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AMA submission to Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.

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The Australian Medical Association (AMA) welcomes the opportunity to make a submission to the inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.

The AMA's submission is principle based, and should be considered in the context of being applicable to all of the Inquiry's Terms of Reference.

AMA Principles

1. The indefinite detention of anyone is a violation of basic human rights. Indefinite detention is likely to contribute to poor mental and physical health outcomes.

2. Any person with a cognitive of psychiatric impairment should be afforded the same right of access, equity and quality of health care as the general population. As with all people, they should be treated with respect dignity and in a culturally and linguistically appropriate manner.

3. Medical practitioners who provide medical care to those who are detained require sufficient professional autonomy and clinical independence to ensure that the integrity of the therapeutic relationship can be established and maintained.

4. Advice around medical treatment, and capacity to be involved in decisions related to any ongoing detention, must be informed by appropriately trained medical practitioners.

5. Lack of a suitable supported accommodation should not be used as an argument for an individual to be indefinitely detained.

Indefinite detention – at risk groups

As noted above, the AMA believes that indefinite detention of people with cognitive and psychiatric conditions poses real and serious risks to physical and mental health. Due to the nature of the problem, and related data collection issues, it is unclear how widespread this problem is. However, it is important to note that there are certain population groups that do appear to be at increased risk of being detained, and possibly being detained indefinitely. This includes asylum seekers and refugees in onshore and offshore detention facilities, Aboriginal and Torres Strait Islander people and those with serious mental illness, cognitive impairment and intellectual disabilities.

The AMA is on the record expressing strong opposition to the current approach to the healthcare being provided to those seeking asylum in Australia. This is especially an issue for those in indefinite detention.

The current approach to the indefinite detention of asylum seekers under Australia's duty of care is a major concern. Prolonged, offshore detention undoubtedly has impacts on physical and mental health. The AMA has made a number of recommendations to government about this including:

1. A moratorium on asylum seeker children being sent back to detention centres;

2. The immediate release of all children from offshore and onshore detention centres into the community where they will be properly cared for;

3. The establishment of a transparent, national statutory body of clinical experts, independent of government, with the power to investigate and report to the Parliament on the health and welfare of asylum seekers and refugees in Australia; and

4. If Government or the Opposition cannot provide satisfactory health care to people seeking asylum, then their policies should be revisited.

The AMA is concerned that there are asylum seekers who are currently being detained who have serious psychiatric illness or cognitive impairment.

Aboriginal and Torres Strait Islander people may also be at increased risk of indefinite detention. The AMA's 2015 Report Card on Indigenous Health provides a detailed examination of Indigenous incarceration, and makes a number of important recommendations to government, such as adopting an integrated approach to reducing imprisonment rates and improving health through much closer integration of Aboriginal Community Controlled Health Organisations (ACCHOs), other services and prison health services across the pre-custodial and post-custodial cycle.

Three key aspects contained in the material includes the need for:

- a focus on health issues associated with increases risk of contact with the criminal justice system including mental health conditions, substance abuse disorders and cognitive disabilities;
- preventing criminalisation and recidivism. The former by detecting individuals with health issues that can put them at risk of imprisonment while in the community and working with them to treat those issues and prevent potential offending; and
- continuity of care. That is, (a) from community to prison - with a particular focus on successfully managing release. And (b) post-release (from prison to community) - with a focus on successful reintegration of a former prisoner into the community and avoiding recidivism. Important elements of continuity of care include access to health records, and individual case management as available.

These recommendations are relevant to the inquiry in the context of the Report Card's finding that there are complex drivers of imprisonment directly related to Aboriginal and Torres Strait Islander peoples' health issues, in particular conditions relating to drug and alcohol use, substance abuse disorders and cognitive disabilities.

Related issues to indefinite detention of people with cognitive and psychiatric impairment

In addition to population groups that may be at increased risk, the AMA has identified a number of aspects that are also relevant to this inquiry:

- consent and decision- making capacity
- non-treating medical practitioners
- health and the criminal justice settings
- impact of hearing loss
- Fetal Alcohol Spectrum Disorder
- supported living and accommodation

Consent and decision- making capacity

A particularly important issue relevant to anyone with a cognitive or psychiatric impairment is consent and decision-making capacity. Decision-making capacity can be limited or impaired at the time a specific health care or other decision is being made. People with limited or impaired capacity may include:

- those who never had decision-making capacity;
- those with a mental illness or other condition resulting in permanent impairment of decision-making capacity;
- those with decision-making capacity for some, but not all, decisions; and
- those with fluctuating decision-making capacity.

For many, a loss of decision-making capacity may not be permanent – it may be temporary or may be progressive rather than immediate, and the condition may fluctuate over time. In health care, patients with limited or impaired capacity are encouraged to participate in decision-making consistent with their level of capacity at the time a decision needs to be made. Some people will

have capacity to make a supported decision, where the patient makes the decisions themselves with the assistance of a support person, while others with insufficient capacity will require a substitute decision-maker, where a decision is made on behalf of the person.

