Australian Government
Australian Law Reform Commission

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Dear Sir/Madam,

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

I refer to the invitation for submissions to the Senate Community Affairs References Committee (the Senate Committee) inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.

I note that the Senate Committee's November 2015 report on violence, abuse and neglect against people with disability recommended (Rec 6) that the Australian Government work with state and territory governments on the implementation of initiatives to improve access to justice for people with disability contained in the ALRC Report (and other recent reports by the Australian Human Rights Commission and the Productivity Commission).

The Senate Committee recommended that initiatives include a particular focus on ensuring that, where a person who has been found unfit to plead is to be held in detention, it be demonstrated that all reasonable steps have been taken to avoid this outcome, and that the person is held in a place of therapeutic service delivery.

The Senate Committee also stated its belief that there is a need for further investigation of access to justice issues, with a focus, among other things, on the implementation requirements for supported decision-making and the indefinite detention of people with cognitive impairment or psychiatric disabilities (Rec 8).

A communiqué of the Law, Crime and Community Safety Council's meeting on 5 November 2015 recorded that Ministers agreed to 'establish a working group to collate existing data across jurisdictions and develop resources for national use on the treatment of people with cognitive disability or mental impairment unfit to plead or found not guilty by reason of mental impairment'.

The ALRC's report *Equality, Capacity and Disability in Commonwealth Laws* (ALRC 124, 2014) ('ALRC Report') examined issues and made recommendations relevant to several aspects of the Terms of Reference for the Senate Committee's current inquiry. These are highlighted below. References in the text are to elements of the ALRC Report unless otherwise stated.

Detention of individuals who have been declared unfit to plead: Senate Terms of Reference para 1(d)

The ALRC concluded that the current legal test for unfitness to stand trial (see para 7.18) needs to be reformed to avoid unfairness and maintain the integrity of criminal trials, while ensuring that people with disability are entitled to equal recognition before the law, and to participate fully in legal processes.

The common law test of unfitness to stand trial has been criticised in a number of recent inquiries in Australia and overseas. In particular, the common law may place an undue emphasis on a person's intellectual ability to understand specific aspects of the legal proceedings and trial process, and too little emphasis on a person's

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decision-making ability. The rules on unfitness to stand trial are characterised as 'protective'—ensuring that a person cannot be tried for a crime unless capable of defending themselves.

However, in practice, the rules can lead to adverse outcomes for individuals found unfit to stand trial, who may be subject to detention, for an uncertain period, in prison or in secure hospital facilities. The risk is that incentives exist for innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of unfitness.

As a result of being determined unfit to stand trial, a person may end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts. They may find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed.

In some cases, the defendant's interests may not be served in being found unfit to stand trial if the outcome is that they are put on a supervision order, particularly for less serious offences. Such defendants may later be unable to have their supervision orders revoked because they continue to breach the conditions of the order or commit offences. Further, they remain at risk of the order being varied from non-custodial to custodial if they continue to pose a danger to the community. (See paras 7.17–7.34.)

In relation to reforming the test for eligibility to stand trial, the ALRC recommended (Rec 7–1) that the *Crimes Act 1914* (Cth) should be amended to provide that a person cannot stand trial if the person cannot be supported to:

> (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;
>
> (b) retain that information to the extent necessary to make decisions in the course of the proceedings;
>
> (c) use or weigh that information as part of the process of making decisions; or
>
> (d) communicate the decisions in some way.

Modelling a new approach to eligibility to stand trial in Commonwealth law is intended to provide an opportunity to guide law reform at state and territory level and reflect a new approach to determining decision-making ability in criminal justice settings.

The ALRC also noted the wide range of concerns raised about the processes and outcomes of unfitness determinations—including about the availability or otherwise of appropriate accommodation, support services, and diversion from the criminal justice system (see paras 7.71–7.91). In particular, some jurisdictions do not provide statutory limits on the period of detention for those found unfit to stand trial (see para 7.82). Accordingly, the ALRC recommended (Rec 7–2) that:

> State and territory laws governing the consequences of a determination that a person is ineligible to stand trial should provide for:
>
> (a) limits on the period of detention that can be imposed; and
>
> (b) regular periodic review of detention orders.

Compliance with Australia's human rights obligations: Terms of Reference para 1(e)

The United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) was the first binding international human rights instrument to explicitly address disability. The ALRC Report was centrally concerned with Article 12 of the CRPD, which is entitled 'Equal recognition before the law'. This underpins the ability of persons with disability to achieve many of the other rights in the CRPD and recognises the right of persons with disability to enjoy legal capacity 'on an equal basis with others in all aspects of life'. (See generally, Ch 2).

