



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Legal Advocacy for vulnerable people with Disability

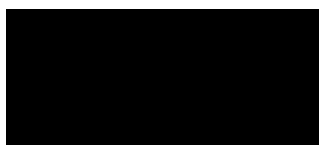
4 September 2017

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
indigenous-incarceration@alrc.gov.au

Dear Sir/Madam

Thank you for this opportunity to share our views on Aboriginal and Torres Strait Islander overrepresentation in criminal justice systems.

Yours sincerely



Michelle O'Flynn, Director

07 38444200

QAI Submission

About QAI

Queensland Advocacy Incorporated (QAI) is an independent and community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland. We do this by engaging in systems advocacy work; campaigns directed to attitudinal, law and policy change; and by a range of advocacy initiatives in this state and nationally.

QAI has a 30 year record of effective systems advocacy, including campaigns directed to attitudinal, law and policy reform and support for a range of advocacy initiatives. For almost a decade, we have provided individual advocacy through three services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program. Our expertise in providing legal and advocacy services and support for individuals within these programs has provided us with a wealth of knowledge and understanding about the challenges, issues, needs and concerns of people who are the focus of this submission.

Everyone is unique, important and of intrinsic value. Each of us should be seen as a whole. Communities should embrace difference and diversity rather than homogenous ideals. QAI avoids language that stereotypes or makes projections based on a particular feature or attribute of a person or that detracts from the worth or status of a person with disability. Appropriate language and discourse is fundamental to protecting the rights and dignity and to elevating the status of people with disability.

QAI's constitution mandates that the Board of Management is comprised of a majority of people with disability. Their wisdom and lived experience is our foundation and guides our direction.

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1. Key Recommendations

(NB - In this submission, 'indigenous' indicates Aboriginal or Torres Strait Islander.)

- The National Disability Insurance Agency (NDIA) must develop a strategy to deliver culturally appropriate services for Aboriginal and Torres Strait Islander people with disabilities who are in the criminal justice system.
- The Department of Social Services and the National Disability Insurance Agency ('NDIA') urgently must clarify which approved NDIA-funded supports are available to prospective and existing indigenous NDIS participants in custody or on correction orders and how it (the NDIA) monitors and ensures that NDIS participants access the supports they are entitled to while in custody.
- Revisit and complete implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.
- Indigenous people with cognitive impairments are subject to indefinite detention in Queensland and some other Australian jurisdictions. The Senate Standing Committee on Community Affairs must resume its inquiry 'Indefinite detention of people with cognitive and psychiatric impairment in Australia'.
- Indigenous people who have disabilities in forensic facilities must receive culturally appropriate services.
- Use forensic detention only as a last resort. Direct resources to community-based programs that allow people to receive supports in their communities of origin.

- In undertaking this Inquiry, the ALRC should consider the National Disability Strategy and the Report into Provision of Services under The NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition.¹

- Each state and territory should develop a Disability Justice Strategy² that:
 - aims to reduce overrepresentation
 - sets up trials for diversionary options
 - mandates high level cooperation between the Queensland Police Service, the Department of Justice and the Attorney-General, the Department of Communities and the National Disability Insurance Agency.

- The Commonwealth should fund research on indigenous approaches to disability in order better to understand how to engage with this group.
- The Commonwealth should fund research on the incidence and needs of indigenous people with disability in criminal justice systems, in general and in particular as they interact with:
 - police
 - courts
 - corrections
 - post-corrections supports
 - legal assistance services.

- Police services should assess and revise their Disability Plans so that they are consistent with the *Convention on the Rights of Persons with Disabilities* (CRPD), the *Convention Against Torture* (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination and current best practice in police mental health and disability service delivery, including:
 - the need for early and repeated police training in mental health awareness and crisis de-escalation

 - the need for communication between front-line services.

¹ Joint Standing Committee on the National Disability Insurance Scheme
 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MentalHealth/Report>

² South Australia has one.

