been found unfit to plead to charges of criminal conduct or because orders have been made for their detention under mental health legislation. We shall also be considering the factors that contribute to people with cognitive disability being imprisoned and subsequently cycling in an out of the prison system. Of necessity this will require close examination of the experiences of First

Nations people with cognitive disability who are so heavily over-represented in the criminal justice system.

Acknowledgement of Country

We begin with an acknowledgment of country by Commissioner Andrea Mason OAM, who is in our Brisbane hearing room.

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The hearing

We had hoped that this hearing would be conducted solely in our Brisbane hearing room with members of the public free to attend. We have decided to take the cautious approach and maintain the format we adopted in the six hearings held in the second half of 2020, after the onset of the pandemic. Events in Victoria over the past week rather suggest that Shakespeare was right: discretion is indeed the better part of valour.

The hearing will be held with Commissioners in three locations. Commissioner Mason is in the Brisbane hearing room, Commissioner Roslyn Atkinson AO is joining the hearing remotely. Commissioner Alastair McEwin AM is with me in the Sydney hearing room, which naturally is not as spacious or as well appointed as the custom-built Brisbane hearing room. We shall do our best to manage.

Dr Kerri Mellifont QC is the Senior Counsel Assisting the Royal Commission at this hearing. She appears with Ms Janice Crawford and Mr Ben Power of Counsel. All three Counsel are in the Brisbane hearing room. They are assisted by the Office of the Solicitor Assisting the Royal Commission and by Ms Avelina Tarrago of Counsel.

A number of parties have been granted leave to appear. Their appearances will be announced shortly.

Subject to the ever-present possibility of changes to the best laid plans, evidence will be given at this hearing by 33 witnesses. Five witnesses will give evidence in person in the Brisbane hearing room; five in person in the Sydney hearing room; and 23 remotely. Some evidence will be presented by way of pre-recorded video.

Of course the proceedings can be followed on the webcast on the Royal Commission's website. As with all our hearings an Auslan-English interpreter will be visible on the webcast. Our excellent Auslan interpreters will be operating from the Sydney hearing room.

Progress

I wish to draw attention to the Third Progress Report of the Royal Commission, which was published earlier this month.[1] The Report covers the half year from 1 July 2020 to 31 December 2020, a period which was heavily affected by the restrictions associated with the pandemic. Nonetheless the Royal Commission developed new ways of conducting our public activities, including holding the six important virtual public hearings to which I have referred.

The details of the Commission's many activities during this period are set out in the report. I encourage people interested in our work to read the report which can be found on our website.

Human rights

Our terms of reference recognise that Australia has international obligations to take appropriate legislative, administrative and other measures to protect the human rights of people with disability, including those recognised under the Convention on the Rights of Persons with Disabilities (**CRPD**). Numerous

[1] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Third Progress Report* (February 2021). Available at disability.royalcommission.gov.au/system/files/2021-02/Third%20Progress%20report_0.pdf.

provisions of the CRPD and other international agreements to which Australia is a party are relevant to the subject of this hearing.

They include:

- the basic principle that there must be respect for the inherent dignity and individual autonomy of all persons (Art 3(a));
- the right of people with disability to enjoy legal capacity on an equal basis with others in all aspects of life (Art 12(1)); and
- the obligation on States Parties to take effective measures to prevent people with disability from being subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art 15(1)(2)).

The populist view of the legal system

These days we often hear the words “populism” and “populists” used. Like democracy, populism can take many different forms.

In more recent times, populism, especially of the authoritarian kind, is not seen as a sound approach to policy making (except perhaps by populists). That is because the essence of populism in its modern sense is the belief that there are simple solutions to exceedingly complex problems. Such solutions rarely work.

What is the relevance of this definition of populism to the subject matter of this hearing? The answer is that the criminal justice system is a lightning rod for simple answers to complex questions.