By ratifying the CRPD, Australia accepted the obligations to recognise that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life, and to take appropriate measures to provide persons with disability access to the support they may require in exercising their legal capacity. In this context, the ALRC recommended a continued shift away from 'substitute decision-making' to 'supported decision-making'. The ALRC recommended a set of National Decision-Making Principles (see Ch 3, Rec 3–1) to guide reform of Commonwealth laws and legal frameworks and the review of state and territory laws.

These principles reflect the paradigm shift signalled in the CRPD to recognise people with disabilities as persons before the law and their right to make choices for themselves. The emphasis is on the autonomy and independence of persons with disability who may require support in making decisions—their will and preferences must drive

decisions that they make, and that others make on their behalf. These principles may be relevant to the Senate Committee's consideration of many issues within its Terms of Reference, including for example, in relation to access to justice issues and the regulation of restrictive practices.

It may be observed that the United Nations Committee on the Rights of Persons with a Disability (UNCRPD) interprets art 12 of the CRPD as incompatible with a functional approach to assessing legal capacity—on the basis that functional tests may be discriminatorily applied to people with disabilities; presume to be able to accurately assess the inner-workings of the human mind; and then deny a core human right—the right to equal recognition before the law. (See UNCRPD, *General Comment No.1*, 2014 [15].)

The ALRC's recommendation for a new functional test of eligibility to stand trial may not be consistent with the UNCRPD's interpretation of art 12 as expressed in its General Comment. However, the ALRC concluded that it is not practicable to completely do away with functional tests of ability that have consequences for participation in some legal processes. For example, even where a person has clearly expressed a will and preference to be subject to a criminal trial, the integrity of the trial (and, arguably, the criminal law itself) would be prejudiced if the person does not have the ability to understand and participate in a meaningful way. (See para 7.43.) At the same time, the functional test takes the availability of support into account, which is consistent with the CRPD's requirement that support be provided in the exercise of legal capacity, where necessary.

Access to justice for people with cognitive and psychiatric impairment: Terms of Reference para 1(h)

Chapter 7 of the ALRC Report discusses a number of access to justice issues affecting persons with cognitive impairment including as defendants in criminal proceedings—the concept of unfitness to stand trial (referred to above in this submission); as parties to civil proceedings—the appointment and role of litigation representatives; and as witnesses in criminal or civil proceedings—giving evidence as a witness, and consenting to the taking of forensic samples.

In each of these areas there are existing tests of a person's capacity to exercise legal rights or to participate in legal processes. The ALRC recommended that these tests be reformed consistently with the National Decision-Making Principles (see Recs 7–3 to 7–11). By providing models in Commonwealth laws, the ALRC seeks to inform and provide a catalyst for reform of state and territory laws.

For example, in relation to giving evidence, the ALRC recommended that the *Crimes Act* should be amended to provide that a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers; and to provide that a witness who needs support has the right to have a support person present while giving evidence, who may act as a communication assistant, assist the person with any difficulty in giving evidence, or provide the person with other support (see Recs 7–9, 7–10).

The use and regulation of restrictive practices: Terms of Reference para 1(l)

The term 'restrictive practices' refers to the use of interventions that have the effect of restricting the rights or freedom of movement of a person in order to protect them. Serious concerns have been expressed about inappropriate and under-regulated use of restrictive practices in a range of settings in Australia.

Current regulation of restrictive practices occurs mainly at a state and territory level. However, the Commonwealth, state and territory disability ministers endorsed the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (National Framework) in March 2014 to forge a consistent national approach.

As observed in Chapter 8 of the ALRC Report, the National Framework is intended to reduce the use of restrictive practices, including by informing the development of the NDIS quality assurance and safeguards system. The ALRC recommended that the Australian Government and the Council of Australian Governments (COAG) incorporate aspects of the National Decision-Making Principles in developing the NDIS system (see Rec 8–1).

Taking the National Decision-Making Principles into account in the context of restrictive practices would mean that, as far as possible, decisions about restrictive practices should ultimately be those of the person potentially subject to them. The National Decision-Making Principles can be interpreted as being consistent with best practice alternatives to restrictive practices, which consider the causes of behaviour and plan for positive behaviour support. For example, a person may require support to make decisions about the use of restrictive practices under a behaviour support plan (see paras 8.44–8.62).

The ALRC also recommended that the Australian Government and COAG adopt a similar, national approach to the regulation of restrictive practices in other relevant sectors such as aged care and health care (see Rec 8–2).

Thank you for this opportunity to comment on the matters before the Senate Committee inquiry. If you require any further information please do not hesitate to contact me

Yours sincerely,