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Senate Standing Committee on Community Affairs

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Canberra ACT 2600

20/09/2016

Dear Committee Secretary

Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia

I attach a brief submission in relation to the current inquiry into the indefinite detention of people with disabilities in Australia. This submission posits that the indefinite detainment of individuals deemed unfit to plead in prisons and secure psychiatric facilities amounts to a violation of their human rights under international law. I argue that Australia's failure to fulfil their obligations under the Convention on the Rights of People with Disabilities should be used as an impetus to bring about change.

If you should wish to discuss this submission, please feel free to contact me

Yours sincerely

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SUBMISSION TO THE SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE INQUIRY INTO THE INDEFINITE DETENTION OF PEOPLE WITH COGNITIVE AND PSYCHIATRIC IMPAIRMENT IN AUSTRALIA

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I INTRODUCTION

In recent years, it has come to light that disabled members of the Australian community are being treated unfairly by the criminal justice system. Numerous individuals, after establishing their unfitness to plead to a criminal charge, have suffered extensive and at times indefinite detention in custody. Such treatment is clearly inconsistent with Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD), and has been condemned by the Committee on the Rights of Persons with Disabilities (CRPD Committee).

This submission has several aims. By detailing the impact of unfitness to plead laws on the lives of everyday Australians, it aims to provide insight into the real and damaging effect of indefinite detention. This is followed by an outline of unfitness to plead legislation in each state and Australia's obligations under the CRPD. Together, these sections aim to allow the Senate Committee to analyse the discrepancies between current legislation and the nation's international obligations. These discrepancies are then reinforced by the concerns and recommendations provided by the CRPD Committee, as well as the Human Rights Council. Finally, the Senate Committee is presented with an analysis of current government efforts, as well as an explanation of why they are insufficient to meet the obligations under the CRPD. Suggestions for potential, viable reform aim to leave the Committee contemplative of solutions from here on in.

II AUSTRALIANS WHO HAVE FACED INDEFINITE DETENTION

A *Marlon Noble*

Marlon Noble suffered from meningitis during infancy, which left him mentally impaired from an early age.[1] In 2001, he was alleged of sexually assaulting two girls under the Western Australia *Criminal Code*.[2] He was 19 at the time. The year after, he appeared in court and was quickly found to be unfit to stand trial. Once this was established, Marlon was subjected to a custodial order and placed in prison.[3] He remained in prison until January 2011, detained for a total of ten years.[4] He is still subject to a community supervision order.

It has been argued that Marlon Noble's case was mishandled from the get-go. Western Australia police were not forthcoming about how or why Marlon was charged with sexual assault.[5] The charge was laid after an interrogation over stolen alcohol; nothing more is known. Marlon was also declared fit for trial in 2010. However, we was not granted the opportunity to plead, as the Director of Prosecutions chose to withdraw the charges. In 2010, the supposed victims came forward and denied the assault, instead describing him as a "big softie" and a "good bloke".[6]

[1] Michael Brull, 'The sad story of Marlon Noble', *Ramp Up* (online), 9 December 2011 <http://www.abc.net.au/rampup/articles/2011/12/09/3387845.htm>.
[2] Ibid.
[3] Ibid.
[4] Editorial, 'Marlon Noble seeks justice', *SBS* (online), 26 August 2013 <http://www.sbs.com.au/news/article/2012/05/21/marlon-noble-seeks-justice>.
[5] Above n 1.
[6] Ibid.

Even after being released, Marlon has been subject to strict house arrest by the Mentally Impaired Accused Review Board. His release was accompanied by nine conditions, including being unable to stay overnight at any other place except his residence, and a ban against entering his home town of Carnarvon.[7] He was also prohibited from associating with girls under the age of sixteen and drinking alcohol. Marlon's lawyer argues that these conditions are inappropriate for someone who has not been convicted of any crime.[8] The fact that Marlon has been subject to extensive punitive measures without being convicted has caused uproar within the Australian community.

B *Christopher Leo and Kerry Doolan*

Both born with Foetal Alcohol Syndrome, Christopher and Kerry faced intellectual disability since birth.[9] The two were abandoned during childhood because their parents were unable to take care of them.[10] Christopher also had an unstable childhood, as he constantly had to change homes and carers.[11]

Both have faced difficult lives. Kerry's adoptive mother recalls his reluctance to converse from an early age, stating "[h]e couldn't talk much but we made him talk…I knew he had a disability."[12] During childhood, he was diagnosed with an intellectual disability and a low grade psychotic disorder. His cognitive impairment has left him with suicidal and antisocial.

[7] Above n 4.
[8] Ibid.
[9] Mick Gooda, 'Mental illness and cognitive disability in Aboriginal and Torres Strait Islander prisoners – a human rights approach' (Speech delivered at 22nd Annual National Mental Health Services Conference 2012, Cairns Convention Centre, 23 August 2012).
[10] Suzanne Smith, 'Mentally impaired held in NT jails without conviction', *ABC News* (online), 25 June 2012 <http://www.abc.net.au/news/2012-06-25/mentally-impaired-being-held-in-nt-prisons-without-conviction/4091940>.
[11] Ibid.
[12] Ibid.

Christopher has also suffered from poor health, having a history of alcohol abuse, chronic liver disease, pancreatitis, epilepsy and brain injuries due to a head injury and alcohol abuse.[13] As a consequence, Christopher faces impairments in memory maintenance, maintaining attention and processing information, and has been diagnosed with "global cognitive impairment".[14]

Both individuals were detained in maximum security at Alice Springs Correctional Facility for a number of years.[15] Supervision orders were made at their trials, in 2007 and 2008 respectively. The individuals faced assault-related charges, but were found unfit to stand trial. The lack of support facilities in the Northern Territory meant that the two were forced to be detained involuntary.[16]

Christopher and Kerry have suffered mentally during their time in prison. They both feel sad that they are unable to see family members and be part of their community. At a review hearing in 2009, Justice Brian Martin strongly criticised the government for not providing alternative premises for individuals deemed unfit to plead.[17] A neuro-psychological assessment conducted for the review recommended that it was not appropriate for Christopher to be in prison, and that his mental health was going to deteriorate markedly if he remained there.[18]

