

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 2

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Question No. 168

Senator Boyce asked the following question at the hearing on 24 May 2012:

- a) Given Ms Catherine Fitch's previous statement that a person accused of a federal offence found unfit to be tried or not guilty due to mental illness, can be detained in a jail or psychiatric unit/ institution at the direction of the court for a period that does not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged; can Ms Fitch explain how states and territories are able to detain people for periods far greater than if they are charged with the offence.
- b) Given Ms Catherine Fitch's previous response to a question that it is not possible for a person charged with a federal offence to be held past the conclusion of a supervision order; can you please explain on what basis is it possible for the states and territories to detain a person past the conclusion of a supervision order if the Commonwealth believes it is not possible?
- c) Given that all states and territories practice indefinite detention regimes for people with cognitive impairments and psychiatric disabilities past the cessation of their supervision or custodial orders who have committed crimes or are a risk of harm to others, what is the Commonwealth's view given the Constitution stipulates that there must be a conviction before a person is imprisoned?
- d) Given the advice from the Australian Centre for Disability Law that the practice of indefinite detention regimes for people with cognitive impairments and psychiatric disabilities past the cessation of their supervision or custodial orders most likely breach Australia's obligations to a large number of international conventions, what is the Commonwealth doing to bring the states and territories into line with Australia's international human rights obligations?
- e) Can the Commonwealth provide an update on progress towards Outcome Area 2 of the National Disability Strategy 2, "Rights Protection, Justice and Legislation" specifically 2.4, 2.9 and 2.10 of the National Disability Strategy, particularly referencing how any development and implementation of those strategies will impact upon the indefinite detention of Aboriginal people with cognitive impairments and psychiatric disabilities in prisons in the states and territories?
- f) The coordinator of the Aboriginal Disability Justice Campaign has recently informed us that a young Aboriginal man with a profound Intellectual Disability is being mechanically and chemically restrained in the Alice Springs Correctional Centre by being belted into a chair to prevent him from banging his head and self-injuring himself. When he is belted into a chair, this young Aboriginal man becomes so

distressed that he is then chemically restrained by being injected with a tranquilizer so that he goes to sleep. Can the Commonwealth describe how this is consistent with Outcome 2, "Rights Protection" of the National Disability Strategy, and comment on whether such practices, particularly in relation to 2.4, "Review restrictive legislation and practices from a human rights perspective" are being reviewed?

- g) Given that Custodial Supervision Orders were introduced to protect the rights of people with a mental or intellectual disability presenting in the criminal justice system, have they in fact worked to protect those rights especially if you consider the situation in the Northern Territory and Queensland?
- h) In a recent episode of Background Briefing on the ABC there was mention of a case of a young indigenous individual with an alcohol dependency and some cognitive impairment who was charged with assault – according to his lawyer he would have more than likely received a custodial sentence if found guilty of 4 months but because of his disability it was decided he was unfit to plead and he was then placed in gaol, in maximum security for an indefinite period- he's been there now for five years. Is the Department aware of such cases, how common are they and what is Department proposing to do about them?
- i) Is it true that some individuals have been dealt with in this matter simply because they were deaf?
- j) Is the incarceration of people with a disability who have not been convicted a widespread problem in all states?
- k) What data have you collected regarding this issue and could you please make it all available to the Committee
- l) How does this situation square with our commitments under international human rights agreements we have signed?
- m) Given the advice from the Australian Centre for Disability Law that the practice of indefinite detention regimes for people with cognitive impairments and psychiatric disabilities past the cessation of their supervision or custodial orders most likely breach Australia's obligations to a large number of international conventions, what is the Commonwealth doing to bring the states and territories into line with Australia's international human rights obligations?
- n) In that this situation has a disproportionate impact on our indigenous citizens is this situation truly closing the gap?
- o) Has this situation been exacerbated in the Northern territory by the application of the Intervention?
- p) The defence is often put that there is simply nowhere else to send these people so is this a failing of the criminal justice system or the resourcing of disability services in this country?

The answer to the honourable senator's questions is as follows:

Responsibility for Criminal Law

Under Australia's federal system of government, criminal law enforcement is primarily a matter for the States and Territories, with each managing their own criminal justice system, including police, courts, prisons and parole. States and Territories are generally responsible for criminal laws directed against crimes such as murder, rape, assault, theft and damage to property. Under the Constitution, the Commonwealth is limited to dealing with criminal matters that fall within its federal jurisdiction and within the scope of Commonwealth powers, such as the importation of drugs, people smuggling, theft or destruction of Commonwealth property and social security fraud.

