

Chapter 4

The over-representation of disadvantaged groups within Australian prisons

Introduction

4.1 This chapter examines the over-representation of disadvantaged groups within Australian prisons including Aboriginal and Torres Strait Islander peoples and individuals experiencing mental ill-health, cognitive disability and hearing loss. Other issues were also identified such as an increase of juvenile representation in the justice system, the correlation between the completion of high school and offending behaviour, as well as the link between incarceration and language impairment.

Young people in the justice system

4.2 In Australia, the upper age limit for treatment as a young person in the justice system is 17 in all states and territories except Queensland, where the limit is 16. However, some young people aged 18 and older are involved in the youth justice system—reasons for this include the offence being committed when the young person was aged 17 or younger, the continuation of supervision once they turn 18, or their vulnerability or immaturity.¹

4.3 The Australian Institute of Health and Welfare (AIHW) administers the Juvenile Justice National Minimum Data Set (JJ NMDS). Both Western Australia and the Northern Territory have not contributed to the NMDS since 2007–08. The AIHW estimates national totals based on previous data supplied from those jurisdictions.²

4.4 AIHW data indicated that on an average day in 2011–12, there were almost 7,000 young people aged 10 and older under youth justice supervision. A total of 13,830 young people were supervised at some time during the year. Among those aged 10–17, this equates to a rate of 26 young people per 10,000 under supervision on an average day and 52 per 10,000 during the year.³

4.5 Most young people under supervision are male and the majority are aged 14–17. Most young people are supervised in the community with 1,000 (14 per cent) in detention on an average day in 2011–12.⁴

4.6 Most young people in supervision were from cities (49 per cent) and regional areas (40 per cent). Young people aged 10–17 from remote areas were almost four

1 Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12: an overview*, Bulletin 115, April 2013, p. 3.

2 Australian Institute of Health and Welfare, *Submission 73*, p. 2.

3 Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12: an overview*, Bulletin 115, April 2013, p. 4.

4 Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12: an overview*, Bulletin 115, April 2013, p. 1.

times as likely to be under supervision on an average day as those from major cities (63 per 10,000 compared with 17 per 10,000), while those from very remote areas were six times as likely (103 compared with 17 per 10,000). The AIHW added that, based on postcode of last address, almost 2 in 5 young people under supervision on an average day were from the areas of the lowest socioeconomic status. Young people aged 10–17 from the areas of lowest socioeconomic status were five times as likely to be under supervision as those from the areas of highest socioeconomic status (42 per 10,000 compared with 9 per 10,000).⁵

4.7 The AIHW commented that nationally, the numbers and rates of young people under justice supervision have remained relatively stable over the four years from 2008–09 to 2011–12.⁶

4.8 The Youth Affairs Council of Western Australia submitted that the daily rate of young people in detention in Western Australia between 2007 and 2011 increased by 33 per cent.⁷ The Commissioner for Children and Young People WA also provided information on youth detention, including trends, in Western Australia. While the number of proceedings taken against young people by police in Western Australia decreased (by 20 per cent in 2010–11), the average daily population in juvenile detention grew by 2.1 per cent. Over the five years from 2005, there was a 40 per cent increase. The Commissioner also noted that Western Australia has the second highest rate of juvenile detention in Australia, 0.69 young people per 1,000 in detention, second only to the Northern Territory at 1.55 per 1,000.⁸

4.9 The cost of detaining juveniles is high. The cost of housing a young person in a correction facility is significantly higher than the costs of accommodating adult prisoners. In NSW, just under half of the Department of Juvenile Justice budget is spent on keeping juvenile offenders in custody.⁹

Indigenous young people

4.10 Indigenous young people are over-represented in the justice system. Although less than 5 per cent of young people are Indigenous, on an average day in 2011–12, 39 per cent of those under supervision were Indigenous. In detention, this proportion was higher, where almost half (48 per cent) are Indigenous. Indigenous young people under supervision were younger, on average, than non-Indigenous young people.

5 Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12: an overview*, Bulletin 115, April 2013, p. 6.

6 Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12: an overview*, Bulletin 115, April 2013, p. 16.

7 Youth Affairs Council of Western Australia, *Submission 54*, p. 14.

8 Commissioner for Children and Young People WA, *Submission 23*, p. 2.

9 The Centre for Independent Studies, *Submission 46, Attachment 1*, Sara Hudson, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities', *Policy Monographs*, The Centre for Independent Studies, No. 134, 2013, p. 4.