It is important for those involved in criminal justice and detention facilities (and others involved in situations where people are detained) to understand the nature of a person's decision-making capacity. However, it should not be automatically assumed that if a person suffers from a mental illness, cognitive impairment or intellectual disability that they lack decision-making capacity for a given decision. Each individual should receive proper, and where appropriate, ongoing assessment of their decision-making capacity, so they are able to participate to the best of their abilities in health care and other decisions that affect them. Appropriate tailored support for decision-making must be available for those who require it.

Non-treating medical practitioners

Doctors who work in a detention environments may either serve as a treating or non-treating doctor. A non-treating doctor does not have a therapeutic relationship with an individual who has been detained and they may be engaged to conduct an independent medical assessment on behalf of a third party (such as a detention facility, a court or tribunal). It is essential that the individual (or their substitute decision maker) understands the role of the doctor when participating in any sort of assessment.

Health and the Criminal Justice System

The AMA's position statement *Health and the Criminal Justice System 2012* explains that contact with the criminal justice system provides a valuable opportunity to detect and address health conditions experienced by detainees/prisoners. In the Position Statement the AMA recommends:

- upon admission, all prisoners and detainees should receive screening from a medical practitioner for physical, addiction-related and psychiatric disorders, and potential suicide risk. Additional screenings should be undertaken periodically and as an individual is transferred between facilities or different stages of the justice system;
- health assessments should be promptly undertaken to define more fully the nature of health issues identified during screening, and to determine appropriate types of treatment. Health assessments must be undertaken by a medical practitioner or nurse, and mental health assessments should be administered by a trained mental health clinician;
- health assessments should include evaluation of substance use, hearing loss, acquired brain injury, intellectual disability and other cognitive disabilities given the significant implications these issues have for both health and recidivism outcomes;
- prisoners with an intellectual or physical disability are provided with relevant services and facilities, including for dual disabilities and/or multiple morbidities associated with disability.

Hearing loss

Another aspect that must be considered in the context of the current Inquiry, and in relation to Aboriginal and Torres Strait Islander people, is hearing loss. The AMA has been informed that

deafness and perforated eardrums are at pandemic levels in remote Aboriginal communities. Poor auditory perception contributes to difficulties in understanding. The Senate Inquiry *Hear Us: Inquiry into Hearing and Health in Australia* is particularly relevant to the current Inquiry, as it describes the link between early onset hearing impairment and increased engagement with the criminal justice system.

Fetal Alcohol Spectrum Disorders

The AMA is also concerned about the contact that people with Fetal Alcohol Spectrum Disorders (FASD) have with the criminal justice system. FASD is an umbrella term used to describe a range of physical and cognitive, behavioural and neurodevelopmental abnormalities that result from exposure to alcohol in utero.

The symptoms and behaviours relating to FASD increase the likelihood that impacted individuals will come into contact with the criminal justice system (particularly those that are undiagnosed). This includes, but is not limited to: low impulse control, inappropriate reactions to loud and or frightening noises, inappropriate sexual behaviour and being easily convinced to engage in criminal activities.

FASD is not always visibly identifiable and its cognitive impacts mean that individuals who are affected may not always understand the full extent of their limitations (or be able to advocate for themselves appropriately). Many people with FASD remain undiagnosed. Individuals with FASD who become involved with the criminal justice system may not understand their arrest and related court processes, are likely to have diminished competency and capacity, and will not fully grasp the severity of the situation.

Without a formal diagnosis of FASD, it is difficult for magistrates to use impaired functioning as a mitigating factor in sentencing. People with FASD may encounter difficulties adhering to any court ordered activities, including the payment of fines, and as a result they may become enmeshed in the criminal justice system. It is vital that individuals with FASD are provided with appropriate supports, including individual case management, to ensure that they are not at increased risk of being indefinitely detained. Appropriate supported accommodation options must be available for people impacted by FASD.

It is important to note that while individuals affected by FASD come from across the broader community, there is estimated to be a higher prevalence of individuals with FASD in Indigenous communities. This is relevant to the unacceptably high rates on incarceration of Indigenous Australians.

Supported living and accommodation

One potentially significant contributor to individuals being detained indefinitely is lack of access to suitable accommodations, including acute hospital care, specialised outpatient care or supported accommodation. Beds in facilities that care for people with mental illness or cognitive impairments are often limited. Investment in improving and expanding access to the full range of supports and services is vital. Lack of access to suitable care and accommodation should never be justification for an individual to be detained (temporarily or indefinitely) in any corrections facilities.

As referenced in this submission, please find attached:

- AMA Position Statement Health and the Criminal Justice System – 2012
- AMA Report Card on Indigenous Health 2015: Treating high rates of imprisonment of Aboriginal and Torres Strait Islander peoples as a symptom of the health gap: an integrated approach to both;
- Medical Ethics in Custodial Settings – 2015
- AMA Position Statement Health Care of Asylum Seekers and Refugees - 2015

Conclusion

The AMA is concerned about the impacts of indefinite detention. The impacts may be magnified if the person being indefinitely detained is suffering from a cognitive disability or a psychiatric illness.

While there is often a high demand for appropriate accommodations for people with additional support needs, lack of access to such accommodation should never be used as an argument to justify temporary or indefinite incarceration.

The AMA congratulates the Senate Standing Committees on Community Affairs for investigating this important matter.

6 APRIL 2016

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