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25 May 2011

Mr Damian Griffis and Ms Therese Sands
Aboriginal Disability Justice Campaign
c/- People with Disability Australia
PO Box 666
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Dear Damian and Therese:

Incarceration of persons with intellectual disability pursuant to Part IIA of the Criminal Code of the Northern Territory of Australia

1. You have asked us to advise on possible remedies in discrimination and human rights law for persons with intellectual disability who are incarcerated in Northern Territory prisons pursuant to custodial supervision orders made under Part IIA of the Criminal Code of the Northern Territory of Australia (affected persons).

2. We note your instructions that another firm of solicitors has undertaken to research and provide advice to the Aboriginal Disability Justice Campaign in relation to the availability of any common law remedy that may be available to affected persons. This advice therefore does not consider any potential common law remedy.

3. For the purposes of this advice we note that we have not been briefed with the circumstances of any particular affected person. Our advice is therefore only of a preliminary and general nature.

4. We are available to provide more detailed advice as to possible remedies to any affected person who wishes to instruct us to do so, or anyone acting on their behalf.

Summary of our advice

5. In our view, an affected person is unlikely to have an arguable basis for complaint under the *Disability Discrimination Act* 1992 (DDA) in relation to Part IIA of the

Criminal Code of the Northern Territory of Australia (the statutory scheme) or the penal service delivery framework per se.

5. Nor, for essentially the same reasons, is such a person likely to have an arguable basis for complaint under the *Racial Discrimination Act* 1975 (Cth) (RDA) or the *Anti-Discrimination Act* (NT) (ADA).

6. However, an affected person may have an arguable basis for complaint under the DDA, RDA or ADA if some aspect of the operation of the penal service delivery system discriminated against him or her on the basis of disability or race (for example, if an affected person were to be excluded from a rehabilitation program on the basis of his or her disability or race or on the basis of both attributes).

7. Additionally, it may be arguable that the statutory scheme is racially discriminatory, in that it has a disproportionate impact on Aboriginal persons, and to this extent it is invalidated by Section 10 of the RDA.

8. An affected person may have an arguable basis for complaint to the Australian Human Rights Commission (AHRC) under the *Australian Human Rights Commission Act* 1986 (AHRCA) in relation to the statutory scheme and the penal service delivery arrangements. Such a complaint could allege that the statutory scheme and the penal service delivery arrangements contravene several provisions of the *International Covenant on Civil and Political Rights* (ICCPR), *the International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *Convention on the Rights of Persons with Disabilities* (CRPD). The availability and strength of any such claims will to a significant extent depend upon the specific circumstances of an affected person.

9. An affected person may have now, or have ultimately, an arguable basis for a communication to the United Nations Committee on the Rights of Persons with Disabilities under the Optional Protocol to the CRPD which could allege violation of several provisions of that Convention. An affected person may also have now, or have ultimately, an arguable basis for communications to United Nations Human Rights Committee and the United Nations Committee on the Elimination of Racial Discrimination under the Optional Protocol to the ICCPR and the CERD respectively, which could allege violation of several provisions of those treaties. Again, the availability and strength of any such claims will to a significant extent depend upon the specific circumstances of an affected person.

Your instructions

10. The Aboriginal Disability Justice Campaign is an unincorporated coalition of organisations and individuals who are principally concerned about the incarceration of Aboriginal persons with intellectual disability in Northern Territory prisons pursuant to Part IIA of the Criminal Code of the Northern Territory of Australia.

11. In very brief overview, the statutory scheme provides, inter-alia, for persons who have been found not guilty of an offence charged because of their mental impairment, or persons who have been found unfit to stand trial, to be placed under a supervision order.[1]

12. A supervision order (including a variation to a supervision order (see following) is subject to the same rights of appeal as a sentence.[2]

13. A supervision order may be either of a custodial or non-custodial nature.[3] We note that this advice is only concerned with supervised persons subject to custodial supervision orders.

14. If a custodial supervision order is made, the Court must commit the affected person to custody in prison or another appropriate place.[4] The statutory scheme does not directly define or designate what constitutes 'another appropriate place.' However, the Chief Executive Officer (Health) may provide the Court with a certificate stating that facilities or services are available in an appropriate place for the custody, care and treatment of the person.[5]

15. The Court must not make a custodial supervision order committing a supervised person to custody in prison unless it is satisfied that there is no practical alternative given the circumstances of the person.[6]

16. A supervision order is for an indefinite term,[7] although it may be revoked or varied.[8]

17. When the Court makes a supervision order it must fix a term that is appropriate for the offence concerned and specify that term in the order.[9] Generally speaking, that

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[1] Sections 43I(2)(a), 43X(2)(a) s 43X(3); s 412A(3) and Part IIA, Division 5 of the *Criminal Code of the Northern Territory of Australia.*
[2] Section 43ZB.
[3] Section 43ZA(1)
[4] Section 43ZA(1)(a)
[5] Section 43ZA(3)
[6] Section 43ZA(2)
[7] Section 43ZC
[8] Sections 43ZD; 43ZE and 43ZG

term will be equivalent to the period of imprisonment and/or supervision that would have been the appropriate sentence to impose if the person had been found guilty of the offence charged.[10]

18. At least 3 months, but not more than 6 months, before the time fixed in the order the Court must conduct a review to determine whether to release the supervised person.[11] On completing this review, the Court must release the supervised person unconditionally unless it considers that the person's safety or that of the public is, or is likely to be, seriously at risk if the supervised person is released.[12] If the Court considers that the safety of the supervised person or the public will or is likely to be at serious risk if the person is released unconditionally the court must confirm or vary the supervision order.[13]

19. The Court must be provided with reports on the treatment and management of supervised persons at intervals of not more than 12 months. These reports must provide details of the treatment, therapy or counselling that the supervised person has received, and the services that have been provided to the person since the supervision order was made, or the last report was prepared. They must also provide details of any changes to the prognosis of the supervised person's mental impairment, condition or disability and the plan for managing that condition.[14]

