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# MDAA's Response to the NSW Law Reform Commission Consultation Paper 11:

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## **Young people with cognitive and mental health impairments in the criminal justice system**

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## **About MDAA**

The Multicultural Disability Advocacy Association of NSW (MDAA) is a state-wide advocacy organisation representing the rights and interests of people from non-English speaking backgrounds (NESB) with disability, their families and carers in New South Wales.

In 2006 MDAA conducted research into people with cognitive and mental health impairments in the criminal justice system. MDAA collected case studies but did not publish the research, some of which relates directly to this inquiry. The purpose of this submission is to raise awareness of the additional issues that affect young people from NESB with cognitive and mental health impairments.

## **MDAA Definitions**

NESB – (non-English speaking background)

- born overseas and whose language or culture is not English;
- born in Australia and who has at least one parent whose first language or culture is not English;
- born in Australia with a linguistic or cultural background other than English or Anglo-Australian who wishes to be identified as such.

## Introduction

Young people from NESB with cognitive and mental health impairments face additional barriers to their peers. When they enter the criminal justice system (the system) many of these factors are exacerbated, although we do not know to what extent and the causes are likely to vary between different groups. Before this group comes into contact with the system, they have experienced barriers to accessing appropriate medical care and are often not diagnosed or misdiagnosed. Once they enter the system, this group experiences difficulties with accessing appropriate legal services and suitable support services.

## Access to legal and disability services

A number of organisations have acknowledged that people from NESB face difficulties in accessing legal services. The NSW Legal Assistance Forum (NLAF) Working Group on Access to Justice for Culturally and Linguistically Diverse (CALD) Communities identified the following barriers CALD communities have in accessing the legal system generally:

- have a fear of the law and legal system
- have different understandings of how the law operates e.g. concepts of civil law
- lack knowledge of their rights and responsibilities in Australia
- lack knowledge or are confused about the roles of different legal services
- prefer to use face-to-face services
- may have low literacy levels in their own language
- have difficulty communicating in English

The NSWLRC identified that young people in general face barriers to being correctly diagnosed with cognitive or mental health impairments. If they are also from a NESB they may not be correctly diagnosed for additional reasons:

- different understandings about disability within NESB communities and/or lack of knowledge, appropriate information or words to translate concepts associated with cognitive disability;
- stigma, shame and family dishonour associated with disability in some NESB communities;
- a tendency for cognitive disability to be concealed by language and cultural differences;
- the lack of culturally appropriate assessment tools; and
- a lack of training, skills, resources and time allocated to identifying the needs of people from NESB with cognitive disability in the criminal justice system.
- Some may incorrectly be diagnosed as having a cognitive or mental health impairment due to cultural misunderstandings or language barriers

These factors disadvantage young people from NESB before they enter the system and are likely to be exacerbated once they are in the system.

### **One, two, or many? – Data on NESB in the criminal justice system**

It is not possible to determine whether people from NESB with cognitive and mental health impairments are over-represented in the system. According to NSW Corrective Services Inmate Census 2009, 16.4% of all prisoners, including those on periodic detention, were from non-English speaking countries (NSW Corrective Services, 2009, p. 3)

It is also difficult to determine whether particular NESB groups are over-represented in the system and using vague criteria such as CALD renders it impossible. The Noetic review of juvenile justice made this comment about data:

The absence of reported data for this group is likely due to the difficulties involved in collecting data on ethnicity, particularly for children and young people. These difficulties include the large numbers of different cultural backgrounds... there are small numbers from specific backgrounds, which is not conducive to data analysis. Additionally, children and young people from CALD backgrounds are not a homogenous group ... do not have the same issues. For these reasons, it is not possible to analyse them as a group. (Noetic Solutions Pty Ltd, 2010, p. 167)

Anecdotally, it is reported that NESB youth are over-represented. In the 'Bail Me Out' report, the Youth Justice Coalition (YJC) found that on the day they collected data from the children's court:

...young people from culturally and linguistically diverse backgrounds were the largest group of young people in custody (37%) on the day of collection, followed by those from an English speaking background (34%) and by those identified as Aboriginal (29%). (Youth Justice Coalition, 2010, p. 10)

These findings are supported by the Australian Research Alliance for Children & Youth who found that:

Second generation young people such as Pacific islanders, Lebanese and Vietnamese are unfortunately also over-represented in the juvenile justice system. Specific areas of need include knowledge about laws, improved police relations, multicultural youth friendly public spaces, and culturally appropriate responses to violent behaviour. (Australian Research Alliance for Children and Youth, 2007, p. 28)