We have all experienced what is usually described as the “law and order auction” that is a familiar feature of elections in Australia, particularly in the

States and Territories.[2] This is not a phenomenon that is exclusively the responsibility of any one political party, but it is much loved by large parts of the mass media (not only during elections).

The principal factor underlying the law and order auction is a belief – or at least a belief attributed to the community – that what is needed to curb crime and enhance community safety is simply to adopt a more punitive approach to offenders. Supporters of a punitive approach typically demand more severe penalties for offenders and agitate for more people to be denied bail pending their trial, on the ground that these are the most effective ways to enhance community safety.

This belief is closely linked with another – that crime is increasing and that we are much less safe than we used to be. A book about to be published, of which Professor Don Weatherburn, the former Director of the NSW Bureau of Crime Statistics and Research is the co-author, tells a different story.

The Vanishing Criminal,[3] as the book is entitled, reports that in Australia between 2001 and 2017 the rate of break and enters fell by 68%; the overall homicide rate by 59%; and between 2009 and 2017 the rate of assaults fell by a third. Yet as Professor Weatherburn is reported to have said, this has not stopped most people thinking that there has been a big increase in crime. In his view, public perceptions "are completely out of whack with what is happening".[4]

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[2] See Nicholas Cowdery, 'Contemporary Comments: Criminal Justice in New South Wales under the New State Government' (2012) 23(3) *Current Issues in Criminal Justice* 447.
[3] Don Weatherburn and Sara Rahman, *The Vanishing Criminal* (Melbourne University Press, 2021).
[4] David Murray, 'The decline of crime', *The Australian* (online, 29 January 2021) www.theaustralian.com.au/inquirer/the-vanishing-criminal-explains-the-decline-of-crime/news-story/96f867bc47c187602a02209a368d171f.

One of the main objectives of this hearing is to demonstrate, primarily through the experiences of people with cognitive disability, that if we want to promote both community safety and the human rights of people with cognitive disability, we have to challenge the assumptions underlying the populist view of the criminal justice system. Much of the evidence will be directed to the proposition that there are much better ways of promoting community safety than relying on ever harsher penalties and longer periods of incarceration. These ways have the additional benefit of protecting and enhancing the human rights of people with disability who became embroiled in the criminal justice system.

Data

Prison population

As we have found in most areas of the Royal Commission's work, there is a dearth of data about people with disability, especially with cognitive disability, who are in custody. But let us consider some of the figures that are available.

According to the Australian Bureau of Statistics (**ABS**), on 30 June 2020 41,060 people in Australia were prisoners, of whom 13,097 (about a third) were on remand awaiting trial.[5] This was the first decrease in the prison population in 10 years.[6] By 2018, the prison population had actually increased by about 56 per cent over the previous decade, compared with a 17 per cent increase in the general population.[7]

