



Australian
Human Rights
Commission

Indefinite detention of people with cognitive and psychiatric impairment in Australia

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Community Affairs References Committee in its inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.
2. The Commission welcomes the Committee's scrutiny of the systemic failures which lead to people with cognitive and/or psychiatric impairment being detained indefinitely, including in prisons, without conviction.
3. The Commission notes that the Australian Government made a commitment at the UN Universal Periodic Review in November 2015 'to improving the way the criminal justice system treats people with cognitive disability who are unfit to plead or found not guilty by reason of mental impairment'.¹
4. For over 10 years the Commission has raised concerns about the treatment of people with cognitive or psychiatric impairment who come into contact with the criminal justice system.² The Commission has placed particular focus on the disproportionate number of Aboriginal and Torres Strait Islander people with cognitive impairment who are subjected to prolonged and indefinite detention. The Commission's previous work on this issue includes:
 - *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008)³
 - *Social Justice Report* (2012)⁴ (see section 1.4(b))
 - *Equal before the law: Towards Disability Justice Strategies* (2014)⁵
 - *KA, KB, KC and KD v Commonwealth of Australia* (2014)⁶
 - *Social Justice Report* (2015)⁷ (see chapter 4).
5. Drawing upon this work, the Commission's submission will focus on responding to the following terms of reference:
 - a. the prevalence of imprisonment and indefinite detention of individuals with cognitive and psychiatric impairment within Australia;
 - b. the experiences of individuals with cognitive and psychiatric impairment who are imprisoned or detained indefinitely;
 - d. the impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead;
 - e. compliance with Australia's human rights obligations;
 - h. access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants;
 - n. the prevalence and impact of indefinite detention of individuals with cognitive and psychiatric impairment from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, including the use of culturally appropriate responses.

6. The Commission will not be commenting in this submission about the indefinite detention of people with cognitive or psychiatric impairment through ‘civil’ confinement, as involuntary patients under mental health legislation (without any contact with criminal justice system).

2 Summary

7. Under current laws and practices in Australia, people with cognitive and/or psychiatric impairment who are charged with a crime, but found not guilty or ‘unfit to stand trial’ because of impairment, may be detained for indefinite and prolonged periods. In practical terms, this has meant detention for longer than if they had been convicted. A disproportionate number of the people who are indefinitely detained are Aboriginal and Torres Strait Islander people.
8. People with cognitive and/or psychiatric impairment end up in indefinite detention due to a series of systemic failures:
 - they are not provided with culturally appropriate supports and services in the community to avoid socio-economic disadvantage, which can lead to offending behaviour
 - if they come into contact with the criminal justice system, they are not provided with adequate support and adjustments to enable them to effectively participate in that system
 - if they are deemed ‘unfit to stand trial’ because of impairment, they are locked out from the usual criminal trial process (which contains fair trial guarantees and safeguards against arbitrary and indefinite detention)
 - despite the fact they have not been convicted of any crime, people found unfit to stand trial or not guilty by reason of mental impairment can be subjected to detention orders, with no set end date
 - due to the lack of appropriate facilities, services and resources to facilitate their rehabilitation, people subjected to these detention orders are detained for long periods in high security correctional facilities.
9. These are failures in Australia’s obligations under the *Convention on the Rights of Persons with Disability* (Disability Convention).⁸ That Convention requires that people with cognitive and psychiatric impairment be supported to effectively participate in the criminal justice processes which apply to everyone else.
10. People with severe cognitive and/or psychiatric impairment must not be disadvantaged as a result of not being able to participate in the court process. They must not be deprived of their liberty arbitrarily, including through processes that do not contain the same protections that people without disability enjoy. Article 14(2) of the Disability Convention requires States Parties to ensure that:

if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the

objectives and principles of this Convention, including by provision of reasonable accommodation.⁹

11. In light of the obligations in the Disability Convention, the Commission is specifically concerned that:
 - The lack of support and procedural accommodations provided in the criminal justice process, and the current tests for unfitness to stand trial, are contrary to the obligations to recognise the legal capacity of people with disability, and ensure they have effective access to justice.¹⁰
 - The special hearings people with cognitive and/or psychiatric impairment are subject to in some jurisdictions may be contrary to the right to a fair trial.¹¹
 - The lack of appropriate and effective limits on the detention orders made against people found unfit to stand trial or not guilty by reason of mental impairment are contrary to the right not to be detained arbitrarily.¹²
 - The detention in prisons of people with cognitive and/or psychiatric impairment who have not been convicted is inappropriate and contrary to their right to health, habilitation and rehabilitation, and may expose them to cruel, inhuman or degrading treatment.¹³
12. Action is needed at multiple levels to address the systemic failures which are resulting in people with cognitive and/or psychiatric impairment being denied effective access to justice and detained indefinitely. The Commission recommends a number of actions designed to ensure that people with cognitive and/or psychiatric impairment:
 - have access to supports and services in the community to help avoid unnecessary contact with the criminal justice system
 - are provided with effective support if they come into contact with that system
 - if found unfit to stand trial and/or not guilty by reason of mental impairment:
 - are accommodated in appropriate facilities, and provided with treatment and support to facilitate their rehabilitation, and
 - are protected by appropriate and effective safeguards, including regular monitoring and effective limits on detention.

3 Recommendations

Recommendation 1: All governments fund adequate and culturally appropriate community welfare, accommodation and support services for people with cognitive and/or psychiatric impairment to reduce disadvantage and the risk of offending behaviour.

Recommendation 2: All state and territory governments implement a Disability Justice Strategy¹⁴ which includes reasonable adjustments to court procedure and provision of support to defendants with disability to ensure they can participate in legal processes.

Recommendation 3: All governments consider amendments to the evidence laws in each jurisdiction similar to those introduced by the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA).

Recommendation 4: Each state and territory government:

- (1) Develop a culturally-appropriate assessment protocol that assists those administering the justice system to identify people with disability and ensure appropriate support and adjustments are provided.
- (2) Develop and deliver training to those administering the justice system on how to identify and support people with disability to ensure they have effective access to justice.

Recommendation 5: The tests for unfitness to stand trial in every jurisdiction be amended to require judges to consider whether the accused could effectively participate in a trial if provided with support and/or modifications.

Recommendation 6: Training be delivered to the judiciary in every jurisdiction on how to determine capacity to stand trial by reference to the support available.

Recommendation 7: All state and territory laws which allow for people to be detained following a finding of unfitness to stand trial, or a verdict of not guilty by reason of mental impairment:

- (1) impose effective limits on the total period of detention
- (2) require regular reviews of the need for detention
- (3) require a plan to be put in place including actions to be taken for the person's rehabilitation to facilitate their transition into progressively less restrictive environments, and eventually out of detention.

Recommendation 8: All state and territory governments establish as a matter of urgency an appropriate range of facilities to accommodate people who are found unfit to stand trial and/or not guilty by reason of mental impairment. Particular priority should be given to establishing appropriate facilities for people with cognitive impairment.

Recommendation 9: The Australian Government ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and establish an independent national preventative mechanism to monitor places of detention, including all those where people with disability are detained.

4 Persons affected by mental health laws allowing for indefinite detention

4.1 Defining ‘cognitive’ vs ‘psychiatric’ impairment

13. ‘Cognitive impairment’ can refer to a range of disorders relating to mental processes of knowing, including awareness, attention, memory, perception, reasoning and judgement. Cognitive impairment includes intellectual disabilities, learning difficulties, acquired brain injury, foetal alcohol syndrome, dementia, neurological disorders and autism spectrum disorders.¹⁵
14. Psychiatric impairment, on the other hand, refers to mental illness. A psychiatric impairment is a condition that severely impairs (temporarily or permanently) the mental functioning of the person and is characterised by the presence of one or more of the following symptoms: delusions, hallucinations, serious disorder of thought, a severe disorder of mood, and sustained or repeated irrational behaviour.¹⁶
15. A key difference between these two types of impairment is that ‘cognitive impairment is not “treatable” in the same way that much mental illness [psychiatric impairment] is’:

While mental illness is episodic, and may respond to pharmaceutical and clinical treatment resulting in a return of capacity...cognitive disabilities (although involving fluctuating skill sets depending on a range of environmental and support factors) [are] permanent.¹⁷
16. It is also important to note that many people in the criminal justice system may have both a cognitive impairment *and* a psychiatric impairment.¹⁸