The lack of available data has been observed by the Drugs and Crime Prevention Committee of the Parliament of Victoria. In their final report on strategies to prevent high volume offending and recidivism by young people the committee stated:

During its deliberations for the Inquiry the Committee was keen to establish the extent to which juvenile offending is a problem for Victorians from culturally and linguistically diverse (CALD) communities and the challenges this might pose for these communities... Given the limited evidence available with regard to youth offending among CALD communities, this forum provided an excellent opportunity to obtain valuable information from a small, but enthusiastic sample of Melbourne's various ethnic groups. (Parliament of Victoria - Drugs and Crime Prevention Committee, 2009, p. 5)

From the available data, at least some NESB groups are over-represented in the system, but without better data collection and analysis it is not something that can be easily identified or addressed. MDAA recommends the collection of both ancestry and language other than English spoken data be collected, which are already captured by the ABS Census of Population and Housing.

### **A cautionary tale – is diversion a catalyst for attraction?**

According to the NSWLRC, police use diversionary options under the Young Offenders Act approximately 50% of the time. (New South Wales Law Reform Commission, 2010, p. 62) Whilst this is positive it is not possible to determine whether these options are being delivered in an equitable manner. A number of diversionary measures, such as warnings and cautions, relate directly to the police exercising their discretion. This relies on the assumption that police will exercise their discretion on an equitable basis. MDAA acknowledges that there are benefits for police having discretionary powers. However, the available data does not indicate that this is occurring and may be explained by a number of factors.

Firstly, there is evidence that diversionary measures do not result in more people being diverted from the system. Instead, police simply pursue more individuals. For example, the NSW Ombudsman found that the advent of criminal infringement notices (CINS) resulted in significantly more people coming into contact with the police and receiving CINS in situations where the police previously would have issued a warning or not taken any action (NSW Ombudsman, 2009, p. V). Similarly, the NSW Bureau of Crime Statistics and Research reported that net widening had occurred in the pilot of community conferencing for young adults (BOSCAR, 2007, p. 51).

Secondly, individuals who are distinctive of mainstream groups are more likely to be stopped by police. The NSWLRC Report on Young Offenders stated:

...young people who visibly belong to racial, ethnic or cultural minorities often experience direct or indirect racism when dealing with police. Other research from this time cites the existence of poor

relations between police and young people from racial or ethnic minorities, in particular, Aboriginal young people and those from Indo-Chinese, Arabic or Pacific Islander backgrounds. (NSW Law Reform Commission 2005, p.67)

More recently, VicHealth found that people from non-English speaking countries were more than 3 times more likely to report discrimination in policing. (VicHealth, 2007, p. 32). The Youth Affairs Council of Victoria offered the following explanation:

The tension between the two groups is fostered by a range of stereotypical images pertaining both to young people ('ethnic youth gangs') and to the police (repressive figures associated with authoritarian regimes). Several studies and reports have highlighted the lack of adequate police training, especially cross-cultural training, in dealing with people from culturally and linguistically diverse backgrounds, particularly refugees and recent migrants. Various studies have also shown that CLD young people are more likely than other groups of young people (with the exception of Indigenous young people) to be stopped by the police for questioning. (Youth Affairs Council of Victoria, 2008, p. 28)

As the NSWLRC noted, the limit on the number of cautions is not appropriate for many with cognitive impairments (New South Wales Law Reform Commission, 2010, p. 63). Furthermore, any limit on the number of cautions is inherently discriminatory to groups who are more likely to come into contact with law enforcement and considerably limits the aims of diversion.

Warnings and cautions provide an opportunity to divert young people from the system and should be the preferred method of dealing with young people, especially those who have cognitive or mental health impairments. It is not possible to determine if young people from NESB with cognitive and mental health impairments are benefiting from discretionary warnings and cautions at the same rate as their peers. However, the Noetic Review noted that males and Indigenous youth were more likely to receive harsher penalties from the police than their female and non-Indigenous peers. It also found that there were significant discrepancies in the number of juveniles referred to youth conferencing between local area commands (Noetic Solutions Pty Ltd, 2010, p. 16). The inconsistent application of diversionary provisions indicates that there is a strong possibility that particular groups are not benefiting from the diversionary programs and the police may not be exercising their discretion appropriately.