Under the established framework, the States and Territories are responsible for the imprisonment of both state and federal offenders and the conditions under which they are held. Section 120 of the Constitution requires that every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

The Department understands the term Custodial Supervision Order to refer to orders under State and Territory sentencing acts. There is no reference to such orders in the *Crimes Act 1914* (Cth). Instead, Part 1B of the Commonwealth Act sets out specific provisions that relate to court orders that can be made in relation to federal offenders who are found unfit for trial or acquitted because of mental illness. Although federal offenders would be detained in State or Territory prisons or psychiatric hospitals in such cases, the orders authorising their detention would have to be made under the *Crimes Act 1914* (Cth).

The Department is not in a position to comment on the various laws and practices, including custodial arrangements, that apply when a State or Territory offence is in question.

International Law Obligations

The Department is unable to provide legal advice to the Committee, but provides the following information on Australia's obligations under international law.

Australia has international obligations concerning detention under a number of human rights treaties to which it is a party. The most relevant of these treaties is the Convention on the Rights of Persons with Disabilities. Under Article 14 of the Convention, Australia has an obligation to ensure that persons with disabilities, on an equal basis with others,

(a) enjoy the right to liberty and security of the person; and

(b) are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

Australia also has an obligation to ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the

objectives and principles of the Convention, including by provision of reasonable accommodation.

National Disability Strategy

Questions regarding updates on the progress of the 2010-2020 National Disability Strategy are best answered by the Department of Families, Housing, Community Services and Indigenous Affairs. However, investigating ways that the justice system can address the needs of people with a mental illness and/or cognitive disability (including intellectual disability and acquired brain injury), with a strong focus on the needs of Aboriginal, Torres Strait Islander and Maori people, is an action outlined in the exposure draft of Australia's National Human Rights Action Plan 2012.

Inter-jurisdictional Working Group

One way in which the Department is supporting both Outcome Area 2 of the National Disability Strategy and the exposure draft item in the National Human Rights Action Plan 2012 is through active participation on the National Justice Chief Executive Officer's (NJCEO) Working Group on the issue of mental illness and/or cognitive disability in the criminal justice system. The Working Group is examining mechanisms employed within the criminal justice system to address the needs of people with a mental illness and/or cognitive disability and is investigating the role that the justice system can play in supporting diversion outcomes for these groups. This project has a focus on the needs of Aboriginal, Torres Strait Islander and Maori people.

The Department is not in a position to pre-empt the outcomes of this project.

Data Collection

Examination of current data collection methods is not specifically included in the Working Group's Terms of Reference, but this issue may be considered when the Working Group develops options for further work.

The Department is not in a position to comment on data or the various laws and practices relevant when a State or Territory offence is in question. Therefore, the Department is not in a position to comment on the frequency of cases such as that outlined in a recent episode of Background Briefing on the ABC. Likewise, the Department is not in a position to comment on what factors may be considered in such cases, such as whether being deaf is a contributing factor.

The Department is not aware of any people charged with federal offences who are currently incarcerated in prisons without trial after being found unfit to be tried or due to a finding of mental impairment. The Department is not in possession of any other data regarding people charged with State or Territory offences who are in these circumstances. The Department does not have mechanisms for collecting such data and given Australia's federal framework, would not look to begin collecting such data.

Restrictive Practices

In regards to restrictive practices, the Department of Families, Housing, Community Services and Indigenous Affairs is leading the Commonwealth's involvement in the Restrictive Practices Cross-Jurisdictional Reference Group. The Department does recognise the interrelationship between these issues. Restrictive practices are not specifically included in the NJCEO Working Group's Terms of Reference, but this issue may also be considered when the working group develops options for further work.

Intersection between Justice and Disability

The broader issue of improved outcomes for people with mental illness and/or cognitive disability in the criminal justice system is a complex problem which requires cooperation between the disability and justice portfolios at all levels of Government. The Department is committed to maintaining a dialogue with Australia's disability portfolios.

Indigenous Disadvantage

Australian governments have, through the Council of Australian Governments, committed to closing the gap in Indigenous disadvantage. The Department recognises that Indigenous Australians are over-represented in the criminal justice system. It also recognises that alcohol and substance abuse is a key influence in Indigenous Australians' contact with the criminal justice system, and a factor in the incidence of cognitive disabilities.

The Department is not aware of any evidence suggesting that the Northern Territory Emergency Response has exacerbated the situation concerning Indigenous Territorians with cognitive disabilities and their contact with the criminal justice system. There have, however, been a number of encouraging signs in relation to alcohol consumption in the Northern Territory with the implementation of the NTER. If these indications continue, there may be a positive impact on the incidence of cognitive disabilities.