4.2 People with cognitive and/or psychiatric impairment who come into contact with the criminal justice system

17. People with cognitive and/or psychiatric impairment are exposed to the risk of indefinite detention when they are charged with an offence and brought into the criminal justice system.
18. It is clear that people with cognitive and/or psychiatric impairment are over-represented in criminal justice systems in Australia.¹⁹ However, as the New South Wales Law Reform Commission (NSWLRC) has emphasised, ‘the great majority of people with a cognitive and/or mental health impairment do not offend.’²⁰ The disproportionate number of people with cognitive and/or psychiatric impairment who end up in the criminal justice system:

does not arise from any simple relationship between impairment and crime, but from impairment together with a multiplicity of other factors, such as disrupted family backgrounds, family violence, abuse, misuse of drugs and alcohol, and unstable housing.²¹

19. Without adequate support in the community, people with cognitive and/or psychiatric impairment are also more likely to experience social or economic disadvantage, for example reduced access to education and employment opportunities, and social isolation.²² Forty-five percent of people with disability in Australia live in poverty or near poverty.²³ These factors increase the risk of engaging in criminal behaviour.²⁴
20. Aboriginal and Torres Strait Islander people experience disability at approximately twice the rate of non-Indigenous people.²⁵ This high rate of disability is driven by a number of factors, including socio-economic disadvantage, poor health care and nutrition, exposure to violence, psychological trauma and substance abuse, and the breakdown of traditional community structures in some areas.²⁶ It is important to recognise the ‘historical and socio-political context of Aboriginal mental health’ which includes:

the impact of colonisation; trauma; loss and grief; separation of families and children; the taking away of land; and the loss of culture and identity; plus the impact of social inequality, stigma, racism and ongoing losses.²⁷
21. Aboriginal and Torres Strait Islander people with disability can experience ‘double disadvantage’, that is discrimination on the basis of both race and disability. There are also a number of unique challenges that Aboriginal and Torres Strait Islander peoples face when trying to access disability services.²⁸
22. Aboriginal and Torres Strait Islander people with disability, particularly cognitive impairment, therefore often have multiple and complex needs, which complicates their interaction with criminal justice systems.²⁹ Their disability can be ‘masked’ by the consequences of the other disadvantages they experience, for example a lack of response to questions may be ascribed to language and cultural barriers, rather than cognitive impairment.³⁰
23. The Commission notes that *young* Aboriginal and Torres Strait Islander people with cognitive and/or psychiatric impairment are particularly at risk of contact with the criminal justice system. The Commission commends to the Committee its 2008 report *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, which discusses in detail the multiple levels of disadvantage experienced by this group of young people, and explores the types of interventions which can assist them.³¹
24. It is well-documented that Aboriginal and Torres Strait Islander people generally are overrepresented in the prison population.³² There are many factors which contribute to this, including homelessness and the disproportionate impact of ‘public order’ laws on Aboriginal and Torres Strait Islander people.³³
25. It is estimated that Aboriginal and Torres Strait Islander people *with disability* are almost 14 times more likely to be imprisoned than the rest of the population.³⁴ In terms of people in indefinite detention, the Aboriginal Disability Justice Campaign (ADJC) has noted that ‘there is no doubt that Indigenous people are massively over-represented.’³⁵ From the limited data available to the ADJC, it identified that at the time of its research all 9 of the people on indefinite supervision orders in the Northern Territory were Indigenous, and in Western

Australia over 30 per cent (11 out of 33) of the people under the Mentally Impaired Accused Review Board were Aboriginal or Torres Strait Islander people.³⁶

5 Human rights obligations

26. There are a number of international human rights instruments which impose obligations on Australia relevant to the treatment of people with cognitive and/or psychiatric impairment. The key obligations are in the Disability Convention.³⁷
27. Australia has an obligation under the Disability Convention to ensure that people with disability enjoy all their human rights without discrimination.³⁸ The Convention does not include a comprehensive definition of disability, but provides that 'persons with disabilities' include those who have long-term mental impairments and intellectual impairments. When a person's impairment interacts with various barriers that restrict that person's effective participation in society on an equal basis to others, they are considered to have disability.³⁹
28. The Disability Convention and other international treaties impose clear obligations on Australia which are central to protecting the rights of people with cognitive and/or psychiatric impairments who come into contact with the criminal justice system. The obligations are:
 - to recognise that people with disability are **equal before and under the law**, and are entitled to equal protection and equal benefit of the law⁴⁰
 - to recognise that people with disability **enjoy legal capacity on an equal basis** with others in all aspects of life, and to take appropriate measures to **provide access by persons with disabilities to the support they may require in exercising their legal capacity**⁴¹
 - to ensure **effective access to justice** for persons with disabilities on an equal basis with others, including through the **provision of procedural and age-appropriate accommodations**, in order to **facilitate their effective role as direct and indirect participants in all legal proceedings**, including at investigative and other preliminary stages⁴²
 - to ensure that people with disability are **not deprived of their liberty unlawfully or arbitrarily**, or *because of* the disability⁴³
 - to ensure that if people with disability are **deprived of their liberty through any process**, they are, on an equal basis with others, **entitled to guarantees in accordance with international human rights law** and to be treated in compliance with the objectives and principles of the Convention, including by provision of reasonable accommodation⁴⁴
 - to take appropriate measures to ensure access for persons with disabilities to health services, and to organize, strengthen and extend comprehensive **habilitation and rehabilitation services and programmes**⁴⁵
 - to take all effective legislative, administrative, judicial or other measures to **prevent persons with disabilities**, on an equal basis with others, from

being subjected to **torture or cruel, inhuman or degrading treatment or punishment**.⁴⁶

29. In the context of criminal proceedings, the obligation under the Disability Convention to ensure effective participation for people with disability is given further detail by article 14(3) of the *International Covenant on Civil and Political Rights* (ICCPR).⁴⁷ Article 14 sets out the minimum guarantees all people are entitled to 'in the determination of any criminal charge' against them, to ensure they receive a fair trial. They include the right to participate by:
- being informed...in detail in a language which the person understands of the nature and cause of the charge against them
 - having adequate time and facilities for the preparation of a defence and to communicate with counsel
 - being present during the trial, and defending the charges in person or through legal assistance
 - examining, or having examined, the witnesses giving evidence against the person
 - having the free assistance of an interpreter if the person cannot understand or speak the language used in court.
30. Given the double discrimination that young people and Aboriginal and Torres Strait Islanders with cognitive and/or psychiatric impairment can experience, it is also relevant to note that:
- The Disability Convention imposes a specific obligation on States Parties to 'take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children'.⁴⁸
 - The *Convention on the Rights of the Child*:
 - requires States Parties to respect and ensure the rights in that Convention for every child without discrimination of any kind, including on the basis of race and/or disability,⁴⁹
 - recognises the special needs of children with disability, and requires States Parties to provide assistance to children with disability to address these needs.⁵⁰
 - The *United Nations Declaration on the Rights of Indigenous Peoples*:
 - requires States to take all necessary steps to ensure the social and economic improvement of Indigenous peoples, with a particular focus on people with disability,⁵¹ and
 - places an obligation on States to focus on the rights and special needs of Indigenous peoples with disability and guarantees protection against all forms of violence and discrimination.⁵²

6 Access to justice for people with cognitive and/or psychiatric impairment

6.1 Introduction

31. In 2013 the Commission conducted a wide-ranging consultation process to investigate the experience of people with disability who come into contact with the criminal justice system. The Commission urges the Committee to read the Commission's report *Equal before the law: Towards Disability Justice Strategies*.⁵³ That report provides the broader context for the specific issues affecting defendants with cognitive and/or psychiatric impairment. It identifies a number of actions to improve access to justice for people with disability.

32. The Commission's primary finding in *Equal before the law* was that '[p]eople with disabilities do not enjoy equality before the law when they come into contact with the criminal justice system in Australia'.⁵⁴ The Commission identified 5 main barriers in this respect:

BARRIER 1. Community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disabilities.

BARRIER 2. People with disabilities do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.

BARRIER 3. Negative attitudes and assumptions about people with disabilities often result in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.

BARRIER 4. Specialist support, accommodation and programs may not be provided to people with disabilities when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead').

BARRIER 5. Support, adjustments and aids may not be provided to prisoners with disabilities so that they can meet basic human needs and participate in prison life.⁵⁵

33. The Commission's consultations revealed that:

- Inability to access effective justice compounds disadvantages experienced by people with disabilities.
- People with disabilities experience a relatively high risk of being jailed and are then likely to have repeated contact with the criminal justice system.
- There is widespread difficulty identifying disability and responding to it appropriately.
- Necessary supports and adjustments are not provided because the need is not recognised.
- When a person's disability is identified, necessary modifications and supports are frequently not provided.