20. When making orders under Part IIA, the court must apply the principle that restrictions of a supervised person's freedom and personal autonomy are to be kept to a minimum that is consistent with maintaining and protecting the safety of the community.[15] The court must also have regard to the following matters:

(a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;

(b) the need to protect people from danger;

(c) the nature of the mental impairment, condition or disability;

(d) the relationship between the mental impairment, condition or disability and the offending conduct;

(e) whether there are adequate resources available for the treatment and support of the supervised person in the community;

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[9] Section 43ZG(1)
[10] Section 43ZG(2)
[11] Section 43ZG(5)
[12] Section 43ZG(6)
[13] Section 43ZG(7)
[14] Section 43ZK
[15] Section 43ZM

(f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;

(g) any other matters the court considers relevant.[16]

21. You instruct us that the Northern Territory Government takes the position that there are, currently, no 'practical alternatives' to custody in prison for persons subject to custodial supervision orders.

22. You instruct us that Aboriginal persons with cognitive impairments are more likely to be placed on custodial supervision orders because their social circumstances are such that a non-custodial supervision orders are not viewed as viable alternatives. Consequently, it is primarily Aboriginal persons with cognitive impairment who are made subject to, and remain on, custodial supervision orders, and do so beyond the limiting term.

23. You instruct us that the custodial environment to which affected persons are committed presents significant risks to them because of their intellectual impairment and vulnerability to harm from others. Additionally, you instruct us that affected persons do not have access, or do not have sufficient access, to habilitation and rehabilitation programs in this environment that are capable of addressing the root cause of their offending behaviours or meeting their disability related needs.

24. You have briefed us with a copy of correspondence from the Hon Delia Lawrie, MP, Northern Territory Minister for Justice and Attorney-General to the Honourable Catherine Branson, QC, President, Australian Human Rights Commission, which is dated 30 September 2010. It appears from this correspondence that the Northern Territory Government is proposing to construct Mental Health and Behavioural Unit within the new Northern Territory prison precinct.

25. The Mental Health and Behavioural Unit is to be administered by the Department of Health and Families and is to accommodate *some* supervised persons in a secure custodial environment (our emphasis). As we understand it, there will be 36 places in the Mental Health and Behavioural Unit. Tenders for the construction of the new prison precinct close at the end of May 2011, with construction currently planned for completion in June 2014.[17]

26. In March 2010, the Chief Justice of the Northern Territory determined in *R v Ebatarintja* that under the statutory scheme as it then stood, the court did not have

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[16] Section 43ZN

[17] See Media Release: Gerry McCarthy, Minister for Correctional Services, *New Prison Precinct Takes Important Step Forward,* 24 November 2010.

power to authorise the Chief Executive Officer (Health) or his or her staff to restrain the liberty of a supervised person in residential premises separate from a prison or an approved treatment facility within the meaning of the *Mental Health and Related Services Act* 1998.[18]

27. This decision would have effectively prevented the Court from making a custodial supervision order committing a supervised person to 'custody' other than in a prison or approved treatment facility. However, this problem has now been rectified by legislative amendment.[19] Pursuant to new section 43ZA(2A) the court may make a custodial supervision order subject to a condition that a person authorised by the Chief Executive Officer (Health) may use reasonable force and assistance to enforce the supervision order and to take the accused person into custody, or restrain the accused person in order to prevent the accused person harming himself or herself or someone else.

28. However, the Court is only entitled to make a custodial supervision order subject to such a condition where it has received a certificate from the Chief Executive Officer (Health) stating that facilities or services are available for the custody, care and treatment of the person in a place other than prison or an approved treatment facility. We understand your instructions to be that the Chief Executive Officer (Health) as a matter of policy refuses to issue such a certificate.

Our advice

29. We understand that you consider this statutory regime and the failure on the part of the Northern Territory Government to provide accommodation and support services for persons subject to custodial supervision orders outside the Northern Territory prison system (the custodial service delivery setting) to raise serious human rights concerns.

30. Additionally, or specifically, we understand you are concerned that the custodial service delivery setting is, in effect, punitive rather than 'treatment' oriented, and that this is unacceptable according to human rights principles given that supervised persons have not been convicted of any offence.

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[18] in *R v Ebatarintja* at pars 38 to 41

[19] Introduced by *Criminal Code Amendment (Mental Impairment and Unfitness for Trial Act)* 2010. This amendment was introduced to overcome the problem identified in *R v Ebatarintja* [2010] NTSC 6 (11 March 2010),

***Disability Discrimination Act* 1992 (DDA)**

31. In particular, you have asked us to advise if the statutory scheme or the custodial service delivery setting may be susceptible to a claim of unlawful discrimination on the basis of disability under the DDA.

32. Broadly speaking, the DDA makes discrimination on the basis of disability unlawful in specified areas of life subject to certain exemptions and defences. Both direct and indirect discrimination are made unlawful. Areas of life in which discrimination on the basis of disability are made unlawful include *goods, services and facilities* (s 24 of the DDA), and the *administration of Commonwealth laws and programs* (s 29 of the DDA).

33. In our view, the statutory scheme itself is not susceptible to complaint under the DDA. Statutory rules per se are not an area of life in which discrimination on the basis of disability is made unlawful under the DDA.

34. Discrimination on the basis of disability in the *administration* of Commonwealth laws and programs is made unlawful under the DDA, but the prohibited conduct is discrimination in the performance of a function, the exercise of a power, or the fulfilment of a responsibility under the law or program. The DDA is not capable of impugning a law per se.

35. In any event, we do not think the *Criminal Code of the Northern Territory of Australia* is capable of being construed as a Commonwealth law. The definition of 'Commonwealth law' provided in s 4 of the DDA includes '(b) an ordinance of a Territory, or a regulation, rule, by-law or determination made under an ordinance of a territory or (c) an order or award made under a law referred to in paragraph ... (b).'