In 2012, Christopher and Kerry were moved to a secure care facility for individuals subject to supervision orders. However, community leaders have been pessimistic about the new facility,

[13] Above n 9.
[14] *The Queen v Kerry Doolan & The Queen v Christopher Leo* [2012] NTSC 46, 14.
[15] Above n 10.
[16] Above n 9.
[17] Above n 10.
[18] Ibid.

stating that it is "marginally better than a prison", and "primitive" in terms of the therapy provided for residents.[19] The fact that the two men will be detained indefinitely in this facility has been described as "heartbreaking".[20]

C *Rosanne ('Rosie') Fulton*

Rosie was arrested in 2012 for crashing a stolen car. She was subsequently deemed unfit to plead and detained at a Kalgoorlie prison.[21] Her detainment at the prison was due to a lack of alternative accommodation more suitable for her circumstances.[22]

A psychiatric report used in Rosie's case stated that she had the mental age of a young child, despite being 22 at the time.[23] This is reportedly due to her suffering from Foetal Alcohol Syndrome as a baby.

Rosie faced 21 months of imprisonment before being released into community care in Alice Springs. The move was sparked by public outrage relating to her situation. Social Justice Commissioner Mick Gooda noted that Aboriginal and Torres Strait Islander individuals are more likely to suffer from the lack of facilities for the mentally impaired, as they are "over-represented in the justice system and disproportionately affected by circumstances such as those experienced by Ms Fulton."[24] Disability Discrimination Commissioner Graeme Innes agrees that individuals deemed unfit to

[19] Ibid.
[20] Ibid.
[21] Editorial, 'Rosie Ann Fulton: Intellectually impaired woman arrested for second time since jail release', *ABC News* (online), 13 July 2014.
[22] Editorial, 'Jailed without conviction: Rosie Fulton leaves WA prison', *Australian Human Rights Commission News* (online), 26 June 2014.
[23] Above n 21.
[24] Above n 22.

plead should not be detained in prison, stating that it is "…simply not an alternative accommodation option for people with disabilities."[25]

D 'Jason'

'Jason' was a juvenile when he was first imprisoned. In 2003, he was charged with unlawfully killing his 12 year-old cousin in a car crash.[26] At the time of the trial, Jason was found to have an intellectual disability and brain damage due to substance abuse, and consequently found unfit to plead. He was jailed indefinitely under a court order, and has spent almost 12 years in prison to date.[27]

It has been argued that Jason should be freed immediately. His advocate Ms Harvey argues that the *Criminal Law (Mentally Impaired Accused) Act*[28] requires the individual to face the "least restrictive" method of imprisonment, considering community safety and the safety of the accused.[29] When considering Jason's case in its entirety, Ms Harvey submits that there is no reason for him to face ongoing imprisonment, as he does not represent a risk to the community and would greatly benefit from support not available in prison.[30]

Others argue that transferring individuals like Jason to Disability Justice Centres will not solve the problem. Opposition Legal Affairs spokesman John Quigley argues that it is unjust for individuals unfit to plead to face longer detainment than they would if they were sentenced.[31]

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[25] Ibid.
[26] Editorial, "Urgent need' for law change as mentally-impaired accused detained indefinitely, WA Chief Justice Wayne Martin says', *ABC News* (online), 10 July 2015 <http://www.abc.net.au/news/2015-07-10/push-for-mentally-impaired-accused-law-change-in-wa/6611010>.
[27] Bernadette McSherry, Piers Gooding, Anna Arstein-Kerslake and Louis Andrews, 'Disability-based disadvantage – a life sentence?' *Pursuit* (online), 4 April 2016 <https://pursuit.unimelb.edu.au/articles/disability-based-disadvantage-a-life-sentence>.
[28] *1996* (WA).
[29] Nicholas Perpitch, 'Indefinite jailing: Call for review as Indigenous driver involved in fatal crash remains in prison', *ABC News* (online), 17 September 2014.
[30] Ibid.
[31] Ibid.

Indeed, Jason would have faced imprisonment for four to eight years for his actions, and then be released afterwards. The indefinite detention of individuals such as Jason is described by Quigley as "abhorrent."[32]

III UNFITNESS TO PLEAD LEGISLATION IN AUSTRALIA

A *Overview*

Each Act contains unique laws relating to unfitness to plead. However, they all possess a similar flow of steps and requirements. Firstly, they all enable the question of unfitness to be raised at any point of the trial. Once the question is raised, every Act requires the matter to be investigated and considered by the court. If the person is deemed unfit, they will inevitably face either acquittal, some form of supervision or detainment, or potentially both. Supervision and detainment orders are reviewed periodically. Most jurisdictions note that there is no requirement to release the individual upon review.

A notable variation between legislation is the limit of time for which a person may be detained. In Western Australia, Queensland and Tasmania, people deemed unfit to plead may be detained indefinitely. In Western Australia and Queensland, a person may only be released upon request by the Governor. In Tasmania, they may only be released if decided by the Mental Health Tribunal.

People deemed unfit to plead in Victoria, the Northern Territory and the Australian Capital Territory may be detained for a nominal term. Essentially, this means that a person's order will be reviewed at the end of the nominal term. Despite closely resembling detention for a limited

[32] Ibid.

time, nominal terms do not mandate release. It is therefore possible for individuals deemed unfit to plead to face indefinite detention in these states.

Limiting terms are only utilised in New South Wales, South Australia and under Commonwealth jurisdiction. In these states, people deemed unfit to plead will only be detained for a length states on their court order. This length is generally determined with reference to the maximum term of the crime they allegedly committed. Legislation in these jurisdictions do not enable indefinite detention.

