



CDU / Menzies Child Rights Forum

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Children with Mental Disabilities – a project across 28WU Member States – why not the NT? Me, MDAC and the eye-opening difference between the EU and the NT!

What are Human Rights?

Human Rights are fundamental rights that each of us is entitled to simply by virtue of being a human being. They are universal – they belong to each person regardless of their nationality, place of residence, sex, sexual orientation or gender identity, race and ethnicity, religion, language or other status.

Human rights are set out and guaranteed by law, such as in international treaties.

- Universal Declaration of Human Rights (UNDR)
- UN Convention on the Rights of the Child (CRC)
- UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- UN Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- **UN Convention on the Rights of Persons with Disabilities (CRPD)**

These texts set out which human rights are guaranteed. They also place obligations upon states (governments, parliaments and the judiciary) to respect, protect and fulfill human rights.

The CRPD

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is the first binding international human rights instrument to explicitly address disability.

Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009. **This means there should be implementation, reporting and there can be individual complaints.**

The CRPD entered into force for Australia on 16 August 2008, and the Optional Protocol in 2009. **7 -8 years of application in the NT.**

The purpose of the CRPD is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.

Australia's Declaration

Australia has ratified the CRPD and its Optional Protocol with the following declaration:

“Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others.”

Vulnerability in Australia

The Red Cross Vulnerability Report for Australia for 2016 highlights that a disproportionate number of highly disadvantaged people end up in prison. It is estimated prisoners are up to three times more likely to have mental illness and up to 15 times more likely to have a psychotic disorder. Another study has found 42% of male prisoners and 33% of female prisoners have an acquired brain injury. Crime is higher in more disadvantaged postcodes, where there's entrenched poverty, segregation and residential instability. So people go into prison disadvantaged and they come out of prison even more disadvantaged. And this also hits innocent families and communities. When a child loses a parent to the prison system this becomes an intergenerational problem.

<http://www.redcross.org.au/files/VulnerabilityReport2016.pdf>

Vulnerability in the NT criminal justice system

- The NT imprisonment rate sits at 847 per 100,000 adults nearly four times that of its nearest Australian rival, Western Australia. In the Territory, 86% of those in prison and 96% of those in juvenile detention are Indigenous. The daily average number of prisoners has more than doubled in the last 20 years. The new \$500 million adult prison in the NT will reach capacity by 2018 and has seen the youth detention facility re-located to the former adult prison which had been condemned.
- The mandatory sentencing regime and restrictive bail laws, has caused a significant growth in prisoner numbers. Daily averages grew by 31% over just two years. 38% of those entering an adult prison and 60% of those entering youth detention are un-sentenced on reception. This has not led to a decrease in offending or recidivism.
- Remote health services are limited which has direct and indirect effects on rates of Indigenous incarceration. Transport back to community on release was removed leaving people homeless on release. Community-based orders are often unavailable in remote areas as there are no programs or staff to supervise them. Overcrowding and poor housing means the suitability requirements of a Home Detention Order cannot be fulfilled. Access to in-prison programs is low overall. Access to culturally appropriate programs is even lower. Suitability and success is rarely evaluated and often ignored at the changing whim of political rhetoric.
- Alcohol-related harm is rife and child protection notifications have increased. 26% of Indigenous children are in out-of-home care. Youth justice diversionary programs are underfunded and exclude young people without a responsible adult. There are few programs for young people in detention or in the community, particularly in areas such as violent and sexual offending.
- **No rights based approach is taken in any court despite the requirements of the CRPD and other instruments.**
- **Recent complaints about youth sentencing drew responses from all quarters based solely on local legislation.**

Mental Disabilities in the NT

People with complex cognitive and psychiatric needs and offending behaviours, or who are assessed as a risk to the community, are incarcerated and held indefinitely in maximum-security prisons in the NT largely because there is no or no sufficient alternative provision and no services to effect crime prevention through health and welfare.

What of the Children?

No CRPD assessment has occurred in the NT – not just about ramps.

No specific implementation in the NT

No training in the NT

No awareness in the NT? If aware, no decent action.

Decisions made on a lack of comprehensive data

In the context of the number of people with cognitive and psychiatric impairment in the NT, there is no proper data. Nobody knows exactly how many people, let alone Aboriginal people, with a cognitive impairment are dealt within the Northern Territory's courts or the penal estate each year. For example, Foetal Alcohol Syndrome Disorder (FASD) is the leading cause of non – genetic disability in Australia. At present, there is no formal assessment system for a person, either upon reaching school age or after first contact with the justice system, to undergo assessment for FASD or any other physical or mental disability or cognitive or psychiatric impairment. It is unknown how many youth or adults are held within the NT penal estate living with foetal alcohol related disabilities and therefore the chances of suitable health responses are reduced.

Why is there no comprehensive research?

What of the wider community?