36. However, the reference to an ordinance in the case of the Northern Territory appears to mean statutory rules made prior to the enactment of the *Northern Territory (Self-Government) Act* 1978, which conferred powers in the Northern Territory Legislative Assembly to make laws for the peace, order and good government of the Northern Territory. Construing Northern Territory laws made since the passage of the *Northern Territory (Self-Government) Act* 1978 as Commonwealth laws for the purposes of the DDA appears to us incompatible with the conferral of self-government.

37. We now turn to the custodial service delivery setting. The question of whether prisons are or provide a 'service' within the meaning given that term in the DDA remains, at least to some extent, unsettled law.

38. Section 4 of the DDA defines 'services' to include 'services of a kind provided by a government, a government authority, or a statutory authority.'

39. However, the performance of a government 'function' will not always amount to the provision of a service within the meaning of the DDA. This will be a matter of fact, and the key question is whether the governmental activity confers a benefit on the individual or upon the class to which the individual belongs.[20]

40. There is authority,[21] and appellate obiter,[22] that concludes that a custodial regime may be compatible with the provision of services to prisoners. However, a custodial regime itself could not be construed as a service. This is because incarceration, per se, is the result of the coercive exercise of power by the Territory following judicial determination which is imposed on both the prisoner and the provider of correctional services. It is not, of itself, the provision of a service to the prisoner.[23]

41. In any event, acts done under statutory authority are exempt from the DDA. This includes anything done in direct compliance with an order of a court.[24]

42. Custodial supervision orders committing a supervised person to custody in prison are orders of a court and are therefore immune from complaint under the DDA for this reason, quite apart from whether or not the custodial regime is capable of being construed as a service.

43. Nevertheless, prisoners may receive (or be entitled to receive) services in prison which are, properly construed, for their benefit. Where this can be established as a matter of fact, the provision or failure to provide these services may be susceptible to complaint under the DDA. For example, if a correctional facility provided a rehabilitation program for sex offenders that was designed to address the root cause of offending behaviour and so improve the prospects of release on parole, but denied persons with intellectual disability access to this program, such conduct may well be capable of founding a claim of disability discrimination under the DDA.

Anti-Discrimination Act (NT)

44. For essentially the same reason a complaint of disability discrimination in relation to the statutory regime and custodial service delivery framework would fail under the

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[20] *IW v City of Perth* (1997) 191 CLR 1
[21] *Rainsford v Victoria* [2007] FCA 1059 per Sundberg J at pars 73 to 78 in particular
[22] *Rainsford v Victoria* (2005) 144 FCR 279 per Kenny J (with whom Hill and Finn JJ agreed) at pars 54 to 55; *Rainsford v Victoria* [2008] FCAFC 31 at par 9.
[23] *Rainsford v Victoria* (2004) 184 FLR 110 at pars 20 to 24
[24] Section 47(1)(b)

DDA, it would also fail under the ADA.[25] However, as is the case with respect to the DDA, there will be some circumstances where the custodial supervision framework is providing services to affected persons (or failing to provide them) that may be susceptible to complaint.

45. For completeness, we note that, on your instructions, it may be possible to argue that the statutory regime and custodial service delivery framework is racially discriminatory in that it has a disproportionate impact on Aboriginal persons with cognitive impairments. However, as we have noted with respect to disability discrimination, laws per se are not an area of life covered by the ADA, and its prohibition on race discrimination. The ADA is also subject to the statutory authority exemption.[26] This means that it is unlikely that the race discrimination provisions of the ADA could be used to attack the statutory regime or custodial service delivery framework per se.

46. Nevertheless, there may be some circumstances where the custodial supervision framework is providing services to affected persons (or failing to provide them) that may be susceptible to such a complaint.

***Racial Discrimination Act* 1975 (Cth)**

47. Unlike the DDA and the ADA, the RDA does not incorporate a statutory authority exemption. This may appear to provide more scope for a complaint that alleges race discrimination. However, the key issue remains whether the custodial service delivery framework is an area of life in which discrimination is prohibited; that is, is this framework a "service." For the reasons we outlined at paragraphs 37 to 40 above, in our view, it is unlikely that the custodial service delivery system per se is capable of being construed as a service within the meaning given that term in the RDA.[27]

48. Nevertheless, again, there may be some circumstances where the custodial supervision framework is providing services to affected persons (or failing to provide them) that may be susceptible to such a complaint.

49. Section 10 of the RDA protects the right of persons of a particular race, colour or national or ethnic origin to equality before the law. It does so, in summary, by

[25] ADA, Section 53
[26] RDA Secion
[27] Note also that the definition of "services" provided in Section 3 of the RDA is potentially narrower than the definition of "services" under the DDA in that it does not refer to services 'of the kind provided by government...'

overriding another law, or a provision of any other law, that has the purpose or effect of creating inequality.[28]

50. If it is possible to prove that the statutory regime has a disproportionate and discriminatory impact upon persons with intellectual disability who are from Aboriginal backgrounds, it may be possible to argue that it is invalidated by section 10 of the RDA. Essentially this is a constitutional argument which would contend that the section 10 the RDA, as a Commonwealth law, prevails over the inconsistent Territory law. This issue might be raised, for example, in an application to the Court for a review of a custodial supervision order.

51. We note that on the basis of our current instructions such a claim appears quite speculative. However, for reasons we outline following in relation to the exhaustion of domestic remedies as a pre-condition to communication with human rights treaty bodies, it is a potential cause of action that must at least be considered.

Contravention of human rights – *Australian Human Rights Commission Act*

52. Sections 11(1)(f) and 20 of the *Australian Human Rights Commission Act* 1986 (AHRCA) confer power on the Australian Human Rights Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right. 'Act' is defined in s 3 of AHRCA to mean:

> ... an act done:
> (a) by or on behalf of the Commonwealth or an authority of the Commonwealth
> (b) under an enactment
> (c) wholly within a territory; or
> (d) partly within a territory, to the extent to which the act was done within a territory.