B *Western Australia Legislation*

In Western Australia, it is the *Criminal Law (Mentally Impaired Accused) Act 1996* that addresses the issue of mental unfitness to stand trial.[33] The Act defines 'mental unfitness to stand trial' as being unable to understand or take part in the proceedings.[34] The presiding judicial judge determines whether an accused is mentally unfit to stand trial.[35] If it is decided that the accused is mentally unfit, and will not become mentally fit to stand trial within 6 months, the judicial officer will either release the accused or make a custody order in respect of the accused.[36]A custody order must be made if the accused was charged with certain offences relating to homicide, endangering life or health, sexual or physical assault or stealing.[37] An accused can only be released from a custody order upon the request of the Governor.[38]

C *Queensland Legislation*

The law relating to unfitness to plead in Queensland is found in the *Criminal Code Act 1899*.[39] This Act refers to mental impairment as "insanity". If an accused person is alleged to or appears

[33] (WA).
[34] Ibid s 9.
[35] Ibid s 12.
[36] Ibid s 19.
[37] Ibid sch. 1.
[38] Ibid s 35.
[39] (Qld).

to be 'insane' (or not of sound mind), the jury must determine if this is true.[40] If they find the person 'insane', they are held in strict custody until they are 'dealt with' under the *Mental Health Act 2000*.[41] Under this Act, the Mental Health Court must decide whether the person is fit for trial, and if not, whether their unfitness is of a permanent nature.[42] Based on this finding, the court must then order the proceedings to be continued, stayed or discontinued.[43] If they order the proceedings to be discontinued, the Governor has the authority to order the person to remain in custody for a length of their choosing.[44]

D *Tasmanian Legislation*

In Tasmania, the law on unfitness to stand trial is found in the *Criminal Justice (Mental Impairment) Act 1999*.[45] A person is unfit to stand trial if their mental processes are disordered or impaired. A person may also be unfit if they are unable to understand the nature of the charge or the nature of the proceedings, follow the course of the proceeds, or plead, defend or answer a charge.[46] This is determined based on the balance of probabilities[47] by a jury.[48] If it is found that a defendant is unfit to stand trial, the Supreme Court must determine if they will likely become fit to stand trial within the next 12 months.[49] If so, the Court is to adjourn proceedings until that time.[50] However, if the court is later of the opinion that the adjournment is not necessary, they may choose to call on the defendant to plead to the charge.[51]

[40] Ibid s 645.
[41] (Qld).
[42] Ibid s 270, 271.
[43] Ibid s 272, 280, 281.
[44] Ibid s 647(2).
[45] (Tas).
[46] Ibid s 8.
[47] Ibid s9.
[48] Ibid s 12.
[49] Ibid s14(1).
[50] Ibid s14(2).
[51] Ibid s14(4).

Alternatively, if the court determines that the defendant is unlikely to be fit to stand trial within 12 months, they must hold a special hearing.[52] During this hearing, the jury must determine whether the defendant is guilty of the offence based on the evidence available.[53] The aim of this hearing is therefore to replicate the criminal proceedings as nearly as possible.[54] The jury may reach a number of verdicts – not guilty of the offence charged, not guilty of the offence charged but not innocent of a special offence available as an alternative, not guilty on the ground of insanity, or a finding cannot be made.[55] If the jury makes any of the latter three judgements, the defendant will be subject to a restriction order, a supervision order, a treatment order, or released on conditions or unconditionally.[56]

A court may vary or revoke a supervision order at any time.[57] If a defendant wishes for a restriction order to be revoked within two years of the order being made, they must apply to the Supreme Court.[58] After two years has passed, the Mental Health Tribunal must review the order every 12 months.[59] There is no limit on the length of a restriction order.

E *Victorian Legislation*

The relevant legislation in Victoria is the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.[60] The aim of this legislation is to (a) define the criteria for determining if a person is unfit to stand trial; (b) replace the common law defence of insanity with a statutory defence of mental impairment; and (c) provide new procedures for dealing with people who are unfit to stand trial or who are found not guilty because of mental impairment.[61] A person is

[52] Ibid s15(1).
[53] Ibid s 15(2) and s 15(3).
[54] Ibid s 16(1).
[55] Ibid s17.
[56] Ibid s18.
[57] Ibid s30(1).
[58] Ibid s26.
[59] Ibid s37(1).
[60] (Vic).
[61] Ibid s 26.

deemed unfit to stand trial when, due to their disordered or impaired mental status, they would be unable to understand or actively take part in the trial.[62]

This is generally determined by a jury on the balance of probabilities.[63] If it is determined that a person is unfit to be tried, they will be found not guilty and subjected to either a supervision order or unconditional release.[64] Two types of supervision orders are available to the court: a custodial supervision order, where the person be committed to custody in an appropriate place or prison; and a non-custodial supervision order, where the person is released subject to the conditions decided by the court and specified in the order.[65] The order includes a nominal term determined by the court, generally based on the maximum term of imprisonment of the offence which the person was found not guilty.[66] The court is required to complete a major review of the order at the end of the nominal term and at regular intervals thereafter.[67] Persons can therefore be subject to a supervision order indefinitely.[68]

F *Northern Territory Legislation*

The relevant legislation in the Northern Territory is the *Criminal Code Act 1983*.[69] This Act states that a person is unfit to stand trial if they are unable to understand or take part in the proceedings.[70] If the question of unfitness to be tried is raised during the committal proceedings, or the judge is satisfied that there are reasonable ground to question the person's fitness, the court must order an investigation into the matter.[71] This investigation aids the jury

[62] Ibid s 6.
[63] Ibid s 21(2)(b). However, in cases where a person is charged with an indictable offence and, before the empanelment of a jury, the prosecution and defence agree that the proposed evidence establishes the defence of mental impairment, the trial judge may hear the evidence and direct that a verdict of not guilty because of mental impairment be recorded: s21(4).
[64] Ibid s23.
[65] Ibid s 26.
[66] Ibid s 28.
[67] Ibid s 35.
[68] Ibid s 27.
[69] (NT).
[70] Ibid Sch 1 s 43J.
[71] Ibid Sch 1 s43N.

with deciding, on the balance of probabilities, whether the person is unfit to stand trial.[72] If the jury decides that the person is unfit, the judge must determine whether there is reasonable prospect of the person becoming fit to stand trial within 12 months.[73] If it is determined that this is unlikely, the court must hold a special hearing within 3 months.[74]