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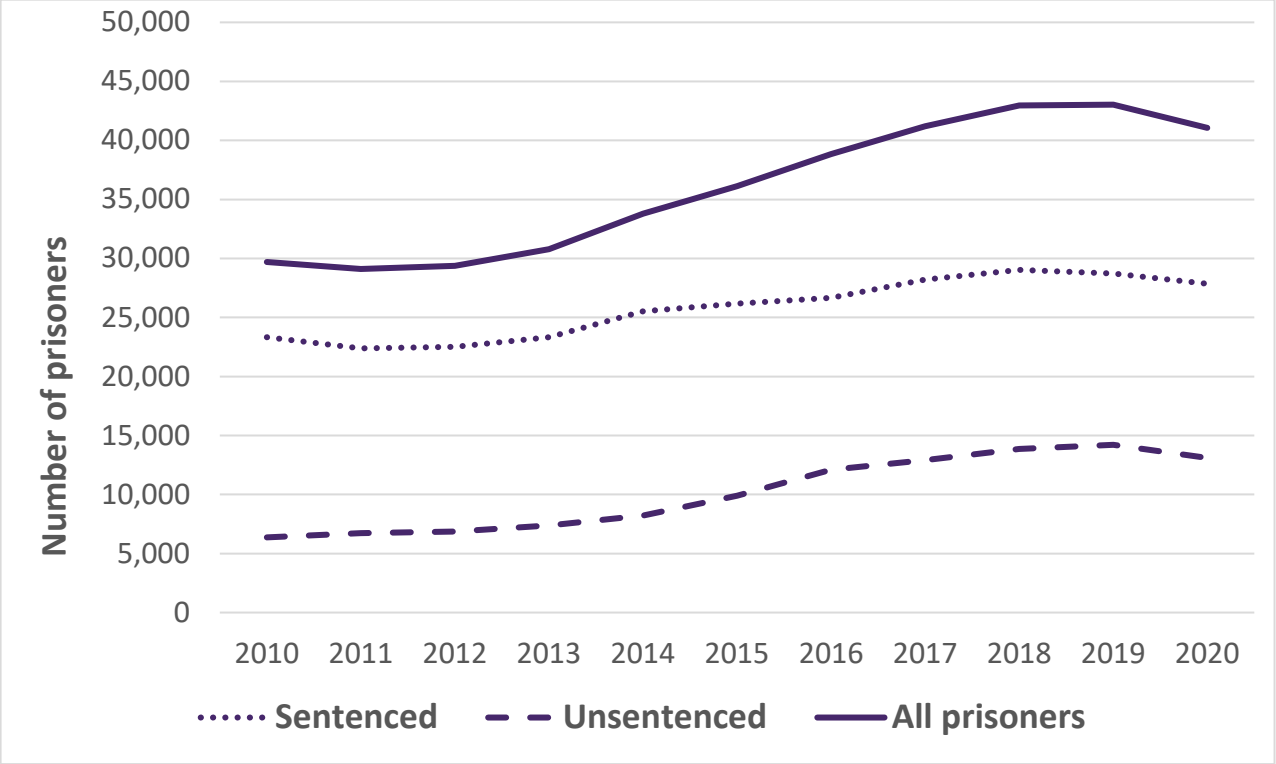
[5] Australian Bureau of Statistics, *Prisoners in Australia* (2020), 'Prisoners, Selected legal status, 2015 to 2020'.
[6] Australian Bureau of Statistics, *Prisoners in Australia* (2020),
[7] Australian Bureau of Statistics, *The health of Australia's prisoners 2018* (2019), 5.

Figure 1 Prisoners, selected legal status, 2010–2020



Source: Australian Bureau of Statistics, *Prisoners in Australia, 2020*, 3 December 2020, Table 2: Prisoners, selected characteristics, 2010–2020.

Of course, the prison population is fluid because people enter and leave all the time. Professor Eileen Baldry, in a statement which will be tendered in evidence, estimates that about 70,000 people spent some time in prison in Australia in the 2018-2019 year.[8]

First Nations people

For a long time we have heard a great deal about the massive over representation of First Nations people in prisons in this country, but unfortunately not much has changed. On 30 June 2020, according to the Australian Bureau of Statistics (**ABS**), 29 per cent of all adult prisoners in Australia were First Nations people[9] – I repeat, 29 per cent. Yet First Nations

[8] Statement of Eileen Baldry, 22 October 2020, [52].
[9] Australian Bureau of Statistics, *Prisoners in Australia* (2020), 'Aboriginal and Torres Strait Islander prisoners'.

people comprise just 2.5 per cent of the Australian adult population.[10] It is profoundly disturbing that in the Northern Territory 84% of the prison population comprise First Nations people,[11] when First Nations people comprise just 26.3% of the Northern Territory adult population.

The ABS figures suggest that at any given time, about 2.3 per cent of First Nations adults and more than 4 per cent of First Nations adult males are in prison. Over time, it is likely that the proportion of the First Nations people who have experienced some time in prison will be greater.