- conditions for the review, monitoring and reporting on the plan.
- Police services should update their Vulnerable Persons Policies (or equivalent) to include specific directions regarding the treatment of indigenous persons with intellectual impairments and other indigenous people with disability.
- Police services should renew their focus on early and repeated police training in mental health awareness and crisis de-escalation.
- Government must coordinate communication between front-line services.
- Police services should amend their operational procedures with the assistance of and in consultation with the Anti-Discrimination Commissioner and the Race Commissioner to provide enhanced guidance on how police can improve communications with people with an intellectual disability or cognitive impairment.
- Police powers around public nuisance and order offences must be used judiciously and in some instances curtailed.
- It is essential that Police are trained and given incentives to act with discretion, particularly in relation to minor public space offences.
- We support a more therapeutic approach to these offences, in which police can play a major role.
- It is vital that Police have training in the diverse means of communication employed by people with disability to gain better understanding and to avoid misinterpretation of behavioural communication.
- Police must have training in communicating with indigenous people with disability in order to be understood and so not to instill unnecessary fear.



2. Introduction

QAI submits these comments because of our work with persons with disabilities in the criminal justice system rather than any expertise in Aboriginal and Torres Strait Islander issues. The majority of indigenous people with disabilities who come into contact with criminal justice systems have some form of cognitive disability, including intellectual disability; mild to borderline intellectual disability; acquired brain injury and foetal alcohol spectrum disorders. The overwhelming majority of these individuals also experience a range of psychosocial disabilities related to mental health impairments. The combination of these issues significantly impacts upon the person's daily functioning, often resulting in compounding social disadvantage and complex support needs.

Our anecdotal experiences indicate the overlapping impact of indigenous and disability status. According to recent research involving face-to-face interviews with all but a few of Queensland's indigenous prisoners, for example, nearly all indigenous prisoners have what the researchers termed a 'mental health disorder', which includes intellectual impairment, mental illness and substance use disorders.³

Inference from other research also appears to confirm the overlap. According to the Australian Bureau of Statistics, indigenous Australians are nearly four times as likely to have an intellectual disability, and indigenous people in Queensland are almost twice as likely to need assistance with core activities.⁴

While approximately two percent of the general population has intellectual disability, a 2002 survey conducted by Queensland Corrective Services showed that people with intellectual disability comprise about ten percent of prisoners, indicating that people with intellectual disability are imprisoned at five times the rate of the general population in Queensland.⁵ New South Wales research in rural jurisdictions with high Aboriginal and Torres Strait Islander populations shows that more than half of the accused were likely to have intellectual

³ E Heffernan, K Andersen, A Dev, S Kinner. 2012. 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons'. *Medical Journal of Australia*.

⁴ ABS 2006 Census.

⁵ Queensland Corrective Services. 2002. *Intellectual Disability Survey*.

disability.⁶ Baldry's 2012 research established that approximately 24 percent of all people and 43 percent of Aboriginal and Torres Strait Islander defendants appearing before a NSW court had an intellectual disability.⁷

Almost half of Queensland prisoners have a disability, including intellectual disability, mental illness, acquired brain injury, fetal alcohol spectrum disorder and other forms of intellectual impairment. People with intellectual impairments alone represent up to 30 percent of the Queensland prison population, and among Queensland Aboriginal and Torres Strait Islander prisoners the proportion with disabilities is even higher:⁸

A Queensland sample of Aboriginal and Torres Strait Islander prisoners in nine prisons revealed that a staggering 72.8 percent of Aboriginal and Torres Strait Islander men and 86.1 percent of Aboriginal and Torres Strait Islander women had at least one mental health episode in the preceding twelve months, against a 20 percent rate in the general community.⁹ The remand sample was even higher: 84.4 percent overall compared with 70.4 percent overall.¹⁰

The graph below shows the respective 12 month prevalence of anxiety, psychotic, depressive and substance misuse disorders experienced by the general population compared to the prevalence among Queensland Indigenous prisoners.¹¹

⁶ S Hayes. 1997. 'Prevalence of intellectual disability in local courts. *Journal of Intellectual and Developmental Disability* 22(2): 71-85.

⁷ E Baldry, L Dowse & M Clarence. 2012. *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*. University of New South Wales. Available from: www.adhc.nsw.gov.au/about_us/research/completed_research.