At this special hearing, a jury determines whether the person is not guilty of the offence; not guilty of the offence due to mental impairment; or committed the offence or an offence available as an alternative to the offence charged.[75] If they determine that the person is not guilty due to mental impairment, the court must either declare that the person is liable to supervision or order that the person be released unconditionally.[76] Supervision orders are either custodial or non-custodial. If a custodial supervision order is made, the person is held in a custodial correctional facility or another place considered appropriate by the court.[77]

A supervision order is for an indefinite term.[78] However, a major review of the order must take place at a time determined in reference to the likely term of the offence with which the person would have been charged.[79] At this time, the court must consider whether the person should be released. Release must be ordered unless the court considered that the safety of the person or the public will or is likely to be seriously at risk if the person is released.[80] If the supervision order is upheld, periodic reviews take place thereafter.[81]

[72] Ibid Sch 1 s43L.
[73] Ibid sch 1 s 43R(1).
[74] Ibid sch 1 s 43R(3).
[75] Ibid sch 1 s 43V(1).
[76] Ibid sch 1 s43X(2).
[77] Ibid sch 1 s43ZA.
[78] Ibid sch 1 s43ZC.
[79] Ibid sch 1 s43ZG(2).
[80] Ibid sch 1 s43ZG(6).
[81] Ibid sch 1 s 43ZH.

G *Australian Capital Territory Legislation*

In the Australian Capital Territory, the *Crimes Act 1900*[82] iterates the law on unfitness to plead. A person is considered unfit to plead if their mental processes are distorted or impaired, to the extent that they fail to understand the nature of the charge, the impact of evidence or the nature of the proceeding, fail to follow the course of the proceedings or are unable to give instructions to their lawyer.[83] If a person or party raises the issue of unfitness, and the court is satisfied that it is a real and substantial issue, it must proceed with an investigation into the matter.[84]

During the investigation, the court must consider any relevant evidence presented by the parties, and may call evidence or require that the defendant by psychologically examined. If the court decides that, based on this evidence, the defendant is unfit to plead, they must also decide whether they will become fit within the next 12 months.[85] If the defendant is deemed temporarily unfit to plead, the court must adjourn the proceedings and either remand them in custody or release them on bail.

Alternatively, if the defendant is deemed unlikely to become fit, the court must conduct a special hearing.[86] This special hearing is to be conducted as nearly as possible to that of an ordinary criminal proceeding.[87] If the court is satisfied beyond reasonable doubt that the accused committed the crime, and chooses not to acquit them, it is to order that the accused submit to the jurisdiction of the ACT Civil and Administrative Tribunal (ACAT).[88] If the accused has committed a serious offence, the court must order them to be detained in custody for immediate ACAT review.[89]

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[82] (ACT).
[83] Ibid s311.
[84] Ibid s314 and s315.
[85] Ibid s315A.
[86] Ibid s315C.
[87] Ibid s316 and s335.
[88] Ibid s318.
[89] Ibid s318(2)(a).

ACAT then reviews the accused under the *Mental Health Act 2015*.[90] This review involves consideration of whether the person is deemed unfit to plead. The tribunal then notifies the court of their findings and provides recommendations on how to continue.[91] The court then makes a decision on whether or not the accused is to be detained. This decision is to be based on considerations including the nature and extent of the accused's mental impairment, how likely it is to have an effect of their future behaviour, whether they would likely be a danger to the community if released, the circumstances of the charge, and any recommendations made by ACAT.[92] If it chooses to detain the accused, it may do so for a nominated term based on the offence committed.[93]

H *New South Wales Legislation*

The relevant legislation in New South Wales is the *Mental Health (Forensic Provisions) Act 1990*.[94] The Act deals with questions of mental health in criminal proceedings in the Supreme and District Courts, as well as summary offences before a Magistrate.[95] When the issue of unfitness is raised, the court may order an inquiry into the person's unfitness. [96] The results of this inquiry are then used by the judge to determine if, on the balance of probabilities, the person is unfit to be tried.[97]

If a person is deemed unfit, they are referred to the Mental Health Review Tribunal.[98] The tribunal will then determine whether the person will become fit to be tried within 12 months of the finding of unfitness, and if so, whether the person if suffering from a mental illness or a

[90] (ACT).
[91] Ibid s 177.
[92] Crimes Act 1900 (ACT) s308.
[93] Ibid s 301(2).
[94] (NSW).
[95] Ibid Ss 4, 31
[96] Ibid s 8, 9.
[97] Ibid s 6, 11.
[98] Ibid s 14.

mental condition for which treatment can be provided at a mental health facility.[99] If this is the case, the tribunal will notify the court of their findings, and the court will defer the hearing until that time is up.[100]

Alternatively, if the tribunal finds that the person will not become fit to be tried within 12 months, they must notify the court and the Director of Public Prosecutions of their findings.[101] If the Director of Public Prosecutions advises the court that further proceedings will be taken in relation to the offense, the court then conducts a special hearing.[102] During the special hearing, the court can choose to acquit the person and either take no further action or nominate a term for the person to remain in custody or detention.[103]

I *South Australia Legislation*

The *Criminal Law Consolidation Act*[104] dictates the process taken with mental unfitness in South Australia. A person is deemed mentally unfit if they are unable to understand the allegations of the charge, unable to exercise their procedural rights, or unable to understand the nature of the proceedings.[105] A persons mental fitness may be investigated upon application of the prosecution or defence, or if the judge considers it necessary to prevent a possible miscarriage of justice.[106] If it is found that a person is mentally unfit, the court will either adjourn the defendant's trial for up to 12 months, or proceed with a trial of the objective elements of the offence.[107] If the latter is chosen, and the court is satisfied beyond reasonable doubt that the objective elements of the offence are established, the defendant is to be liable to

[99] Ibid s 16(1), s16(2).
[100] Ibid s 16(3).
[101] Ibid s 16(4).
[102] Ibid s 19(1).
[103] Ibid s 23.
[104] *1935* (SA).
[105] Ibid s269H.
[106] Ibid s 269J(2).
[107] This can also occur in the reverse order, where the objective elements of the offence are considered first and the person's mental unfitness considered afterwards.