This is far from the whole story. Almost four fifths (79%) of First Nations prisoners had experienced prior adult imprisonment.[12] It is hard to describe this phenomenon in any way other than a revolving door of First Nations people into and out of incarceration.

People with Cognitive disability

I have referred to the dearth of data concerning the number of people with cognitive disability in prison or detained in closed institutions. Nonetheless there is evidence that such people are also heavily over-represented in the criminal justice system.

For example, a survey conducted by the Australian Institute of Health and Welfare in 2018 found that 29% of prison entrants reported that they had a long term health condition or disability that affected their participation in education, employment or everyday activities.[13]

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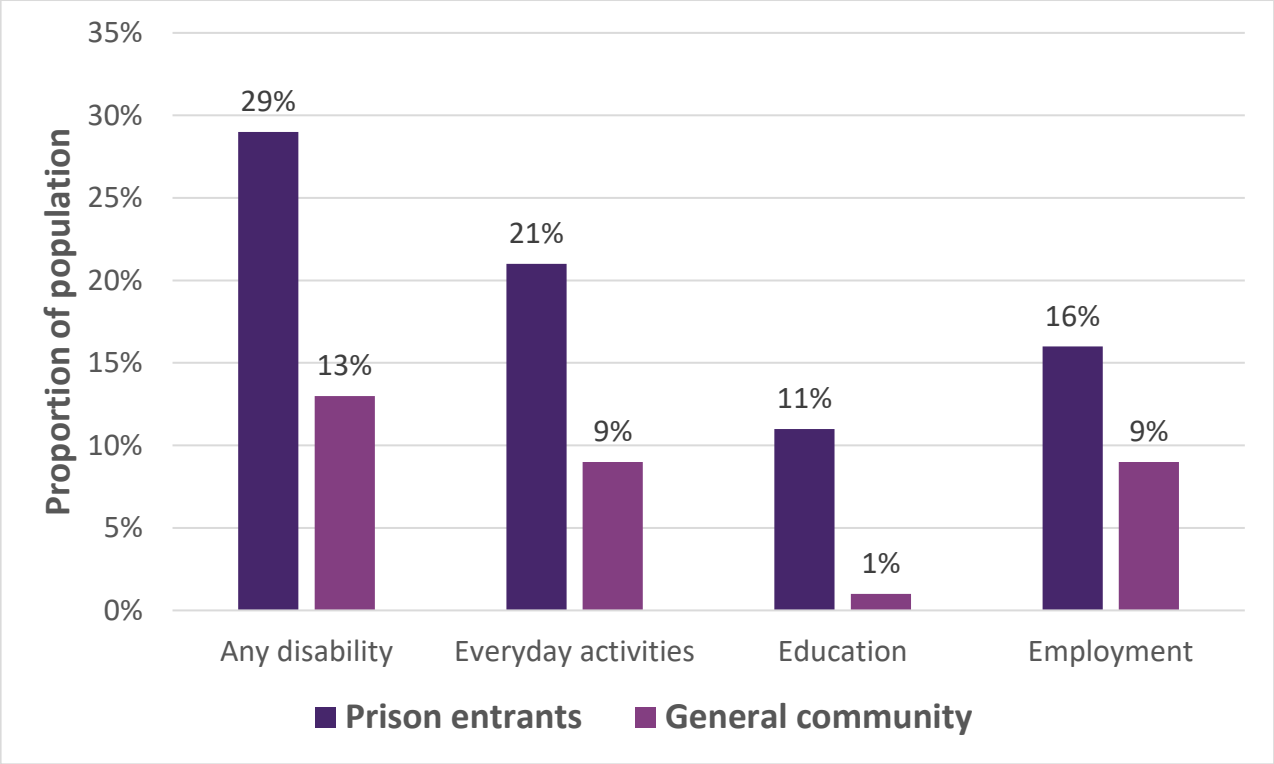
[10] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians 2016* (2018), 'Estimates of Aboriginal and Torres Strait Islander Australians'; Australian Bureau of Statistics*, 3101.0 Australian Demographic Statistics Jun 2016* (2016).
[11] Australian Bureau of Statistics, *Prisoners in Australia* (2020), 'State/territory'.
[12] Australian Bureau of Statistics, *Prisoners in Australia* (2020), 'Aboriginal and Torres Strait Islander prisoners'.
[13] Australian Bureau of Statistics, *The health of Australia's prisoners 2018* (2019), 78.