53. AHRCA also provides that 'a reference to, or the doing of, an act includes a reference to a refusal or a failure to do an act.'[29] It also defines an 'enactment' to mean a Commonwealth enactment or a Territory enactment.[30]

54. AHRCA defines 'human rights' to mean, inter alia, the rights and freedoms recognised in the ICCPR or recognised or declared by any relevant international

[28] RDA Section 10, construed according to section 9.
[29] AHRCA Section 3(3)
[30] AHRCA section 3(1)

instrument. Pursuant to s 47 of the AHRCA the Attorney-General has declared CERD and the CRPD to be international instruments relating to human rights and freedoms for the purposes of the AHRCA.

55. A complaint to the AHRC under the AHRCA which alleges a contravention of a human right may only be made by or on behalf of one or more persons 'aggrieved by' (that is, directly affected by) the act or practice.[31] However, the AHRCA also incorporates provisions that provide for representative complaints to be made. A representative complaint is made on behalf of a class of persons. All class members must have a complaint against the same person, the complaint must be 'in respect of, or arise out of, the same, similar or related circumstances,' and all the complaints must give rise to the substantial common issue of fact and law.[32]

56. Apart from its power to inquire into a complaint that alleges a contravention of a human right, the AHRC may also attempt to effect a settlement of the complaint by conciliation. If a settlement cannot be reached, the AHRC may report to the Commonwealth Attorney-General about the matter.[33] There is no power in the AHRC or in any other body (such as the Federal Court) to adjudicate the complaint. If it cannot be resolved by conciliation, and it is referred to the Attorney-General for attention, any further outcome depends upon action by Executive Government.

57. As we have noted, the AHRC's jurisdiction in relation to complaints that allege a contravention of human rights is limited to acts and practices (including failures to act) that occur under an enactment[34] and either partly or wholly within a Territory or for which the Commonwealth is responsible, either directly, or through some form of agency. Such an act or practice therefore must arise from some form of power or function inhering in the Commonwealth.

58. The 'acts' which are the subject of your instructions occur wholly within the Northern Territory of Australia under the Criminal Code (which is an enactment of the Northern Territory). This should be sufficient in itself to provide the AHRC with jurisdiction to deal with complaint brought by or on behalf of an affected person that alleges that the statutory scheme and custodial service delivery framework contravene human rights.

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[31] Section 20(1)(c)
[32] Section 46PB
[33] Section 11(1)(f)
[34]

59. However, even if this is not the case, there are, in our view, a number of sources of Commonwealth power and function that are potentially capable of providing the AHRC with jurisdiction to inquire into such a complaint. These potentially include:

59.1 Commonwealth Constitutional power with respect to the Territories

Section 122 of the Commonwealth of Australia Constitution Act (the Australian Constitution) provides the Commonwealth Parliament with power to make laws for the government of any Territory. Notwithstanding the *Northern Territory (Self-Government) Act* 1978, the Commonwealth Parliament retains the power to make laws with respect to the Northern Territory, including laws that negative laws enacted by the Legislative Assembly of the Northern Territory.

59.2 Commonwealth *Disability Services Act* 1986

Under the Commonwealth *Disability Services Act* 1986 the Commonwealth Government has power to fund services for persons with disability who fall within the target group of that Act. The types of services that may be funded include accommodation support services.[35] Additionally, the Minister administering the Act may, by legislative instrument, approve additional classes of services if this would further the objects and principles and objectives of the Act.[36]

The target group of the DSA (Cth) includes persons with a disability that:

(a) is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments;
(b) is permanent or likely to be permanent; and
(c) results in:
    (i) a substantially reduced capacity of the person for communication, learning and mobility; and
    (ii) the need for ongoing support services.

Additionally, where a service is provided predominately for persons included in the target group, the services shall be taken to be provided to persons in the target group even if it is also provided to some persons who are not included in the target group.

[35] DSA (Cth), see s 7, definition of eligible service
[36] DSA (Cth), Section 9

59.3 National Disability Agreement

The National Disability Agreement (NDA) is an agreement between the Commonwealth Government and each State and Territory Government (including the Northern Territory) created subject to the *Intergovernmental Agreement on Federal Financial Relations.* It is made pursuant to the *Federal Financial Relations Act* 2009.

The objective of the NDA is that people with disability and their carers have an enhanced quality of life and participate as valued members of the community.[37] The designated 'outcomes' to which the agreement is to contribute include people with disability achieving economic participation and social inclusion, and people with disability enjoy choice, wellbeing and the opportunity to live as independently as possible.[38]

The Commonwealth has a number of responsibilities under the NDA which are shared with the States and Territories. Notable shared responsibilities include the development of national policy and reform directions, and developing and implementing reforms to improve outcomes for indigenous people with disability.[39] This includes, as a priority, the development of a National Indigenous Access Framework which is to ensure that the needs of Indigenous Australians with disability are addressed through appropriate service delivery arrangements.[40]

The Commonwealth also has a specific role under the NDA, which includes provision of funds to the State and Territories to contribute to the objective and outcomes of the NDA and ensuring that Commonwealth legislation is aligned with the CRPD.[41]

59.4 National Disability Strategy 2010-2020

The National Disability Strategy 2010-2020 (NDS) is an initiative of the Council of Australian Governments which has been endorsed by the Prime Minister, each State Premier, the Chief Ministers of the Australian Capital Territory and the Northern Territory, and the President of the Australian Local Government Association. The purpose of the NDS includes the establishment of a high-level policy framework to give coherence to, and guide government activity across mainstream and disability-

[37] NDA Clause 6
[38] NDA Clause 7
[39] NDA Clause 14, paragraphs (a) and (c)
[40] NDA Clause 26, paragraph (h)
[41] NDA Clause 15, paragraphs (c) and (e)

specific areas of public policy.[42] The NDS is structured around six broad outcome areas. These include '2 Rights protection, justice and legislation,' and '4 Personal and community support.' Each outcome area incorporates a number of policy directions and areas for future action by participating governments.