### **Youth conferencing and diverse youth groups**

The NSW Law Reform Commission summarised youth justice conferences as:

... conferencing is a “community based” way of dealing with young people who have committed crimes. Conferencing is only available where the young person admits to an offence and consents to a conference. The process brings together a young offender (and their family and supporters) with the victim (and their support people)... During the conference, participants can agree on an “outcome plan”. (New South Wales Law Reform Commission, 2010, p. 61)

In their submission to the Victorian inquiry the Youth Action Coalition of Victoria raised the possibility that NESB youth were not benefiting from diversionary programs:

Often culturally diverse young people are not easily able to engage with ‘mainstream’ programs ...this sometimes means they are pushed to ‘higher order’ outcomes. For example, research suggests that sometimes the ‘lower level’ outcomes are less likely to be available to some of the most vulnerable groups eg cautioning for Indigenous young people, conferencing for people from non-English speaking backgrounds. (Youth Affairs Council of Victoria, 2008, pp. 18,19)

People from NESB may have difficulty in engaging in youth conferencing for a range of reasons. Anecdotally, MDAA has identified the following barriers:

1. People from NESB may find it difficult to understand the concept of youth justice conferencing and may be very suspicious of it.
2. People from countries where police have been known to be corrupt or abusive are very fearful of police. A young person may not wish to admit they committed the offence due to fears associated with past experiences.
3. People from NESB may perceive that the attitudes of law enforcement system favour other groups (e.g. perceptions of being over policed) and may be fearful of engaging in parts that vary from formal processes.

None of these barriers should prevent the application of a successful program to NESB youth. Provided that resources are dedicated to address language barriers and cultural misunderstandings, youth justice conferencing should be a viable option for young offenders from NESB. Due to the lack of data on the country of birth or language background, it is not possible to determine if young people, in NSW, from NESB are accessing diversionary programs at the same rate as their peers. However, if they are not delivered in a culturally accessible manner that considers the young person’s circumstances, unless proved otherwise, it is assumed that they are not accessing these programs at an equitable rate. Even fewer of those in that group who have cognitive or mental health impairments would.

The need for specific multicultural services in the juvenile justice system has been raised previously. In 2007 the Australian Research Alliance for Children and Youth made the following recommendation:



There is a need for specific services for multicultural young people within the juvenile justice system, particularly given the proportional over-representation of second generation and newly arrived young people. There is a continued need for cultural sensitivity and flexibility within the juvenile justice system, and for appropriate community education in relation to rights and the law. (Australian Research Alliance for Children and Youth, 2007, p. 30)

The Victorian inquiry also made the following recommendations:

26. ...that the Victorian Multicultural Commission develop culturally and linguistically appropriate programs and resources to assist young people in culturally diverse communities in understanding the law as well as their rights and responsibilities.

27. ...that Victoria Police programs are supported and expanded to train all operational police in interacting with young people from diverse cultural backgrounds. (Parliament of Victoria - Drugs and Crime Prevention Committee, 2009, p. x)

As noted by the NSWLRC, youth conferencing may not be suitable for people with cognitive and mental health impairments for a number of reasons (New South Wales Law Reform Commission, 2010, p. 63). To maximise the likelihood of diversion and to deliver an equitable diversionary system, an alternative diversionary program should be established for those whose situations are not appropriate for youth conferencing so they are not forced into 'higher order' punishments. Such a program should be developed in consultation with organisations that understand cognitive and mental health impairments.

To maximise the effectiveness of the Young Offenders Act, it is essential to ensure that they are delivered in a culturally competent manner and are accessible to people from diverse backgrounds, including people from NESB with disability. This may require more intense work prior to youth justice conferencing to allay fears of individuals from NESB and to ensure they understand the process. This requires interpreters, translated information and appropriately trained support staff. Failure to do so, guarantees that the diversion programs will not be delivered in an equitable manner.

### **Bail and Remand**

The fact that 66% (New South Wales Law Reform Commission, 2010, p. 30) of young people on remand for breaching bail restrictions, breached bail by some means other than the commission of a further offence indicates that a significant proportion are not a threat to the community. By avoiding remand for these individuals, a significant reduction of young people on remand could be made. One way to achieve this is for a presumption for bail where the breach does not involve an act which otherwise would not amount to an offence.

## MDAA's 2006 Case Studies

The following case studies demonstrate that due to a lack of appropriate accommodation and community services, people from NESB with disability are not being diagnosed or receiving appropriate support and as a result come into contact with the police. Unfortunately, they may not access legal or court support services and this can lead to imprisonment.