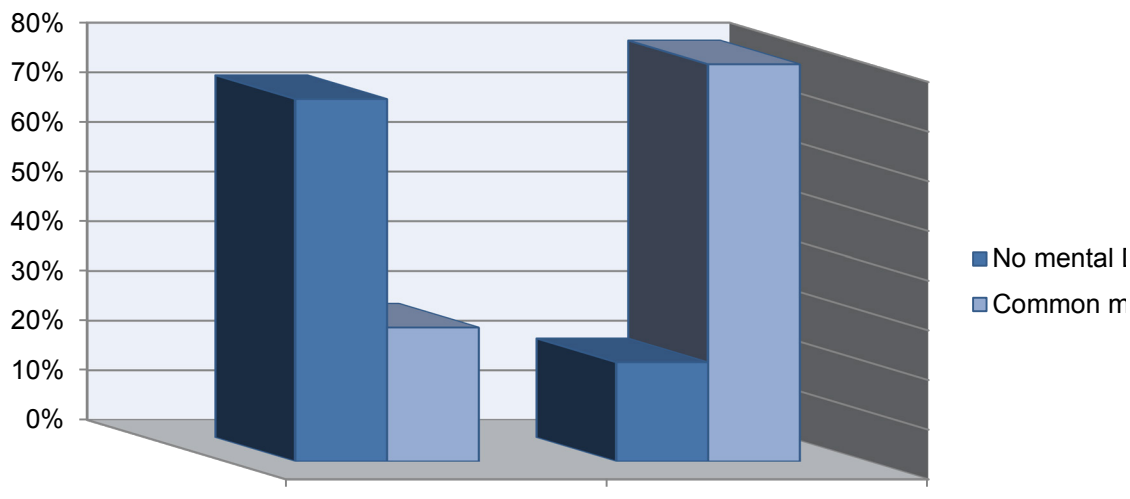
⁸ I Heffernan, K Anderson & K Dev. 2012. *Inside Out - The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report*. Queensland Forensic Mental Health Service.

⁹ Queensland Forensic Mental Health Service. 2013.

¹⁰ The term 'mental health disorder' is used to describe both mental illnesses such as depressive, anxiety and psychotic disorders and substance use disorders by Heffernan et al. 2012. *The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report*. Queensland Government.

¹¹ E Heffernan, K Andersen, A Dev, S Kinner. 2012. 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons'. *Medical Journal of Australia*. 197(1):37-41.

12 month prevalence of common mental health disorders in Aboriginal and Islander people in Qld prisons: Source Heffernan, K Anderson & K Dev. 2012. Inside Out - The Health of Aboriginal and Torres Strait Islander People in Custody Report. Queensland



3. Pathways

There are common criminal justice pathways for indigenous people with complex disability needs. In Queensland, the first is the common circular path: indigenous people churn through the system as they are arrested, convicted and sentenced, arrested, convicted and sentenced for lesser crimes.

In another, Queensland magistrates have the power to suspend simple proceedings and refer defendants who may be unfit or unsound to the NDIA,¹² but this option has only recently been established and few if any defendants have benefited by it.

The third pathway is conviction and imprisonment for indictable offences. The fourth and much less common pathway is diversion into the Mental Health Court and the making of forensic orders. The court, or mental health review tribunal, will assess a person's risk to themselves or others and need for ongoing treatment, and can impose forensic orders to detain the person in a prison, hospital or mental health care facility. About half of the detainees at Queensland's 'Forensic Disability Service' are indigenous people. No-one has yet transferred from this facility although it was originally conceived as a transitional one.

¹² Section 172 *Mental Health Act 2016* (Qld).

People are stuck there, their capacities stagnating or degenerating, because they so rarely have stimulating exposure to new environments.

Generally, disabilities are not recognised or taken into account as indigenous people move through the system, often because of the lack of expertise or opportunity to identify impairment, because defendants actively conceal impairment as a ‘weakness’ or liability, or because lawyers advise their clients to plead guilty and avoid the issue of fitness for trial and the possibility of indefinite detention.

Access to the NDIS may be an opportunity to decrease incarceration rates for people with a cognitive and psychosocial impairment, particularly for Aboriginal and Torres Strait Islander people who are overrepresented amongst those in prison with complex disability support needs. To date, there is no data available on the number of people incarcerated who are NDIS participants or in the process of applying to become participants.