Outcome area '2 Rights protection, justice and legislation' incorporates Policy Direction 5, which is "more effective responses from the criminal justice system to people with disability who have complex needs or heightened vulnerabilities. It also includes as future action areas '2.4 Review restrictive legislation and practices from a human rights perspective'; '2.9 Support people with disability with heightened vulnerabilities in any contacts with the criminal justice system, with an emphasis on early identification, diversion and support'; and '2.10 Ensure that people with disability leaving custodial facilities have improved access to support in order to reduce recidivism.' This may include income and accommodation support and education, pre-employment, training and employment services. Outcome area '4 Personal and community support' incorporates Policy Direction 2, which is "a disability support system which is responsive to the particular needs and circumstances of people with complex and high needs for support."

Arguably, the NDS is made pursuant to both the DSA (Cth) and the *Federal Financial Relations Act* 2009.

59.5 National Indigenous Reform Agreement (Closing the Gap) and related initiatives

The National Indigenous Reform Agreement (NIRA) is an agreement between the Commonwealth Government and each State and Territory Government (including the Northern Territory) created subject to the *Intergovernmental Agreement on Federal Financial Relations.* At least in so far as it affects the Northern Territory it is arguably made pursuant to the *Northern Territory Emergency Response Act* 2007 (or at least aspects of it are supported by this legislation).

The objective of NIRA is for participating governments to work together to 'close the gap' in Indigenous disadvantage. NIRA is structured around a number of 'building blocks,' which include 'safe communities.' Among other things this building block mandates action in terms of prevention strategies. Pursuant to the NIRA intergovernmental agreement, the Commonwealth and Northern Territory have also entered into a bilateral plan to close the gap on Indigenous Disadvantage.[43] Related

[42] NDS, at page 9

[43] *Overarching Bilateral Indigenous Plan Between the Commonwealth of Australia and the Northern Territory of Australia to Close the Gap in Indigenous Disadvantage 2010-2015*

initiatives include the appointment of a Co-ordinator General for Remote Indigenous Services, whose role it is to drive the implementation of reforms across government in remote Australia to support achievement of Closing the Gap targets.[44]

59.6 National Indigenous Law and Justice Framework

The National Indigenous Law and Justice Framework (NILJF) is an initiative of the Standing Committee of Attorneys-General. The NILJF was endorsed by the Attorneys of the Commonwealth and each State and Territory in November 2009. The NILJF has five inter-related goals, which include:

1. improve all Australian justice systems so that they comprehensively deliver on the justice needs of Aboriginal and Torres Strait Islander peoples in a fair and equitable manner, and

2. reduce over-representation of Aboriginal and Torres Strait Islander offenders, defendants and victims in the criminal justice system

There may be some difficulty is identifying an enactment under which it might be said that the NIJF is made. However, arguably and at the least, it furthers the objectives of the RDA .

60. The complaint allegation would be, in summary, that the Commonwealth engaged in acts or practices (or failures to act) that have resulted in, or which have failed to redress, contraventions of human rights by the statutory scheme or custodial service delivery framework. For example, it might be alleged:

60.1 that the Commonwealth has failed to use its Constitutional legislative power with respect to the Northern Territory to over-ride the statutory scheme;

60.2 that the Commonwealth has failed to use the powers and functions conferred upon it under the *Disability Services Act* 1986 (Cth) to develop appropriate accommodation and other services for supervised persons as an alternative to custody in prison;

60.3 that the Commonwealth has failed to use the powers and functions available to it under the NDA, NDS, NIRA, and NILJF to pursue appropriate law reform and service delivery initiatives that would prevent or redress contraventions of human rights.

[44] NIRA, page A-25

61. It will also be necessary to identify with some precision which human rights are alleged to have been contravened and in what respects. This is likely to give rise to some complex issues of fact and law which in some cases we are unable to canvass in detail or with confidence on the basis of our limited instructions to date. For the sake of convenience, we will outline in broad terms what some of these contraventions may be later in this advice.

62. We also note in this respect that while there is considerable jurisprudence under the ICCPR and CERD, some of which is of assistance in relation to this matter, there is no jurisprudence to date under the CRPD. Moreover, in light of the adoption of the CRPD, we might now reasonably anticipate that there will be significant interaction between the jurisprudence of each treaty body in relation to complaints that engage the human rights of persons with disability. In summary, there is a degree of uncertainty as to the scope, content and implications of some human rights that are likely to be engaged by a complaint.

Optional Protocol to the *Convention on the Rights of Persons with Disabilities*

63. There is an Optional Protocol to the CRPD (Optional Protocol) which provides for two international oversight mechanisms additional to those incorporated into the CRPD itself. These oversight mechanisms are only operative where a nation has ratified both the CRPD and the Optional Protocol. However, in this respect, we note that Australia ratified the CRPD in July 2008 and the Optional Protocol in August 2009. Both are now binding upon Australia.

64. Article 1 of the Optional Protocol provides the CRPD treaty body (the Committee on the Rights of Persons with Disabilities (the treaty body) with jurisdiction to receive and adjudicate complaints from individuals and groups of individuals who are subject to the jurisdiction of a State Party that allege that they are the victim of a violation of a provision of the CRPD (the communications procedure).

65. Article 6 of the Optional Protocol provides the CRPD treaty body with jurisdiction to examine information that indicates grave or systematic violations of the CRPD rights (the inquiry procedure). This advice considers the potential utility of the communications procedure as an avenue of redress for persons subject to custodial supervision orders. However, in a case such as this, the inquiry procedure should not be overlooked as a possible alternative means of attracting treaty body attention to the issues.

66. A complaint under the Optional Protocol is made to the treaty body through the Petitions Team of the United Nations High Commissioner for Human Rights (based in Geneva).

67. When a communication is received, it is first assessed in terms of its "admissibility" and, if assessed as admissible, then on its "merits."