About 1 in 4 Indigenous young people under supervision on an average day were aged 10–14, compared with 1 in 8 non-Indigenous young people.¹⁰

4.11 Nationally, there were 236 Indigenous young people per 10,000 aged 10–17 under justice supervision on an average day in 2011–12, compared with just 15 non-Indigenous young people per 10,000. Thus, Indigenous young people aged 10–17 were almost 16 times as likely to be under supervision as non-Indigenous young people.

4.12 This over-representation was most notable in detention where Indigenous young people aged 10–17 were 15 times as likely as non-Indigenous young people to be under community based supervision and almost 25 times as likely to be in detention.¹¹ While the Northern Territory and Western Australia have not provided data for the NMDS which covers the whole justice system, data is provided for detentions. In the Northern Territory, there were 39 Indigenous young people aged 10 to 17 in detention on an average night in the June quarter 2011–12. This was a rate of 3.29 per 1,000 Indigenous young people. In Western Australia, the rate was 8.90 per 1,000 Indigenous young people.¹²

4.13 The trend in Indigenous young people under justice supervision is different to the national trend: between 2008–09 and 2011–12, there was an increase in the rate of Indigenous young people aged 10–17 under supervision on an average day from 226 to 236 per 10,000 population.¹³ The level of Indigenous over-representation increased in unsentenced detention over the period from 24 to 31 times the likelihood of non-Indigenous young people.¹⁴

Drivers of juvenile incarceration

4.14 There are multiple reasons for the increased juvenile representation in prisons. These include the disproportionate over-representation of Aboriginal young people held in detention. The AHYW reported that data collections show that young people from areas of low socioeconomic status or remote areas and young people who are homeless or in the child protection are also over-represented in the youth justice supervision system.¹⁵ Other factors include the increasing number of sentenced young

10 Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12: an overview*, Bulletin 115, April 2013, p. 9.

11 Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12: an overview*, Bulletin 115, April 2013, p. 10.

12 Australian Institute of Health and Welfare, *Juvenile detention population in Australia 2012*, Juvenile justice series No. 11, 2012, Tables S2, S10.

13 Australian Institute of Health and Welfare, *Youth justice in Australia 2011–12: an overview*, Bulletin 115, April 2013, p. 16.

14 Australian Institute of Health and Welfare, *Juvenile detention population in Australia 2012*, Juvenile justice series No. 11, 2012, p. vii.

15 Australian Institute of Health and Welfare, *Submission 73*, p. 3.

people being held on remand; the limited implementation of bail and supervision orders; and the geographic concentration of young offenders in disadvantaged areas.¹⁶

4.15 Legal Aid NSW commented that young people are often released on bail subject to onerous conditions such as curfews, requirements to be in the company of a parent, requirements to follow the directions of a parent, and place restrictions. Because of the stringency of such conditions, there is an increased likelihood that the conditions will be breached. Legal Aid NSW also commented that police appear to be giving more attention to bail compliance checking. As a result, the number of bail breach matters coming before the Children's Court has increased dramatically.¹⁷

4.16 This trend has several adverse consequences: a young person breaching bail will end up on remand; and if the young person comes into contact with the adult criminal justice system at a later stage having breached bail multiple times as a juvenile, that person is treated by the courts as a person with a lengthy criminal history which, among other things, decreases the chances of that person being granted bail in the future.¹⁸

4.17 In addition, a disproportionately larger number of juveniles are currently being held on remand in comparison to the rest of the prison population, for example, 53 per cent of the 320 juveniles and young people in custody in NSW held on remand. One of the reasons for remand being that 'a substantial number are refused bail because they are homeless'.¹⁹ The North Australian Aboriginal Justice Agency (NAAJA) observed that on 31 January 2013, 24 of 65 juvenile detainees in the Northern Territory were on remand.²⁰ Many young people are being held on remand due to their difficulty in upholding strict bail conditions and yet over 80 per cent of young people in remand in Western Australia will not receive a custodial sentence once they appear in court.²¹

4.18 The offending behaviour of young people is linked to their circumstances: 'there is strong evidence that children who suffer abuse or neglect are more likely to engage in criminal activity than those who do not'.²² The AIHW noted that almost 15 per cent of young people under juvenile justice supervision received homelessness support in the year before their most recent supervision. There is also an overlap between youth justice and child protection systems. Almost 10 per cent of those who

16 Youth Affairs Council of Western Australia, *Submission 54*, p. 13.

17 Legal Aid NSW, *Submission 38*, p. 3.

18 Legal Aid NSW, *Submission 38*, p. 3.

19 Sara Hudson, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities', *Policy Monographs*, The Centre for Independent Studies, No. 134, 2013, p. 19.