- Erroneous assessments are being made about the legal competence of people with disabilities.
 - Styles of communication and questioning techniques used by police, lawyers, courts and custodial officers can confuse a person with disability.
 - Appropriate diversionary measures are underutilised, not available or not effective due to lack of appropriate supports and services.⁵⁶
34. The Australian Law Reform Commission (ALRC) made very similar findings about the barriers preventing people with disability from fully participating in court processes in its 2014 report *Equality, Capacity and Disability in Commonwealth Laws*.⁵⁷

6.2 Lack of community support prior to contact with criminal justice system

35. People with cognitive and/or psychiatric impairment usually come into contact with the criminal justice system only after failures in service provision and support in the community. The ADJC found that 'contact with criminal justice agencies is usually preceded by compromised educational experience, disconnection with community, and inadequate service system responses to need'.⁵⁸
36. The National Mental Health Commission which conducted a national Review of Mental Health Programmes and Services in 2014 found that 'meaningful help often is not available until a person has deteriorated to crisis point'.⁵⁹
37. The lack of support in the community can lead to offending behaviour, and an 'inappropriate drift into the criminal justice system', particularly for Aboriginal and Torres Strait Islander people.⁶⁰
38. The Commission found in its 2013 consultations that people with disability had limited access to advocacy and legal services with disability expertise, especially in remote and regional areas.⁶¹ For Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disability, access to culturally competent services with disability expertise, and Aboriginal legal services, was even harder.⁶²
39. The key to protecting people with cognitive and/or psychiatric impairment from being inappropriately 'managed' by the criminal justice system, including by being placed in indefinite detention, is to support them to function in the community. It is not appropriate or effective for people with complex needs to have to reach a crisis point before they receive supports and services. The National Mental Health Commission concluded that the mental health system in Australia needs to be reformed with 'a strong focus on prevention, early intervention and support for recovery'.⁶³
40. The need for support in the community is as important for preventing re-offending as it is for preventing offending. In the context of the over-representation of Aboriginal and Torres Strait Islander people with disability in

prisons, it is relevant to note that 77 per cent of the Aboriginal and Torres Strait Islander people in prison on 30 June 2015 had been previously imprisoned.⁶⁴

41. People with cognitive and/or psychiatric impairment who spend time in custody or detention require specific post-release support services and accommodation to enable them to rebuild their lives in the community. If adequate post-release support is not provided, there is a risk that these people will reoffend and cycle back through the criminal justice system.⁶⁵ This suggests that the availability of a continuum of support, including post-release, is important when considering the risk of (re)offending.
42. The roll-out of the National Disability Insurance Scheme (NDIS) brings with it an opportunity to address current shortcomings with regard to service provision for people with disability, particularly in Aboriginal and Torres Strait Islander communities. In its most recent *Social Justice and Native Title Report 2015* the Commission identified principles for effective service provision to Aboriginal and Torres Strait Islander people with disability, and identified some of the emerging challenges in terms of their access to the NDIS.⁶⁶

Recommendation 1: The Commission recommends that all governments fund adequate and culturally appropriate community welfare, accommodation and support services for people with cognitive and/or psychiatric impairment to reduce disadvantage and the risk of offending behaviour.

6.3 Challenges interacting with system because of disability

43. People with cognitive and/or psychiatric impairment can face particular challenges once they are brought within the criminal justice system. For example, people with cognitive impairment can be 'overly compliant, easily intimidated and prone to confusion', and 'highly susceptible to suggestion, influence and coercion'.⁶⁷ For people affected by this type of impairment, the adversarial style of communication and questioning which is used in criminal processes in Australia can be problematic.
44. People with intellectual disability also have 'high rates of illiteracy and limited language skills'.⁶⁸ They may 'struggle to understand legal advice, court process and court dialogue, which is filled with jargon and complex statements'.⁶⁹
45. As a result of such difficulties, people with disability frequently experience prejudicial assessments of their competency to give evidence, including as a defendant to proceedings.⁷⁰
46. Article 13 of the Disability Convention requires States Parties to actively facilitate the participation of people with disability in legal proceedings so that they can have effective access to justice, on an equal footing with people without disability.⁷¹ States have an obligation to provide procedural modifications to legal processes to ensure people with disability can participate effectively.⁷²

47. The UN Committee on the Rights of Persons with Disabilities (UN Disability Committee) in 2013 recommended that Australia as a matter of urgency establish 'mandatory guidelines and practice to ensure that persons with disabilities in the criminal justice system are provided with appropriate support and accommodation'.⁷³
48. The Victorian Parliamentary Law Reform Committee in 2013 concluded that:

Many of the barriers experienced by a person with an intellectual disability or cognitive impairment before the courts could be overcome if adjustments were made to court procedures and case management, and if support services were made available during and after a person's court appearance.⁷⁴
49. However, the Commission in its 2013 consultations found that such adjustments were frequently not made in court processes for a range of reasons, including lack of screening mechanisms, training and inability of lawyers and judges to identify disability.⁷⁵ The Commission heard that courts are not adjourned to find out if a person has disability, and that systematic approaches to identify disability do not exist. The failure to identify disability results in supports and services not being provided, and no adjustments being made.⁷⁶
50. In 2011 the Council of Australian Governments (COAG) agreed to the *National Disability Strategy 2010-2020* (the Strategy).⁷⁷ The Strategy includes a policy direction that 'people with disability have access to justice' and agreement on future action to '[p]rovide greater support for people with disability with heightened vulnerabilities to participate in legal processes on an equal basis with others'.⁷⁸ In the Strategy COAG acknowledges that:

Effective access to justice for people with disability on an equal basis with others requires appropriate strategies, including aids and equipment, to facilitate their effective participation in all legal proceedings. Greater awareness is needed by the judiciary, legal professionals and court staff of disability issues.⁷⁹
51. In 2014 the South Australian Government launched a Disability Justice Strategy which includes a number of priority actions to support people with disability to participate effectively in the criminal justice process.⁸⁰ The actions included amendments to the *Evidence Act 1929* (SA) to allow for flexibility and support for people with disability giving evidence. These amendments, which were implemented by the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA), include a general entitlement for people with complex communication needs (including defendants) to have a communication assistant present for any contact with the criminal justice system.
52. The Commission welcomes the reforms in South Australia which are important steps in adjusting criminal court processes to allow people with cognitive and/or psychiatric impairment to effectively participate. The introduction of a 'communication assistant' is similar to suggestions from other reform bodies for a formal support person, 'disability advocate' or 'intermediary' scheme.⁸¹ In the case of Aboriginal and Torres Strait Islander people with cognitive impairment, the ADJC has recommended that 'skilled interpreting services for Indigenous

people with cognitive impairment who are subject to the criminal justice system and who do not have English as their first language must be provided'.⁸²

Recommendation 2: The Commission recommends that all state and territory governments implement a Disability Justice Strategy⁸³ which includes making reasonable adjustments to court procedure and provision of support to defendants with disability to ensure they can participate in legal processes.⁸⁴

Recommendation 3: The Commission recommends that all governments consider amendments to the evidence laws in each jurisdiction similar to those introduced by the *Statutes Amendment (Vulnerable Witnesses) Act 2015 (SA)*.

53. Those responsible for administering criminal justice processes need to be trained to identify the need for and provide appropriate supports and adjustments to enable people with cognitive and/or psychiatric impairment to participate in those processes.⁸⁵ The Disability Convention places a specific obligation on States Parties to promote appropriate training for those working in the field of administration of justice, in order to help to ensure effective access to justice for people with disability.⁸⁶
54. In its report on Australia in 2013 the UN Disability Committee recommended that 'standard and compulsory modules on working with persons with disabilities be incorporated into training programmes for police officers, prison staff, lawyers, the judiciary and court personnel.'⁸⁷
55. There is currently guidance available to some judges on considering and making adjustments to enable people with cognitive and/or psychiatric impairment to participate in court proceedings. For example, the Judicial Commission of New South Wales has produced the *Equality before the Law Bench Book* which assists judges to identify and understand disability and the types of adjustments that can be made to assist people with disability to participate.⁸⁸

Recommendation 4: The Commission recommends that each state and territory government:

- (1) Develop a culturally appropriate assessment protocol that assists those administering the justice system to identify people with disability and ensure appropriate support and adjustments are provided.**
- (2) Develop and deliver training to those administering the justice system on how to identify and support people with disability to ensure they have effective access to justice.**

6.4 Tests for unfitness to stand trial

56. In every jurisdiction in Australia there is a requirement that a person must be 'fit to stand trial' in order to have the charge against them determined through the

usual criminal process.⁸⁹ This fundamental principle of the criminal justice system in Australia is based on the common law right to a fair trial.⁹⁰