supervision.[108] When making a supervision order, the court must fix a limiting term equivalent to the period of imprisonment that would have been appropriate if the defendant has been convicted of the offence they were charged with.[109] A supervision order may be carried out in a prison if there are no practicable alternatives.[110] At the end of the limiting term, the supervision order lapses.[111]

J *Commonwealth Legislation*

The *Crimes Act 1914* (Cth) applies to state offences that have a federal aspect because they either (a) fall within Commonwealth legislative power because of the elements of the State offence; (b) fall within Commonwealth legislative power because of the circumstances in which the offence was committed; or (c) the offence is being investigated by the Australian Federal Police.[112]

If the question of the accused's unfitness to be tried is raised during proceedings, the magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person been committed for trial.[113] The court must then determine whether a person is unfit to be tried, and whether a prima facie case can be established that they committed the offence they are accused of.[114] If this is established, the court can choose to dismiss the charge and order the release of the person, or determine whether the person will become fit to be tried within the 12 months following.[115] In considering the person's return to fitness, the court must consider evidence from a duly qualified psychologist or medical practitioner.[116]

[108] Ibid s269M, 269N.
[109] Ibid s269O(2).
[110] Ibid s269V(2)(b).
[111] Ibid s269O(3).
[112] S3AA.
[113] S20B.
[114] S 20B(3).
[115] S 20BA.
[116] Ibid ss(5).

If the court finds that the person will not become fit within 12 months, it must then determine whether they are suffering from a mental illness treatable by hospital admittance.[117] If so, and if the person does not object to being detained in a hospital, the court will order their detainment in a hospital.[118] If the person objects to being detained in a hospital, the court will order that they be detained in another place, such as a prison. The order must state a specific period not exceeding the maximum period of imprisonment for the offence for which they would have been convicted.[119]

If such an order is made, the Attorney-General must review the order at least every 6 months thereafter.[120] This review must include consideration of a reporting from a duly qualified psychiatrist or psychologist, and a report from another duly qualified medical practitioner.[121] If the Attorney-General finds that the person should be released from detention, they must order this in writing.[122] However, such an order may be revoked and the person can be ordered back into detention.[123] It is unclear whether persons who are ordered back into detention continue to face limitations on the length of their detainment. If the term of the original order does not apply, individuals potentially face indefinite detention.

[117] S 20 BC (1).
[118] Ibid ss(2).
[119] Ibid.
[120] S 20BD.
[121] Ibid ss(2).
[122] S 20BE.
[123] S20BF, s 20BG.

IV AUSTRALIA'S HUMAN RIGHTS OBLIGATIONS

A *The International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities*

Australia has signed and ratified both the International Convention on Civil and Political Rights (ICCPR)[124] and the Convention on the Rights of Persons with Disabilities (CRPD).[125] It is therefore required to fulfil its obligations under these Covenants. Several articles in these Covenants are relevant to the issue of indefinite detention due to unfitness to plead.

The International Covenant on Civil and Political Rights is a core human rights document. Making up a third of the International Bill of Human Rights, the ICCPR focuses on core rights which are inalienable and equally applicable to all.[126] Article 9 of the ICCPR states that everyone has the right to liberty and security of the person, and that no person shall be subjected to arbitrary arrest or detention.[127] Further, no person shall be deprived of liberty except on grounds in accordance with established law.[128] Anyone deprived of liberty is also entitled to trial within a reasonable time or to release.[129]

These core obligations are reflected and expanded upon in the Convention on the Rights of Persons with Disabilities. Article 12 of the CRPD requires State Parties to reaffirm the legal capacity of people with disabilities as being equal to others in all aspects of life. It requires State Parties to take measures to provide access to support for people with disabilities in

[124] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171.
[125] *Convention on the Rights of Persons with Disabilities*, opened for signature 24 January 2007, A/RES/61/106.
[126] United for Human Rights, *International Human Rights Law*, United for Human Rights, <http://www.humanrights.com/what-are-human-rights/international-human-rights-law-continued.html>.
[127] Above n 121 Article 9(1).
[128] Ibid.
[129] Ibid Article 9(3).

exercising their legal capacity. Furthermore, states must ensure that measures relating to the exercise of legal capacity provide for safeguards to prevent abuse, by ensuring that they:

> "…respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body."[130]

State Parties also agree to take appropriate measures to ensure that people with disabilities have the equal right to own or inherit property, control their own finances, and ensure that they are not arbitrarily deprived of their property.[131]

Together, these obligations reflect the need for states to shift away from perceiving people with disabilities as being unable to exercise their legal capacity and instead perceive the right to exercise legal capacity as being absolute and inviolable.[132] That is, disabilities or impairments should never be grounds for denying legal capacity or any of the rights created by article 12. Unfortunately, this is exactly what the Australian unfitness to plead laws do – diminish a defendant's legal capacity based on their 'mental impairment'.

Instead, states must fully recognise "universal legal capacity" by abolishing denials of legal capacity due to discrimination based on disability.[133] In order to protect an individual's inalienable right, states must also implement the supports necessary for an individual to be able

[130] Ibid Article 9(4).
[131] Ibid Article 9(5).
[132] CRPD Committee, *General comment on Article 12: Equal recognition before the law,*11th sess, UN Doc CRPD/C/11/4 (11 April 2014) at [9].
[133] Ibid at [25].

to exercise their absolute right to legal capacity.[134] In order for the Australia to comply with this obligation, each state would need to repeal unfitness to plead clauses and establish support systems to accommodate people with disabilities.

Article 13 reinforces this approach. It requires states to ensure that individuals with disabilities have equal access to justice with others. This can be achieved by implementing procedural and age-appropriate accommodations which allow people to fulfil their role as participants in all legal proceedings, including at the legislative and other preliminary stages. State Parties must also promote appropriate training for individuals working in the field of administration of justice, such as police and prison staff.

This Article therefore places a positive obligation on State Parties to implement measures which ensure that all individuals have unimpeded access to justice. This obligation can be fulfilled in various ways, as the needs of individuals will vary based on the impairments they face. The employment of multimedia, written and audio materials, including plan language materials, can enable individuals to better understand proceedings.[135] Court assistants or intermediaries can also be made available to assist individuals who need to communicate as witnesses, and measures to make court procedures less formal can be implemented to ensure individuals feel more at ease with the process. Australian states should seriously consider implementing some, or all, of these support systems.