### Language, education and disability - Adrijana's story

Profile: 22 year old female, parents from Serbia  
Impairment: Intellectual Disability  
Charge: 'break and enter'

#### Education:

Adrijana attended a mainstream school. Despite teachers reporting that her concentration was poor and that she had significant learning difficulties and exhibited 'anti-social' behaviour, her parents did not access any information or support from services. They were not aware of the available services and were unable to navigate the system due to their limited English and not knowing where to go, who to speak to or what to ask. They were also reluctant to discuss their 'problems' with Adrijana with other members of the Serbian community due to fear of being ostracised from the community for not being able to look after their daughter.

#### Recent history

Adrijana had left home several times. She lived in a few refuges but ended up living on the street because the refuges were unable to accommodate her escalating behaviour, which was regarded as 'destructive and threatening to others'. After being homeless for twelve months, Adrijana was arrested and charged with 'break and enter'.

#### Contact with legal system

Adrijana was not identified as having a cognitive impairment. She had no history of contact with disability services and did not receive a disability support pension. It was assumed her difficulty in understanding the court process was because English was her second language. However, Adrijana is more fluent in English than Serbian.

Adrijana was sentenced to a good behaviour bond, which she breached. Throughout the court proceedings she had no access to a support person and had little support to understand the system or to comply with the bond conditions. As a result she served two months in prison. Since her first contact with the criminal justice system Adrijana has been in and out of prison three times. Although her contact with the

system led eventually to identification of her cognitive impairment, Adrijana's behaviour has deteriorated into a pattern of re-offending.

## Lessons learned

- It is dangerous to assume a person's difficulty with understanding something is due to a language barrier
- People from NESB in general will have experienced a series of barriers prior to contact with the criminal justice system. Additional assessment and assistance may be required.
- Appropriate accommodation and support is required for people with cognitive impairments to prevent them from being incarcerated

## **Nowhere to go but gaol – Maria's story**

Profile: 24 year old female, parents from Spain  
Impairment: Acquired Brain Injury and Intellectual Disability  
Charge: break and enter and assault

## History

Maria's parents emigrated from Spain and speak limited English. Maria's ABI was the result of a car accident and she continues to live at home as she was deemed to be ineligible for supported accommodation and other support services because of her non-compliance and violent behaviour.

## Contact with the legal system

Maria was refuse bail because she was regarded as a threat to the community. Maria was on remand for 4 months whilst waiting for a pre-sentencing plan to be developed so she would be eligible for a Community Service Order. Ageing Disability and Home Care (ADHC formally known as the Department of Ageing Disability and Home Care) developed a behavioural plan to support Maria's parents to supervise her at home. Maria was ordered to attend an 'Attendance Centre' several hours a week.

Maria's parents received little support from ADHC and the Probation Service to understand the sentencing process and its outcomes, the significance of the community service order, or assistance to support their daughter to comply with the conditions of the order. Maria breached the conditions and was waiting for a pre-sentencing plan to be developed when MDAA was last in contact with her in 2006.

## Lessons learned

- Appropriate support accommodation needs to be arranged for people whose impairments affect their behaviour. Ideally, this support should be offered prior to contact with criminal justice system.
- Information must be provided, in an accessible manner, to support persons (e.g. parents) to enable them to understand significance of sentences
- Support persons should be provided with support to assist the person with the impairment to comply with any conditions.

## **Fixing fragmented systems**

Young people from NESB with cognitive and mental health impairments are particularly disadvantaged by fragmented systems. The principle that vulnerable people are entitled to a support person during police questioning should be regarded as the bare minimum. Accessing a suitable person at the correct time and addressing the fears experienced by young people who may have had adverse experiences with the police can be difficult. It also requires the police to be able to detect other layers of vulnerability, such as NESB and cognitive and mental health impairments. It also relies on appropriate support mechanisms to be in place.

The Victorian government has established a program called the Youth Referral and Independent Person Program (YRIPP), which is a partnership of the Centre for Multicultural Youth, the Youth Affairs Council of Victoria, UnitingCare and other agencies. In Victoria an adult person must be present during formal police questioning. An independent person (rather than a support person) must be present if a parent or guardian is unavailable. Their website states:

The establishment of a coordinated Independent Person system of support provided to young people in police custody offers a significant opportunity to address the over-representation of young people in the justice system, including those from migrant and refugee communities<sup>1</sup>

The YRIPP provides the following services:

- provides appropriately trained volunteer IPs to attend police interviews with young people under 18;
- provides a 1300 telephone number for police to call 24/7 when they require the attendance of an IP at their station;
- works with Victoria Legal Aid to ensure the availability of free legal advice (through the same 1300 telephone number) to young people in police custody where YRIPP is operational;

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<sup>1</sup> <http://www.cmy.net.au/YRIPP/AboutYRIPP>

- provides multilingual flyers for parents/guardians outlining the purpose of a parent or guardian's presence at police interviews;
- provides referrals for at-risk young people to local health and welfare services to reduce the chances of future offending; and
- works with local networks to ensure the program complements the existing service system

If the person has a cognitive disability (regardless of age) they are entitled to an 'independent third person' (ITP) who can be a relative or a friend. ITPs that are not relatives or friends are trained by and registered with the Office of the Public Advocate. They are also required to attend additional training sessions. Whilst these are separate from IPs they can be arranged through the same phone number.