57. The purpose of the unfitness test is to determine whether the person is and will be able to sufficiently participate in trial proceedings so that their trial would be 'fair'. The test generally requires the defendant to be able to understand key aspects of the trial process, and communicate responses to his or her lawyer and the court.⁹¹ If the person is found to lack the ability to do any aspect of this, they are considered unfit to stand trial.
58. The unfitness test acts as a threshold for whether a person charged with a crime will be provided access to justice through the usual criminal trial procedure. The UN Disability Committee has been critical of courts making declarations of unfitness, particularly where the result may be indefinite detention. Such declarations 'depriv[e] the person of his or her right to due process and safeguards that are applicable to every defendant'.⁹²
59. The obligation under article 12 of the Disability Convention to recognise that people with disability enjoy legal capacity on an equal basis with others requires States Parties not to conflate concepts of mental capacity with legal capacity.⁹³ The UN Disability Committee has noted that in many States 'where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed'.⁹⁴ It has emphasised that '[a]rticle 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity'.⁹⁵
60. The Disability Committee has recommended that to comply with its obligation under article 13 of the Disability Convention to provide effective access to justice for people with disability, Australia must ensure to 'persons with psychosocial disabilities...the same substantive and procedural guarantees as others in the context of criminal proceedings'.⁹⁶ It also must ensure:

that all persons with disabilities who have been accused of crimes and are currently detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation.⁹⁷
61. Although courts currently have the power to consider the use of support measures and other adjustments to assist a person to participate in a trial, it is evident that such measures are frequently not considered, available and/or provided.⁹⁸ A key problem identified by the ALRC is that across Australia 'tests of unfitness to stand trial do not consider the possible role of assistance and support for defendants'.⁹⁹
62. The NSWLRC, the Victorian Law Reform Commission (VLRC), the ALRC and the Law Commission in the United Kingdom have all recommended that tests for unfitness should be changed to require the court to consider *whether* the person *could* participate in a trial *if provided with support*.¹⁰⁰ These Commissions recognised that to try the defendant through the normal criminal trial process whenever possible 'is best not just for the defendant, but also for

those affected by an offence and society more generally'.¹⁰¹ It is in a defendant's interests to participate in the full trial process because it includes procedural protections, but also because of the adverse consequences if found unfit to stand trial, including the real risk of indefinite detention.¹⁰²

63. As the ALRC noted, refocusing the test for unfitness on the question of 'whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all' would also be more consistent with Australia's obligations under article 12 of the Disability Convention.¹⁰³ As the VLRC recognised, 'unfitness to stand trial is support-dependent' and therefore 'the law should accommodate the varying abilities and needs of accused...to the greatest extent possible'.¹⁰⁴
64. The Victorian Parliamentary Law Reform Committee in 2013 concluded that 'most defendants with an intellectual disability or cognitive impairment will be fit to stand trial when information is given in simple terms and support is available to help them understand court proceedings'.¹⁰⁵
65. The Commission recommends that the tests for unfitness to stand trial in every jurisdiction be changed to require judges to consider whether the accused could be supported to effectively participate in a trial. The Commission suggests that a good model for an amended test is the provision recommended by the VLRC.¹⁰⁶
66. In considering whether an accused can be supported to participate, judges should be assisted by expert reports which provide an assessment as to what modifications might assist the accused.¹⁰⁷ The Commission agrees with the UK Law Commission that:

every effort should be made to afford a defendant whose capacity may be in doubt such adjustments to the proceedings as he or she reasonably requires to be able to participate in the full criminal process, and to maintain that capacity for the whole of the process.¹⁰⁸

Recommendation 5: The Commission recommends that the tests for unfitness to stand trial in every jurisdiction be amended to require judges to consider whether the accused could effectively participate in a trial if provided with support and/or modifications.

Recommendation 6: The Commission recommends that training be delivered to the judiciary in every jurisdiction on how to determine capacity to stand trial by reference to the support available.

6.5 Special hearings for unfit defendants

67. The practice varies across the jurisdictions as to what happens once a person is determined to be unfit to stand trial. In Victoria, New South Wales (NSW), Tasmania, the Australian Capital Territory (ACT) and the Northern Territory (NT), if a person is charged with an indictable offence but is found unfit to stand trial (and unlikely to become fit in the next 12 months), the court is generally required to hold a 'special hearing'.¹⁰⁹

68. Special hearings were introduced as a mechanism to provide people who had been found unfit to stand trial with an opportunity to be acquitted.¹¹⁰ They replaced regimes in which unfit defendants were detained indefinitely 'at the Governor's pleasure', without any consideration of whether the evidence available established that the person had committed the offence charged.¹¹¹
69. It is commendable that a special hearing provides an opportunity for an acquittal. However, the Commission is concerned that it also provides an opportunity for a finding adverse to the unfit defendant which triggers the court's power to order (and ostensibly justifies) the person's detention.
70. A special hearing is run as much as possible as if it were a normal criminal trial, with the accused being deemed to have pleaded not guilty.¹¹² However it is a 'necessarily imperfect' process, as it involves '[t]rying an unfit person who may not be able to communicate properly or understand proceedings'.¹¹³ Due to the impairment which rendered him or her unfit to stand trial, the defendant in a special hearing may not be able to understand the process or the charge against them, to adequately instruct their lawyer, or to provide relevant evidence in their own defence.¹¹⁴
71. A special hearing therefore involves a determination of the case against the accused, but without their effective participation in one or more ways which would be required for a normal trial to be fair.¹¹⁵ The fact that 'unfit' defendants will generally be unable to give evidence is particularly problematic when without their testimony it is likely they will be found to have 'committed the offence'.¹¹⁶ The 'inability of the accused to participate in a meaningful way' 'diminishes the ability of the court to test the case made against the accused'.¹¹⁷
72. It also results in the jury in a special hearing having to reach a finding as to whether the unfit accused is not guilty, not guilty by reason of mental impairment/illness, or 'committed the offence charged' (or an alternative offence), on limited evidence.¹¹⁸ Adverse findings by a jury at a special hearing cannot lead to any conviction.¹¹⁹ However they trigger the court's power to ultimately order that the accused be detained (potentially indefinitely).¹²⁰
73. In the Commission's view special hearings do not constitute a fair trial under international human rights law or the Australian common law. They will often if not always involve a compromise of the minimum guarantees (which require participation of the accused) that all people are entitled to under article 14(3) of the ICCPR. They necessarily involve a compromise of the right of people with disability to equality before and under the law and effective access to justice *on an equal basis with others*, as people without disability are not subjected to these 'necessarily imperfect' fact-finding processes.
74. These special hearings also appear to undermine the common law principle (underpinning the fitness to stand trial requirement) that 'a trial is not held when the defendant's abilities are so limited that the trial would be unfair or unjust'.¹²¹
75. Special hearings also do not provide an effective safeguard against indefinite detention. Rather, adverse findings at a special hearing trigger the court's

power to order detention of the accused, but generally do not circumscribe the length of that detention (see the discussion in the section immediately below).

76. Given these limitations, the Commission emphasises that special hearings should not be viewed as an equal alternative to a full criminal trial for people with cognitive and/or psychiatric impairment. A full criminal trial contains safeguards which best protect the rights of all accused, and therefore should be the process adopted, with necessary modifications, whenever possible. As discussed below, if it is not possible to conduct a full criminal trial, a person should not be subject to criminal punishment, and should only be detained if necessary for treatment, rehabilitation and the protection of the individual and/or the community.

6.6 *Lack of appropriate and effective limits on detention for people found unfit to stand trial or not guilty by reason of mental impairment*

77. People with cognitive and/or psychiatric impairment who are charged with a crime may be found unfit to stand trial (and put through a special hearing procedure), or be tried and found not guilty by reason of mental impairment. In both situations, despite the fact they have not been convicted of any offence, these people are at risk of orders for their indefinite detention, or detention for longer than if they had been found guilty and sentenced to imprisonment. In 2000 the Chief Justice of the High Court recognised that in Australia ‘the *usual* consequence of a finding that a person is unfit to plead is indefinite incarceration without trial’.¹²²
78. The ADJC concluded in 2012 that indefinite detention of people with cognitive impairment was possible in all but two jurisdictions.¹²³
79. The ALRC in 2014 examined the legislation across Australia providing for detention of people found unfit to stand trial. It concluded that there were inadequate safeguards against indefinite detention in some jurisdictions, including Western Australia, Victoria and the NT, because they ‘do not provide statutory limits on the period of detention for those found unfit to stand trial’.¹²⁴ The ALRC further noted that some of the review mechanisms for people detained because they are unfit to stand trial may be inadequate.¹²⁵
80. In some jurisdictions such as NSW, the NT and Victoria, if a person has been found to have ‘committed the offence’ (at a special hearing) or to be not guilty by reason of mental impairment, the court is required to set a ‘limiting’ or ‘nominal’ term for the person’s detention.¹²⁶ This term is determined by reference to sentencing principles. In Victoria, the term is generally the maximum penalty available for the crime charged.¹²⁷ In NSW and the NT, the nominal term is equal to the length of the sentence of imprisonment that the court would have imposed if the person had been found guilty.¹²⁸
81. The aim of introducing ‘limiting’ or nominal terms was to avoid a person getting ‘lost in the system’ (and arbitrarily detained) as happened under ‘Governor’s pleasure’ regimes.¹²⁹