68. If the complaint is assessed as admissible on a prima facie basis, it is brought to the attention of the State Party, and the State Party is provided the opportunity to comment on its admissibility and merit. The initial response from the State Party is required within six months. The complainant will then, generally, be afforded the opportunity to comment on the State Party response and further submissions may be requested from both parties.

69. Once all the relevant material is before the treaty body, the complaint is considered and determined in closed session. The outcome usually comprises formal decisions on the admissibility, and if relevant, observations and recommendations addressed to the State Party on the merits of the complaint.

70. We note that the period of time from the complaint being lodged until it is finally determined by the Committee may be considerable.

71. In certain circumstances, an application may be made to the treaty body to request a State Party to provide interim relief to a complainant. Generally speaking, such interim relief is to preserve the status quo until the complaint is formally determined.

72. Only individuals or groups of individuals who are victims of alleged human rights violations are entitled to lodge complaints alleging violation of CRPD rights. If another person or organisation wishes to lodge the complaint, in general, they must do so with the authority of the victim or victims of the alleged violation of human rights.

73. Before a victim of an alleged violation of human rights is entitled to lodge a complaint with the treaty body they must have first exhausted all reasonably available domestic remedies.

74. In the present case, there may be no reasonably available domestic remedy. Australia and the Northern Territory do not have a constitutionally entrenched or statutory bill of rights that might be invoked to invalidate the statutory regime. Similarly, there is no statutory entitlement to necessary services that might be

asserted by victims. Victims may have a right of complaint under the AHRCA to the effect that their human rights have been contravened. However, this jurisdiction only provides for the co-operative resolution of complaints or referral for action by Executive Government. It does not provide any basis upon which human rights might be asserted and enforced against the Northern Territory or Australian Governments. In this respect it is arguably not an "effective" remedy.

75. We have noted that there may be some basis for a Constitutional claim to the effect that the statutory scheme is racially discriminatory and therefore to this extent is invalidated by the RDA. However, it is at present difficult for us to assess if this is a reasonably available domestic remedy.

76. It is important to observe that the statutory scheme does incorporate appeal[45] and review[46] mechanisms which, arguably, may need to be exhausted before a complaint may be raised under the Optional Protocol. Leaving aside a possible action under the RDA based upon a claim of inconsistency of laws, these appeal and review mechanisms are not capable of impugning the statutory scheme itself. However, they do provide respectively for a supervision order to be quashed, or for a person to be released from custody. There may be circumstances where either outcome may amount to an effective domestic remedy.

77. Complaints may only be made about alleged human right violations that have occurred since the CRPD and Optional Protocol entered into force with respect to a State Party. Consequently, only persons who have been affected by the statutory scheme since 20 September 2008[47] would be entitled to make a complaint. In this respect it does not matter that an individual became subject to the statutory regime prior to 20 September 2008 provided that they remained subject to it after 20 September 2008. Note, however, that the complaint could not raise allegations about matters that occurred before 20 September 2008.

78. There are other issues that may affect the admissibility of a complaint, but these do not appear to arise based upon your instructions to date.

79. It is important to appreciate that a decision of the treaty body cannot be enforced against a State Party. Action to remedy a finding of a human rights violation requires voluntary action by the State Party itself based upon its solemn commitment to

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[45] Section 43ZB
[46] Sections 43ZG and 43ZH
[47] This is the date that the Optional Protocol came into force with respect to Australia (30 days after the date of ratification)

recognise the rights recognised in the CRPD. This ultimately requires a commitment by Executive Government to address the human rights violation.

80. In this respect we note that Australia, historically, has a variable record in responding to the findings and recommendations of human rights treaty bodies.

81. Nevertheless, a finding that Australia is responsible for a human right violation may constitute a highly persuasive basis for action by executive government, and for associated advocacy by stakeholder groups such as your own.

Optional Protocols to the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*

82. For completeness, we also note that there is an Optional Protocol to the ICCPR and a provision of CERD which also set out communications procedures that entitle victims of alleged violations of those treaties to lodge complaints with the Human Rights Committee and the Committee on the Elimination of Racial Discrimination respectively. Australia is a party to the both the ICCPR and its First Optional Protocol and has recognised the competence of Committee on the Elimination of Racial Discrimination to receive and consider communications under Article 14 of CERD. The process for making a complaint under the ICCPR and CERD, and the admissibility of issues associated with such a complaint, are basically the same as those that pertain to a complaint made under the Optional Protocol to the CRPD.

83. It is important to note that the ICCPR, CERD and CRPD have concurrent and joint application to persons with disability; the CRPD does not in any respect supersede or displace the ICCPR and CERD with respect to persons with disability. This point has particular significance in this case where some relevant human rights recognised in the ICCPR and CERD are not recognised in the CRPD. In other words, depending upon the facts in the particular case, it may be necessary to allege violation of the ICCPR, CERD and the CRPD in complaints addressed to each treaty body.

Which human rights are contravened or violated?

84. There are some potential differences in the scope of what might be alleged as a contravention of a human right under the AHRCA, as compared with what might be alleged as a violation of a provision of the CRPD under the Optional Protocol. This is because the jurisdiction conferred on the AHRC under s 11(1)(f) of the AHRCA is in relation to "human rights" whereas the jurisdiction of the treaty body under the Optional Protocol is in relation to the "provisions" of the CRPD. Similarly, the

communications procedures of both the ICCPR and CERD refer only to "human rights."

85. The CRPD is constituted by 50 Articles. Arguably, 20 of these (Articles 10 to 30) recognise or declare human rights while the remainder are either of an interpretive or operational nature or set out state obligations are facilitative of, but distinct from, human rights. If this construction of the CRPD is correct (and it may not be)[48] then a complaint under the AHRCA could only allege a contravention of a human right recognised in Articles 10 to 30 of the CRPD, whereas, it would appear that a complaint under the Optional Protocol could allege a violation of any article. In most cases, this is unlikely to make much practical difference.