Article 14 relates directly to the issue of indefinite detention. It requires state parties to ensure that persons with disabilities enjoy the right to liberty and security of person on an equal basis with others.[136] It also requires states to ensure that persons with disabilities do are not deprived

[134] Melbourne Social Equity Institute, Submission No 5 to Senate Community Affairs References Committee, *Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia*, 21 March 2016, 4.
[135] Ibid, 5.
[136] Above n 122 Article 14(1)(a).

of their liberty unlawfully or arbitrarily, and that any deprivation of liberty conforms to the law.[137] States must also ensure that the existence of a disability shall in no case justify a deprivation of liberty.[138] If individuals with disabilities are deprived of their liberty, they are to be entitled to guarantees in accordance with international human rights law on an equal basis with others.[139]

These obligations are expanded upon in the Committee's guidelines on article 14.[140] The Committee has stated that security measures directed at individuals classified as "insane" are unsuitable and unjust. State members who have such laws are advised to eliminate such measures, including those that force medical or psychiatric treatment upon individuals in institutions. It has also expressed concern about states employing security measures which deprive people with disabilities of liberty and regular guarantees in the criminal justice system.

Article 14 is closely linked to article 12, as both deal with the treatment of disabled individuals in the justice system. Indeed, violations in this area often breach both articles: physical or mental impairment is used to establish a lack of legal capacity, which in turn results in the deprivation of liberty.[141] The deprivation of liberty is therefore due to one's disability, as opposed to any criminal proceedings themselves. As a result, the CRPD Committee has declared that denying the legal capacity of persons with disabilities and placing them in detention against their will a violation of both articles.[142]

[137] Ibid Article 14(1)(b).
[138] Ibid.
[139] Ibid 14(2).
[140] CRPD Committee, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities - The right to liberty and security of persons with disabilities*, 14th sess (17 August 2015).
[141] Above n 131, 6.
[142] CRPD Committee, *General comment No 1: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) at [40].

B *These Obligations and Indefinite Detention*

The Committee on the Rights of Persons with Disabilities has established that detention due to unfitness to stand trial is contrary to the CRPD.[143] This has been reinforced by several statements on the laws of various state members. In 2013, the CRPD expressed concern about Australians with disabilities being deemed unfit to stand trial, and potentially detained indefinitely in prisons or psychiatric facilities, without being convicted of a crime.[144] The CRPD Committee was also concerned that the length of indefinite detention faced by these individuals often greatly exceeded the maximum period which they would be subject to had they been fit to plead. The overrepresentation of women, children, Aboriginal and Torres Strait Islander people with disabilities in the prison and juvenile justice system also concerned the CRPD Committee.

These obligations were restated during Australia's 2015 review by the Human Rights Council. During the review, various states expressed concern regarding the indefinite detention of persons with disabilities, particularly of indigenous Australians.[145] These concerns are likely to be reflected in the Concluding Remarks from the review, which is expected to be released later this year.

The CRPD Committee also discussed this issue during the examination of Ecuador. In its concluding observations, the Committee expressed concerns about the State Member's lack of due process for persons with disabilities accused of committing an offence.[146] It recognised that this led to the application of security measures, which included the indefinite deprivation

[143] CRPD Committee, *Report of the Committee on the rights of Persons with Disabilities on its twelfth session*, 12th sess, UN Doc CRPD/C/12/2 (5 November 2014).
[144] CRPD Committee, *Concluding observations on the initial report of Australia*, 12th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013), 31.
[145] *Report of the Working Group on the Universal Periodic Review*, UNGA, 31st sess, Agenda item 6, UN Doc A/HRC/31/14 (13 January 2016), 10
[146] CRPD Committee, *Concluding observations on the initial report of Ecuador*, 12th sess, UN Doc CRPD/C/ECU/CO/1 (27 October 2010), 28.

of liberty of individuals with disabilities. This in turn illustrated the fact that people with disabilities were not entitled to the same guarantees as other persons interacting with the criminal justice system.

The CRPD Committee has also noted that New Zealand's criminal justice system enables the indefinite detention of individuals with disabilities. In 2014, it stated that the declaration of "unfitness to stand trial" essentially deprived individuals of liberty before being found guilty of a crime.[147] It concerned the Committee that people with disabilities were not given the same safeguards and guarantees provided to everyone else, and that criminal procedure had not been followed in detaining people with disabilities.

These statements illustrate the widespread issue of indefinite detention due to unfitness to plead legislation. It is therefore clear that states including Australia need to address this issue. A failure to amend our laws on unfitness to plead will amount to a breach of our obligations under the CRPD.

C *Recommendations*

The CRPD Committee has also provided recommendations on how the issue of indefinite detention should be addressed. In regards to Australia, the Committee recommended that it urgently cease to use prisons to detain unconvicted people with disabilities, and instead develop legislative, administrative and support frameworks that comply with the Convention.[148] It also recommended that Australia establish mandatory guidelines to ensure that people with disabilities in the criminal justice system are provided with appropriate support and accommodation. Further, it advised that Australia review its laws that allow for the indefinite detention of individuals based on their disability, and for the state to repeal provisions that

[147] CRPD Committee, *Concluding Observations on the Initial Report of New Zealand*, 12th sess, UN Doc CRPD/C/NZL/CO/1 (31 October 2014)
[148] Above n 141, 32.

authorise involuntary internment linked to disability. Finally, the Committee called for the repealing of legislation which authorises compulsory treatment or the committal of individuals to institutions via Community Treatment Orders.[149]

Some of these recommendations have also been given to other state members. It was also suggested that New Zealand and Ecuador refrain for declaring persons with disabilities as unfit to stand trial, in order for people with disabilities to be granted due process on an equal basis with others. In regards to New Zealand, the CRPD Committee also recommended that the deprivation of liberty should be applied only as a last resort when other diversion programs, such as restorative justice, fail to deter future crime. [150] If people with disabilities are to be detained in prison, the state should also ensure that they be provided with reasonable accommodations in respect to their disability.[151]

However, some of the recommendations provided to Australia are unique in their own right. In its concluding observations, the Committee seemingly stressed the importance of establishing legislative, administrative and support frameworks to ensure that people with disabilities are able to effectively navigate the criminal justice system. This suggests that the Committee believes Australia has the capacity, and the need, to undertake these equitable measures.