82. In Victoria and the NT, the 'limiting' or nominal term does not actually limit the amount of time the person will spend in detention – it only marks the point at which there must be a major review of the detention order.¹³⁰ In NSW, a person who is found to have committed the offence at a special hearing must be released from detention at the expiry of the limiting term.¹³¹ However, the court cannot set a limit on the detention of a person who is found not guilty by reason of mental impairment.¹³²
83. The practice of courts setting 'nominal' or 'limiting' terms of detention for unconvicted people has been criticised for a number of reasons, including:
- they result in people being detained longer than if they had been convicted of the offence and sentenced to imprisonment, in part because the entire term is seen as a non-parole period¹³³
 - in some jurisdictions, they do not actually limit the length of detention¹³⁴
 - they are viewed as a 'sentence', and therefore suggest the person has been found to be criminally responsible for a crime and is being punished.¹³⁵
84. The Commission emphasises that people who are found to be unfit to be tried or not guilty because of mental impairment have not been found to be criminally responsible for any crime. It is therefore not appropriate for them to be punished by the criminal justice system.¹³⁶ They have a right not to be subjected to arbitrary detention.¹³⁷ If they are to be detained, the only permissible purposes of their detention are treatment and rehabilitation and protection of the individual and the community.¹³⁸
85. It accordingly is inappropriate for the length of the person's detention to be set by reference to sentencing principles, which factor in punishment and deterrence.¹³⁹ The decision to detain the person should be based on the same criteria as for civil confinement as an involuntary patient under mental health laws, namely if it is necessary for the treatment of the person or the protection of the person for their own health or safety, or for the protection of the public.¹⁴⁰
86. The UN Human Rights Committee has emphasised that any detention of individuals under mental health laws:
- must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law.¹⁴¹
87. As detention should only occur for so long as is necessary to address the risk posed by the person, their level of risk (and hence the need for them to remain in confinement) must be regularly reviewed.¹⁴² It is also crucial that while they are detained appropriate treatment, support and rehabilitation services are provided to address the causes of the person's behaviour. This includes culturally specific services for Aboriginal and Torres Strait Islander people with disability.

88. The needs of people with cognitive impairment who are placed in detention after being found unfit to stand trial or not guilty by reason of mental impairment require special attention. They are at greater risk of being detained indefinitely, as unlike most types of psychiatric impairment, cognitive impairment is not 'treatable' and does not "improve" over time'.¹⁴³ This is problematic as under mental health laws 'assessments, reviews, and in some cases the possibility of release are all dependent on the potential for an improvement in the condition'.¹⁴⁴
89. People with cognitive impairment who have been found unfit to stand trial or not guilty by reason of mental impairment may therefore get stuck in detention. When they are reviewed by the various decision-making tribunals, 'there is usually very little shift in terms of their "risk" to themselves or to the community'.¹⁴⁵ The VLRC noted that 'it is rare for a person with an intellectual disability to have their supervision order revoked'.¹⁴⁶
90. The unique needs of people with cognitive impairment in detention need to be addressed in order to ensure that they can be supported to transition into lower security settings, and ultimately back into the community, whenever possible.
91. The Commission echoes the recommendation of the ALRC that there need to be effective limits in the relevant legislation on the period of detention that can be imposed on people found unfit to stand trial, and requirements for regular periodic reviews of detention orders.¹⁴⁷ The Commission suggests the six month timeframe for reviews used under Commonwealth and Queensland laws be considered.¹⁴⁸ These safeguards should also apply to the detention of people found not guilty by reason of mental impairment after a full trial.
92. There also should be a requirement in all jurisdictions that at the time a detention order is made, a plan is put in place, with timeframes, to ensure support, treatment and rehabilitation services are provided to the person so that they can transition into progressively less restrictive environments, and eventually be reintegrated back into the community.

Recommendation 7: The Commission recommends that all state and territory laws which allow for people to be detained following a finding of unfitness to stand trial, or a verdict of not guilty by reason of mental impairment:

- (1) impose effective limits on the total period of detention**
- (2) require regular reviews of the need for detention**
- (3) require a plan to be put in place including actions to be taken for the person's rehabilitation to facilitate their transition into progressively less restrictive environments, and eventually out of detention.**

6.7 Detention in prisons

93. Under the Disability Convention, people with disability deprived of their liberty are entitled to guarantees in accordance with international human rights law and to be treated in compliance with the Convention.¹⁴⁹ This includes the right to be

treated with humanity and respect for their inherent dignity.¹⁵⁰ People with disability also have a right to health, habilitation and rehabilitation services.¹⁵¹

94. The relevant legislation in most Australian jurisdictions allows for people found unfit to stand trial or not guilty by reason of mental impairment to be detained in prisons.¹⁵² In Victoria, South Australia, the ACT and the NT, the legislation only allows this when there is no practicable alternative available.¹⁵³

95. In many jurisdictions there have been reported to be 'insufficient facilities to provide both the required level of security and also the treatment and services needed' for some people found unfit or not guilty by reason of mental impairment, with the consequence that they are held in correctional centres.¹⁵⁴ This is particularly true for people with cognitive impairment. The NSWLRC noted 'while the mental health system has gaps, services for people with cognitive impairment in the community are even more limited'.¹⁵⁵ That Commission identified that prisons may be 'filling the gap' left by the

absence of secure facilities in the community where forensic patients with cognitive impairments can be detained and appropriately treated or managed, and of infrastructure to assist them in the community in supported accommodation or otherwise.¹⁵⁶

96. Mental health facilities may not be appropriate places for people with cognitive impairment. Detention in such facilities may even be harmful to them, such that they may choose to be detained in prison, if that is the only other option.¹⁵⁷ Legal Aid New South Wales has explained that:

In a mental health facility, which is geared towards mental health treatment in a medical framework, the forensic patient is subject to compulsory treatment, and might receive inappropriate or ineffective treatment with side effects that decrease his or her quality of life, as well as have certain freedoms curtailed.¹⁵⁸

97. The detention of people with cognitive and/or psychiatric impairment in prisons raises concerns about their rights to health and rehabilitation. The prison environment may have a negative impact on their health, make it difficult to monitor and identify deterioration in a person's condition, and restrict the extent to which their therapeutic needs can be addressed.¹⁵⁹ The NSWLRC highlighted the example of a 2006 coronial inquest into the suicide of a person in prison:

While on remand for another offence, this inmate, who had paranoid schizophrenia and a long history of violence and mental illness, killed a cellmate during a psychotic episode. He was found not guilty due to mental illness and became a forensic patient. He returned to prison where, because of his previous conduct, he was segregated and reportedly spent 22 hours per day in a cell. Within a short time the forensic patient committed suicide.¹⁶⁰

98. The indefinite and/or prolonged nature of detention for people in this situation increases the negative impact of their time in corrective facilities on their health, which in turn can make it less likely they will be released.¹⁶¹
99. The negative health impact of indefinite detention in prison on people with cognitive and/or psychiatric impairment is particularly concerning given the

number of Aboriginal and Torres Strait Islander people in this situation. One of the primary recommendations of the Royal Commission into Aboriginal Deaths in Custody was that incarceration must be used as a last resort.¹⁶²

100. The Commission is also very concerned that people with cognitive and/or psychiatric impairment detained in prisons may be subjected to harmful practices to 'manage' their behaviour.¹⁶³ The case studies of KA and KD in the Appendix reveal people with cognitive impairment being subjected in prison to frequent physical, mechanical and chemical restraints, and prolonged solitary confinement. In those cases the Commission found that this treatment constituted cruel, inhuman or degrading treatment contrary to Australia's obligations under the Disability Convention and other treaties.¹⁶⁴
101. The UN Disability Committee in 2013 recommended as a matter of urgency that Australia '[e]nd the unwarranted use of prisons for the management of unconvicted persons with disabilities, focusing on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention'.¹⁶⁵ The UN Human Rights Committee has stated that to avoid arbitrary detention of people with disability 'States parties should make available adequate community-based or alternative social-care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement'.¹⁶⁶
102. The Commission recommends that appropriate and adequate facilities must urgently be developed for unconvicted people with cognitive and/or psychiatric impairment, so that they are not detained in prisons. Sufficient options should exist so that placement decisions are made on the basis of 'what is the least restrictive alternative and what is the best therapeutic context' for the person, rather than the use of prison by default.¹⁶⁷

Recommendation 8: The Commission recommends that all state and territory governments establish as a matter of urgency an appropriate range of facilities to accommodate people who are found unfit to stand trial and/or not guilty by reason of mental impairment. Particular priority should be given to establishing appropriate facilities for people with cognitive impairment.