86. However, it does mean, generally speaking, that a complaint that alleges a contravention of a human right under the AHRCA ought to be based upon Articles 10 to 30 of the CRPD and if elements of other Articles are relevant to the complaint it will need to be shown how the failure to fulfil these elements gives rise to the contravention of a substantive right.

87. Arguably, and broadly speaking, the following contraventions or violations of human rights might be alleged in the circumstances of this case. However, we note that the availability and strength of such allegations will obviously depend in some instances on the individual's particular circumstances.

88. The following allegations may be arguable:

88.1 the statutory scheme contravenes the guarantees of equal protection and non-discrimination provided for in Articles 2 and 26 of the ICCPR and Article 5 of the CRPD in that it is a law of specific application to persons with disability.

88.1.1 In this respect it is a discriminatory law that arguably has the purpose and effect of impairing or nullifying for persons with disability the recognition, enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others.[49] The human rights that it impairs or nullifies are, arguably, as follows.

88.1.2 Article 5(4) of the CRPD provides that specific measures that are necessary to accelerate or achieve de facto equality of persons with

[48] There remains debate about whether some other articles also recognise or declare human rights (for example, articles 5 and 9); this issue is likely to be resolved eventually in the evolution of treaty body jurisprudence.
[49] See Article

disability are not to be considered discrimination under the terms of that Convention. This exception is also recognised in the jurisprudence that has developed under the ICCPR.[50]

88.1.3 The question of whether the statutory scheme is a special measure is likely to be a fundamental and threshold issue in this case, and we note that the answer to the question may vary between individuals. For example, the statutory regime is arguably more likely to be viewed as a special measure in relation to those persons who are relieved of criminal responsibility and diverted to non-custodial community based alternatives to prison where they receive appropriate social interventions to deal with the root cause of their offending behaviour.

88.1.4 However, with respect to the specific population group with which this advice is concerned, we think it unlikely that the statutory scheme is capable, ultimately, of being construed as a special measure. Whatever may be the policy intention of the scheme, and however else it may in theory be capable of operating, the fact remains that this population group, in spite of being relieved of criminal responsibility, are nevertheless confined to custody in prison.

88.1.5 Moreover, they are confined to prison for an unlimited term whereas had they been convicted of the offence charged a limiting term would have been set after which they would have been released.

88.1.6 Although there are appeal and review mechanisms associated with the unlimited term of confinement, as a practical matter, at least in some cases, affected persons remain in prison for substantially longer periods than they would have done had they been convicted.

88.1.7 We also note that your instructions are that affected persons do not receive the habilitiation and rehabilitation services in prison that are reasonably required to address the root causes of their offending behaviour.

88.1.8 Consequently, for the class of affected persons with which this advice is concerned, we think it is strongly arguable that the statutory scheme operates in a punitive rather than beneficial way and therefore is not properly considered a special measure. Even if the

[50] Committee on Human Rights, *General Comment 18,* par 10.

relief from criminal responsibility is beneficial, the net effect of the statutory regime is negative and therefore discriminatory.

88.1.9 Under international law, a measure will not be discriminatory if it is based upon reasonable and objective factors, and it is a proportionate response to those factors.[51] This is essentially a defence to a claim of discrimination, and the burden of proof rests with the party asserting the defence.

88.1.10 The question of whether the statutory regime is a reasonable and objective response to a justifying factor is also likely to be a key issue in this case. As we understand it, each of the persons subject to a custodial supervision order has engaged in behaviours that involved serious actual harm to themselves or others and there is a reasonable basis upon which to conclude that a risk of such harm persists. In these circumstances, there would appear to be an arguable defence to the discriminatory measure.

88.1.11 However, in our view, (and always depending upon the specific facts) such a defence is unlikely to ultimately succeed in this case because the statutory scheme creates an arbitrary distinction between persons with intellectual impairment and others who may engage in the same behaviours and carry an equivalent associated risk; that is, the statutory regime applies only to persons with cognitive impairment rather than the population as a whole.

88.1.12 Moreover, as we have already noted, the effect of the statutory regime is to subject affected persons to more punitive treatment than others who are convicted of equivalent offences. In our view, this means that there is unlikely to be a reasonable relationship of proportionality between the statutory scheme and the justifying factor.

88.2 the statutory scheme contravenes Article 9(1) of the ICCPR and 14(1)(b) of the CRPD in that it subjects affected person to arbitrary detention. Moreover, the statutory scheme contravenes Article 14(1)(b) in the further

[51] Human Rights Committee, *General Comment 18,* paragraph 13; cf *Belgian Linguistics Care (Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* ECtHR 23 July 1968 especially at Section 1B, paragraph 10.

respect that, arguably, the deprivation of liberty is justified on the basis of the disability of the person.

88.2.1 In spite of the fact that the detention to which affected persons are subject is authorised by law, and subject to review by a Court, it may nevertheless be arbitrary for a number of reasons, which include:

(a) affected persons have not been convicted of an offence;

(b) the detention is substantially the result of the lack of availability of social supports for the individual;

(c) The conditions of detention are harsh and unreasonable, and unlikely to lead to habilitation or rehabilitation, particularly given that affected persons are persons with intellectual impairment;

(d) Persons with an Aboriginal background are disproportionately subject to custodial supervision orders. In other words, the statutory scheme is (indirectly) racially discriminatory, and therefore arbitrary;

(e) the length of detention, which at least in some cases exceeds that of persons convicted of equivalent offences;

(f) the statutory regime is based upon the status of affected persons as persons with intellectual disability; that is, it discriminates against persons with intellectual disability.

88.2.2 Article 14(1)(b) of the CRPD provides that "the existence of a disability shall in no case justify a deprivation of liberty."

88.2.3 It is important to remain conscious of the fact that affected persons have become subject to the statutory regime because they have caused harm to themselves or others. On one view, it is this harm, and not the person's disability that justifies the deprivation of their liberty. It might be expected that this would be the position of the Northern Territory Government in response to any complaint made about the statutory regime.