Figure 2 Disability and restriction type among prison entrants and in the general community, 2018

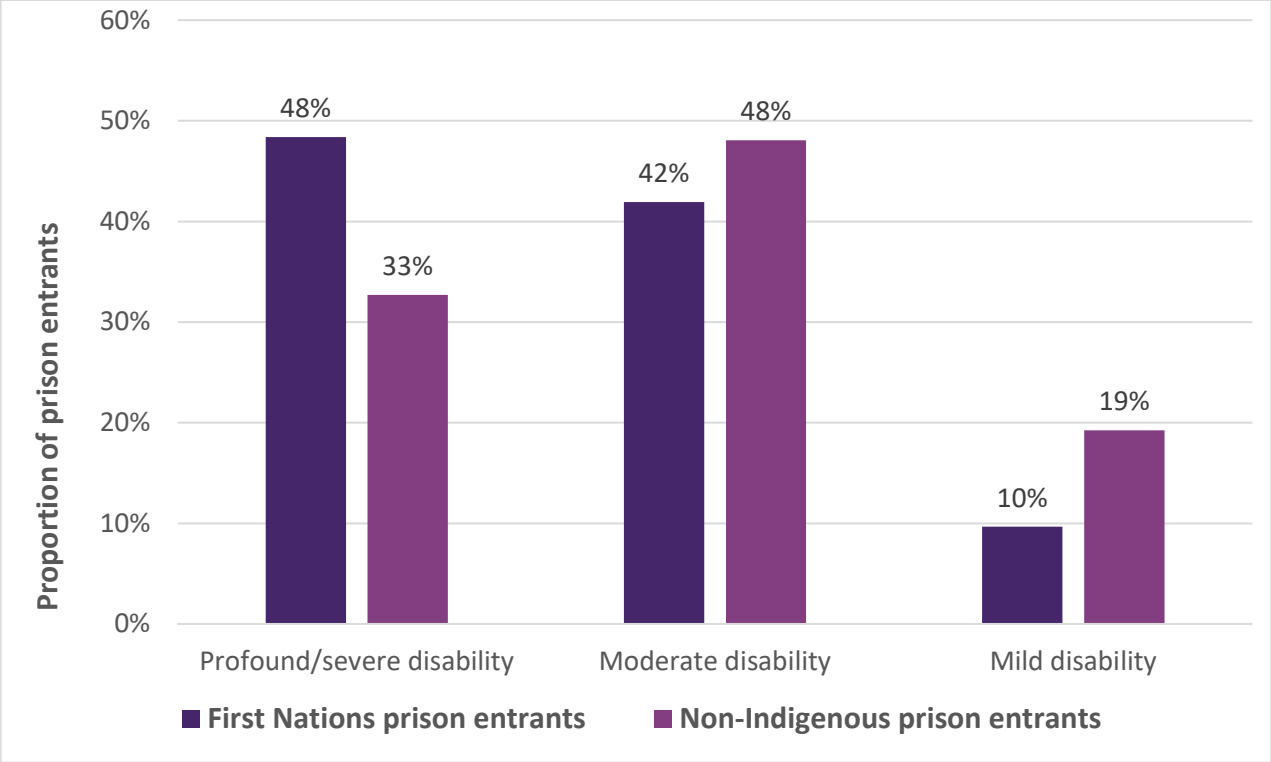


Source: Australian Institute of Health and Welfare, *The health of Australia's prisoners, 2018*, p 78; Australian Bureau of Statistics, *Disability, Ageing and Carers, 2018*. Results accessed using TableBuilder.
Note: General community data reflects people aged 18–64 years.