103. It is also important that there be effective monitoring of all places where people with cognitive and/or psychiatric impairment are detained, to ensure that they are not subjected to harmful practices. In 2013 the UN Disability Committee expressed concern that in Australia people with disability were subjected to 'unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion'.¹⁶⁸ The Committee recommended that Australia:

take immediate steps to end such practices, including by establishing an independent national preventive mechanism to monitor places of detention - such as mental health facilities, special schools, hospitals, disability justice centres and prisons - in order to ensure that persons with disabilities, including psychosocial disabilities, are not subjected to intrusive medical interventions.¹⁶⁹

104. The establishment of an independent national preventative mechanism to monitor places of detention is part of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).¹⁷⁰ OPCAT is aimed at preventing torture and cruel, inhuman or degrading treatment or punishment. The Australian Government signed OPCAT on 19 May 2009, but has not yet ratified the agreement.

Recommendation 9: The Commission recommends that the Australian Government ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and establish an independent national preventative mechanism to monitor places of detention, including all those where people with disability are detained.

7 Case studies of people in indefinite detention

105. Through the Commission's complaints and policy work it has investigated and raised concerns about a number of cases of unconvicted Aboriginal people with cognitive and/or psychiatric impairment being indefinitely detained in prisons.
106. The Commission's report *KA, KB, KC and KD v Commonwealth of Australia*¹⁷¹ contains the stories of four Aboriginal people with cognitive and/or psychiatric impairment each of whom has been subjected to indefinite detention in the NT. Each spent a number of years incarcerated in the Alice Springs Correctional Centre, the main maximum security prison in the NT, despite never having been convicted of a crime. A summary of this report (and each of the four cases) is contained in the Appendix to this submission.
107. The Commission has also produced a video about the case of Marlon Noble. The video is entitled 'Presumed Guilty', and can be viewed at <https://www.humanrights.gov.au/twentystories/videos.html>.
108. Marlon Noble is an Aboriginal man who was charged with sexual assault against two girls in 2001. In 2002 Mr Noble first appeared in court, and was held in custody while awaiting assessment. In 2003 he was declared unfit to stand trial, due to cognitive impairment. A custody order was made under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). The Act provides for the declaration of places, such as a secure care facility, to accommodate people who have been deemed unfit to plead.¹⁷² However, as no such places had been 'declared', Mr Noble was incarcerated in the same facilities as the general prison population.
109. Mr Noble was detained in prison for 10 years. In 2010 the Director of Public Prosecutions withdrew the case against Mr Noble, noting that he had been imprisoned for a much longer time that he was likely to have been sentenced if he had been found guilty of all charges. He was released in January 2012, subject to strict conditions.

Appendix: Summary of *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80¹⁷³

The case of KA

Mr KA, an Aboriginal man, was diagnosed with epilepsy and brain injury when he was 13 months old. At six he was assessed as having intellectual impairment and as exhibiting significant behaviours of concern.

When Mr KA was 6 years old he went to live with his uncle. His guardian said that Mr KA's uncle lived with an unmanaged addiction to alcohol and was not capable of providing Mr KA with a stable home and family environment.

On or about 17 July 2007, when Mr KA was 16 years old, his uncle came home from work drunk. Mr KA became angry because he had been expecting his uncle to take him on a trip. He picked up a knife and stabbed his uncle.

On 17 November 2009 Mr KA was charged with murder but was found unfit to stand trial (under s 43T of the NT *Criminal Code*). A special hearing was conducted, and the jury found Mr KA guilty of manslaughter by reason of diminished responsibility. The Court ordered that Mr KA was liable to supervision under the Code. It was uncontested that the Court should make a custodial supervision order committing Mr KA to custody in the Alice Springs Correctional Centre (ASCC), because there was no practicable alternative in the circumstances.

The Court determined that the nominal term of imprisonment it would have imposed if Mr KA had been convicted of manslaughter was 12 years. Mr KA was placed in detention in the ASCC in May 2010. He was still detained there at the time of the Commission's report in September 2014.

The Commission noted that it appeared that Mr KA 'has been subject to the most severe treatment while in prison, including frequent use of physical, mechanical and chemical restraints, seclusion, and shackles when outside his cell'.¹⁷⁴

The Commission reported that:

[i]n November 2013, Mr KA's guardian wrote to responsible officials at ASCC and noted that there had been three incidents in the previous week of behaviour which caused harm to Mr KA and distress to those working around him, and which resulted in him being belted into a restraint chair and chemically restrained. Mr KA's guardian said that this was the sixteenth time that Mr KA had engaged in behaviour of a nature which injured him, caused prison officials to belt him into a restraint chair and inject him with tranquilizers, and resulted in him spending at least one hour and sometimes two hours in this kind of restraint.¹⁷⁵

The Commission found that the conditions of detention faced by Mr KA amounted to cruel, inhuman or degrading treatment contrary to article 7 of the ICCPR, and article 15 of the Disability Convention.¹⁷⁶

The case of KB

Mr KB is an Aboriginal man who has a chronic acquired brain injury and epilepsy. In 2007 a psychologist who assessed Mr KB identified evidence of global cognitive impairment and was of the opinion that Mr KB was not able to live independently and required support in all areas of daily living. The psychologist noted that Mr KB had a history of aggression, little insight into his condition and poor judgment regarding his actions. On 30 May 2007, an adult guardian was appointed for Mr KB.

On 15 August 2007 Mr KB assaulted a female employee of Tangentyere Council who had been working to assist him. On 2 November 2007 he appeared before the NT Supreme Court charged with unlawful aggravated assault. The Court found that Mr KB was unfit to stand trial. On 31 March 2008 a special hearing took place and the jury returned a verdict that Mr KB had ‘committed the offence charged’.

16 months after the incident took place, on 22 December 2008, Chief Justice Martin of the NT Supreme Court made a custodial supervision order for Mr KB, commenting:

This is yet another case in which an offender with mental disabilities has been required and will be required to be held in prison custody for longer than the offence committed would otherwise require... if Mr [KB] had pleaded guilty to the offence in the Court of Summary Jurisdiction, he would have received a relatively short sentence and certainly would have been released well before now.

...As I have said before, this is indeed a most unfortunate situation as...custody in a gaol is quite inappropriate for people like Mr [KB] and they cannot receive the necessary treatment and support that should be available to them and would be available to them if an appropriate facility to house these people existed in the Territory. The need for that facility is acute and growing rapidly.

His Honour concluded that he was ‘left with no alternative but to make a custodial supervision order’. He stated that if Mr KB had been found guilty, he would have nominated a sentence of 12 months’ imprisonment. Mr KB was detained in the ASCC for six years, until June 2013, when he was moved to Kwiynrpe House, a secure care facility located adjacent to the ASCC.

The Commission found that:

- the detention of Mr KB at the ASCC was inappropriate and therefore arbitrary, contrary to article 9(1) of the ICCPR and 14(1) of the Disability Convention
- Mr KB was not treated with humanity and respect while in detention, contrary to article 10(1) of the ICCPR
- As the ASCC was a maximum security prison and MR KB had not been convicted of any offence, there was a breach of article 10(2)(a) of the ICCPR which requires that convicted offenders be separated from unconvicted detainees.¹⁷⁷

The case of KC

Mr KC is an Aboriginal man with a moderate to severe cognitive impairment who requires full time care.

On 14 August 2008 Mr KC threatened a carer with a shard of broken glass. He also caused damage to property including throwing a coffee table through lounge room windows and smashing the windscreen and windows of a car.

On 8 October 2008 Mr KC appeared before the NT Supreme Court charged with unlawful aggravated assault and damage to property. On 21 May 2009 he was found unfit to stand trial. The jury at a special hearing returned verdicts on each offence of not guilty by reason of mental impairment.

On 19 November 2009, 15 months after the incident took place, Chief Justice Martin made a custodial supervision order for MR KC, noting that:

residence in a correctional centre is not the ideal locality for Mr [KC] and others like him. He is not on remand and he is not a convicted offender. He requires special assistance.

The Chief Justice stated that if Mr KC had been found guilty he would have imposed a sentence of 12 months' imprisonment. However, Mr KC was detained in the ASCC for four and a half years before being relocated to Kwiernpe House in April 2013.