20 North Australian Aboriginal Justice Agency, *Submission 47*, p. 7.

21 Youth Affairs Council of Western Australia, *Submission 54*, pp 14; 17.

22 Western Australian Council of Social Services, Western Australian Association for Mental Health, Western Australia Network of Alcohol and Drug Agencies, *Submission 64*, p. 28.

have had some supervision have also had at least one substantiated child protection notification.²³

Aboriginal and Torres Strait Islander peoples

4.19 Aboriginal and Torres Strait Islander peoples are the most over-represented in Australia's justice systems. The Report on Government Services Indigenous Compendium provided the following information for 2011–12:

- the daily average number of Indigenous prisoners was 7757, 26.6 per cent of prisoners nationally;
- the national (crude) imprisonment rate per 100,000 Indigenous adults was 2246.3 compared with a corresponding rate of 123.7 for non-Indigenous prisoners;
- the national age standardised imprisonment rate per 100,000 Indigenous adults was 1749.7 compared with a corresponding rate of 129.1 for non-Indigenous prisoners.²⁴

4.20 It was noted that there has been an increase in the incarceration of Indigenous prisoners. In 1991, the number of adult Indigenous prisoners was 2,140 and 14 per cent of all adult prisoners identified as Indigenous. Currently, Indigenous people comprise only 2.5 per cent of Australia's population they also incorporate over a quarter of the prison population.²⁵ NATSILS also commented that Aboriginal and Torres Strait Islander peoples are incarcerated at a rate 14 times higher than non-Aboriginal and Torres Strait Islander peoples. This rate has increased between 2000 and 2010 by almost 59 per cent for Aboriginal and Torres Strait Islander women and 35 per cent for Aboriginal and Torres Strait Islander men.²⁶

4.21 The National Justice Chief Executive Officers (NJCEOs) also commented on the trend in Indigenous incarceration and stated that if the rate of Indigenous imprisonment is maintained at current levels, in 2021 the number of Indigenous people in prison on an average day will increase to 10,313. However, if the rate continues to trend upwards as it has over the last decade, in 2021, the number of Indigenous people in prison on an average day will reach 13,558. The NJCEOs stated that this would represent 'a virtual doubling of the number of Indigenous adults in prison over a period of 12 years'.²⁷

23 Australian Institute of Health and Welfare, *Submission 73*, p. 3.

24 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2013 Indigenous Compendium*, pp 8.3–8.4.

25 Sara Hudson, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities', *Policy Monographs*, The Centre for Independent Studies, No. 134, 2013, p. 5. Note: Hudson commented that the increase in the proportion of Indigenous offenders is partly due to more Aboriginal offenders identifying as Indigenous and not just the result of increases in offending rates.

26 National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*, p. 9.

27 NJCEOs Working Group, *Justice Reinvestment/Causes of Crime*, p. 5.

4.22 The South Australian Justice Reinvestment Working Group submitted it is the rate of reoffending of Indigenous people, as well as their over-representation in the justice system, which is of concern. In 2011, 70 per cent of Aboriginal and Torres Strait Islander prisoners convicted of a violent offence had a previous conviction and 81 per cent who were convicted of non-violent offences had a previous conviction.²⁸

4.23 Sisters Inside pointed to the increasing incarceration rate of Indigenous women and stated that not only are Indigenous women the most over-represented population in prison, they also have the fastest growing rate of imprisonment. Nationally, the increase in incarceration rates between 2000 and 2010 was greater for Aboriginal and Torres Strait Islander women than any other cultural group. Over the last decade there was a 58.6 per cent increase in incarceration for Indigenous women compared with a 22.4 per cent increase for non-Indigenous women. The increase in incarceration for Indigenous men was 35.2 per cent. Indigenous women are also more likely to return to prison than non-Indigenous women.²⁹ Indigenous women are also more likely to be in prison on remand and less likely to be granted conditional release or post prison community-based release.³⁰

4.24 Sisters Inside pointed to the significant level of trauma and abuse suffered by Indigenous women beginning in childhood. Many face high levels of ongoing family violence which have been connected to their offences and convictions with 80 per cent of women prisoners in one NSW study stating that they believed their offending was a direct consequence of their victimisation. The effects of repeated victimisation are well documented and can lead to low self-esteem, anxiety, depression, other mental health issues and substance abuse. Sisters Inside concluded:

These factors are all correlated with increased risk of offending and in the case of substance abuse can constitute an offence in itself. Therefore many Indigenous women and girls are not only stuck in cycles of abuse as victims, but also get stuck in cycles of offending in an effort to cope with their difficult life situations.³¹

Drivers of high Indigenous incarceration rates

4.25 It was noted that violent offending is the primary driver of Indigenous incarceration and that offences against justice procedures have a considerable impact. Violent offences account for 48 per cent of all prison sentences and offences against justice procedures 17 per cent.³²

28 South Australian Justice Reinvestment Working Group, *Submission 28*, p. 6.

29 Sisters Inside, *Submission 69*, p. 6; see also Anti-Discrimination Commission Queensland, *Submission 71*, p. 8.

30 Anti-Discrimination Commission Queensland, *Submission 71*, p. 9; Victorian Aboriginal and Community Controlled Health Organisation, *Submission 112*, p. 8.

31 Sisters Inside, *Submission 69*, pp 6–7.

32 NJCEOs Working Group, *Justice Reinvestment/Causes of Crime*, pp 6–7.

4.26 Other drivers behind the over-representation of Aboriginal and Torres Strait Islander people in Australia's prisons are linked to disadvantage: high levels of poverty, poor education outcomes and high rates of unemployment, lack of housing and homelessness, family dysfunction and loss of connection to community and culture.³³ The lack of access to adequate services such as housing, health and schooling also has a direct impact on the growing rates of imprisonment of Aboriginal and Torres Strait Islander people.³⁴ The impact of drug and alcohol abuse on incarceration rates is high, with suggestions that 'alcohol is a factor in up to 90 per cent of all Indigenous contact with the criminal justice system'.³⁵

4.27 The changes to judicial processes have also been linked to increases in Indigenous incarceration. For example, submitters pointed to the impact of mandatory sentencing laws. NATSILS submitted that:

By removing discretion, mandatory sentencing has resulted in inappropriate sentences of imprisonment, disproportionately high imprisonment rates in those jurisdictions in which it exists, and has contributed to the overwhelming overrepresentation of Aboriginal and Torres Strait Islander peoples in the prison population of those jurisdictions.³⁶

4.28 Furthermore, strict bail and monitoring conditions are becoming increasingly difficult to follow for some individuals with unstable living arrangements or a lack of financial means. These pose further issues for Indigenous populations 'especially in cases where an individual does not speak English or seeks to reside in a remote or regional community'.³⁷ The NSW Reconciliation Council also commented that 'police continue to use arrest for minor offences, meaning that Indigenous people are far more likely than non-Indigenous people to be arrested, charged, taken to court and given bail conditions'.³⁸

4.29 A further matter raised in evidence was 'normalisation' of imprisonment. As a consequence, imprisonment loses much of its deterrent effect and becomes a 'rite of passage' for disenchanting young people. Mr Craig Comrie, Youth Affairs Council of Western Australia, stated:

Unfortunately, I have heard numerous stories—in Western Australia particularly, given our distance and the location of our juvenile facility in Perth—of young people in regional areas offending merely so they can be with their friends and peers, because they know that they are in the prison here. I think as well there is an element of young people seeing it as a rite of passage. I would hazard to say that I do not think it is the main contributor that puts young people into the detention system, but it is

33 National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*, p. 10.

34 Just Reinvest NSW, *Submission 44*, p. 12.

35 Law Council of Australia, *Submission 97*, p. 15.

36 National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*, p. 7.

37 National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*, p. 8.

38 NSW Reconciliation Council, *Submission 31*, p. 3.

something that we need to look at, and at providing young people with better opportunities and better support in their own communities so that it does not sound like a good thing to head down to Perth to go to Banksia Hill.³⁹

People suffering from mental ill-health

4.30 A large number of individuals suffering from mental ill-health are contained in Australia's justice system. The AIHW 2010 National Prisoner Health Census found that 31 per cent of people coming into prison reported having ever been told that they had a mental health disorder. Female prison entrants were more likely to have a history of mental health disorder than males. The proportion of prison entrants with a history of mental health disorder was about 2.5 times higher than the general population.⁴⁰ Australians for Native Title and Reconciliation submitted that if personality disorder and substance use disorder is included as a mental health problem the figure goes up to about 90 per cent for women and 75 per cent for men.⁴¹

4.31 This data is supported by the Human Rights Law Centre which stated that:

...around one in every five prisoners in Australia suffers from serious mental illness. There is both a causal and consequential link between imprisonment and mental illness; people with mental illness are more likely to be incarcerated, particularly having regard to the lack of support provided by the poorly resourced community mental health sector, and people in prison are more likely to develop mental health problems, with prisons not being conducive to good mental health.⁴²