4. Young Aboriginal and Islander people and the juvenile justice system

We rely on NSW figures again. The *Young People in Custody Health Survey (YPCHS)*¹³ and the *Young People on Community Orders Health Survey*¹⁴ provided detailed health data, including cognitive disability/mental health status for young people in custodial facilities and on community based supervision orders in NSW. The researchers adopted a ‘culture fair’ approach to measuring cognitive impairment which aims to eliminate the cultural bias inherent in conventional testing. The *YPCHS* researchers compared the respondents’ performance on the Wechsler Abbreviated Scale of Intelligence (WASI) against their performance on the Performance (non-verbal) IQ scale, finding that the 37 percent of indigenous detainees with intellectual disability result using the former test fell

‘Disability’

Some Indigenous Australians find the concept of disability foreign or irrelevant, reducing the likelihood that surveys such as the 2006 Census and the 2009 National Aboriginal and Torres Strait Islander Social Survey accurately record indigenous disability. The First Peoples Disability Network has suggested that “in traditional language there was no comparable word to disability, which suggests that disability may not have been accepted as part of the human experience”.¹

¹³ NSW Department of Juvenile Justice, 2003. *NSW Young People in Custody Health Survey Key Findings Report*, Haymarket,

¹⁴ D Kenny, P Nelson, T, Bulter. C Lennings, M Allerton & U Champion. 2006. *NSW Young People of Community Based Orders Health Survey 2003-2006: Key Findings Report*, University of Sydney.

to around 10 percent with the culture fair measure - a figure that is more consistent with the proportion of non-indigenous detainees (~ 10 percent) with intellectual disability.¹⁵

On community based orders the culture fair estimate of Indigenous young people with an intellectual disability represents 8 percent of the sample, indicating that Indigenous young people in contact with the juvenile justice system are 3 to 4 times more likely to have an intellectual disability than the general population.

The *Young People in Custody Health Survey* and *Young People on Community Based Orders Health Survey* both found a high level of mental illness amongst their population sample:

- 88% reported mild, moderate or severe symptoms consistent with a clinical disorder¹⁶
- 8% of males and 12% of females in custody reported that they had attempted suicide.¹⁷

If anything these figures are likely to underrepresent the crisis, given what we know of adult Aboriginal and Islander overrepresentation from the work of Heffernan *et al* cited below.¹⁸

5. Why Overrepresentation?

5.1 Social disadvantage

The disproportionate presence of indigenous people with disabilities in prisons challenges Australia's egalitarian self-image and the strength of our commitment to human rights, natural justice and systemic equity. Political and moral judgements aside, this overrepresentation is costly to indigenous people with disabilities and their families who cope with disruption, stigma, loss and separation; and costly to Australian society more broadly in both human and in dollar terms.

Indigenous people with intellectual impairments are in prison because they commit crimes *and* because they were born to and continue to live in disadvantaged life circumstances, including homelessness, unemployment, individual and systemic discrimination, dispossession, poverty associated with reliance on Commonwealth income support, and

¹⁵ NSW Department of Juvenile Justice, 2003. *NSW Young People in Custody Health Survey Key Findings Report*, Haymarket, p19.

¹⁶ NSW Department of Juvenile Justice, 2003. *NSW Young People in Custody Health Survey Key Findings Report*, Haymarket, p19.

¹⁷ *Ibid.* p 27.

¹⁸ I Heffernan, K Anderson & K Dev. 2012. *Inside Out - The Mental Health of Aboriginal and Torres Strait Islander People in Custody Report*. Queensland Forensic Mental Health Service.

addiction to drugs, alcohol and/or gambling. They are also in prisons for reasons endemic to criminal justice institutions.

5.2 Over-policing

Police are the default frontline response to Aboriginal people with mental and cognitive disabilities. In the absence of culturally responsive and therapeutic community-based support, regular police contact from a young age sets this group up for a lifetime of 'management' by the criminal justice system.

The Indigenous Australians with Mental Health Disorders and Cognitive Disability in the Criminal Justice System project¹⁹ visited Aboriginal communities in regional and remote New South Wales and the Northern Territory, and they found that police are often the first and only service to show up to a crisis involving Aboriginal people with mental and cognitive disabilities. Police often do not recognise that someone has an intellectual disability or brain injury due to police lack of training in this area.

Police often assume that Aboriginal people are drunk or having a drug-induced mental health episode, and that this means police do not respond appropriately. Interaction can escalate quickly and badly. Aboriginal people with mental and cognitive disabilities have frequent contact with police from a younger age than non-Aboriginal people with disabilities.

