



Department of
Seniors, Disability Services and
Aboriginal and Torres Strait
Islander Partnerships

Our reference: [REDACTED]

The Honourable Michael Shanahan AM
Criminal Procedure Review—Magistrates Courts
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Dear Mr Shanahan

Thank you for the opportunity to provide a submission to the Criminal Procedure Review of the Magistrates Courts.

People with disability are over-represented across the criminal justice systems and are at a heightened risk of violence, abuse, neglect and exploitation in criminal justice settings. People with cognitive and/or psychosocial disability are significantly over-represented among the group of people charged with or accused of criminal offences. They are also disproportionately victims of abusive or violent criminal conduct.

Further, data from the Australian Law Reform Commission's *Pathways to Justice – An inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* highlights that Aboriginal and Torres Strait Islander peoples were seven times more likely to be charged with criminal offences, and 12.5 times more likely to receive a sentence of imprisonment than non-Indigenous people.

First Nations people with disability face particular disadvantages in the criminal justice system and are substantially over-represented across the criminal justice system. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability stated that research indicates they often experience multiple discrimination due to the intersection of racism and ableism. The available information suggests that First Nations people with disability are about 14 times more likely to be imprisoned than the general population.

Culturally appropriate and accessible court processes that consider individual and cultural needs and preferences, intersectionality and lived experience, are critical to providing justice responses to Aboriginal and Torres Strait Islander peoples and people with disability.

An overview of specific considerations and relevant background information relating to Aboriginal and Torres Strait Islander peoples and people with disability in contact with the criminal justice system is provided in the attached document.



Australia's Disability Strategy 2021–2031 (ADS) and the National Agreement on Closing the Gap (Closing the Gap) both seek a criminal justice system that responds effectively to the complex needs and vulnerabilities of Aboriginal and Torres Strait Islander peoples and people with disability.

As such, it is suggested that:

- consideration be given to the criminal justice-related targets in Closing the Gap, and the relevant policy priorities in the ADS
- consideration be given to accommodating the particular needs and vulnerabilities of these cohorts, regardless of whether they are a defendant, victim or witness
- the final report describes how any reforms will support progress towards the Closing the Gap targets and ADS policy priorities.

It is further suggested the review draw on learnings from multiple current and prior inquiries, reports and reviews and engage with Aboriginal and Torres Strait Islander and disability sector stakeholders to recommend a contemporary, efficient and effective criminal justice procedure for the future.

I am pleased to see that the consultation process for the review includes a video outlining the review process and audio and video submissions are being accepted. The department recommends that any further documents produced, including the review report, be reviewed for accessibility, including easy English versions and compatibility with screen readers.

If you require further information, I encourage you to contact Ms Elizabeth Bianchi, Executive Director, Strategic Policy and Legislation, Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships on [REDACTED]

I trust this information is of assistance to you.

Yours sincerely

[REDACTED]

Dr Chris Sarra
Director-General
29/06/2022

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Aboriginal and Torres Strait Islander peoples

- The Queensland Productivity Commission's inquiry into imprisonment and recidivism highlighted the significant proportion of Aboriginal and Torres Strait Islander peoples, both in the youth justice and adult correction systems, are on remand and have not been sentenced with any offence. Therefore the Department is supportive of exploring any mechanisms that makes the court procedures culturally appropriate for First Nations, makes the procedures easy to understand and that matters are dealt with efficiently, and any institutional bias in the system is addressed.
- The specific needs of Aboriginal and Torres Strait peoples involved in the criminal justice system have been addressed by numerous National and State inquiries. A number of these are referenced in the consultation paper, including:
 - Women's Safety and Justice Taskforce's *Hear her voice - Report one - Addressing coercive control and domestic and family violence in Queensland*, highlighting "a focus on improving victim safety and participation and fairness for Aboriginal and Torres Strait Islander peoples, particularly in relation to domestic and family violence related matters as a key objective of work already underway to review the *Justices Act 1886* to establish contemporary, efficient and effective criminal justice procedure for the future" (recommendation 49)
 - The Australian Law Reform Commission's *Pathways to Justice – An inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* – "that communication barriers, alienation and disconnection from mainstream court processes contribute to the complexity of Aboriginal and Torres Strait Islander legal needs and limit access to justice.' Further, that 'a culturally appropriate court process was "critical when providing a justice response for Aboriginal and Torres Strait Islander people"."
- In addressing court diversion options, the consultation paper includes the option of deferred prosecution. This approach differs from deferred sentencing, as the prosecution is deferred and when any requirements or conditions attaching to the deferred prosecution (which may be determined in consultation with the victim) are successfully completed, the matter ends without a finding of guilt, conviction or sentence. The Department is supportive of this as an option worth exploring.
- Introduction of this approach was recommended in the recent report of the *Queensland Productivity Commission Inquiry into Imprisonment and Recidivism* as "it provides an offender with an incentive not to reoffend (or to seek treatment)" and has advantages over court-based diversion as it avoids complex court processes and provides more certainty to the offender. The Queensland Government response to this recommendation was that it be considered as part of the current review process.
- While this option might be considered ideal for youth crime, first offenders and vulnerable people, the consultation paper also suggests that it may provide a more culturally responsive approach for Aboriginal and Torres Strait Islander peoples, as it is consistent with the approach of some Aboriginal communities to settlement of criminal matters; allows victim participation in restorative justice processes, and attainment of negotiated outcomes which may be used to resolve matters in more culturally appropriate ways. The department supports any such innovations being explored where they have the potential to address the continuing high levels of over-representation and enhance culturally appropriate options through the justice system.
- Overall as noted the review should draw on learnings from multiple prior reports and reviews and engage with First nations stakeholders, to make recommendations for addressing continuing Aboriginal and Torres Strait Islander over-representation as a priority focus. This should refer explicitly to the new Closing the Gap justice related targets and describe how any reforms will support targets being met.