88.2.4 Nevertheless, it is only persons with intellectual impairment who may be deprived of liberty under the statutory regime. No-one else may

be subject to the regime. In these circumstances we think it is strongly arguable that disability is, in substance, the basis for deprivation of liberty.

88.2.5 In any event, even if the harm is the original justifying factor, we think it strongly arguable, at least in some cases, that disability becomes the basis for the detention. This is because there will be a point beyond which a person who does not have a disability who was convicted of an equivalent offence will be entitled to be released, whereas affected persons do not have such an entitlement.

88.3 the custodial service delivery framework contravenes Article 10(1) of the ICCPR and Article 14(2) of the CRPD in that it does not treat persons who are deprived of their liberty with humanity and respect for their inherent dignity or other guarantees in accordance with intellectual human rights law and the provisions of the CRPD including in relation to reasonable adjustment.

88.3.1 The custodial service delivery framework is arguably inhumane for a number of reasons including:

(a) Persons with intellectual impairment are vulnerable to harm from other prisoners;

(b) It intensifies and exacerbates the impairment and disability of affected persons;

(c) it does not provide, or does not sufficiently provide, essential habilitation and rehabilitation services to affected persons;

(d) Confining persons who have not been convicted of an offence to prison on an indefinite basis is degrading and incompatible with human dignity; and

(e) The length of the period of detention.

88.3.2 Article 14(2) of the CRPD provides that persons with disability who are lawfully deprived of their liberty are entitled "to guarantees in accordance with international human rights law and the provisions of the CRPD including in relation to reasonable adjustment."

88.3.3 Consequently, to be "humane," a system of detention must provide persons with disability with any adjustments and supports they require because of their disability. This might include for example, recognition and support of alternative or augmentative forms of communication and adaptation to habilitation and rehabilitation programs to ensure they are accessible to persons with disability. On your instructions it would appear that the custodial service delivery framework does not satisfy these minimum guarantees.

88.4 the statutory scheme and custodial service delivery framework contravenes Article 10(2) of the ICCPR in that it does not segregate accused persons from convicted persons, nor does it subject affected persons to separate treatment that is appropriate to their status as unconvicted persons.

88.4.2 Affected persons have either been found not guilty by reason of mental impairment or they have been found unfit to be tried. They are therefore not convicted persons and arguably must be separated from convicted persons, rather than accommodated in prison with convicted persons.

88.4.3 Moreover, as has already been suggested, your instructions are that affected persons do not have access to habilitation and rehabilitation programs that are capable of responding effectively to the root cause of their offending behaviour. Arguably, these programs are appropriate to their status as unconvicted persons, and the failure to provide them violates Article 10(2) of the ICCPR.

88.5 the custodial service delivery framework contravenes or violates Article 10(3) of the ICCPR in that it does not provide, or does not sufficiently provide, treatment leading to the reformation and social rehabilitation of affected persons.

88.6 the custodial service delivery framework contravenes or violates Article 7 of the ICCPR and Article 15 of the CRPD in that, for the reasons outlined at paragraph 88.3.1 to 88.3.3 of this advice , it subjects affected persons to inhuman and degrading treatment or punishment.

88.7 The custodial service delivery framework contravenes or violates Article 19 of the CRPD in that it does not recognise or give effect to the right of persons with disability to live in the community with choices equal to others.

88.7.2 Again, it must be borne in mind that affected persons are subject to the statutory regime because they have engaged in acts of serious harm to themselves and others. These acts may justify limitations being imposed on liberty rights, such as that recognised in Article 19, provided these limitations are in accordance with law.

88.7.3 However, for reasons we have already explained, any such limitations must be proportionate to the justifying factor. In this respect it is also important bear in mind that affected persons have not been convicted of an offence. For both reasons, we think it may be arguable that the custodial supervision framework contravenes or violates Article 19.

88.8 the custodial supervision framework contravenes or violates Article 26 of the CRPD in that it does not provide habilitation and rehabilitation services that enable affected persons to attain maximum independence, full physical, mental, social and vocational ability, and full inclusion in all aspects of life.

88.8.1 In this respect it is relevant to note not only that (as you instruct us) habiliation and rehabilitation programmes are absent or inadequate, but also that, to the extent they are provided, they are provided in a segregated custodial setting. Both features arguably contravene or violate Article 26.

88.9 the custodial supervision framework contravenes or violates Article 28 of the CRPD in that it not does recognise the right of persons with disability to an adequate standard of living.

88.9.1 In this respect it is notable that Article 28 incorporates obligations that require state parties to ensure access by persons with disability to appropriate and affordable services and other assistance for disability related needs, and to ensure access by persons with disability to public housing programmes.

88.9.2 Arguably, if such assistance was available in the community, it would be much less likely that custodial supervision orders would be made, and less likely still that persons subject to them would be committed to custody in prison.

88.10 the statutory scheme and custodial supervision framework contravenes or violates Articles 2 and 5 of CERD in that they are (indirectly) racially discriminatory for the reasons outlined above.

89. Articles 26 and 28 of the CRPD are social rights which may be realised progressively. State parties are not required to give them immediate effect. Nevertheless, progressive realisation must be undertaken to the maximum extent of available resources. It must also be undertaken in an equitable manner that ensures the most concerted progressive action is directed towards those population groups that are most disadvantaged. It would seem unarguable that affected persons are among the most acutely disadvantaged Australians by virtue of their disability, Aboriginality and social circumstances.

Closure

90. We intend this letter of advice to conclude our assistance to you in relation to these instructions. We will now close this file. However, as we have indicated, we are available to provide more specific and detailed advice to any affected person, or group of affected persons, or persons acting on their behalf, who may wish to pursue any of the actions we have outlined.

82. Thank you for your instructions. We hope that we have been of some assistance to you. Please telephone me if you would like to discuss this advice.

Yours sincerely

[redacted]

PHILLIP FRENCH
Solicitor