4.32 The reasons behind the high rates of incarceration for individuals suffering from a mental illness include their incidence of homelessness and economic difficulties, the deinstitutionalisation and isolation of those suffering from mental illness, and increased alcohol and substance abuse among the general population as well as among the mentally ill.⁴³

4.33 The National Centre for Indigenous Studies and Indigenous Offender Health Capacity Building Group explained that due to a lack of appropriate mental health services 'people with mental illness are often incarcerated rather than treated'.⁴⁴ Once an individual suffering from a mental illness is imprisoned, the situation is often exacerbated as a result of inadequate prison health care. These individuals are

39 Mr Craig Comrie, Chief Executive Officer, Youth Affairs Council of Western Australia, *Committee Hansard*, 17 April 2013, p. 29.

40 Australian Institute of Health and Welfare, *The mental health of prison entrants in Australia*, Bulletin 104, June 2012, p. 6.

41 Australians for Native Title and Reconciliation, *Submission 63*, p. 7.

42 Human Rights Law Centre, *Submission 120*, p. 7.

43 Public Interest Advocacy Centre, *Submission 88*, p. 16.

44 National Centre for Indigenous Studies and Indigenous Offender Health Capacity Building Group, *Submission 83*, p. 2.

managed in other ways, including through segregation, and such methods can have a further detrimental effect on mental health and can cause psychological harm.⁴⁵

4.34 An individual with a mental illness also has a higher chance of being incarcerated if that person also abuses drugs or alcohol as it 'drastically increases a person's risk of negative interactions and outcomes, in particular as it relates to involvement in the criminal justice or forensic mental health system'.⁴⁶

4.35 The National Congress of Australia's First Peoples also commented on the association between mental health conditions and imprisonment rates for Aboriginal and Torres Strait Islander peoples. A recent study of Aboriginal and Torres Strait Islander people in Queensland prisons found that 72.8 per cent of men and 86.1 per cent of women had at least one mental health disorder, compared to a prevalence rate in the general community estimated at 20 per cent. The study concluded that the overrepresentation of Aboriginal and Torres Strait Islander people in prison, the high prevalence of mental disorder, and the frequent transitioning to and from prison, would have flow-of effects in Aboriginal and Torres Strait Islander communities.⁴⁷

Alcohol and substance abuse

4.36 Another disadvantaged group that is over-represented in the penal system is those individuals with a history of alcohol and substance abuse. The South Australian Justice Reinvestment Working Group cited the AIHW's 2010 report on prisoner health which stated that:

- 65 per cent of Australia's prisoners had used illicit drugs in the 12 months prior to incarceration (compared with 15 per cent of the general population using illicit drugs in the previous 12 months);
- 50 per cent reported drinking alcohol at levels that put them at risk; and
- 73 per cent of Aboriginal and Torres Strait Islander prisoners reported alcohol issues.⁴⁸

4.37 A high number of prison inmates blame intoxication for their imprisonment. A review of inmates in NSW and the ACT found that 61 per cent of inmates in NSW and 72 per cent of inmates in the ACT stated that their current imprisonment was due to being intoxicated while offending, showing the direct link between alcohol and drug use and involvement in the justice system.⁴⁹

4.38 Some offences have a high correlation with drug and alcohol use such as homicide, with 47 per cent of 1,565 homicides over six years being categorised as

45 Human Rights Law Centre, *Submission 120*, pp 20–21.

46 Alcohol Tobacco and Other Drug Association ACT, ACT Council of Social Service, Mental Health Community Coalition ACT, *Submission 117*, p. 6.

47 National Congress of Australia's First Peoples, *Submission 53*, p. 8.

48 South Australian Justice Reinvestment Working Group, *Submission 28*, p. 6.

49 National Centre for Indigenous Studies and Indigenous Offender Health Capacity Building Group, *Submission 83*, p. 2.

alcohol related, with both the victim and the offender having consumed alcohol prior to the offence.⁵⁰ Violent offences are in general linked to drugs and alcohol, with drunkenness fueling aggression and hostility. Potent stimulants, for example methamphetamines, can cause severe hostility including aggression, breaking property, or threatening and assaulting individuals with a weapon.⁵¹

4.39 Furthermore, drug and alcohol dependency can push an individual with limited income to commit property crime in order to sustain their habit. Conversely, an individual may resort to drug dealing to finance their addiction. This can create a higher chance of further offending as '[a]mong higher level dealers violence is associated with the drug trade'.⁵²