People with disability

- Understanding individual needs is critical to ensuring effective understanding, connection and participation in criminal procedures. For example, consideration may need to be given to the physical, intellectual, emotional and other support needs of people with disability, depending on the impacts of their disability on their capacity to engage with the procedures. To meet these needs, adjustments may be required, such as the timing of the case listing, amount of breaks allowed or provided, the ability to access and use communication devices and other relevant supports.
- The consultation paper identifies that procedures and documents need to be easy to understand, however, this does not negate the need to provide additional support to people with disability. This additional support may be required to assist people with disability to understand procedures and documents which, even if developed to be easily understood, may still present comprehension challenges for people with disability.
- The Disability Royal Commission's Criminal Justice System Issues paper, points to the adverse effect for people with disability, including no equitable or equal participation producing unjust outcomes, when appropriate adjustments and supports are not made.
- These impacts have been outlined through evidence provided at public hearings of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) which has examined individuals' experiences with the criminal justice system. These include:
 - A lack of cultural awareness and a lack of appropriate support and accommodation, such as accessible court rooms, video link testimony, and decision-making support.
 - A lack of understanding of the rights of people with disability by those who work in the criminal justice system.
- The lack of a systematic, reliable identification of people with disability can further exacerbate barriers for people with disability accessing the criminal justice system.
- A common theme in responses to the Royal Commission's Criminal Justice System Issues Paper has been the need for greater awareness of disability amongst some parts of the judiciary, legal professionals and court staff including in identifying and assisting or communicating with people with disability.
- This is consistent with Article 13 of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) that appropriate training for those working in the field of administration of justice be promoted by States Parties to ensure effective access to justice for persons with disabilities. The department recommends that provisions regarding frequent training are included in the new framework.

Young people with disability

- The Consultation Paper outlines a range of potential and additional in-court-diversion procedures, stating on p.48, "When these kinds of diversions are used, the intention is matters are resolved through ways outside the traditional court process and outcome."
- In terms of current in-court diversion procedures, Magistrates are currently empowered under section 174 of the *Mental Health Act 2016* (MHA) to dismiss charges for simple offences where a young person has an intellectual or cognitive impairment and considered of unsound mind/unfit for trial, and refer the young person for support.
- Referral pathways are limited to the National Disability Insurance Agency or the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships. However, given existing barriers to accessing referral pathways to appropriate, timely and available specialist supports under the NDIS, there is a risk affected young people may not access the supports they need to address their disability and/or criminogenic support needs.

- The department suggests consideration be given to ensuring deferred prosecution agreements are available to young people whose disability adversely impacts their ability to understand and consent to the terms of an agreement, and to reasonable adjustments necessary to support this cohort's compliance with agreements.
- The Consultation Paper notes that deferred prosecution agreements "would operate as an agreement between the parties rather than as a court order", which eliminates risk of breach of a court order, however, the department also suggests that additional safeguards are considered to ensure that non-engagement does not impact subsequent acceptance of pleas or sentencing decisions.
- The department also suggests further consideration as to how deferred prosecution agreements could be made available to young people whose intellectual, cognitive or neurodevelopmental disability could adversely impact their ability to understand and consent to the terms of a proposed agreement. This consideration should also take into account any reasonable adjustments that may be necessary to ensure young people in this cohort are appropriately supported to comply with the terms of any agreement.