According to the Indigenous Australians with Mental Health Disorders and Cognitive Disability in the Criminal Justice System project their age of first contact with police was 3.4 years younger than the non-Aboriginal people.

Aboriginal people have a higher rate of contact with police than non-Aboriginal people, both as victims and offenders, particularly women. Many Aboriginal people feel poorly treated and targeted by police.

Aboriginal people with mental and cognitive disabilities can have long histories of offending, often as a result of behaviour connected with their disability including charges for offences such as offensive language or behaviour, resisting or hindering a police officer, or breaching bail conditions. These histories justify police "hyper-surveillance" of Aboriginal people with mental and cognitive disabilities. Aboriginal people see over-policing as evidence of systemic racism, highlighting the stark contrast between high levels of funding for police in their towns and a lack of funding for Aboriginal community-based mental health and disability services.

¹⁹ <https://www.mhdcd.unsw.edu.au/>

Some remote towns, for example, have long histories of poor relations between police and the Aboriginal community. Towns like Mossman in north Queensland, for example, have de facto apartheid that confines indigenous people to particular pubs and other retail premises.

Sometimes police try to assist young Aboriginal people with mental and cognitive disabilities to get support from human services, but a lack of culturally responsive, therapeutic community-based options means that police become default “care managers” and start to manage this group as offenders from a young age. Greater understanding, accountability and community-police collaboration can help to build more positive approaches and alternatives to supporting Aboriginal people with mental and cognitive disabilities in their communities.

5.3 Differential treatment

As an explanation for overrepresentation, differential treatment in and by criminal justice institutions doubly applies where indigenous persons who have disabilities are concerned. This is the proposition that police, support workers, service providers, defence lawyers, prosecutors, the judiciary and corrective services personnel treat indigenous people who have impairments differently, consciously and unconsciously discriminating to the disadvantage of indigenous people with impairments. Nearly three decades ago, the National Inquiry into Racist Violence²⁰ established that ‘blue on black’ was the biggest category of violence (by far).

There are compelling reasons for considering the use of violence by police officers against Aboriginal and Islander people as part of an institutionalised form of racist violence. The wider policing processes which bring such a massively over-representative number of Aboriginal people into the criminal justice system has the effect of subjecting those persons to violent treatment: the violence which is part of the routine practices of policing. In other words, the processes of criminalisation entail subjecting individuals to varying degrees of violence. Those same processes selectively discriminate against Aboriginal people. In addition, the over-representation has racist outcomes. Aboriginal people are seen in some way to be 'naturally' criminal.²¹

Whether a person is a victim, defendant or witness in a criminal matter, initial interactions are generally with a police officer, and this initial interaction can set the scene for the overall interaction with the criminal justice system. As far back as 1993, the *Burdekin Report* recognized that police need training in how to work with people who are mentally ill,²² and

²⁰ The Moss Inquiry, 1991. Human Rights Commission.

²¹ *Ibid*: page 120.

²² Human Rights and Equal Opportunity Commission. 1993. *Human Rights and Mental Illness: Report of the national inquiry into the human rights of people with mental illness. 'the Burdekin Report' Volume 1.* p 196-197.

training in cultural sensitivity towards the mental health needs of, for example, Aboriginal and Islander people, whose behaviour the police may misinterpret.²³

It is important that police are trained appropriately to identify and accommodate the needs of persons with intellectual and mental health impairments, and while it is not their job to provide support, the police are best placed to notify others that legal and emotional support may be needed.

6. Disability awareness

According to the 'differential treatment hypothesis' police may (usually unconsciously) view persons with disability as inherently prone to crime, focusing inappropriately on people with intellectual impairments to the exclusion of other potential explanations and suspects. The churning of particular persons with disability through the criminal justice system rather than any inherent tendency to break the law only reinforces this view. The lack of appropriate services and less-than-ideal police responses to the needs of vulnerable people with disability together with the recurring cycle of arrest, processing, conviction, sentencing and correction only reinforces the association between impairment and criminality, becoming a self-fulfilling prophecy.

One consequence of unsatisfactory police training in impairment awareness and disability issues is that some police officers are unable to identify that suspects have relevant intellectual impairments in the first place.²⁴ This can have flow-on effects: coerced confessions and other violations of rights, including the right to remain silent and the right of a vulnerable suspect to have a third party present during the police interview, and unsuccessful prosecutions because of faulty questioning.