A shift in thinking

Convention on the Rights of Person with Disabilities (CRPD) purports to represent paradigm shift, reflecting progressive attitudes and approaches to persons with disabilities. It moves away from the medical model of disability which views people with disabilities as objects (of treatment, management, protection, charity and sometimes pity and fear), and towards the social model of disability which regards people with disabilities as subjects of the full range of human rights on an equal basis with others, and where people's capacity to make decisions is presumed. Two substantive areas demonstrate the 'paradigm shift'. The first is legal capacity and the second is the right to live in the community.

Convention on the Rights of Persons with Disabilities

- Right to non-discrimination
- Right to live in the community
- Right to education
- Right to health
- Freedom from abuse
- Right to access to justice and a fair trial

The 2016 EU Project

MDAC (www.mdac.org) is an international human rights organisation that uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide.

These rights are not being enforced in the NT
Instead there is a call for incarceration (Largely for acquisitive crime)
against a background where there is ample research that the
disempowered and disadvantaged are more likely to commit offences.
Is the very failure to empower the NT children through a rights based
approach that is creating the social failure in the NT?

Incarceration of Children with Mental Disabilities

Article 5 CRPD prohibits discrimination

Disability-based discrimination = any distinction, exclusion or restriction based on disability which impairs the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others.

Are rights being violated in the NT?

Is the very failure to empower the NT children through a rights based approach creating the social failure in the NT?

Living in community

Every child has the right to live and be supported to live with their family in the community.

Article 19 of the CRPD sets out that each person, irrespective of their disability or level of impairment, has the right to live in the community.

Article 23 of the CRC sets out “children should enjoy a full and decent life in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”

Are children with mental disabilities in the NT presumptively institutionalised or denied community support services which would allow them to continue living in the community?

Right to education

Regardless of nature or degree of their impairments, children have a right to education that is inclusive.

Article 24 CRPD, Article 28 CRC, ECHR Protocol 1, Article 2.

Specifically Article 24 of the CRPD establishes *“the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels.”*

Are children with mental disabilities in the NT excluded from education or segregated, for example, through detention?

Right to Health

Article 25 CRPD, Article 242 CRC, Article 35 Charter of Fundamental Rights
Article 25 CRPD: *“persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.”*

Are children with mental disabilities in the NT enjoying their rights to the highest attainable standard of health and access to health services without discrimination?

Freedom from Abuse

Torture, inhuman or degrading treatment are prohibited

Children with mental disabilities have a right to be free from exploitation, violence and abuse.

Articles 15, 16 and 17 CRPD; Articles 19, 24 and 37(a) CRC; Articles 1, 2, and 16 CAT

Art. 15 CRPD *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”*

Art. 37(a) CRC *“no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”*

Unicef estimates that children with disabilities are 3 to 4 times more likely to experience physical and sexual violence, including neglect, than non-disabled children.

Their impairments, higher reliance on care, social isolation, and the stigma attached to disabilities are all factors increasing the risk of violence against children with mental disabilities

Failure to provide adequate medical treatment has been held to be inhuman or degrading treatment. Are children with mental disabilities in the NT receiving adequate medical treatment? How will Australia fulfil its obligations under the CRPD in relation to the NT?

Right to Access Justice & Fair Trial

Access to justice means the ability to seek and obtain an effective remedy for a violation of one's rights or fundamental freedoms.

Set out in Art. 8 UNDHR; Art. 13 CRPD; Art. 13 ECHR; Art. 47 EU Charter on Fundamental Rights

Right to be heard is an important aspect – Art. 12 CRC *“the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

Also coupled with right to a fair trial: Art. 14 ICCPR, Art. 6 ECHR, Art. 40 CRC

Barriers to accessing justice:

- 1) Denial of the right to be informed
- 2) Nonexistence or inaccessibility of complaints mechanisms
- 3) Discriminatory failure of police/prosecutor to investigate/prosecute
- 4) Failure to accommodate
- 5) Failure to take measures to protect victims and women

Is the court system in the NT inadequate in relation to children with mental disabilities accused of crime?

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International Avenues – Treaty Bodies

Each UN human rights treaty has a “treaty body” set up under it. These bodies consist of independent experts who enforce the treaty and monitor its implementation by State parties. Treaty bodies also serve a quasi-judicial role – they are able to hear individual complaints and give redress. There are three ways a treaty body can review challenges against a State Party’s implementation:

- Individual communications
- State-to-state complaints
- Inquiries

Will the Royal Commission on Youth Detention provide material for use at international level?

What mechanism will the NT provide to assist with individual complaints?

Given the lack of implementation of previous inquiries / reports - Is it time for Interim Measures?

Children in detention.....

To stop children with mental disabilities from entering and re-entering the justice system, it is important that we identify, assess, divert and support those who come before the Northern Territory's Courts. This requires removal of the application of any mandatory provisions, improved resourcing for therapeutic techniques, training for professionals and all stakeholders, reliable assessment tools, services in remote communities and developing a bridge between those services and the criminal justice process.

Children with Mental Disabilities – a project across 28WU Member States – why not the NT? Some recent investment is a start. Not just a question of training and reports are not enough. Child Rights in the NT – an Australian disgrace.

Thank you