The Commission made the same findings about breaches of human rights in relation to Mr KC's case as it did for Mr KB.¹⁷⁸

The case of KD

Mr KD is an Aboriginal man with severe acquired brain injury. On 15 October 1996 Mr KD was found not guilty by reason of insanity on charges of murder, robbery, aggravated assault and attempted sexual intercourse without consent. As then required by the NT *Criminal Code*, the Court ordered that he be kept in strict custody at the ASCC at the 'Administrator's pleasure'.

On 27 September 2001 the Administrator ordered that Mr KD be detained in the ASCC and the Director of Correctional Services be responsible for his safe custody. When Part IIA of the NT Criminal Code came into operation in June 2002, Mr KD was taken to be a supervised person held in custody under a custodial supervision order.

Chief Justice Martin of the NT Supreme Court conducted a review of Mr KD's detention in August 2003. Martin CJ noted that he was kept in a normal cell in the protection wing of the maximum security area of the prison. Notwithstanding regular reviews and concerns expressed by mental health professionals about his progressive mental deterioration, there was no evidence that Mr KD received any particular treatment, therapy or counselling, 'beyond tranquillising when required'.¹⁷⁹

The Chief Justice ordered that Mr KD continue to be detained in a prison under a custodial supervision order, because there were 'no adequate resources available for his treatment and support in the community outside of prison'.¹⁸⁰

The Commission found that the conditions of detention faced by Mr KD amounted to cruel, inhuman or degrading treatment contrary to article 7 of the ICCPR and article 15 of the Disability Convention, as:

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[t]he impact on Mr KD of custody in a maximum security prison was severe. Chief Justice Martin found that Mr KD was unable to live under conditions in a prison where he can associate with other prisoners...he was isolated in a small single cell and the opportunities for him to be permitted outside this cell were restricted to two or three hours per day. Prolonged solitary confinement of a detained or imprisoned person may amount to a breach of article 7 of the ICCPR. Despite these severe conditions, the custodial order was confirmed because there were no adequate resources available for his treatment and support in the community outside of prison.¹⁸¹

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- ¹ John Quinn, 'Opening statement by Australia' (Speech delivered to Universal Periodic Review Working Group – 23rd Session, Geneva, 9 November 2015). At <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx> (viewed 22 February 2016). Note also that during the Universal Periodic Review countries made specific recommendations to Australia to end the practice of indefinite detention of people with disability (192, 194, 195 and 196)
- ² See Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous young people with cognitive disabilities & Australian juvenile justice systems* (Human Rights and Equal Opportunity Commission, 2005), and the publications cited in the following five endnotes.
- ³ Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008). At <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/preventing-crime-and> (viewed 2 March 2016).
- ⁴ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2012* (Australian Human Rights Commission, 2012). At <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-11> (viewed 2 March 2016).
- ⁵ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014). At <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>.
- ⁶ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80 [2014] AusHRC 80. At <https://www.humanrights.gov.au/our-work/legal/publications/ka-kb-kc-and-kd-v-commonwealth-australia> (viewed 31 March 2016).
- ⁷ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015). At <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-1> (viewed 2 March 2016).
- ⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
- ⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), art 14(2).
- ¹⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) arts 12 and 13.
- ¹¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 13(1) (see also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1)).
- ¹² *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 14(1).
- ¹³ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) arts 14(2), 15(2), 25, 26.
- ¹⁴ Guidance about the relevant principles and actions that should be included in a Disability Justice Strategy is contained in Chapter 4 of Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014).
- ¹⁵ Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 3.
- ¹⁶ Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 3.
- ¹⁷ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 27.
- ¹⁸ See for example Eileen Baldry, Leanne Dowse, Melissa Clarence, *People with mental and cognitive disabilities: pathways into prison*, Background Paper for the National Legal Aid Conference Darwin (2011) 5; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 8.
- ¹⁹ See for example New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report No 135 (2012) ch 4; Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2012*

(Australian Human Rights Commission, 2012) 62 (and the sources cited in footnote 179 therein); Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 12; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 15.

²⁰ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report No 135 (2012) xv.

²¹ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report No 135 (2012) xv.

²² Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 9.

²³ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 12.

²⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 11.

²⁵ Council of Australian Governments, *National Disability Strategy 2010-2020* (2011) 25.

²⁶ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015) 104, 110.

²⁷ Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 4.

²⁸ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015) 109-111.

²⁹ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 68.

³⁰ Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous young people with cognitive disabilities & Australian juvenile justice systems* (Human Rights and Equal Opportunity Commission, 2005) 12 (quoting Simpson and Sotiri). See also Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 19.

³¹ Available at <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/preventing-crime-and>.

³² According to recent estimates Aboriginal and Torres Strait Islander people are 13 times more likely to be imprisoned than non-Indigenous people: Change the Record Coalition, *Blueprint for Change* (2015) 4.

³³ See for example Dr William Jonas AM, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Evolving law and order policy – A rights perspective' (Speech delivered at The Royal Commission into Aboriginal Deaths in Custody: Unfinished Business, ATSIC Forum, 2 November 2001). At <https://www.humanrights.gov.au/news/speeches/evolving-law-and-order-policy-rights-perspective> (viewed 4 March 2016).

³⁴ *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (2012) 80.

³⁵ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 23.

³⁶ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 23-4. The ADJC also noted that there were over 100 people with cognitive impairment detained indefinitely in psychiatric hospitals in Queensland, but there was no data available about the number of Aboriginal or Torres Strait Islander people in that group.

³⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

³⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) arts 4(1) and 5(1) and (2).

³⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 1.

⁴⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 5(1).

⁴¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 12(2) and (3).

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- ⁴² *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 13(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40.
- ⁴³ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 14(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b).
- ⁴⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 14(2). See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10.
- ⁴⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) arts 25 and 26.
- ⁴⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 15(2); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 16.
- ⁴⁷ See also art 40(2)(b) of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- ⁴⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 7(1).
- ⁴⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2(1).
- ⁵⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 23.
- ⁵¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007) art 21.
- ⁵² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007) art 22.
- ⁵³ Available at <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>.
- ⁵⁴ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 8.
- ⁵⁵ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 8.
- ⁵⁶ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 5.
- ⁵⁷ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 192.
- ⁵⁸ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 49. See also Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 58.
- ⁵⁹ National Mental Health Commission, *Report of the National Review of Mental Health Programmes and Services: Summary* (Australian Government, 2014) 18. At <http://www.mentalhealthcommission.gov.au/our-reports/contributing-lives,-thriving-communities-review-of-mental-health-programmes-and-services.aspx> (viewed 16 February 2016).
- ⁶⁰ Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 18.
- ⁶¹ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 20.
- ⁶² Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 20.
- ⁶³ National Mental Health Commission, *Report of the National Review of Mental Health Programmes and Services: Summary* (Australian Government, 2014) 14.
- ⁶⁴ Australian Bureau of Statistics, *Prisoners in Australia, 2015*, Cat no. 4517.0 (2015).

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- ⁶⁵ See, for example, Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 85.
- ⁶⁶ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015) section 4.6.
- ⁶⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 103 (quoting the Coalition for Disability Rights).
- ⁶⁸ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 25.
- ⁶⁹ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 25.
- ⁷⁰ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 21.
- ⁷¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 13(1).
- ⁷² *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 13(1).
- ⁷³ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (2013).
- ⁷⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 279.
- ⁷⁵ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 24-25.
- ⁷⁶ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 25.
- ⁷⁷ Council of Australia Governments, *National Disability Strategy 2010-2012* (2011) 9.
- ⁷⁸ Council of Australia Governments, *National Disability Strategy 2010-2012* (2011) 41 (area 2.7).
- ⁷⁹ Council of Australia Governments, *National Disability Strategy 2010-2012* (2011) 38.
- ⁸⁰ Attorney-General's Department, Government of South Australia, *Disability Justice Plan 2014-2017* (2014). At <http://www.agd.sa.gov.au/initiatives/disability-justice-plan> (viewed 22 February 2016).
- ⁸¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 79-80; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 91 (Rec 19); Law Commission (United Kingdom) *Unfitness to Plead: Summary* (2016) 9 -10. At <http://www.lawcom.gov.uk/project/unfitness-to-plead/> (viewed 22 February 2016).
- ⁸² Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 13.
- ⁸³ Guidance about the relevant principles and actions that should be included in a Disability Justice Strategy is contained in Chapter 4 of Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014).
- ⁸⁴ The term 'reasonable adjustments' is defined in the *Disability Discrimination Act 1992* (Cth): see ss 4(1) and 11. This definition generally aligns with the meaning of the term 'reasonable accommodation' which is used in the *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (see art 2). 'Reasonable accommodation' in the context of access to justice is specifically addressed in article 13 of the Convention.
- ⁸⁵ See *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (2012) 77-78.
- ⁸⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 13(2).
- ⁸⁷ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (2013), [28].
- ⁸⁸ Available at <http://www.judcom.nsw.gov.au/publications/benchbks/equality> (viewed 31 March 2016).