4.40 For female offenders, there is a stronger association between incarceration and drug and alcohol dependency than for male offenders. The Women in Prison Advocacy Network submitted that the reason for this was that 'women are more inclined to abuse substances as a form of self-medication or coping mechanism for the psychological and emotional distress correlated with their historical trauma'.⁵³ The historical trauma itself may have been the result of the alcohol and drug abuse of a partner, with the partner becoming more aggressive and physically violent.⁵⁴

Fetal Alcohol Spectrum Disorders

4.41 Drug and alcohol abuse can have intergenerational effects, especially for individuals that have been exposed to alcohol in the womb. Fetal Alcohol Spectrum Disorders (FASD) are conditions that are unique to an individual who has been exposed to alcohol during pregnancy and is characterised by:

...a spectrum of conditions which are unique to an individual and which may be physical and/or neurobehavioural...fetal alcohol exposure is often noticed as behaviours which result in a disparity between individual abilities and environmental expectations which increase over time. Frequently undetected, FASD is referred to as the "invisible disability". This may be attributed to the current lack of a comprehensive understanding of FASD among many health professionals and service providers.⁵⁵

4.42 The Royal Australian and New Zealand College of Psychiatrists submitted that the resulting brain damage from prenatal exposure to alcohol can increase involvement in criminal activity due to the following characteristics of FASD:

- a lack of impulse control;

50 Alcohol and other Drugs Council of Australia, *Submission 109*, pp 5–6.

51 Families and Friends for Drug Law Reform, *Submission 123*, pp 9–10.

52 Families and Friends for Drug Law Reform, *Submission 123*, p. 10.

53 Women in Prison Advocacy Network, *Submission 50*, p. 6.

54 North Australian Aboriginal Family Violence Legal Service, *Submission 55*, p. 3.

55 National Organisation for Fetal Alcohol Spectrum and Related Disorders, *Submission 106*, p. 7.

- trouble identifying future consequences of current behaviour;
- difficulty planning and connecting cause and effect;
- difficulty empathising with others and taking responsibility for actions;
- difficulty delaying gratification or making good judgments;
- a tendency toward explosive episodes; and
- vulnerability to social influences such as peer pressure.⁵⁶

4.43 There are other factors that can increase the probability of an individual with FASD committing offending behaviours. Dr Raewyn Mutch, Telethon Institute for Child Health Research, explained:

These conditions are characterized by significant central nervous system dysfunction leading to learning, developmental, sensory and behavioural problems. They are primary disabilities that then go on to develop secondary and tertiary disabilities such as depression, school failure, low self-esteem...They can also go on to develop other mental health disorders and substance dependency.⁵⁷

4.44 Dr Mutch also noted that studies from North America have estimated that juveniles with FASD are 19 times more likely to be incarcerated than those without FASD.⁵⁸

4.45 The National Organisation for Fetal Alcohol Spectrum and Related Disorders also pointed to a North American study which found that '60% of adolescents and adults diagnosed with FASD had been in trouble with the law and 50% had experienced a type of confinement'. Other indicators of higher rates of offending behaviour included '61% of individuals having a disrupted school experience...35% experienced alcohol and other drug problems and 49% had displayed inappropriate sexual behaviours on multiple occasions'.⁵⁹

Cognitive disability

4.46 Individuals with an intellectual disability are similarly overrepresented in Australia's justice system. The Royal Australian and New Zealand College of Psychiatrists referenced a study that examined '1,325 prisoners in Queensland and found that 9% of prisoners had an intellectual disability...three times higher than the prevalence in the normal population (3%)'.⁶⁰ Just Reinvest NSW cited a 2009 NSW

56 The Royal Australian and New Zealand College of Psychiatrists, *Submission 19*, pp 8–9.

57 Dr Raewyn Mutch, Post-Doctoral Research Fellow, Alcohol, Pregnancy and FASD Research Group of the Telethon Institute for Child Health Research, *Committee Hansard*, 17 April 2013, p. 1.

58 Dr Raewyn Mutch, Post-Doctoral Research Fellow, Alcohol, Pregnancy and FASD Research Group of the Telethon Institute for Child Health Research, *Committee Hansard*, 17 April 2013, p. 1.