Of those reporting such a condition or disability, one third of non-indigenous entrants rated their disability as profound or severe, while nearly half of the First Nations entrants reporting a long term condition or disability rated it as profound or severe.[14]

[14] Ibid, 80.

Figure 3 Self-reported extent of limitation among First Nations and non-Indigenous prison entrants, 2018

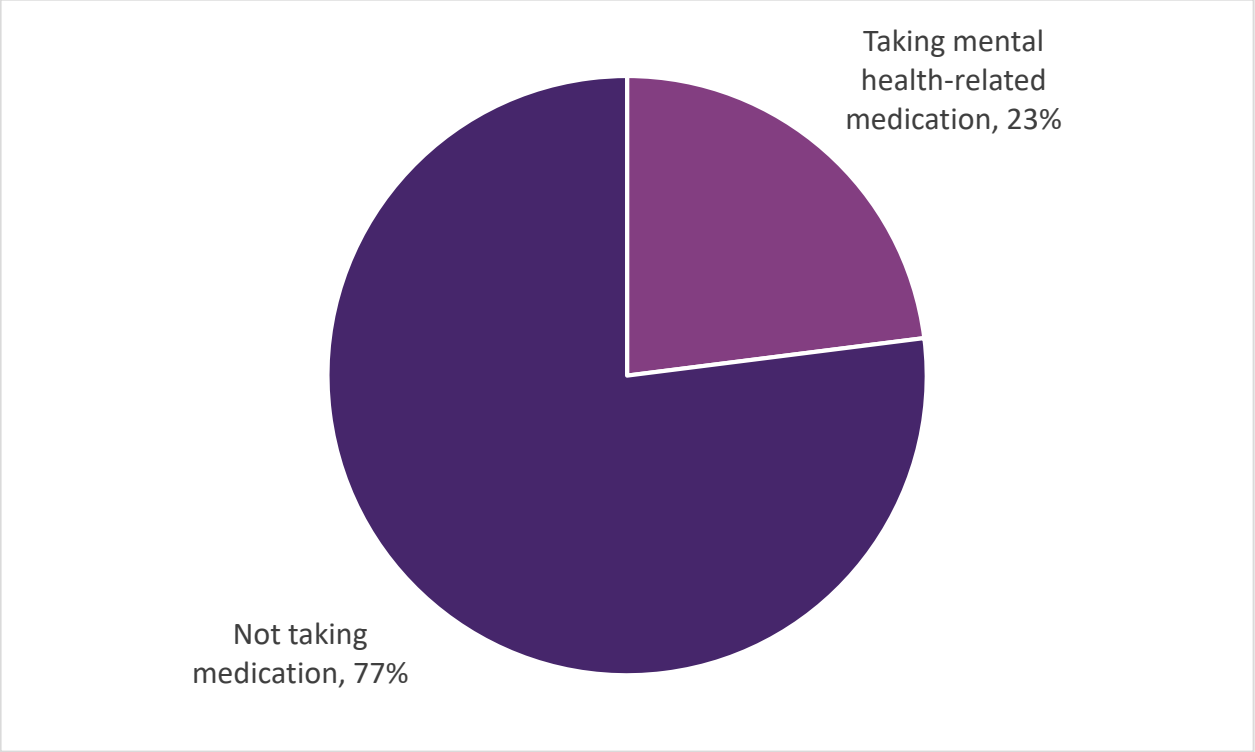


Source: Australian Institute of Health and Welfare, *The health of Australia's prisoners, 2018*, p 80.

The same survey showed that almost one in four prison entrants (23%) were currently taking mental health medication.[15]

[15] Ibid, 27.