⁸⁹ Note however that in some jurisdictions this requirement only seems to apply to charges of indictable offences: see DLA Piper, *Background Paper on Access to Justice for People with Disability in the Criminal Justice System* (2013) section 4. At <https://www.humanrights.gov.au/our-work/disability-rights/projects/access-justice-criminal-justice-system-people-disability> (viewed 19 February 2016).

⁹⁰ *R v Presser* [1958] VR 45, 48; *Eastman v R* (2000) 203 CLR 1 [64], [65], [316].

⁹¹ See for example the requirements listed in *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6(1).

⁹² UN Committee on the Rights of Persons with Disabilities, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities*, September 2015, [16].

⁹³ UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014): Article 12: Equal recognition before the law*, UN Doc CRPD/C/GC/1 (19 May 2014) [13]-[15].

⁹⁴ UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014): Article 12: Equal recognition before the law*, UN Doc CRPD/C/GC/1 (19 May 2014) [15].

⁹⁵ UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014): Article 12: Equal recognition before the law*, UN Doc CRPD/C/GC/1 (19 May 2014) [15].

⁹⁶ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013), [29].

⁹⁷ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013), [30].

⁹⁸ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 32-33; Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014), section 3.3; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 89.

⁹⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 199.

¹⁰⁰ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 35 (rec 2.2); Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 89 (rec 18); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 200-201 (rec 7-1); Law Commission (United Kingdom), *Unfitness to Plead Volume 1: Report*, Report No 364 (2016) ch 3.

¹⁰¹ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 33; Law Commission (United Kingdom), *Unfitness to Plead: Summary* (2016) 4. Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 89.

¹⁰² Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 196. See on this latter point *Kesavarajah v R* (1994) 181 CLR 230 [3] (per Deane and Dawson JJ); *Eastman v The Queen* (2000) 203 CLR 1, [24] (per Gleeson CJ).

¹⁰³ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 192, 201.

¹⁰⁴ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 89.

¹⁰⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 226.

¹⁰⁶ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 89 (rec 18).

¹⁰⁷ See for example Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 96 (rec 22).

¹⁰⁸ Law Commission (United Kingdom), *Unfitness to Plead: Summary* (2016) 4.

¹⁰⁹ *Crimes Act 1900* (ACT) ss 315C, 315D(9)(ii) and 316; *Mental Health (Forensic Provisions) Act 1990* (NSW), ss 16 and 19; *Criminal Code* (NT) s 43R(3) and 9(b); *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 15; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 12(5).

¹¹⁰ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 141.

¹¹¹ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 141; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) x and 3.

¹¹² Crimes Act 1900 (ACT) s 316(1) and (8); *Mental Health (Forensic Provisions) Act 1990* s 21; *Criminal Code* (NT) s 43W(1) and (2); *Criminal Justice (Mental Impairment) Act 1999* (Tas), s 16(1) and (3)(a); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 16(1) and (2).

¹¹³ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 148.

¹¹⁴ See the explanation of a special hearing by the High Court in *Subramaniam v R* (2004) 211 ALR 1, [40]; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 150-151.

¹¹⁵ See *Subramaniam v R* (2004) 211 ALR 1, [40].

¹¹⁶ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 151.

¹¹⁷ Rashelle Seiden and Siddharth Chandrasekaran, 'Special hearings under the Crimes Act: A potentially misconceived adventure' (2010) 84 *Australian Law Journal* 553, 562.

¹¹⁸ *Crimes Act 1900* (ACT) s 317; *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(1); *Criminal Code* (NT) s 43V; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 17 (note however that in Tasmania there is no verdict of 'committed the offence charged', rather 'a finding cannot be made that the defendant is not guilty of the offence charged or any offence available as an alternative': s 17(d)); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 17(1).

¹¹⁹ *Crimes Act 1900* (ACT) s 317(4); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(3); *Criminal Code* (NT) s 43X(3).

¹²⁰ *Crimes Act 1900* (ACT) ss 301-303, 318-319; *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1); *Criminal Code* (NT) s 43X(3); *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 18; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 18(4)(a) and 28.

¹²¹ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 15 (and see the cases cited therein).

¹²² *Eastman v The Queen* (2000) 203 CLR 1, [24] (emphasis added).

¹²³ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 36.

¹²⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 208-209.

¹²⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 209.

¹²⁶ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23; *Criminal Code Act* (NT) s 43ZG; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28.

¹²⁷ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28.

¹²⁸ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23; *Criminal Code Act* (NT) s 43ZG(2).

¹²⁹ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 361 and 368.

¹³⁰ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27(1) and (2); *Criminal Code Act* (NT) ss 43ZC and 43ZG.

¹³¹ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 52(2). Note however that the Minister may apply to the Supreme Court for an extension of the order for up to five years, after which a further extension order can be made: see sch 1.

¹³² *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 39 and 51(1).

¹³³ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 174, 180 (the NSWLRRC noted that 'Very few UNA forensic patients have been released prior to the expiry of their limiting terms'); Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 362.

¹³⁴ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 368.

¹³⁵ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 174; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 369.

¹³⁶ See for example, New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (January 2012) 157-158; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 166; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Report* (2014) 29.

¹³⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 14(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1)).

¹³⁸ See, for example, *Mental Health (Forensic Provisions) Act 1990* (NSW) s 40; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (January 2012) 157-158; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Report* (2014) 29-30.

¹³⁹ Jonathon Hunyor and Michelle Swift 'A judge short of a full bench: mental impairment and fitness to plead in the NT criminal legal system' (Paper presented at the Criminal Lawyers Association Northern Territory Conference, Sanur, Bali, 30 June 2011) 12-13.

¹⁴⁰ Jonathon Hunyor and Michelle Swift 'A judge short of a full bench: mental impairment and fitness to plead in the NT criminal legal system' (Paper presented at the Criminal Lawyers Association Northern Territory Conference, Sanur, Bali, 30 June 2011) 23 (quoting Bernadette McSherry).

¹⁴¹ UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (2014) [19].

¹⁴² UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (2014) [19].

¹⁴³ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 46-7. New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 9.

¹⁴⁴ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 46-7. See also New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 9.

¹⁴⁵ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 37.

¹⁴⁶ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 434.

¹⁴⁷ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 208 (rec 7-2).

¹⁴⁸ See *Crimes Act 1914* (Cth) s 20BD; *Mental Health Act 2000* (Qld) s 200.

¹⁴⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 14(2). See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990) art 37(c).

¹⁵⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10(1).

¹⁵¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) arts 25 and 26.

¹⁵² New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 309-311.

¹⁵³ *Crimes Act 1900* (ACT) ss 308(d), 318-9, 323-4; *Criminal Code* (NT) ss 43ZA(1)(a)(i) and 43ZA(2); *Criminal Law Consolidation Act 1935* (SA) ss 269O and 269V; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 26(2)(a)(ii) and 26(4).

¹⁵⁴ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) xxiii-xxiv; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 415; see also *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80.

¹⁵⁵ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 9.

¹⁵⁶ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 299.

¹⁵⁷ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 312.

¹⁵⁸ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 312.

¹⁵⁹ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 298.

¹⁶⁰ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 298.

¹⁶¹ Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The Imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (University of New South Wales, 2012) 38.

¹⁶² Royal Commission into Aboriginal Deaths in Custody, *National Report: Volume 5* (1991) rec 92. At <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> (viewed 24 February 2016).

¹⁶³ See *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (2012) 97.

¹⁶⁴ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [264]-[267].

¹⁶⁵ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (2013) [32].

¹⁶⁶ UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (2014) [19].

¹⁶⁷ Jonathon Hunyor and Michelle Swift 'A judge short of a full bench: mental impairment and fitness to plead in the NT criminal legal system' (Paper presented at the Criminal Lawyers Association Northern Territory Conference, Sanur, Bali, 30 June 2011) 24.

¹⁶⁸ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (2013), [35].

¹⁶⁹ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [264]-[267].

¹⁶⁹ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (2013), [36].

¹⁷⁰ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006).

¹⁷¹ [2014] AusHRC 80.

¹⁷² *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 24.

¹⁷³ Available at <https://www.humanrights.gov.au/our-work/legal/publications/ka-kb-kc-and-kd-v-commonwealth-australia>.

¹⁷⁴ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [265]-[266].

¹⁷⁵ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [265]-[266].

¹⁷⁶ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [267].

¹⁷⁷ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [258]-[263].

¹⁷⁸ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [258]-[263].

¹⁷⁹ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [161].

¹⁸⁰ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [164]-[165].

¹⁸¹ *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [264]-[265] (citation omitted).