V REFORM IN AUSTRALIA

A *Current government efforts*

Australia has expressed a commitment to improving the way the criminal justice system treats people deemed unfit to plead or found not guilty due to mental impairment.[152] In order to

[149] Ibid 34.
[150] Above n 144, 34.
[151] Ibid.
[152] Above n 142.

achieve this, the state has committed to a national effort to analyse data and establish best practice resources for jurisdictions. The current senate inquiry can be considered a step towards fulfilling this commitment.

The state of Western Australia has also illustrated a commitment to assessing unfitness to plead legislation. This is visible in the recently released review of the *Criminal Law (Mentally impaired Accused) Act 1996.*[153] Written by the Department of the Attorney General, the report assesses the effectiveness of the current legislation at ensuring paramount safety of the community, as well as the fair and equitable treatment of mentally impaired individuals in contact with the criminal justice system.[154] It was written in light of consultations with key stakeholders, as well as the current policy and legislative context in Western Australia.[155]

The report offers a total of 35 recommendations on 12 topics. One major topic discussed is the determination of unfitness to stand trial. Many stakeholders felt that the court should be given more guidance on how to determine unfitness. Despite noting that current legislation sufficiently guides the court in making their decision, it also recommends that the *Equality before the Law Benchbook* be amended to provide greater guidance. Others also felt that that the current legislation was lacking express provision for support of individuals who could be mentally fit to stand trial with appropriate support. The report explains that current legislation allows judges to order certain supports to enable individuals to participate fully, such as allowing the accused to have a person near them to offer support, or providing a communicator while they are giving evidence.[156] In response to stakeholder concern, it was recommended that a non-exhaustive list of support options be made explicit in section 12 of the Act.

[153] Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996 Final Report,* April 2016.
[154] Ibid, 6.
[155] Ibid, 4 and 5.
[156] *Evidence Act 1906* (WA) s 106R

In relation to dispositions, stakeholders expressed concern as to the limited options available to the Court and the Mentally Impaired Accused Review Board. They noted that people with mental impairment often have complex needs, and that decision-makers need to be able to take these needs into account when making orders or recommendations. In response to these concerns, the report recommended that the disposition options available to the court should be expanded and modelled on the options available under the *Sentencing Act 1995*.[157] Notably, the *Sentencing Act* provides 'intermediate' sentencing options, such as intensive supervision orders, community based orders, custody orders and orders releasing the accused unconditionally.[158] The report also recommended the removal of mandatory custody orders of juvenile mentally impaired persons, as well as the requirement for the Mentally Impaired Accused Review Board to consider the principle of least restriction when making an order.

The potential for detainment to take place in prison also concerned many stakeholders. In response to this, the report notes that prison is commonly the only secure option for detention to take place. As the paramount consideration of the Act is community safety, the report recommends that prison should be retained as a place of custody under the Act.[159] This logic was also applied to concerns on the unfairness of mandatory custody orders. Many stakeholders expressed concern on the impact of detainment on individuals. Again, the report relied on the overarching consideration of community safety as a reason not to recommend changes to mandatory custody orders. However, due to the high level of stakeholder engagement on the issue, the report did recommend the formation of a working group to further consider the issue.

The potential for custody orders to result in indefinite detention was also raised as a concern by stakeholders. Many submissions noted the effects of custody orders without time limits;

[157] (WA).
[158] Above n 150 at 56.
[159] Ibid 11.

they could enable people to be detained longer than they would have been detained if they had been found guilty and sentenced accordingly. As a consequence, stakeholders argued that people with mental impairments may be unduly deterred from raising mental health issues during trial. The overwhelming majority of stakeholders therefore called for the abolition of indefinite custody orders.

In response to this concern, the report noted that abolishing the indefinite order would impact the overarching aim of ensuring community safety. It therefore made no recommendation to change the legislation in relation to the duration of custody orders. Once again, however, it did recommend the establishment of a working group in order to further review the issue.

B *Assessing current efforts*

So far, Australia has initiated investigations into the treatment of individuals deemed unfit to plead. The current senate inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia is an example of this. The Attorney General's review of the Western Australia mentally impaired accused legislation is another example. These efforts fulfil one recommendation provided by the CRPD; that is, for Australia to review its laws that allow for the indefinite detention of individuals based on their disability. Four other recommendations, however, have not yet been fulfilled. Essentially, this means that Australia has failed to fulfil its obligations under articles 12, 13 and 14 of the CRPD.

The WA Attorney General's report also failed to encourage adequate reform in several key areas. It failed to recognise that more support is required for individuals with disabilities to be able to effectively engage with the criminal justice system. It also reaffirmed the need for detainment in prison facilities. Alarmingly, the report also condoned the indefinite detention of individuals.

This lack of progress can be attributed to the basis upon which recommendations were assessed. The overarching aim of the legislation, ensuring the paramount safety of the community, was used by the department to dodge many concerns presented by stakeholders. The potential for detention order to be indefinite, for example, was perceived as an unfortunate but necessary measure at ensure safety of the community. This overarching aim appears to have been used to avoid any opportunity for significant reform.

This reflects a greater issue – the separation of state jurisdictions from international law obligations. With states not required to consider Australia's obligations under international law, they are free to create, amend and repeal legislation as they see fit. It is therefore imperative that the Commonwealth government coordinate with state governments in order to develop a national framework on the fair treatment of people with disabilities who interact with the criminal justice system. The Commonwealth should also use its external affairs power, granted by the Constitution,[160] to incorporate the provisions of the CRPD into domestic law.[161] Without such efforts, Australia will continue to fail to fulfil its obligations under articles 12, 13, and 14 of the CRPD.