59 National Organisation for Fetal Alcohol Spectrum and Related Disorders, *Submission 106*, p. 8.

60 The Royal Australian and New Zealand College of Psychiatrists, *Submission 19*, p. 9.

survey that found that 17 per cent of young people in prison had 'cognitive functioning scores consistent with a possible intellectual disability, and 10 per cent met both IQ and adaptive behaviour deficits consistent with...criteria for intellectual disability'.⁶¹

4.47 National Disability Services cited a recent Victorian Law Reform Committee report which found that 'anecdotal evidence and the limited statistical evidence that is available strongly suggest that people with an intellectual disability or cognitive impairment form a large and disproportionate proportion of offenders and victims of crime'.⁶²

4.48 The explanations given for the over-representation of individuals with intellectual disabilities are varied. For example, the Advocacy and Support Centre submitted that there may be some behavioural issues exhibited by people with disabilities that brings them into contact with the prison system, such as 'poor impulse control; lack of insight into offending behaviours; lack of self-control; lack of knowledge around social norms/rules; and difficulties in learning and communication'.⁶³

4.49 The high rate of incarceration of individuals with an intellectual disability could also be a result of a possible susceptibility to 'delinquent behaviour' due to mental disabilities; vulnerabilities in court processes as a result of incomprehension; or psychological and socio-economic disadvantage.⁶⁴ Additionally, it can be particularly difficult for a person with an intellectual disability to communicate instructions to legal representatives, or understand court processes, or the significance of legal issues.⁶⁵

4.50 Specifically, individuals with a complex cognitive disability 'broadly defined as a mental health disorder with an intellectual disability' have a much higher rate of early contact with the justice system than those with a single disability or without a disability.⁶⁶ Prisoners with an intellectual disability have high rates of deferral of parole due to a lack of post-release accommodation with appropriate support. In addition, prisoners with an intellectual disability have a higher average number of prison incidents recorded against them.⁶⁷

4.51 Recidivism rates of this group are also uncharacteristically high with prisoners suffering from an intellectual disability in NSW being 78 per cent more likely to return to prison.⁶⁸

61 Just Reinvest NSW, *Submission 44*, p. 16.

62 National Disability Services, *Submission 41*, p. 3.

63 The Advocacy and Support Centre, *Submission 21, Attachment 1*, p. 4.

64 The Advocacy and Support Centre, *Submission 21, Attachment 1*, p. 11.

65 Redfern Legal Centre on behalf of the CRPD Shadow Report Project Group, *Submission 84*, p. 15.

66 National Disability Service, *Submission 41*, p. 3.

67 National Disability Service, *Submission 41*, p. 2.

68 The Advocacy and Support Centre, *Submission 21, Attachment 1*, p. 11.

4.52 Another issue for individuals suffering from an intellectual disability is the difficulty these individuals have during exchanges with law enforcement. The Advocacy and Support Centre submitted as an example that 'a person with an intellectual disability [is] more likely to admit to offences, including those offences that they may not have committed, due to a desire to please an authority figure (police) or a desire to conceal the fact they do not understand the questions being asked'.⁶⁹

4.53 Difficulties exist for law enforcement as well due to a lack of training to identify individuals with signs of mental health issues or a cognitive disability. NATSILS stated that it:

...often see the failure of police to deal with the mental illness and cognitive/intellectual disabilities of a person who has come into contact with the criminal justice system, for relatively minor offending, without resorting to judicial proceedings and detention.⁷⁰

4.54 The absence of a procedural guide for law enforcement with regards to cognitive disability indicates that these individuals are not necessarily diverted to rehabilitative programs or other alternatives when necessary.⁷¹ Furthermore, there are occasions when an individual with a cognitive disability has to be detained as there are no rehabilitative programs available or they are oversubscribed or underfunded.⁷²

Young people with a cognitive disability

4.55 Legal Aid NSW noted that young people with a cognitive disability or mental health issue are more likely to be placed in care as a consequence of their problematic behaviour. Legal Aid NSW stated that the police and the justice system are increasingly being relied upon in lieu of adequate behaviour management, especially in relation to children with complex needs. For example, a common bail condition imposed on children in out-of-home care is the condition to 'obey the directions of carer'. As a result, children are reported to the police for breaching bail by carers and are subsequently arrested for demonstrating the type of behaviour that, if they were living in a functioning family environment, may have been dealt with without police intervention. In addition, both care workers, using occupational health and safety mandates, and parents have applied for apprehended violence orders (AVOs) against young people as a way of dealing with their behaviour. Legal Aid NSW stated that breaches are common because young people with cognitive and mental health impairments often lack the capacity to understand the conditions attached to AVOs.⁷³