Given their strategic commitment to reducing that overrepresentation,²⁵ police must receive training in how to interact with people with different kinds of impairment that are relevant to and impact upon police procedures. QPS officers do receive training in the identification of and interaction with people with disabilities. For example, the QPS Education Services Branch guide *Contemporary Issues: Disability, Policing Services and the Community* (2nd edition, 3rd revision) contains descriptions of many common forms of intellectual impairment, and advice on appropriate police interaction with suspects, witnesses and victims. QAI was

²³ Ibid- see Chapter 23.

²⁴ This important issue is discussed at length later in this chapter.

²⁵ Ibid.

asked to consult on the most recent revision of this work before publication. Nevertheless, QAI's justice support work with suspects suggests that the training provided to police in the area of disabilities, if not inadequate, is sometimes ignored.²⁶

Police need comprehensive policy guidance that provides them with alternative ways of interacting with people with various forms of intellectual impairment. To better serve the public and to interrupt suspects' cycling through the system police must develop practices that allow them to fulfil both their duty to investigate crime and their obligations to people with disability subject to the *Convention on the Rights of Persons with Disabilities*.

7. Public Space Policing

Police take an oath to keep the peace and the street is the focus of police activity. This focus places indigenous people with intellectual impairments - who are more likely to live in public spaces - at a disadvantage.

Evidence suggests that indigenous people with intellectual impairments are:²⁷

- more likely to be arrested, detained and questioned for minor public order infringements
- disproportionately affected by police powers around public order behaviour
- more easily persuaded to confess, and
- more likely to misunderstand their rights, such as the right to silence.²⁸

We have provided evidence that people with capacity impairments tend to be clustered at the lower end of the socio-economic scale, are more likely to live in private rentals and group homes, in boarding houses and hostels or on the street and to be caught up in the petty criminality associated with poverty and drug addiction, and are particularly susceptible to prosecution for public nuisance offences (also referred to as public space offences) such as begging, trespass and failure to follow a police direction. Indigenous people's impairments or

²⁶ Police actively sought to question a client with an obvious intellectual impairment was questioned

²⁷ See, for example, NSW Law Reform Commission. 1996. *Report 80: People with an Intellectual Disability and the Criminal Justice System*.

²⁸ A police officer must caution a suspect that they have a right to silence before questioning: *PPRA* s 431; *PPRR* Sch 9, 26(1). If the police officer suspects the relevant person does not understand the caution, the officer may ask the person to explain the meaning of the caution in their own words: *PPRR* Sch 9, 26(2).

disabilities, coupled with associated psychological and environmental factors can make them more visible and less tolerated by others in public spaces.

- Indigenous persons with intellectual impairments are subject to a higher level of police surveillance and suspicion than others. Members of the public are more likely to experience discomfort in the presence of people who are perceived as different or dangerous and may seek police assistance in moving them on. Indigenous persons with disability are therefore particularly susceptible to being charged by Police with public nuisance offences, whether or not there has been wrongdoing.
- Public space policing typically involves verbal directions to take certain action, such as to move on. Indigenous persons with disability may find it difficult to comprehend directions, remember them or act in accordance with them, leading to an escalation in law enforcement interventions based on the mistaken belief that the person is willfully disobeying a police instruction. For some people with cognitive impairment or mental illness, talking loudly or calling out is a communication tool and not necessarily intended to offend or annoy anyone. 'Resisting arrest' can simply be being loud or yelling out - something that a person with cognitive impairment or mental illness may do when apprehended by more than one officer.
- Indigenous persons with intellectual impairments may find it difficult to comply with legal obligations such as a requirement to pay a fine: they may not be able to afford to do so or may find it difficult to organize themselves to do so and are therefore much more likely to end up serving a default period of imprisonment. Because their underlying living situation is unlikely to change, they may be charged repeatedly with the same or a similar public nuisance offence. This may result in an accumulation of undischarged fines and an escalation in sanctions imposed not only for the nuisance behaviour but because of their failure to deal with legal consequences. Public nuisance offences are generally victimless crimes with disproportionate impact on persons with disability and other socially disadvantaged groups.

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