C *Further reform*

It is clear that further reform is required for Australia to fulfil its obligations under articles 12, 13 and 14 of the CRPD. Various organisations have made suggestions on how Australia should go about initiating further reform. The Melbourne Social Equity Institute (MSE Institute), for example, has suggested that the government begin considering the ways in which it can establish support services for people with disabilities in the criminal justice system.[162] The government should begin by considering whether intermediaries and support people are

[160] *Australian Constitution* s51(xxix)
[161] *Koowarta v Bjelke-Petersen* (1982) CLR 168 at 224-225 per Mason J.
[162] Above n 131.

necessary, and if so, whether Australian jurisdictions should recognise a statutory entitlement to such services.[163] It should also consider the need for registration and accreditation of intermediaries, and whether their role should extent to providing emotional support.[164]

In response to these questions, the MSE Institute recommends that the government establish formal, non-voluntary procedural accommodations for accused persons with cognitive disability.[165] Procedural accommodations could include employing formal communication assistants and support persons to provide both emotional and communication support to the accused. The Institute also recommends that support people be trained and/or accredited to a minimum standard. Additional voluntary measures should also be available to further assist accused persons with disabilities in contact with the criminal justice system. Such measures would affirm the social model of disability, which posits that barriers built by society is what causes disability, and that such barriers need to be struck down.[166] By implementing procedural accommodations such as these, people with disabilities will be able to function at the same level of people without disabilities.

Certain Australian states currently have similar schemes in place, but only for witnesses with disabilities. Queensland legislation, for example, provides witnesses with disabilities to be supported by a person approved by the court.[167] New South Wales legislation also allows witnesses with mental impairment to request the support of a person of their choice while giving evidence.[168] These provisions illustrate the capacity for courts to support and

[163] Ibid 9.
[164] Ibid.
[165] Ibid 17.
[166] Tom Shakespeare, 'The social model of disability' in L. J. David (ed.), *The disability studies reader* (4th ed, Routeledge, 2013) 214.
[167] *Evidence Act 1977* (Qld) s21(2)(d).
[168] *Criminal Procedure Act 1986* (NSW) s306ZK(2).

accommodate individuals with disabilities during cases. States should consider extending these provisions to make them applicable to defendants with disabilities.

Other organisations have suggested ways in which the Australian government can gradually eliminate the use of prisons for detaining people deemed unfit to plead. The Aboriginal Disability Justice Campaign suggests that custody orders should only be used as a last resort.[169] If this method is adopted, the number of individuals subject to prison-based orders is likely to decrease. It will also become standard practice for courts to make alternate orders when faced with unfitness to plead. They also suggest that community services be improved and expanded in order to manage community supervision orders. Governments should also allocate funding to developing disability-specific units or facilities which meet the needs of individuals with intellectual impairment, while ensuring that a focus is placed on reintegration into the community. Such reform would gradually encourage courts to apply orders carried out outside of prison.

Researchers at La Trobe Law School have developed draft legislation which could be introduced by the federal government.[170] The draft legislation, titled the *'Mental Impairment and Cognitive Disability (Treatment and Support) Bill'*, would 'provide a set of consistent, national minimum principles to avoid the gaps in bureaucratic drift which have marked previous state legislation and practice in the area.'[171] Among other things, the legislation would allow custodial orders to be made only when no reasonable or practicable less restrictive alternative was available. Custodial orders would also be reviewed annually, at which time there would be a rebuttable statutory presumption that the person would transition to a less

[169] M. Sotiri, P. McGee, and E. Baldry, *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*. (Sydney, 2012), 16

[170] Patrick Keyzer and Darren O'Donovan 'Imprisonment of indigenous people with cognitive impairment: What do professional stakeholders think? What might human rights-compliant legislation look like?' (2016) 8(22) *Indigenous Law Bulletin,* 17.
[171] Ibid 18.

restrictive order. This presumption would be applied to ensure that the treatment and support remain appropriate and are the least restrictive possible.

This draft legislation identifies the need for the federal government to implement uniform legislation on the issue. Minimum requirements will enable the treatment of individuals to be relatively consistent across states. However, caution should be taken in ensuring that the minimum standards continue to work towards the complete eradication of custodial orders, as opposed to validating their continued presence in unfitness legislation. In order to fulfil its obligations under the CRPD, Australia would need to continue to amend the legislation until it was in line with articles 12, 13 and 14.

VI CONCLUSION

Australians with mental impairment currently face the risk of being detained indefinitely. This can occur when they are deemed unfit to plead to a criminal charge. If it is decided that a custodial order is most appropriate for the accused person, they can potentially remain in prison for an unlimited amount of time. Australians such as Marlon Noble, Rosie Fulton, Christopher Leo and Kerry Doulan have experienced such circumstances.

This treatment is considered to breach the CRPD. Australia is currently breaching Article 12 and 13 by not providing adequate support to people with disabilities navigating the criminal justice system. Likewise, by failing to ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, Australia breached article 14. It does so by allowing people with disabilities to be detained indefinitely in prison or psychiatric settings.

The CRPD Committee has provided various recommendations to Australia to encourage compliance with these obligations. These include repealing legislation which enabled prisons to be used to detain people with disabilities, as well as ensuring that such people are provided with appropriate support and accommodations in interacting with the criminal justice system.

The Committee has also recommended that Australia review its legislation allowing for the indefinite detention of people based on their disability.

So far, Australia has merely begun to conduct reviews of relevant legislation. All other recommendations have not been acted upon; prisons are still used to detain unconvicted people with disabilities, and these people are still not provided with appropriate accommodations and support. The government is yet to develop mandatory guidelines to ensure that people with disabilities are given appropriate support and accommodation when interacting with the criminal justice system. Finally, the state has not repealed legislation that enables the involuntary detainment of people with disabilities.

Australia needs to make a serious effort to adopt these recommendations and reform unfitness to plead laws. Such progress will inevitably require substantive discussion and gradual reform. Organisations such as the Melbourne Social Equity Institute and the Aboriginal Disability Justice Campaign have provided suggestions on how the Australian government can continue work towards meeting their obligations under the CRPD. These suggestions should play an important role in shaping future policy. After all, the input of stakeholders and members of the disability community is indispensable when considering policy affecting this exact group.

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