Figure 4 Prison entrants taking mental health-related medication, 2018



Source: Australian Institute of Health and Welfare, *The health of Australia's prisoners, 2018*, p 38.

Professor Eileen Baldry will give evidence about important studies of prison populations she and her collaborators have conducted. One study found that two thirds of people who had been in prison between 2000 and 2008 had multiple complex needs.[16] Nearly all of these people were known to police as the victims of crime.[17] Professor Baldry concluded that many thousands of people across Australia were being 'managed' by Australian criminal justice systems, rather than being supported by the community.[18]

Of course, people with disability and First Nations people are not separate categories. We know from evidence at previous hearings that First Nations people have significantly higher rates of cognitive disability that people in the non-indigenous community. We have also been repeatedly told – and indeed

[16] Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) *Griffith Law Review* 370, 375.
[17] Ibid.
[18] Ibid, 382.

our terms of reference explicitly acknowledge the point – that First Nations people with disability experience multiple forms of disadvantage that contribute to their appallingly high levels of incarceration.

A quarter of the people involved in Professor Baldry's study were First Nations people.[19] It is not surprising that she and her collaborators found that those people were significantly more likely than the non-indigenous participants to have multiple and complex needs.[20]

Criminalisation of disability

These are some of the reasons why researchers, advocates and workers at the front line of criminal justice refer to the 'criminalisation of disability'.[21] Of course there are some hardened criminals in prison. But a very large proportion are there primarily and sometimes entirely because of their cognitive disability.

This raises some obvious questions that will be considered during the hearing:

- How do we, consistently with community safety, prevent people with cognitive disability, especially First Nations people, from coming into contact with the formal criminal justice system in the first place?
- If people with cognitive disability do come into contact with the criminal justice systems what can be done, again consistently with community safety, to provide the support necessary to avoid or minimise incarceration and to maximise their opportunities for integration or re-integration in their communities?

[19] Ibid, 375.
[20] Ibid.
[21] See for example, Ruth McCausland et al, *'I feel like I failed him by ringing the police': Criminalising disability in Australia* (SAGE Publications, 2017)

- If people with cognitive disability are incarcerated, whether as the result of a conviction of an offence or otherwise, what culturally appropriate supports should be provided to maximise the opportunities for rehabilitation and successful integration or re-integration into their communities?
- In all cases what measures are needed to ensure that the human rights of people with cognitive disability in custody, are respected and that in no circumstances are they subjected to torture or cruel, inhuman or degrading treatment?
- Is prolonged incarceration of people with cognitive disability, particularly First Nations people (including indefinite detention) the most constructive and cost-effective strategy for enhancing community safety?

Context

As the evidence unfolds there are three important things to remember.

First, the policy questions that will arise are complex and difficult. There are no easy answers. Workable solutions require a full understanding of the factors contributing to the current state of affairs, careful consideration of options for change and, as a practical matter, a good deal of trial and error.

The particular case studies we shall be examining and about which Dr Mellifont will speak in more detail, demonstrate the difficulty. It is necessary, on the one hand, to protect the safety of the community and of staff in forensic units or prisons and, on the other, to safeguard the human rights, health and wellbeing of people in custody who have complex and longstanding needs. Institutions and staff responsible for people with cognitive disability in custody undoubtedly are usually very well intentioned, yet the results not only from the perspective of the person in custody but also from that of the community, may be far from optimal.

Secondly, this hearing is certainly not the first time the issues have been examined by an official inquiry – far from it. There is a very good reason why the Royal Commission's terms of reference direct us to take into account the findings and recommendations made in previous reports and inquiries.

Dr Mellifont will tender in due course a document prepared within the Royal Commission which summarises relevant recommendations from previous inquiries. The document records the extensive and detailed work done by a multitude of bodies in this country to ameliorate the violence, abuse and neglect experienced by people with disability in the criminal justice system. Many of these reports deal specifically with the problems created by the incarceration of so many First Nations people, especially those with cognitive disability.