## MDAA's response to specific NSWLRC questions

11.9 What other approaches might be adopted to avoid remand in custody in appropriate cases where a young person with a cognitive or mental health impairment breaches a bail condition as a result of their impairment?

11.10

(1) Are young people with cognitive and mental health impairments remanded or remaining in custody because of difficulty in accessing suitable accommodation or mental health or disability services?

(2) Are additional legal and/or procedural measures required to avoid young

### Recommendation 1:

As a large proportion of juveniles on remand who breached bail did not commit an act that otherwise would be an offence, they should be assumed not to be a threat to the community. Bail should consider:

- The nature of the breach and causal factors relating to the breach, including whether the conditions were ever achievable by the young person
- Support must be provided to juveniles on bail to assist with compliance, taking into consideration whether they are from NESB and the type of their impairment(s)
- If the breach would not amount to an offence if it was not a bail condition, there should be a presumption in favour of bail.

### Recommendation 2:

MDAA's 2006 research found that at least some people from NESB with cognitive and mental health impairments were in custody due to problems with accessing suitable accommodation and related services. Directing money to these services, rather than incarceration, would deliver greater benefits to the government.

11.13

(1) Are the objects of the Young Offenders Act 1997 (NSW) being achieved with respect to the application of the Act to young people with cognitive and mental health impairments?

(2) Is any amendment required, having regard to the applicability of the Act to young people with cognitive and mental health impairments?





### Recommendation 3

The Young Offenders Act should make an explicit commitment to deliver programs in an equitable and culturally competent manner. Additional diversionary programs that are more appropriate to diverse groups, such as people from NESB with cognitive and mental health impairments are developed.

11.14

- (1) Are additional protections required where young people with cognitive and mental health impairments are arrested and/or questioned by police? If so, what changes are required?
- (2) Are police able to screen effectively for cognitive and mental health impairments in young people? If not, how can this be improved?

### Recommendation 4:

NSW should expand the Criminal Justice Network to work in a similar manner to the Youth Referral and Independent Person Program (YRIPP) discussed above. Such a program should have a specific acknowledgement and commitment to addressing the needs of youth from NESB with cognitive and mental health impairments and have similar safeguards in place.

### Recommendation 5:

Police are not in a position to effectively screen for cognitive and mental health impairments.

- Police should consult with professionals who deal with cognitive and mental health impairments to develop guidelines on how to detect the impairments but should also be mindful of their limitations.
- Police must treat an individual as having a cognitive impairment if there are reasonable grounds to suspect the person has cognitive and mental health impairments.

### Recommendation 6

Police should be trained to identify vulnerability rather than specific disadvantage. Current training should be adapted to ensure training recognises that an individual person may be experiencing multiple levels of disadvantage (e.g. mental health training must address that some people will be from NESB.) and cannot be divided into specific types of disadvantage.

## MDAA's Additional Recommendations

### Data collection and research

#### Recommendation 7:

Annual statistics on the number and characteristics of high volume and repeat youth offenders should be collected. MDAA recommends the collection of ancestry as well as language other than English spoken at home.

#### Recommendation 8:

The Noetic Review recommendation 77 be implemented but CALD should be replaced with NESB. -

***Recommendation 77:** Juvenile Justice ensure their plan for gathering and analysing data on culturally and linguistically diverse groups is cognisant of localised issues, and ensuring the effectiveness of their work with groups from over-represented culturally and linguistically diverse backgrounds.*

### Access to legal services

#### Recommendation 9:

A targeted education campaign at NESB populations to assist young people in NESB communities in understanding the law and disability services

#### Recommendation 10:

Resources are developed specifically for NESB groups identified as being over-represented in the criminal justice system

### Whole of government approach

#### Recommendation 11

Agencies should consider people from NESB with disability as a specific vulnerable group and should implement strategies that identify and support the person prior to and during their involvement with the criminal justice system.

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