69 The Advocacy and Support Centre, *Submission 21, Attachment 1*, p. 37.

70 National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*, p. 13.

71 Public Interest Advocacy, *Submission 88*, p. 23.

72 Redfern Legal Centre on behalf of the CRPD Shadow Report Project Group, *Submission 84*, p. 21.

73 Legal Aid NSW, *Submission 38*, pp 3–4.

People suffering from hearing loss

4.56 Many submitters commented on the representation of individuals suffering from hearing loss in the justice system.⁷⁴ An individual with hearing loss can have early contact with the criminal justice system due to problematic linguistic development during childhood, which results in poor written literacy and communication, and subsequent poor education and employment outcomes. It was noted that within the justice system, people with hearing loss are disadvantaged. They may face more severe penalties if they cannot communicate effectively with police, if they cannot participate or fully understand court proceedings or cannot understand bail conditions or a parole order because of undetected hearing loss.⁷⁵

4.57 Hearing loss is particularly prevalent in Indigenous communities with over half of Aboriginal and Torres Strait Islander children experiencing some form of hearing loss, and 11 per cent having chronic otitis media.⁷⁶ Aboriginal and Torres Strait Islander people suffer hearing loss at ten times the rate of non-Indigenous people.⁷⁷

4.58 The Anti-Discrimination Commission Queensland submitted that statistical data on hearing loss was not available for those among the general prison population, nor for the Indigenous prison population, however 'informed estimates suggest that the incidence may be very high indeed'.⁷⁸

4.59 Other submitters provided evidence of hearing loss in prison populations. Juvenile Justice NSW referenced a survey conducted in 2009 that found that '18% of young people [in custody] had mild to moderate hearing loss in one or both ears, with a further 32% having at least one ear with a degree of hearing loss'.⁷⁹ NATSILS stated that an investigation among inmates in the Northern Territory corrections facilities found that more than 90 per cent of Aboriginal and Torres Strait Islander inmates had significant hearing loss.⁸⁰

4.60 Hearing loss can have a direct link to recidivism with an individual breaching parole or bail due to miscommunication. NATSILS provided an example of this in its submission:

...a client, who has an undetected hearing impairment, indicates that they understand what has transpired and that they understand the conditions of a

74 See for example, National Congress of Australia's First Peoples, *Submission 53*; Anti-Discrimination Commission Queensland, *Submission 71*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*; Juvenile Justice NSW, *Submission 124*.

75 National Congress of Australia's First Peoples, *Submission 53*, p. 6; National Association of Community Legal Centres, *Submission 103*, p. 10.

76 National Congress of Australia's First Peoples, *Submission 53*, p. 6.

77 National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*, p. 14.

78 Anti-Discrimination Commission Queensland, *Submission 71*, p. 8.

79 Juvenile Justice NSW, *Submission 124*, p. 7.

80 National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*, p. 14.

bail or parole order when in fact they haven't actually been able to hear a thing. Consequently, not being aware of their bail conditions, the client is then released only to unknowingly breach the order and be remanded in custody.⁸¹

4.61 The Senate Community Affairs References Committee report, *Hear Us: Inquiry into Hearing Health in Australia*, expressed concern regarding the links between hearing impairment and incarceration:

The committee is gravely concerned about the potential implications of hearing impairment on Indigenous Australian's engagement with the criminal justice system. Those most vulnerable are Indigenous people from remote areas who do not have English as their first language, or indeed who, due to early onset untreated hearing loss, have little means of communication at all.⁸²

4.62 The Community Affairs Committee stated that any improvements in Indigenous hearing health would have a subsequent positive impact on the reduction in incarceration rates.⁸³

Other disadvantaged groups

4.63 The committee identified other disadvantaged groups during its inquiry, including individuals with an oral-language impairment, who experienced difficulties when interacting with the justice system.

4.64 Oral language impairment is a common factor in young male offenders, with approximately 50 per cent having deficits in both comprehension and spoken language. Associate Professor Pamela Snow and Professor Martine Powell submitted that 'young people with more serious offence histories (i.e. involving interpersonal violence) are particularly likely to have language impairment'.⁸⁴

81 National Aboriginal and Torres Strait Islander Legal Services, *Submission 72*, p. 14.

82 Senate Community Affairs References Committee, *Hear Us: Inquiry into Hearing Health in Australia*, May 2010, p. 147.

83 Senate Community Affairs References Committee, *Hear Us: Inquiry into Hearing Health in Australia*, May 2010, p. 147.

84 Associate Professor Pamela Snow and Professor Martine Powell, *Submission 18*, p. 1.