Reports have been prepared by a remarkable range of bodies: Parliamentary committees, State and Territory Royal Commissions, law reform commissions, the Productivity Commission, the Australian Human Rights Commission, representative legal bodies such as the Law Council of Australia, Ombudsmen, and numerous ad-hoc inquiries. In addition, we have the benefit of path-breaking research undertaken within our universities and other academic institutions, some of which will be referred to in the evidence.

It follows that we do not need to reinvent the wheel. Rather, we must build on the excellent work that has already been done. The difficult part is to ensure that worthwhile recommendations for changes in legislative, policy and practice are implemented and properly evaluated.

Thirdly, somewhat paradoxically governments have shown themselves willing to introduce significant reforms and innovative programs that move away from reliance on criminal punishment as the primary means of addressing harmful behaviour by people with cognitive disability. The regular

“law and order auctions” have not prevented governments from acting on sound advice, although the process often takes considerable time.

For example, a working group established by the Law Crime and Community Safety Council (now the Council of Attorneys-General) has developed the *National Statement of Principles Relating to Persons Unfit to Plead or Fount Not Guilty by Reason of Cognitive or Mental Health Impairment* (***National Principles***). The *National Principles* state a number of overarching principles and more specific propositions. These include the following:

- Decision-making should be guided by the least restriction of the rights of a person with cognitive or mental health impairment taking into account the risk of harm they may pose to themselves, to victims or to others.
- The setting in which people are detained should aim to be inclusive and recovery-orientated, acknowledging that there will be individual differences in the meaning of recovery or rehabilitation and what they may entail.
- Planning is required to facilitate the provision of appropriate supports, accommodation and community based alternatives to detention.
- The needs of particular population groups, including First Nations people, and their understanding and experience of impairment, disability, health and wellbeing, should inform policy and practice relating to persons who are found unfit to plead, of unsound mind, or not guilty by reason of cognitive or mental health impairment.
- Such people should have access to tailored assistance, service pathways and reasonable adjustments, including those needed to facilitate their effective participation in the criminal justice system or forensic mental health system.

- Orders for detention made by Courts or Tribunals should be for the minimum period necessary to address the risk they pose to themselves, victims or others.
- Where time limits on orders apply, jurisdictions should avoid time limits that exceed the maximum term of imprisonment that could have been imposed if the person had been convicted of the offence charged.

It is significant that the National Principles have been endorsed by five states and both mainland territories.

Governments in Australia have also demonstrated that they are prepared to introduce legislative reforms, even if there is typically a long delay between the reforms being proposed and implementing legislation being enacted.

A very recent example is the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), which will come into force later this year. The Act implements proposals made in two important reports by the New South Wales Law Reform Commission dating from 2012 and 2013 (to which Professor Baldry and Mr Jim Simpson of the Council for Intellectual Disability, both of whom will give evidence at this hearing, contributed).[22]

The legislation aims to ensure that people with mental or cognitive impairment who commit crime receive the treatment, support and supervision they need to be reintegrated into the community, while also seeking to protect public safety. Among other things the Act:

- aims to divert more people with mental health or cognitive impairment from the criminal justice system into treatment, support and rehabilitation;

[22] New South Wales, *Parliamentary Debates,* Legislative Assembly, 3 June 2020, 2349-2350 (Mark Speakman, Attorney-General).

- rewrites the current test for the so-called defence of mental illness, which dates from an English decision of 1840; and
- alters procedures for determining whether the person is fit to stand trial and provides greater protection for the rights of such a person once incarcerated.[23]

The task of the reformer is strewn with obstacles, but there is reason to hope that this hearing and what flows from it will not be in vain.

[23] New South Wales, *Parliamentary Debates,* Legislative Assembly, 3 June 2020, 2350-2352 (Mark Speakman, Attorney-General).